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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4714-12T4
A-4799-12T4

IMPERIUM INSURANCE COMPANY f/k/a
DELOS INSURANCE COMPANY,

Plaintiff-Appellant,

v.

ALAN S. PORWICH, ESQUIRE,
FEINTUCH, PORWICH & FEINTUCH,
and ISMAEL SALGADO,

Defendants-Respondents.

IMPERIUM INSURANCE COMPANY f/k/a
DELOS INSURANCE COMPANY,

Plaintiff-Respondent,

v.

ALAN S. PORWICH, ESQUIRE, and
FEINTUCH, PORWICH & FEINTUCH,

Defendant-Appellants,

and

ISMAEL SALGADO,

Defendant.

Argued February 10, 2015 - Decided February 27, 2015

Before Judges Reisner, Haas and Higbee.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-328-12.

Steven I. Lewbel argued the cause for Imperium Insurance Company, appellant in A-4714-12 and respondent in A-4799-12 (Melito & Adolfsen, attorneys; Mr. Lewbel, of counsel and on the briefs).

Jack Jay Wind argued the cause for Alan S. Porwich, Esq. and Feintuch, Porwich & Feintuch, respondents in A-4714-12 and appellants in A-4799-12 (Margulies Wind, attorneys; Robert E. Margulies, of counsel; Prakash S. Patel and Gerard D. Pizzillo, on the brief).

Jonathan Koles argued the cause for respondent Ismael Salgado in A-4714-12 (Koles, Burke & Bustillo, LLP, attorneys; Mr. Koles, of counsel and on the brief; Robert E. Taylor, Jr., on the brief).

PER CURIAM

In these consolidated insurance coverage matters, plaintiff Imperium Insurance Company (Imperium) appeals from the Law Division's orders requiring it to provide a defense and indemnification to defendants Alan Porwich, Esq. (Porwich) and Feintuch, Porwich & Feintuch (FPF), and to pay attorney's fees and costs to defendant Ismael Salgado (Salgado). Porwich and FPF have also filed an appeal, challenging the trial court's order denying their request for counsel fees and costs. After reviewing the record in light of the contentions advanced on appeal and the unique facts presented, we reverse the trial court's orders requiring Imperium to provide coverage to Porwich and FPF and to pay Salgado's counsel fees and costs, and we

affirm the order denying Porwich and FPF's motion for fees and costs.

I.

We derive the following facts from the record. On February 8, 2005, Salgado allegedly slipped and fell on a snow-covered sidewalk outside an apartment building. On July 5, 2006, Salgado retained FPF to bring a lawsuit against the apartment building owner, and the firm assigned Porwich to the case. FPF is a firm headed by Philip Feintuch (Feintuch), who testified he operated the firm as a "sole proprietorship." Feintuch employed his son, Howard Feintuch, and Porwich as associates. Nevertheless, FPF's website indicated that Porwich, who joined the firm in 1980, was a partner. Porwich also appeared in the firm's letterhead, could bring in clients without Feintuch's permission, and had access to the firm's trust account.

On February 7, 2007, one day before the expiration of the applicable statute of limitations, Porwich filed a complaint on Salgado's behalf against the alleged owner of the apartment building. However, this individual had died approximately five years earlier. Thereafter, Porwich did not ascertain the identity of the building's true owner and he never effected service of the complaint. The clerk's office sent Porwich a June 23, 2007 notice advising that the complaint was scheduled to be dismissed for lack of prosecution. Porwich testified he

"was going through a lot of personal problems at that time" and admitted that he ignored the notice. Accordingly, Salgado's complaint was dismissed. Porwich testified that, based upon his failure to serve the complaint in a timely manner, and the dismissal of the matter with prejudice, he knew that his conduct in the Salgado case had "subjected [FPF] to a potential malpractice matter[.]"

Between 2006 and 2008, Salgado called Porwich several times to inquire about his case, but Porwich never responded. In November 2008, Salgado sought to terminate FPF's representation of him and he demanded his file. In response, Porwich promised he would send Salgado the file, but he failed to do so. In March 2009, Salgado complained to the district ethics committee, and a committee member told Porwich to give Salgado the firm's file. The committee member also sent a confirming letter to Salgado and Porwich stating that more formal action would be taken if Porwich did not respond. Porwich ignored the letter.

On May 12, 2010, the ethics committee filed a complaint against Porwich based on his failure to act with reasonable diligence in the matter. Porwich failed to file an answer and the Disciplinary Review Board denied his subsequent motion "seeking to have the default vacated." On December 14, 2010, the Board reprimanded Porwich for his conduct in representing Salgado.

On December 9, 2008, FPF first applied to Imperium for professional liability insurance. Feintuch filled out the application and sought insurance for the firm, comprised of himself, his son, and Porwich. Question 40 on the application form asked, "Have any of you had a disciplinary complaint made to any court, administrative agency or regulatory body in the past 5 years?" (Emphasis added). Feintuch answered "no" to this question.

Question 41 asked, "Has any professional liability claim or suit been made against any of you or any previous member of your current firm or predecessor firm within the last five (5) years?" (Emphasis added). Feintuch answered "yes" to this question, and listed a prior claim involving his son. He did not divulge anything related to Porwich's failure to serve a timely complaint on Salgado's behalf.

Finally, Question 42 asked, "Are you aware of any incident, circumstances, acts, errors, omissions, or personal injuries that could result in a professional liability claim against any attorney of the firm or its predecessors irrespective of the actual validity of the claim?" Feintuch answered "no" to this question, and did not disclose any information concerning the Salgado matter.

Feintuch conceded that his answers on the application form were "not only on behalf of [FPF, they were] on behalf of"

himself, Porwich, and his son. In spite of this, however, Feintuch testified he did not ask Porwich whether his actions in any case subjected the firm to a professional liability claim or suit prior to completing the form. Feintuch did not have any system in place to monitor his associates' work. Instead, Feintuch stated he relied upon the associates to advise him of any problems in their cases, explaining "I can't imagine going to an attorney and say[ing], was there a disciplinary action filed against you today."

Feintuch admitted being aware that Porwich "had disciplinary issues in the past[.]" Because of his "don't ask policy," however, Feintuch stated he only became aware of these issues "[a]fter the fact. . . . In other words, a . . . grievance would come in or an allegation of a[n] ethics violation. [Porwich] would not tell me that. He would tell it to me after it was disposed of in whatever fashion it was disposed of."[1] Porwich testified that Feintuch never asked him

[1] The Disciplinary Review Board's December 14, 2010 written reprimand decision stated that Porwich "was reprimanded for misconduct for three matters" in 1999. "There, he was found guilty of a combination of gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to cooperate with disciplinary authorities, and misrepresentation to one client." See In re Porwich, 159 N.J. 511 (1999). The record does not disclose whether Porwich was involved in any other incidents prior to, or following, the 1999 matters.

about the Salgado case or any other matter and he did not tell Feintuch anything about the dismissal of Salgado's complaint.

Based upon Feintuch's representations on the application form, Imperium issued a professional liability policy to FPF for the December 27, 2008 to December 27, 2009 policy period.[2] The "Named Insured" on the policy was FPF. The policy defined "Named Insured" as "the individual, partnership, or firm engaged in the practice of law under the name stated in . . . the Declarations and its predecessor practice, if any." The terms "You or your" were defined as meaning "the NAMED INSURED and any person which was, is or becomes any of the following: . . . a partner, principal, director, member, officer or shareholder or employed lawyer of you but only while acting on your behalf." (Emphasis added).

The policy defined "claim" as meaning:

> a. a written or verbal demand for money or services;
>
> b. a written or verbal demand to toll or waive a statute of limitations;
>
> c. a judicial civil proceeding;
>
> d. a disciplinary proceeding including but not limited to a demand, grievance, or allegation involving a covered act made against you to any professional association

[2] However, the policy excluded coverage for the prior incident involving Feintuch's son that Feintuch disclosed in the application.

> or society charged with the responsibility to oversee professional disciplinary matters, whether or not such demand, grievance, or allegation is initiated at or results in a formal civil proceeding in state or federal court but only to the extent of the coverage afforded by Insuring Agreement 1.31; or
>
> e. any other regulatory, administrative, or arbitrative proceeding.

The policy provided coverage for a

> [L]oss arising from a claim first made against you during the policy period and reported in writing to us during the policy period or, if applicable, the extended reporting period pursuant to the terms of this policy for any actual or alleged covered act whenever or wherever such covered act has been committed by:
>
> [a.] you in rendering or failure to render professional services for others; and
>
> [b.] any other person or law firm in rendering or failure to render professional services for others on your behalf for whose covered act you are legally responsible . . . .

The policy also contained a "pending/prior claims exclusion endorsement," which in pertinent part stated:

> This Policy does not apply to any Claim or Defense Costs based upon or arising out of or alleging or resulting, directly or indirectly, from:
>
> a) any act, circumstance, or event committed, omitted, or occurring prior to the Policy Period if, on or before the Effective Date, the Named Insured knew or could have reasonably foreseen that such

> act, circumstance, or event could give rise to a Claim against <u>any of you</u> . . . .
>
> [(Emphasis added).]

Armed with all of the information and definitions set forth in the policy, Feintuch submitted a second application on October 20, 2009, to renew FPF's coverage for the period beginning December 27, 2009, and ending December 27, 2010.[3] By this time, Porwich admittedly knew that: (1) Salgado had complained to the district ethics committee about Porwich's handling of his case; (2) a committee member had advised Porwich that formal disciplinary action would be taken against him if the matter was not resolved; and (3) Porwich had ignored the committee member's warning.

However, Feintuch again failed to disclose Porwich's involvement in this professional liability "claim" as defined in the FPF's insurance policy in response to Question 42 of the application. Feintuch testified he did not ask Porwich whether he was aware of any incidents that could result in a professional liability action, and Porwich stated he did not reveal the Salgado incident to Feintuch on his own. Based upon Feintuch's representations in the application, Imperium issued FPF an insurance policy covering Feintuch, his son, and Porwich.

[3] In all material respects, the renewal application was the same as the initial application Feintuch completed on December 8, 2008.

The renewal policy was identical to the initial policy in all material respects, including the definitions section and the pending/prior claims exclusion endorsement.

On October 21, 2010, Salgado filed a legal malpractice action against Porwich and FPF, alleging they negligently allowed his premises liability action to be dismissed with prejudice. Feintuch told Porwich to tender the complaint to Imperium, and he did so on November 16, 2010. Imperium thereafter sent Porwich three separate reservation of rights letters in which Imperium agreed to provide a defense to Porwich and FPF in connection with Salgado's malpractice complaint, while reserving its right to deny coverage based upon its further review of the matter.

On January 19, 2012, Imperium filed a declaratory judgment action against Porwich, FPF, and Salgado. Imperium sought a declaration that, because of FPF's failure to apprise it of the claim pending against Porwich at the time the policies were issued, Imperium had "no obligation to defend or indemnify" Porwich and FPF with regard to Salgado's malpractice complaint. Porwich and FPF retained the same attorney to represent them in the declaratory judgment action.

Imperium named Salgado as a defendant because of his interest in the outcome of the dispute between Imperium and FPF. Salgado's attorney in the malpractice litigation also

represented him in the declaratory judgment action. The attorney's retainer agreement provided that the attorney was representing Salgado on a contingent fee basis, and that the attorney would not bill Salgado for any fees and costs incurred in either the malpractice or declaratory judgment actions. Instead, the retainer agreement stated it was the parties' "intention that the Attorney's fees and costs incurred pursuant to this Agreement shall be included as part of the Client's damages to be collected from [Imperium, Porwich, or FPF], whatever the case may be."

Following a bench trial, the judge issued a written decision denying Imperium's request for declaratory relief, and holding that it had an obligation to provide a defense and indemnification to Porwich and FPF in the Salgado malpractice action. Citing Liberty Surplus Insurance Corp. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007), the judge examined the pending/prior claims exclusion clause of Imperium's policy. As previously noted, the policy excluded any claim based upon "any act, circumstance, or event committed . . . prior to the Policy Period if, on or before the Effective Date, the Named Insured knew or could have reasonably foreseen that such act, circumstance, or event could give rise to a Claim against any of you."

Consistent with Liberty, the judge ruled that a subjective standard should be applied to the first portion of the exclusion, that is, whether "the Named Insured knew" of the "act, circumstance, or event" prior to the effective date of the policy. The judge also determined that an objective standard would be used to determine whether "the Named Insured . . . could have reasonably foreseen that such act, circumstance, or event, could give rise to a Claim against any of you."

In applying these standards, the judge determined that Feintuch was the only "Named Insured," even though she specifically noted that the definition section of the policy "expansively" defined the term "you" to include both "the Named Insured" and "any . . . employed lawyer" of the "Named Insured." Nevertheless, the judge interpreted the term "you" to include only Feintuch because he was the "sole proprietor" of the firm. Finding that Feintuch did not have actual knowledge of Porwich's errors and omissions in the Salgado case, the judge ruled that the subjective test was not met and accordingly, Imperium was obligated to provide coverage to Porwich and FPF.[4]

[4] On the other hand, the judge found that the objective test was met because, if Feintuch had known of Porwich's failure to timely serve Salgado's complaint and Salgado's subsequent contacts with the district ethics committee, Feintuch would have foreseen that Porwich's actions would lead to a malpractice claim against Porwich and FPF. On appeal, the parties agree (continued)

Porwich and FPF then filed an application for attorney's fees and costs, as did Salgado. In a written decision, the judge denied Porwich and FPF's request, finding that they were responsible for the malpractice event that caused the dismissal of Salgado's premises liability complaint in 2007. However, the judge found that Salgado was "a successful claimant" in the declaratory judgment action under Rule 4:42-9(a)(6), and awarded his attorney $48,140.28 in fees and costs.[5] Imperium's appeal and Porwich and FPF's appeal followed.

II.

On appeal, Imperium contends the trial judge mistakenly determined that only Feintuch's subjective knowledge of Porwich's actions was relevant in determining whether the policy's pending/prior claims exclusion clause relieved Imperium of its obligation to provide a defense and indemnification to Porwich and FPF. We agree.

We begin with a review of the principles governing insurance contract interpretation. "An insurance policy is a

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(continued)
with this determination and, accordingly, this portion of the judge's ruling is not at issue.

[5] Imperium continued to defend Porwich and FPF in Salgado's malpractice action. After a five-day trial, a jury returned a "no cause" verdict in favor of Porwich and FPF and against Salgado. On appeal, Imperium is not seeking to be reimbursed for its expenses in defending Porwich and FPF against Salgado's malpractice claim.

contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010). An insurance policy should be interpreted in accordance with its terms' plain and ordinary meaning. Mem'l Props. v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (citing Flomerfelt, supra, 202 N.J. at 441).

Any ambiguities must be "resolved in favor of the insured." Ibid. Even so, simply because different wording could possibly make a provision more clear, does not render the language chosen ambiguous. Villa v. Short, 195 N.J. 15, 26 (2008) (citing Argent v. Brady, 386 N.J. Super. 343, 352 (App. Div. 2006)). "[T]he test for determining if an ambiguity exists is whether 'the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Nunn v. Franklin Mut. Ins. Co., 274 N.J. Super. 543, 548 (App. Div. 1994) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)).

"[W]hen considering ambiguities and construing a policy, courts cannot 'write for the insured a better policy of insurance than the one purchased.'" Flomerfelt, supra, 202 N.J. at 441 (quoting Walker Rogge, Inc. v. Chelsea Tile & Guar. Co., 116 N.J. 517, 529 (1989)). Moreover, the courts must not read one provision such that another provision is rendered

meaningless. Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 47 (App. Div. 2010).

The standard of review from the court's findings in a bench trial is limited. We owe "'deference to those findings of the trial judge which are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Thus, we will "'not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)).

However, "[t]he interpretation of an insurance contract is a question of law for the court to determine[.]" Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996) (citing Weedo v. Stone-E-Brick, Inc., 155 N.J. Super. 474, 479 (App. Div. 1977), rev'd on other grounds, 81 N.J. 233 (1979)). Such purely legal questions are entitled to no deference. 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006).

Applying these standards to the facts of this specific case, we conclude that the terms of the policy clearly excluded FPF's claim because Porwich was fully aware that his actions would likely lead to Salgado filing a malpractice claim against him and the firm. As noted above, the policy "expansively" defined the term "you" to include both the Named Insured and any attorney employed by the firm. Thus, when the application asked, "Are you aware of any incident, circumstances, acts, errors, omissions, or personal injuries that could result in a professional liability claim against any attorney of the firm?[,]" the term "you" included Feintuch, his son, and Porwich, rather than just Feintuch as the trial judge mistakenly found. Thus, Porwich's knowledge of his own errors in the Salgado matter was plainly critical to the issue of coverage.

Just as significantly, the policy defined "Named Insured" as "the individual, partnership, or firm engaged in the practice of law under the name" set forth on the declarations page of the policy. Although Feintuch was the sole proprietor of FPF, the policy also provided coverage to the two other "individual[s] . . . engaged in the practice of law under the [FPF] name," specifically, Porwich and Feintuch's son. Thus, when the exclusion clause of this policy referred to "Named Insured," it is clear that the term included both the firm as an entity and the individual attorneys employed by the firm. Here, Porwich

was employed by the firm and knew that his actions and inactions in the Salgado case had "subjected [FPF] to a potential malpractice matter." Thus, Porwich's subjective knowledge of the possible claim triggered the exclusion clause and eliminated Imperium's obligation to provide a defense and indemnification to Porwich and FPF in the Salgado malpractice action.

In so concluding, we again stress the distinctive facts of this case. This was a small, three-person firm. FPF held Porwich out to the public as a partner and he had an extraordinary amount of responsibility in the firm. In spite of this fact, Feintuch adopted a policy of not asking his associates if they were facing any possible professional liability claims because he believed they would bring those matters to his attention. In Porwich's case, however, this policy was honored only in the breach because Feintuch admitted knowing that Porwich had been the subject of prior claims, and that Porwich never brought those matters to Feintuch's attention until after they were resolved. Under these unique circumstances, we do not believe that Feintuch can reasonably rely upon his asserted lack of personal knowledge of Porwich's actions to defeat the clear terms of the policy.

Moreover, we note that Feintuch purchased policies in two successive years from Imperium. Thus, at the time Feintuch applied for the second policy covering the period when Salgado

filed his malpractice complaint, he already had a copy of the policy and its definitions section. Therefore, he was aware of the broad manner in which the policy defined the terms "you" and "Named Insured" and should have known that Porwich's knowledge of any pending claims would be imputed to FPF.

Because Porwich knew of Salgado's claim at the time FPF obtained the second policy, and this claim was not disclosed in the application, Imperium was not obligated to provide a defense and indemnification to Porwich and FPF in connection with Salgado's malpractice complaint. We therefore reverse the trial judge's contrary determination. In view of this holding, neither Salgado nor Porwich and FPF can be deemed "successful claimant[s]" under Rule 4:42-9(a)(6). Therefore, we reverse the order requiring Imperium to pay $48,140.28 in counsel fees and costs to Salgado's attorney. For this same reason, we affirm the judge's denial of Porwich and FPF's motion for counsel fees and costs.[6]

Affirmed in part, and reversed in part.

[6] Porwich and FPF also sought to recover counsel fees and costs incurred in this appeal. Because they were unsuccessful in their appeal, we deny this request.