SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5341-14T4

OHIO CASUALTY INSURANCE COMPANY,

Plaintiff-Respondent,

v.

MERCER INSURANCE COMPANY,

Defendant-Appellant,

and

MERCER INSURANCE COMPANY OF NEW JERSEY, INC.,

Third-Party Plaintiff-Appellant,

v.

SHEARON ENVIRONMENTAL DESIGN OF NEW JERSEY,

Third-Party Defendant-Respondent.

Argued October 26, 2016 – Decided February 23, 2017

Before Judges Alvarez and Accurso.[1]

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1609-11.

Jared E. Stolz argued the cause for appellant (Stolz & Associates, LLC, attorneys; Mr. Stolz, of counsel and on the briefs).

Joyce E. Boyle argued the cause for respondent Ohio Casualty Insurance Company (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Ms. Boyle, of counsel and on the brief).

Mario C. Colitti argued the cause for respondent Shearon Environmental Design of New Jersey (Viscomi & Lyons, attorneys, join in the brief of respondent Ohio Casualty Insurance Company).

PER CURIAM

Defendant Mercer Insurance Company of New Jersey, Inc. appeals from two orders. On April 27, 2012, a Law Division judge denied Mercer's cross-motion and granted plaintiff Ohio Casualty Insurance Company's motion for summary judgment on the issue of primacy of coverage. On June 24, 2015, the court entered an

[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

additional order that Mercer was obliged to reimburse Ohio Casualty $54,460.63 in attorney's fees and costs in defending the underlying lawsuit, and awarded $30,824.25 as attorney's fees pursuant to Rule 4:42-9(a)(6).

Briefly summarized, on October 26, 2005, Shearon Environmental Design Company (Shearon) entered into a contract with Society Hill to remove snow and ice from the premises during the 2005/2006 snow season. The snow and ice removal contract required Shearon to name Society Hill as an additional insured under Shearon's liability policy. Shearon further agreed to indemnify Society Hill from liability for any damages and to defend it against any claims that arose from Shearon's performance of its contractual obligations. In 2007, a plaintiff injured as a result of a slip and fall in snowy conditions sued Society Hill at Hamilton Condominium Association (Society Hill) for personal injuries.

In addition to an answer to the personal injury complaint, Society Hill filed a third-party complaint against Ohio Casualty,[2] seeking defense, indemnification, and coverage. Ohio Casualty's answer to the third-party complaint in the underlying action

[2] Ohio Casualty, through its member company, American Fire & Casualty Insurance Company (American Fire) issued the Shearon policy of insurance.

included an affirmative defense limiting the company's liability to "the terms, conditions and limitations set forth in the policy on which plaintiff sues." The third-party complaint was eventually dismissed as Ohio Casualty agreed to assume Society Hill's defense pursuant to a reservation of its rights.

On June 14, 2011, Ohio Casualty filed a declaratory judgment complaint against Mercer, Society Hill's insurer, alleging that Mercer's policy was primary, seeking a "declaration to that effect" and to recoup "amounts expended in defense of the claims asserted against Society Hill in the [u]nderlying [a]ction." Ohio Casualty was provided with a copy of the Mercer policy on August 20, 2010, after several requests.

Ohio Casualty's American Fire policy states in relevant part:

> 1. BLANKET ADDITIONAL INSURED (Owners, Lessees, Contractors or Lessors) (Includes a Primary/Non-Contributory provision)
>
> Who is An Insured Section II is amended to include as an insured any person or organization whom you are required to name as an additional insured on this policy in a written contract or written agreement. The written contract or written agreement must be currently in effect or becoming effective during the term of this policy and executed prior to the "bodily injury," "property damage" or "personal and advertising injury."
>
> . . . .

3. The following is added to Paragraph a., Primary Insurance of Condition 4. Other Insurance:

> If the additional insured's policy has an Other Insurance provision making its policy excess, and a Named Insured has agreed in a written contract or written agreement to provide the additional insured coverage on a primary and noncontributory basis, this policy shall be primary and we will not seek contribution from the additional insured's policy for damages we cover.

4. The following is added to Paragraph b., Excess Insurance of Condition 4. Other Insurance:

> Except as provided in Paragraph 4.a. Primary Insurance as amended above, any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis. In the event an additional insured has other coverage available for an "occurrence" by virtue of also being an additional insured on other policies, this insurance is excess over those other policies.

[(emphasis added).]

