JUNE CARRINGTON, Plaintiff-Appellant,

v.

CHICAGO TITLE INSURANCE COMPANY, Defendant-Respondent, and KIM FELLENZ, ESQ., Defendant.

No. A-5926-13T2.

Superior Court of New Jersey, Appellate Division.

Argued October 20, 2015.
Decided November 6, 2015.

Elias L. Schneider argued the cause for appellant.

William J. McGuire argued the cause for respondent (Fidelity National Law Group, attorneys; Mr. McGuire, on the brief).

Before Judges Yannotti and Guadagno.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff June Carrington ("Carrington") appeals from an order entered by the Law Division on June 24, 2014, granting summary judgment in favor of defendant Chicago Title Insurance Company ("Chigago Title"), and an order entered on August 14, 2014, denying reconsideration of the June 24, 2014 order. We affirm.

We briefly summarize the relevant facts and procedural history. On June 8, 1998, Carrington acquired title to certain real property in Asbury Park.[1] On June 23, 1998, Chicago Title issued a title insurance policy to plaintiff and the others holding title, which covered certain risks, including the risk that "[s]omeone else owns an interest in your title." The policy had certain conditions and exclusions. The exclusions applied to title risks "that are created, allowed, or agreed to by you[,]" those "that are known to you, but not to [Chicago Title], on the Policy Date — unless they appeared in the public records[,]" and those "that first affect your title after the Policy Date[.]"

In December 2011, Ricardo Calliste, Marion Calliste, Adanna Baptiste, and Gina Baptiste (collectively, the "Siblings"), filed a complaint in the Chancery Division, Monmouth County, naming Carrington as defendant. The Siblings claimed that in 2001 they, Carrington, and their parents had agreed to purchase the Asbury Park property.

According to the Siblings, Carrington only provided $1,000 toward the down payment and closing costs, and their parents paid the balance. The Siblings claimed that because they had poor credit ratings, it was agreed that title to the property would be initially placed in Carrington's name.

They alleged it was agreed that when one or more of the Siblings' credit worthiness improved, a new mortgage would be sought, and title would then be adjusted "to reflect the true, beneficial ownership of the subject property." The Siblings claimed that they and Carrington would each hold a one-fifth interest in the property.

The Siblings further alleged that Carrington violated her agreement with them by refinancing the original purchase mortgage loan and obtaining a new loan in her own name. They claimed that Carrington's actions were a breach of a fiduciary duty owed to them. The Siblings sought a determination of their respective interests in the subject property.

After the lawsuit was filed, Carrington retained counsel, who wrote to Chicago Title and stated that he had filed an answer to the complaint, but wanted Chigago Title to assign counsel to assume representation of Carrington. By letter dated April 12, 2012, Chicago Title declined to provide legal representation for Carrington's defense, citing the exclusions in the policy.

Chicago Title noted that the Siblings' complaint alleged that Carrington entered into a verbal agreement with them regarding title to the property, which Carrington allegedly breached through the subsequent refinancing of the purchase money mortgage loan. Furthermore, in the complaint, the Siblings alleged that Carrington committed certain fraudulent acts in violation of a fiduciary duty owed to the Siblings.

Chicago Title stated that the Siblings had made "allegations [that] refer to an unrecorded agreement made by [Carrington], which she failed to disclose, and further intentional acts of [Carrington]." Chicago Title said such claims are expressly excluded by the policy. Moreover, the Siblings had made allegations pertaining to the refinancing of the purchase money mortgage loan, which took place subsequent to the date of the policy. Chicago Title said such claims also are excluded under the policy.

Carrington's attorney responded and told Chicago Title that Carrington denied that she failed to disclose to the insurer any agreement regarding title when the policy was issued. Carrington also denied that she entered into any agreement after she took title to the property. Thereafter, Chicago Title reaffirmed its earlier determination to deny coverage.

In April 2013, Carrington filed this action, claiming that Chicago Title had unlawfully failed to provide a defense to her in the underlying action; investigated the claim in bad faith; and violated the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20. Thereafter, the underlying action was settled. On December 20, 2013, the Chancery Division entered an order in that action granting sole possession of the property to Carrington.

Chicago Title later filed a motion for summary judgment in this case, which Carrington opposed. On June 20, 2014, the judge heard oral argument by counsel and on June 24, 2014, entered an order granting Chicago Title's motion for summary judgment. As indicated in the statement of reasons filed

with the order, the judge determined that Chicago Title was entitled to summary judgment because the Siblings were claiming interests in the property based upon an agreement that Carrington had allegedly entered into before Chicago Title issued the policy, and that she had not disclosed.

The judge determined that the Siblings' claims were excluded under the policy. Therefore, Chicago Title had no obligation to provide a defense to Carrington in the Siblings' lawsuit. Carrington subsequently filed a motion for reconsideration, which the judge denied by order entered on August 14, 2014. This appeal followed.

On appeal, Carrington argues the trial court erred by granting summary judgment in favor of Chicago Title. Carrington contends that Chicago Title had a duty to provide a defense to her in the underlying action, and the court erred by considering the exclusions under the policy when deciding if Chicago Title had a duty to defend.

"Summary judgment must be granted if the court determines `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.'" Parsons v. Mullica Twp. Bd. of Educ., 440 N.J. Super. 79, 83 (App. Div. 2015) (quoting R. 4:46-2(c)). Furthermore, "`[a] ruling on summary judgment is reviewed de novo.'" Ibid. (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014)).

Here, there was no genuine issue of material fact as the claims the Siblings had asserted in the underlying action, and no dispute as the relevant provisions of the Chicago Title policy. We are convinced that the motion judge correctly determined that Chicago Title had no duty to provide Carrington with a defense in the Siblings' lawsuit. As the judge explained, in that action, the Siblings had claimed interests in title to the subject property, based on an agreement that Carrington allegedly entered into with the Siblings before Chicago Title issued the policy. The policy clearly excluded coverage for the claims asserted in the underlying action because those claims pertained to a title risk allegedly created by Carrington, and known to her but not disclosed to the insurer before the policy was issued.

Carrington argues, however, that Chicago Title had a duty to provide her with a defense because the Siblings' lawsuit asserted a claim to title, which was a covered risk, and the motion judge erred by finding that Chicago Title had no duty to defend based on the policy's exclusions. We disagree.

"An insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy." Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010) (citing Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992); Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512 (1965), L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 490 (App. Div. 2004)). "In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome, that governs the insurer's obligation." Ibid. (citing Flanagin, supra, 44 N.J. at 512).

In this case, Chicago Title did not have a duty to defend Carrington in the underlying action because, in that matter, the Siblings had asserted claims that were not covered under the policy. As the judge

noted in his statement of reasons, the Siblings had asserted claims to title. Among the risks covered by the policy was the risk that "[s]omeone else owns an interest in your title."

However, the Siblings' claims that they had interests in Carrington's title were all premised on the assertion that Carrington and the Siblings had agreed they would jointly purchase the property, even though it was initially titled in Carrington's name. The Siblings alleged that, if their credit ratings improved, they and Carrington would each have interests in the property.

The Siblings' claims were clearly excluded under the Chicago Title policy because they had asserted interests in the property that had allegedly been created by Carrington, and not disclosed to the insurer before the policy was issued. Furthermore, although the Siblings asserted different theories of liability, all of the claims were based on the alleged agreement. The judge correctly determined that Chicago Title had no duty to provide Carrington a defense with regard to those claims.

Carrington also argues that, in granting Chicago Title's motion for summary judgment, the judge misapplied Burd v. Sussex Mut. Ins. Co., 56 N.J. 383 (1970). Again, we disagree. In Burd, the Court stated that an insurer's duty to defend arises whenever a complaint "alleges a basis of liability within the covenant to pay." Id. at 388. The Court added that, "The sense of the covenant is to defend suits involving claims which the carrier would have to pay if the claimant prevailed in the action." Ibid. The Court also stated that an insurer is not obligated to defendant a lawsuit involving "claims which would be beyond the covenant to pay if the claimant prevailed." Id. at 389.

Here, the motion judge properly applied Burd, and correctly determined that Chicago Title had no duty to provide a defense to Carrington in the Siblings' lawsuit. As we have explained, the Siblings asserted claims that were clearly excluded under the policy. Chicago Title had no duty to cover those claims, even if the Siblings ultimately were to prevail upon them. It had no duty to defend claims that were clearly excluded under the policy.

Carrington further argues that Chicago Title should be estopped from denying coverage because, at the time she purchased the property, she acted on the advice of an attorney, who was purportedly acting as Chicago Title's agent. It appears, however, that the attorney was designated solely as issuing agent or attorney for the closing, and the attorney's responsibilities regarding the transaction were limited to obtaining the necessary documents, disbursing funds necessary to establish title, and paying funds due to the policyholder.

There is no evidence that the attorney had any further responsibilities to Carrington or the transaction. There also is no evidence the attorney had any involvement or knowledge of the alleged agreement between the Siblings and Carrington. The motion judge correctly rejected Carrington's claim of estoppel.

We have considered Carrington's other arguments, including her contentions that: (1) the theory advanced by the Siblings for recovery is irrelevant to the insurer's duty to defend; (2) the exclusion under the policy for any risk "created, allowed or agreed to" by the insured did not apply because the exclusion requires "conscious conduct" on the part of the insured; and (3) Chicago Title had a duty to

investigate whether the Siblings' allegations of an agreement with Carrington were true. These arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

[1] It should be noted that initially Carrington acquired title with Sherry-Ann and Wesley Salfarlie (the "Salfarlies"). Carrington claimed that they were merely "accommodation signers" of the initial mortgage loan for $99,000. On August 1, 2001, Carrington refinanced the loan, and the Salfarlies transferred their interests in the property to Carrington.