SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5448-16T4

THE ESTATE OF HENRI ADIER; DAVID I. ADIER, in his individual capacity, and as Executor of the Estate of Henri Adier, and ANNE M. ADIER-VIVIN,

Plaintiffs-Respondents,

v.

WELLS FARGO HOME MORTGAGE a/k/a AMERICA'S SERVICING COMPANY; LENDER PROCESSING SERVICES, INC.; TMB RENOVATIONS LLC; THE RAS GROUP, LLC; and INNOVATIVE INSPECTIONS;

Defendants-Respondents.

SERVICELINK FIELD SERVICES LLC,

Third-Party Plaintiff/ Respondent,

v.

ZVN PROPERTIES, INC.,

Third-Party Defendant/ Appellant.

Argued November 13, 2017 – Decided December 13, 2017

Before Judges Messano, Accurso, and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1839-15.

Don R. Sampen (Clausen Miller PC) of the Illinois bar, admitted pro hac vice, argued the cause for appellant (Clausen Miller PC, attorneys; Don R. Sampen, Carl M. Perri and Matthew T. Leis, on the briefs).

Brian S. Tretter argued the cause for respondent ServiceLink Field Services, LLC (Fidelity National Law Group, attorneys; Brian S. Tretter, on the brief).

Cruser, Mitchell, Novitz, Sanchez, Gaston & Zimet, LLP, attorneys for respondent TMB Renovations, LLC (Douglas V. Sanchez, on the brief).

PER CURIAM

Plaintiffs, the Estate of Henri Adier (the Estate), David Adier, individually and as executor of the Estate, and Anne M. Adier-Vivin, sued defendants, Wells Fargo Home Mortgage, America's Service Company, ServiceLink Field Services, LLC (ServiceLink), TMB Renovations, The Ras Group, New Vision Development Group, LLC and National Field Representatives, Inc. Plaintiffs alleged causes of action for trespass, conversion, property damage and intentional infliction of emotional distress based upon defendants' entry into, and theft from, decedent's home after Wells Fargo declared its mortgage in default.

ServiceLink answered and filed a third-party complaint against ZVN Properties, Inc. (ZVN), with whom it had entered into

a "Trade Contractor Agreement" (the Agreement). ServiceLink sought common law and statutory contribution from ZVN pursuant to the Joint Tortfeasors Contribution Law (the JTCL), N.J.S.A. 2A:53A-1 to -5, and the Comparative Negligence Act (CNA), N.J.S.A. 2A:15-5.1 to -5.8, as well as common law and contractual indemnification under the Agreement.[1]

The Agreement, drafted by ServiceLink, a Delaware corporation, included the following forum selection clause:

> THIS AGREEMENT SHALL BE GOVERNED BY, CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF FLORIDA, AND NO DOCTRINE OF CHOICE OF LAW SHALL BE USED TO APPLY ANY LAW OTHER THAN THAT OF FLORIDA. Any action brought which is related, directly or indirectly, to this Agreement will be brought in a court of appropriate jurisdiction in Duval County, Florida. . . . The choice of forum set forth in [this section] shall not be deemed to preclude the enforcement of any action related to this Agreement in any other jurisdiction.

ZVN, an Ohio-based corporation, moved to dismiss the third-party complaint based on the forum selection clause.

Relying on our decision in McNeill v. Zoref, 297 N.J. Super. 213 (App. Div. 1997), the judge denied ZVN's motion, reasoning the entire controversy doctrine (ECD), Rule 4:30A, expressed New

[1] The Agreement contained an indemnification provision wherein ZVN agreed to indemnify and hold ServiceLink harmless for any property damages "arising out of acts or omission to act under [the] Agreement of [ZVN's] employees, contractors or agents."

Jersey's strong public policy of avoiding piecemeal litigation, and that policy trumped the forum selection clause. Importantly, the judge also recognized that plaintiffs' claims had nothing to do with the Agreement, but, instead were grounded in claims of "tortious conduct . . . in New Jersey that resulted in losses." We granted ZVN's motion for leave to appeal.

Before us, ZVN argues that forum selection clauses are generally valid and enforceable, and the judge erred by relying on the reasoning expressed in McNeill, which was tethered to a former, much broader iteration of the ECD and not the doctrine's present version. While we agree that changes to the ECD since McNeill limit its application to these facts, we nevertheless affirm for other reasons. See, e.g., Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (noting appeals are taken from orders, not the reasons for the court's decision).

Forum selection clauses are prima facie valid and enforceable in New Jersey. Caspi v. Microsoft Network, LLC, 323 N.J. Super. 118, 122 (App. Div.), certif. denied, 162 N.J. 199 (1999). However, courts will decline to enforce a forum selection clause if: "(1) the clause is a result of fraud or 'overweening' bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial." Ibid.

The ECD reflects a preference that related claims arising among related parties be adjudicated together rather than in separate, successive, or fragmented litigation. Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 443 (2011). "In its first formulation, Rule 4:30A was broad, requiring joinder of claims and parties and imposing preclusion as a penalty to ensure compliance with that mandate." Ibid. It was during this period that we decided McNeill.

In McNeill, the plaintiff and her late husband entered into a mortgage with Mercury Capital and on the same day entered into an "Agreement for Mortgage Brokerage Services," which was signed by the plaintiffs and one defendant, Mark Gleitman. McNeill, supra, 297 N.J. Super. at 217. That agreement contained a clause stating all litigation would be venued in New York. Ibid. Thereafter, the plaintiff brought suit in New Jersey, against Mercury, its officers, and agents, including Gleitman, seeking discharge of the mortgage. Id. at 218. The trial court enforced the forum selection clause in the plaintiff's agreement with Gleitman and dismissed the complaint on jurisdictional grounds. Ibid. The plaintiff appealed and argued the trial court erred in enforcing the forum selection clause because it applied only to Gleitman. Ibid.

We reversed and remanded, reasoning that, since the mortgage documents contained no forum selection clause, and only the plaintiff and Gleitman executed the brokerage agreement, the forum selection clause was enforceable only by or against the signatories to the brokerage agreement. Id. at 221-22. We further invalidated the forum selection clause because it contravened the policy objectives of the entire controversy doctrine. Id. at 223-24.

> If we were to reverse the jurisdictional issue as to all defendants but Gleitman, we would be running against the grain of what the entire controversy doctrine was designed to achieve. We would thereby sanction that if any relief were obtained against defendant Gleitman under the brokerage services agreement, it would have to be secured in New York when all the remaining parties to the mortgage transaction that Gleitman was instrumental in producing would be in New Jersey. Under these circumstances, the forum-selection clause in the brokerage services agreement must give way to the strong public policy promoting the constitutionally based entire controversy doctrine. Consequently, we decline to enforce the forum-selection clause in the brokerage services agreement.
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> [Id. at 223-24.]

We stated the "objectives behind the [ECD] are (1) to encourage the comprehensive and conclusive determination of a legal controversy; (2) to achieve party fairness, including both parties before the court as well as prospective parties; and (3) to promote judicial economy and efficiency by avoiding fragmented, multiple

and duplicative litigation. Id. at 223 (emphasis added). We emphasized, "[Rule] 4:30A . . . requires all claims against all potential defendants in one encompassing litigation." Ibid. (emphasis added).

In 1998 -- one year after McNeill -- the Court "adopted the recommendation of the Civil Practice Committee and amended [Rule] 4:30A to restrict the scope of the [ECD] to non-joinder of claims, as opposed to its earlier formulation of non-joinder of claims and parties." Hobart Bros. Co. v. Nat. Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div. 2002). In sum, the "Court moderated its approach by reinterpreting the doctrine as it related to parties and . . . Rule 4:30A was amended to limit its scope to mandatory joinder of claims." Kent Motor Cars, supra, 207 N.J. at 444. As a result, certainly McNeill's persuasive authority is limited.

However, as the judge noted, plaintiffs' complaint alleged damages as a direct result of the tortious conduct of defendants. ServiceLink's third-party complaint sought contribution under the JTCL and the CNA. As the Court recently said:

> A defendant compelled to pay more than the percentage of damages corresponding to the jury's allocation of fault to that defendant ordinarily has a remedy under the [CNA]: a claim for "contribution from the other joint tortfeasors." N.J.S.A. 2A:15-5.3(e). The contribution claim is governed by the [JTCL],

> in which the Legislature declared that "[t]he right of contribution exists among joint tortfeasors." N.J.S.A. 2A:53A-2. "The [JTCL] was enacted to promote the fair sharing of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim." Holloway v. State, 125 N.J. 386, 400-01 (1991) (citation omitted). The statute provides that where an injury is caused by the conduct of joint tortfeasors, and a joint tortfeasor pays the judgment "in whole or in part," that party shall be entitled to recover contribution from other joint tortfeasors "for the excess so paid over his pro rata share." N.J.S.A. 2A:53A-3.
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> Applied together, "[t]he [CNA and the JTCL] comprise the statutory framework for the allocation of fault when multiple parties are alleged to have contributed to the plaintiff's harm." Town of Kearny v. Brandt, 214 N.J. 76, 96 (2013).
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> [Jones v. Morey's Pier, Inc., 230 N.J. 142, 159-160 (2017).]

"Given the impact of a defendant's percentage of fault on the scope of its liability, the statutes' objectives are best served when the factfinder evaluates the fault of all potentially responsible parties." Brandt, supra, 214 N.J. at 102. Assessment of each tortfeasor's comparative fault applies to alleged negligence as well as intentional torts, as here. Blazovic v. Andrich, 124 N.J. 90, 107 (1991).

In other words, ServiceLink was entitled to implead ZVN and prove ZVN was responsible as a joint tortfeasor so as to limit any

allocation of its own fault for plaintiffs' damages, and thereby limit any award against it. ServiceLink may assert this claim even though plaintiffs, having failed to name ZVN as a direct defendant, are not "in a position to recover damages from the defendant at issue." Brandt, supra, 214 N.J. at 103. ServiceLink bears the burden of proof on its third-party contribution claim. Miraglia v. Miraglia, 106 N.J. Super. 266, 270 (App. Div. 1969).

The right to assert this claim was wholly separate from the Agreement. In short, the forum selection clause had no application to ServiceLink's statutory contribution claim. Resolution by the factfinder of whether ZVN is a joint tortfeasor with ServiceLink, and if so, their comparative faults, should properly be decided in the same forum adjudicating plaintiffs' claims. The judge, correctly recognizing the nature of plaintiffs' tort claims, properly denied the motion to dismiss.

We add only the following. Adjudication of ServiceLink's and ZVN's comparative faults may fully address any contractual indemnification claim ServiceLink may have under the Agreement. For example, if the factfinder concludes ZVN had no responsibility, then ServiceLink would have no viable indemnification claim. However, if the findings are otherwise, the court shall at that time consider the applicability of the forum selection clause to ServiceLink's contractual indemnification claim against ZVN. We

do not express an opinion on that issue. As to claims of indemnification, "obligations generally accrue on an event fixing liability, rather than on preliminary events that eventually may lead to liability but have not yet occurred." Bd. of Educ. v. Utica Mut. Ins. Co., 172 N.J. 300, 307 (2002).

Affirmed.