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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
John **LISS**, Plaintiff-Respondent,
v.
FEDERAL INSURANCE COMPANY, Defendant-Appellant,
and
Anthony Ilutzi, Grace Holdings, Inc., Gracetech, Inc. and Grace Technologies, Inc., Indispensable Parties.
Argued Oct. 15, 2008.
Decided Feb. 3, 2009.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, L-1845-01.
Stacey P. Rappaport argued the cause for appellant (Drinker, Biddle & Reath LLP, attorneys; Ms. Rappaport and Erin M. Turner, on the brief).

David A. Mazie argued the cause for respondent (Mazie, Slater, Katz & Freeman, LLC, attorneys; Mr. Mazie and David M. Freeman, of counsel and on the brief).

Before Judges FUENTES, GILROY and CHAMBERS.

PER CURIAM.

*1 Defendant Federal Insurance Company (Federal) appeals from the order dated July 16, 2007, that entered judgment against it and in favor of plaintiff John Liss in the sum of $2,401,014. We affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

The complex procedural history and factual background of the case are set forth in our opinion of October 6, 2006, and will not be repeated here. *Liss v. Fed. Ins. Co.*, No. A-6863-03 (App.Div. Oct. 6, 2006). In that opinion we remanded for a trial to determine the enforceability of the settlement against Federal. *Ibid.* We now provide only a brief review of the relevant facts and procedural history necessary to address the issues before us.

Plaintiff was an employee of Grace Technologies, Inc. (Grace Technologies), and in 1998, he was owed $800,000 in commissions from this company. Ilutzi was the president of Grace Technologies. He was also the principal in Grace Consulting, Inc. (Grace Consulting), another company he founded.

In November 1998, plaintiff became the vice president of a newly formed company of Ilutzi named Gracetech, Inc. (Gracetech). As part of his employment agreement with Gracetech, plaintiff waived the $800,000 in commissions owed to him by Grace Technologies, and he received a 9.8 percent interest in Gracetech. While Gracetech did not have any assets at this time, Ilutzi promised plaintiff that the assets of Grace Technologies and Grace Consulting would be transferred to Gracetech.

In January 1999, plaintiff resigned from Gracetech and sought to redeem his shares in that company. However, Ilutzi had not transferred the assets to Gracetech as promised. Instead, he formed another company called Grace Holdings, Inc. (Grace Holdings), and after plaintiff's resignation, he transferred the assets of Grace Technologies and Grace Consulting to this new company. As a result, plaintiff's shares in Gracetech were worthless. Ilutzi and the Grace companies [FN1] contended that plaintiff breached his employment agreement when he resigned and began working for a competitor, and as a result, they had no obligation to redeem plaintiff's shares. Litigation ensued.

FN1. Grace Technologies, Grace Consulting, Gracetech, and Grace Holdings will be

referred to as "the Grace companies."

Ilutzi sought coverage for plaintiff's claims against him under the executive liability and indemnification policy that the various Grace companies, including Gracetech, had obtained from Federal. Federal denied coverage to Ilutzi, and litigation on the coverage dispute followed.

On May 23, 2003, plaintiff, Ilutzi, and the Grace companies reached a *Griggs* settlement.[FN2]In full settlement of plaintiff's claims, Ilutzi agreed to pay plaintiff $1.45 million, representing "the redeemable value of those shares [Liss's shares in Gracetech], including interest."Plaintiff agreed not to pursue his claim against Iltuzi's personal assets, but would limit his recovery to proceeds from the Federal policy. Ilutzi assigned to plaintiff his rights in the Federal policy. As a result, in accordance with the terms of the agreement, plaintiff pursued Federal for recovery of the settlement sum.

FN2. *Griggs v. Bertram*, 88 *N.J.* 347 (1982).

*2 Thereafter, the trial court granted summary judgment in favor of Federal, and plaintiff appealed. We reversed and remanded, concluding that before the coverage issues could be resolved, a trial was necessary. *Liss v. Fed. Ins. Co, supra,* No. A-6863-03 (slip op. at 22-23). As we explained, "Liss's coverage claim against Federal would depend upon whether Ilutzi's conduct as a Director or President prevented Liss from recovering the value of his claim."*Ibid.* Thus, a trial on plaintiff's underlying claim was "required in order to determine whether the Federal policy affords coverage, and if so, for what amount."*Id.* at 23.The Federal policy provided no coverage for plaintiff's breach of contract claim. *Id.* at 22.However, the policy would provide coverage for a claim of breach of fiduciary duty against Ilutzi. *Ibid.* As a result, in order to obtain coverage under the Federal policy, plaintiff had to prove that Ilutzi breached a fiduciary duty to plaintiff. *Ibid.* Accordingly, plaintiff had to first prove his contract claim against Ilutzi and the Grace companies on the redemption of his shares, and the value of that claim. *Id.* at 21-22.Plaintiff would then have to prove that he was unable to recover on his contract claim due to Ilutzi's breach of his fiduciary duty to plaintiff. *Ibid.*

On remand, a bench trial was held. The parties stipulated that plaintiff did have a valid contract claim for stock in the Grace companies. The trial court found that Ilutzi's conduct prevented plaintiff from recovering the value of his shares, and that Ilutzi's actions constituted a breach of his fiduciary duty to plaintiff. The trial court accepted the testimony of plaintiff's expert that plaintiff's shares were worth $1.35 million as of January 29, 1999, the date plaintiff resigned, and that the Grace companies were worth $19.6 million. The trial court further found that the Grace companies had suffered no damage as a result of plaintiff's breach of his employment agreement with the Grace companies. Applying the *Griggs* analysis, the trial court found that plaintiff had sustained his burden of going forward and providing proofs that the settlement was reasonable and entered in good faith, and that Federal had failed to sustain its ultimate burden of persuasion that the settlement was unreasonable, in bad faith, or the result of collusion.

After the decision was placed on the record; the trial court sent counsel a letter dated June 28, 2007, setting forth the amount of the judgment and allowing prejudgment interest. That letter provides in pertinent part: "I have decided this case in favor of the plaintiff in the amount of $1.35 million as of January 29, 1999 plus 6% per annum to date."Judgment was entered on July 16, 2007, in favor of plaintiff and against Federal in the total sum of $2,401,014, representing the value of plaintiff's shares on January 29, 1999, in the sum of $1.35 million, interest in the amount of $684,616 calculated from January 29, 1999, legal fees totaling $355,569, and disbursements totaling $10,829.

*3 Federal appeals this judgment contending that the trial court erroneously concluded that Ilutzi breached a fiduciary duty to plaintiff; that the

award of prejudgment interest was an abuse of discretion; and that entering a judgment in excess of the policy limits was in error.

On appeal, we defer to the factual determinations of the trial judge provided they are "supported by adequate, substantial and credible evidence." *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 *N.J.* 474, 484 (1974). However, our review is de novo on questions of law "and the legal consequences that flow from established facts." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995).

Federal disputes the trial court's finding that Ilutzi breached a fiduciary duty to plaintiff. It maintains that Ilutzi merely breached his agreement to transfer assets to Gracetech, in exchange for plaintiff's relinquishment of the $800,000 claim against Grace Technologies. According to Federal, plaintiff's claim is that of breach of contract against Ilutzi, and thus the claim is not covered by the Federal policy.

We disagree. Ilutzi, as an officer and majority shareholder of Gracetech, had a fiduciary duty to that company and its minority shareholders, including plaintiff. *See Casey v. Brennan*, 344 *N.J.Super.* 83, 108 (App.Div.2001) (stating that the majority shareholders and directors of a corporation have a fiduciary duty to treat the minority shareholders fairly), *aff'd* 173 *N.J.* 177 (2002).[FN3] Due to this fiduciary duty imposed upon majority shareholders and directors, the minority shareholders are entitled to receive "fair value for their shares." *Id.* at 107-08.The duty of the directors to treat minority shareholders fairly is "consistent with the restraint upon them of using their powers for their own personal advantage to the detriment of the minority shareholders." *Id.* at 108.Majority shareholders have been found to have breached their fiduciary duties to the minority shareholders when they transferred the business of the corporation to another entity owned by them to the exclusion of the minority shareholders. *Grato v. Grato*, 272 *N.J.Super.* 140, 159 (App .Div.), *certif. denied*, 138 *N.J.* 264

FN3. The sole issue addressed on certification was whether appellants were statutory dissenters under *N.J.S.A.* 14A:11-1 in connection with their claim for counsel and expert fees.

In this case, plaintiff received shares in Gracetech in exchange for valuable consideration, and as part of that transaction, Ilutzi represented that he would transfer assets from his other Grace companies to Gracetech. Ilutzi, as an officer and the majority shareholder of Gracetech, thereafter failed to act in the best interests of Gracetech and its shareholders. He set up a competing corporation and redirected assets intended for Gracetech to this new competing corporation. As the trial court found:

> Ilutzi created a new company known as Grace Holdings and made it the parent and sole owner of the Grace Companies. This left Gracetech as a shell corporation with no assets which rendered Liss's [plaintiff's] shares of stock worthless. Ilutzi's actions prevented Liss from redeeming his shares. Ilutzi had testified that it was his decision as CEO and major[ity] shareholder in each company not to redeem Liss's stock, to leave Gracetech a shell company, and to create Grace Holdings and to make it rather than Gracetech the parent and sole owner of the Grace companies. No one else had the authority to make that decision or to overrule the actions taken by Ilutzi. These actions constitute a breach of Ilutzi's fiduciary duty to Liss as well as gross negligence.

