

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1515-03T5

DENNIS DELENGOWSKI and
GEORGIA DELENGOWSKI,

Plaintiffs-Respondents,

v.

CONTINENTAL INSURANCE
COMPANY OF NEW JERSEY,

Defendant-Appellant.

Argued June 2, 2004 -- Decided **JUN 14 2004**

Before Judges Ciancia, Parker and R.B. Coleman.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County, L-4546-03.

Joseph V. Leone argued the cause for appellant
(Hoagland, Longo, Moran, Dunst & Doukas,
attorneys; John C. Simons, of counsel; Mr. Leone,
on the brief).

John B. Kearney argued the cause for plaintiffs
(Kearney & Schweitzer, attorneys; Sherri L.
Schweitzer, on the brief).

PER CURIAM

The gravamen of this litigation is a dispute between
defendant, Continental Insurance Company of New Jersey
(Continental), and its insured, plaintiff Dennis Delengowski,
over plaintiff's entitlement to underinsured motorist (UIM)



C-MUD-2

coverage following an automobile accident. Two issues were initially raised on appeal, one of which has become moot.

Plaintiff's claim for UIM benefits was resisted by defendant and plaintiff sought arbitration. Defendant took the position it was not obligated to arbitrate such a claim. The trial court agreed with plaintiff and ordered the parties to arbitration. As discussed below, fees and costs were awarded against Continental.

An appeal was taken by defendant challenging both the order compelling arbitration and the award of fees. Defendant's requests for a stay of arbitration pending appeal were denied by both the trial court and this court. Arbitration went forward and an award was made to plaintiff of \$100,000, reduced to \$75,000 by virtue of plaintiff's twenty-five percent comparative negligence. The award was not binding and Continental rejected it, requesting a trial de novo.

In these circumstances, the question of whether defendant should have been compelled to arbitrate plaintiff's claim for UIM, a matter turning on contract interpretation, is moot. Nor do we believe that exploration of that question would affect our determination of the remaining issue -- the award of attorney's fees to plaintiff.

Defendant contends an award of fees was erroneous because plaintiff was seeking first-party coverage from defendant and a claim for UIM benefits is not "an action upon a liability or indemnity policy" within the meaning of R. 4:42-9(a)(6). As a legal proposition, defendant's position is sound and supported by considerable case law. Barnett v. Prudential Prop. & Cas. Ins. Co., 304 N.J. Super. 573, 578 (App. Div. 1997), certif. denied, 154 N.J. 610 (1998); New Jersey Mfrs. Ins. Co. v. Breen, 297 N.J. Super. 503, 516-517 (App. Div. 1997), aff'd as modified, 153 N.J. 424 (1998); Goodwin v. Rutgers Cas. Ins. Co., 223 N.J. Super. 195, 199 (App. Div. 1988).

Plaintiff, in turn, accepts the proposition that fees were not awardable under R. 4:42-9(a)(6), but contends that the award was made on other grounds. Plaintiff argues that fees were awarded because of defendant's persistent failure to comply with the trial court's orders directing arbitration. In effect, if not by specific designation, plaintiff was compelled to bring a motion in aid of litigant's rights and, having succeeded, the court was well within its discretion in awarding fees. R. 1:10-3.

On the facts presented, we find plaintiff's arguments to be the more persuasive. The trial court initially ordered the selection of arbitrators followed by arbitration within thirty

days, on September 12, 2003.¹ Defendant did not comply but, instead, moved for reconsideration. Plaintiff cross-moved to enforce the court's order.

Following argument, the trial court, on October 24, 2003, denied reconsideration and granted the motion to enforce. Arbitration was directed to start within thirty days. Plaintiff had sought fees and costs "in light of the motion to compel . . . and for having to respond to the . . . motion to reconsider." The trial court, however, "reserve[d] on plaintiff's request for costs and fees." At the end of oral argument the trial judge stated, "and as to fees and costs, I'm tempted, what I'm going to do is reserve on that to see what happens."

Defendant appealed this order but, as previously noted, no stays were granted pending appeal. On December 10, 2003, plaintiff moved for an order to show cause "for defendant's failure to comply" with the trial court's order of October 24, 2003. Fees and costs were again requested, "as a result of necessitating this application."

On January 20, 2004, the trial court entered an order appointing arbitrators, directing that arbitration take place

¹ An award of fees was made at that time, but plaintiff concedes and conceded below, that the award was inappropriate. That award is not here in issue.

within sixty days, and awarding \$2,170 in counsel fees and \$60 in costs.

It is clear from the record that the trial court was aware that fees were not allowable under R. 4:42-9(a)(6). The limitations of that rule were specifically brought to the court's attention in defendant's brief in support of the motion for reconsideration. It is also clear that the court was frustrated with Continental's continuing failure to comply with the court's orders. Only after plaintiff brought a second motion to compel compliance did Continental submit to arbitration. Although plaintiffs' motions to enforce and for an "order to show cause for defendant's failure to comply with a court order" were not captioned as applications pursuant to R. 1:10-3, in substance they were exactly that. We are satisfied that it was well within the sound discretion of the trial court to award fees and costs under these circumstances.

Affirmed.

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


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NOTICE TO THE BAR

Appellate Division Opinions

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Counsel may divulge the outcome to the client, provided that counsel informs the client that the information cannot be made public prior to the filing date.

Dated: February 5, 1999

Sylvia B. Pressler
Presiding Judge for Administration
Appellate Division