IFA INSURANCE COMPANY, Plaintiff-Appellant,

v.

MERCURY INDEMNITY COMPANY OF AMERICA, KENNETH McELYEA and JENNICE McELYEA, Defendants-Respondents, and CAROLYN LEFEVER, Defendant.

No. A-6124-09T4.

Superior Court of New Jersey, Appellate Division.

Argued May 17, 2011.
Decided August 4, 2011.

Robert R. Nicodemo III, argued the cause for appellant (Law Office of Robert R. Nicodemo III, attorneys; Richard V. Cosentino, on the briefs).

Allison M. Koenke argued the cause for respondent Mercury Indemnity Company of America (**Methfessel** & **Werbel**, attorneys; Ms. Koenke, on the brief).

Before Judges Carchman and Waugh.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff IFA Insurance Company (IFA) appeals the order of the Law Division dismissing its complaint seeking a declaratory judgment that defendant Mercury Indemnity Company of America (Mercury) was precluded from rescinding an automobile insurance policy issued to defendant Jennice McElyea. We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

On January 8, 2007, defendant Carolyn LeFever was driving her vehicle on the Atlantic City Expressway when she was struck by a vehicle owned by Jennice and driven by defendant Kenneth McElyea, causing her injury and damaging her car.[1] The Dodge Ram driven by Kenneth was insured by Mercury at the time of the accident.

Jennice obtained the policy at issue from Mercury in May 2004, when she applied for insurance coverage on the two cars she owned at that time, a Chevrolet Blazer and a Nissan Maxima. The Dodge Ram subsequently replaced the Maxima on the policy.

Jennice's application stated that her "[c]urrent policy [from Prudential Insurance Company was] being cancelled due to [her] husband. Insured and husband are separated[.] [H]e resides [on] Chatham Rd. [in] Turnersville . . . [and] he has his own auto insurance." Prudential had sent Jennice a notice of non-renewal on March 11, 2004. The notice stated that the policy would not be renewed because, in February 2004, Kenneth was involved in an accident in which he was at fault and had received nine points for operating a vehicle while his license was suspended in December 2002. The notice was received by Mercury on June 8, 2004. An additional policy change letter from Prudential, which was also received by Mercury on June 8, 2004, indicated that Kenneth was a licensed operator under Jennice's Prudential policy.

Jennice placed an "S" under the marital status section of the Mercury application, and listed her address as being on Whitman Terrace in Turnersville. Jennice did not list the names of any other persons who would be driving the insured vehicles in response to the question asking for that information. Jennice also wrote "separated" in a space provided for listing the insured's

spouse's name. In a section titled "UNDISCLOSED DRIVER CERTIFICATION," Jennice certified that "there are no additional relatives living in my household or regular operators of the insured vehicles that are not listed as drivers on my automobile policy with the Company," except any relatives not of driving age or those who maintain their own automobile insurance.

After receiving a claim regarding the January 8, 2007 accident, Mercury began an investigation. On April 17, 2007, the testimony of both Jennice and Kenneth[2] was taken by way of examinations under oath. Jennice testified that she obtained insurance from Mercury in May 2004 because the rates were less expensive. She further testified that she had no knowledge that Prudential had determined not to renew her insurance policy as of May 2004, and claimed that she had never seen the notice of non-renewal. Jennice also testified that she was separated when she submitted the Mercury application on May 25, 2004. Although she could not at first recall when she and Kenneth separated, she later testified that they separated around July 2003.

According to Jennice, Kenneth "was in and out of" her residence after they separated. He would also visit, typically on the weekends, staying a couple nights. When he was not staying with Jennice on Whitman Terrace, he would stay with friends or at motels. She testified that this arrangement continued beyond May 2004. She also testified that, following the separation, Kenneth never stayed at her parents' residence, located on the Chatham Road address in Turnersville listed on the policy application.

Jennice also testified that in May 2004 Kenneth would take the Blazer from the Whitman Terrace residence to work, and would keep the vehicle wherever he was staying. Jennice eventually replaced the Blazer with a Ford Expedition, and the Maxima was traded in for the Dodge Ram in April 2006. According to Jennice, Kenneth contributed to the purchase of the vehicles. Jennice also testified that Kenneth would seek her permission to use the Dodge Ram prior to driving the vehicle.

Jennice testified more specifically that, from about September or October 2006 through the date of the accident, Kenneth was living with her because he did not have a place to stay. During that time, the Dodge Ram became Kenneth's primary vehicle, which he kept at Whitman Terrace. Jennice testified that between July 2003 and the date of the examination, she did not know of any other vehicles registered to Kenneth.[3]

Between the date of the separation in July 2003 and the time he resumed residing with Jennice in September or October 2006, Kenneth continued to receive bills and mail at the Whitman Terrace address. Kenneth and Jennice also maintained joint checking and savings accounts during that time period. For the tax years 2004 through 2006, Kenneth's address was listed as being on Whitman Terrace.

Kenneth testified that he was living at the Whitman Terrace home at the time of the examination. He further testified that he began to reside there in 1999, when it was purchased as the marital home. Three or four years later, he began "coming and going" from the residence. He testified that he began to stay with friends at that time, but "probably stayed more" at Whitman Terrace in an effort to resolve his marital issues.[4]

Kenneth also testified that, in May 2004, he would use either the Blazer or the Maxima to travel to work. According to Kenneth, the Maxima was traded in for the Dodge Ram, which was purchased for his use. He also testified that he had to ask for Jennice's permission to use the vehicles.

Kenneth testified that Jennice "took care of the insurance" and put the cars in her name. He also testified that he was never informed that any insurance company terminated his coverage due to his driving record; and he maintained that he never had his license suspended or revoked.

On June 13, 2007, Mercury sent Jennice a notice of rescission of her insurance policy. The stated basis for rescission was material misrepresentation. Mercury maintained that Jennice had provided incorrect information on her application because she represented that she was "single" while she actually resided with her husband, who "had an unacceptable driving record" because he had nine points due to operating a vehicle while his license was suspended or revoked in 2003. The letter stated that $5984 in premium would be returned to Jennice as a result of the rescission.

On January 7, 2008, almost one year after the accident, LeFever filed a tort action against Jennice and Kenneth, seeking damages for injuries stemming from the accident. On April 15, 2009, Mercury sent LeFever's attorney a letter to notify him that Jennice's Mercury policy had been rescinded for material misrepresentation.

On July 8, 2009, IFA, LeFever's automobile insurance carrier, filed a complaint against LeFever, Mercury and the McElyeas for

declaratory judgment. IFA was seeking to preclude any obligation to LeFever based upon her IFA uninsured motorist coverage. In November 2009, LeFever's tort action against the McElyeas and IFA's action for declaratory judgment were consolidated.

In May 2010, IFA filed a motion for summary judgment, and Mercury filed a cross-motion for summary judgment. The motions were argued on July 16, 2010. In an oral decision delivered following oral argument, the judge made detailed findings of fact and conclusions of law explaining his reasons for denying IFA's motion and granting Mercury's cross-motion. He concluded that Jennice's statement that Kenneth was not residing with her was a material misrepresentation on her application to Mercury for insurance coverage. This appeal followed.

II.

On appeal, IFA argues that the motion judge erred in granting summary judgment because (1) Jennice's misrepresentations concerning Kenneth were not material, (2) Mercury failed to demonstrate that it actually relied on Jennice's misrepresentations, and (3) Mercury failed to demonstrate that Jennice made the specific misrepresentations contained in its rescission letter. Before addressing those arguments, we outline the general principles of law that govern our decision in this case.

A.

It is well-established that our review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Consequently, we review a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)).

In addressing a motion for summary judgment, a court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540; see also R. 4:46-2(c). Because the trial judge granted summary judgment to Mercury, we must construe the facts in the light most favorable to IFA. Liberty Surplus, supra, 189 N.J. at 445.

An insurer has the right to void an automobile insurance policy ab initio when the insured's affirmative representation or failure to disclose information in an application for insurance coverage constitutes a misrepresentation. Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 527-29 (2008). However, the applicant's misrepresentation must be material before the insurer has a right to void the policy ab initio. Id. at 522 n.6 (citing Longobardi v. Chubb Ins. Co., 121 N.J. 530, 542 (1990)).

A misrepresentation is material if it "`naturally and reasonably influence[d] 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 premium.'" Mass. Mut. Life Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991) (alteration in original) (quoting Kerpchak v. John Hancock Mut. Ins. Co., 97 N.J.L. 196, 198 (E. & A. 1922)). See also Palisades Safety & Ins. Ass'n v. Bastien, 344 N.J. Super. 319, 322 (App. Div. 2001) ("Misrepresentations to an insurance company which, if the truth were known, would affect the premium charged or exposure to the risks of providing the coverage are material."), aff'd, 175 N.J. 144 (2003). The insurance policy may be declared void "when the materiality of a misrepresentation strikes at the core of the agreement to insure." Rutgers Cas. Ins. Co., supra, 194 N.J. at 528.

In Palisades Safety, supra, the insured husband falsely listed himself as the only resident at his address on his application for coverage and stated he was single, although he was married at the time and his wife resided with him. Palisades Safety, supra, 344 N.J. Super. at 320. He also listed himself as the only driver of his two vehicles. The insured's wife sought PIP coverage after she was injured driving one of the cars. Id. at 320-21.

We affirmed the order granting summary judgment to the insurer on the grounds that the insured husband's misrepresentations were material. Id. at 321. We elaborated on the materiality requirement: "`An insured's misstatement 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. In effect, materiality should be judged according to a test of prospective reasonable relevancy.'" Id. at 323 (quoting Longobardi, supra, 121 N.J. at 542). We concluded that "[c]learly, it is `prospectively reasonably relevant' to an auto

carrier whether it is insuring one resident driver or two." Palisades Safety, supra, 344 N.J. Super. at 323.

B.

IFA contends that any misrepresentations made by Jennice were not material to Mercury's decision to issue the policy because Mercury had sufficient information in its underwriting file to determine that Kenneth was possibly residing with Jennice and using her vehicles. We disagree.

In support of its contention, IFA points to the fact that (1) Jennice represented she was "separated" in one of the sections of the application and (2) Mercury received information from Prudential that it was declining to renew Jennice's policy because Kenneth had been an insured user of her cars and had a bad driving record. IFA argues that this information should have led Mercury to seek further information from Jennice or to make some sort of further investigation. However, Jennice had already represented that she was "separated," that her husband was residing at a specific different address (Chatham Road in Turnersville), and that her husband had his own automobile insurance.

The uncontroverted evidence in the record demonstrates that all of those representations, whether by affirmative assertion or failure to disclose, were untrue. They were patently material to the underwriting of the policy. Palisades Safety, supra, 344 N.J. Super. at 323.

In granting summary judgment, the motion judge noted that Kenneth was living at the residence approximately seventy percent of the time and "was in constant use of the household vehicles." Based on these and other facts he recited in his opinion, the judge granted summary judgment:

> [T]he information set forth in the application was material, was germane to Mercury Insurance Company as to whether or not they would have issued this policy. . . . Clearly the failure of the — of Ms. McElyea to mention — in fact, to go out of her way to indicate that Mr. McElyea was not residing at the property and, in fact, living with her parents, which was conceded by both to be false, I think it's clear that that was done in order to get lower rates. . . . I find that's a material misrepresentation.

The judge's decision that there was no genuine issue of material fact as to whether Jennice's statements on the application were material misrepresentations was amply supported by the facts in the record.

We also see no merit in IFA's argument that Mercury had knowledge of sufficient information, particularly the information from Prudential, to suggest the falsity of Jennice's statements, thereby warranting further investigation by Mercury. We have previously expressed our "reluctan[ce] to burden the underwriting process with investigation of such basic information so readily available from the insured." Palisades Safety, supra, 344 N.J. Super. at 323.

We see no reason to depart from that view here. Jennice stated that her husband did not live with her[5] and that he had his own insurance. It was not unreasonable for Mercury to rely on that statement without further investigation. See Allstate Ins. Co. v. Meloni, 98 N.J. Super. 154, 160-61 (App. Div. 1967) (stating additional investigation was unnecessary because "nothing in the contents of the application" indicated the insured's husband, who had a prior driving infractions, would be "an actual, or even a potential driver of the insured vehicle").

C.

IFA next argues that Mercury failed to meet its burden of proof to show that it "actually and reasonably relied upon the claimed misrepresentation." It relies on Allstate Ins. Co., supra, 98 N.J. Super. 154, which held:

> In order to justify cancellation or rescission of a policy for a misrepresentation material to the risk, it must appear that in issuing the policy the carrier relied upon the misrepresentation and that the circumstances were such that its reliance thereon was reasonable. Here the burden of proving reasonable reliance was on the company and it produced its sales manager who testified to the effect that the policy had been issued in reliance upon the cited representation and would not have been written otherwise.
>
> [Id. at 160.]

Mercury concedes on appeal that it did not submit a certification stating that it relied on Jennice's statements in issuing the policy.

The issue of detrimental reliance was not raised in IFA's motion papers in the trial court. It was raised for the first time at oral argument. In fact, during oral argument, the judge pointed out that it had not been briefed or explored in the moving papers. The judge chose not to require Mercury to submit a certification on that issue, as it had offered to do.

While the better procedure would have been to defer decision pending receipt of such a certification, our review of the record convinces us that there is no real, practical doubt that the policy was only issued in reliance on Jennice's representations. The suggestion that Mercury issued an automobile insurance policy to Jennice without reviewing the application and the relevant underwriting information contained therein is not realistic. And, as noted, the issue was not raised in the moving papers in the Law Division. See R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

D.

Finally, IFA argues that Mercury failed to demonstrate that Jennice actually made the specific misrepresentations mentioned in the rescission letter. Our review of the record convinces us that IFA's argument is without merit and does not warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). The rescission notice was clearly inaccurate in asserting that Jennice represented that she was single. She put an "S" under marital status, meaning "separated" rather than "single."

Nevertheless, IFA's narrow reading of the rescission letter is not warranted. There is no genuine issue of fact that Jennice represented that she was not living with her husband, that he was not using the cars being insured, and that he had his own insurance, nor is there any genuine issue of fact that those representations were untrue. IFA has demonstrated no harm resulting from Mercury's unclear and incomplete articulation of the grounds for rescission.

Affirmed.

[1] Because the two McElyea defendants share the same last name, we refer to them by their first names.

[2] Kenneth has since died.

[3] On August 3, 2009, Jennice entered a consent order with the Office of the Insurance Fraud Prosecutor, admitting that she failed to disclose that Kenneth was living with her when she applied for insurance with Mercury, in violation of N.J.S.A. 17:33A-4. Jennice agreed to pay a civil penalty in the amount of $1500.

[4] In 2007, the parties were in the process of obtaining a divorce.

[5] IFA's observation that sometimes people who are separated spend time living together is not persuasive and does not raise an issue of material fact. In addition to stating that she was separated, Jennice gave a separate address for her husband in the Mercury application.

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