The Mercer policy issued to Society Hill for the relevant period states:

GENERAL CONDITIONS — PART II

10. OTHER INSURANCE

A. This insurance is excess insurance over insurance provided on any basis:

> (1) That is property insurance (including fire, allied lines, inland marine) for your work or a premises loaned or rented to, or occupied by, you.
>
> (2) This is liability insurance (including a catastrophe/excess liability policy) for aircraft, automobiles, watercraft, or pollution, to the extent otherwise covered here.
>
> Otherwise, this insurance is primary insurance.

On February 18, 2010, Ohio Casualty, which had not yet received a copy of Mercer's policy, wrote to Society Hill, advising that it reserved its rights "under the indemnity portion of the policy," and that the policy did not require it to indemnify Society Hill for "any award or judgment rendered as a result of their sole negligence." On April 15, 2011, Ohio Casualty advised Mercer in writing, after finally receiving Mercer's policy, that primary coverage was the responsibility of Mercer and that Ohio Casualty was only responsible for the excess.

Oral argument was not conducted on the motions for summary judgment in the trial court. When the judge granted Ohio Casualty's motion, and denied Mercer's cross-motion, she observed that the answer to Society Hill's third-party complaint seeking insurance coverage from Ohio clearly stated that its liability was

"limited by the terms, conditions and limitations set forth in the policy under which plaintiff relies."

The judge also noted that Shearon's counsel in the underlying suit advised Mercer that Ohio Casualty would undertake the defense of Society Hill if and only if Society Hill was not solely negligent in causing the circumstances that resulted in the plaintiff's personal injury damages. She found there were no facts in controversy.

The judge concluded that "Mercer's real defense to this is that Ohio waited too long" to assert the primacy of coverage issue, not an actual dispute regarding primacy of coverage. She opined that the caselaw Mercer cited with regard to estoppel was inapplicable to a dispute as between insurers. She observed that Mercer had not alleged any prejudice arising from Ohio Casualty's claims being made at a later point in time than would ordinarily be the case.

The judge agreed with Ohio Casualty that Vornado v. Liberty Mutual, 106 N.J. Super. 111 (App. Div. 1969), controlled with regard to reimbursement to the excess carrier. So long as there is no prejudice arising from the delay in pursuing coverage, reimbursement is owed for indemnification to the excess carrier. Accordingly, she entered judgment for Ohio Casualty in the amount of $54,460.63 for attorney's fees and costs accrued in the

underlying suit. Ohio Casualty subsequently filed an application for attorney's fees for the costs of pursuing the declaratory judgment action, in accord with Rule 4:42-9(a)(6). The court, after adjustments to the amounts claimed, awarded $30,824.25 in attorney's fees. The judge stated that it would be "a hollow victory" to grant summary judgment and mandate reimbursement on the underlying cause of action, but not make the insurance company whole for counsel fees expended for the declaratory judgment proceedings.

The judge expressly reviewed the certifications with regard to the bills for the declaratory judgment action and made downward adjustments to the total amount sought. She did not, however, make any adjustment for the cost of defense. On June 24, 2015, she awarded that sum, $54,460.53, the entirety of the amount Ohio paid its counsel for the underlying cause of action. Although Mercer's attorney objected that the bill should be revised because insurance companies had, in his experience, "review committee[s]" that would routinely lower counsel fees, he had no specific objections. Since his argument was speculative, she discounted it. Nonetheless, she directed that Ohio Casualty provide a certification that the sum billed by the law firm in the underlying suit was in fact paid.

Mercer raises the following points for our consideration:

POINT I
TRIAL COURT ERRED BY GRANTING OHIO'S MOTION FOR SUMMARY JUDGMENT AND DENYING MERCER'S CROSS MOTION FOR SAME

A. OHIO IS ESTOPPED FROM ASSERTING POLICY DEFENSE[S] THAT WERE NOT RAISED OR PROPERLY RESERVED

B. DOCTRINE OF LACHES BARS OHIO'S CLAIMS

C. ALTERNATIVELY, BOTH POLICIES ARE TO BE CONSIDERED CO-PRIMARY

POINT II
TRIAL COURT ERRED BY RECENTLY AWARDING OHIO THE QUANTUM OF FEES FOR THE DEFENSE OF THE UNDERLYING ACTION

POINT III
TRIAL COURT ERRED BY RECENTLY GRANTING OHIO'S MOTION FOR ATTORNEY'S FEES, COSTS AND EXPENSES IN THE DECLARATORY JUDGMENT ACTION

A grant of summary judgment is reviewed on appeal "in accordance with the same standard as the motion judge[]" in the first place. Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016) (quoting Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014)). That standard compels summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to judgment or order as a matter of law." R. 4:46-2(c). Where "the party opposing summary judgment points only to disputed issues of

fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (internal citations and quotations removed).

I.

We first address Mercer's contention that Ohio Casualty is estopped from asserting the "policy defenses" because they were not properly raised or reserved. It is black letter law that when an insurer misrepresents coverage to the detriment of its insured, the insurer may be estopped from denying coverage despite the actual provisions in an insurance policy. Morton Int'l v. General Accident Ins. Co., 134 N.J. 1, 74 (1993), cert. denied, 512 U.S. 1245, 114 S. Ct. 2764, 129 L. Ed. 2d 878 (1994). The doctrine springs from the public policy acknowledging that "insurance policies are complex contracts of adhesion, prepared by the insurer, not subject to negotiation, in the case of an average person, as to terms and provisions quite unintelligible to the insured even were he to attempt to read [them]." Harr v. Allstate Ins. Co., 54 N.J. 287, 303 (1969). Accordingly, insureds are entitled to broad measures of protection in order to fulfill reasonable expectations. Id. at 304.

Principles regarding estoppel, however, have not generally been applied as between insurers. In Vornado, for example, a second insurance company mistakenly extended coverage not

realizing that the underlying incident occurred when the earlier policy issued by a first company was in effect. Vornado, supra, 106 N.J. Super. at 117-18. When the second insurance company sought reimbursement from the first, the first attempted to deny the claim on the basis of estoppel. Id. at 113-15. Acknowledging that the first insurer had been "deprived of the opportunity to handle its own defense," which would ordinarily, were the claim to be made against an insured, have resulted in a presumption of prejudice, the court held that as between insurers, the party raising estoppel as a defense must demonstrate actual prejudice. Id. at 117-18. The second insurance company in Vornado merely assumed a contractual obligation belonging to the first and thus no prejudice could be presumed. Id. at 118.

There is no significant difference between the scenario in Vornado and this case. Estoppel is a doctrine that requires some prejudice to the party who allegedly relied on the actions of another. Merchants Indem. Corp. v. Eagleston, 37 N.J. 114, 129 (1962) ("where [an insurance] policy does not cover [a] loss . . . the relevant thought is estoppel, and undoubtedly prejudice is an essential ingredient." (internal citations omitted)).

Mercer is on equal footing with Ohio Casualty, and did not respond when advised in February 2010 of Ohio Casualty's reservation of rights. In contrast with a typical insured, Mercer

had ample resources with which to assume representation of Society Hill as it was on notice years earlier of the pending lawsuit. Given that it had ample notice of the claim, and makes no showing of prejudice, estoppel does not bar its primacy of coverage.

II.

Mercer also contends that the doctrine of laches also protects it from the summary judgment issued against it. "Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is 'an unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-418 (2012) (quoting Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)). In determining whether to apply the doctrine, courts should consider "the length of the delay, the reasons for the delay, and the changing conditions of either or both parties during the delay." U.S. v. Scurry, 193 N.J. 492, 504 (2008) (citations omitted).

Regardless, laches can be found only where "the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing the right had been abandoned." Fox, supra, 210 N.J. at 418 (internal quotations omitted). Mercer's contention that Ohio Casualty's delay in asserting its claim was "inexcusable and unexplained" is irrelevant. Mercer is unable to demonstrate prejudice, or that

it acted in good faith, believing Ohio Casualty had abandoned its claims against it. Ibid. Having failed to demonstrate prejudice, it cannot gain the protection afforded by the doctrine.

III.

Mercer contends that the policies should be considered co-primary. In support of that position, it cites to Sunoco Products Company, Inc. v. Fire & Casualty Insurance Company of Conn., 337 N.J. Super. 568, 576-77 (App. Div. 2001). Sunoco involved a dispute between two insurers, both of which had issued policies covering the insured's motor vehicle accident. Id. at 569-71. The insurers attempted to avoid covering the accident using the "other insurance" provisions in their policies, each of which provided that the other company should be the primary insurer. Id. at 570-72. The court held that because the conflicting "other insurance" provisions were "virtually identical in every respect . . . they should be deemed mutually repugnant," and invalidated. Id. at 577. However, the policy language here is neither conflicting nor identical.

