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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0593-15T1

COOPER INDUSTRIES, LLC,

Plaintiff-Respondent,

v.

COLUMBIA CASUALTY COMPANY and
ONE BEACON AMERICA INSURANCE COMPANY,

Defendants-Appellants,

and

EMPLOYERS INSURANCE OF WAUSAU,
ALLSTATE INSURANCE COMPANY,
LEXINGTON INSURANCE COMPANY and
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

Argued telephonically March 15, 2017 – Decided April 13, 2018

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2471-13.

Karen H. Moriarty and Clinton E. Cameron (Troutman Sanders, LLP) of the Illinois bar, admitted pro hac vice, argued the cause for appellants (Coughlin Duffy, LLP, and Clinton E. Cameron, attorneys; Suzanne C. Midlige, Timothy P. Smith and Karen H. Moriarty, on the briefs).

Michael D. Lichtenstein and Michael H. Ginsberg (Jones Day) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent (Lowenstein Sandler, LLP, and Michael H. Ginsberg, attorneys; Michael D. Lichtenstein, Catherine M. Aiello, Michael H. Ginsberg, and Dominic I. Rupprecht (Jones Day) of the Pennsylvania bar, admitted pro hac vice, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Appellants, Columbia Casualty Company (Columbia) and OneBeacon Insurance Group (OneBeacon), appeal from the June 12, 2015 Law Division order granting summary judgment to plaintiff Cooper Industries, LLC (Cooper), and the August 21, 2015 order denying their motion for reconsideration. The issues presented in this appeal are whether a Bill of Sale between plaintiff and its predecessor transferred insurance rights to plaintiff, and, if so, whether the transfer violated the anti-assignment clause contained in the insurance policies in question. We conclude that the sale transferred the insurance rights and did not violate the anti-assignment clauses. Thus, we affirm.

I.

To put the issues in perspective, a brief overview of plaintiff's corporate history is necessary. In 1928, Thomas A. Edison, Inc. began industrial operations in Kearny, New Jersey. In 1957, the company merged with McGraw Electric Company to form the McGraw-Edison Company (Old McGraw), and continued operations. Old McGraw later obtained primary and umbrella general liability insurance coverage from Commercial Union Insurance Company, a OneBeacon predecessor, covering Old McGraw from 1971 to 1980. In addition, American Employers Insurance, another OneBeacon predecessor, issued an umbrella policy covering 1974 to 1977, and Columbia issued two umbrella policies covering 1977 to 1978. The named insured on each policy was Old McGraw, and each policy contained an anti-assignment clause, barring any assignment of the policies without the insurers' consent. Additionally, the policies protected against occurrences, including environmental and pollution-related occurrences.

In May 1985, plaintiff acquired Old McGraw and set up ten "Mirror Image Companies" mimicking Old McGraw's previous business operations. The Mirror Image Companies owned an acquisition company called CI Acquisition, which, in turn, owned another acquisition company called CM Mergerco. Neither the Mirror Image Companies, CI Acquisition, nor CM Mergerco had any operating

assets. On May 31, 1985, CM Mergerco and Old McGraw merged with Old McGraw as the surviving entity. Thus, as of this date, CI Acquisition owned Old McGraw, with plaintiff as the owner of both through the corporate chain.

A year later, on May 30, 1986, Old McGraw and CI Acquisition merged, with CI Acquisition as the surviving entity. In this merger, the certification and agreement of merger documents revealed that CI Acquisition was assuming all of Old McGraw's liabilities and obligations, while absorbing all of Old McGraw's assets. The Merger Agreement transferred "all the property, rights . . . and other assets of ever [sic] kind and description" from Old McGraw to CI Acquisition. Despite the absence of any specific reference to insurance rights, appellants do not dispute that Old McGraw's insurance rights transferred to CI Acquisition through this merger.

Five minutes later on the same date, plaintiff merged five of the Mirror Image Companies together and renamed the surviving entity "McGraw-Edison Company" (New McGraw). CI Acquisition then distributed its assets, all of which had been Old McGraw's assets, to New McGraw and the remaining Mirror Image Companies.[1] This

[1] The remaining Mirror Image Companies were Cooper Clark, Cooper Power Systems, Cooper Service and Cooper Controls. Of the ten

distribution was effectuated by Bills of Sale issued to the five entities in exchange for their stock in CI Acquisition. In the Bill of Sale to New McGraw, with the exception of certain listed assets,[2] CI Acquisition transferred "all of [its] assets, rights and properties of every kind and nature . . . used in or related to all operations other than its Power Systems, Controls, Clark and Service operations." Although the Bill of Sale did not specify Old McGraw's insurance among the transferred assets, it stated that New McGraw assumed all of CI Acquisition's liabilities.

After distributing its assets, CI Acquisition liquidated itself. At that point, plaintiff owned the surviving Mirror Image Companies and New McGraw, which together owned all of Old McGraw's former assets. Eighteen years later, on November 30, 2004, plaintiff merged New McGraw into itself, with plaintiff as the surviving entity. Appellants do not dispute that if Old McGraw's insurance rights transferred to New McGraw through the 1986 Bill of Sale, then those rights transferred to plaintiff when it merged with New McGraw in 2004.

Mirror Image Companies originally created in 1985, one of them, Cooper Generators, was sold prior to the 1986 merger.

[2] The exempted assets consisted of those used in Old McGraw's business operations that had been transferred to the four corresponding Mirror Image Companies and were reflected in Bills of Sale issued to those companies.

In 2009, the Environmental Protection Agency (EPA) identified plaintiff as an entity responsible for the remediation of the Kearny site, based on Old McGraw's actions in generating and disposing hazardous substances there. The EPA considered plaintiff to be the "successor to a person who owned and operated the [s]ite[.]" In 2011, plaintiff notified appellants and Old McGraw's other liability insurers of the potential environmental claims. Plaintiff asserted that defense and indemnification were covered under the policies these insurers, including appellants, issued to Old McGraw. Appellants did not acknowledge any obligation to plaintiff related to the EPA action.

On April 19, 2013, plaintiff entered into an Administrative Settlement Agreement and Order on Consent with the EPA. In turn, on May 24, 2013, plaintiff filed a complaint against appellants and the other insurers, asserting breach of contract and seeking a declaratory judgment that it was entitled to coverage in the EPA action under Old McGraw's policies. On May 14, 2015, plaintiff moved for partial summary judgment on the issue of whether plaintiff could file claims under Old McGraw's policies. On June 12, 2015, following a hearing, the trial court granted plaintiff's motion.

In its decision, the court found that the language used in the 1986 Bill of Sale transferring all rights and assets from CI

Acquisition to New McGraw was ambiguous because it did not specifically reference insurance rights. To resolve this ambiguity and determine the intent of the parties in executing the 1986 Bill of Sale, the court relied on deposition testimony submitted by plaintiff in support of its motion from three of plaintiff's employees.

Diane Schumacher, who worked in plaintiff's law department and became general counsel to the company in 1995, was one of the three deponents. Although she did not participate in drafting the Bill of Sale, she had knowledge of plaintiff's business operations. Schumacher testified at two separate depositions, first as a fact witness and later as a corporate representative. She testified that the sale of CI Acquisition was intended to create New McGraw with all of the assets and liabilities of Old McGraw, including the insurance rights. She further testified that any assets that the four Mirror Image Companies received through the asset sale already belonged to those companies and did not include the insurance rights.

The other two deponents, Robert Teets and Anthony Black, worked in plaintiff's risk management and insurance department. Although neither was involved in the 1986 asset sale, they had personal knowledge of plaintiff's business operations both prior to and after the asset sale, as well as plaintiff's ongoing

business relationship with appellants. They testified that plaintiff made retroactive premium payments to defendants with plaintiff's logo on the checks. Furthermore, they asserted that plaintiff made claims against Old McGraw's insurance policies, which appellants paid. Documentary evidence corroborated the testimony of all three witnesses.

After considering the deposition testimony, the court determined that the 1986 Bill of Sale included the insurance rights under Old McGraw's policies, and that those rights transferred to plaintiff when it merged New McGraw into itself in 2004. Next, the court examined whether the transfer violated the anti-assignment clause contained in the insurance policies. The court acknowledged that plaintiff needed to prove that the 1986 transfer "constituted a valid post-loss assignment and/or that the transaction constitute[d] a de facto merger." To that end, the court found that the Kearny site had been polluted during the policies' coverage period in the 1970s and early 1980s, and, as such, Old McGraw's liability for that contamination attached before the 1986 asset sale. The court thus concluded that the anti-assignment clauses were inapplicable because the sale constituted a post-loss assignment of a claim to Old McGraw's successors, rather than a passing of the policies themselves. In the alternative, the court also found that the 1986 sale

constituted a de facto merger because "there was a continuity of management, ownership, personnel, and general business operations" between Old McGraw, CI Acquisition, New McGraw and then plaintiff.

On July 9, 2015, appellants moved for reconsideration. While the reconsideration motion was pending, the court conducted a bench trial on July 13, 2015 on all remaining issues. Although appellants did not participate in the bench trial, they informed the court that they had reached a settlement agreement with plaintiff. Thereafter, on July 23, 2015, the court entered a consent order memorializing the settlement agreement, wherein appellants agreed not to dispute the fact that plaintiff's claims for damages arose from occurrences that were covered by Old McGraw's policies. Appellants did however reserve the right to pursue their motion for reconsideration and to appeal from the June 12, 2015 decision or any adverse decision on the reconsideration motion. On August 21, 2015, the court issued an opinion and order, indicating it would not change its decision on reconsideration for the same reasons the court found previously. This appeal followed.

II.

We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. Templo Fuente De Vida Corp. v. National Union Fire Ins. Co., 224 N.J.

189, 199 (2016) (citation omitted). Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial court's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). "[F]or mixed questions of law and fact, [we] give[] deference . . . to the supported factual findings of the trial court, but review[] de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (citations omitted).

This standard compels the grant of summary judgment "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 a judgment or order as a matter of law." R. 4:46-2(c). "To defeat a motion for summary judgment,

the opponent must come forward with evidence that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (citation omitted). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). Thus, if the evidence is "so one-sided that one party must prevail as a matter of law," the trial court's grant of summary judgment should be affirmed. Brill, 142 N.J. at 540. Applying the above standards, we discern no basis to reverse the grant of summary judgment.

Appellants contend the trial court erred in finding that the language of the 1986 Bill of Sale was ambiguous and then construing the Bill of Sale to include the transfer of the insurance rights. They assert the court improperly found that there was no genuine issue of material fact as to coverage. "When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). No special deference is given to the trial court's interpretation, and we "look at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 225 (2011).

An "unambiguous contract[] will be enforced as written unless [it is] illegal or otherwise violate[s] public policy." Leonard & Butler, P.C. v. Harris, 279 N.J. Super. 659, 671 (App. Div.

1995). If a contract's language is plain, that language alone must determine the agreement's effect. Manahawkin Convalescent, 217 N.J. at 118. However, if a contract is ambiguous, "courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining [the] contract's interpretation." County of Morris v. Fauver, 153 N.J. 80 (1998).

Extrinsic evidence is admissible to assist a court in "achiev[ing] the ultimate goal of discovering the intent of the parties," or "uncover[ing] the true meaning of contractual terms." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269-70 (2006). This evidence may include "the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979). Ultimately, courts enforce contracts based on their express terms, their underlying purpose, the surrounding circumstances, and the intent of the parties. Manahawkin Convalescent, 217 N.J. at 118.

Here, in interpreting the 1986 Bill of Sale between CI Acquisition and New McGraw, the analysis boils down to whether the language alone clearly provided for the transfer of the insurance rights, and, if so, which entity received those rights. The Bill of Sale provided that CI Acquisition transferred "all of [its]

assets, rights and properties of every kind and nature" to New McGraw and the remaining Mirror Image Companies. Because insurance rights are unequivocally encompassed within the plain meaning of an asset or a right, the Bill of Sale undoubtedly transferred the insurance rights. This conclusion is further supported by appellants' concession that the merger agreement between Old McGraw and CI Acquisition transferred the insurance rights to CI Acquisition, despite failing to expressly reference those rights.

