SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5331-18

STEVEN D'AGOSTINO,

Plaintiff-Appellant,

v.

COLONY INSURANCE COMPANY,[1] BLAKE POULTON, POULTON & ASSOCIATES, LLC, and THE LAWYERS' FUND FOR CLIENT PROTECTION,

Defendants-Respondents.

Submitted November 15, 2021 – Decided May 17, 2022

Before Judges Messano and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1937-18.

Steven D'Agostino, appellant pro se.

Stewart Smith, attorneys for respondent Colony Insurance Company (William F. Stewart and Danielle

[1] Improperly pled as Colony (Specialty) Insurance, Argo Group Insurance.

A. Willard, of counsel and on the brief; Nancy E. Zangrilli, on the brief).

Schenck, Price, Smith & King, LLP, attorneys for respondents Blake Poulton and Poulton & Associates, LLC (Jeffrey T. LaRosa, of counsel and on the brief; Franklin Barbosa, Jr., on the brief).

PER CURIAM

Plaintiff Steven D'Agostino appeals from trial court orders dismissing his complaint against defendants Colony Insurance Company, Blake Poulton, and Poulton & Associates, LLC under Rule 4:6-2(e) for lack of standing.[2] We reverse.

Although the parties dispute the controlling law, plaintiff's complaint alleges the following facts, which, like the trial court, we accept as true for purposes of the motion. See Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019). In February 2002, plaintiff retained Laurence Hecker, a solo practitioner licensed in New Jersey,

[2] Plaintiff also appealed a January 25, 2019 order dismissing his claims against the New Jersey Lawyers' Fund for Client Protection, for lack of jurisdiction. The trial court has since entered a consent order between plaintiff and the Fund dismissing plaintiff's claims without prejudice pending final disposition of his claims against Colony, Poulton and Poulton & Associates, at which time either party to the order may apply to the court to have the claims reinstated or dismissed with prejudice. The Fund is thus no longer a party to this appeal.

to represent him in connection with an employment matter. Despite harboring some initial skepticism as to Hecker's ability to handle the case, plaintiff claims he decided to retain Hecker once the lawyer represented "he was 'a PC' with 'half a million dollars' worth of malpractice insurance."

Plaintiff's employment matter went against him and, in September 2006, proceeding pro se, he filed a legal malpractice action against Hecker. In 2009, a jury determined Hecker had been negligent in his representation of plaintiff and awarded plaintiff $330,000 in damages, along with pre-judgment interest. Plaintiff maintains "[a]t no time during th[e] litigation, did Hecker ever mention that he had malpractice insurance."[3] Plaintiff claims Hecker repeatedly indicated there was no insurance coverage, even after being questioned about it at deposition, and reportedly told two different pretrial judges he had no insurance carrier.

Unbeknownst to plaintiff, defendant Colony Insurance Company issued a $1,000,000 claims made professional liability policy to Hecker for a one year period beginning March 16, 2006 — six months before plaintiff filed suit. The retroactive date for that policy, however, was March 16, 2006, the first day of

[3] Plaintiff claims he represented himself in the malpractice action after the attorney he had been working with learned from official sources that Hecker's malpractice coverage had lapsed in 1999.

the policy period. Hecker renewed coverage with Colony under the same terms for two additional one-year policy periods with the retroactive date remaining March 16, 2006. The premium for each policy period was $17,500. The record includes a memo written by Hecker in December 2006, indicating he spoke with defendant Blake Poulton, president of the insurance brokerage Poulton & Associates, about the malpractice suit. Poulton agreed Hecker's insurance carrier should defend him and Hecker forwarded the complaint to the carrier. Colony later declined Hecker's request for defense and indemnification under the policy.

