NOVA DEVELOPMENT GROUP, INC., Plaintiff-Appellant, v. J.J. FARBER-LOTTMAN CO., INC., SCOTT SWAN, AMERICAN SAFETY CASUALTY INSURANCE COMPANY and AMERICAN SAFETY INSURANCE SERVICES, INC., Defendants-Respondents. J.J. FARBER-LOTTMAN CO., INC. and SCOTT SWAN, Third-Party Plaintiffs-Appellants, v. AMERICAN SAFETY CASUALTY INSURANCE COMPANY and AMERICAN SAFETY INSURANCE SERVICES, INC., Third-Party Defendants-Respondents.

DOCKET NO. A-5531-08T2, A-5532-08T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 413

December 9, 2009, Argued
March 1, 2010, Decided

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PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5759-07.

COUNSEL: Ronald Steinvurzel argued the cause for appellant Nova Development Group, Inc.

Frederick M. Klein argued the cause for respondents (A-5531-08T2) / appellants (A-5532-08T2) J.J. Farber-Lottman Co., Inc. and Scott Swan (The Sullivan Law Group, L.L.P., attorneys; Mr. Klein, of counsel and on the brief).

Susan P. Mahon argued the cause for respondents American Safety Casualty Insurance Company and American Safety Insurance Services, Inc. (Gartner & Bloom, P.C., attorneys; Ms. Mahon, on the brief).

JUDGES: Before Judges Fisher and Sapp-Peterson.

OPINION

PER CURIAM

These are interlocutory appeals [1] challenging various orders issued by the Law Division denying the parties' motions and cross-motions for summary judgment, and denying their motions for reconsideration. We reverse the trial court's determination that *N.J.A.C. 11:1-20.2(c)* applies to renewal policies. We nonetheless remand to the trial court for further proceedings.

1 These appeals originally calendared back-to-back are consolidated for purposes of opinion only.

The salient facts are not in dispute. Plaintiff Nova Development Group, Inc. (Nova) is engaged [*2] in the business of environmental material abatement in New Jersey and New York. Its principal place of business is located at 189 Townsend Street, New Brunswick, New Jersey. Beginning in 2003, defendant Scott Swan (Swan), who at the time was employed as an insurance producer by defendant J.J. Farber-Lottman Co., Inc. (Lottman), [2] an insurance brokerage firm, placed insurance coverage for Nova that included commercial general liability (CGL) insurance. Swan procured the policies through American Safety Insurance Services, Inc. (ASIS), the program manager of American Safety Casualty Insurance Company (ASCIC), [3] and ASIS issued the CGL policies. The last CGL policy that Swan placed for Nova was for the June 25, 2006 to June 25, 2007 policy period.

2 Swan and Lottman are collectively referred to as "Swan/Lottman."

3 ASCIC and ASIS are collectively referred to as "ASCIC/ASIS."

On March 8, 2006, Andrea Leroy of ASIS sent an e-mail to Swan with an attachment captioned, "Employee Contractual Liability Exclusion Endorsement." According to Nancy Duval, ASIS' Director of Technical Underwriting, this endorsement was added to the policies of insureds with either addresses or operations in New York to [*3] exclude coverage for employee injuries because of the laws and legal climate in New York. Although Swan claims he discussed this policy change with Todd Grant, Nova's President, Swan acknowledged during his deposition that he never sent Nova this endorsement. However, on March 9, 2008, ASIS did send to Nova a Notice of Policy Conditional Renewal, which stated:

> This notice is to advise that we are agreeable to renewing this policy subject to the following:
>
> Change in or reduction of coverage; Increased deductible or retention; Addition of an exclusions [sic] or Increase in premium of more than ten percent.
>
> Your renewal premium is TBD and is due by 7/25/2006[.]
>
> If the premium is not paid by the due date, coverage will cease on the due date indicated above.

The policy was renewed for the period June 25, 2006, through June 25, 2007. There is no dispute that neither ASIS nor Swan, either prior to or at the time the policy was renewed, ever sent a copy of the exclusion endorsement to Nova.

In March 2006, Nova entered into a subcontract agreement with Edison Construction Management, L.L.C. (Edison) for asbestos removal. The subcontract required Nova to name, as additional insureds under its CGL [*4] policies, Edison and the property's owner, EPL Exchange Company, LLC (EPL), as well as others identified in the subcontract or identified by EPL. Exhibit B of the subcontract contained the "Standard General Conditions" and called for Nova to provide defense and indemnification on behalf of those parties identified in Exhibit B.

On September 5, 2006, Nova's employee, Darius Kelner, was injured while working at a New York City project. Later that month, Kelner filed a complaint in New York state court seeking to recover damages for his claimed injuries. Edison and EPL were among the defendants named in the action. ASIS refused to provide a defense on their behalf because Nova's subcontract with the general contractor did not meet the definition of an "insured contract" for which ASIS' duty to provide coverage would be triggered. Additionally, ASIS indicated that even if the parties were entitled to coverage, ASIS' coverage would not take effect until the limits of the parties' primary insurance policy were exhausted. Edison and EPL filed a third-party action against Nova on February 20, 2007 for contribution, indemnification and breach of contract for failing to procure adequate insurance [*5] coverage under the subcontract agreement.

Nova sought coverage in connection with its defense against the third-party action. ASIS denied coverage, citing the same reasons it denied coverage to Edison and EPL. On August 2, 2007, Nova filed a complaint in the Law Division against Swan/Lottman alleging failure to maintain appropriate insurance coverage, negligence, fraud, misrepresentation, violation of the Consumer Fraud Act (CFA), *N.J.S.A. 56:8-1 to -184*, and unfair or deceptive trade practices.

On October 2, 2007, counsel for Swan/Lottman requested indemnification from ASIS under a Preferred Producer Agreement with ASIS. Under that agreement, ASIS agreed to hold Swan/Lottman harmless and to indemnify them against claims resulting from ASIS' error or omission in servicing any policy or endorsement, or failure of a policyholder to receive "any notice affecting coverage, where we send notices directly to the policyholder, except to the extent that [Swan/Lottman] caused, contributed to, or compounded such error[.]" ASIS denied coverage in a letter dated November 2, 2007, in which it stated:

> After a careful review and analysis of your correspondence and the Preferred Producer Agreement, it [*6] is ASIS[']' position at this time, that it does not have a duty to indemnify Farber. ASIS can demonstrate that it sufficiently notified Nova Development Group, Inc., (the insured) of the policy coverage change to Policy No. ENV014151-06-01. Moreover, ASIS can demonstrate that it notified Farber on several different occasions by various methods of communication of the policy coverage change to Policy No. ENV014151-06-01. Further, if ASIS committed an error in notifying the insured, ASIS believes this error was contributed to or compounded by Farber, who ASIS understood communicated with the insured in regard to the policy coverage change.

On November 16, 2007, the trial court granted Swan/Lottman's motion to dismiss Nova's CFA and unfair or deceptive trade practices claims, along with their demand for treble damages. Swan/Lottman then filed their answer to the complaint, asserting affirmative defenses, and three weeks later filed a third-party complaint against ASCIC and ASIS seeking contractual indemnification pursuant to the Preferred Producer Agreement and common law contribution and indemnification. Also in December, Nova as well as Swan/Lottman sought reconsideration of the court's [*7] November 16 orders, which the court denied.

By consent order dated November 6, 2008, Nova amended its complaint to assert direct causes of action against ASIS and ASCIC, including negligence and breach of contract. In addition, Nova sought declaratory relief, specifically, a determination that pursuant to the terms of the policies ASIS was obligated to provide a defense and indemnification on its behalf.

In March 2009, Swan/Lottman and ASCIC/ASIS filed motions for summary judgment. Nova argued that it was entitled to coverage because it was not given the requisite notice under *N.J.A.C. 11:1-20.2(c)*. Swan/Lottman argued that ASCIC/ASIS had a non-delegable duty to provide written notice of the exclusion endorsement, relieving Lottman of any liability to Nova stemming from Nova's failure to receive the requisite notice. ASCIC/ASIS contended that it provided sufficient notice to NOVA that there was going to be a change in the policy and also sent the notice and exclusion endorsement to Swan so he could meet with Nova and discuss the changes. Additionally, ASCIC/ASIS argued that it was questionable whether *N.J.A.C. 11:1-20.2(c)* applied under the particular facts at issue.

In an order dated [*8] March 26, 2009, the court denied all of the motions, reopened discovery, extended the discovery end date to May 26, and adjourned the upcoming June 22 trial date. Citing *McClellan v. Feit, 376 N.J. Super. 305, 870 A.2d 644 (App. Div. 2005)*, the motion judge found that *N.J.A.C. 11:1-20.2(c)* does not apply and that under *Skeete v. Dorvius, 184 N.J. 5, 875 A.2d 859 (2005)*, and *Bauman v. Royal Indemn. Co., 36 N.J. 12, 174 A.2d 585 (1961)*, there were genuinely disputed issues of fact as to whether Nova had been provided reasonable notice of the reduced coverage in its policy at the time it was renewed.

Nova and Swan/Lottman moved for reconsideration or for a stay of the court's order. The court denied both motions. Both parties sought leave to file an interlocutory appeal, which we granted, along with a stay of the trial court proceedings.

On appeal, Nova contends:

POINT I

N.J.A.C. 11:1-20.2(c) APPLIES TO RENEWAL POLICIES.

A. THE STRICT REQUIREMENTS OF *N.J.A.C. 11:1-20.2(c)* APPLY TO RENEWAL POLICIES.

B. THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE INSISTS THAT *N.J.A.C. 11:1-20.2(c)* APPLIES TO RENEWAL POLICIES AND COURTS ARE REQUIRED TO DEFER TO AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS.

POINT II

DOCTRINE OF [*9] *STARE DECISIS* CANNOT BE USED TO EXTEND ERROR OR TO IMPEDE THE EVOLUTION OF THE LAW.

POINT III

WHERE NOTICE IS INSUFFICIENT THE INSURED HAS THE RIGHT TO RELY ON THEIR EARLIER POLICY.

POINT IV

REVERSAL OF THE TRIAL COURT'S RULINGS IS REQUIRED TO PREVENT IRREP[A]RABLE INJURY.

Swan/Lottman raise the following points for our consideration:

POINT I

SUMMARY JUDGMENT MUST BE GRANTED TO J.J. FARBER-LOTTMAN AND SCOTT SWAN.

POINT II

BECAUSE ASCIC AND ASIS'[ ] NOTICE WAS DEFICIENT UNDER [*N.J.A.C. 11:1-20.2*], NOVA IS ENTITLED TO COVERAGE UNDER THE TERMS OF PRIOR POLICY AND THERE IS NO BASIS FOR CLAIM

AGAINST J.J. FARBER-LOTTMAN AND SCOTT SWAN.

POINT III

THE LOWER COURT ERRED WHEN IT HELD THAT THE NOTICE REQUIREMENTS OF [*N.J.A.C. 11:1-20.2*] DID NOT APPLY TO RENEWALS.

POINT IV

ASCIC'S RESPONSIBILITY FOR PROVIDING NOTICE TO AN INSURED OF CHANGES TO ITS INSURANCE POLICY UPON RENEWAL IS NON[-]DELEGABLE.

I.

The relevant provisions of *N.J.A.C. 11:1-20.2* provide:

> (c) [W]ith respect to payment of the renewal premium, notice of the amount of the renewal premium and any change in contract terms shall be given to the insured in writing not more than 120 days nor less than 30 days prior to the due date of the premium and shall [*10] clearly state the effect of nonpayment of the premium by the due date.
>
> . . . .
>
> (1) An insurer may in writing delegate to its appointed agent or to another person or legal entity the performance of any or all of the notice functions set forth in this section. However, delegation of these functions by the insurer to any person or entity shall not relieve the insurer of its responsibilities hereunder. No notice, whether provided by the insurer directly or through a person or entity authorized to act on the insurer's behalf, shall be deemed effective unless provided in conformance with the requirements of this section.

In *In re N.J.A.C. 11:1-20,* we observed that this regulation was originally adopted on an emergency basis by the Commissioner of Insurance to curb what the commissioner "conceived as abuses by insurance companies, including midterm policy cancellations, blanket non[-]renewals, cancellations of entire lines of insurance and midterm premium increases without adequate reasons or notice to the insureds." *208 N.J. Super. 182, 186, 505 A.2d 177 (App. Div. 1986).* As originally adopted, the word "renewal" was not contained in this subsection's title. A 2005 amendment to the regulation added the word [*11] "Renewal" to the caption. *See* 36 N.J.R. 4871(a) (Nov. 1, 2004); 37 N.J.R. 2040(a) (June 6, 2005). That this subsection was intended, however, to apply to renewal policies prior to the amendment is evident by the fact that the substantive language contained in subsection (c) references renewal and that language has been in effect since the regulation was adopted in 1987. Moreover, subsection (j), also in existence at the time the regulation was first adopted, makes specific reference to the remedy available to the insured where the insurer has failed to comply with the notice provisions of subsection (c) in the context of a renewal policy. *N.J.A.C. 11:1-20.2(j).*

We are satisfied that under *N.J.A.C. 11:1-20.2(c),* ASCIC/ASIS had a non-delegable duty to provide Nova with a written copy of the exclusion endorsement. Its purported notice contained in its March 8, 2006 letter fell woefully short of that obligation. *N.J.A.C. 11:1-20.2(c).* That letter provided no specific information about the amount of the premium. *Ibid.* Nor was there specific information about the exclusion endorsement or a copy of the exclusion endorsement attached, a task ASCIC/ASIS could have easily accomplished, particularly [*12] since it e-mailed the exclusion endorsement to Swan one day after mailing the March 8 letter to Nova. *Ibid.* Finally, we also note that the March 8 letter was sent more than 120 days prior to the due date of the premium. *Ibid.* In light of these deficiencies, if the regulation applies to Nova, it was entitled to the coverage extended to it under the terms of the expiring policy that contained no such exclusion endorsement. *Bauman, supra, 36 N.J. at 23*; *see also N.J.A.C. 11:1-20.2(j).*

The trial court was satisfied that the Notice of Policy Conditional Renewal "only vaguely alerted Nova that changes would occur without providing any detail" but appropriately felt constrained by our decision in *McClellan,* where we held that the notice requirements under *N.J.A.C. 11:1-20.2(c)* do not apply to renewal policies. *McClellan, supra, 376 N.J. Super. at 315.* We note that *McClellan* was decided two months before subsection (c) was amended and included the word "Renewal" in its caption. Hence, we believe that any question as to the applicability of subsection (c) to renewal policies was addressed in the amendment. Our analysis, however, does not end here.

II.

ASCIC/ASIS argues that it is questionable [*13] whether the regulation applies at all because it expressly states that its provisions are not intended to apply to multi-state location risks. *N.J.A.C. 11:1-20.1(a)*. As originally proposed, *N.J.A.C. 11:1-20.1(a)* provided that Subchapter 20 of Title 11 would not apply to "multi-state location risks which do not have their principal headquarters in the state . . . ." *Di Giacomo v. Saladino, 279 N.J. Super. 96, 101, 652 A.2d 223 (App. Div. 1995)*. As adopted, the language "which do not have their principal headquarters in the state" was deleted. *Ibid*. Both Nova and Swan/Lottman urge that ASCIC/ASIS' interpretation of "multi-state location risks" as excluding Nova would be absurd. Apparently, because the trial court found the regulation inapplicable for other reasons, namely, its reliance upon *McClellan*, it did not address the "multi-state location risk" provisions of Subchapter 20.

We do not agree that it is clear, at least from this record, as Nova and Swan/Lottman argue, that the "multi-state location risks" are intended to refer to "corporations with offices in multiple states, not New Jersey corporations such as Nova with a sole, or even principal, place of business in New Jersey who merely conduct [*14] business across state lines." We believe an equally cogent argument could be made that the deletion of the aforesaid language was intended to exclude *any* corporation engaged in "multi-state location risks," including those corporations whose principal place of business is New Jersey.

If the regulation is not applicable, the issue remains, as the motion judge found, whether Nova was otherwise given reasonable notice of the exclusion endorsement. *Skeete, supra, 184 N.J. at 8-9*; *Bauman, supra, 36 N.J. at 25-26*. Swan testified that he discussed the exclusion endorsement and its effects upon Nova's coverage with Nova's president, Grant, a fact that Grant disputes. The motion judge found that the issues of whether Nova was given notice and the reasonableness of that notice were genuinely disputed issues of fact that warranted denial of the summary judgment motion.

We therefore remand to the trial court for sixty (60) days to make further findings on the issue of whether the term "multi-state location risk," within the meaning of *N.J.A.C. 11:1-20.1(a)*, includes Nova's operations. The court may permit the parties to conduct limited discovery on this issue within a period fixed by the court that [*15] will enable it to make its requisite ruling within the time prescribed herein. We retain jurisdiction on this limited issue.

Remanded for further proceedings consistent with this opinion.