ARI MUTUAL INSURANCE, CO., Plaintiff-Respondent,

v.

ANTONIO JORGE, Defendant-Appellant, and

ALLSTATE NEW JERSEY INSURANCE COMPANY, ZINA TRUCKING, INC., Defendants.

No. A-1256-10T2.

Superior Court of New Jersey, Appellate Division.

Argued June 6, 2011.
Decided June 16, 2011.

Edward Rubenstone of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellant (Lamm Rubenstone, L.L.C., attorneys; Christopher J. Fox and Frank Schwartz, on the brief).

Danielle M. Lozito argued the cause for respondent (**Methfessel** & **Werbel**, attorneys; Marc L. Dembling, of counsel and on the brief; Ms. Lozito, on the brief).

Before Judges Lisa and Reisner.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Defendant Antonio Jorge appeals from two orders dated September 28, 2010, denying his summary judgment motion, and granting summary judgment in favor of plaintiff ARI Mutual Insurance Company (ARI). We affirm.

I

Jorge is the sole owner of Zina Trucking, Inc. In July 2006, he applied to ARI for a commercial insurance policy covering the period August 1, 2006 to August 1, 2007. The first page of the application listed the "named insured and other named insured" as "Antonio Jorge dba [doing business as] Zina Trucking." Under the applicant's name, a box was checked designating the applicant as a "corporation." In the "BUSINESS AUTO SECTION" of the application, the applicant was listed as "Zina Trucking Inc." Accordingly, ARI issued a policy on which the declarations page listed "Zina Trucking Inc[.]" as the named insured. Jorge did not ask ARI to correct the policy to reflect a different named insured.

The policy contained a step-down clause, providing that if a covered person, other than a named insured, was involved in an accident and had other auto insurance, the $1 million in Uninsured Motorists (UM) coverage under the ARI policy would be reduced to the limits of the covered person's own policy. The relevant language is as follows:

> . . . if:
>
> (1) An "insured" is not the individual named insured under this policy;
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> (2) That "insured" is an individual named insured under one or more other policies providing similar coverage; and
>
> (3) All such other policies have a limit of insurance for similar coverage which is less than the Limit of Insurance for this coverage; then the most we will pay for all damages resulting from any one "accident" with an "uninsured motor vehicle" . . . shall not exceed the highest applicable limit of insurance under any coverage form or policy providing coverage to that "insured" as an individual named insured.

On November 27, 2006, about four months after purchasing the policy, Jorge was involved in an accident while driving the Zina truck. Claiming that the accident was caused by a phantom vehicle, he sought UM coverage under the ARI policy. ARI filed a declaratory judgment complaint against Jorge and his personal auto insurer, Allstate New Jersey Insurance company, contending that the $1 million of UM coverage under the ARI policy should be stepped down to $100,000, which was the level of UM coverage available under Jorge's Allstate policy.[1]

Jorge moved for summary judgment, contending that ARI mistakenly listed Zina Trucking as the named insured in the policy, when he had applied for coverage as the individual named insured. In support of the motion, Jorge filed a certification, attesting that at the time he applied for the ARI policy, he understood that he "would be the named insured under any policy to be issued by ARI pursuant to the Application." He attested that he signed the application in his individual capacity, and he would not have purchased that policy if he "had known that ARI intended to change the named insured from myself to Zina Trucking, Inc." He further stated that he did not receive a copy of the policy document until after he purchased the policy. ARI cross-moved for summary judgment.

At oral argument of the motion, Jorge's counsel agreed that he was not challenging the validity or enforceability of the step-down clause. Rather, he argued that, given the way Jorge completed and signed the application, he had a "reasonable expectation" that he would be the named insured. He also argued that any ambiguity, created by a difference between the application and the policy, should be resolved in the insured's favor. Third, he contended that even if Zina Trucking was the named insured, Jorge should be deemed the "alter ego" of the corporation, because he was its sole shareholder.

In an oral opinion placed on the record on September 24, 2010, Judge Phillip Lewis Paley found that the policy unambiguously listed Zina Trucking Inc. as the named insured. He reasoned that Jorge had a duty to read the policy and ask ARI to correct it if he believed his company should not have been listed as the named insured. He concluded:

> [D]efendant's expectation that he was a named insured is unreasonable in light of the plain language of the policy. He was in possession of the insurance policy naming [Zina] Trucking as the named insured for several months before the accident.
>
> I cannot ignore the obligation imposed upon him by law to read the plain language of the policy. While it may be that he had a reasonable expectation of coverage as a named insured when he signed his application, his failure to read and/or protest the plain language of the policy as written until after his accident makes his belief unreasonable.

The judge further found that there was no mutual mistake, and no evidence that ARI committed any fraud or unconscionable conduct. He also concluded that any ambiguity was created by Jorge, who listed Zina Trucking as the insured in filling out the application.

II

Our review of the trial court's summary judgment decision is de novo. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Using the Brill[2] standard, we determine whether, giving the non-moving party the benefit of all favorable inferences, the undisputed material facts entitle the moving party to judgment. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). After reviewing the record, we conclude that Judge Paley correctly granted summary judgment in favor of ARI.

In Pinto v. New Jersey Manufacturers Insurance Co., 183 N.J. 405 (2005), the Supreme Court held that step-down clauses in insurance policies were enforceable. A 2007 statute superseded Pinto by making step-down clauses unenforceable, N.J.S.A. 17:28-1.1(f), but Jorge concedes that the statute is not retroactive. See Olkusz v. Brown, 401 N.J. Super. 496, 499 (App. Div. 2008).[3]

Instead, as in the trial court, he seeks to circumvent Pinto by arguing that: the insurance policy "materially differed" from the application; when read together with the application, the policy should be deemed "ambiguous," and the ambiguity should be construed in Jorge's favor and consistent with his reasonable expectations; the UM/UIM endorsement of the policy defines an insured as a natural person whose "family members" will be covered, thereby misleading Jorge into believing that he was the named insured.

We agree with Judge Paley that these arguments are all without merit. They require no further discussion here, R. 2:11-3(e)(1)(E), and we affirm substantially for the reasons stated in Judge Paley's opinion. We add the following comments.

In completing the insurance application, Jorge did not indicate that he was applying for insurance or signing the form in his individual capacity, as opposed to in his capacity as owner of the business. The application listed "Antonio Jorge dba Zina Trucking" as the named insured, and immediately thereafter indicated that the applicant was a corporation. In a later section of the application, the applicant was listed only as Zina Trucking Inc. The declarations page of the insurance policy unambiguously listed Zina Trucking Inc. as the named insured. See Lehrhoff v. Aetna Cas. & Sur. Co., 271 N.J. Super. 340, 347 (App. Div. 1994) (ordinarily a policy's declarations page "must be deemed to define coverage and the insured's expectation of coverage").

Upon receiving the policy, Jorge did not object or advise his insurance agent that there was a mistake on the declarations page. "`When an insured purchases an original policy of insurance he may be expected to read it and the law may fairly impose upon him such restrictions, conditions and limitations as the average insured would ascertain from such reading.'" Morrison v. Am. Intern. Ins. Co. of Am., 381 N.J. Super. 532, 542 (App. Div. 2005) (quoting Bauman v. Royal Indem. Co., 36 N.J. 12, 25 (1961)).

Nor is the UM/UIM endorsement ambiguous. The relevant portion of the endorsement indicates that "If the Named Insured is designated in the Declarations as . . . An individual" then the insured's family members are also covered by the policy. The next section provides that if the insured is a corporation, the corporation's employees are insured. These sections control who is entitled to UM coverage under the policy. They do not address the level of that coverage. The amount of coverage is separately controlled by the step-down clause. Jorge's reliance on Progressive Casualty Insurance Co. v. Hurley, 166 N.J. 260, 272 (2001), and O'Hanlon v. Hartford Accident & Indemnity Co., 639 F.2d 1019, 1023 (3d Cir. 1981), is misplaced. Those cases deal with whether individual owners of small businesses, or their family members, are entitled to UM coverage; they do not address step-down clauses.

In an argument raised for the first time on appeal, Jorge argues that ARI should be estopped from enforcing the step-down clause because the insurer allegedly did not act promptly in denying coverage beyond that provided under the clause. We decline to consider this argument, because Jorge did not raise it in the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Similarly, we will not consider his argument, raised for the first time in a footnote in his reply brief (and not supported by any record evidence), that ARI allegedly failed to counsel him about the step-down clause. See Pinto, supra, 183 N.J. at 417 (prospectively requiring insurers to tell commercial insurance applicants that individual employees must be named insureds to avoid operation of the step-down clause).[4]

Affirmed.

[1] Jorge filed a separate complaint and an order to show cause, seeking UM arbitration.

[2] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

[3] The ARI policy was issued, and expired, before the 2007 legislation was passed. See Hand v. Philadelphia Ins. Co., 408 N.J. Super. 124 (App. Div.) (disagreeing with Olkusz on the retroactivity issue, but declining to apply N.J.S.A. 17:28-1.1(f) to the plaintiff's claim because the relevant insurance policy expired before the statute was enacted), certif. denied, 200 N.J. 506 (2009).

[4] Although Jorge filed suit against ARI to require UM arbitration, he did not sue the insurance agent who allegedly assisted him in filling out the insurance application and allegedly failed to advise him about the step-down clause.