SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2494-20

KENNETH MCDONALD,
principal by his attorney-in-fact,
MARY GILYARD,

Plaintiffs,

v.

MANUEL PARADA, NATIONAL RETAIL SYSTEMS, INC., KEYSTONE FREIGHT CORP., NATIONAL RETAIL TRANSPORTATION, INC., AMERICAN MARITIME SERVICES OF N.J., INC., AMERICAN MARITIME SERVICES OF N.J., INC. and/or GARDEN STATE INTERMODAL REPAIR d/b/a INTEGRATED INDUSTRIES, CORP., AGF MARINE CONSULTANTS, INC., MARK ANDERSON, and MHP TRUCKING. L.L.C.,

Defendants,

and

INTERPOOL, INC., d/b/a TRAC INTERMODAL, INC. and TRAC LEASE, INC.,

Defendants/Third-Party Plaintiffs-Respondents,

v.

HARTFORD FIRE INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, and HANOVER INSURANCE COMPANY,

Third-Party Defendants,

and

DARWIN NATIONAL ASSURANCE COMPANY,

Third-Party Defendant-Appellant,

and

AMERICAN MARITIME SERVICES OF N.J., INC. d/b/a INTEGRATED INDUSTRIES and GARDEN STATE INTEGRATED INDUSTRIES, and GARDEN STATE INTERMODAL REPAIR,

Third-Party Plaintiffs,

v.

DARWIN NATIONAL ASSURANCE COMPANY/ALLIED WORLD, MARKEL INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, NAVIGATORS INSURANCE COMPANY, JBL TRINITY GROUP LTD., and CAPACITY MARINE CORPORATION,

Third-Party Defendants.

Argued December 21, 2022 – Decided January 11, 2023

Before Judges Mayer, Enright and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-0208-14.

Charles D. Cole, Jr. (Newman, Myers, Kreines, Harris, PC) argued the cause for appellant (Charles D. Cole, Jr., on the briefs).

John J. Levy argued the cause for the respondents (Montgomery, McCracken, Walker & Rhoads, LLP, attorneys; John J. Levy and Jack K. Hagerty, on the brief).

PER CURIAM

Third-party defendant Darwin National Assurance Company (Darwin) appeals from an August 23, 2022 order entering summary judgment after finding Darwin had a duty to defend and indemnify third-party plaintiff TRAC Lease, Inc. (TRAC) against the claims asserted in a personal injury lawsuit filed on behalf of plaintiff Kenneth McDonald (McDonald). Darwin also appeals from an August 23, 2022 amended judgment awarding litigation costs and fees to TRAC. We affirm the order and judgment.

This case returns to us after we vacated a February 20, 2017 order and an April 23, 2018 judgment. See McDonald v. Parada, Nos. A-4414-17 and A-4547-17 (App. Div. Oct. 19, 2019). We remanded the matter for the judge to provide findings of fact and conclusions of law supporting his determination that Darwin had a duty to defend and indemnify TRAC.

On remand, in a December 4, 2020 written decision, the judge found Darwin had a duty to defend and indemnify TRAC and awarded $342,661 in litigation fees and costs to TRAC. On April 23, 2021, a different judge entered a judgment against Darwin, in the amount of $342,661, representing fees and costs awarded to TRAC.

Darwin appealed the April 23, 2021 judgment. In reviewing Darwin's appeal, we noted there was no order memorializing the judge's December 4, 2020 written decision. As a result, we issued an August 3, 2022 order temporarily remanding the matter to the trial court to address two issues. First, to "issu[e] an order that expressly incorporate[d] the factual findings and legal conclusions [the motion judge] made in his December 4, 2020 written [f]indings of [f]act[] and [c]onclusions of [l]aw."[1] Second, to "issu[e] an amended

[1] The judge who issued the December 4, 2020 written decision retired prior to our review of the case.

[j]udgment on TRAC's application for litigation costs." We retained jurisdiction, allowing Darwin to file an amended notice of appeal within fifteen days of the remand proceeding.

In an August 23, 2022 order, the remand judge "memorialize[d] and incorporate[d] by reference the written [f]indings of [f]acts and [c]onclusions of [l]aw made by the [retired judge] on December 4, 2020." The judge also issued an August 23, 2022 amended judgment awarding $342,661 to TRAC. Attached to the August 23, 2022 order and amended judgment was the December 4, 2020 written findings of fact and conclusions of law, the February 20, 2017 order, and the April 27, 2018 judgment awarding litigation costs to TRAC. Darwin filed an amended notice of appeal on August 23, 2022.

Having recited the procedural history, we summarize the facts in McDonald's personal injury action leading to the insurance coverage dispute between Darwin and TRAC.

On February 20, 2013, McDonald was struck by a wheel assembly that separated from the chassis of a passing tractor trailer and suffered serious injuries. McDonald then filed a personal injury action against several defendants, including Manuel Parada (Parada), TRAC, National Retail

Transportation, Inc. (NRT), and American Maritime Services of NJ d/b/a Integrated Industries (AMS).

TRAC owned the chassis and NRT owned the tractor trailer. TRAC leased its chassis to NRT. On the date of McDonald's accident, Parada, an employee of NRT, drove the tractor trailer with the attached chassis.

Prior to the accident, TRAC signed a Depot Agreement (Agreement) with AMS to repair, maintain, and periodically inspect TRAC's chassis. Less than a month before the accident, AMS inspected the chassis that injured McDonald. AMS agreed to indemnify and hold TRAC harmless for any liability arising out of AMS's obligations under the Agreement. Further, the Agreement provided AMS was "solely liable for" losses, damages, costs, and legal fees "arising out of [AMS's] storage, use, repair, or possession of [TRAC's equipment] and arising out of [AMS's] performance of th[e] Agreement."

The Agreement also required AMS to maintain insurance "covering . . . all [e]quipment under [AMS's] control." AMS agreed to name TRAC as an additional insured under its insurance policy. AMS obtained the required insurance coverage from Darwin and named TRAC as an additional insured (Darwin policy).

The Darwin policy included a provision entitled "Coverage B [-] Contractual Liability Coverage." Under Coverage B, Darwin agreed to provide coverage for liability arising out of "any oral or written contract or agreement relating to the conduct of [AMS's] business." After McDonald's accident, TRAC sought coverage under this section of the Darwin policy.

The Darwin policy also contained an "Additional Insured" provision. The provision stated:

> [a]ny person or organization to whom you become obligated to include as an additional insured under this policy, as a result of any contract or agreement you enter into which requires you to furnish insurance to that person or organization of the type provided by this policy, is an insured, but only with respect to liability arising out of your operations or premises owned by or rented to you.

Additionally, the Darwin policy included an endorsement, which specified its insurance was primary if the following conditions were met: 1) the liability arose out of work performed by AMS, and 2) the policy "is required of the insured by a written contract to provide coverage on a primary basis."

In his personal injury action, McDonald asserted negligence claims against NRT, TRAC, and AMS. TRAC demanded that Darwin defend and indemnify it as an additional insured under the Darwin policy. Darwin refused.

TRAC then filed a third-party complaint against Darwin asserting the Darwin policy afforded it insurance coverage for McDonald's personal injury claims.

TRAC subsequently moved for summary judgment on the insurance coverage issue. Darwin also filed a motion for a declaratory judgment that it was not obligated to defend or indemnify TRAC for McDonald's personal injury claims.

On January 20, 2017, the motion judge heard argument on the motions. In a February 20, 2017 order, the judge denied Darwin's motion and granted TRAC's motion. The judge concluded Darwin had a duty to defend and indemnify TRAC against McDonald's personal injury claims.

McDonald subsequently settled his claims against all defendants. As part of the settlement, in July 2017, TRAC and McDonald executed a confidential release.

On December 15, 2017, TRAC filed a motion seeking attorney's fees and costs against Darwin for failing to comply with the prior order compelling Darwin to defend and indemnify TRAC. TRAC's application for fees and costs included sums incurred in defending against McDonald's personal injury claims and prosecuting its insurance coverage claim against Darwin.

On April 27, 2018, a different judge entered a $342,661 judgment against Darwin, representing counsel fees and costs incurred by TRAC. The judge noted Darwin did not contest the "counsel fees or cost sought" by TRAC.

Darwin appealed the February 20, 2017 order denying its motion for summary judgment and granting TRAC's motion for summary judgment. Darwin also appealed the April 27, 2018 judgment. Based on our review of the record on appeal, we remanded for the motion judge to provide findings of fact and conclusions of law.

On remand, the motion judge found Darwin had a duty to indemnify TRAC under Coverage B. He stated the Darwin policy clearly and unambiguously compelled Darwin to provide coverage for the personal injury claims against TRAC because McDonald's claims were based on AMS's obligation under the Agreement to maintain, repair, and inspect TRAC's chassis. The judge concluded "the Darwin policy provide[d] primary coverage . . . because; 1) the liability [arose] out of work performed by the insured, AMS; and 2) the Darwin policy was required of AMS by a written contract to provide coverage on a primary basis through the . . . Agreement." The judge held "[t]he allegations in [McDonald]'s complaint obligated Darwin to indemnify TRAC."

Additionally, the judge determined Coverage B "did not require reciprocal indemnification, i.e., that TRAC also indemnify AMS."

On appeal, Darwin argues TRAC is not insured under Darwin's policy because TRAC did not agree to indemnify AMS or any other entity under the Agreement. Darwin also contends TRAC failed to prove its costs and attorney's fees through competent and admissible evidence.

Darwin raises several additional arguments on appeal not presented to the trial court. Darwin now contends its policy does not constitute primary insurance coverage because the word "primary" does not appear in the Agreement. In another newly asserted argument, Darwin claims that even if it did provide primary insurance coverage to TRAC, it should only pay a portion of the judgment because TRAC had other primary insurance. Darwin also asserts TRAC waived coverage by "compromising its claims against [the trucking company] and [its insurance carrier]" when it settled with McDonald. We reject Darwin's arguments.

We review a trial court's grant or denial of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for summary judgment must be granted "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 that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

"To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). The key inquiry is whether the evidence presented, when viewed in the light most favorable to the non-moving party, "[is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The interpretation of a contract is subject to a de novo review. Kieffer v. Best Buy, 205 N.J. 213, 223–24 (2011). The starting point when interpreting an insurance contract is the plain meaning of the contractual language. Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 207 (2017). "If the language is clear, that is the end of the inquiry." Ibid. (quoting Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008)).

Regarding an award of counsel fees, "[a]lthough New Jersey generally disfavors the shifting of attorneys' fees, a prevailing party can recover those fees

if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001) (citations omitted). "[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Collier, 167 N.J. at 444).

We first address Darwin's argument that TRAC is not insured under the policy "because no covered claim . . . was pleaded against it." Darwin asserts there was no contractual liability claim pleaded against TRAC by AMS or McDonald to trigger Coverage B under the Darwin policy.

Darwin contends Coverage B is available only "when two conditions are satisfied: (1) the insured assumes a liability under a contract and (2) the contract relates to the named insured's business." According to Darwin, TRAC must be an indemnitor under the Agreement to satisfy the first condition and TRAC never agreed to indemnify AMS under the Agreement. Because TRAC was not sued under a contractual liability theory, Darwin argues TRAC is not entitled to coverage under its policy. We disagree.

Under the Agreement, AMS contracted to indemnify TRAC "against any and all liability, loss, damage, cost and expense, including, but not limited to,

attorney's fees . . . arising out of [AMS's] storage, use, repair, or possession of [TRAC's equipment] and arising out of [AMS's] performance of th[e] Agreement." As part of its performance obligation under the Agreement, AMS inspected TRAC's chassis less than one month prior to McDonald's accident. Coverage B of the Darwin policy provided coverage for liability arising out of "any oral or written contract or agreement relating to the conduct of [AMS's] business."

Here, TRAC satisfied the conditions necessary to trigger coverage under the Darwin policy. The Agreement specifically required AMS to indemnify TRAC "against any and all liability" related to AMS's performance under the Agreement, which included inspection of TRAC's chassis. Nowhere in the Agreement, or in the Darwin policy, is there any reciprocal indemnification requirement for TRAC to indemnify AMS. Certainly, Darwin had the ability to include such a provision in its policy but did not do so. To read such a provision into the Darwin policy would impermissibly alter the terms of a clearly worded and unambiguous insurance contract. An unambiguous indemnity provision is strictly construed against the indemnitee. See Kieffer, 205 N.J. at 224.

Additionally, the Agreement established TRAC as an additional insured, triggering coverage under the Additional Insured provision of the Darwin

policy. In the Agreement, AMS agreed to name TRAC as an additional insured. The Darwin policy's Additional Insured provision provided coverage to TRAC for AMS's "liability arising out of [AMS's] operations," which included servicing and inspecting TRAC's chassis.

We next consider Darwin's arguments raised for the first time on appeal. Darwin's newly raised arguments were not presented to the motion judge. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (declining to consider questions or issues not properly presented to the trial court unless the matter is addressed to the jurisdiction of the trial court or concerns matters of great public interest). Darwin's new arguments do not relate to the jurisdiction of the trial court or concern matters of great public interest. Therefore, we need not consider them.

However, because the judge's December 4, 2020 written decision stated the Darwin policy provided "primary" insurance coverage, even though that issue does not appear to have been argued as part of the summary judgment motions, we address the argument that the Darwin policy does not afford primary insurance coverage to TRAC.

According to Darwin, it became obligated to provide primary insurance coverage only if "this policy is required of the insured by a written contract to

provide coverage on a primary basis." Because the Agreement does not contain the phrase "primary insurance," Darwin contends its policy is not primary.

We are satisfied the clear and unequivocal language in the Agreement establishes that the Darwin policy provides primary coverage rather than excess coverage to TRAC. Under the Agreement, AMS was liable to TRAC for AMS's negligent inspection of TRAC's chassis. AMS agreed to be "solely liable" for "any and all" liability claims asserted against TRAC. The use of the word "solely" signified that the Darwin policy would be the primary insurance policy because there was no mention of any additional policies or coverages to be applied before the Darwin policy would be triggered. Nor did the Agreement or the Darwin policy state AMS would only be partially or conditionally liable for claims asserted against TRAC.

We next address Darwin's argument that TRAC is not entitled to attorney's fees and costs incurred in defending against McDonald's personal injury claims and pursuing the insurance coverage claim. Darwin contends that TRAC failed to provide appropriate admissible evidence in support of the requested attorney's fees and costs. According to Darwin, TRAC's counsel failed to include the invoices paid by TRAC to defend against McDonald's personal injury claims and to prosecute the insurance coverage dispute. Thus, Darwin asserts the judge

should have denied the application for costs and fees. We are not persuaded by Darwin's arguments.

The judges issuing the original judgment and the amended judgment considered and rejected Darwin's arguments in opposition to the award of TRAC's fees and costs. They noted that Darwin never contested the amount of fees and costs requested by TRAC. Rather, Darwin simply disputed the admissibility of the documents submitted by TRAC in support of the application.

A trial court may grant attorneys' fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." R. 4:42-9(a)(6). Under Rule 4:42-9(c), "[a]ll applications for the allowance of fees shall state how much had been paid to the attorney . . . and what provision, if any, has been made for the payment of fees to the attorney in the future."

Here, TRAC submitted an attorney certification with a twenty-six-page spreadsheet documenting the dollar amounts TRAC paid to its attorneys. The spreadsheet identified the dates of the legal services, described the services provided by TRAC's attorneys, and stated the exact dollar amount of those services. Nothing in Rule 4:42-9(b) or (c) required TRAC to provide copies of ledgers, invoices, or canceled checks in support of its motion for fees and costs.

We will reverse a judgment awarding fees and cost only where the motion judge's determination amounted to a clear abuse of discretion. Here, TRAC provided ample support for the awarded fees and costs. We are satisfied the amount awarded in the judge's August 23, 2022 amended judgment was not an abuse of discretion.

Affirmed.