NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6061-09T3

DAVID ROUNDTREE,

Plaintiff,

v.

AUTO INJURY SOLUTIONS, CONCENTRA INTEGRATED SERVICES, INC., AUTO INJURY SOLUTIONS/CONCENTRA EMPLOYEE CHRISTINA COURTOT (R.N. CASE COORDINATOR), SERVANTS and EMPLOYEES of JUSTIN BEAN, AUTO INJURY SOLUTIONS and CONCENTRA INTEGRATED SERVICES, INC.,

Defendants,

and

JUSTIN BEAN,

Defendant/Third-Party
Plaintiff-Respondent,

v.

ALLIED PROFESSIONALS INSURANCE COMPANY, A RISK RETENTION GROUP, INC.,

Third-Party Defendant-Appellant.

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Submitted March 29, 2011 - Decided August 15, 2011

Before Judges Messano, Waugh, and St. John.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3175-08.

Jeffrey B. Randolph, attorney for appellant.

Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys for respondent (Gerard W. Quinn, on the brief).

PER CURIAM

Third-party defendant Allied Professionals Insurance Company (Allied) appeals the Law Division's orders refusing to compel arbitration and finding that a malpractice insurance policy issued by Allied covers claims asserted by plaintiff David Roundtree against defendant/third-party plaintiff Justin Bean in the underlying action. We reverse and remand for arbitration.

I.

We discern the following facts and procedural history from the record on appeal.

Roundtree was involved in an automobile accident in 2005 and claimed that he suffered injuries as a result. He sought medical treatment from his PIP carrier. The PIP carrier eventually sent Roundtree for an independent medical evaluation (IME) by an acupuncturist. Bean, an acupuncturist who had never treated Roundtree, performed the IME. He prepared an IME report concluding that Roundtree did not need any further acupuncture

treatment. According to Roundtree, Bean's IME report contradicted his oral statements to Roundtree during the IME.

On September 18, 2008, Roundtree filed a complaint against Bean and others. With respect to Bean, Roundtree alleged negligent representations, negligent record keeping, negligent examination, negligent reporting, professional malpractice, breach of contract, misrepresentations, and violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -184.

At the time the IME was performed, Bean was covered by a professional liability insurance policy issued by Allied. The policy contained the following general condition relevant to this appeal:

> C. Arbitration. If a dispute or claim shall arise with respect to any of the terms or provisions of this Policy, or with respect to the performance by any of the parties to the Policy, then any party or that party's authorized representative may, by notice as herein provided, require that the dispute be submitted within fifteen (15) days to an arbitrator in good standing with the American Arbitration Association under the Commercial Arbitration Rules of the American Arbitration Association then in effect. Any arbitration undertaken pursuant to the terms of this section shall be governed by the Federal Arbitration Act and shall occur in Orange County, California.

On October 20, 2008, Bean made a claim for defense and indemnification under the Allied policy. Allied denied coverage on October 31, 2008, stating that "no acupuncture patient

relationship or Professional Services are alleged at all and no injury is alleged at all." In a later letter, Allied again insisted that "there can be no Professional Services, as defined, without an acupuncture/patient relationship." Bean and Allied exchanged letters and telephone calls concerning coverage, but Allied continued to maintain that the policy did not cover any of Roundtree's claims.

On January 27, 2009, Bean filed a third-party complaint against Allied in the Roundtree action, seeking a declaratory judgment that Allied's policy provided coverage and that he was entitled to a defense of Roundtree's complaint. Bean also sought reimbursement of costs related to his defense in the underlying action, as well as counsel fees and costs related to the declaratory judgment action.

Roundtree's underlying action against Bean was dismissed with prejudice in February 2009. However, Bean's third-party action was excluded from that dismissal. On February 23, 2009, Allied wrote to Bean formally demanding arbitration of the coverage dispute.

On March 20, 2009, Allied filed a motion to compel arbitration and to dismiss or stay the complaint pending arbitration. Bean opposed the motion. At oral argument on May 15, 2009, the motion judge denied Allied's motion. He held that

the policy's arbitration clause was permissive, rather than mandatory, and that Allied had not made a timely demand for arbitration prior to the filing of Bean's third-party complaint. We denied Allied's motion for leave to appeal on September 15, 2009.

Shortly after the discovery end date of March 14, 2010, Bean filed a motion for summary judgment. Allied opposed the motion, and filed a cross-motion to amend its answer to the third-party complaint to assert a claim against some of the other defendants and to extend discovery.

The motion was argued before a different motion judge. He held that Allied had a duty to defend Bean because Roundtree's complaint "contain[ed] allegations of injuries as defined by the policy." Allied's cross-motion was denied. The judge subsequently awarded counsel fees and costs to Bean in the amount of $64,085.28.

Allied requested a stay pending appeal. The motion judge granted the stay upon the filing of a supersedeas bond in the amount of $65,810.42. This appeal followed.

II.

On appeal, Allied argues that the motion judges erred first by refusing to require arbitration of the coverage dispute, and second by finding that Bean was entitled to a defense under his

malpractice policy. Before turning to the specific issues before us, we outline some of the general principles that govern our disposition of this appeal.

A.

It is well-established that our review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Consequently, we review a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)). "The interpretation of an insurance contract is a question of law which we decide independently of a trial court's conclusions." Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008) (citing Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004)), certif. denied, 199 N.J. 133 (2009).

"Public policy favors arbitration." Coast Auto. Grp., Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 369 (App. Div.

2010) (citing Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 186 (1981)). "Accordingly, arbitration clauses should be construed 'liberally to find arbitrability if reasonably possible.'" Ibid. (quoting J. Baranello & Sons, Inc. v. Davidson & Howard Plumbing & Heating, Inc., 168 N.J. Super. 502, 507 (App. Div.), certif. denied, 81 N.J. 340 (1979)). See also Marchak v. Claridge Commons Inc., 134 N.J. 275, 282 (1993); Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 617 (App. Div.), certif. denied, 149 N.J. 408 (1997). Nonetheless, "'a court may not rewrite a contract to broaden the scope of arbitration.'" Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001)).

In construing an arbitration clause, courts must honor the intentions of the parties as set forth in the language. Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 270 (App. Div.), certif. denied, 165 N.J. 527 (2000). The scope of arbitration is dependent on the parties' agreement. Id. at 270-71.

"In the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be." Fawzy, supra, 199 N.J. at 469 (internal quotations marks

omitted) (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979)). "In respect of specific contractual language, '[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.'" Garfinkel, supra, 168 N.J. at 132 (alteration in original) (quoting Marchak, supra, 134 N.J. at 282). "As . . . in other [waiver] contexts, a party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Ibid. (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)).

The interpretation of an insurance contract typically raises questions of law. Consequently, it is generally appropriate to resolve such questions on summary judgment. 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)).

When reviewing an insurance policy, a court "should give the policy's words 'their plain, ordinary meaning.'" President

v. Jenkins, 180 N.J. 550, 562 (2004) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). If the terms of the insurance policy are clear and unambiguous, the court "should interpret the policy as written and avoid writing a better insurance policy than the one purchased." Ibid. (citing Gibson v. Callaghan, 158 N.J. 662, 670 (1999)). If the insurance contract is ambiguous, the policy should be construed in favor of providing coverage for the insured. Id. at 563 (citing Doto v. Russo, 140 N.J. 544, 556 (1995)).

Ambiguity only occurs "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Weedo, supra, 81 N.J. at 247; see also Powell v. Alemaz, Inc., 335 N.J. Super. 33, 44 (App. Div. 2000) ("An insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants."). A court should not strain the language of the insurance policy to create ambiguity. Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div. 1990).

B.

We turn first to the issue of whether Allied was entitled to have the coverage issue determined by arbitration.

The arbitration provision of the policy does not provide that arbitration is the sole forum for resolving coverage

disputes. The operative language is: "any party . . . may, by notice as herein provided, require that the dispute be [arbitrated] . . . ."[1] Giving the words their plain meaning, and noting the absence of any language stating that arbitration is the sole forum for dispute resolution,[2] we do not read that provision as requiring the arbitration of a coverage dispute absent a demand by the insurer or the insured for arbitration. In other words, arbitration is mandatory only if it is properly requested by the party seeking arbitration. Absent a proper request for arbitration, a judicial forum is the appropriate forum for resolution of a contested coverage issue. The general requirement that an arbitration provision should be "construed liberally to find arbitrability," Coast, supra, 413 N.J. Super. at 369, cannot overcome the plain meaning of the policy language.

In its several letters to Bean's attorney prior to the filing of the third-party complaint, Allied categorically asserted that the "policy required arbitration." As held above, that assertion is not supported by the plain language of the

[1] Despite the reference to "notice as herein provided," the policy contains no provision with respect to the form or timing of notice.

[2] A waiver of the right to sue must be "clearly and unmistakably established." Red Bank, supra, 78 N.J. at 140.

policy and was incorrect. The arbitration provision had to be invoked.

The question then becomes whether there was a timely invocation of Allied's right to arbitration. Allied did not formally invoke its right to arbitration until its letter of February 23, 2009, which was titled "DEMAND FOR ARBITRATION". The letters dated October 31, 2008, December 24, 2008, and January 7, 2009, contained no such demand. The motion judge found that Allied's February 23, 2009 demand letter was not a timely assertion of its right to arbitrate and concluded that Allied had waived its right as a result of its delay. We disagree.

Parties can expressly waive their rights to arbitration. Wein v. Morris, 194 N.J. 364, 376 (2008). They can also waive these rights by implication. Knorr v. Smeal, 178 N.J. 169, 177 (2003). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. However, "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid.

We have held that "[t]here is a presumption against waiver of an arbitration agreement, which can only be overcome by clear and convincing evidence that the party asserting it chose to

seek relief in a different forum." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008) (citing Am. Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 92 (4th Cir. 1996); Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC, 260 Fed. Appx. 497, 500 (3d Cir. 2008)).

There is no single test for the type of conduct that may waive arbitration rights. In fact, "the mere institution of legal proceedings . . . without ostensible prejudice to the other party" does not constitute a waiver. Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974). Rather, the presence or absence of prejudice has been deemed determinative of the issue of waiver. Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 149-50 (App. Div. 2008).

In Spaeth, we held:

> [S]imply wasting a party-opponent's time and money was found to be insufficient to constitute prejudice under the analogous [Federal Arbitration Act]. Rush v. Oppenheimer & Co., 779 F.2d 885, 888 (2d Cir. 1985). Also, when parties specifically indicate they will be moving to compel arbitration, the opposing party is unable to show prejudice. Angrisani, supra, 402 N.J. Super. at 150-51.
>
> [Spaeth, supra, 403 N.J. Super. at 515-16.]

Here, although we have found that Allied delayed in formally invoking its right to arbitration, it made its position with

respect to arbitration clear to Bean from the outset. The delay between the filing of Bean's third-party complaint and the filing of Allied's motion to compel arbitration cannot, under the principles set forth in Spaeth, supra, 403 N.J. Super. at 514, be considered "clear and convincing evidence" of waiver.

Because we conclude that there was no waiver of Allied's right to arbitrate, we must briefly address Bean's arguments that the arbitration provision is unconscionable. Given the public policy favoring arbitration, any argument that the arbitration clause itself is unconscionable is without merit and need not be discussed at length. R. 2:11-3(e)(1)(E). We turn, therefore, to the issues raised by Bean with respect to choice of law and forum selection.

Bean contends that he should not be bound by the policy's provisions with respect to the application of California law and the requirement that the arbitration take place in Orange County, California. Allied argues in its reply brief that we should not reach those issues because they were neither presented to nor decided by the motion judge who declined to order arbitration, and chose not address them on the merits.

We reach the issues of choice of law and forum in order to provide a complete disposition of this appeal. R. 2:10-5. We agree with Bean that the forum-selection and choice-of-law

clauses in the Allied policy should be disregarded. The record supports Bean's assertion that his practice is in New Jersey, rather than California.

Consequently, we hold that the arbitration should be held in New Jersey and that New Jersey law should be applied. See Param Petroleum Corp. v. Commerce & Indus. Ins. Co., 296 N.J. Super. 164, 170 (App. Div. 1997) ("[C]hoice-of-forum and choice-of-law agreements in liability insurance policies should generally be ignored at least when the insured risk is in this State."). With respect to the choice-of-law question, we note that Allied cited New Jersey law concerning coverage in its appellate brief and that it has not argued that California law is significantly different.

Consequently, we reverse the order denying Allied's motion to compel arbitration. We also vacate the orders finding coverage and awarding counsel fees and costs without prejudice. We remand to the Law Division for entry of an order compelling that Bean's claim for coverage be submitted to arbitration pursuant to the arbitration clause in the policy, except that the arbitration shall take place in New Jersey and be governed by New Jersey law.

Reversed and remanded.