Nevertheless, this does not resolve the issue in its entirety. Rather, the remaining inquiry is whether the Bill of Sale effectively transferred the insurance rights to New McGraw or one of the Mirror Image Companies. In this regard, we agree that the language is ambiguous in that the Bill of Sale exempted certain assets and transferred those assets to the four Mirror Image Companies, but never specified which assets were being transferred to those companies and which were being transferred to New McGraw. Because it is impossible to discern from the plain meaning of the language whether the rights were part of "all operations" or were "relat[ed] to . . . Power Systems, Controls, Clark, [or] Services operations[,]" we agree with the trial court that the language was ambiguous and necessitated reliance on extrinsic evidence to aid in the interpretation of the Bill of Sale.

Based on the extrinsic evidence submitted by plaintiff, consisting of the deposition testimony of Teets, Black, and Schumacher, we are satisfied as was the trial court that plaintiff intended the insurance rights to pass from CI Acquisition to New McGraw. In particular, Schumacher's testimony made plaintiff's intentions in undergoing this corporate restructuring abundantly clear. Schumacher testified that, with the exception of the assets specifically owned by the four Mirror Image Companies, plaintiff's intent was to move all of Old McGraw's assets, including the insurance rights, to New McGraw. Schumacher explained that the insurance policies belonged to Old McGraw as the parent company and was intended to be included in the "all . . . other assets" language in the Bill of Sale to New McGraw.

In addition, Teets and Black both testified that after the Bill of Sale was effectuated, plaintiff continued to pay premiums on Old McGraw's insurance policies using checks with plaintiff's logo and appellants never refused those payments. Further, according to Teets and Black, plaintiff made claims under the policies and appellants paid out on the claims. The testimony was corroborated by documentary evidence and appellants submitted no evidence contradicting the proffered testimony. Thus, the evidence here was "so one-sided that one party must prevail as a

matter of law," Brill, 142 N.J. at 540, and the court's conclusion in this regard was amply supported by the record.

Appellants challenge the admissibility of the testimony that formed the basis for the court's decision, arguing that the deposition testimony was inadmissible hearsay because none of the three deponents participated in drafting the Bill of Sale and therefore had no personal knowledge of the drafter's intent. We evaluate a trial court's evidential ruling under an abuse of discretion standard. Knop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012). Such a ruling must be upheld "unless it can be shown that [it] . . . was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

Under N.J.R.E. 602, witnesses may not testify to a matter unless they have personal knowledge of it. One exception to that requirement is set forth in Rule 4:14-2, which provides that a party may depose a corporation, and the corporation must designate one or more persons to testify on its behalf. These corporate witnesses may then testify "as to matters known or reasonably available to the organization," even if these matters are outside the witness' personal knowledge. Ibid.

Under Rule 4:16-1(b), the deposition of a party or a witness designated as a corporate party's representative "may be used by

an adverse party for any purpose against the deponent or the corporation." Additionally, Rule 4:16-1(c) provides that any party may utilize the deposition of a witness, "whether or not a party," against any other party that was present or represented at the taking of the deposition "if the court finds that the appearance of the witness cannot be obtained." One of the listed reasons why a witness' deposition testimony may be submitted in lieu of live testimony is that the witness "is out of this state." Ibid.

Here, we acknowledge that Teets and Black were not involved with the drafting of the 1986 Bill of Sale. However, their testimony was confined to subjects about which they had personal knowledge, specifically, plaintiff's risk management, insurance, and ongoing business relationships with appellants as insurers. Therefore, their testimony regarding their retroactive premium payments to appellants, their submission of claims to appellants under Old McGraw's policies, and their receipt of payouts on claims from appellants was entirely proper. Furthermore, because Teets and Black lived in Texas and were indisputably "out of this state" at the time this matter was considered, admission of their deposition testimony was permissible under Rule 4:16-1(c).

Schumacher's testimony as both a fact witness and a corporate representative was also properly admitted under Rule 4:14-2. At

her first deposition, Schumacher testified about matters she had personal knowledge of, including plaintiff's operations before and after the Bill of Sale was effectuated and plaintiff's interactions with appellants. At her second deposition, her testimony concerned matters outside her personal knowledge, but within plaintiff's corporate knowledge. Additionally, it was also undisputed that Schumacher was in Mexico when the summary judgment motion was adjudicated and thus "out of this state." As a result, the use of her deposition testimony was permissible under Rule 4:16(c).

We reject appellants' additional argument that pursuant to Rule 4:16-1(b), the deposition of a corporate representative may only be used by an adverse party against the corporation. Appellants' reliance on federal case law and treatises applying F.R.C.P 30(b)(6), the federal equivalent to Rule 4:14-2, is misplaced, as those authorities address whether corporate designees deposed under the rule may be called to testify at trial to matters outside their personal knowledge, not whether their deposition testimony may be admitted into evidence. Moreover, in the cases relied upon by appellants, the corporate representative was available to testify, whereas here, appellants do not dispute that Schumacher was unavailable. Accordingly, we discern no abuse of discretion in the court's consideration of the deposition

testimony of Teets, Black, and Schumacher to aid in the interpretation of the Bill of Sale at issue.

Finally, appellants argue that even if the Bill of Sale included insurance rights under Old McGraw's policies among the transferred assets, the court should have found the transfer void based on the anti-assignment clauses contained in the policies. More specifically, appellants contend the court erred in finding that the Bill of Sale assigned claims under the policies because the Bill of Sale was drafted "decades before any assignable claim . . . could even exist."

It is undisputed that the subject policies required the insurers' consent in order to assign the policies to a third party. "However, once a loss occurs, an insured's claim under a policy may be assigned without the insured's consent." Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 442 N.J. Super. 28, 36 (2015). This is so because an assignment after a loss has occurred "is not an assignment of the policy, but of the claim for the insurance, and is not within the inhibition of [an anti-assignment] clause." Combs v. Shrewsbury Mut. Fire Ins. Co., 32 N.J. Eq. 512, 515 (N.J. Ch. 1880).

It is undisputed that appellants' policies were "occurrence" policies. In "occurrence" policies, the peril insured is the occurrence itself and, upon the happening of the occurrence,

"coverage attaches even though the claim may not be made for some time thereafter." Zuckerman v. Nat'l Union Fire Ins. Co., 100 N.J. 304, 310 (1985) (quoting S. Kroll, "The Professional Liability Policy 'Claims Made'" 13 Forum 842, 843 (1978)). In addition, once a covered loss occurs, the assignment from the insured to another party of the right to make a related claim "does not alter, in any meaningful way, the obligations of the insurer accepted under the policy," and instead changes only "the identity of the entity enforcing the insurer's obligation to insure the same risk." Elat, Inc. v. Aetna Cas. & Sur. Co., 280 N.J. Super. 62, 67 (App Div. 1995). The risk to the insurer is not thereby increased by changing the beneficiary of the insurance proceeds. Givaudan, 442 N.J. Super. at 37. In effect, the insurer becomes a debtor of the insured and cannot restrict the assignment of that debt through enforcement of an anti-assignment clause. Flint Frozen Foods v. Firemen's Ins. Co., 12 N.J. Super. 396, 401 (Law Div. 1951).

Here, in the July 23, 2015 consent order memorializing the settlement agreement, appellants agreed not to dispute that plaintiff's claims for damages arose from occurrences covered by the Old McGraw's policies. As a result, it is undisputed that any claims made under the policies related to the EPA action stemmed from occurrences during the policy periods. Because the insured-against occurrences happened before the 1986 asset sale, any

transfer from CI Acquisition to New McGraw of insurance rights under Old McGraw's policies was an assignment of claims, not the policies themselves. Thus, we agree with the trial court that the assignment of insurance rights in the 1986 Bill of Sale was a post-loss assignment, as opposed to an impermissible assignment of insurance policies.

Because of our disposition on the issues, we need not address the trial court's determination regarding a de facto merger.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION