ENCOMPASS INSURANCE COMPANY, Plaintiff-Respondent/Cross-Appellant,

v.

QUINCY MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellant/Cross-Respondent.

No. A-3000-12T4.

Superior Court of New Jersey, Appellate Division.

Argued August 26, 2014.
Decided November 14, 2014.

Edward L. Thornton argued the cause for appellant/cross-respondent (Methfessel & Werbel, attorneys; Mr. Thornton, on the briefs).

John J. Grillos argued the cause for respondent/cross-appellant (Hardin, Kundla, McKeon & Poletto, attorneys; John S. Favate of counsel and on the brief; Mr. Grillos and Eileen P. Walsh on the brief).

Before Judges Hayden and Leone.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

This appeal concerns a declaratory judgment action to determine insurance coverage. Defendant Quincy Mutual Fire Insurance Company appeals from orders denying Quincy's motion for summary judgment and granting summary judgment to plaintiff Encompass Insurance Company. Encompass cross-appeals from an order denying it counsel fees and interest. We affirm on the appeal, and vacate and remand on the cross-appeal.

I.

The following facts are set forth in court orders or admitted in the pleadings or the appellate briefs.[1]

This action arises out of accident involving Richard S. Cumming, Jr., who was riding a motorcycle, and Charlotte F. Casey, who was driving a motor vehicle. Cumming was severely injured. At the time of the accident, Casey was a real estate agent associated with Levinson Realty Associates, Inc., and was returning to Levinson's office from a title closing with a commission check made out to Levinson.

Cumming brought an action against Casey and Levinson. Cumming v. Casey, et al., Docket No. MID-L-6468-09. Cumming claimed that Casey was negligent, that Casey was an employee and agent of Levinson, and that Levinson was vicariously liable.

Casey and Levinson sought insurance coverage of Cumming's claims. Casey had a package policy from Encompass, providing primary motor vehicle protection

of $500,000, and personal umbrella coverage of $1,000,000. The Encompass policy stated that its umbrella coverage was "excess over any other valid and collectible insurance." Levinson sued Encompass as a third-party defendant in the Cumming action.

Levinson had a $1,000,000 commercial auto liability policy issued by New Jersey Manufacturers Insurance Company (NJM). Levinson also had issued a Business Owners' Liability Policy issued by Quincy ("Quincy policy" or "BOP"). (Quincy also received notice of the accident.) The Quincy policy contained a "Hired Auto and Non-Owned Auto Liability" endorsement. It provided coverage to Levinson for "`bodily injury' or `property damage' arising out of the use of any `non-owned auto' in your business by any person other than you." It further provided that "`[n]on-owned auto' means any `auto' you do not own, lease, hire or borrow which is used in connection with your business." The Quincy policy had a limit of $1,000,000.[2]

On February 18, 2011, Judge Arthur Bergman granted Cumming's motion for partial summary judgment, "holding that [Levinson] is vicarious liable for [Casey's] negligence in the event she is found to be negligent." Shortly before the trial date, the judge denied Encompass's motion to join Quincy as a fourth-party defendant, and ordered Encompass to file a separate declaratory judgment action against Quincy.

Encompass filed this declaratory judgment action against Quincy before a different judge. The action sought to determine coverage. Quincy filed a counterclaim.

While the declaratory judgment action was pending, the Cumming action settled for $2,500,000. The Stipulation and Settlement Agreement was signed by the parties in the Cumming action and by Quincy. It funded the $2,500,000 payment to Cumming as follows:

- $1,000,000, the full amount of Levinson's primary auto policy with NJM;
- $500,000, the full amount of Casey's primary auto coverage with Encompass;
- $500,000 of Casey's $1,000,000 umbrella coverage from Encompass; and
- $500,000 of Levinson's $1,000,000 BOP coverage from Quincy.

The latter two $500,000 contributions were made by Encompass and Quincy, without prejudice to the right of each in the declaratory judgment action to contend that the other should have paid the entire $1,000,000.

In the declaratory judgment action, Encompass and Quincy filed motions for summary judgment. In orders dated November 16, 2012, the trial court denied Quincy's motion for summary judgment but granted Encompass's motion for summary judgment. The court ruled that Quincy's policy was applicable as primary insurance in the Cumming action regarding Levinson's vicarious liability. The court ordered Quincy to reimburse Encompass the $500,000 Encompass advanced under its umbrella policy to settle the Cumming action.

The trial court denied Encompass's application for counsel fees, costs, and pre-judgment interest in a January 25, 2013 order. Quincy and Encompass appeal.

II.

Summary judgment must be granted if "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). Deciding "whether there exists a `genuine issue' of material fact that precludes summary judgment requires the [court] to 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citation omitted). As "appellate courts `employ the same standard that governs the trial court,'" we review these determinations de novo, and the "trial court rulings `are not entitled to any special deference.'" Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010) (citation omitted). We must hew to that standard of review.

III.

Quincy first challenges the trial court's finding that the BOP Quincy issued to Levinson provided coverage of Cumming's claim. The court found that the Quincy policy applied because Levinson was vicariously liable for Casey's negligence.

Quincy does not dispute that Levinson was vicariously liable for Casey's negligence. Instead, Quincy contends that Levinson's vicarious liability arose because Levinson and Casey had a principal-agent relationship, rather than an employer-employee relationship.[3]

In finding vicarious liability, the trial court relied on Judge Bergman's ruling in the Cumming litigation. Quincy argues that Judge Bergman never found that Casey was an employee of Levinson.

To the contrary, Judge Bergman viewed the question before him as whether an "employee/employer" relationship existed. The judge stressed that a real estate sales person is an employee under the New Jersey Real Estate Brokers and Salesmen Act (Brokers Act), N.J.S.A. 45:15-1 to-29.5, and Re/Max of N.J. v. Wausau Ins. Cos., 162 N.J. 282 (2000). Judge Bergman ruled that at the time of the accident, Casey's activities were "solely employment-related" and within the "scope of her employment" because she was going directly from the closing to Levinson's office to drop off its commission check. The judge ruled Casey was "clearly doing it for the employer," even though there was "no express directive from the employer." Further, "the employer" plainly benefitted from "the employee's actions." Thus, Judge Bergman held Casey was an employee of Levinson.

In deciding the declaratory judgment action, the trial court incorporated Judge Bergman's holding in the Cumming litigation that Levinson was vicariously liable, and stated that it was "the law of the case, whether you label it law of the case, res judicata, [or] collateral estoppel." The court added that it was "not here to reverse Judge Bergman."

Quincy argues that the law of the case, res judicata, and collateral estoppel doctrines do not bar it from litigating the issue because it was not a party to the Cumming litigation. We need not decide whether any of those doctrines apply. Even assuming Quincy is free to litigate the issue, we, like Judge Bergman, are persuaded that Casey was Levinson's employee under the Brokers Act and Re/Max.

Our Supreme Court in Re/Max held that a licensed real estate agent should be considered the broker's employee, rather than an independent contractor. Re/Max, supra, 162 N.J. at 284, 286. The Court agreed with the trial court that real estate agents were employees under both the "control" test and the "relative nature of the work" test. Id. at 286. The agent is subject to the supervision and control of the broker, work exclusively for the broker, and is economically dependent on the broker, which supplies services needed to implement an agent's sales efforts. Ibid.

The Court emphasized that "the statutory scheme that creates and governs the relationship between brokers and real estate agents or salespersons characterizes that relationship as employer-employee." Id. at 287. The Brokers Act provides the agent is "employed by and operates under the supervision of" the broker. Ibid. (quoting N.J.S.A. 45:15-3). "Consistent with the legislative mandate that real estate salespersons are employees of the broker, the statute restricts the filing of claims for compensation on brokered transactions to brokers exclusively," and "prohibits a real estate salesperson from accepting compensation for the performance of his or her work "`from any person except his employer, who must be a licensed real estate broker.'" Ibid. (quoting N.J.S.A. 45:15-16).

Moreover, to protect the public, "the Brokers Act charges brokers with the duty to supervise and control sales agents." Ibid. "[U]nder that legislatively-mandated employer-employee relationship, the Legislature has directed that the salesperson's license `shall be kept by the broker by whom such real estate licensee is employed,'" that "the broker, as the employer, is obligated to notify the licensing authority" if the agent's employment ends, and that an agent "cannot work again until he or she `has obtained employment with another licensed broker.'" Id. at 288 (quoting N.J.S.A. 45:15-14). The Court ruled that "the employer-employee relationship [was] established as a matter of public policy under the Brokers Act." Ibid.

Of course, the issue in Re/Max was whether real estate agents were "employees" of brokers "for purposes of computing workers' compensation insurance premiums." Id. at 284. However, the particulars of workers' compensation played no significant role in the Supreme Court's reasoning. Instead, the Court relied on the purpose and language of the Brokers Act, and on the "control" and "relative nature of the work" tests to determine whether a person is an employee. Id. at 286-88. Thus, the Court's rationale is equally persuasive here.

Quincy fails to distinguish this case from Re/Max. Quincy cites the depositions of Casey and Levinson's principal, in which they stated that Casey was not an employee, but was an independent contractor.[4] In Re/Max, "the brokers and the agents ha[d] themselves defined their relationship as independent contractors." Re/Max of N.J., Inc. v. Wausau Ins. Cos., 304 N.J. Super. 59, 66 (Ch. Div. 1997), aff'd o.b., 316 N.J. Super. 514, 516 (App. Div. 1998), aff'd, 162 N.J. 282, 285-86 (2000). Indeed, the Re/Max agents had to "`sign an "Independent Contractor Agreement" which sets forth their rights and obligations and contains a variety of provisions intended to underscore the agents' independent contractor status.'" Re/Max, supra, 162 N.J. at 285 (quoting Re/Max, supra, 304 N.J. Super. at 62-63). Nonetheless, the Supreme Court "affirm[ed] the determination that the sales agents are employees of Re/Max rather than independent contractors," and rejected the "Independent Contractor Agreement" as "simply another sophisticated attempt to thwart the employer-employee relationship." Id. at 286, 288.

Quincy cites the deposition testimony that Casey was not required to work a certain number of hours per week, was responsible for obtaining her own business, used her own car, and receive commissions rather than salary or benefits. The same was true of the agents in Re/Max. Id. at 285; Re/Max, supra, 304 N.J. Super. at 66. Nothing Quincy cites from the depositions is sufficient to distinguish Re/Max or to justify diverging from "the employer-employee relationship established as a matter of public policy under the Brokers Act." Re/Max, supra, 162 N.J. at 288; see also Stomel v. City of Camden, 192 N.J. 137, 155 (2007) (use of a 1099 form, rather than a W-2 form, "`is merely a factor to be considered, and is by no means controlling'") (citation omitted). Thus, the trial court was not required to conduct an evidentiary hearing on the topic.

Thus, we agree with Judge Bergman that Casey was an employee of Levinson. Therefore, Levinson was vicariously liable for any negligence by Casey because she was indisputably acting on behalf of Levinson at the time of the accident. "Under respondeat superior, an employer can be found liable for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment." Carter v. Reynolds, 175 N.J. 402, 408-09, 417 (2003) (holding an employer liable because the employee "had made an off-site [work-related] visit in her car and was returning home from the off-site location when the accident occurred").

Accordingly, Quincy's non-owned auto endorsement provided Levinson with coverage of his vicarious liability to Cumming for Casey's negligence. "Nonownership motor vehicle coverage insures an employer and its executive officers against liability imputed to them [under respondeat superior] by reason of the negligence of employees and other persons using vehicles not owned by the insured on the business of the insured." Ins. Co. of N. Am., supra, 162 N.J. Super. at 535.

Quincy notes that Casey was not an insured under the Quincy policy because the non-owned auto endorsement defined the "insured" as Levinson, a partner, or an executive officer. That is irrelevant because Levinson was an insured and was vicariously liable for Casey's negligence. Id. at 536.

We need not determine whether Levinson would have been vicariously liable if Casey was Levinson's agent. See ibid. Because Casey was Levinson's employee, Quincy's policy covered Levinson's vicarious liability for her negligence.

IV.

The trial court properly ruled that Quincy's BOP coverage was primary in comparison to Encompass's umbrella policy. Under Quincy's policy, including the non-owned auto endorsement, Quincy agreed to "pay those sums that the insured becomes legally obligated to pay because of `bodily injury.'" Quincy's policy does not declare the non-owned auto coverage to be excess.

Quincy notes its policy generally provided that "Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage." See W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co., 407 N.J. Super. 177, 186 (App. Div. 2009). However, it was undisputed that Encompass's umbrella coverage was excess, and would pay only if the amount of damages exceeded the total policy limits of the underlying insurance. See Doto v. Russo, 140 N.J. 544, 552 (1995). Thus, the "other insurance" clause in Quincy's primary policy did not shift the loss to Encompass's excess umbrella coverage. See Jeffrey M. Brown Assocs., v. Interstate Fire & Cas. Co., 414 N.J. Super. 160, 168 (App. Div.), certif. denied, 204 N.J. 41 (2010); CNA Ins. Co. v. Selective Ins. Co., 354 N.J. Super. 369, 380-81 (App. Div. 2002); Prudential Prop. & Cas. Ins. Co. v. N.H. Ins. Co., 164 N.J. Super. 184, 191-93 (Law Div. 1978).

Because Quincy's $1,000,000 BOP coverage was sufficient to pay the two disputed $500,000 contributions to the Cumming settlement, the trial court properly required Quincy to reimburse the $500,000 contribution from the Encompass umbrella coverage.

V.

Quincy ultimately contends it can recover that $500,000 by seeking indemnification from Casey, and therefore from the Encompass umbrella coverage. The trial court determined that an employer was prohibited from recouping from an employee any sums the employer may be required to pay a third party as a result of the employee's negligence. The court dismissed Quincy's cross-claim for indemnification of Levinson by Casey.[5]

Quincy cites pre-1961 cases stating that "where a principal or employer is not in fault, but has been compelled to pay damages to a third person for the negligence of his agent or employee, he may maintain an action over against such servant or employee to recover what he has been compelled to pay." Frank Martz Coach Co. v. Hudson Bus Transp. Co., 23 N.J. Misc. 342, 346 (Sup. Ct. 1945); see Pub. Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 431 (App. Div. 1955).

However, in 1961 our Supreme Court indicated that the "theoretical liability of an employee to reimburse the employer is quite anachronistic." Eule v. Eule Motor Sales, 34 N.J. 537, 540 (1961); see Merenoff v. Merenoff, 76 N.J. 535, 544 (1978). The Court stressed that "[t]he rule would surprise the modern employer no less than his employee. Both expect the employer to save harmless the employee rather than the other way round, the employer routinely purchasing insurance which protects the employee as well." Eule, supra, 34 N.J. at 540. The Court added that "respondeat superior rests upon a public policy that the employer bear the burden as an expense of the operation he expands through the employment of others," and that "[t]he employee can hardly carry that burden." Id. at 540-41. Accordingly, the Court found that "the prospect of a claim for indemnity is only of academic significance" where an employee injured his wife by negligent operation of his employer's auto. Id. at 540. Since Eule, "New Jersey apparently follows the ... rule in not permitting an employer to seek indemnity from an employee for acts of negligence causing the employer losses." Fried v. Aftec, Inc., 246 N.J. Super. 245, 259 (App. Div. 1991).

Quincy attempts to avoid Eule's limits on employers seeking indemnity from employees by claiming that Levinson and Casey were in a principal-agent

relationship, that such a relationship could result in vicarious liability, and that indemnity could be sought from Casey based on that agency relationship. Quincy also cites the broader rule that "`[a] person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.'" Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80 (1960) (quoting Restatement of Restitution, § 96 (1937)). This "branch of common-law indemnity shifts the cost of liability from one who is constructively or vicariously liable to the tortfeasor who is primarily liable." Promaulayko v. Johns Manville Sales Corp., 116 N.J. 505, 511 (1989) (citing Adler, supra, 32 N.J. at 80). Because Casey was Levinson's employee, we need not determine if indemnification would be permissible if Levinson and Casey were only in a principal-agent relationship. See Brown v. United Cerebral Palsy/Atl. & Cape May, Inc., 278 N.J. Super. 208, 213 n.2. (Law Div. 1994). Accordingly, we reject Quincy's appeal from the trial court's order.

VI.

Encompass cross-appeals the trial court's order denying it counsel fees. Rule 4:42-9(a)(6) permits the award of counsel fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." "The rule is intended `to discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance contract without the necessity of obtaining a judicial determination that the insured, in fact, is entitled to such protection.'" Passaic Valley Sewerage Com'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 618 (2011) (quoting Sears Mortg. Corp. v. Rose, 134 N.J. 326, 356 (1993)). "The award of counsel fees, however, is not mandatory, `but rather the trial judge has broad discretion as to when, where, and under what circumstances counsel fees may be proper and the amount to be awarded.'" Ibid. (quoting Iafelice ex. rel. Wright v. Arpino, 319 N.J. Super. 581, 590 (App. Div. 1999)). "`Since equitable principles govern the trial court's decision, the court should consider the totality of the circumstances[.]'" Ibid. (quoting Iafelice, supra, 319 N.J. Super. at 591.)

In denying fees, the trial court simply stated in its January 25, 2012 order: "No finding of bad faith to support counsel fee award." However, "bad faith is not a prerequisite to an attorney's fee award under Rule 4:42-9(a)(6)." DeMarco v. Stoddard, 434 N.J. Super. 352, 381 (App. Div.), appeal granted, 218 N.J. 270 (2014); Iafelice, supra, 319 N.J. Super. at 590; Pressler & Verniero, Current N.J. Court Rules, comment 2.6 at on R. 4:42-9 at p. 1805 (2015); e.g., Sears Mortgage Corp., supra, 134 N.J. at 356 (awarding fees though the insurer "may not have been acting in bad faith"). The trial court's order gives the impression that a finding of bad faith is required to support a counsel fee award. Because there was no oral or written opinion, we cannot dispel that impression on the record before us, which contains factors favoring the award of counsel fees. Thus, we remand to allow the trial court to consider anew the request for counsel fees and costs. See Knight v. AAA Midatlantic Ins. Co., 394 N.J. Super. 333, 337 (App. Div. 2007).

We do not suggest that the trial court must award counsel fees, or that it cannot consider whether the insurer acted in good or bad faith. "In the exercise of its broad discretion in awarding and fixing a counsel fee pursuant to Rule 4:42-9(a)(6), the trial court may consider the insurer's good faith[.]" Ibid. Indeed, we have long stated that a court may consider:

> "(1) the insurer's good faith in refusing to pay the demands; (2) [the] excessiveness of plaintiff's demands; (3) [the] bona fides of one or both of the parties; (4) the insurer's justification in litigating the issue; (5) the insured's conduct in contributing substantially to the necessity [of litigation]; (6) the general conduct of the parties; and (7) the totality of the circumstances."
>
> [Scullion v. State Farm Ins. Co., 345 N.J. Super. 431, 438 (App. Div. 2001).]

We note that the rule permits fee awards "whether the claimant be an insured or an insurer." W9/PHC Real Estate, supra, 407 N.J. Super. at 203 (citing Tooker v. Hartford Accident & Indem. Co., 136 N.J. Super. 572, 576 (App. Div. 1975), certif. denied, 70 N.J. 137 (1976)); see Sears Mortg. Corp., supra, 134 N.J. at 355.

However, in suits "between insurers, as opposed to a claim between insured and insurer, it does no violence to the general principles of R. 4:42-9(a) to have each party bear its own legal fees," if the totality of the circumstances so suggests. White v. Howard, 240 N.J. Super. 427, 435 (App. Div.), certif. denied, 122 N.J. 339 (1990).

On remand, the trial court can consider these factors in determining whether to award fees. See also R.P.C. 1.5(a).

VII.

Encompass also appeals the trial court's denial of prejudgment interest. The court stated in its January 25 order: "Interest rule cited is for tort actions not D.J. actions." The court was referencing Rule 4:42-11(b), entitled "Tort Actions," which provides that "the court shall, in tort actions, including products liability actions, include [prejudgment interest] in the judgment." "While this rule addresses only tort judgments, it is clear that prejudgment interest may run on contract claims ... not as a matter of right, but rather in accordance with equitable principles." Pressler & Verniero, supra, comment 3.1 on R. 4:42-11 at p. 1842; Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 390 (2009). "Thus the award of prejudgment interest in a contract case is within the sound discretion of the trial court." Litton, supra, 200 N.J. at 390.

The trial court's order suggests it felt bound by the limitations of the rule, and gives no indication that it exercised its discretion. Again, there is no oral or written opinion to contravene those impressions. Therefore, we remand for the trial court to consider anew the request for prejudgment interest. See Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 467 (App. Div. 2008), appeal dism'd, 203 N.J. 433 (2010).

On remand, "the primary consideration in awarding prejudgment interest is that `the defendant has had the use, and the plaintiff has not, of the amount in question[,] ... to which the plaintiff is found to have been earlier entitled.'" Litton, supra, 200 N.J. at 390 (citation omitted). The equities may favor the insured where the issue is coverage, rather than the amount of damages, about which parties often disagree. Ellmex Constr. Co. v. Republic Ins. Co., 202 N.J. Super. 195, 212-13 (App. Div. 1985); see Benevenga v. Digregorio, 325 N.J. Super. 27, 34 (App. Div. 1999). The factors in Rule 4:42-11 are not binding in contract actions, but "constitute factors for the court's consideration in exercising its discretion in determining to award prejudgment interest in this different context and in setting the rate of that interest." DialAmerica Mktg., Inc. v. KeySpan Energy Corp., 374 N.J. Super. 502, 509 (App. Div. 2005).

We affirm the trial court's November 16, 2011 orders, vacate the January 25, 2012 order, and remand for consideration of Encompass's motion for counsel fees, costs, and prejudgment interest in accordance with our opinion. We do not retain jurisdiction.

[1] We are forced to draw the facts from these sources because of an unfortunate failure to follow the requirements of Rule 4:46-2(a)-(b). The record before us indicates that Encompass issued a forty-paragraph statement of material facts, and that Quincy apparently responded to a different, twenty-nine-paragraph statement of material facts, and denied everything.

[2] Finally, Levinson had a $1,000,000 Commercial Umbrella Policy issued by Quincy, but it was excess of the NJM policy and the Quincy BOP, and as a result is not at issue in these appeals.

[3] Quincy makes this argument as its basis for seeking indemnity from Casey, addressed in Part V below.

[4] However, Levinson's answer in Cumming, admitted that Casey was an employee of defendant.

[5] Quincy's answer purported to include a third-party complaint against Casey.