SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0997-21

TONY PING YEW,

Plaintiff-Appellant,

v.

FMI INSURANCE COMPANY,

Defendant-Respondent.

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Argued February 13, 2023 – Decided March 29, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. DC-001516-21.

Tony Ping Yew, appellant, argued the cause pro se.

Kyle A. Livingstone argued the cause for respondent (Methfessel & Werbel, attorneys; Olivia R. Licata, of counsel and on the brief).

PER CURIAM

Self-represented plaintiff Tony Ping Yew appeals from the October 25, 2021 Law Division order denying reconsideration of a September 27, 2021

order. The September 27 order dismissed with prejudice his complaint against defendant FMI Insurance Company on the ground that the complaint, which followed an identical lawsuit brought by plaintiff, was precluded based on principles of res judicata, collateral estoppel, and the entire controversy doctrine. We affirm.

Plaintiff's complaint arises from a water damage claim stemming from a March 3, 2018 sump pump failure in the basement of plaintiff's home. At the time, plaintiff was insured under a homeowner's insurance policy issued by defendant. On March 14, 2018, defendant denied the claim because plaintiff's policy excluded coverage for damage caused by a sump pump failure.

Plaintiff had been insured by defendant for many years prior to the denial of the claim. Back in 2012, along with a general renewal notice, plaintiff had received a "special notice" from defendant informing him that defendant was consolidating all sump pump coverage in a separate endorsement that he could add to his policy for an additional premium.[1]

The special notice warned plaintiff that if he did not affirmatively select the coverage, the policy would exclude all claims for damage caused by a sump

[1] According to defendant, an "endorsement" is "an amendment or addition to an existing policy, which can be used to add, delete, expand, exclude, or otherwise alter the coverage contained within the policy."

pump failure. In subsequent annual renewal notices after 2012, defendant did not specifically address or reinform plaintiff about the option to purchase supplemental sump pump insurance coverage or the consequences for failing to do so. Nonetheless, plaintiff never elected to add the supplemental sump pump coverage to his insurance policy.

Plaintiff filed an internal appeal of the March 14, 2018 claim denial with defendant. On April 19, 2018, defendant reaffirmed its denial, explaining that plaintiff "did not elect to include sump pump coverage on [his] policy." Plaintiff then requested the New Jersey Department of Banking and Insurance (DOBI) to review defendant's denial of coverage.

On June 12, 2018, following a formal investigation of plaintiff's claim, DOBI upheld defendant's denial of coverage, concluding that defendant's "actions [were] in accordance with the provisions of the policy contract, applicable statutes and regulations" because supplemental sump pump coverage "was not elected, purchased, or paid for" by plaintiff. DOBI subsequently declined to reopen the investigation as requested by plaintiff and rejected plaintiff's additional contentions "that [defendant] maliciously removed the [sump pump] coverage and sought to keep it secret from [plaintiff]" or that defendant's "actions [were] discriminatory."

On March 12, 2019, plaintiff filed a complaint against defendant seeking compensatory and punitive damages (the first complaint). In the complaint, plaintiff acknowledged receipt of the 2012 special notice of supplemental sump pump coverage. However, plaintiff alleged defendant was "negligent for not providing [the] notice . . . in each renewal period," "breached the implied covenant of good faith and fair dealings" by not providing the notice annually, and acted in "bad faith" by "fail[ing] to include" and "deliberate[ly] . . . excluding" the notice each renewal period. As a result, the complaint asserted that "[p]laintiff was denied the opportunity to buy coverage and thus suffered uncovered damages on [March 3, 2018]."

Over plaintiff's objection, defendant ultimately moved for summary judgment dismissal of the first complaint, which was granted in a May 24, 2019 order. In granting the motion, the trial court found no dispute of material facts and no legal basis for the claims. Plaintiff's subsequent motion for reconsideration was denied on July 2, 2019.

Plaintiff appealed from the trial court orders, and, in an unpublished opinion, we affirmed both orders. Ping Yew v. FMI Ins. Co., No. A-4947-18 (App. Div. June 22, 2020) (slip op. at 2). In our opinion, we first recounted that plaintiff's complaint "alleged [defendant] was negligent and breached the

covenant of good faith and fair dealing, because it failed to advise him that he could add supplementary sump pump coverage each year he renewed his policy." Ibid. We observed that "[plaintiff] admitted he saw the [2012] notice, but elected not to purchase the coverage." Id. at 4.

We rejected plaintiff's contention that defendant had a duty to inform him each renewal period of the supplemental sump pump coverage because of "a special relationship" between defendant and plaintiff. Id. at 7. We explained:

> [Plaintiff] has not established a basis for finding a special relationship between [defendant] and himself that would give rise to a duty to inform him of the need to buy sump pump coverage, or to inform him annually of the option to do so. [Plaintiff] has presented no evidence that he consulted with [defendant] regarding any special insurance needs, nor that [defendant] made any representations to him about the adequacy of his coverage. We reject the notion that because [defendant] provided notice to [plaintiff] in 2012, it was obliged to provide similar notices every year thereafter. As the notice stated, it was prompted by a consolidation of sump pump coverages in a single endorsement. The notice informed [plaintiff] that his underlying policy form excluded sump pump coverage. [Plaintiff] does not contend that the exclusion itself was somehow unclear or ambiguous. He had no reason to assume his policy included coverage in subsequent years without purchasing the endorsement.
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> [Id. at 7-8 (footnote omitted).]

Plaintiff's petition for certification to the Supreme Court was subsequently denied, Ping Yew v. FMI Ins. Co., 244 N.J. 428 (2020), as was plaintiff's "motion for reconsideration of the Court's order denying the petition for certification." Ping Yew v. FMI Ins. Co., 246 N.J. 305 (2021).

On July 25, 2021, plaintiff filed a second complaint against defendant alleging defendant "committed the common law tort of negligence of bad faith and violation of statutory laws." In the second complaint, plaintiff renewed his allegations that defendant's failure to notify plaintiff of supplemental sump pump coverage in each annual renewal of his policy constituted negligence, bad faith, and breach of the implied covenant of good faith and fair dealing. Plaintiff also asserted that "the second complaint [was] to address the legal errors of the prior courts," to "improve on [the] previous complaint [by] adding case law[and] rules," and to preemptively address why res judicata was not a bar to the second complaint.

In lieu of an answer, defendant moved pursuant to Rule 4:6-2(e) to dismiss the second complaint with prejudice based on res judicata, collateral estoppel, and the entire controversy doctrine. Following oral argument conducted on September 27, 2021, the motion judge entered an order granting defendant's motion. In an oral opinion, the judge noted that the second complaint contained

"the same arguments" alleged "in the first complaint." The judge found "no legal basis to proceed" because plaintiff's claims were precluded by the prior proceeding.

Specifically, applying res judicata, the judge found that "a detailed review of the [second] complaint" revealed that it was "the same complaint" as the first, summary judgment dismissing the first complaint was a "final judgment on the merits," and the second complaint related to "the same sump pump loss" alleged in the first complaint. As an alternative basis for dismissing plaintiff's complaint, the judge found that "even if, for some reason, res judicata did not apply, . . . collateral estoppel would."

In finding that the five elements of collateral estoppel were present to bar all issues raised in the second complaint, the judge explained that: (1) the issue of whether defendant had a "duty" to provide notice of supplemental sump pump coverage each renewal period raised in the second complaint was "identical" to the issue raised in the first complaint; (2) the Appellate Division's decision affirming the trial judge's summary judgment order suggested that "[t]he issue was actually litigated in the prior proceeding"; (3) "[t]he court in the prior proceeding issued a final judgment," which plaintiff "appealed . . . to the Appellate Division"; (4) "[t]he determination of the issue was essential to the

prior judgment" because it "was the main issue"; and (5) "the party against whom the doctrine was asserted was a party . . . in the earlier proceeding."

As yet another alternative basis for dismissing plaintiff's complaint, the judge determined that even if plaintiff's second complaint "accounted for some new claim," the claim would be barred under the "entire controversy doctrine." After reciting the governing principles, the judge observed that the second complaint involved "the same facts" and tort claims as the first complaint, namely "the sump pump incident" and the allegations of "negligence and bad faith" by virtue of defendant's failure to include supplemental sump pump coverage notices in annual renewals following 2012. Therefore, the judge concluded that the entire controversy doctrine barred any additional related claim raised for the first time in plaintiff's second complaint.

Plaintiff subsequently moved for reconsideration. On October 25, 2021, after oral argument, the judge entered an order denying plaintiff's motion. In an oral opinion, the judge determined that plaintiff failed to meet the standard for reconsideration under Rule 4:49-2. This appeal followed.

We "review[] de novo the trial court's determination of [a] motion to dismiss under Rule 4:6-2(e)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Consequently, we

"owe[] no deference to the trial court's legal conclusions." Ibid. The application of res judicata, collateral estoppel, and the entire controversy doctrine are questions of law which we also review de novo. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000) (finding res judicata and collateral estoppel are questions of law); Higgins v. Thurber, 413 N.J. Super. 1, 6 (App. Div. 2010) (finding the application of the entire controversy doctrine is a legal issue).

Rule 4:6-2(e) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Our Supreme Court has explained that "the test for determining the adequacy of a pleading[is] whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). To that end, "a reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Still, "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted," Rieder v. State, Dep't of

Transp., 221 N.J. Super. 547, 552 (App. Div. 1987), or if "discovery will not give rise to such a claim," Dimitrakopoulos, 237 N.J. at 107.

Rule 4:49-2 governs reconsideration motions seeking to "alter or amend final judgments and final orders." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021) (emphasis omitted). Under Rule 4:49-2, a party may move for reconsideration of a trial court's decision on the grounds that (1) the court based its decision on "a palpably incorrect or irrational basis," (2) the court "did not consider, or failed to appreciate the significance of probative, competent evidence," or (3) the moving party is presenting "new or additional information . . . which it could not have provided on the first application." 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)). "Reconsideration cannot be used to expand the record and reargue a motion," and "[a] litigant should not seek reconsideration merely because of dissatisfaction with a decision of the [c]ourt." Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) (second alteration in original) (quoting D'Atria, 242 N.J. Super. at 401).

"We review the trial court's denial of [a] plaintiff's motion for reconsideration for abuse of discretion." Branch v. Cream-O-Land Dairy, 244

N.J. 567, 582 (2021) (citing Kornbleuth v. Westover, 241 N.J. 289, 301 (2020)). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Kornbleuth, 241 N.J at 302 (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)).

On appeal, plaintiff challenges the judge's application of the preclusive doctrines of res judicata and collateral estoppel as well as the entire controversy doctrine to dismiss his second complaint and deny reconsideration. He argues the judge should have decided his claims anew and suggests that the judge erred in not overturning the prior courts' decisions in the first action to correct the trial and appellate courts' "harmful judicial errors."

Under the doctrine of res judicata, once a "'controversy between parties is . . . fairly litigated and determined[,] it is no longer open to relitigation.'" Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 606 (2015) (quoting Lubliner v. Bd. of Alcoholic Beverage Control of Paterson, 33 N.J. 428, 435 (1960)). For res judicata to bar a subsequent complaint, a court must determine whether the following three elements are satisfied:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow

> out of the same transaction or occurrence as the claim in the earlier one.
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> [Rippon v. Smigel, 449 N.J. Super. 344, 367 (App. Div. 2017) (citing Velasquez v. Franz, 123 N.J. 498, 505-06 (1991)).]

A judgment is "'on the merits'" when "'the factual issues directly involved . . . have been actually litigated and determined.'" Adelman v. BSI Fin. Servs., Inc., 453 N.J. Super. 31, 40 (App. Div. 2018) (quoting Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 183 (App. Div. 1993)). In contrast, "'a judgment entered by confession, consent, or default'" is not on the merits because "'none of the issues [are] actually litigated.'" Ibid. (quoting Allesandra v. Gross, 187 N.J. Super. 96, 106 (App. Div. 1982)). It is well settled that "an order granting summary judgment and disposing of the case is a final judgment." Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 n.8 (2010) (citing R. 2:2-3(a)(1)).

The doctrine of collateral estoppel, also known as issue preclusion, is an equitable remedy that """bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action."'" In re Liquidation of Integrity Ins. Co., 214 N.J. 51, 66 (2013) (quoting N.J. Div. of Youth & Fam. Servs. v. R.D., 207 N.J. 88, 114 (2011)). For collateral estoppel to apply, it must be shown that:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
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> [Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)).]

"The entire controversy doctrine 'stems directly from the principles underlying the doctrine of res judicata.'" Bank Leumi USA v. Kloss, 243 N.J. 218, 227 (2020) (quoting Prevratil v. Mohr, 145 N.J. 180, 187 (1996)). Yet, our Supreme Court has made clear that "[t]he doctrine is a broad one" and its preclusive effects go beyond those recognized by "res judicata." Ibid. (alteration in original) (internal quotation marks omitted) (quoting Kozyra v. Allen, 973 F.2d 1110, 1111 (3d Cir. 1992)). As codified in Rule 4:30A, the "'[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.'" Kloss, 243 N.J. at 226 (alteration in original) (quoting R. 4:30A).

The entire controversy doctrine is rooted in the goal of encouraging parties to resolve all their disputes in one action. Dimitrakopoulos, 237 N.J. at 98. In

determining "what claims are 'required to be joined' by the doctrine, . . . th[e] Court has explained that the 'claims must "arise from related facts or the same transaction or series of transactions" but need not share common legal theories.'" Kloss, 243 N.J. at 226 (quoting Dimitrakopoulos, 237 N.J. at 119). Accordingly, not only are parties barred under the entire controversy doctrine from subsequently bringing claims that were litigated, but they are also barred from litigating "all relevant matters that could have been so determined." Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991); see also Olds v. Donnelly, 150 N.J. 424, 431-32 (1997) (holding entire controversy doctrine "requires that parties should present all affirmative claims and defenses arising out of a controversy" and "requires the mandatory joinder of all parties with a material interest in a controversy"); Tisby v. Camden Cnty. Corr. Facility, 448 N.J. Super. 241, 251 (App. Div. 2017) (affirming application of entire controversy doctrine where a plaintiff asserted "different allegations arising from the same events" against the same defendant in a subsequent action).

"[B]ecause the entire controversy doctrine is an equitable principle, its applicability is left to judicial discretion based on the particular circumstances inherent in a given case." Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 323 (1995). In that regard, "[a] court should not preclude a claim under

the entire controversy doctrine if such a remedy would be unfair in the totality of the circumstances and would not promote the doctrine's objectives of conclusive determinations, party fairness, and judicial economy and efficiency." Kloss, 243 N.J. at 227-28 (quoting Dimitrakopoulos, 237 N.J. at 119).

Applying these principles, we affirm substantially for the reasons expressed by the judge in his oral opinions. The judge's findings are amply supported by the record and his decisions comported with the applicable legal principles. Plaintiff's second complaint was properly dismissed with prejudice because plaintiff sought to relitigate against the same party issues and claims arising from the same controversy that were conclusively resolved on the merits in the prior action. We are satisfied that plaintiff had his day in court and the arguments raised in his brief lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.