CPR RESTORATION AND CLEANING SERVICES, L.L.C., Plaintiff-Appellant,

v.

FRANKLIN MUTUAL INSURANCE COMPANY, Defendant-Respondent, and

LUKE WITHERSPOON, Defendant, and

FRANKLIN MUTUAL INSURANCE COMPANY, Third-Party Plaintiff,

v.

ALTMAN & ALTMAN PUBLIC ADJUSTERS, Third-Party Defendant.

No. A-3858-10T2.

Superior Court of New Jersey, Appellate Division.

Submitted February 1, 2012.
Decided June 21, 2012.

Law Offices of Jonathan Wheeler, P.C., attorneys for appellant (Mr. Wheeler, on the brief).

Methfessel & **Werbel**, attorneys for respondent (Allison M. Koenke, on the brief).

Before Judges Axelrad and Sapp-Peterson.

NOT FOR PUBLICATION

PER CURIAM.

In this appeal, we consider whether an anti-assignment clause in an insurance policy between a homeowner and defendant, Franklin Mutual Insurance Company (Franklin Mutual), invalidated the homeowner's assignment to plaintiff, CPR Restoration and Cleaning Services, LLC (CPR), of the right to collect payment under the policy. The trial court granted summary judgment in favor of Franklin Mutual, dismissing CPR's claim against it and finding the non-assignment clause invalidated the assignment of benefits from the homeowner to plaintiff. We reverse and remand for further proceedings. We do not retain jurisdiction.

In March 2007, homeowner, Luke Witherspoon, obtained a homeowner's insurance policy from Franklin Mutual. The insurance policy covered, among other things, loss resulting from fire. Under the General Conditions, the policy stated "No assignment of this policy or an interest here is binding on *us* without *our* written consent."

Following a fire at his residence on February 19, 2008, Witherspoon retained CPR to perform emergency clean-up and mitigation services and executed three assignments to CPR dated February 19, 2008, February 20, 2008, and April 8, 2008. The assignments all included the following language:

> Providing the owner had valid effective insurance coverage for all or part of the services to be performed by CPR, the owner further authorizes and directs their insurance carrier, mortgage company and/or public adjuster to make direct payments to CPR for work performed. Owner, INTENDING TO BE LEGALLY BOUND HEREBY, further agrees to assign, promises to assign, and does assign to CPR all of his/her/its rights and benefits under the insurance policy to the extent necessary to pay CPR all of the sums due for work performed by CPR, as set forth in CPR's invoice.
>
> CPR shall bill all charges and/or costs to owner and a copy of these invoices shall be sent to the insurance carrier and/or public adjuster. It is fully understood and agreed to by [o]wner that all charges are due upon completion of work and the [o]wner is personally responsible for any and all charges and/or costs not paid by insurance to CPR. Any and all charges for services not paid by insurance carrier are the sole responsibility of the [o]wner and are to be paid upon completion of work....
>
> ....

> Insurance Carrier: _____

On the line for Insurance Carrier, either "Franklin" or "Franklin Mutual" was written but none of these documents were signed by a representative from Franklin Mutual.

After completing the work, CPR submitted four invoices totaling $32,004.38 to Witherspoon's public adjuster, Altman & Altman, who in turn forwarded them to Franklin Mutual. Franklin Mutual reviewed the claims and receipts submitted and issued payment to Witherspoon in the amount of $26,521.18 for the bills submitted on behalf of CPR. After Franklin Mutual settled Witherspoon's claim, CPR contacted the public adjuster to complain that it had not been compensated for its services. On June 20, 2009, the public adjuster issued a check to CPR in the amount of $7,354.54, and promised that "[t]he remaining monies due will be paid out of the draws on the building."

Having received no further payment, CPR brought suit against Franklin Mutual and Witherspoon for $26,644.84, the outstanding balance it claimed was due. Franklin Mutual filed a motion for summary judgment. Franklin Mutual's motion was initially denied, as the court found there were genuine issues of material fact in dispute, namely, the validity of the assignment and the amount paid by Franklin Mutual to Witherspoon. Franklin Mutual subsequently moved for reconsideration, which the court granted. After hearing oral arguments, the motion judge granted summary judgment to Franklin Mutual on the basis that the alleged assignment was invalid and Franklin Mutual therefore did not breach its contractual obligations by rendering payment to Witherspoon directly. The court reasoned:

> This case does not sound in tort and should not be made to conform to a precedent based entirely on the settlement of a tort claim. As a result, the holding in Owen [v. CNA Insurance/Continental Casualty, 167 N.J. 405 (2001)] is distinguishable and does not bind this [c]ourt.
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> ... In short, [Franklin Mutual] did nothing [wrong] and should not be penalized because Mr. Witherspoon chose not to compensate CPR. It is impossible to be in breach of someone else's contract. The fact that [Franklin Mutual] never agreed to be bound by the purported assignment means that it was not obligated to pay CPR for any services rendered. The responsibility to pay CPR rested solely with Mr. Witherspoon and his public adjuster, Altman & Altman.

Shortly thereafter, Witherspoon filed for bankruptcy and he was dismissed from the action.

On appeal, CPR raises the following points for our consideration:

> POINT I
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> THE TRIAL COURT COMMITTED AN ERROR OF LAW AND [A] MISTAKE OF FACT WHEN IT GRANTED THE MOTION FOR RECONSIDERATION AND ENTERED SUMMARY JUDGMENT IN FAVOR OF FRANKLIN MUTUAL INSURANCE COMPANY ON THE BASIS THAT THE ASSIGNMENT OF BENEFITS BY LUKE WITHERSPOON TO CPR RESTORATION AND CLEANING SERVICES, LLC WAS INVALID.
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> A. A VALID CONTRACT OF ASSIGNMENT EXISTED BETWEEN WITHERSPOON AND CPR.
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> B. THE ANTI-ASSIGNMENT PROVISION IN THE FRANKLIN MUTUAL POLICY DOES NOT MAKE THE ASSIGNMENT OF BENEFITS BY WITHERSPOON TO CPR INVALID.

I.

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); Garden State Bldgs., L.P. v. First Fid. Bank, N.A., 305 N.J. Super. 510, 521 (App. Div. 1997), certif. denied, 153 N.J. 50 (1998). When reviewing a grant of summary judgment, we use the same standards as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We first decide whether there was a genuine issue of material fact. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). If there was not, we then decide whether the lower court's application of the law was correct. Ibid. "A trial court's interpretation of the law and the legal consequences that flow from established facts are

not entitled to any special deference." Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

A.

Initially, we note the purported assignment is not an assignment of a policy, as Franklin Mutual argues, but an assignment of a right to receive payment under the policy. Once a loss occurs, any assignment undertaken is an assignment of the loss and not of the policy. Elat, Inc. v. Aetna Cas. and Sur. Co., 280 N.J. Super. 62, 67 (App. Div. 1995). After a loss has transpired, "the insurer becomes absolutely a debtor to the assured for the amount of the actual loss, to the extent of the sum insured, and it may be transferred or assigned like any other debt." Ibid. (citations and internal quotations omitted).

Under New Jersey law, contractual rights are generally assignable. N.J.S.A. 2A:25-1 provides: "All contracts for the sale and conveyance of real estate, all judgments and decrees recovered in any of the courts of this State or of the United States ... and all choses in action[1] arising on contract shall be assignable." The Restatement (Second) of Contracts (Restatement) § 317 (1981) also provides that contractual rights are freely assignable, except where:

> (2)(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
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> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

Under the homeowner's policy, Franklin Mutual was obligated to cover damages resulting from the fire. After the fire, Witherspoon assigned "all [his] rights and benefits under the insurance policy" to CPR "to the extent necessary to pay CPR for the work performed." Once a loss has occurred, assignment of the right to collect proceeds under a casualty or liability policy "does not alter, in any meaningful way, the obligations the insurer accepted under the policy." Elat, supra, 280 N.J. Super. at 67; 9 Corbin on Contracts § 49.9 (Perillo ed. 1993). "The assignment only changes the identity of the entity enforcing the insurer's obligation to insure the same risk." Elat, supra, 280 N.J. Super. at 67. Thus, Witherspoon's assignment of his rights under the insurance policy did not materially change Franklin Mutual's duty.

B.

We next address whether the contract precluded any assignment. The motion judge found the Court's decision in Owen, supra, 167 N.J. 450, inapplicable. There, the Court held where a structured settlement agreement did not provide that assignments were void, the anti-assignment clause contained in the agreement was simply a covenant not to assign, the breach of which renders the assigning party liable for damages. Id. at 467-68. The motion judge found Owen distinguishable because the case involved an assignment of settlement proceeds arising out of a tort action as opposed to a contract action, which is the nature of the action here. Id. at 467. We disagree.

No such distinction was made by the Court in Owen. We conclude the Court's decision was not so limited in its scope, particularly since the Court's analysis was based on the Uniform Commercial Code (UCC), which is contract-based, and on the Restatement, which applies to all contracts. Moreover, two cases upon which the Court based its decision and discussed extensively involved assignments unrelated to structured settlements. Owen, supra, 167 N.J. at 458-68. See Garden State, supra, 305 N.J. Super. at 517 (involving assignment of a loan); Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 437-38 (3d Cir. 1999) (involving assignment of a trade agreement).

As noted in Owen, New Jersey follows the "general rule" embodied in the Restatement § 322 (1981) that contractual provisions limiting or prohibiting assignments operate only to limit a party's right to assign the contract, but not their power to do so, unless the parties manifest an intent to the contrary with specificity. 167 N.J. at 461. Restatement § 322 provides:

> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> ...

(b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;

(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

The parties' contrary intention may be manifested by the express language of the contractual provision. Owen, supra, 167 N.J. at 461. "[T]o reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void," an anti-assignment clause must state that non-conforming assignments (i) shall be "void" or "invalid," or (ii) "that the assignee shall acquire no rights or the non-assigning party shall not recognize any such assignment." Id. at 461-68; Garden State, supra, 305 N.J. Super. at 522. Where such language is not included in the contract, any provision limiting or prohibiting assignments "will be interpreted merely as a covenant not to assign," the breach of which "may render the assigning party liable in damages to the non-assigning party, but the assignment ... remains valid and enforceable against the both assignor and the assignee." Owen, supra, 167 N.J. at 461.

Applying this principle to the facts of this case, we conclude Witherspoon's assignment to CPR is valid and enforceable. The non-assignment provision contained in the Franklin Mutual policy, which provides "No assignment of this policy or an interest here is binding on us without our written consent[,]" contains no specific prohibition on the power to make an assignment, and does not specifically state an assignment is "void," "invalid" or "that the assignee shall acquire no rights or the non-assigning party shall not recognize any such assignment." Ibid. The non-assignment provision, therefore, does not "`reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void.'" Id. at 468 (quoting Garden State, supra, 305 N.J. Super. at 522). As such, Witherspoon's assignment to CPR of the right to collect payment under his policy is valid under Restatement § 322(2) and § 317.

C.

Plaintiff's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following brief comments.

Defendant argues there was a lack of privity between itself and CPR. However, where there is a valid assignment, the assignment gives a plaintiff the right to litigate the object of the assignment and the assignee "may sue thereon in his own name." Lech v. State Farm Ins. Co., 335 N.J. Super. 254, 258 (App. Div. 2000); N.J.S.A. 2A:25-1.

Additionally, during oral argument before the motion judge on the motion for reconsideration, defendant's attorney raised, for the first time, the issue of whether Franklin Mutual had notice of the assignment. As this issue has not been revisited on appeal, this argument will be deemed abandoned. See Morey v. Essex Cnty., 94 N.J.L. 427, 430 (E. & A. 1920) (declining to consider a six-year limitation which was not raised on appeal); Hyland v. Simmons, 163 N.J. Super. 137, 139 (App. Div. 1978), certif. denied, 79 N.J. 479 (1979) (declining to express an opinion on the propriety of an award of punitive damages since the issue has not been raised on appeal).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

[1] A chose in action is the right to bring an action to recover a debt, money, or thing. Blacks Law Dictionary 234 (7th ed. 1999).