SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3358-15T2

WAYNE SAVAGE,

Plaintiff-Appellant,

v.

PROGRESSIVE INSURANCE CO.,

Defendant-Respondent,

and

A.T.

Defendant.

Submitted July 13, 2017 – Decided July 27, 2017

Before Judges Yannotti and Haas.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4048-14.

Wayne Savage, appellant pro se.

Kent & McBride, P.C., attorneys for respondent (Bradley R. Lawrence, on the brief).

PER CURIAM

Plaintiff Wayne Savage appeals from an order entered by the Law Division on February 26, 2016, dismissing plaintiff's claims

against defendant Progressive Insurance Company (Progressive) with prejudice. We affirm.

We briefly summarize the relevant facts and procedural history. On January 28, 2014, plaintiff filed a complaint in the Special Civil Part against Progressive and a person we refer to as A.T., asserting a claim under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, based on Progressive's alleged wrongful rescission of an automobile insurance policy. Plaintiff claimed he acquired the policy on December 10, 2013.

It appears that plaintiff was in an automobile accident on January 8, 2014. According to the complaint, a police officer contacted Progressive to confirm that plaintiff had auto insurance, but Progressive informed the officer that plaintiff did not have coverage. Plaintiff sought treble damages pursuant to the CFA.[1]

Because plaintiff was seeking damages that exceed the jurisdiction monetary limits of the Special Civil Part, the court transferred the case to the Civil Part. Progressive then filed an answer denying liability. The court later denied Progressive's motion for summary judgment and conducted a bench trial in the matter.

[1] The court later dismissed the complaint as to A.T. apparently because the complaint was never served upon him.

At the trial, plaintiff testified that on December 5, 2013, he purchased a used Dodge automobile, and on December 10, 2013, he went to Rallye Motors, another used car dealership, to arrange for the purchase of automobile insurance. Plaintiff spoke with A.T., an individual whom he knew at Rallye Motors. Plaintiff said A.T. had previously assisted him in purchasing auto insurance for his daughter. Plaintiff told A.T. he wanted the best coverage at the lowest price.

A.T. contacted Progressive and he gave plaintiff a quote for coverage. Plaintiff agreed to purchase the coverage for a total premium of $2700, which he would pay in installments. Plaintiff said he gave A.T. $593 in cash. Plaintiff claimed he was supposed to pay the remaining installments with electronic transfers of money from an account. Plaintiff claimed A.T. gave him a receipt but he could not produce it.

Plaintiff testified that he had been living with his sister in an apartment in Newark. Plaintiff was no longer living at that location, but he was still receiving his mail there. He stated that he had received a "welcome package" from Progressive, which included a five-page application for insurance.

The application stated that the policy was for the period from December 10, 2013, to June 10, 2014, with a total premium of $2967, which would be paid in five installments. The first

installment payment was $593.40. The application stated that the initial payment had been received.

The application indicated that the initial payment would be made with funds transferred from a checking account, which was identified by the last four digits of both the account and the routing number. The application stated:

> This is to confirm the authorization you gave for your first installment payment to be made by [electronic funds transfer]. This authorization applies to your first installment only. After your first installment payment, we cannot withdraw funds from your checking account for future payments unless you provide us with another authorization. An authorization form is included in this package.

In another section, the application form contained the following statement:

> If I make my initial payment by electronic funds transfer, check, draft, or other remittance, the coverage afforded under this policy is conditioned on payment to the Company by the financial institution. If the transfer, check, draft, or other remittance is not honored by the financial institution, the Company shall be deemed not to have accepted the payment and this policy shall be void.

On cross-examination, plaintiff again stated that he had provided A.T. with cash for the first installment payment, but he did not have a receipt for the payment. Plaintiff conceded that

he never mailed cash, a money order, or a check to Progressive. He claimed that A.T. told him he sent the money to Progressive.

Plaintiff acknowledged that a few days after he arranged for coverage, he received a package of documents from Progressive but he claimed he only read the first page. Plaintiff said he did not read the page with the authorization of an electronic transfer of funds from an account for the first payment.

Progressive's attorney asked plaintiff whether he read the part of the application form which states that if the initial payment is not honored by a financial institution, the policy "shall be void." Plaintiff said he read this part of the application but claimed it did not apply to him because he had not paid by check. Progressive's attorney asked plaintiff if he signed and returned the application to Progressive, and he replied that he could not recall but he "could have."

Progressive's attorney then showed plaintiff a rescission notice dated December 16, 2013. He acknowledged that his name and policy number were on the notice, and the address was his mailing address in Newark. Plaintiff also acknowledged that the police officer had given him a ticket for failing to maintain auto insurance. Plaintiff said he pled guilty to the charge and paid a fine, but he was going to appeal if he succeeded in this case.

Progressive presented testimony from Debra Henry (Henry), a defense litigation specialist for the company. Ms. Henry was responsible for investigating coverage disputes regarding auto insurance policies. She reviewed plaintiff's file, including the documents Progressive sent to plaintiff. Ms. Henry testified that plaintiff had obtained a "direct policy," which means that a Progressive agent did not arrange for the insurance.

Ms. Henry said that in this case, someone had asked Progressive for a price quote, an application was made, and the company asked for payment information. She noted that Progressive accepts payments from policyholders through a bank or financial institution. Policyholders also may pay the company directly using a check or credit card. Progressive does not, however, allow cash payments for its policies. When the company receives banking information, the company's customary practice is to generate and mail policy documents to the customer.

Ms. Henry further testified that in this case, the financial institution had informed Progressive that plaintiff's payment had been rejected. Progressive then issued a rescission notice dated December 16, 2013, which the company mailed to plaintiff at his Newark address. The notice stated that Progressive had rescinded the policy.

Ms. Henry explained Progressive's process for mailing its notices. Progressive mails out notices regarding policies with certain addresses and locations at the same time. The letters are processed and a representative from the United States Postal Service (USPS) comes to Progressive's mail facility in Cleveland, and stamps the manifest, which constitutes a certified report of the mailings. Thereafter, a postal worker picks up the mail. Ms. Henry identified the rescission notice and said it was a true copy of the notice mailed to plaintiff.

The trial judge then permitted plaintiff and Progressive's attorney to make closing arguments. Thereafter, the judge placed an oral decision on the record. The judge noted that the basic facts were essentially undisputed. The judge found that while plaintiff claimed he paid A.T. cash for the first premium payment, plaintiff did not have a receipt for the cash payment and Progressive had no record of receiving that payment. The judge noted that Progressive does not accept cash payments.

The judge also noted that although plaintiff had authorized an electronic transfer of funds for the first payment, the funds had not been transferred. The judge found that because plaintiff did not make the initial premium payment, Progressive properly rescinded the policy. The judge also determined that Progressive

had complied with the requirements of N.J.S.A. 17:29C-10 by mailing to plaintiff a notice stating that the policy had been rescinded.

The judge memorialized his decision in an order of judgment dated February 26, 2016, which dismissed plaintiff's claims against Progressive with prejudice. This appeal followed.

On appeal, plaintiff argues the trial court erred because: (1) he had a valid receipt from Progressive stating it had received his first installment payment; (2) he had a policy number and valid policy at the time it was cancelled, and Progressive failed to cancel the policy in accordance with the requirements of N.J.S.A. 17:29C-10; (3) Progressive's witness presented no evidence that an online transaction had taken place on December 10, 2013 (not raised below); (4) the trial judge did not remain objective (not raised below); and (5) ambiguities in an insurance policy should be resolved in favor of the insured (not raised below).

We note initially the factual findings of the trial judge, sitting without a jury, are binding on appeal if supported by sufficient credible evidence in the record. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citing N.J. Tpk. Auth. v. Sisselman, 106 N.J. Super. 358, 370 (App. Div.), certif. denied, 54 N.J. 565 (1969)). Our deference to the trial court's factual findings is especially appropriate "when the

evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997).

However, we review the trial court's decision on a question of law de novo. Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 139 (2015) (citing Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 535 (2013)). Therefore, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Twp. Comm., 140 N.J. 366, 378 (1995).

We are convinced from our review of the record that there is sufficient credible evidence in the record to support the trial court's finding that Progressive validly rescinded the policy it had issued to plaintiff on December 10, 2013. As the trial testimony and documents admitted into evidence show, plaintiff applied for a policy on December 10, 2013, but failed to make the first premium payment. Therefore, Progressive properly rescinded the policy.

Plaintiff argues on appeal that he had a valid receipt from Progressive, which indicated that he made the first installment payment. Plaintiff claimed he provided A.T. with cash for the first payment, but he presented no evidence to corroborate that

claim. Moreover, as Ms. Henry testified, Progressive does not accept cash payments for its policies.

Furthermore, the evidence shows that Progressive had issued that receipt based on the policy application, which stated that plaintiff would make the first payment by means of an electronic transfer of funds from a specified checking account. Progressive presented evidence showing that the financial institution did not transfer the funds and the payment was not made. Therefore, Progressive properly declared the policy void ab initio.

The trial court's finding that Progressive acted properly by rescinding the policy is supported by our decision in Tucker v. Allstate Insurance Co., 195 N.J. Super. 230 (App. Div. 1984). In that case, the plaintiff applied for auto insurance through an agency, which submitted the application and its own check to the insurer for the premium deposit. Id. at 232. The insurer received the application and the check, which it deposited. Ibid.

The coverage was to be retroactive to the date on which the plaintiff signed the application. Ibid. The agent later advised the insurer that the check that plaintiff had provided for the premium had been returned for insufficient funds. Ibid. The insurer declared the application null and void and rescinded coverage retroactive to the date the coverage became effective. Ibid. We held that the insurer "was within its rights" to declare the policy

void from its inception. Id. at 234. The same conclusion applies here.

Plaintiff also argues that Progressive failed to cancel the policy in accordance with N.J.S.A. 17:29C-10. The statute provides:

> No written notice of cancellation or of intention not to renew sent by an insurer to an insured in accordance with the provisions of an automobile insurance policy shall be effective unless a. (1) it is sent by certified mail or (2) at the time of the mailing of said notice, by regular mail, the insurer has obtained from the Post Office Department a date stamped proof of mailing showing the name and address of the insured and b. the insurer has retained a duplicate copy of the mailed notice which is certified to be a true copy.

Here, Progressive did not cancel the policy. It declared the policy void from its inception. See First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 137 (2003) (finding that rescission of an insurance policy by an insurer voids the agreement ab initio, and treats it "as if it does not exist for any purpose"). Therefore, the statute did not apply.

Even if Progressive's action is deemed to be a cancellation of the policy, the record supports the trial court's determination that Progressive complied with the requirements in N.J.S.A. 17:29C-10. As noted, Ms. Henry testified that Progressive sent the notice to plaintiff on December 16, 2013, as shown by the mailing

manifest, which listed his name and address and was date-stamped by the USPS.

Ms. Henry further testified that Progressive retained the rescission notice in the ordinary course of its business. She stated that the copy of the notice presented to the court was a full and complete copy of the notice that Progressive sent to plaintiff on December 16, 2013.

We note that Progressive did not show that it created a certification at the time it sent the notice to plaintiff, stating that the duplicate was a true copy of the mailed notice. See Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 543 (App. Div. 1986) (stating that the statute requires certification of the duplicate as a true copy "contemporaneously" with the mailing of the original). Even so, the trial judge properly found that Ms. Henry's testimony and the documentary evidence established that Progressive had retained a duplicate copy of the notice and that the duplicate was, in fact, a true copy of the notice that Progressive mailed to plaintiff on December 16, 2013.

Plaintiff further argues for the first time on appeal that: Progressive failed to show that an online transaction took place on December 10, 2013; the trial judge did not remain objective; and certain ambiguities in the policy should be resolved in his favor.

This court will not, however, consider arguments that were not raised in the trial court "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)). Because plaintiff's three additional arguments do not concern the trial court's jurisdiction and are not of great public interest, they will not be addressed.

Affirmed.