MONIQUE ARTWELL v. SEA SCAPE LANDSCAPING LLC

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

MONIQUE ARTWELL, Plaintiff,

v.

SEA SCAPE LANDSCAPING LLC and LUIS CHEVERE, Defendants,

and

FARM FAMILY CASUALTY INSURANCE COMPANY, Defendant-Appellant/Cross-Respondent,

and

METROPOLITAN DIRECT PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant-Respondent/Cross-Appellant.

March 27, 2014

Argued January 6, 2014 Decided

Before Judges Harris and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-6168-11.

Edward R. Murphy argued the cause for appellant/cross-respondent (Law Offices of Michael J. Dunn, LLC, attorneys; Mr. Murphy, of counsel and on the brief).

Neal A. Thakkar argued the cause for respondent/cross-appellant (Sweeney & Sheehan, attorneys; Mr. Thakkar, on the brief).

PER CURIAM

The issue here is whether an insurance carrier entitled to seek from another insurance carrier reimbursement of the personal injury protection (PIP) benefits it paid pursuant to N.J.S.A. 39:6A-9.1, but which failed to formally pursue its right of reimbursement within two years of its insured's filing of a claim, may nonetheless enforce its subrogation right1 under either the principle of "relation back" or equitable tolling of the limitations period. We hold that under the circumstances of this case, the carrier is barred from enforcing its reimbursement right and we reverse the order of the Law Division holding otherwise.

Farm Family Casualty Insurance Company (Farm Family) appeals from orders entered by the Law Division denying summary judgment, dismissing the cross-claim for PIP reimbursement brought against it by Metropolitan Direct Property and Casualty Insurance Company (Metropolitan) pursuant to N.J.S.A. 39:6A-9.1, and granting Metropolitan's cross-motion for summary judgment against Farm Family. Metropolitan cross-appeals from the denial of its request for counsel fees. For reasons which follow, we reverse the grant of Metropolitan's motion for summary judgment on its claim for PIP reimbursement, and we dismiss its cross-appeal for fees as moot.

I.

The facts which follow are uncontested. On December 25, 2009, Monica Artwell was a passenger in a parked car that was struck by a commercial vehicle driven by Louis Chevere and owned by Sea Scape Landscaping,

LLC. Artwell was injured by the collision and on January 8, 2010, submitted a PIP claim to Metropolitan, the insurance carrier for the car in which she had been seated at the time of the accident. A little over a month later, Metropolitan wrote to Farm Family, the insurance carrier for the Sea Scape vehicle, inquiring about the status of its "subrogation claim." On February 23, 2010, Farm Family wrote back and denied Metropolitan's claim, stating: "After reviewing the loss facts, we are unable to provide coverage for this loss as the person driving our insured's vehicle did not have permission to use the vehicle."

On January 13, 2011, Metropolitan again wrote to Farm Family asking to be notified of "any settlement with our insured because we are entitled to reimbursement from Sea Scape Landscaping under the provisions of the NJ No-Fault Law." Farm Family did not respond.

On December 13, 2011, Artwell filed a complaint in the Law Division against Sea Scape, Chevere, Metropolitan, and Farm Family. The complaint asserted a claim for personal injury against Sea Scape and Chevere, as well as bad faith claims and a claim for uninsured motorist benefits against Metropolitan, and a claim for a declaratory judgment for coverage against Farm Family. Metropolitan was served with process through certified mail on January 6, 2012, and filed its answer to the complaint on April 10, 2012. Metropolitan also asserted a cross-claim against Farm Family for a declaration of coverage and stated that Farm Family's "wrongful denial" of coverage damaged Metropolitan by requiring it to defend an uninsured motorist claim and by "interfering" with its statutory right to PIP reimbursement.

Farm Family never answered the complaint, but "resolved" the permissive use issue and settled with Artwell in June 2012. Thereafter, counsel for Metropolitan wrote to Farm Family to inquire if it was interested in settling Metropolitan's reimbursement claim. Farm Family responded that it would agree to "arbitrate" but was "not willing to waive any of our defenses, such as the statute of limitations."

Unable to reach a settlement, Farm Family filed an answer to Metropolitan's cross-claim on November 1, 2012, raising, among other things, an affirmative defense based upon the statute of limitations. Thereafter, Farm Family filed a motion for summary judgment to dismiss Metropolitan's cross-claim, and Metropolitan filed a cross-motion for summary judgment and counsel fees.

The motion judge found the "relation back theory applies" and, apparently relying upon De Sisto v. City of Linden, 80 N.J. Super. 398 (Law Div. 1963), held that summary judgment should be entered for Metropolitan on its claim for reimbursement under N.J.S.A. 39:6A-9.1 because "Farm Family was aware of the nature of the claims that would be brought against it." In his order, the motion judge "declared that the statute of limitations does not apply." The judge also denied Metropolitan's application for counsel fees under Rule 4:42-9(a)(6) because he determined that fees were not "appropriate." This appeal and cross-appeal followed.

II.

Farm Family argues that the relation-back rule does not apply because Artwell, who filed her complaint within the statute of limitations, never thereafter sought to amend her complaint to assert a PIP claim against Farm Family, and because Metropolitan's cross-claim for statutory reimbursement was filed outside the statute of limitations. Metropolitan argues that Farm Family's "wrongful disclaimer" of coverage precluded it from timely pursuing PIP arbitration because "coverage issues are not arbitrable" and, further, "equitably tolled" the statute of limitations by erecting an artificial barrier to Metropolitan's pursuit of PIP reimbursement.

Whether a cause of action is barred by the statute of limitations is a legal question subject to our de novo review. See Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 325 (App. Div.) (citations omitted), certif. denied, 188 N.J. 577 (2006). As we shall explain, there is no question that Metropolitan's cross-claim against Farm Family was filed outside the two-year limitations period applicable to PIP reimbursement claims under N.J.S.A. 39:6A-9.1. The issue before us, therefore, is whether the limitations period was equitably tolled or whether Metropolitan's claim related back to the Artwell complaint.

We begin with a review of some general principles that will guide our analysis. PIP reimbursement is strictly governed by N.J.S.A. 39:6A-9.1. IFA Ins. Co. v. Waitt, 270 N.J. Super 621, 622 (App. Div. 1994). The statute provides, in pertinent part:

a. An insurer . . . paying . . . personal injury protection benefits in accordance with section 4 or section 10 of P.L.1972, c.70 (C.39:6A-4 or 39:6A-10), . . . as a result of an accident occurring within this State, shall, within two years of the filing of the claim, have the right to recover the amount of payments from any tortfeasor who was not, at the time of the accident, required to maintain personal injury protection . . . under the laws of this State . . . .

b. In the case of an accident occurring in this State involving an insured tortfeasor, the determination as to whether an insurer . . . is legally entitled to recover the amount of payments and the amount of recovery, including the costs of processing benefit claims and enforcing rights granted under this section, shall be made against the insurer of the tortfeasor, and shall be by agreement of the involved parties or, upon failing to agree, by arbitration. . . .2

[N.J.S.A. 39:6A-9.1.]

The statute was not among the provisions contained in the original New Jersey Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 to -35. Instead, it was enacted as part of the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984. Liberty Mut. Ins. Co. v. Selective Ins. Co., 271 N.J. Super. 454, 458 (App. Div. 1994). Its purpose was to reduce "the cost of insurance for automobile owners and allow[] automobile insurers to recover PIP through reimbursement." State Farm Mut. Auto. Ins. Co. v. Licensed Beverage Ins. Exch., 146 N.J. 1, 9 (1996) (internal citations omitted). "Allowing the PIP carrier to recoup its payments from a commercial liability carrier reduces premiums for private automobile insurance, thus advancing a purpose of N.J.S.A. 39:6A-9.1." Liberty Mut., supra, 271 N.J. Super. at 458.

In N.J. Manufacturers Insurance Group v. Holger Trucking Corp., 417 N.J. Super. 393 (App. Div. 2011), plaintiff (NJM) filed a complaint seeking reimbursement more than two years after its insured first advised NJM of the accident and more than two years after NJM opened a file, assigned it a number, received medical bills and treatment plans, and approved the treatment plan. Id. at 395-96. However, the complaint was filed within two years of the date that NJM received its insured's formal PIP application. Id. at 396. We reviewed the competing arguments as to whether the complaint was timely filed in light of established principles of statutory interpretation and concluded that "it is the submission of the PIP claim form that triggers the two-year limitations period contained in N.J.S.A. 39:6A-9.1." Id. at 400.

A mere request for reimbursement within two years of the filing of a claim for PIP benefits does not satisfy N.J.S.A. 39:6A-9.1. N.J. Auto. Full Ins. Underwriting Ass'n v. Liberty Mut. Ins. Co., 270 N.J. Super. 49, 54 (App. Div. 1994). An insurance company seeking reimbursement from a tortfeasor's insurance company must file a formal demand for arbitration within two years of the filing of the PIP claim; sending mere notice of its claim to the defendant within a two-year period does not constitute a demand for arbitration and does not toll the statute of limitations. Ibid.

N.J.S.A. 39:6A-9.1 provides two means of securing reimbursement for PIP payments: agreement between the parties and arbitration. N.J. Auto. Full Ins. Underwriting Ass'n, supra, 270 N.J. Super at 53. The statutory language reads: "An insurer . . . shall, within two years of the filing of the claim, have the right to recover the amount of payments . . . . [T]he determination [of entitlement to and amount of recovery] . . . shall be by agreement . . . or, upon failing to agree, by arbitration." N.J.S.A. 39:6A-9.1. If an agreement is not reached, the only other way to obtain reimbursement is by arbitration. N.J. Auto. Full Ins. Underwriting Ass'n, supra, 270 N.J. Super. at 53; see also Allstate Ins. Co. v. Universal Underwriters Ins. Co., 330 N.J. Super. 628, 636 (App. Div. 2000). In general, the Legislature intended that these claims not be pursued in the courts but rather through agreement or arbitration. Unsatisfied Claim & Judgment Fund Bd. v. N.J. Mfrs. Ins. Co., 138 N.J. 185, 196-97 (1994); Fireman's Fund Ins. Co. v. N.J. Mfrs. Ins. Co., 341 N.J. Super. 528, 533 (App. Div.), certif. denied, 170 N.J. 211 (2001).

Here, the parties did not reach agreement on eligibility or amount of recovery, so the only way Metropolitan could have complied with the limitations period was to file a demand for arbitration within two years of Artwell's formal PIP application, which was submitted on January 8, 2010. N.J. Auto. Full Ins. Underwriting Ass'n, supra, 270 N.J. Super. at 53-54. Metropolitan, however, did not file a formal request for arbitration within that period, and its cross-claim for reimbursement was not filed until April 20, 2012. Though N.J.S.A. 39:6A-9.1 lacks a court-based reimbursement remedy, the court may still assume jurisdiction to determine if the parties should proceed to arbitration. See State Farm, supra, 146 N.J. at 3-4 (affirming trial court's grant of summary judgment requiring defendant to submit to arbitration of reimbursement claim under N.J.S.A. 39:6A-9.1); see also Hanover Ins. Co. v. Borough of Atlantic Highlands, 310 N.J. Super. 599, 602 (Law Div. 1997), aff'd, 310 N.J. Super. 568 (App. Div.), certif. denied, 156 N.J. 383 (1998). Consequently, while the filing of its cross-claim for reimbursement within two years would have been sufficient to toll the statute, Metropolitan did not do so, and thus its claim is barred unless saved by the relation-back rule or by the principle of equitable tolling.

Rule 4:9-3 provides in relevant part that:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading . . . . An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.

[R. 4:9-3.]

As explained by Justice Jacobs in Lawlor v. Cloverleaf Mem'l Park Inc., 56 N.J. 326, 339 (1970), the rule's predecessor was intended to accommodate the policy of repose underlying statutory limitations periods with the essential judicial task of ensuring substantial justice between litigants. Ibid.

Initially, we observe that the rule, on its face, appears to have no application to the case before us on the obvious ground that we are not dealing with an amended pleading. Rather, as we have explained, plaintiff brought timely suit to recover for her personal injury and asserted numerous claims against Metropolitan for bad faith and for failing to provide UM benefits. Plaintiff's cause of action against Farm Family was for a declaration that it was obligated to provide liability coverage to Chevere and Sea Scape. Thereafter, well outside the two-year window prescribed by N.J.S.A. 39:6A-9.1, Metropolitan asserted an independent claim against Farm Family for statutory reimbursement of its PIP payments. The rule ordinarily would not apply in this circumstance. Cf. McGlone v. Corbi, 59 N.J. 86 (1971) (holding that plaintiffs' claims against a third-party defendant impleaded by defendant after the statute of limitations had run was barred, notwithstanding that the action was consolidated with a separate action in which the third-party defendant had been impleaded within the statute of limitations). Nonetheless, we shall consider the precedents relied upon by the motion judge.

We have previously recognized that an amended complaint asserting a claim for damages inadvertently omitted from the original complaint may relate back to the original complaint. In Wimmer v. Coombs, 198 N.J. Super. 184, 186 (App. Div. 1985), relied upon by Metropolitan here, the original complaint filed by a husband and wife in an automobile negligence case asserted only a per quod claim on behalf of the wife even though she and her husband had both suffered personal injuries. Id. at 186. We concluded that the wife's personal injury claim, asserted for the first time in an amended complaint filed after the two-year limitations period had expired, related back to the date of filing of the original complaint. Id. at 189-90. In reaching this conclusion, our opinion by Judge Pressler stated:

In the context of amended pleadings, an accommodation has traditionally been made between the defendant's right to rely on the repose afforded by the statute of limitations and the right of the plaintiff to correct pleading errors or to respond affirmatively to his acquisition of new information respecting his claim. This accommodation is based on the perception that a person who has timely notice of the pendency of an action predicated on his alleged wrongful conduct cannot reasonably object to the late assertion against him of other claims attributable to that conduct provided he is reasonably chargeable with the knowledge that those other claims would have been timely asserted against him but for plaintiff's error or lack of information and provided further that the late assertion does not prejudice him in maintaining his defense. . . .

We are satisfied that this same principle applies to the late assertion of a new and different claim pursuant to R. 4:9-3 and hence that such claims may properly relate back when the defendant is chargeable with reasonable anticipation from the outset of the controversy that that claim would be likely to be made.

[Id. at 188-89.]

We found in Wimmer that defendant was aware of the wife's personal injury claim and consequently was not prejudiced by assertion of that claim after expiration of the limitation period because his insurance carrier had received information concerning those injuries in pre-suit settlement negotiations. Id. at 190.

In De Sisto v. City of Linden, an amendment to plaintiff's complaint, made after the expiration of the statutory two years, which brought in as an additional party one who had been made a third-party defendant prior to the expiration of the statute, was upheld. De Sisto, supra, 80 N.J. Super. at 406. The court there held that "a new claim based on the same occurrences and the same wrong against an existing party may be asserted when that party has become a party and has been alerted to the claim before the running of the statute." Ibid.

Guided by these precedents, we perceive no basis on which to deem Metropolitan's claim for PIP reimbursement against Farm Family to be timely under the relation-back rule. First, Artwell's claim against Farm Family was for a declaration of coverage on the liability claim. No PIP claims or claims for medical benefits were asserted against Farm Family. Second, the record irrefutably establishes that the first formal demand for reimbursement brought by Metropolitan against Farm Family was the cross-claim it filed on April 10, 2012, by which time the limitations period had run. Third, as we noted earlier, Metropolitan's right to reimbursement of its PIP payments was purely statutory, and not derivative in any manner upon any right of Artwell. Finally, merely because Farm Family knew that Metropolitan "might" someday have filed a reimbursement claim against it, that fact alone is not a ground for tolling the limitations period or for relating back Metropolitan's tardy claim to the date of an earlier, timely claim brought by Artwell seeking a declaration of coverage not including PIP. Nothing in the record suggests that Metropolitan failed to assert a timely claim against Farm Family as a consequence of the type of mistake encompassed by Rule 4:9-3.

Likewise, we perceive no basis to "equitably toll" the limitations period. In Price v. N.J. Manufacturers Ins. Co., 182 N.J. 519 (2005), our Supreme Court noted that it "has applied equitable principles to conclude that the statute should yield to other considerations. . . . Flexible applications of procedural statutes of limitations may be based on equitable principles, such as the discovery rule, or estoppel." Id. at 524-25 (citations omitted).

In Price, the Court held that the insurance carrier could not raise the statute of limitations to bar the plaintiff's uninsured motorists claim, after it received early notice from plaintiff of the claim, and thereafter sought and received from plaintiff various information necessary to evaluate plaintiff's claim over the course of several years. Id. at 525-26. The Court concluded that "the record amply supports the trial court's finding that NJM's conduct lulled plaintiff and his counsel into believing that the [UM] claim had been properly filed. Plaintiff reasonably relied on NJM's conduct in failing to file a complaint or to request arbitration within the statute of limitations period." Id. at 527.

Guided by these principles, again we perceive no basis on which to equitably toll application of the statute of limitations here.3 Approximately one month after Artwell had submitted her PIP application to Metropolitan, Farm Family unequivocally advised Metropolitan it was denying its "subrogation" claim. Farm Family never deviated from that position, and explicitly advised Metropolitan it would not waive its limitations defenses.

Metropolitan's assertion that it could not have earlier demanded arbitration because Farm Family had raised a non-arbitrable coverage defense is without merit. Metropolitan could have preserved its rights by filing a formal demand for arbitration, or, as noted earlier, by filing a complaint in the Law Division seeking a declaration for coverage and a remand of the remainder of the action to arbitration. Having done neither, there is no basis in equity to afford Metropolitan relief from the limitations period.

Accordingly, we reverse the judgment of the motion judge. Because, by our decision, Metropolitan is not a prevailing party under Rule 4:42-9(a)(6), we have no occasion to consider whether the motion judge abused his discretion in denying Metropolitan's application for fees and we dismiss its appeal as moot. Cf. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 175 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Reversed, and the cross-appeal is dismissed.

1 We use the term "subrogation" because it has achieved an almost universal status as a short-hand expression for PIP reimbursement. Technically, however, the right is not one of "subrogation" because N.J.S.A. 39:6A-9.1 creates a direct right of action not derived from an insured. See Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 567 (1981); Allstate Ins. Co. v. Coven, 264 N.J. Super. 240, 245-46 (App. Div. 1993).

2 Because the Sea Scape truck was a commercial vehicle, see N.J.S.A. 39:6A-2(a) and -4, it was not required to be insured for PIP.

3 Metropolitan, in arguing the applicability of equitable tolling, raises the "discovery rule" and claims that the rule supports its position, citing Allstate Ins. Co. v. Coven, 264 N.J. Super. 240 (App. Div. 1993). However, we perceive no basis to consider application of the discovery rule here. As noted by Justice Long in Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012), the discovery rule addresses the person who is unaware that he or she has a cause of action. Metropolitan cannot make that claim on this record.