

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2840-07T1

HANOVER INSURANCE COMPANY as  
Subrogee of Jill Sorensen and  
HANOVER INSURANCE COMPANY,  
Individually,

Plaintiff-Appellant,

v.

YU GUAN, S.H. RESTAURANT EQUIPMENT,  
INC.,

Defendants,

and

MULLIGAN INSURANCE AGENCY,  
NATIONAL CONTINENTAL/PROGRESSIVE  
INSURANCE COMPANY,

Defendants-Respondents.

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Argued February 9, 2009 - Decided March 5, 2009

Before Judges Lisa and Reisner.

On appeal from the Superior Court of New  
Jersey, Law Division, Cumberland County,  
Docket No. L-457-06.

Richard M. Pescatore argued the cause for  
appellant.

John M. Palm argued the cause for respondent  
National Continental/Progressive Insurance  
Company.

Joseph M. Powell argued the cause for respondent Mulligan Insurance Agency (Powell & Roman, LLC, attorneys; Mr. Powell, of counsel; Jose D. Roman, on the brief).

PER CURIAM

On September 7, 2004, Jill Sorensen was injured in an automobile accident caused by the driver of another vehicle, Yu Guan, who was driving a vehicle owned by his employer, S.H. Restaurant Equipment, Inc. (S.H.). Prior to the accident, S.H. procured insurance on its vehicle through the Mulligan Insurance Agency (Mulligan) with National Continental/Progressive Insurance Company (National). However, National cancelled the policy prior to the accident. Sorensen had an automobile policy at the time of the accident with Hanover Insurance Company (Hanover). Hanover paid Sorensen benefits totaling \$193,711.23, consisting of \$12,764.52 for property damage, \$420 for vehicle rental, \$95,526.71 for personal injury protection (PIP) benefits, and \$85,000 for uninsured motorist (UM) benefits.

Hanover sued Guan and S.H. in an effort to recover these sums. However, Guan could not be found and S.H. was out of business. Hanover amended its complaint to sue Mulligan and National to recover the benefits paid. Its theory was that it could step into the shoes of S.H., as a subrogee or third-party beneficiary, and assert a claim that National's cancellation of

the policy was improper and that Mulligan was professionally negligent in allowing S.H.'s policy to be cancelled.

Judge Michael Brooke Fisher found that Hanover lacked standing to assert its claims against Mulligan and National. He granted summary judgment to Mulligan by order of September 20, 2007, and denied Hanover's reconsideration motion as to that order on January 4, 2008. The judge granted summary judgment to National by an order of January 4, 2008. On February 11, 2008, a default judgment was entered in favor of Hanover against Guan and S.H. for \$193,711.23. This appeal followed. Hanover's arguments before us are the same as those presented in the trial court. We reject those arguments and affirm.

The relevant facts are not in dispute. Mulligan secured a policy for S.H.'s commercial vehicles through the New Jersey Commercial Automobile Insurance Plan (CAIP) with National for the policy period of March 25, 2004 to March 25, 2005. S.H.'s place of business at the inception of the policy was 50 Washington Avenue in Milltown. On April 5, 2004, S.H. notified National by fax that it was changing its address from the Milltown location to 135 Bowery Street in New York, New York. Under the CAIP, the insured must maintain its operating headquarters in New Jersey. N.J.A.C. 11:3-1.2. Thus, upon receipt of the fax, National engaged the services of an

independent contractor to conduct an investigation and inspection of S.H.'s premises in Milltown. The contractor wrote two letters and made three telephone calls to S.H. and visited the Milltown location, concluding that S.H. had vacated the premises. Based upon this information, National concluded that S.H. no longer maintained a headquarters in New Jersey.

On June 16, 2004, National mailed a notice of cancellation to S.H. at its New York address and to Mulligan, canceling the policy effective July 18, 2004. The record contained unrefuted proof that the notice was mailed to the correct address for S.H. in New York, and Mulligan acknowledged receiving a copy. The notice advised S.H. that its policy was being canceled "in accordance with the terms and conditions of the . . . policy, and in accordance with law." The notice advised S.H. that because the "policy was obtained through the New Jersey Automobile Insurance Plan, . . . [it had] the right to appeal to the Governing Committee of the Plan," the address of which was furnished. The notice specified as the reason for cancellation: "Violation of contract terms – failure to comply with Physical Inspection."

Upon cancellation of the policy, National issued a check on August 3, 2004 to S.H. for the return of unearned premiums in

the amount of \$664.16. S.H. cashed the check on August 11, 2004.

Judge Fisher found it very significant that, in addition to receiving notice of cancellation, S.H. received and cashed the return of premium check about one month before the accident underlying this litigation. The judge found it unnecessary to address the substantive arguments regarding the adequacy of National's notice to S.H. and whether Mulligan was negligent in fulfilling its duty to S.H. with respect to the cancellation. He concluded that those were arguments that could be made by S.H., but there was no basis to confer standing on Hanover to assert those claims against National or Mulligan.

No material facts were in dispute before the trial court, and the matter was ripe for summary judgment. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In reviewing the grant of summary judgment, we employ the same standard used by the trial court, and our review is de novo. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

We first address Hanover's claim against National. To be a "qualified applicant" under the CAIP, the applicant "must have its operating headquarters in New Jersey." N.J.A.C. 11:3-1.2.

In New Jersey, insurance policy cancellation is controlled by the Commissioner of the Department of Banking and Insurance. Piermount Iron Works, Inc. v. Evanston Ins. Co., \_\_\_ N.J. \_\_\_, \_\_\_ (2009) (slip op. at 9). "Notice allows the consumer to take protective action." Id. at \_\_\_ (slip op. at 11). Under the CAIP regulations, the Commissioner of the New Jersey Department of Banking and Insurance must approve a plan of operation for the program. N.J.A.C. 11:3-1.6(c). The plan is required to contain provisions for the cancellation or non-renewal of policies. N.J.A.C. 11:3-1.6(a)12. Article 15 of the plan pertains to cancellations. Section B of Article 15 regulates "Termination by Insurer," and provides in relevant part:

2. During the first 120 days of the effective date of the original policy period and any subsequent renewal policy under the Plan, a servicing carrier may give notice of intent to cancel its policy if the servicing carrier, on the basis of actions or omissions by the named insured of the producer of record, has reason to believe that the named insured

- a. is not in good faith entitled to insurance, or
- b. is not qualified for coverage through either the Plan (CAIP) or the New Jersey Personal Automobile Insurance Plan, or

. . . .

e. has violated any the of terms or conditions upon the basis of which the insurance was issued, . . .

. . . .

Notice of such cancellation intent, which notice shall specify the date upon which the cancellation is to be effective, shall be furnished to the Insured and the producer of record together with a statement of facts upon which such action is taken. Such notice shall inform the Insured that if he/she believes the cancellation should not be effectuated he/she may appeal such cancellation to the Committee as provided in Article 16.

By statute, a notice of cancellation must be in writing and mailed to the insured at its correct address in order to be effective. N.J.S.A. 17:29C-10. There is no dispute that National complied with this requirement. The dispute with respect to National revolves around the content of the notice. Hanover contends that the reason given for cancellation, "Violation of contract terms – failure to comply with Physical Inspection," was incorrect, or, at the very least, confusing (because a "physical inspection" would typically be understood to refer to inspection of a motor vehicle). Hanover argues that the true reason was S.H.'s failure to maintain its headquarters in New Jersey, and the notice should have clearly stated that.

National argues that the notice was not factually incorrect because (1) S.H. was no longer a qualified applicant under the

CAIP, as a result of which it was in violation of the contract terms, and (2) it failed to cooperate in the attempted physical inspection of its Milltown premises. National further argues that, even if there was some uncertainty about the reason, S.H. had the right to make inquiries for clarification or to file an appeal. It did neither. Instead, it acquiesced in the notice of cancellation and accepted and cashed the return of premium check.

We bypass the standing issue with respect to Hanover's claim against National, which we decide substantively. We agree with National that its notice to S.H. was regular in all respects and fully compliant with the applicable regulatory scheme. In passing, we note that generally a notice of cancellation is not statutorily required to include a reason for cancellation. See N.J.S.A. 17:29C-12 (providing that if no reason is specified in a cancellation notice, the insured may request the reason, and the insurer must then provide a written statement of the reason for cancellation). In this case, pursuant to the CAIP regulations, a reason was given. The specified reason was adequate. If deemed inadequate or confusing, the insured was properly notified of its right to seek clarification or appeal. There can be no dispute that, in its entirety, the notice informed S.H. that its policy was going

to be cancelled. We have no hesitancy in concluding that the policy was properly terminated and was no longer in effect after July 18, 2004. Further, because the insured cashed the refund check after receiving the cancellation notice, it obviously had no objection to the cancellation. Piermount, supra, \_\_\_ N.J. at \_\_\_ (slip op. at 20).

We next address Hanover's claim against Mulligan. Hanover argues that Mulligan was guilty of insurance agent malpractice because it failed to take action upon receiving the notice of cancellation to prevent the cancellation of National's policy. Presumably, Hanover implicitly contends that Mulligan should have done something to arrange for or to at least assist and advise S.H. in obtaining alternate coverage.

Before Mulligan was made a party to this litigation, Hanover's attorney took the deposition of its principal, James P. Mulligan (Mr. Mulligan). Mr. Mulligan was unrepresented, and no other parties were present or represented at the deposition. Mr. Mulligan acknowledged that National had previously sent a cancellation notice to S.H. for non-payment of premium. However, S.H. paid the delinquent premium and the issue was resolved. Coincidentally, Mulligan received the notice of reinstatement with respect to the non-payment cancellation notice on the same day it received the notice of cancellation

that is the subject of this litigation. Mr. Mulligan acknowledged that he or his staff might have thought that the notice of reinstatement corresponded to the new notice of cancellation, that there was really no problem, and that the two notices merely crossed in the mail. He had no recollection and could not say with specificity whether he called S.H. when he received the cancellation notice involved in this litigation. He said it was his standard custom and practice to make such a call, and if S.H. did not receive such a call from his office, that would be a deviation from his standard policy. However, when asked whether he had an obligation to inform an insured of a notice of cancellation, Mr. Mulligan replied, "I don't know if I can say that." Whether this testimony established an applicable standard of care is not dispositive, because the record contains no competent evidence to support a finding that Mulligan breached it if it existed. Therefore, substantively, any claim S.H. had against Mulligan could not withstand summary judgment on the record before us.

As we have stated, Judge Fisher did not reach the substantive arguments because he found a lack of standing on Hanover's part. We agree.

An innocent injured person has standing to make a claim for insurance agent malpractice against an agent who negligently

allows the policy of its insured, the tortfeasor, to lapse, leaving the injured party with no source of recovery. Werrmann v. Aratusa, Ltd., 266 N.J. Super. 471, 474-76 (App. Div. 1993). In Werrmann, we held that such a claim can be grounded in negligence principles. Id. at 474. We reasoned that an insurance broker owes a duty to members of the public because, in addition to the reasonable foreseeability of harm to members of the public flowing from the broker's negligence in failing to provide coverage for its insured, an innocent party injured by the tortious conduct of the insured might well be left without a means of redress if the insured's liability policy is not procured or is allowed to lapse. Id. at 475. Considering the nature of the risk and the public policy of protecting innocent injured parties, "it is patently unfair to forfeit the injured party's unquestioned interest in the insured's liability policy and his or her right to be made whole simply because of the fortuitous circumstance of the broker's negligence which results in the lapsing of the liability policy." Id. at 475 (internal citation omitted).

We further held in Werrmann that an injured party has a claim as a third-party beneficiary of the agreement between the insured and the agent. Id. at 476. This is because members of the general public are deemed intended beneficiaries under a

contract between an insured and the insured's agent. Ibid. And, whether the type of coverage is legally mandated or optional, members of the general public are third-party beneficiaries because, although the policy is intended to protect the assets of the insured, "of equal importance, it is intended to provide a source of recovery for an innocent injured party who, because of the insolvency of the insured, would otherwise have no means of redress." Id. at 477-78.

The public policy reasons for finding a duty by an insurance agent to members of the general public and for finding third-party beneficiary status of members of the public to the contract between the insured and broker, do not translate to the circumstances here. There is no injured innocent party without means of redress. Hanover issued a policy to Sorensen fully aware that it might be called upon to pay Sorensen various benefits within the policy limits. This is the risk Hanover undertook, and it collected an appropriate premium as compensation for the risk. Among the risks accepted were that its insured would suffer injuries and property damage caused by an uninsured motorist, who might be unidentified or insolvent. As between insurers, the cancellation of a policy that might be the result of a broker's negligence is not the kind of "fortuitous circumstance" that underpinned our rationale in

Werrmann. The possible defalcation of the broker there was indeed fortuitous as to an innocent injured member of the public. However, Hanover contemplated this very kind of circumstance. It underwrote the risk that it would occur and charged a premium. In return, it compensated its insured, Sorensen, for such an occurrence.

Generally, one who is not a party to a contract but merely benefits from it does not have standing to sue to enforce it. Parkway Ins. Co. v. N.J. Neck & Back, 330 N.J. Super. 172, 186-87 (Law Div. 1998). Whether a third party has standing to bring a claim on an underlying contract depends upon whether the parties to the contract intended others to benefit from its existence or whether the benefit is derived merely as an incident of the agreement. Broadway Maint. Corp. v. Rutgers, The State Univ., 90 N.J. 253, 259 (1982); GE Capital Mortgage Serv., Inc. v. Privetera, 346 N.J. Super. 424, 434 (App. Div. 2002). "If that intent does not exist, then the third person is only an incidental beneficiary, having no contractual standing." GE Capital Mortgage, supra, 346 N.J. Super. at 434 (quoting Broadway Maint. Corp., supra, 90 N.J. at 259).

In our view, Hanover was no more than an incidental beneficiary of the contract between S.H. and Mulligan. The consequences to Hanover do not match up to those of an innocent

injured party who is left with no means of recourse for this isolated event in his or her life. For Hanover, incurring and absorbing a loss of this nature is a regular consequence of its business for which it charges and collects premiums.

We therefore conclude that, because Mulligan owed no duty to Hanover and because Hanover was not a third-party beneficiary of the contract between Mulligan and S.H., Hanover lacked standing to assert a claim of insurance agent malpractice against Mulligan.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION