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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1266-15T4

MITCHELL HAFTELL, by his subrogee, THE CUMBERLAND INSURANCE GROUP,

Plaintiff-Appellant,

v.

STEVEN L. BUSCH and ELIZABETH BUSCH,

Defendants-Respondents.

Submitted December 19, 2016 – Decided March 22, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1070-15.

Kearns & Duffy, P.C., attorneys for appellants (Paul R. Duffy, on the brief).

LeClairRyan, attorneys for respondents (Todd A. Rossman, on the brief).

PER CURIAM

This is an insurance subrogation action. Plaintiff, The Cumberland Insurance Group (Cumberland), as subrogee of its

insured, Mitchell Haftell, appeals from an order denying reconsideration of the trial court's grant of summary judgment to defendants Steven L. Busch and Elizabeth Busch. We reverse and remand for further proceedings.

These are the facts developed on the summary judgment motion record, viewed most favorably to Cumberland, the non-moving party. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Cumberland's subrogation claim arose out of an October 24, 2014 fire at a three-story apartment complex in Voorhees Township known as the Club at Main Street Apartments. Cumberland's insured, Haftell, leased an apartment in the complex. Defendant Elizabeth Busch leased an apartment in the same complex. She lived there with her family, including her husband, defendant Steven Busch. According to the Camden County Fire Marshall's report, Steven Busch caused the October 24, 2014 fire by carelessly discarding a cigarette on the balcony of the Busch apartment.

Cumberland paid Haftell's claim for property damage caused by the fire and then filed a subrogation complaint on March 19, 2015. Defendants filed an answer on June 8, 2015. One month later, on July 9, 2015, defendants filed a motion for summary judgment. No discovery had been completed. Defendants based their motion solely on a provision in a section of Haftell's lease

entitled "Insurance." The Insurance clause stated, in pertinent part:

> The Tenant agrees to be solely responsible for all loss or damage to Tenant or their property or to any other person who may be situated in the Apartment during the term of this Agreement . . . including any loss by water, fire, or theft in and about the Apartment; gross negligence of Landlord, its servants, agents or employees excepted. . . . Tenant agrees to procure and to maintain content and liability insurance as described on Liability and Contents and Contents Insurance Requirements Addendum. . . . Nothing contained herein shall be construed to supersede the common law rights of the parties. . . .
>
> Regardless of anything stated in this Lease, Tenant releases Landlord from any injury, loss or damage to personal property or persons from any cause. Landlord shall only be responsible for any acts caused by negligence of its employees, servants or agents. <u>Tenant waives any right of subrogation by Tenant or any insurance company, which covers Tenant.</u> Subrogation is the right to be repaid for any payments made by Tenant or Tenant's insurance for injury, loss or damage to personal property or persons. Landlord requires tenant to produce proof of insurance . . . .
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> [(Emphasis added).]

Relying on the underlined sentence, defendants argued they were entitled to the benefit of the subrogation waiver. In an oral opinion, the motion judge agreed, granted defendants' summary judgment motion, and dismissed the complaint with prejudice.

Thereafter, the judge denied Cumberland's motion for reconsideration. This appeal followed.

On appeal, Cumberland argues the motion judge erred when he barred its claim against defendants, non-signatories to Haftell's lease, based on the subrogation waiver in Haftell's lease. Cumberland also claims the motion judge confused condominium ownership and Haftell's tenancy, thereby overlooking legal principles concerning adhesion contracts and disfavored exculpatory clauses.

Defendants counter that longstanding precedent permits a party to waive subrogation rights, and the insurer of a party who has waived subrogation rights cannot recover if the insured cannot recover. Defendants quote the subrogation sentence in Haftell's lease – out of its context – and assert "[i]t is not limited in any way, shape, or form and the word 'any' must be construed to include owners, landlords, and tenants. Stated differently, Mr. Haftell has no rights to subrogation whatsoever."

We "review the grant of summary judgment 'in accordance with the same standard as the motion judge.'" Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (citations omitted). Under that standard, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact challenged and that the moving party is entitled to judgment . . . as a matter of law." R. 4:46-2(c); Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). A motion judge's determination that a party is entitled to summary judgment as a matter of law is "not entitled to any special deference[,]" and subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted).

When a motion involves the interpretation of a contract, the motion presents what "is ordinarily a legal question for the court and may be decided on summary judgment unless 'there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation. . . .'" Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (citation omitted). Because the interpretation of a contract generally presents a legal issue, appellate courts owe "no special deference" to a trial court's interpretation. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (quoting Kieffer v. Best Buy, 205 N.J. 213, 223 (2011)).

A motion for reconsideration is addressed to the "sound discretion of the [c]ourt to be exercised in the interests of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch.

Div. 1990)). Thus, we review a motion judge's denial of reconsideration under an abuse-of-discretion standard. Ibid.

We begin our analysis by reviewing fundamental principles of contract law generally, and leases specifically. A "lease is a contract between [the lessor and lessee] which sets forth their rights and obligations to each other in connection with [the lessor's] temporary grant of possession of its property to [the lessee]." Town of Kearny v. Disc. City of Old Bridge, Inc., 205 N.J. 386, 411 (2011) (emphasis added) (citing Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007)). Generally, unless the parties to a contract "intend[] that a third party should receive a benefit which might be enforced in the courts[,]" a non-party having no privity of contract has no cause of action based on the contract. Rieder Cmtys., Inc. v. Twp. of N. Brunswick, 227 N.J. Super. 214, 222 (App. Div.) (citations omitted), certif. denied, 113 N.J. 638 (1988).

Conversely, "third-party beneficiaries may sue upon a contract made for their benefit without privity of contract." Id. at 221-22 (citing Houdaille Constr. Materials, Inc. v. Am. Tel. & Tel. Co., 166 N.J. Super. 172, 184-85 (Law Div. 1979)). "The standard applied by courts in determining third-party beneficiary status is 'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the

courts[.]'" Id. at 222 (quoting Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 77 (E. & A. 1940)); see also Ross v. Lowitz, 222 N.J. 494, 513 (2015) (quoting Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982)) ("When a court determines the existence of 'third-party beneficiary' status, the inquiry 'focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement'").

In the case before us, the contractual waiver of subrogation clause is contained in a lease between Haftell and the landlord. Defendants are not parties to that contract. Thus, the threshold inquiry is not whether the waiver of subrogation clause is generally enforceable, but rather whether the parties to the lease, Haftell and the landlord, "'intended others to benefit from the existence of the contract[.]'" Ross, supra, 222 N.J. at 513 (citation omitted). Nothing in the lease suggests they did. Moreover, because defendants' summary judgment motion was decided before the parties had undertaken discovery, there is no competent evidence on the motion record from which anything can be inferred about Haftell and his landlord's intent.

We discern from the transcript of oral argument and from the motion judge's sparse opinion that the judge found controlling our

decision in Skulskie v. Ceponis, 404 N.J. Super. 510 (App. Div. 2009). Skulskie is distinguishable from the case before us. Skulskie involved a waiver of a subrogation provision in a homeowner's insurance policy, not a waiver of a subrogation provision in a lease. Id. at 511. The homeowner's residence was a condominium unit, not a leased apartment. Ibid. Upholding the insurance policy's waiver of subrogation clause, we explained:

> In light of the overall purpose of the waiver of subrogation provision in any insurance policy obtained by the unit owner, we discern no basis to allow the insurance carrier of the damaged unit owner to proceed against another unit owner, even an uninsured unit owner. The scheme created by this residential condominium community contemplated no litigation between unit owners or between unit owners and the Association. The optional nature of the insurance scheme does not alter the purpose of the waiver of subrogation provision. Moreover, the insurance carrier that issues insurance to any unit owner with a waiver of subrogation provision has no expectation that it will be able to pursue a claim against a negligent unit owner. Stated differently, when an insurer . . . issues a policy, it does so with the understanding that it has no recourse against a negligent unit owner.
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> [Id. at 514.]

Unlike Skulskie, here we can discern no "scheme" created by either the landlord or the residential community. Perhaps one exists, but if it does, it is not apparent from the summary

judgment motion record. The motion judge granted summary judgment before the parties could develop the issue through discovery.

Additionally, unlike Skulskie, here there is no evidence Cumberland's policy contained a waiver of subrogation. Consequently, we cannot conclude Cumberland knew it would be unable to pursue a subrogation claim against a negligent tenant.

Defendants' argument – essentially, that Haftell waived subrogation against all tortfeasors – is devoid of merit. It overlooks the issues of privity and whether defendants are third-party beneficiaries of Haftell's lease. Defendants' argument, if accepted, would hypothetically bar Cumberland from subrogating against a resident from another state who, while visiting New Jersey, becomes inebriated and crashes a car into Haftell's apartment complex, igniting a fire resulting in the destruction of Haftell's personal belongings. Nothing in Haftell's lease suggests such a strained interpretation of the waiver-of-subrogation clause.

In addition, defendants have constructed their argument by taking a single sentence in the lease out of context, disregarding the fundamental principle of contract interpretation that contracts must be considered in their entirety. See Cumberland Cty. Imp. Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.) (citation omitted) (noting a contract "must be read

as a whole, in 'accord with justice and common sense'"), certif. denied, 177 N.J. 222 (2003).

For the foregoing reasons, we conclude the motion judge erroneously granted defendants' summary judgment motion and misapplied his discretion in denying Cumberland's motion for reconsideration. Although the interpretation of the subrogation waiver in Haftell's lease might well present a purely legal issue, the parties should be provided an opportunity to present their positions on the need for discovery and presentation of parol evidence. For that reason, we reverse and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION