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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0382-14T3

PHARMACY & HEALTHCARE
COMMUNICATIONS, L.L.C.
and INTELLISPHERE, L.L.C.,

Plaintiffs-Appellants,

v.

NATIONAL CASUALTY COMPANY,

Defendant-Respondent.

Argued November 2, 2015 – Decided May 11, 2016

Before Judges Sabatino, O'Connor, and Suter.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2811-11.

Frank J. Rontely, III, argued the cause for appellants (Hoagland, Longo, Moran, Dunst & Doukas, L.L.P., attorneys; Robert G. Kenny, of counsel; Jacquelyn L. Poland, on the brief).

Alexis J. Rogoski (Boundas Skarzynski Walsh & Black) of the New York Bar, admitted pro hac vice, argued the cause for respondent (Prutting & Lombardi and Mr. Rogoski, attorneys; George A. Prutting, Jr., of counsel and on the brief; Mr. Rogoski and James R. Steal III (Boundas Skarzynski Walsh & Black) of the New York Bar, admitted pro hac vice, on the brief).

PER CURIAM

Plaintiffs Pharmacy & Healthcare Communications, LLC, ("PHC") and Intellisphere, LLC, appeal the granting of summary judgment to defendant National Casualty Company ("National" or "defendant") and the denial of their motion for partial summary judgment.[1] After reviewing the briefs, record, and applicable legal principles, we remand for further proceedings.

I

PHC and Intellisphere are both owned by Michael J. Hennessey and Associates, an entity that issues publications of interest to the medical community. In particular, PHC publishes a monthly journal known as "Pharmacy Times," which contains articles of specific interest to pharmacists. Among other things, Intellisphere provides marketing services to drug manufacturers designed to reach and provide pharmacists with information about various topics, including new drug products.

In 2009, Meda Pharmaceuticals ("Meda") endeavored to promote the marketing of one of its new drugs, Soma 250, a pain medication. To help market its new product, Meda retained the Hal Lewis Group ("Group"), an advertising agency that provides advertising services to those in the healthcare community. In connection with this project, Group had a meeting with Intellisphere during which Intellisphere represented it provided

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[1] Plaintiffs settled with all of the other defendants and the complaint against them has been dismissed.

facsimile advertising services, and that it possessed facsimile telephone numbers for a number of pharmacies, all of which had granted Intellisphere specific permission to fax advertisements to them. Intellisphere also allegedly told Group that its facsimile advertising services complied with all applicable federal and state laws. On the basis of Intellisphere's representations, Group retained it to fax out advertisements about Soma 250 to these particular pharmacies.

The contract governing the transaction between Group and Intellisphere, styled an "Insertion Order," indicates the contract was made between Group and Pharmacy Times, the publication issued by PHC. However, although plaintiffs contest the insertion order is a contract, they did not dispute Pharmacy Times and Intellisphere are one and the same for the purpose of addressing the issues raised by both parties in their respective motions for summary judgment.

The insertion order indicates Group and Pharmacy Times agreed that, in consideration for $46,500, Pharmacy Times would send out faxes to 52,500 retail sites, reaching 119,000 pharmacists (some pharmacies had more than one pharmacist). The documents were ultimately faxed out on two different days in May 2009.

In June 2009, Glen Ellyn Pharmacy, Inc., one of the pharmacies that had received a faxed advertisement, filed a

class action suit in Illinois against Meda and Group for sending unsolicited faxes to it and others similarly situated. The complaint alleged Meda and Group had violated the Telephone Consumer Protection Act, 47 U.S.C.A. § 227; the Illinois Consumer Fraud and Deceptive Business Protection Act, 815 Ill. Comp. Stat. 505/2; and "the common law." Approximately one month later, the case was removed to the United States District Court for the Northern District of Illinois.

In December 2010, Group filed in the federal action a third party complaint against Intellisphere, although in the body of that complaint Group referred to Intellisphere as Pharmacy Times. Group alleged that as a result of Pharmacy Times' representations that it had permission from the pharmacies to send them advertisements by facsimile and that Pharmacy Times would fax the advertisements in accordance with all applicable laws, Group was induced to enter into the contract with Pharmacy Times to transmit the subject advertisements. Group complained that after the advertisements were faxed and it had compensated Pharmacy Times, Group discovered Pharmacy Times did not have the pharmacies' authorization to send the subject advertisements by facsimile. As a result, Group contended it sustained damages in the form of having to pay litigation expenses and a loss of business.

The specific causes of action Group asserted as a result of Pharmacy Times' alleged wrongdoing were breach of contract, intentional misrepresentation, negligent misrepresentation, and promissory estoppel. Group also asserted a claim for contribution.

Plaintiffs were insured under a Business and Management Indemnity Policy issued by defendant. In February 2011, plaintiffs demanded that defendant indemnify them for all losses and costs associated with Group's federal third-party complaint against them. Specifically, plaintiffs made a demand for coverage under two sections of the policy, the Employment Practices Coverage ("EPL") Section and the Directors and Officers and Company Coverage ("D&O") Section. In March 2011, defendant denied plaintiffs' request to provide coverage and a defense.

Defendant's reasons for denying coverage were: (1) the EPL Section provided coverage for only harassment or discrimination claims and these causes of action were not alleged in the third party complaint; and (2) the "professional services" and "breach of contract" exclusions in the D&O Section precluded coverage. Because there was no coverage, defendant also determined there was no basis to provide a defense.

Plaintiffs retained its own counsel and spent $988,734.68 before settling the third-party complaint, in 2013; plaintiffs paid $400,000 toward settlement and $588,734.68 in counsel fees.

In April 2011, plaintiffs filed a declaratory judgment action in New Jersey seeking a finding defendant owed them coverage and a defense under the policy. The trial court ultimately denied plaintiffs' motion for partial summary judgment and granted defendant's motion for summary judgment and dismissed the complaint.

The trial court found the EPL Section of the policy did not afford coverage to plaintiffs because they were not alleged to have committed acts of harassment or discrimination in the third-party complaint. Plaintiffs have not challenged this finding on appeal.[2]

The D&O Section of the policy insured plaintiff and its directors and officers against losses resulting from "wrongful acts." The policy also provided that defendant had a duty to defend a covered claim. The scope of coverage provided in the

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[2] In their appellate brief in reply, plaintiffs claim they did appeal this ruling. Although plaintiffs' initial brief mentions the EPL Section, they do not assert in a point heading or argue elsewhere in their initial brief that the EPL Section afforded coverage to them under these circumstances and that the trial court had erred in determining otherwise. Accordingly, plaintiffs waived their right to challenge the trial court's finding the EPL Section does not provide plaintiffs with coverage. See Telebright Corp., Inc. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012).

D&O Section is set forth in the insuring clauses, the details of which need not be addressed here because only the two exclusions in the D&O Section - the breach of contract exclusion and the professional services exclusion – are relevant.

The breach of contract exclusion provides in pertinent part as follows:

> Insurer shall not be liable for loss on account of any claim:
>
> alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way involving the actual or alleged breach of any contract or agreement, except and to the extent the Company would have been liable in the absence of such contract or agreement.

The professional services exclusion, meanwhile, provides:

> Insurer shall not be liable for loss . . . . on account of any claim alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way involving the rendering or failing to render professional services . . . .

On the breach of contract exclusion, plaintiffs argued the insertion order was not a contract and, thus, in the absence of a contract, that exclusion was inapplicable. As for the remaining claims asserted against them in the third-party complaint, plaintiffs contended that even if the insertion order were a contract, the other claims were based upon actions that

preceded the formation of the contract and, therefore, were independent of the existence of the contract.

The trial court found the breach of contract exclusion deprived plaintiffs of coverage and a defense. Because of its ruling that the breach of contract exclusion precluded coverage, the court specifically declined to rule on whether the professional services exclusion similarly deprived plaintiffs of the same relief.

On the breach of contract exclusion, the trial court concluded the insertion order was a contract. The court did acknowledge that if there had not been a contract, then there would not have been a viable claim for intentional or negligent misrepresentation because "[i]f Pharmacy and Intellisphere didn't do anything for [Group,] they wouldn't be getting sued for misrepresentation." However, because there was a contract, the court found that

> but for that [contractual] relationship, you would not be a party to this case, there would be no third party action. In other words, it all arises – all those causes of action in the third party complaint exist, because of the agreement or alleged agreement between [Group and plaintiffs] . . . . You just can't get away from the . . . fact that but for an agreement or contract none of these other theories can stand.

We understand the trial court's decision to mean that although plaintiffs' alleged misrepresentations to Group

preceded the formation of the contract, those misrepresentations induced Group to enter into the contract and it was the execution of that contract that caused Group's harm. Accordingly, the claims for misrepresentation exist because of the contract; that is, it cannot be said defendant would have been liable for a defense and coverage in the absence of such contract or agreement.

The trial court found without explanation that plaintiffs' pre-contract misrepresentations also constituted a breach of contract. The court did not comment upon Group's claim for promissory estoppel.

Finally, although the court briefly alluded to the fact Illinois law was applied in the underlying federal action, the record does not reveal the law that defendant applied when it determined back in March 2011 that it had no obligation to provide coverage or a defense to plaintiffs.

II

On appeal, plaintiffs argue, among other things, there was no contract between plaintiffs and Group and, thus, the breach of contract exclusion could not have defeated their claim for coverage and a defense. Plaintiffs further contend that even if the insertion order were a contract, the breach of contract exclusion could not have extended to any of the alleged wrongs that were committed before the existence of the contract.

Further, although the trial court did not rule on whether the professional services exclusion applied, plaintiffs argue they had not provided any professional services to Group and thus this clause should not have barred coverage and a defense.

First, we agree with the trial court that the insertion order was a binding contract between plaintiffs and defendant, and plaintiffs' arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Second, whether or not the professional services exclusion clause precludes coverage and a defense for plaintiffs has not been determined by the trial court. We thus shall not pass upon this issue in the first instance. Ins. Co. of North Am. v. GEICO, 162 N.J. Super. 528, 537 (App. Div. 1978).

Third, we are unable to evaluate the merits of defendant's determination the breach of contract exclusion precluded coverage, because we do not know what law defendant applied when it concluded it was relieved from providing coverage and a defense to plaintiffs. There is some indication Illinois law was applied in the underlying federal action, but the law defendant used to reject plaintiffs' claim for coverage and a defense to that action is not known. In addition, the insurance contract between the parties does not specify which state's law governs their relationship.

Because the elements of the causes of action alleged in the third-party complaint can vary from jurisdiction to jurisdiction, and it is axiomatic the elements that comprise a cause of action can affect whether an insurer is obligated to provide coverage or a defense under a policy, we cannot evaluate whether the breach of contract exclusion precludes coverage and a defense without knowing the law under which defendant evaluated the claims in the third-party complaint.

An example illustrates our point. To prove a claim of negligent misrepresentation under New Jersey law, the plaintiff must prove (1) the defendant negligently made an incorrect statement; (2) the plaintiff justifiably relied on the defendant's statement; and (3) the plaintiff was injured as a consequence of relying upon that statement. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 502 (App. Div. 1998); see also Rosenblum v. Adler, 93 N.J. 324, 334 (1983).

By comparison, to prove a claim of negligent misrepresentation under Illinois law, the claimant must show "(1) a false statement of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage to the other party resulting from such reliance; and (6) a duty on the party making the statement to

communicate accurate information." First Midwest Bank, N.A. v. Stewart Title Guar. Co., 843 N.E.2d 327, 332 (Ill. 2006) (citing Bd. of Educ. of the City of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 591 (Ill. 1989)).

Most of the elements comprising a claim for negligent misrepresentation in New Jersey and Illinois are fundamentally the same, but under Illinois law there is the additional element that the plaintiff prove the defendant had a duty to communicate accurate information. Ibid. When the plaintiff seeks solely economic damages (as was the case with Group), the duty to not make negligent misrepresentations appears to be limited under Illinois law to two factual circumstances.

The first is that one may not negligently convey false information where the information results in physical injury to a person or harm to property. Hoover v. Country Mut. Ins. Co., 975 N.E.2d 638, 648 (Ill. App. Ct. 2012) (citing Brogan v. Mitchell Int'l., Inc., 692 N.E.2d 276, 277 (1998)). The second is that one may not negligently convey false information if in the business of supplying information to another party for that party's guidance in its business transactions with third parties. Brogan, supra, 692 N.E.2d at 278; Lang v. Consumers Ins. Serv., Inc., 583 N.E.2d 1147, 1153 (Ill. App. Ct. 1991). As for the latter exception, if the information conveyed is pertinent solely to the contractual dealings between the two

parties, then no third party reliance is implicated. Rankow v. First Chicago Corp., 870 F.2d 356, 364 (7th Cir. 1989) (applying Illinois law); Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 452 (Ill. 1982).

We note, without deciding, that if Illinois law applied, plaintiffs might not have had a duty to refrain from making a negligent misrepresentation to Group because, in this instance, plaintiffs provided only facsimile transmission services to Group. The first qualifying circumstance to trigger such a duty does not appear applicable because the fax advertisements did not cause physical injury to a person or property. Hoover, supra, 975 N.E.2d at 648. The second qualifying circumstance arguably might pertain if plaintiffs are deemed to be in the business of supplying information to other parties; however, that exception would be nullified if it were shown that any representations plaintiffs made to Group were incidental to the transaction between them and Group. Brogan, supra, 692 N.E.2d at 278; Rankow, supra, 870 F.2d at 364.

Thus, subject to further factual development and legal argument of the parties, there is at least a colorable basis to find that under Illinois law, any duty plaintiffs may have had to Group existed apart and aside from the contract between them, rendering the breach of contract exclusion inapplicable with respect to the claim of negligent misrepresentation. At the

least, a duty to defend this claim may have been appropriate under the terms of the policy.

Accordingly, we are constrained to remand this matter for a finding of whether or not the law of the jurisdiction defendant applied to reject plaintiffs' claim for coverage and a defense supports that determination, and whether the jurisdiction that guided National's analysis was fair and appropriate.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction. The aggrieved party from the outcome of the remand may pursue a timely new appeal if it desires appellate review.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION