MICHAEL BANDLER, Plaintiff-Appellant,

v.

PROGRESSIVE SPECIALTY INSURANCE COMPANY, Defendant-Respondent.

MICHAEL BANDLER, MINDY BANDLER and DOREE BANDLER, Plaintiffs-Appellants,

v.

BARBARA LIBRIZZI, on Behalf of the ESTATE OF BERTHA KLEIN, Defendant-Respondent.

MICHAEL BANDLER, Plaintiff-Appellant,

v.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY and PROGRESSIVE SPECIALTY INSURANCE COMPANY, Defendants-Respondents.

Nos. A-0197-07T3, A-3953-07T3

Superior Court of New Jersey, Appellate Division.

Argued June 2, 2009.
Decided August 19, 2009.

Michael Bandler, appellant, argued the cause pro se. James R. Connell argued the cause for respondents Barbara Librizzi on Behalf of the Estate of Bertha Klein and New Jersey Manufacturers Insurance Company in A-3953-07T3 (Dwyer Connell & Lisbona, attorneys; Mr. Connell, on the brief).

Keith J. Murphy argued the cause for respondent Progressive Specialty Insurance Company (**Methfessel** & **Werbel**, attorneys; Mr. Murphy, of counsel and on the brief).

Before Judges Fuentes, Gilroy and Chambers.

PER CURIAM

These are back-to-back appeals, consolidated for the purpose of this opinion. In the matter of Michael Bandler v. Progressive Specialty Insurance Co., Docket No. A-3953-07, plaintiff appeals from the order of the Law Division dismissing his complaint with prejudice, and awarding defendant counsel fees as sanctions for filing a frivolous action under N.J.S.A. 2A:15-59.1 and Rule 1:4-8. In the matter of Michael Bandler v. Estate of Bertha Klein, Docket No. A-0197-07, plaintiff appeals from a series of orders entered by the trial court, leading to a final judgment against plaintiff pursuant to a jury verdict.

After reviewing the record before us, and mindful of prevailing standards, we are satisfied that the trial court properly addressed and disposed of all of the issues plaintiff has raised in these two consolidated appeals. We thus affirm substantially for the reasons expressed by the various judges who have presided over these matters. In the interest of clarity, we will summarize the salient facts and identify the key procedural events as to each of the matters under review.

I

The Car Accident

At all times relevant to this case, plaintiff owned a 1999 Volkswagon Jetta that was generally driven by plaintiff's daughter Doree. On August 10, 2003, Doree was involved in a car accident in which the Jetta collided with a car owned and operated by Bertha Klein. Plaintiff's other daughter Mindy was a passenger in the Jetta at the time of the accident.

According to plaintiff, the collision resulted in approximately $2,500 worth of damage to the Jetta. At the time of the accident, plaintiff had an auto insurance policy issued by Progressive Specialty Insurance Co. (Progressive). Klein was insured by New Jersey Manufacturers Insurance Co. (NJM). However, while Klein subrogated her claims to NJM, plaintiff paid for the damage to

the Jetta himself, and did not seek payment from Progressive for his property damage.

On January 5, 2004, plaintiff, Doree and Mindy filed an action in the Law Division, Essex County, against defendants Klein and NJM, seeking reimbursement for the repairs to the Jetta and the cost of a rental vehicle ("First Complaint"). This matter was assigned Docket No. L-189-04.

In June 2004, NJM filed a motion for summary judgment seeking to dismiss plaintiff's complaint, arguing that there was no privity of contract between NJM and plaintiff or his two daughters, as NJM was only Klein's insurer.[2] Also in June 2004, plaintiffs filed a motion seeking to compel Klein and NJM to comply with various discovery requests. By orders dated November 19, 2004, Judge Winard granted NJM's motion for summary judgment, and dismissed plaintiff's and his two daughters' complaint against NJM with prejudice. The court also denied plaintiff's motion for discovery.

Klein died on November 11, 2004. Barbara Librizzi was named as executrix of Klein's estate. As a result, plaintiff filed a second motion to compel NJM to comply with his discovery requests, contending that NJM was in possession of documents not otherwise available. The court denied the motion by order dated December 17, 2004, explaining that the summary judgment previously granted to NJM precluded any further motion practice against it, because NJM was no longer a party in the action against Klein's estate.

The Arbitration

On January 7, 2005, NJM initiated an inter-company arbitration proceeding against Progressive, alleging that Doree's "careless actions were the sole cause of th[e] collision" and requesting $2,182.22 in damages against Progressive. Plaintiffs filed a motion under the original Law Division docket number to enjoin NJM and Progressive from going forward with the arbitration.

By order dated May 13, 2005, Judge Lombardi denied the motion without prejudice, finding that relief could not be granted because: (1) NJM and Progressive were not properly noticed of the motion: and (2) these carriers were not parties to the lawsuit against the estate of Bertha Klein. The court noted that, "if [plaintiffs] have rights as against NJM or Progressive, . . . [they] could proceed against them." Thereafter, plaintiff's case against the estate of Klein was transferred to the Special Civil Part.

The Second Complaint

On November 2, 2005, plaintiff (acting individually without his daughters) filed an action in the Law Division, Hudson County, against NJM and Progressive, demanding the following relief: (1) an injunction against NJM preventing it from maintaining the arbitration against Progressive; (2) a declaratory judgment finding that NJM violated the entire controversy doctrine by filing the arbitration claim; (3) an order directing Progressive to defend him in the arbitration between NJM and Progressive; and (4) seeking indemnification from Progressive for any harm caused to him by the arbitration.

After joinder of issue and some preliminary motion practice, the second complaint plaintiff filed in Hudson County was consolidated with his pending action against Klein's estate in Essex County.

Progressive moved for summary judgment under the second complaint, arguing that plaintiff's insurance contract "does not afford [him] with legal services in his efforts to prosecute affirmative causes of action, including his efforts to prevent NJM from exercising its rights to inter-company arbitration on the subrogation claim relative to the August 10, 2003 accident." Plaintiff cross-moved seeking sanctions against Progressive for not adhering to the requirements of Rule 4:46-2.

After oral argument, Judge Simonelli entered an order dated August 4, 2006, granting Progressive's motion for summary judgment, dismissing all counts against it with prejudice.[3] The court also issued a second order denying plaintiff's cross-motion. In her oral opinion delivered from the bench, Judge Simonelli initially noted that "Progressive['s] statement of facts was deemed admitted due to [plaintiff's] failure to dispute it." She also found that "the unambiguous language of Progressive's insurance policy does not provide coverage for the damages claimed by [plaintiff]."

After reviewing the policy, Judge Simonelli held that Progressive was only required to represent plaintiff if he became "legally responsible for any damages, and in this case, that event has not occurred." She gave the following explanation in support of this conclusion:

> It is Progressive who is the named party in the arbitration and who bears the financial responsibility for any arbitration award that may be entered. Absent a pending liability claim against [plaintiff] for which an award or judgment could be entered against [him], Progressive is under no duty to pay for or provide legal services for [plaintiff].

The court thereafter denied plaintiff's belated attempt to cure his failure to provide a contested statement of material facts. The court also denied plaintiff's motion seeking to amend the complaint and for reconsideration of the court's order dismissing his case on summary judgment.

On August 1, 2006, NJM filed a motion for summary judgment as to the second complaint, arguing that Judge Lombardi's May 13, 2005 order dismissing plaintiff's complaint against it was the law of the case as it pertained to NJM. Plaintiff opposed the motion arguing that Judge Lombardi's ruling in the first action cannot be imputed to this second complaint.

On November 15, 2006, Judge Simonelli granted NJM's motion for summary judgment with prejudice. In her opinion in support of her ruling, Judge Simonelli noted that:

> (1) there is no liability on NJM's part to withdraw and/or terminate the arbitration with Progressive because there is no privity of contract between NJM and Mr. Bandler; and (2) the subrogation inherent in Ms. Klein's insurance contract with NJM does not create privity of contract or a cognizable legal relationship between NJM [and] Mr. Bandler.

Judge Simonelli explained that plaintiff could not enjoin the arbitration proceedings because "the insurance contract between [him] and Progressive contains provisions that give Progressive the right to settle claims made against [plaintiff] and consent to and engage in arbitration of those claims." Under those provisions, plaintiff was not legally entitled to participate in the arbitration proceedings.

II

The Trial

On September 18, 2007, plaintiff's daughter Mindy voluntarily dismissed her claims against Klein's estate under the first complaint. The matter then proceed to trial before a jury in Essex County. After the commencement of the trial, the judge, acting on his own initiative, dismissed Doree as a plaintiff in the case. The judge found that Doree did not have standing to prosecute a property damage claim because she did not have a proprietary interest in the damaged vehicle.

On October 3, 2007, the jury reached a verdict finding Doree 75% liable for the accident, and Klein 25% liable. Thereafter, plaintiff moved to vacate the verdict and requested a new trial, arguing that the jury charge was faulty because it "instructed [the jury] to only consider the comparative negligence of [Doree] and the defendant driver, and not the comparative negligence of the plaintiff car owner."

At the hearing on the motions, plaintiff insisted that the jury should have been instructed to assign liability to him, as well as Doree and Klein, because "if his comparative negligence would have been found to have been less than that of the [d]efendant driver[,] he [would be] entitled to collect from the [d]efendant driver." The trial judge denied plaintiff's motions, finding that he had not satisfied the standard under Rule 4:49-1.

III

From these rulings, plaintiff now appeals arguing that Progressive had a duty to defend him in the inter-carrier arbitration between Progressive and NJM; he has standing to challenge the arbitration proceeding; and the trial court misapplied the concept of comparative negligence. We disagree and affirm. Plaintiff's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by the various judges who have ruled in these matters.

IV

The Sanctions Awarded to Progressive

In response to plaintiff's second complaint filed in Hudson County, Progressive not only filed a responsive pleading but, through counsel, it sent plaintiff written notice that the allegations and legal arguments in the second complaint were identical to the complaint filed in Essex County. Progressive's counsel served plaintiff with two notices under Rule 1:4-8, the first one dated April 2, 2007, and the second April 5, 2007, admonishing plaintiff that Progressive would seek sanctions if the second complaint was not withdrawn.

Plaintiff, via email, invoked the so-called safe harbor provision of the rule, which provides that no motion for sanctions may be filed "if the paper objected to has been withdrawn or corrected within 28 days of service of the notice.. . ." R. 1:4-8(b)(1). The record shows that plaintiff had over four months to withdraw or dismiss the second complaint before Progressive moved for sanctions. The sanctions were thus properly awarded. N.J.S.A. 2A:15-59.1; R. 1:4-8; Toll Bros., Inc. v. Twp. of West Windsor, 190 N.J. 61, 67 (2007).

V

Conclusion

The cases reviewed here originated from what can fairly be characterized as a garden variety automobile accident in which plaintiff's car collided with another car. No one was injured. Plaintiff's car allegedly sustained damage amounting to $2,500. Both cars were insured. Instead of simply filing a property damage claim with his insurance company, plaintiff inexplicably paid for the loss himself, and then embarked on a pro se campaign of litigation that has lasted nearly seven years. He has needlessly consumed a large amount of judicial resources. Sanctions were thus properly assessed.

Affirmed.

[2] Although the motion was filed by Klein and NJM, counsel for the parties conceded that it was only moving for summary judgment on behalf of NJM.

[3] The transcript of this hearing is not included in the appellate record.