NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1596

ANNA CRANMER, Individually; BRIAN CRANMER, Individually; TINY TOTS DAYCARE PRESCHOOL, LLC d/b/a TINY TOTS DAY CARE PRESCHOOL
Appellants

v.

HARLEYSVILLE INSURANCE COMPANY;
PHILADELPHIA INDEMNITY INSURANCE COMPANY

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:14-cv-03206)
District Judge: Honorable Esther Salas

Submitted under Third Circuit L.A.R. 34.1(a)
October 11, 2017

Before: HARDIMAN, SHWARTZ, and ROTH, Circuit Judges

(Filed: November 17, 2017)

OPINION*

SHWARTZ, Circuit Judge

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Anna Cranmer, Brian Cranmer, and Tiny Tots Daycare Preschool, LLC (collectively "Plaintiffs") appeal the District Court's orders (1) granting summary judgment to Defendant Philadelphia Indemnity Insurance Company ("PIIC") based on the affirmative defense of accord and satisfaction and (2) denying reconsideration of that order. Because undisputed material facts support the accord and satisfaction defense and because Plaintiffs did not satisfy the reconsideration standard, we will affirm.

I

The Cranmers own Tiny Tots Daycare Preschool, LLC ("Tiny Tots"). Tiny Tots was covered by an insurance policy from PIIC that covered business-related personal property and business interruption losses. Tiny Tots suffered damage from Superstorm Sandy and filed claims totaling $956,455.09 with PIIC. PIIC's certified public accountants valued Plaintiffs' losses at $28,542.84. After an unsuccessful attempt to resolve the dispute in New Jersey's Sandy mediation program, Plaintiffs retained counsel at The Rain Law Firm ("RLF") to represent Tiny Tots, and RLF notified PIIC of that representation by letter dated July 18, 2013.

After a conversation between PIIC's counsel and RLF, PIIC's counsel sent RLF a letter dated August 15, 2013: (1) acknowledging receipt of the July 18, 2013 correspondence, (2) noting that "multiple calls" to RLF "have gone unanswered," and (3) stating, "[a]s I explained to your client, Anna Cranmer, at the time of mediation, . . . upon a review and expert evaluation of hundreds of pages of documents produced by Tiny Tots in support of its claim for recovery," PIIC determined that Tiny Tots "is

entitled to $28,542.84 reimbursement under the coverage provided to it by [PIIC]." App. 341. The letter concluded as follows:

> Accordingly, should I not hear from you within ten (10) days of your receipt of this correspondence, I will instruct [PIIC] to tender settlement in an amount of $28,542.84 payable to Tiny Tots Daycare Preschool, LLC and [RLF], its attorney. We will deem the acceptance of this payment as full and final settlement of this claim as well as a release by your client of any further demand for recovery as against Philadelphia Insurance Companies.

App. 341. The letter was delivered to RLF's office, but RLF did not respond to the letter. On September 23, 2013, PIIC's counsel sent RLF a check for $28,542.84, with an accompanying letter that stated:

> Pursuant to my correspondence to you dated August 15, 2013, enclosed please find [PIIC's] check, number 1111429396, made payable to Tiny Tots Day Care Preschool, LLC and [RLF] in the amount of $28,542.84 which is being tendered to you in good faith for the purposes of settlement. Upon your receipt of the enclosed, please contact my office so that we may discuss this matter and the positions of the parties moving forward.

App. 345-46. The check was marked "FINAL," and the comment line stated "Business Income, windstorm damage, loss of income from the date of loss through the period of restoration." App. 346. RLF did not respond to this letter. However, the check was deposited on October 4, 2013 and was endorsed by "Tiny Tots Daycare Preschool" and "Gregg J. Anderson" on behalf of RLF. App. 350. On December 9, 2013, PIIC's counsel sent RLF a request for a signed release of claims against PIIC, but he received no response.

Plaintiffs filed a Complaint asserting breach of contract and breach of the implied covenant of good faith and fair dealing against PIIC. The District Court granted PIIC's motion for summary judgment on both claims.

Plaintiffs moved for reconsideration and attached materials not previously included in their opposition to PIIC's motion for summary judgment, including certifications from Anna Cranmer and RLF attorney Matthew Kotzen stating that Cranmer never accepted or saw the $28,542.84 check and that RLF accepted that check only for partial payment of the claim. Based on these certifications, the District Court ordered the parties to submit supplemental briefing on the issue of RLF's authority and its impact on accord and satisfaction under the reconsideration standard. In response, Plaintiffs submitted additional certifications from Cranmer and Kotzen, which stated that (1) Cranmer "agreed to allow [RLF] to deposit the [$28,542.84] check" based on the understanding that it was a partial payment, and (2) RLF lacked authority to settle Plaintiffs' claim for $28,542.84 and did not have authority to endorse checks on behalf of Tiny Tots. The District Court denied the reconsideration motion, finding that Plaintiffs failed to satisfy the reconsideration standard. Plaintiffs appeal.

II[1]

Plaintiffs argue that the District Court erroneously entered orders granting summary judgment to PIIC on Plaintiffs' breach of contract and implied covenant of good faith and fair dealing claims and denying reconsideration of that judgment. We will address each order in turn.

A

[1] The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

"We exercise plenary review over a district court's grant of summary judgment." Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210, 218 (3d Cir. 2015). We apply the same standard as the District Court, viewing facts and making all reasonable inferences in the non-movant's favor. Hugh v. Butler Cty. Family YMCA, 418 F.3d 265, 266-67 (3d Cir. 2005). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute "is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party, and a factual dispute is material only if it might affect the outcome of the suit under governing law." Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). To survive a summary judgment motion, the non-movant "must point to specific factual evidence showing that there is a genuine dispute on a material issue requiring resolution at trial." Chavarriaga, 806 F.3d at 218 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)); see also Fed. R. Civ. P. 56(c) (requiring a party who asserts that a fact is genuinely disputed to "cit[e] to particular parts of materials in the record" to support the assertion). We "confine[] our analysis to the record before the district court on the motion[] for summary judgment." O'Keefe v. Sprout-Bauer, Inc., 970 F.2d 1244, 1259 (3d Cir. 1992). Thus, based upon the record before the District Court on PIIC's motion for summary judgment, O'Keefe, 870 F.2d at 1259, we will assess whether PIIC demonstrated an absence of a genuinely disputed material fact on each element of its affirmative defense. In re Bressman, 327 F.3d 229, 237-38 (3d Cir. 2003) (collecting cases).

Under New Jersey law, the affirmative defense of accord and satisfaction requires the defendant to prove: "(a) a bona fide dispute as to the amount owed; (b) a clear manifestation of intent by the debtor to the creditor that payment is in satisfaction of the disputed amount; and (c) acceptance of satisfaction by the creditor."[2] Nevets C.M., Inc. v. Nissho Iwai Am. Corp., 726 F. Supp. 525, 536 (D.N.J. 1989), aff'd, 899 F.2d 1218 (3d Cir. 1990); see also Ameritemps, Inc. v. Hainesport Indus. R.R., LLC, No. DC-010783-10, 2014 WL 684583, at *4 (N.J. Super. Ct. App. Div. Feb. 24, 2014).

The undisputed record shows that the first accord and satisfaction requirement of a bona fide dispute was satisfied because PIIC and Plaintiffs disagreed about the amount to which Plaintiffs were entitled under the insurance policy. Plaintiffs submitted Sandy-related claims to PIIC for $956,455.09 while PIIC valued Plaintiffs' loss at $28,542.84. Thus, the record shows that the parties disputed the amount owed.

There is also no genuine dispute that PIIC intended its $28,542.84 payment to satisfy all of Plaintiffs' Sandy-related claims against PIIC, thus satisfying the second element of accord and satisfaction. The August 15, 2013 letter states that PIIC will "tender settlement in an amount of $28,542.84 payable to Tiny Tots Daycare Preschool, LLC and [RLF], its attorney" and "deem the acceptance of this payment as full and final settlement of this claim as well as a release by [Plaintiffs] of any further demand for

[2] Neither party disputes the applicability of New Jersey common law. Thus, we need not address accord and satisfaction under N.J. Stat. Ann. § 12A:3-311, which contains the same elements as New Jersey common law but adds the element of good faith on the part of the debtor. Even assuming § 12A:3-311 applies, however, the record contains no genuine dispute regarding PIIC's good faith.

recovery as against [PIIC]." App. 341. One month later, PIIC's counsel sent RLF a check for $28,542.84, with an accompanying letter that incorporated by reference PIIC's August 15, 2013 letter and stated that the $28,542.84 payment was tendered "in good faith for the purposes of settlement." App. 345-46. In addition, the check contained a claim number matching the Sandy claim that Plaintiffs submitted to PIIC, was marked "FINAL" in the payment line, and the comment line stated "Business Income, windstorm damage, loss of income from the date of loss through the period of restoration." App. 317 (showing claim number), 346 (check image). The combination of the letters and the check demonstrate that PIIC intended to make a payment in full satisfaction of the claim, and Plaintiffs have identified no evidence to the contrary.[3] See Bayside Chrysler Plymouth Jeep Eagle, Inc. v. Ma, No. DC-9699-02, 2006 WL 1449783, at *7-8 (N.J. Super. Ct. App. Div. May 26, 2006) (stating that "[t]he requisite manifestation of intent may be expressed in the check itself, or in the letter or account, or receipt accompanying

[3] Plaintiffs argue that the "FINAL" notation on the check does not reflect an intent to fully settle the dispute because "FINAL" is stamped on checks as a matter of course or inconsistently, but the record does not support this conclusion. In their opposition to summary judgment, Plaintiffs attached copies of other checks from PIIC relating to other losses, and each is accompanied by commentary reflecting that the designation of final or partial is a deliberate act. For example, one check was marked "PARTIAL" in the payment line, with the comment line of the check stating "ACV Parital [sic] Payment," and the check was accompanied by an email stating that the payment was "a partial settlement check." App. 360-61. Other checks were sometimes marked "FINAL" or "PARTIAL" in the payment line, with language in the comment lines of those checks indicating whether the payments were partial or final. These checks thus show that PIIC does not haphazardly designate checks "FINAL." Nevertheless, even if we were to disregard the word "FINAL" on the September 17, 2013 check, the letter accompanying the check and the August 15, 2013 letter show that PIIC's $28,542.84 payment was intended to resolve the Plaintiffs' entire claim.

the remittance" and finding such intent where a check referenced the specific claim being paid and that the payment was to fully settle the debt); Zeller v. Markson Rosenthal & Co., 691 A.2d 414, 416 (N.J. Super. Ct. App. Div. 1997) (requiring that the "party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected"). Thus, PIIC established the second requirement of accord and satisfaction.

PIIC also satisfied the third element of accord and satisfaction—acceptance—because the summary judgment record reflected that the check was endorsed by both Tiny Tots and RLF and was deposited. See Ameritemps, 2014 WL 684583, at *4 ("In New Jersey, the 'rule has been that when a check is tendered as payment for an unliquidated claim on the condition that it be accepted in full payment, the creditor is deemed to have accepted this condition by depositing the check for collection notwithstanding any obliteration or alteration.'" (citation omitted)); Bayside, 2006 WL 1449783 at *8 (stating that "[i]f the check was unacceptable as a final settlement, plaintiff's remedy was to return the check to defendant and sue for the full amount claimed due" and that "[e]ven if the creditor protests, there is acceptance the moment the check cashing occurs" because "we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection" (quoting Zeller, 691 A.2d at 415). At the summary judgment stage, Plaintiffs did not identify facts in the record to raise a genuine dispute regarding lack of acceptance, assert that the endorsement on the check was fraudulent or unauthorized, or claim that RLF lacked authority to deposit the check. Therefore, PIIC demonstrated all elements of accord and

satisfaction beyond genuine dispute, and the District Court correctly granted summary judgment to PIIC on Plaintiffs' breach of contract claim.

The District Court also properly granted summary judgment to PIIC on Plaintiffs' claim for breach of the duty of good faith and fair dealing because Plaintiffs failed to cite to any evidence or raise any arguments with the District Court to support the claim. Therefore, summary judgment in favor of PIIC on that claim was proper. See Chavarriaga, 806 F.3d at 218 (requiring party opposing a motion for summary judgment to "point to specific factual evidence showing that there is a genuine dispute on a material issue requiring resolution at trial").

B

Plaintiffs' assertion that the District Court erroneously denied Plaintiffs' motion for reconsideration also fails. "We review a denial of a motion for reconsideration for abuse of discretion, but we review the District Court's underlying legal determinations de novo and factual determinations for clear error." Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 246 (3d Cir. 2010). "The scope of a motion for reconsideration . . . is extremely limited." Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011). "[A] judgment may be altered or amended only if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id. (alterations, internal quotation marks, and emphasis omitted).

Plaintiffs rely solely on the third ground, asserting that summary judgment in PIIC's favor is based on an error that would cause manifest injustice because RLF lacked actual and apparent authority to settle Plaintiffs' claim for $28,542.84.[4] In support, they rely on Cranmer's and Kotzen's certifications submitted with their motion for reconsideration, which stated that RLF lacked authority both to settle Plaintiffs' claims for $28,542.84 and to endorse checks on behalf of Tiny Tots.

While normally such late-filed materials would not provide a basis for reconsideration, they were seemingly invited by the District Court and, as such, we will consider them but conclude that they do not show that the District Court erred in denying reconsideration. The record reflects that RLF (1) represented Plaintiffs, (2) had communications with PIIC's counsel concerning the matter, and (3) had Plaintiffs' authorization[5] to deposit the $28,542.84 check that contained Tiny Tots' endorsement, App. 602 (stating that Cranmer "agreed to allow [RLF] to deposit the check in their Trust Account"). Even if RLF lacked actual authority to resolve the dispute for $28,542.84, Plaintiffs have not shown that the District Court committed clear error. At a minimum,

[4] On reconsideration, Plaintiffs also argued for the first time that PIIC acted in bad faith under "N.J.S.A. [§] 17:29B-1 to 14" and N.J. Admin. Code § 11:2-17.11(b), App. 692-93, but did not support this argument with citations to the record nor identify relevant authority supporting a violation of those provisions. In addition, § 11:2-17.11 does not give rise to a private cause of action. Therefore, the District Court properly denied reconsideration of its order granting summary judgment to PIIC on Plaintiffs' good faith and fair dealing claim.

[5] Although Plaintiffs argue, based on Cranmer's and Kotzen's final certifications, that Plaintiffs did not give RLF authority to endorse checks on Tiny Tots' behalf, Cranmer's final certification states that she "agreed to allow [RLF] to deposit the check," App. 602 ¶ 30, which of course required the firm to ensure that the check was endorsed.

the record shows that PIIC reasonably relied on RLF's apparent authority[6] because PIIC explicitly informed Plaintiffs' counsel of the check's purpose and that PIIC would deem acceptance as a final settlement of the claim. The check was thereafter deposited bearing the dual endorsement of Tiny Tots and its counsel. Under these circumstances, PIIC reasonably relied on the dual endorsement and deposit of the check to show that Plaintiffs accepted the check to resolve the dispute.

Even if Kotzen erred by depositing the check when he and his client purportedly found the amount unacceptable for a full settlement, the accord and satisfaction defense bars Plaintiffs' claims against PIIC. See Bayside, 2006 WL 1449783, at *8 (stating that "we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection, notwithstanding the deposit is made under protest"); Chancellor, Inc. v. Hamilton Appliance Co., 418 A.2d 1326, 1327-28 (N.J. Super. Ct. Law Div. 1980) (explaining that "[i]f the check was unacceptable as a final settlement, plaintiff's remedy was to return the check to defendant and sue for the full amount claimed due"). Moreover, and perhaps more significantly for the purposes of

[6] "Apparent authority arises when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 1 A.3d 632, 639 (N.J. 2010) (quoting Restatement (Third) of Agency § 2.03 (Am. Law Inst. 2006)) (internal quotation marks omitted); Amatuzzo v. Kozmiuk, 703 A.2d 9, 12 (N.J. Super. Ct. App. Div. 1997) (stating that an attorney's negotiations are binding on the client where "the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the attorney had authority to enter into a settlement"). "Reliance is usually essential to establish an agency relationship based on apparent authority." Sears Mortg. Corp. v. Rose, 634 A.2d 74, 82 (N.J. 1993).

determining whether reconsideration was warranted, the case law shows that attorney error generally does not satisfy the manifest injustice standard for reconsideration of a judgment, and Plaintiffs have not provided a reason to deviate from this principle.[7] See e.g., Link v. Wabash R. Co., 370 U.S. 626, 634 (1962) (recognizing that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer agent"); Gomez v. City of New York, 805 F.3d 419, 423-24 (2d Cir. 2015) (noting that courts usually do not disturb a judgment based upon counsel's "mistake or omission" due to his "ignorance of the law or the rules of the court, or his inability to efficiently manage his caseload") (quoting United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976)); Mohammadi v. Islamic Republic of Iran, 782 F.3d 9, 17-18 (D.C. Cir. 2015) (concluding no manifest injustice where plaintiffs' inadvertent omission of arguments "could have [been] easily avoided" if counsel had "exercise[d] due diligence or elected" to act before "the entry of judgment") (citations omitted); Servants of Paraclete v. Does, 204 F.3d 1005, 1009 (10th Cir. 2000) (counsel's "inadvertence" is not a basis for Rule 60(b)(1) relief); Chick Kam Choo v. Exxon Corp., 699 F.2d 693, 696-97 (5th Cir. 1983) (attorney's "misjudgment or careless failure" did not rise to the level of "blatant errors" or "malfeasance" necessary for Rule 60(b) relief).

[7] Fraud may provide such a reason, see generally Fox v. RC Fabricators, Inc., C.A. No. N12C-06-244 WCC, 2013 WL 6916917 (Del. Super. Ct. Dec. 20, 2013) (finding lack of authority of plaintiff's lawyer to accept payment in accord and satisfaction where the lawyer pleaded guilty to criminal charges for defrauding his client in connection with the dispute at issue), but fraud has not been alleged here.

Therefore, the District Court did not abuse its discretion in denying Plaintiffs' motion for reconsideration.

III

For the foregoing reasons, we will affirm.