SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3207-20

DANIELA SANCHEZ,

Plaintiff-Appellant,

v.

GASTON FERNANDEZ, KARINA ACOSTA, and PROVIDENCE MUTUAL FIRE INSURANCE COMPANY,

Defendants-Respondents.

PROVIDENCE MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Respondent,

v.

GASTON FERNANDEZ and KARINA ACOSTA,

Defendants-Respondents,

and

DANIELA SANCHEZ,

Defendant-Appellant.

Argued December 5, 2022 – Decided July 20, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1874-19.

Jeffrey S. Farmer argued the cause for appellant (Mazraani & Liguori, LLP, attorneys; Jeffrey S. Farmer, of counsel and on the brief).

Quinn M. McCusker argued the cause for respondent Providence Mutual Fire Insurance Company (Fowler Hirtzel McNulty & Spaulding, LLP, attorneys; Quinn M. McCusker, on the brief).

PER CURIAM

Plaintiff appeals the trial courts February 28, 2020 order dismissing her declaratory judgment action against an insurer for failure to state a claim. She argues the facts of this case present circumstances warranting an exception to the long-standing principle that a plaintiff may not bring a claim against an insurer without having first obtained a judgment against the insured. While we disagree with plaintiff's argument on appeal, we find the trial court committed plain error in granting summary judgment in favor of the insurer on the question of coverage. We vacate the relevant orders and remand.

I.

On May 22, 2019, plaintiff Daniela Sanchez filed a personal injury claim against defendants Gaston Fernandez and Karina Acosta. Plaintiff alleged that on May 24, 2018, she was on Acosta's property visiting Fernandez, and was viciously attacked by a dog resulting in severe facial lacerations and permanent scarring. Acosta was the owner of the home, but not the dog. The dog was owned by Fernandez, who was living with Acosta. The record shows that Fernandez and Acosta are cousins. At the time of the attack, Acosta was covered under a homeowners' insurance policy from Providence Mutual Fire Insurance (Providence).

The policy's definitions section defined "Insured in pertinent part as: [y]ou and residents of your household who are . . . [y]our relatives . . . ." The record shows that the terms "residents" or "relatives" are not defined in the policy.

Plaintiff filed suit against Acosta and Fernandez, alleging negligence. She amended her complaint on January 14, 2020, adding a count seeking a declaration of Fernandez rights under the Providence policy, including payment of damages for bodily injury. Providence moved to dismiss the amended count for failure to state a claim. Providence argued that Sanchez had no direct cause

of action against them before first obtaining a judgment against Fernandez. After oral argument, the trial court granted Providence's motion to dismiss on February 28, 2020. We denied plaintiff leave to appeal.

Providence next filed its own declaratory judgment complaint, seeking an order declaring that it owed no duty to cover Fernandez under Acosta's policy. Plaintiff answered and counterclaimed, once more seeking a declaration of coverage for Fernandez. The declaratory and personal injury cases were consolidated. Fernandez never answered Providence's complaint, and default judgment was entered against him in favor of Providence Mutual. Again, plaintiff's counterclaim seeking coverage was dismissed by the trial court pursuant to Rule 4:6-2(e).

Providence then moved for summary judgment and sought a declaration that the default judgment entered against Fernandez declaring he was not covered under the policy was binding upon all parties. The trial court granted the motion on April 13, 2021.

In its written statement of reasons in support of the default judgment, the court found Fernandez continued to live in his cousin Acosta's residence nearly three years after the dog-bite incident. The court also found he had received notice of the various lawsuits and related proceedings. The court noted

Fernandez and Acosta: "actively participated in litigating the personal injury claim"; "never indicated to any party or [c]ourt that Mr. Fernandez is an insured under Ms. Acosta's policy"; and did not "undertake[] any actions [which] would lead to [that] conclusion." The court stated, "[Fernandez and Acosta] have both acted consistent with a finding that Mr. Fernandez is not insured under the [p]olicy."

The court found that Fernandez's default was binding upon plaintiff. The court concluded plaintiff was therefore barred from proceeding against Providence. The court rejected plaintiff's opposition to Fernandez's default, reasoning plaintiff did not demonstrate any evidence that the court did not consider.

Two days later, on April 15, 2021, plaintiff obtained an arbitration award against Fernandez for $180,000.00. On June 11, 2021, the trial court entered an order enforcing the arbitration award in the amount of $184,903.56.

Plaintiff appealed. Providence moved before us to strike her appeal point challenging the April 13 summary judgment order of the trial court, arguing that she failed to raise the issue in her merits brief. We denied the motion "without prejudice to any argument respondent deems appropriate that would allow respondent to argue that an issue was not briefed and thus has been abandoned."

Plaintiff now argues the trial courts February 28, 2020 order granting Providences motion to dismiss count four of her amended complaint was error. Plaintiff did not appeal the trial courts April 13, 2021, order granting summary judgment against Fernandez or its finding that the order was enforceable against her.

II.

"An appellate court reviews de novo the trial courts determination of the motion to dismiss under Rule 4:6-2(e)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (citing Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017)). In considering a Rule 4:6-2(e) motion, we examine the legal sufficiency of the facts alleged on the face of the complaint and limit our review to the pleadings themselves. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989); Roa v. Roa, 200 N.J. 555, 562 (2010). The test for determining the adequacy of a pleading is "whether a cause of action is suggested by the facts." Printing Mart-Morristown, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

III.

A.

