SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5027-15T4

MARIE T. PINO,

Plaintiff,

v.

JOSE R. POLANCO,

Defendant,

and

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant-Respondent.

Argued November 6, 2017 – Decided November 22, 2017

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1744-13.

David R. Kunz argued the cause for appellant The Hartford (Kunz & Germick, attorneys; Mr. Kunz and Leslie S. Britt, on the brief).

Robert R. Nicodemo, III argued the cause for respondent (Law Offices of Nicodemo & Connell, PC, attorneys; Mr. Nicodemo, on the brief).

PER CURIAM

This appeal concerns a dispute between a workers' compensation insurer and lienholder, The Hartford, and an automobile insurer, New Jersey Manufacturers Insurance Company ("NJM"). The Hartford appeals the trial court's denial of its attempt to reopen a previously-dismissed lawsuit in order to recover its lien against NJM, the issuer of an uninsured motorist ("UM") policy to the injured employee. We affirm.

On May 10, 2011, NJM's insured, Marie Pino, was injured in an automobile accident. At the time of the accident, Pino was acting in the scope of her employment. The vehicle that Pino occupied was struck by an uninsured motorist, Jose R. Polanco. Pino had UM coverage with NJM.

Pino obtained medical services after the auto accident, including treatment by a chiropractor. The medical expenses were paid by The Hartford, in its capacity as her employer's workers' compensation carrier. Pino also received non-medical "indemnity" benefits from The Hartford. Consequently, The Hartford held a workers' compensation lien of $48,056.79 with respect to its payments to Pino, consisting of $21,813.79 in medical expenses and $26,243.00 in indemnity benefits.

On December 5, 2011, The Hartford's subrogation representative sent a letter to Pino's attorney advising him of

the then-current status of The Hartford's lien.[1] The letter reflected The Hartford's understanding that Pino would be pursuing a liability claim against "the responsible party." The representative requested that if Pino was not pursuing such a third-party claim, "please let me know at your earliest convenience."

In April 2013, Pino filed a personal injury action in the Law Division against Polanco, the owner and driver of the vehicle who struck her. In October 2013, Pino amended her complaint to name NJM, her UM insurer, as a direct defendant, having unsuccessfully attempted to obtain recovery or settlement from NJM.[2]

On June 4, 2014, Pino and NJM entered into and filed in the Law Division a "Stipulation of Dismissal Without Prejudice Subject to Reinstatement," apparently in anticipation that they would arbitrate their dispute. Consequently, the court dismissed the Law Division action. Pino and NJM then participated in a non-binding UM arbitration on July 29, 2015. The panel of arbitrators,

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[1] With the consent of his adversary and this court's approval, counsel for The Hartford supplemented the appellate record to include the December 5, 2011 letter. We recognize this letter was not furnished to the trial court.

[2] Although the record is rather uninformative about this, Pino apparently did not obtain any recovery from Polanco or pursue the litigation against him after amending her complaint to assert her UM claims against NJM.

by a 2-1 vote, determined that Pino had sustained objective injuries that satisfied the lawsuit limitation threshold under N.J.S.A. 39:6A-8, and awarded her $65,000. The award was expressly subject to the $21,813.79 lien for medical expenses.[3]

NJM rejected the arbitration award and demanded a jury trial. Nevertheless, Pino chose not to move to reinstate the Law Division case. Although the record does not document exactly why Pino dropped the matter, the briefs suggest that Pino and her attorney concluded that further litigation would not be cost-effective, given the additional expenses that going to trial would entail and the risk that a jury might be unpersuaded that her injuries surmounted the permanency requirements of the lawsuit limitation threshold in the policy.

According to The Hartford, it did not learn about the ultimate outcome of the UM matter until January 26, 2016, when Pino's attorney informed The Hartford's subrogation adjuster that Pino's UM case against NJM had been dismissed and had not been reinstated. Having learned this information, The Hartford filed a motion in

[3] A copy of the arbitration award was supplied to us on appeal by counsel, without objection. The trial court did not receive a copy of the award, but it was summarized in the parties' motion submissions. At oral argument before us, The Hartford's counsel represented that it was not seeking in the UM action reimbursement of the separate indemnity benefits of $26,243 paid to Pino and that only the lien for the medical benefits is at issue here.

the Law Division on April 20 2016, seeking to set aside the dismissal of the case and attempting to reinstate the complaint against NJM as lienor.

The trial court denied The Hartford's motion, concluding that its attempt to revive the Law Division action was untimely under the ninety-day deadline set forth in N.J.S.A. 34:15-40(f). That subsection, which is codified within the workers' compensation statutes, provides in full as follows:

> (f) When an injured employee or his dependents fail within 1 year of the accident to either effect a settlement with the third person or his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee or his dependents, can either effect a settlement with the third person or his insurance carrier or institute proceedings against the third person for the recovery of damages for the injuries and loss sustained by such injured employee or his dependents and any settlement made with the third person or his insurance carrier or proceedings had and taken by such employer or his insurance carrier against such third person, and such right of action shall be only for such right of action that the injured employee or his dependents would have had against the third person, and shall constitute a bar to any further claim or action by the injured employee or his dependents against the third person. If a settlement is effected between the employer or his insurance carrier and the third person or his insurance carrier, or a judgment is recovered by the employer or his insurance carrier against the third person for

> the injuries and loss sustained by the employee or his dependents and if the amount secured or obtained by the employer or his insurance carrier is in excess of the employer's obligation to the employee or his dependents and the expense of suit, such excess shall be paid to the employee or his dependents. The legal action contemplated hereinabove shall be a civil action at law in the name of the injured employee or by the employer or insurance carrier in the name of the employee to the use of the employer or insurance carrier, or by the proper party for the benefit of the next of kin of the employee. Where an injured employee or his dependents have instituted proceedings for recovery of damages for his injuries and loss against a third person and such proceedings are dismissed for lack of prosecution, the employer or insurance carrier shall, upon application made within 90 days thereafter, be entitled to have such dismissal set aside, and to continue the prosecution of such proceedings in the name of the injured employee or dependents in accordance with the provisions of this section.
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> [N.J.S.A. 34:15-40(f) (emphasis added).]

The Hartford appeals, arguing that it is inappropriate to enforce the ninety-day statutory deadline in subsection (f) against it because it did not receive notice of the dismissal of the UM case until January 2016, and that its April 2016 motion to reinstate that case was filed within ninety days of gaining such knowledge. In opposition, NJM argues that the trial court correctly found that N.J.S.A. 34:15-40(f) contains no such "knowledge" predicate. NJM also contends that The Hartford cannot

proceed to recover its lien because of the failure of Pino's injuries to surmount the lawsuit limitation threshold, N.J.S.A. 39:6A-8.

We analyze the legal issues presented de novo. Hodges v. Sasil Corp., 189 N.J. 210, 220-21 (2007). Having done so, we conclude that the denial of The Hartford's motion comports with the applicable law because The Hartford's attempt to pursue recovery of its lien against NJM in the UM action was untimely.

As stated in the prefatory language appearing before the statutory subsections, N.J.S.A. 34:15-40 provides several mechanisms for workers' compensation carriers and employers to obtain reimbursement of benefits they had paid to injured workers in situations where a "third person" may have liability "to the employee or his dependents for an injury or death" that has occurred. Id. The closing language following subsection (g) of the statute broadly defines the term "third person" to "include corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals." Ibid. The statute prescribes in detail what degree of reimbursement occurs if the employee or his dependents recovers from a third party a sum equal to or above the compensation benefits received, N.J.S.A. 34:15-40(b), and, alternatively, a sum less than those paid benefits, N.J.S.A. 34:15-40(c). The statute

further prescribes the counsel fees and "expenses of suit" that are recoverable by the injured worker or his attorney. N.J.S.A. 34:14-40(e).

Subsection (f) of N.J.S.A. 34:15-40, which we have already quoted in full, details the applicable procedures for situations when the injured worker or his dependents has not made a recovery from a potentially-liable "third person or his insurance carrier[.]"[4] For instance, as noted in the first sentence of subsection (f), if the injured employee or his dependents fails within one year of the accident to either obtain a settlement with the third party or insurer, or bring proceedings to recover against that party, the employer or its workers' compensation insurer can bring an action against those potentially liable parties in the employee's stead, upon giving ten days' advance notice. Ibid.

Any excess sum above the workers' compensation lien that may be recovered by the employer or the workers' compensation insurer must be paid to the employee or his dependents. Ibid. Such an

[4] We assume, without deciding, that NJM, a UM carrier that issued a policy to the injured worker, Pino, constitutes under N.J.S.A. 34:15-40(f) a "third person or his insurance carrier within the meaning of this section." See Frazier v. N.J. Mfrs. Ins., 142 N.J. 590, 605 (1995) (holding that any proceeds recovered from a "functionally equivalent source" such as "uninsured motorist proceeds" are subject to workers' compensation liens). See also Montedoro v. Asbury Park, 174 N.J. Super. 305, 307-08 (App. Div. 1980).

action, which is essentially a subrogation claim, is to be filed "in the name of the injured employee or by the employer or [workers' compensation] carrier in the name of the employee to the use of the employer or [compensation] carrier, or by the proper party for the benefit of the next of kin of the employee." Ibid.

The pivotal timing issues here concern the final sentence of N.J.S.A. 34:15-40(f), which reads:

> Where an injured employee or his dependents have instituted proceedings for recovery of damages for his injuries and loss against a third person and such proceedings are dismissed for lack of prosecution, the employer or insurance carrier shall, upon application made within 90 days thereafter, be entitled to have such dismissal set aside, and to continue the prosecution of such proceedings in the name of the injured employee or dependents in accordance with the provisions of this section.
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> [Ibid. (emphasis added).]

The ninety-day deadline set forth in this provision has not been the subject of any reported case law, nor have we been supplied with any informative legislative history concerning its genesis and intended operation.[5]

As a literal matter, Pino's lawsuit against NJM was not "dismissed for lack of prosecution" as that term is commonly used

[5] At oral argument, both counsel acknowledged the rarity of this issue, indicating they had never encountered it before.

within Rule 1:13-7. Instead, the case was dismissed without prejudice, pursuant to a stipulation, and was never revived by Pino. If we apply such a literal reading of subsection (f), the ninety-day deadline seemingly would not apply to The Hartford to bring claims against NJM.

However, without the legal authority provided under subsection (f) to bring a reimbursement action against NJM, The Hartford would have no statutory basis to bring an action "in the name of the employee to the use of the employer or insurance carrier." N.J.S.A. 34:15-40(f). The detailed procedures set forth in N.J.S.A. 34:15-40 to regulate such reimbursement claims should not be bypassed. Moreover, there is no indication in the appellate record that The Hartford has asserted any common law subrogation claim. Nor does The Hartford present any argument for why a common law subrogation claim could override the procedural requirements of N.J.S.A. 34:15-40(f).

In any event, in the present context, The Hartford did not attempt to bring a separate independent action against NJM in its own right, but instead attempted to revive Pino's previously-dismissed case under that same docket number in the Law Division. Hence, if we treat the ninety-day requirement within subsection (f) as inapplicable because Pino's lawsuit was dismissed without prejudice by stipulation and not literally for "lack of

prosecution," then The Hartford lacks a statutory basis to proceed. Its motion was properly denied for that legal reason, even if it was not articulated by the trial court. Isko v. Planning Bd. of the Twp. of Livingston, 51 N.J. 162, 175 (1968) (noting that trial court orders may be affirmed for different reasons than those the trial court recited).

Alternatively, if we construe the dismissal of Pino's lawsuit as the functional equivalent of a dismissal "for lack of prosecution" within the meaning of N.J.S.A. 34:15-40(f), The Hartford's motion in April 2016 to revive the UM case — which had been dismissed in June 2014 — was manifestly beyond the ninety-day deadline.

The Hartford argues that the ninety-day period should be construed so that it is not triggered until a workers' compensation carrier obtains actual knowledge that a UM case has been dismissed. We discern no support for such a knowledge requirement within the words of the statute. The statutory procedures set forth in subsection (f), including the right of a workers' compensation carrier to file suit against a third party, on ten days' notice, if the employee or his dependents have failed to do so within one year, bespeaks a legislative objective to have such claims for subrogation or reimbursement brought expeditiously. N.J.S.A.

34:15-40(f). We agree with the trial court that a knowledge requirement should not be imputed into the statutory text.

We perceive no inequity in concluding that The Hartford's claims are untimely under the circumstances. As its own December 5, 2011 correspondence reflects, The Hartford was well aware of this accident and its right to assert its lien against any third party recovery over four years before it took action to vindicate its rights. The December 5, 2011 memo includes a "statute date" reference point of May 10, 2013, which presumably refers to when the two-year statute of limitations for Pino's personal injury suit would expire under N.J.S.A. 2A:14-2. The Hartford was therefore mindful of timeliness considerations, at least when it issued the December 2011 letter.

We share the trial court's observation in its oral ruling that perhaps Pino or her attorney should have advised The Hartford of the June 2014 dismissal of the UM case sooner, consistent with the request that The Hartford had made in December 2011 to be kept advised of the matter's status. However, we are aware of no authority that imposes a legal duty upon an employee or her personal injury attorney to supply such prompt notice. We are reluctant to recognize such a novel proposition in the absence of the participation of Pino or her former counsel in this appeal.

Moreover, the record is bereft of any documentation of any attempts by The Hartford to follow up with Pino or her counsel about the status of third-party recovery after sending out the December 5, 2011 letter. It appears that this matter may have "slipped through the cracks" at The Hartford and we discern no legal or equitable necessity to allow The Hartford to revive in 2016 a reimbursement claim arising from a 2011 accident and to revive a UM case that had been dismissed long ago in 2014.[6]

Affirmed.

[6] We decline to reach any other issues in this case, including the lawsuit limitation threshold issue and whether a workers' compensation carrier has the right to be reimbursed for medical benefits from the UM insurer, even though the UM insurer and the PIP insurer are one and the same, and reimbursement from a PIP insurer is barred by the "collateral source" doctrine. See N.J.S.A. 39:6A-6; see also Montedoro, supra, 174 N.J. Super. at 306 (noting that the UM award subject to the workers' compensation lien was "exclusive of personal injury protection benefits").