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APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5518-15T3

CAROLE ZELIG,

Plaintiff-Respondent,

v.

TOWER GROUP COMPANIES,

Defendant-Appellant,

and

STATE FARM INDEMNITY COMPANY,

Defendant.

Argued May 15, 2018 – Decided May 25, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Docket No. L-
3168-12.

Robert J. Gillispie argued the cause for
appellant (Mayfield, Turner, O'Mara &
Donnelly, PC, attorneys; Michael J. O'Mara,
of counsel; Robert J. Gillispie, Jr., on the
briefs).

Thomas F. Reynolds argued the cause for
respondent (Reynolds & Scheffler, LLC,
attorneys; Thomas F. Reynolds, on the brief).

PER CURIAM

The Tower Group Companies (defendant) appeals from a July 20, 2016 order requiring that the parties arbitrate the legal question of whether plaintiff was an "insured" under the terms of an uninsured and underinsured motorist endorsement (the endorsement) contained in defendant's commercial automobile liability insurance policy. We reverse and remand.

Plaintiff was a passenger in a Hyundai owned and operated by her friend (the friend). A tortfeasor, who owned and operated a Nissan, failed to yield and made a left turn in front of the Hyundai. The vehicles collided and plaintiff sustained injuries. Plaintiff settled her personal injury claim against the tortfeasor, and then she filed a complaint seeking underinsured motorist (UIM) benefits from defendant.¹

Defendant issued its policy to This and That Uniform, LLC (This and That), a company partially owned by plaintiff. The parties filed motions for summary judgment in part to determine whether plaintiff was an "insured" under the basic insuring clause in the endorsement. The judge denied the motions, referred the

¹ Plaintiff also named the friend's UIM carrier (State Farm Indemnity Company) as a party. State Farm obtained summary judgment and is not involved in this appeal.

matter to arbitration, and directed the arbitrator to resolve that legal question.

On appeal, defendant argues that the judge erred by requiring the parties to arbitrate whether plaintiff is an "insured" under the endorsement. Defendant maintains that the judge should have decided this legal question. Although the judge referred the matter to arbitration and directed the arbitrator to decide the question – and therefore did not adjudicate the matter on the merits – defendant urges us to find that plaintiff is not an "insured." We decline to exercise original jurisdiction; we remand, and leave the details of the analysis to the judge in the first instance.

Defendant asserts that whether plaintiff is an "insured" depends on whether she occupied a "covered 'auto' or a temporary substitute for a covered 'auto.'" Defendant contends that under the endorsement, "the covered 'auto' 'must be out of service because of its breakdown, repair, servicing, loss or destruction.'" Even if plaintiff was conducting business for This and That at the time of the underlying accident – as another judge apparently found – defendant argues that plaintiff was not an "insured" because she was not occupying a covered vehicle as described in the endorsement.

The judge did not render a final determination – as he stated in his written opinion – "as to whether or not [p]laintiff can meet the definition of an 'insured' under the basic insuring clause contained in the . . . endorsement." The judge concluded that "the coverage issue is appropriate for [c]ommon [l]aw [a]rbitration." But the endorsement itself says that "disputes concerning coverage . . . may not be arbitrated."

Reversed and remanded. We do not retain jurisdiction.²

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

² As to the court's order dated April 30, 2018, defendant may seek similar relief on remand.