Plaintiff was unable to recover the $330,000 judgment from Hecker. In 2011, plaintiff filed a claim with the Lawyers' Fund for Client Protection, based on Hecker's representation that he had malpractice insurance when plaintiff hired him for the employment action. The Fund denied plaintiff's claim. Two years later, in 2013, plaintiff went to Hecker's home with the hope of secretly recording him confessing to having told plaintiff he had malpractice insurance in 2002. Plaintiff claimed Hecker refused to acknowledge his prior representation because the Fund would then look to him for reimbursement "and he didn't want any more judgments against him." Plaintiff subsequently decided "it would be best to just . . . wait, and maybe someday, when Hecker

was lying on his deathbed, his conscience would catch up with him, and then finally [he would] admit to [t]he Fund what he had told me."

Hecker died in May 2017, and, over the course of the next year, plaintiff obtained access to several boxes of Hecker's personal and business records. After reviewing the records, plaintiff claims he learned Hecker had malpractice insurance in place during the pendency of the malpractice suit. Plaintiff subsequently called Poulton, which informed him that Colony had denied Hecker's claim for coverage "because the retroactive date of Hecker's policy did not go back far enough to cover" the conduct underlying the malpractice suit. Colony refused to provide any information and claimed it only kept records for ten years.

In September 2019, plaintiff filed a complaint against defendants in the Law Division, again representing himself. In addition to his claims against the Lawyers' Fund, which are not part of this appeal, plaintiff alleged Colony and Poulton had wrongfully denied Hecker's request for coverage or denied the request in bad faith.

Colony and Poulton moved to dismiss for failure to state a claim, arguing plaintiff lacked standing as a third-party beneficiary and any derivative claims were time-barred. Poulton also argued plaintiff had not

stated a viable claim against the company because, as an independent insurance broker, it was not liable for an insurance carrier's coverage decision.

Plaintiff opposed the motions, claiming he had standing as an intended third-party beneficiary; the policy was defective because "it afforded zero retroactive coverage on a claims-made policy"; Poulton was responsible, at least in part, for procuring deficient coverage; and the complaint was timely filed as he only recently learned Hecker had malpractice insurance. The court heard argument and reserved decision. A week or so later, it reconvened the parties and placed a comprehensive decision on the record.

After analyzing the relevant case law, the trial court determined plaintiff lacked standing because he was not an intended third-party beneficiary of the insurance contract between Colony and Hecker, nor an assignee of Hecker's rights in the policy. The court found plaintiff's status was more akin to a judgment creditor. Although sympathetic to plaintiff's situation as the victim of proven legal malpractice, the court found plaintiff's claim was "essentially a bad faith claim against the insurance carrier and the broker," which is not cognizable by "an individual or entity that is not the insured or an assignee of the insured's contract rights" under Ross v. Lowitz, 222 N.J. 494, 513-15 (2015) (holding injured plaintiffs may not assert a direct bad-faith claim

against a tortfeasor's insurer absent an assignment of the tortfeasor's contract rights under the insurance policy or evidence the tortfeasor and its insurer intended to make the plaintiffs third-party beneficiaries of the policy).

The trial court acknowledged the Supreme Court's holding in Sparks v. St. Paul Ins. Co. that "a 'claims made' policy that affords no retroactive coverage whatsoever during its initial year of issuance," like the insurance contract here, is violative of public policy except where the carrier can prove "factual circumstances that would render such limited retroactive coverage both reasonable and expected." 100 N.J. 325, 340 (1985). It found, however, that it was without authority to consider the merits of the claim because plaintiff lacked standing to assert it. Accordingly, the court refused to issue an "advisory opinion on whether or not this policy is void, or whether . . . the discovery rule should be invoked."

On reconsideration, plaintiff re-argued his standing as an intended third-party beneficiary and asserted Colony had conceded his standing as a judgment creditor. Colony countered that even if plaintiff had derivative rights as a judgment creditor, the statute of limitations had long since expired on any claim Hecker had to challenge Colony's decision to disclaim coverage under the policy. The trial court reminded the parties it "did not rule on the statute of

limitations issue," and thus the issue was not before the court on the motion for reconsideration. It also rejected plaintiff's claim that Sparks imposed a burden on Colony to establish Hecker's policy was not void as against public policy, reasoning that would be so only "if someone comes into court with standing to make them meet the burden" because "[s]tanding is . . . a threshold question."

Plaintiff appeals, arguing he has standing to bring suit under N.J.S.A. 17:28-2, the direct action statute, and as an intended third-party beneficiary on the insurance contract. He also requests we enter judgment in his favor for the $1,000,000 policy limits as "the record should be more than sufficient." Both defendants counter that plaintiff is not an intended third-party beneficiary of the policy, and even if plaintiff has standing to sue as a judgment creditor, the complaint was properly dismissed because the statute of limitations on plaintiff's claim expired in 2012. They also contend plaintiff's request for judgment from this court is improper and should be denied. Colony adds that "[a]ssuming . . . plaintiff can satisfy the condition precedent of a return of unsatisfied execution of judgment" against Hecker, plaintiff "would have the ability to seek the policy proceeds to satisfy the malpractice action judgment" under N.J.S.A. 17:28-2, "only if coverage is available, only if plaintiff does so

within the statutory limitations period, and only for the amount of the judgment."

We review the grant of a motion to dismiss a complaint pursuant to Rule 4:6-2(e) de novo, using the same standard that governs the trial court. Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186 (App. Div. 2006). Accordingly, we assume the allegations of the complaint are true and afford plaintiff all reasonable inferences, viewing the pleading generously "to determine whether a cause of action can be gleaned even from an obscure statement." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002) (citing Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989)).

Defendants are correct that as a general rule "an individual or entity that is a stranger to an insurance policy has no right to recover the policy proceeds." Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co., 466 N.J. Super. 471, 479 (App. Div.) (quoting Ross, 222 N.J. at 512), certif. granted, 248 N.J. 10 (2021). But the general rule does not apply here. N.J.S.A. 17:28-2,[4] provides an injured person may maintain an action against an insurer when

[4] The statute states in relevant part,

his judgment against the insured tortfeasor remains unsatisfied due to insolvency, which plaintiff's complaint alleges here. See Dransfield v. Citizens Cas. Co. of N.Y., 5 N.J. 190, 194 (1950). The trial court was correct plaintiff is not an intended third-party beneficiary "in the traditional sense," Crystal Point, 466 N.J. Super. at 483. Nor is he an assignee of Hecker's contract rights entitling him to sue on the policy. See Murray v. Allstate Ins.

> No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by animals or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered in this state by any insurer authorized to do business in this state, unless there is contained within the policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of the policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his personal representative in case death results from the accident, because of the insolvency or bankruptcy, then an action may be maintained by the injured person, or his personal representative, against the corporation under the terms of the policy for the amount of the judgment in the action not exceeding the amount of the policy.
>
> [N.J.S.A. 17:28-2.]

Co., 209 N.J. Super. 163, 165 (App. Div. 1986). But he has plainly stated a claim as "a third-party beneficiary by virtue of the [direct action] statute" with standing to sue Colony on the policy.[5] See Crystal Point, 466 N.J. Super. at 483. See also Northfield Ins. Co. v. Mt. Hawley Ins. Co., 454 N.J. Super. 135, 148-150; 148 n.7 (App. Div. 2018) (discussing the likely roots of N.J.S.A. 17:28-2 in early insurance cases requiring an insured to discharge its liability to the victim before the insured could recover on its policy from the carrier).

Accordingly, the judgment dismissing plaintiff's complaint for lack of standing against Colony must be reversed. While Colony has raised potential defenses it may have to plaintiff's claim, assuming plaintiff can establish Hecker's insolvency — asserting plaintiff can look to the limit of the policy proceeds to satisfy his judgment under N.J.S.A. 17:28-2, "only if coverage is available, [and] only if plaintiff does so within the statutory limitations period" — the viability of those defenses will have to await discovery.

Specifically, we are not prepared, at this juncture, to rule on Colony's assertion that plaintiff's claim is time-barred, although we acknowledge that may prove ultimately to be the case. It is not even clear to us on this record

[5] We note the parties did not bring the direct action statute to the attention of the trial court, and our decision in Crystal Point was issued more than eighteen months after the motion for reconsideration was decided in this case.

when plaintiff's claim accrued under N.J.S.A. 17:28-2, although we doubt it is when Colony disclaimed coverage in 2006 as Colony asserts. Our Supreme Court has noted that "[w]hile the injured person has no greater right under the policy than has the assured, he has 'a cause of action the moment he is injured' which ripens into a right of action when he recovers a judgment against the assured whose insolvency is proved by the return of an execution unsatisfied." Dransfield, 5 N.J. at 194 (quoting Century Indemnity Co. v. Norbut, 117 N.J. Eq. 584, 587 (Ch. 1935); aff'd, 120 N.J. Eq. 337 (E. & A. 1936)).

We are also not prepared to say plaintiff cannot pursue a claim that Colony's policy to Hecker was void as against public policy and should be reformed as in Sparks to provide coverage here. See Sparks, 100 N.J. at 341 (imputing a right of prospective notification in the insured's claims made policy to provide coverage "commensurate with the reasonable expectations of the insured as to 'occurrence' policy coverage"). We held in Crystal Point that a plaintiff suing an insurance company directly under N.J.S.A. 17:28-2 could not be forced to arbitrate its claim, notwithstanding the policy term requiring arbitration, 466 N.J. Super. at 483-85, and we noted in Northfield that we saw "nothing in Ross that would suggest that the basic policy provision that allows a party who has obtained a judgment against the insured to sue the insurer

for relief does not also confer third-party beneficiary status on that party to the extent necessary to pursue complete relief." 454 N.J. Super. at 149-50. This record provides us no opportunity to "measure the full extent of this statutory third-party beneficiary status," Crystal Point, 466 N.J. Super. at 483, and we do not intend to "get out over our skis on this question," Northfield, 454 N.J. Super. at 150. We hold only that plaintiff's claim for reformation of the policy cannot be foreclosed at this point and return the case to the trial court for development of a record.

As to plaintiff's request that we enter judgment in his favor for the "full $1M policy limit," defendants are correct the request is wholly unwarranted and must be denied. We obviously do not find Colony "wrongfully denied" Hecker's insurance claim, "and that it had done so in bad faith," and plaintiff has asserted no basis for entitlement to the $1,000,000 policy limit on a judgment of well less than half that amount. Plaintiff has only stated a claim against Colony under N.J.S.A. 17:28-2, he has come nowhere near proving one. See Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193-94 (1988) (remanding to permit the plaintiff an opportunity to establish a claim suggested by the pleadings).

Finally, we likewise find plaintiff has stated a claim against Poulton and Poulton & Associates for the broker's negligent failure to procure the appropriate professional liability coverage. See Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc., 135 N.J. 182, 190 (1994) (noting "[o]ur cases clearly recognize that an insurance broker may owe a duty of care not only to the insured who pays the premium and with whom the broker contracts but to other parties found within the zone of harm emanating from the broker's actions as well").

In its brief to this court, Poulton failed to address the long line of authority in this State beginning with Rider v. Lynch, 42 N.J. 465 (1964), recognizing the duty of care insurance brokers owe foreseeable third parties injured by the broker's negligence in failing to secure appropriate insurance coverage. Instead, they argued plaintiff is not an intended third-party beneficiary under the Colony policy and "even if plaintiff wants to assert that Hecker was not given the coverage he asked for or expected, plaintiff will never be able to prove that point given Hecker's death and the dissipation of relevant evidence." Although it is certainly possible plaintiff will not be able to prove Poulton failed to secure the coverage Hecker "asked for or expected,"

or that any such cause of action is timely, we are satisfied plaintiff has stated the claim and should thus be permitted the opportunity to try to prove it.

Reversed and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION