SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0939-21

GREENWAY RUN CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Respondent,

v.

K. HOVNANIAN AT HOWELL, LLC, and HOVNANIAN ENTERPRISES, INC.,

Defendants/Third-Party Plaintiffs-Respondents,

v.

CARUSO & MARTIN PAVING CONTRACTORS, INC., BUILDERS FIRSTSOURCE, INC., ATLANTIC GROUP, s/h/a BUILDERS FIRSTSOURCE, INC., WHITMAN CONSTRUCTION, LLC, JR CONSTRUCTION CO., RIVERFRONT RECYCLING AND AGGREGATE, LLC, SOUTH JERSEY EAST COAST PAVING, INC., d/b/a SJP GROUP, INC. and d/b/a SJP CONTRACTORS, ENVIRONMENTAL STONEWORKS, LLC, HANOVER INSURANCE CO., CRUM & FORSTER

SPECIALTY INSURANCE CO., and
FIRST MERCURY INSURANCE CORP.,

Third-Party Defendants,

and

LIBERTY MUTUAL INSURANCE
CO.,

Third-Party Defendant-
Appellant.

Argued June 1, 2022 – Decided June 14, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3534-19.

John T. Coyne argued the cause for appellant (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; John T. Coyne, on the brief).

Martin C. Cabalar argued the cause for respondent Greenway Run Condominium Association, Inc. (Becker & Poliakoff, LLP, attorneys; Vincenzo M. Mogavero, Martin C. Cabalar, Sarah Klein, and Catelyn Stark, on the brief).

Donald E. Taylor argued the cause for respondents K. Hovnanian at Howell, LLC and Hovnanian Enterprises, Inc. (Wilentz, Goldman & Spitzer, PA, attorneys; Donald E. Taylor, of counsel and on the brief; Pierre Chwang, on the brief).

PER CURIAM

When service of process "cannot be made by any of the modes" provided elsewhere in Rule 4:4-4, its subsection (b)(3) permits service "as provided by court order, consistent with due process of law." In this appeal, we consider an order that permitted service of process on an unlocatable defendant through service on that defendant's alleged insurer.

In this construction suit, both plaintiff Greenway Run Condominium Association, Inc. (Greenway), and defendants/third-party plaintiffs Hovnanian Enterprises, Inc., and K. Hovnanian at Howell, LLC (collectively, Hovnanian), were permitted to amend their pleadings to assert claims against South Jersey East Coast Paving, Inc. (South Jersey Paving), which they alleged was responsible for paving the roadways at the Howell condominium pursuant to a subcontract with Hovnanian. The subcontract purports to require South Jersey Paving to indemnify Hovnanian for claims arising from South Jersey's performance and to include Hovnanian as an additional insured on its liability insurance policy. It is also alleged that South Jersey Paving provided Hovnanian with a certificate of insurance stating that Wausau Underwriters Insurance Company provided South Jersey Paving with commercial general liability insurance coverage during the relevant time period.

Both Greenway and Hovnanian claim they were unable to personally serve South Jersey Paving in any of the usual ways, and both moved to be permitted to make substituted service on South Jersey Paving by delivering the summons and complaint to Wausau. Liberty Mutual – already involved in the litigation as the insurer of defendant JR Construction Co. – opposed the motion on behalf of Wausau, which Liberty Mutual identifies as "a Liberty underwriting company."[1] The motion judge permitted substituted service, and we granted Liberty Mutual's motion for leave to appeal.

We reverse, holding that substituted service was inappropriate on this record. We do not, however, foreclose a further request for substituted service on a more fulsome record than presently exists.

The concept that a court may permit substituted service of process by allowing a claimant to serve a defendant's insurer is nothing new. The analysis starts with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950), where the Court identified the polestar to be followed, declaring that

[1] Liberty Mutual opposed the motion and appeals the order of substituted service not as a party to this suit but because of its relationship to Wausau. Without delving into the relationship between Liberty Mutual and Wausau, and without deciding the standing issue raised by Hovnanian in response to this appeal, we assume for present purposes that Liberty Mutual is authorized to speak for Wausau and that Liberty Mutual has standing to seek relief from the order of substituted service.

"[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Based on this "reasonably calculated" standard, our Supreme Court endorsed substituted service in Feuchtbaum v. Constantini, 59 N.J. 167, 177 (1971), "even though it [was] far from certain that the defendant [would] in fact receive notice of the action." Because an insurer, when under a duty to defend and indemnify the unlocatable insured, has a significant interest in the proceedings and in locating its missing insured, these principles presuppose service on the insurer is "reasonably calculated" to provide the defendant with actual notice of the claim.

The propriety of substituted service requires application of "a balancing test," Houie v. Allen, 192 N.J. Super. 517, 521 (App. Div. 1984), by which a court weighs "plaintiff's need, the public interest, the reasonableness of plaintiff's efforts under all the circumstances to inform the defendant, and the availability of other safeguards for the defendant's interests," Feuchtbaum, 59 N.J. at 177. Our focus here starts and ends with an examination of the reasonableness of Greenway's and Hovnanian's efforts to ensure that the service

method they proposed was "reasonably calculated" to give South Jersey Paving notice of the suit.

In seeking relief in the trial court, Greenway and Hovnanian attempted to show Wausau insured South Jersey Paving only by providing a one-page certificate of insurance, which states, among other things, that Wausau provides commercial general liability for South Jersey Paving. The certificate, however, expressly states in bold and conspicuous letters that it was issued "as a matter of information only and confers no rights upon the certificate holder." The important due process rights at play here require greater information about Wausau's relationship to South Jersey Paving than this.

The relevant part of the record – consisting only of the certificate of insurance – demonstrates that Greenway and Hovnanian failed to make reasonable efforts to ensure service on Wausau would be "reasonably calculated" to give notice to South Jersey Paving. In reaching this conclusion, we impose no insurmountable burden on Greenway and Hovnanian, whose interests in proceeding against the unlocatable defendant also form an aspect of the balancing test. But we cannot help but assume that a better understanding about Wausau's relationship to South Jersey Paving would have resulted from the service of a subpoena on Wausau.

The parties have expended significant energy in this appeal questioning to what extent a claimant must show that the party to be served is insured by the insurer to whom it proposes to deliver the summons and complaint and that the insurer covers the claim. In Houie, we said that the "fairness-to-defendant" aspect of the balancing test requires that the movant make "a prima facie showing . . . that the claims asserted against defendant are covered" by the insurer because "[a]n insurance carrier which is not under a duty to defend or indemnify defendant obviously has little incentive to seek out and notify [the alleged insured] of a claim pending against [it]." 192 N.J. Super. at 522. Since Houie, we have said nothing about what constitutes a prima facie showing of coverage in this setting, nor is it necessary to describe what was meant in Houie by a prima facie case of coverage except to reiterate that a certificate of insurance like that provided here is alone insufficient to justify substituted service. We would state only that whether an insurer is ultimately required to defend or indemnify an insured, while governed by the rather simple test of comparing the allegations of the complaint against the policy provisions, see Danek v. Hommer, 28 N.J. Super. 68, 76 (App. Div. 1953), aff'd o.b., 15 N.J. 573 (1954), can generate difficulties that may require considerable litigation with even the simplest of personal injury claims, see, e.g., Hartford Acc. &

Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22-25 (1984), before it can be said with any certainty whether there exists insurance coverage for the claim asserted against the insured. Suits alleging defects in construction can generate even greater difficulties about the existence of a duty to defend or indemnify, as a review of Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC, 226 N.J. 403 (2016), Weedo v. Stone-E-Brick, Inc., 81 N.J. 233 (1979), and Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co., 387 N.J. Super. 434 (App. Div. 2006) reveals.

It would seem to us inconsistent with the due process balancing test described by Chief Justice Weintraub in Feuchtbaum to impose on a claimant the duty to show with ironclad certainty that the insurer will be obligated to defend or indemnify the unlocatable defendant before permitting substituted service. If that were the case, the propriety of substituted service could result in more litigation than the claim itself. The question is not whether the insurer is doubtless obligated to defend or indemnify but whether the particular circumstances generate in the insurer a sufficient incentive to seek out and notify the defendant, as we said in Houie, 192 N.J. Super. at 522, so that it may be fairly concluded that notice to the insurer is reasonably calculated to give notice to the defendant.

In sum, we are satisfied the certificate of insurance provided in support of the motion for substituted service is alone not enough, but we do not foreclose either Greenway or Hovnanian from seeking substituted service upon a greater showing than presented to the trial judge here.

Reversed and remanded for further proceedings. We do not retain jurisdiction.