SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3687-14T2

HARTFORD UNDERWRITERS INSURANCE COMPANY as Subrogee of CREDIT CARD PROCESSING US,

Plaintiff-Appellant,

v.

JACQUELIN SALIMENTE and/or JACQUELIN SALIMBENE,

Defendant-Respondent.

Argued September 28, 2016 – Decided February 6, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3731-12.

Mary Beth Ehalt argued the cause for appellant (Law Offices of Linda S. Baumann, attorneys; Ms. Ehalt, on the brief).

Brian J. McGovern argued the cause for respondent.

PER CURIAM

The issue in this subrogation action is whether plaintiff Hartford Underwriters Insurance Company's complaint against the

tortfeasor, defendant Jacquelin Salimente, filed on the last day of the two-year limitations period, was properly dismissed on a Rule 4:6-2 motion when Hartford failed to produce proof it had given the insured employee the ten-day notice required by N.J.S.A. 34:15-40(f),[1] the workers' compensation provision that

[1] The statute provides:

> (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

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permits the compensation carrier to sue or settle with the tortfeasor when the employee has failed to do so. Because we answer that question in the negative, we reverse.

The essential facts are straight forward. Arthur Mishkoff, driving a car owned by his employer, Credit Card Processing US, Hartford's insured, was injured when Salimente lost control of her car and collided with Mishkoff on May 18, 2010. Hartford made payments to Mishkoff, either directly or on his behalf, of

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> 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.

$16,332.79 under its workers' compensation policy. When Mishkoff had not sued or settled with Salimente as the statute of limitations loomed, Hartford filed its own complaint against her on the last day of the limitations period.

Salimente moved to dismiss the complaint on the basis that Hartford lacked standing to bring the action. Specifically, Salimente claimed Hartford had not filed the action in Mishkoff's name and failed to plead it had obtained his permission to file the suit pursuant to N.J.S.A. 34:15-40(f).

Because Salimente asked the court to consider matters outside the pleadings, the judge treated the motion as one for summary judgment pursuant to Rule 4:6-2(e). In a written opinion, the judge noted that plaintiff failed to cite any "case law for the proposition that a failure to serve written demand on the employee may be excused after the employee has failed to file suit within the limitations period." Instead, she found "[p]laintiff's argument that [d]efendant is protected from double liability because any action by Mishkoff would be barred[,] demonstrates that its failure to give written notice cannot be cured."

The judge reasoned that "[i]f Mishkoff cannot assert a claim against [d]efendant because the statute of limitations has run, [p]laintiff could not create the right to do so by

belatedly serving him with written notice." Concluding that plaintiff had not given Mishkoff the required written notice and the running of the statute made cure impossible, the judge granted Salimente's motion dismissing the complaint.

We conclude the judge erred in dismissing plaintiff's complaint on a Rule 4:6-2 motion. Supreme Court precedent instructs that the ten-day notice can be waived, especially where the carrier's action preserves the subrogor's right of action against the tortfeasor. See Poetz v. Mix, 7 N.J. 436, 448 (1951) (holding "[t]he requirement of such a written demand, however, is undoubtedly for the benefit of the injured employee, and he may waive it, especially where, as here, the action would have been barred if the requirement had been observed").

As a filing on the last day of the limitations period suggests Hartford was preserving not only its own subrogation claim but also Mishkoff's right of action against the tortfeasor Salimente,[2] plaintiff's complaint should not have been dismissed

[2] N.J.S.A. 34:15-40(f) expressly provides that any settlement or judgment recovered by the subrogor against the third person for the injuries and loss sustained by the employee in excess of the employer's obligation to the employee and the expense of suit, shall be paid to the employee. Poetz illustrates just such a case in which the injured employee was content to pursue his own losses in the subrogation action. 7 N.J. at 449 (noting Poetz had cooperated in the compensation carrier's subrogation action and testified at deposition that "although he had taken no steps (continued)

before discovery could be had as to whether Mishkoff waived his right to the ten-day notice. See Errickson v. Supermarkets Gen. Corp., 246 N.J. Super. 457, 461 (App. Div. 1991) (reversing summary judgment for the third-party tortfeasor where factual issues existed as to the carrier's authorization under N.J.S.A. 34:15-40(f) to institute the subrogation action, and whether the injured employee acquiesced in that action).

Our conclusion that this case was improvidently dismissed on a motion on the pleadings, treated as one for summary judgment, is reinforced by plaintiff's belated discovery of letters in its file suggesting notice or waiver under the statute.

Specifically, after judgment was entered and the time for reconsideration had passed, Hartford found two letters in its file, one to Mishkoff two months after the accident and the other to Mishkoff's counsel eighteen months after. In the first letter, Hartford advised Mishkoff of its subrogation rights and asked him whether he intended to pursue a third-party action. In the second, Hartford again asserted its subrogation rights,

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personally to enforce any claim he might have against the defendants, nevertheless, he understood that the insurance carrier had the right to do that for him and he 'intended to go ahead with that right'").

and asked Mishkoff's counsel to advise at his "earliest convenience" if Mishkoff was "not pursuing a third party claim."

Plaintiff filed a motion in this court seeking leave to supplement the record with that correspondence, asserting it establishes (1) the court erred in dismissing the case before discovery that would have revealed its existence, and (2) that Mishkoff was on notice of Hartford's intent to file this subrogation action prior to the filing of the complaint.

We deferred decision until we had the opportunity to consider the motion in the context of the issues raised on appeal and now grant the motion to supplement the record. Although we do not condone plaintiff's delay in diligently pursuing this action and not knowing the contents of its own file,[3] the discovery underscores the error in dismissing this case at the pleadings stage.

"[T]he test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts," which are to be judged employing "a generous and hospitable approach."

[3] Although plaintiff filed its complaint in this case on May 18, 2012, it was twice dismissed for lack of prosecution. Following the filing of an amended complaint in December 2013, it took plaintiff nearly a year to seek reinstatement. Plaintiff only filed proof of service of the amended complaint in December 2014. In light of such a deplorable record of prosecution, it is perhaps not surprising that key documents in the file were not discovered until after entry of judgment.

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)). The court should have no concern as to whether a plaintiff can actually prove the allegations of the complaint at such a preliminary stage of the proceedings. Ibid. The Supreme Court has instructed trial courts "to approach with great caution applications for dismissal under Rule 4:6-2(e) for failure of a complaint to state a claim on which relief may be granted," as "such motions, almost always brought at the very earliest stage of the litigation, should be granted in only the rarest of instances" and only if pleading errors could not be corrected by amendment.[4] Id. at 771-72.

There was no reason to dismiss this case, filed on the last day of the limitations period, at the pleadings stage based on the tortfeasor's allegation that the compensation carrier had yet to establish its compliance with N.J.S.A. 34:15-40(f),

[4] Defendant has not pursued on this appeal the alternate claim she made to the trial court that plaintiff's complaint should have been dismissed for its failure to have sued in Mishkoff's name. Accordingly, we have not addressed the issue here. But see Siligato v. State, 268 N.J. Super. 21, 29 (App. Div. 1993) (noting that although Rule 4:9-3 "applies, in terms, to parties-defendant, we are satisfied that its rationale applies equally to parties-plaintiff. Obviously, an error made by plaintiff in identifying itself should be no less curable than an error in identifying the adversary.").

especially as it now appears that plaintiff might well be able to do so. Accordingly, we reverse the summary judgment and remand for further proceeding not inconsistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.