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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4435-12T1

MARILYN D. MASAITIS AND
WILLIAM J. MASAITIS,

Plaintiffs-Appellants,

v.

ALLSTATE NEW JERSEY INSURANCE
COMPANY,

Defendant-Respondent,

and

MARK J. KREVIS a/k/a
MARK KREVIS, JP MORGAN CHASE
BANK, NA as successor to
WASHINGTON MUTUAL BANK, BANK
OF AMERICA as successor to
COUNTRYWIDE FINANCIAL,
CONSOLIDATED ENVIRONMENTAL
COMPANY,

Defendants.

Submitted June 24, 2014 – Decided August 26, 2014

Before Judges Ashrafi and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Docket No. L-
1645-10.

Mauro C. Casi, attorney for appellant.

Sullivan and Graber, attorneys for
respondent (James F. Sullivan, of counsel;
Chryzanta K. Hentisz, on the brief).

PER CURIAM

Plaintiffs Marilyn D. and William J. Masaitis appeal from a jury's verdict finding that they are not entitled to compensation from their homeowner's insurance carrier, Allstate New Jersey Insurance Company, for loss of property when fire destroyed their house and belongings. They also appeal from the final judgment awarding more than $800,000 to Allstate from plaintiffs under N.J.S.A. 17:33A-7(a), a provision of the Insurance Fraud Protection Act (IFPA), N.J.S.A. 17:33A-1 to -30. We affirm.

Plaintiffs' home in Basking Ridge was damaged by fire on the afternoon of May 6, 2008. The municipality's fire marshal turned the investigation of the fire over to the county prosecutor's office and testified at trial that she never determined the cause of the fire. There was no evidence that the prosecutor's office ever attributed the cause of the fire to an arson.

Allstate had issued a homeowner's insurance policy to plaintiffs, but it considered the fire suspicious and investigated plaintiffs' claims thoroughly. By letter dated May 21, 2009, Allstate informed plaintiffs that it was denying their

claims. The letter recited the terms of the policy pertaining to "misrepresentation, fraud or concealment," and it provided reasons why Allstate did not grant the claims. It also stated that Allstate was in the process of determining what amounts were owed to the mortgagees on the property and that it would pay those amounts to the mortgagees pursuant to the requirements of the policy. Allstate eventually paid the mortgagees $675,000 in satisfaction of their mortgages on the property.

In May 2010, plaintiffs filed a ten-count complaint in the Superior Court against Allstate, its investigator, and the financial institutions that held mortgages on the property. Allstate and its investigator filed an answer and a counterclaim alleging insurance fraud in violation of the IFPA.

After discovery and motion practice, trial before a jury was conducted in December 2012. The jury answered specific, detailed questions on a verdict form that resulted in a verdict against plaintiffs on their claim for recovery against Allstate. The jury found that plaintiffs had knowingly misrepresented material facts concerning their claim for payments under their insurance policy, but it also found that Allstate had not proven that plaintiffs committed arson.

On March 12, 2013, the court issued a final judgment against plaintiffs and awarded Allstate total damages of

$807,980.90, which included interest, attorney's fees, and costs pursuant to N.J.S.A. 17:33A-7(a).

On appeal, plaintiffs make two arguments: (1) that the trial court committed reversible error in permitting Allstate to argue to the jury that plaintiffs were guilty of arson, and (2) that Allstate should have been estopped from denying the claim on grounds of fraud and concealment because it never refunded the premium for the insurance policy to plaintiffs. Neither of these arguments has any merit.

At the start of the trial, plaintiffs' counsel objected to defense counsel mentioning arson during his opening statement. The trial judge overruled the objection and noted that if there were adequate circumstantial evidence from which arson could be inferred, it would be a question for the jury to decide. At the conclusion of proofs, plaintiffs' counsel objected again to the jury being instructed it may consider an arson defense to plaintiffs' claim, but the trial judge ruled there was sufficient evidence from which the jury could rationally conclude defendant had proven arson by the standard of proof applicable in a civil case.

Although plaintiffs argue on appeal that incorrect jury instructions entitle them to a new trial, they do not challenge the specifics of the instructions the judge gave. Essentially,

they argue the arson defense should have been excluded because there was no evidence from which the jury could have concluded the fire was purposely set. They argue that Allstate did not present any expert or forensic evidence of the cause of the fire, and the fire marshal could not determine its cause.

We find no error in the trial court's ruling that Allstate produced sufficient circumstantial evidence of plaintiffs' involvement in the cause of the fire to present a jury question. Allstate proved that plaintiffs were in financial difficulty with respect to their obligations on the house. Although their mortgage debts on the house required yearly payments totaling $135,600, plaintiffs' income tax returns for 2004 through 2006 showed an average yearly income for those years of less than $30,000. The house had been on the market for sale for about one-and-a-half years without any offers. Plaintiffs had reduced the original asking price of $2 million to $1.3 million, but still had no prospect of selling the house.

On the day of the fire, plaintiffs had removed their dog and cat from the house and left the pets at their son's house. In addition, various items of furniture, large screen televisions, and family photographs and portraits had been removed from the house before the fire, and the garage was empty

of vehicles. William Masaitis's Harley Davidson motorcycle had also been removed from the house before the fire.

Allstate also presented evidence from telephone records to prove that William Masaitis misrepresented his whereabouts on the day of the fire. Masaitis testified he had not been in Basking Ridge on the afternoon of the fire, that he was working in Long Valley at that time. His cell phone records, however, showed that he made two phone calls transmitted from cell towers in Basking Ridge about one hour before the fire was first reported by a neighbor who saw smoke coming from the roof and chimney of the house.

In addition, William Masaitis had originally claimed he had not done any electrical work on the house himself, but at the trial, he admitted he had personally done electrical work. As we will further describe, plaintiffs' claims were discredited in other ways, demonstrating a motive to gain financially from the fire. In sum, there was sufficient evidence from which the jury could reasonably infer that plaintiffs had motive and opportunity to set the fire for purposes of relieving their financial difficulties and benefitting from the fire.

Arson is an affirmative defense to an insurance claim and may be proven by a preponderance of the evidence. Italian Fisherman v. Commercial Union Assurance Co., 215 N.J. Super.

278, 282 (App. Div.), certif. denied, 107 N.J. 152 (1987). The trial court charged the jury that it was the plaintiffs' burden to prove their claims for compensation under the insurance policy, but that it was defendant Allstate's burden to prove by a preponderance of the evidence its defenses of arson, material misrepresentation, and violation of the IFPA. With respect to the arson defense, the court instructed the jury that Allstate must prove:

> 1) The loss was due to a fire of incendiary origin. That means that the fire was not accidental, but that it was set on purpose by Mr. Masaitis. That's the first element they have to prove.
>
> 2) Second element is that Mr. Masaitis had an opportunity to set the fire.
>
> 3) And the third element is that he had a motive to set the fire.
>
> 4) And the fourth element is that Mrs. Masaitis consented to Mr. Masaitis in setting the fire.

This instruction actually placed a greater burden of proof on Allstate than the elements of an arson defense in an insurance case. See Rena, Inc. v. T.W. Brien, Underwriters at Lloyd's, London, 310 N.J. Super. 304, 312-13 (App. Div. 1998). Allstate was not required to prove that Mr. Masaitis personally set the fire, id. at 313, and there was also no requirement that both plaintiffs be involved in the arson.

In any event, the jury found insufficient proof that plaintiffs were guilty of arson. Its verdict in favor of Allstate was based on its finding that plaintiffs had misrepresented their losses in making their claims on personal property damaged by the fire.

The Allstate policy provided that Allstate would "not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance." Allstate's denial letter of May 21, 2009, stated: "Material misrepresentations were made by an insured person or persons concerning personal property including the identity, description, valuation and loss to same and other facts relevant to the amount, nature and extent of the claims." There was ample evidence at trial from which the jury could conclude that plaintiffs made false claims to Allstate for loss of their personal property.

Plaintiffs claimed loss of $934,581.75 in personal property caused by the fire. Allstate's contents claim adjuster inspected the house and estimated $308,215.71 in losses. This estimate included $115,000 in damages estimated by an expert appraiser of antiques and fine art. At trial, Allstate proved that items of loss claimed by plaintiffs were fraudulent. For example, plaintiffs claimed loss of two Rolex watches valued at

a total of $70,000. But they could not prove they had ever owned such watches. William Masaitis claimed he had purchased his watch from Braunschweiger Jewelers in Morristown. Allstate presented testimony from a representative of Braunschweiger Jewelers that it had no record of any such sale. Marilyn Masaitis claimed that both Rolex watches had been purchased in the Virgin Islands and charged to her American Express card, but there was no American Express record of such a purchase.

By its answers to special interrogatories, the jury found that Allstate proved plaintiffs knowingly misrepresented material facts concerning their claims for reimbursement from their homeowner's insurance policy, and that they knowingly violated the IFPA. We see no basis on this record to disturb the jury's verdict on those issues.

Finally, plaintiffs argue that Allstate should have been estopped from denying their claim because it did not refund their premium for the insurance policy although it claimed that the policy was void because of their alleged fraud. They cite Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114, 130-31 (1962), and other cases for the proposition that an insurer is estopped from denying a claim for fraud if it retains the premium paid for the insurance policy. However, the requirement discussed in Merchants Indemnity – that the insurer elect either

to rescind the insurance policy and return the premium or to affirm the policy and abide by its terms – applies to circumstances where the insurance policy was obtained by fraud at its inception. Ibid.; see also Englishtown Auction Sales, Inc. v. Mt. Vernon Fire Ins. Co., 112 N.J. Super. 332, 337 (App. Div. 1970) (Insurer's retention of premium payment constituted waiver of its right to cancel the policy.).

Here, Allstate's defense of misrepresentation and fraud was not based on fraudulent procurement of the policy at its inception. Rather, it was that plaintiffs had made a fraudulent claim on their policy. Such a defense did not require Allstate to rescind the policy. See Italian Fisherman, supra, 215 N.J. Super. at 282. Allstate was not estopped from pursuing its defenses and counterclaim.

Affirmed.