SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1731-20

JIAN SHEN, HUI ZHU, and J&H ELITE INVESTMENT GROUP, LLC,

Plaintiffs-Appellants,

v.

HYUNDAI MARINE & FIRE INSURANCE COMPANY, LTD.,

Defendant-Respondent.

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Submitted February 28, 2022 – Decided April 19, 2022

Before Judges Messano and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3099-20.

Robert W. Beattie, attorney for appellants.

Bongiorno, Montiglio, Mitchell & Palmieri, PLLC, attorneys for respondent (William J. Mitchell, of counsel and on the brief).

PER CURIAM

Plaintiffs Jian Shen, Hui Zhu, and J&H Elite Investment Group, LLC, appeal the Law Division's January 27, 2021 orders: 1) granting defendant Hyundai Marine & Fire Insurance Co., Ltd.'s motion to dismiss plaintiffs' complaint; and 2) denying plaintiffs' cross-motion for partial summary judgment.[1] The facts are essentially undisputed.

On July 11, 2017, plaintiffs Jian Shen and Hui Zhu purchased a two-family rental property in Perth Amboy as an investment; they took title as tenants in common. Contemporaneously, Shen applied to defendant for a fire insurance policy, representing that she was the sole owner of the property and confirming the property was not "owned by a business or entity other than [an] individual."

[1] Although filed as a motion to dismiss pursuant to Rule 4:6-2(e), defendant included several documents and an affidavit from one of its underwriters, Eddy Kim, in support of the motion. During the initial oral argument, the judge decided to permit plaintiffs limited discovery. Defendant's third-party claims administrator, Sedgwick, and insurance agent, C & M First Services, produced their files. As a result, although neither the parties nor the judge formally recognized defendant's motion as one seeking summary judgment, it was. See R. 4:6-2(e) (noting that when evidence is considered outside the pleadings, the court may transform a motion to dismiss for failure to state a claim into one seeking summary judgment, and, if there is no objection, consider the motion as such by applying the standards in Rule 4:46-1). Plaintiffs have not raised any procedural objection either in the Law Division or before us, and because the facts were essentially undisputed, considering defendant's motion as one seeking summary judgment was entirely appropriate.

After signing the application in several places as the owner of the property, Shen also confirmed:

> I have read the above application and any attachments. I declare that the information provided in them is true, complete[,] and correct to the best of my knowledge and belief. This information is being offered to the company as an inducement to issue the policy for which I am applying.

In his affidavit supporting defendant's motion, Kim explained that "per [defendant's] underwriting guidelines, the dwelling 'must be owned solely by individuals' and forbids issuance to business entities." Defendant's underwriting guidelines in the record confirm this. Defendant issued the policy with Shen as the sole named insured.

Nearly six months later, on January 2, 2018, Shen formed J&H Elite Investment Group, LLC (J&H), as its authorized representative; Shen and Zhu were the only members, each holding a fifty-percent interest in the LLC. On January 25, 2018, Shen and Zhu conveyed their interests in the Perth Amboy property to J&H. It is undisputed that neither Shen nor Zhu ever notified defendant of the transfer.

Shen twice renewed the policy, at no point advising defendant of the transfer of title to J&H. On July 27, 2019, a fire occurred at a house neighboring plaintiffs' rental property. At the time, both units in the property were rented;

the leases only named Shen as the landlord. The fire spread to plaintiffs' house, resulting in estimated damages exceeding $200,000 and the loss of rental income.

Plaintiffs filed a claim with defendant, which began its investigation. Defendant ordered a title report for the property and soon learned for the first time that J&H was the owner. In October 2019, defendant issued a reservation of rights under the policy and advised plaintiff there "[we]re underwriting issues associated with th[e] loss and . . . coverage for the claim as submitted may be questionable under the policy." In December, defendant examined Shen under oath; she confirmed the signature on the application for the policy was hers. She also admitted transferring ownership of the property to J&H on the advice of a friend who convinced Shen it would help "avoid risks" and "potential lawsuits."

In January 2020, Sedgwick sent a letter on defendant's behalf formally denying coverage and advising Shen that defendant was rescinding the insurance policy ab initio. Defendant noted assignment of the policy to J&H without consent was expressly prohibited by N.J.S.A. 17:36-5.19, and Condition T in the policy. Defendant said, "The inherent risks with the corporate-owned property never would have been accepted as an insurable risk . . . had the true ownership been disclosed." Furthermore, because Shen transferred her

ownership to J&H, she no longer had an "insurable interest" in the property. Lastly, because Shen was under a continuing obligation to "fully disclose all relevant information regarding . . . ownership of the subject property," her failure to do so was a "material misrepresentation," and defendant would provide no coverage for the fire loss.

Plaintiffs filed a complaint, alleging defendant breached the contract of insurance and the implied covenant of good faith and fair dealing, and they also sought reformation, contending defendant "violated the Plain Language Law" leading plaintiffs to be "substantially confused about their rights." Defendant never answered but rather moved to dismiss, as set forth above. Plaintiffs cross-moved claiming defendant breached the insurance contract as a matter of law.

As also noted, before ruling on the motion and cross-motion, the judge permitted plaintiffs limited discovery as to whether defendant was aware of the transfer of title. The judge concluded defendant properly rescinded the policy ab initio, because Shen violated the anti-assignment clause, a policy provision required to be included in all fire insurance policies in New Jersey by statute. N.J.S.A. 17:36-5.19. The judge also held under prevailing New Jersey law, transferring ownership to an LLC without notifying defendant was a misrepresentation that justified recission. Further, the judge found the Court's

decision in Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72 (2008), to be factually similar and held defendant's denial of coverage was proper because Shen had no insurable interest in the property after the transfer to J&H. The judge also denied plaintiffs' cross-motion that sought partial summary judgment on their breach of contract claim.

I.

Before us, plaintiffs contend Shen had an "insurable interest" in the property as fifty-percent owner of J&H, consistent with Shen's reasonable expectations. Plaintiffs also argue that Shen never made a "material misrepresentation" and had no duty to "advise defendant of a deed transfer after the policy [wa]s issued," and, in any event, defendant "waived its fraud in the application defense." Additionally, plaintiffs contend the judge erred in dismissing their claim for reformation under the "Plain Language Law," and their "bad faith claim." We find none of these arguments persuasive and affirm.

We review the grant of summary judgment using the same standard as the motion judge. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Under that standard, "summary judgment will be granted when 'the competent evidential materials submitted by the parties,' viewed in the light most favorable to the non-moving

party, show there are no 'genuine issues of material fact' and that 'the moving party is entitled to summary judgment as a matter of law." Premier Physician Network, LLC v. Maro, 468 N.J. Super. 182, 192 (App. Div. 2021) (quoting Bhagat, 217 N.J. at 38). We "afford[] no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The interpretation of an insurance policy presents a question of law "governed by . . . commonly recognized rules of construction." Id. at 200. "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (citing Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594–95 (2001)). "If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased." President v. Jenkins, 180 N.J. 550, 562 (2004) (citing Gibson v. Callaghan, 158 N.J. 662, 670 (1999)). "Only where there is a genuine ambiguity, that is, 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage,' should the reviewing court read the policy in favor of the insured." Templo Fuente De Vida

Corp., 224 N.J. at 200 (quoting Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001)).

We apply these principles to the facts in this case.

II.

Pursuant to N.J.S.A. 17:36-5.15, "[n]o policy or contract of fire insurance on any property" shall be issued without containing certain required statements, including: "that its assignment shall not be valid except with the written consent of the insurer," N.J.S.A. 17:36-5.19; and that provisions may be added or amended only if "provided for in writing," but they cannot be "inconsistent with the provisions of th[e] policy," N.J.S.A. 17:36-5.20.

Prior to obtaining the policy, plaintiff acknowledged and confirmed that several conditions did not apply to the property, including that the "[p]roperty was owned by a business or entity other than [an] individual." The policy further provided that any change "must be in writing by [defendant] to be valid." Under Section (T), an "[a]ssignment of th[e] policy w[ould] not be valid unless [defendant] give[s their] written consent."

The policy also clearly stated defendant would not provide coverage to the named insured if, "whether before or after a loss," the individual: "(1) [i]ntentionally concealed or mispresented any material fact or circumstance; (2)

[e]ngaged in fraudulent conduct; or (3) [m]ade false statements[] relating to th[e] insurance." Section (P), "Cancellation," provided that defendant may cancel a policy "if there has been a material representation of fact which if known . . . would have caused [Hyundai] not to issue the policy, or . . . [i]f the risk . . . changed substantially since the policy was issued." Defendant's Underwriting Guidelines provided a "[d]welling must be owned solely by individuals."

Plaintiffs contend there was no material misrepresentation when defendant first issued the policy, because Shen was an owner of the property, and the policy does not prohibit transfer to a business entity. Plaintiffs note it is undisputed that defendant knew it was insuring a two-family rental investment property from the start. We disagree.

"A misrepresentation, made in connection with an insurance policy, is material if, when made, 'a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action.'" Palisades Safety & Ins. Ass'n v. Bastien, 175 N.J. 144, 148 (2003) (quoting Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 542 (1990)). When the omission "naturally and reasonably influence[s] the judgment of the underwriter in making the contract at all, or in estimating the degree or character

of the risk, or in fixing the rate of the premium," the omission is material. Mass. Mut. Life Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991) (alteration in original) (emphasis added) (quoting Kerpchak v. John Hancock Mut. Ins. Co., 97 N.J.L. 196, 198 (1922)). Simply put, defendant could not have issued this policy to J&H because it indisputably would have violated its own underwriting guidelines.

We are likewise not persuaded by the assertion that Shen was relieved of her continuing obligation upon renewal to advise defendant of the transfer to J&H. Although Shen's renewal applications are not in the record, counsel for defendant certified that all the renewal files were produced in discovery, and none permitted Shen to transfer title to the property to a business entity. Plaintiffs have not asserted that Shen ever represented that the LLC now owned the property on subsequent renewals. Moreover, the general rule is that in the absence of a contrary renewal application, "underwriters may, in making renewal decisions, rely on the contents of the original application." Batka v. Liberty Mut. Fire Ins. Co., 704 F.2d 684, 687 (3d Cir. 1983) (citing U.S. Fid. & Guar. Co. v. Fridrich, 123 N.J. Eq. 437 (Ch. 1938)).

Shen contends that her deed transfer to J&H was not an assignment forbidden by the policy's terms without defendants' consent. She argues that as

a fifty percent shareholder in the LLC, she retained an interest in the property and never assigned that interest. Shen also contends that as a result, she retained an insurable interest in the property that compels defendant to provide coverage. Again, we disagree.

Initially, plaintiffs' assertion that the deed transfer to J&H was not an assignment of the policy is only a bald-faced attempt to avoid recission. Since Shen was the only insured on the policy and its renewals, if the deed transfer was an assignment, defendant was entitled to rescind, because it has long been accepted that "insurance is a contract of indemnity, personal to the party to whom it is issued." Kase v. Hartford Fire Ins. Co., 58 N.J.L. 34, 36 (Sup. Ct. 1895). Therefore, when the language in the policy requires consent, courts typically uphold the contractual clause and determine the policy is void, and not merely a breach of contract when an assignment is made without consent. Owen v. CNA Ins./Cont'l Cas. Co., 167 N.J. 450, 460–61 (2001); see also Elat, Inc. v. Aetna Cas. & Surety Co., 280 N.J. Super. 62, 66 (App. Div. 1995) (noting "[w]here the policy prohibits an assignment, an assignment without the insurer's consent invalidates it") (quoting Flint Frozen Foods, Inc. v. Firemen's Ins. Co. of Newark, 12 N.J. Super. 396, 400–01 (Law Div. 1951)).

However, even if the deed transfer to the LLC was not a de facto assignment of the policy, certainly J&H and Zhu, who were never named insureds, were not entitled to coverage. Shen argues her fifty-percent interest in J&H translated into an insurable interest in the property under defendant's policy. The motion judge relied upon the Court's decision in Shotmeyer, and we agree it is persuasive and serves as reason to reject Shen's independent claim for coverage.

In Shotmeyer, two brothers created a partnership, purchased a twenty-four-acre farm, and obtained title insurance from the defendant title insurance company. 195 N.J. at 78. The policy named each brother as "[p]artner[]," in the named general partnership, as insureds. Ibid. Ten years later, the brothers formed a limited partnership, with both brothers as individual limited partnership, and a corporation owned jointly and exclusively by the brothers as the general partner. Ibid. Afterwards, the brothers learned of two judgments that declared half the farm's acreage belonged to a neighbor and not the partnership. Id. at 79. They filed a claim against the defendant title insurance company, which denied coverage based on the lack of an insurable interest. Id. at 79–80.

In reversing the trial court's decision, we concluded there was never a transfer of the brothers' beneficial interests in the property, and the limited partnership was "not a stranger to the title insurance policy." Id. at 80. We determined that the corporate form of ownership should be disregarded "in the interests of justice," since the brothers' transfer "did nothing to increase the risk to the insurer." Ibid.

The Court reversed, noting the transfer of title in the property to a limited partnership was a "deliberate and voluntary conveyance to a separate legal entity," and the property belonged to the limited partnership and not the brothers. Id. at 81. The Court noted that the transfer was made to "provide[] particular business and personal advantages to [the brothers]," including "shield[ing them] from personal liability." Id. at 85–86. At the time of the loss, "[t]he brothers had no ownership or insurable interest . . . and therefore [could not] recover under the terms of the . . . title policy." Id. at 85 (emphasis added).

We recognize that "[a]lthough it is not necessary to have legal or equitable title to have an insurable interest in real estate, it is clear that the interest in the property must have some pecuniary value and that the party who seeks to recover bears the burden of proving that value." Arthur Andersen, LLP v. Fed. Ins. Co., 416 N.J. Super. 334, 350 (App. Div. 2010). See, e.g., Miller v. N.J. Ins.

Underwriting Ass'n, 82 N.J. 594, 602–03 (1980) (former owners and mortgagees of properties upon which the city obtained title through foreclosure proceedings for nonpayment of real estate taxes had insurable interest (citing P.R. DeBellis v. Lumbermen's Mut. Cas. Co., 77 N.J. 428 (1978))); Hyman v. Sun Ins. Co., 70 N.J. Super. 96, 99–101 (App. Div. 1961) (assignee of mortgage payment had insurable interest in mortgagee's property in the amount of the payment due). However, upon transferring her interest in the property as a tenant in common to the LLC, Shen no longer had a separate interest in the property. See, e.g., N.J.S.A. 42:2C-27(a) (providing that a member of an LLC is not agent of an LLC "solely by reason of being a member"); N.J.S.A. 42:2C-28(a)(2)(a) (permitting an LLC to execute a "statement of authority" permitting "any position that exists in or with respect to the company" to transfer real property held by the LLC).

Shen contends, however, that she reasonably expected her continued interest in the LLC meant defendant's policy would provide coverage at least for her share of the total fire damages. However, in Shotmeyer, when addressing whether the brothers maintained their status as "insureds" under the policy issued prior to their transfer of the property to the limited partnership, the Court clearly stated, "Use of a 'beneficial interest' test to determine the owner of a

policy, however, may allow a party to 'create' ambiguity in an otherwise clear situation." 195 N.J. at 86. Shen was the only insured under the policy, and, upon her transfer to the LLC, she no longer maintained her insurable interest.

Plaintiffs' final two points require little discussion. Plaintiffs claim defendant waived the right of recission because it never established that it returned plaintiffs' premiums paid since the policy's inception. The record contains a letter from defendant including a check for the returned premiums. Plaintiffs claim the letter is hearsay. However, Shen's certification does not say she never received the monies; only that she could not recall ever receiving the monies. Plaintiffs' contention that this alleged factual dispute equates to a waiver is not worthy of discussion in a written opinion. R. 2:11-3(e)(1)(E).

Finally, plaintiffs argue their "bad faith" and reformation claims should not have been dismissed on summary judgment. However, there is no factual support in the record that defendant acted in bad faith in the investigation of the claim or its denial. And, while "contracts where there is a mutual mistake common to both parties may be reformed in equity," Sav. Inv. & Trust Co. v. Conn. Mut. Life Ins. Co., 17 N.J. Super. 50, 55 (App. Div. 1951), there was no mutual mistake in this case; only Shen's unilateral conduct resulted in recission of the policy. See Millhurst Milling & Drying Co. v. Auto. Ins. Co., 31 N.J.

Super. 424, 434 (App. Div. 1954) ("Reformation on the ground of mistake is not granted in equity where the mistake is the result of the complaining party's own negligence.").

Affirmed.

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

CLERK OF THE APPELLATE DIVISION