Plaintiff's sole argument on appeal is unpersuasive. "[I]t is well recognized that an injured person possesses no direct cause of action against the insurer of the tortfeasor prior to recovery of judgment against the latter." President v. Jenkins, 357 N.J. Super. 288, 312 (App. Div. 2003); see also Crystal Point Condo. Assn, Inc. v. Kinsale Ins. Co., 251 N.J. 437, 448 (App. Div. 2022) (quoting Ross v. Lowitz, 222 N.J. 494, 512 (2015)). Courts have determined that such claims only arise only where an injured party obtains a final judgment against the named insured or, on the issue of bad faith, an assignment of rights from the named insured. See Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 165 (App. Div. 1986).

Plaintiff cites numerous cases which she contends stand for the proposition a declaratory judgment action against an insurer can proceed before final judgment on liability has been secured against the corresponding tortfeasor. See Manukas v. American Ins. Co., 98 N.J. Super. 522 (App. Div. 1968); and Caldwell Trucking PRP Group v. Spaulding Composites, Co., Inc, 890 F. Supp. 1247 (D.N.J. 1995). After carefully reviewing plaintiff's arguments, we find these cases inapposite. We briefly address plaintiff's two primary citations.

In Manukas, we held, absent a judgment against the insured, plaintiff could not maintain a direct action against the insurance company. Manukas, 98 N.J. Super. at 525. The argument plaintiff makes regarding exceptions to the standing rule refers to dicta in the opinion, regarding the hypothetical construction of the charitable immunity statute, N.J.S.A. 2A:53A-7, as it existed prior to its 1995 amendments. We find Manukas distinguishable.

In Caldwell, the federal district court allowed an injured party's claim against the carrier to proceed because "the insured [was] also a party." 890 F. Supp. at 1259. We note, unlike the matter before us, both the injured plaintiff and the insured in Caldwell brought declaratory judgment actions against the tortfeasor's carriers. Id. at 1250. Here, defendant Acosta was not a party to the declaratory judgment action. We find Caldwell is also distinguishable here.

B.

While plaintiff's arguments are unpersuasive, we may, in the interests of justice, notice plain error which was not brought the attention of the trial court, or to us. Rule 2:10-2. We find that to be the case here.

We note the trial courts order of February 28, 2020 dismissed plaintiff's count seeking declaration of coverage in her amended complaint without prejudice. When Providence filed its own declaratory judgment action seeking

a declaration that its policy did not cover Fernandez, plaintiff answered and filed a counterclaim renewing her claim for coverage. That counterclaim was dismissed for failure to state a claim by the trial courts order of December 4, 2020. That order did not state whether the dismissal of plaintiff's counterclaim was with or without prejudice.[1] Providence obtained default judgment against Fernandez[2] on January 11, 2021, and moved quickly for summary judgment against him, seeking a declaration of no coverage as to him.

Two days before plaintiff secured an arbitration award against Fernandez, and fifty-seven days before plaintiff's award was reduced to judgment, the trial court granted Providences motion for summary judgment against Fernandez and further found the judgment barred plaintiff's coverage claims against Providence.

We conduct a de novo review of an order granting a summary judgment motion, Gilbert v. Stewart, 247 N.J. 421, 442 (2021), applying "the same standard as the trial court under Rule 4:46-2(c)[,]" State v. Perini Corp., 221 N.J. 412, 425 (2015). In considering the motion, "both trial and appellate courts must

[1] That same order established a discovery end date of March 29, 2021.

[2] The record shows Fernandez was unrepresented throughout all relevant times during this litigation and appeal.

view the facts in the light most favorable to the non-moving part[ies]." Bauer v. Nesbitt, 198 N.J. 601, 604 n.1 (2009) (citing R. 4:46-2(c)).

The trial court entered judgment against Fernandez based on his failure to answer Providences complaint. Curiously, the court cited but failed to consider undisputed facts in its possession at the time it entered judgment, specifically Fernandez's status as Acosta's cousin and his residence at the home at the time of the dog-bite incident. These facts go directly to the question of whether Fernandez was an insured under Acosta's policy. During summary judgment argument, plaintiff raised these points before the court, contending Providence should have been required to submit proof on the merits of coverage before the trial court granted summary judgment. The trial court rejected this argument and drew an inference of no coverage based on the words and conduct of Fernandez and Acosta gleaned from the record.

There is a genuine issue of material fact as to whether Fernandez was an insured who Providence had a duty to defend under its homeowners policy with Acosta. Viewing the facts on Fernandez residency as well as his relationship to Acosta in a light favorable to the non-moving parties, summary judgment granting Providence declaratory relief under the policy should have been denied. The courts failure to do so clearly led to an unjust result.

Plaintiff secured a judgment for damages against Fernandez days after the close of discovery and entry of judgment for Providence. Having finally obtained judgment, she was nonetheless barred from proceeding under Jenkins to resolve the coverage question as to Fernandez. Providence's strategy to pursue a declaratory judgment action against an unsuspecting and unrepresented tortfeasor like Fernandez is not prohibited. However, the trial court's summary judgment order, based on his default, preempted a proper consideration of the coverage question. The unusual procedural posture of the case further hindered a merits-based decision by the court on coverage.

A finder of fact may or may not decide Fernandez is a resident family member entitled to coverage under the Providence homeowner's policy. However, we conclude the trial court's order granting summary judgment to Providence on the question of Fernandez's coverage clearly led to an unjust result. As such, it was plain error.

We vacate the April 15, 2021 order of summary judgment, the December 4, 2020 order to the extent that it dismisses plaintiff's counterclaim for a declaration of coverage with prejudice, and the January 11, 2021 order granting default judgment against Fernandez to the extent it declares he is not covered

under the Providence homeowner's policy. We remand for proceedings consistent with this opinion.

Vacated and remanded. We do not retain jurisdiction.