The American Fire policy in paragraph 3 clearly states that when additional insureds have a policy on a primary basis, as defined in paragraph 4, coverage extended to an additional insured "shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess,

contingent or on any other basis." The Mercer policy states that it is excess insurance only under certain limited circumstances, including coverage for property or liability "for aircraft, automobiles, watercraft, or pollution[.]" As the policy then goes on to state, it is "otherwise . . . primary insurance."

Since there is neither conflict nor identity of terms in the policies, there is no lawful basis upon which to make a determination that the coverage should be deemed "co-primary." Mercer is the primary insurance. Ohio Casualty provided the excess insurance. Mercer was responsible for the primary coverage.

IV.

Having determined that Mercer was the primary insurance provider, and Ohio Casualty only an excess coverage provider, it follows that Ohio Casualty was entitled to reimbursement of the defense costs. Since Mercer's policy is primary, it was obliged to indemnify Society Hill not only for any payments made to the plaintiff in the underlying suit, but also for the cost of defense. Those defense costs were not awarded pursuant to Rule 4:42-9(a)(6), contrary to Mercer's position on appeal. They were solely awarded because of the court's conclusion that the Mercer policy provided for primary coverage. And they were awarded as a result of Ohio Casualty's motion for enforcement of litigant's rights.

Turning to Mercer's claim that no attorney's fee award should have been made in the declaratory judgment action, we disagree with Mercer's reading of the cases upon which it relies in support of the argument. In Selective Insurance Company of America v. Hojnoski, 317 N.J. Super. 331, 338 (App. Div. 1998), for example, a case in which insurers litigated primacy of coverage, the court denied attorney's fees because actions to "collect attorney's fees under [an underinsured motorist] UIM coverage claim [are] not within then category of suits in which Rule 4:42-9(a)(6) permits an award." As there is no UIM claim here, Selective is not relevant to this case.

That fees are recoverable by the prevailing insurer in a declaratory judgment action is well-established. W9/PHC Real Estate Lp v. Farm Casualty Insurance Co., 407 N.J. Super. 177 (App. Div. 2009); Tooker v. Hartford Accident & Indemnity Co., 136 N.J. Super. 572, 576 (App. Div. 1975), certif. denied, 70 N.J. 137 (1976). A "claimant need only be successful in recovering indemnity or defense costs resulting from the underlying action in order to be awarded counsel fees." W9/PHC Real Estate, supra, 407 N.J. Super. at 203.

As Tooker explains, Rule 4:42-9(a)(6) "expressly provides for the allowance of fees for legal services in favor of a successful claimant in an action upon a liability or indemnity policy in the

Superior Court, Law and Chancery Divisions . . . ." Tooker, supra, 136 N.J. Super. at 578-79. The purpose of the rule is "to discourage groundless disclaimers by carriers by assessing against them the expenses incurred in enforcing coverage."

To allow such fees in suits even between insurers "does not do violence to general principles embodied in" the rule. W9/PHC Real Estate, supra, 407 N.J. Super. at 203. The idea behind the rule is to deter groundless denials of coverage. Tooker, supra, 132 N.J. Super. at 576. See also Moper Transp., Inc. v. Norbet Trucking Corp., 399 N.J. Super. 146, 157-58 (App. Div. 2008); Avemco Ins. Co. v. U.S. Fire Ins. Co., 212 N.J. Super. 38, 47 (App. Div.), certif. denied, 104 N.J. 407 (1986).

As Mercer points out, the rule does not require courts to grant fees to every successful claimant. White v. Howard, 240 N.J. Super. 427, 435 (App. Div.), certif. denied, 122 N.J. 339 (1990). Courts are expected to weigh "considerations of an equitable character" in determining whether to award attorney's fees. Ibid. But this is precisely the kind of case in which considerations of an equitable character weigh more towards Ohio Casualty than Mercer.

Mercer implicitly acknowledges, in the trial court and on appeal, that given the language of the policy, the primacy issue is not the real dispute. Rather, Mercer attempted to avoid its

responsibilities for coverage because Ohio Casualty, despite reserving its rights, and Society Hill being on notice, did not obtain a copy of Mercer's policy and assert its claims until some time after the initiation of the lawsuit. That is not a scenario in which the equities weigh in favor of Mercer in the absence of demonstrable prejudice. Accordingly, the judge's decision was warranted on the law. By combing through the certification and eliminating duplicative or excessive fees, the judge fulfilled her responsibilities and exercised her discretion appropriately in the award of fees.

Affirmed.