***4** We agree, because Ilutzi's conduct constitutes a breach of his fiduciary duty to plaintiff, a minority shareholder of Gracetech. His claim against Ilutzi is covered by Federal's policy.

The trial was intended to determine whether the *Griggs* settlement bound Federal. Under *Griggs*, the settlement will bind the insurer if the settlement falls within the scope of the insurance coverage and the settlement is reasonable and was made in good

faith. *Griggs v. Bertram, supra,* 88 *N.J.* at 364, 368. Here the settlement falls within the scope of Federal's coverage, and the trial court found it to be reasonable and made in good faith. Our review of the record indicates that these findings are supported by adequate substantial and credible evidence in the record, and they are affirmed.

We do, however, find error in the court's calculation of interest reflected in the amount of the judgment. Federal properly contends that the trial court made its decision awarding prejudgment interest before Federal had an opportunity to object. Further, we conclude that the calculations are in plain error "clearly capable of producing an unjust result."*R.* 2:10-2.

The trial court awarded a judgment of $1.35 million plus interest of six percent per annum from January 29, 1999. This award ignores the *Griggs* settlement. The amount of the *Griggs* settlement was $1.45 million, and that is the amount of the claim that Federal must cover, not $1.35 million. Further, the *Griggs* settlement of May 23, 2003, included interest, so plaintiff is not entitled to interest from January 29, 1999, to May 23, 2003.

The question then is whether plaintiff is entitled to pre-judgment interest from May 23, 2003, the date of the *Griggs* settlement, to July 16, 2007, the date of the judgment. If so, we then must determine what rate of interest applies.

Plaintiff is not entitled to prejudgment interest under a tort analysis. While he had an underlying tort claim against Iltuzi for breach of fiduciary duty, that claim was settled by the *Griggs* settlement in May 2003, and all of the interest he was entitled to for that tort claim was included in that settlement figure, as expressly stated in that agreement. Thus, plaintiff is not entitled to prejudgment interest pursuant to *Rule* 4:42-11(b). Rather in asserting his claim against Federal, plaintiff stepped into the shoes of Ilutzi, and he has a first party contract claim of an insured against an insurer.

Prejudgment interest may be awarded on breach of contract claims at the court's discretion in accordance with equitable principles. *County of Essex v. First Union Nat'l Bank,* 186 *N.J.* 46, 61 (2006).

In awarding prejudgment interest, "[t]he basic consideration is that the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled."

*5 [*Ibid.* (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., supra,* 65 *N.J.* at 506) (alteration in original).]

The allowance of prejudgment interest on a contract claim falls within the discretion of the trial court and will not be overturned by the Appellate Division unless allowance of the prejudgment interest "represents a manifest denial of justice."*Ibid.* Claims by insureds against their carriers for failure to pay claims of the insured have been viewed as contract claims subject to interest under contract principles. *See* Pressler, *Current N.J. Court Rules,* comment 2.2.3 on *R.* 4:42-11 (2009) (advising that "[w]ith respect to UM and UIM claims, those actions against one's own carrier have been held to be essentially contract causes and, consequently, interest is allowable only on contract principles"); *Danzeisen v. Selective Ins. Co. of Am.,* 298 *N.J.Super.* 383, 389 (App.Div.1997) (stating that as a general rule "in the absence of special circumstances militating against such an award, prejudgment interest is payable for an insurer's failure to pay a claim for an insured fire loss").

Accordingly, we must remand to the trial court for a determination on whether prejudgment interest should be allowed on plaintiff's claim. If it is allowed, the interest runs from the date of the *Griggs* settlement, and, in the absence of unusual circumstances would be at the rate set forth under *Rule* 4:42-11. *See Benevenga v. Digregorio,* 325

N.J.Super. 27, 34-35 (App . Div.1999), *certif. denied,* 163 *N.J.* 79 (2000) (stating that in the absence of unusual circumstances, the appropriate rate for prejudgment interest imposed under equitable principles in non tort matters is the rate in *Rule* 4:42-11(a)).

In summary, we affirm the trial court's holding that Federal's policy covers the *Griggs* settlement reached between plaintiff and Federal's insured Ilutzi. We reverse and remand, so that the trial court may determine whether prejudgment interest is equitable, and if equitable, to calculate the amount of that interest in accordance with this opinion. The interest, if awarded, should be calculated at the rate set forth in *Rule* 4:42-11, absent unusual circumstances, and the calculation should run from the date of the *Griggs* settlement, May 23, 2003.[FN4]

> FN4. We do not address Federal's contention that it is not responsible for prejudgment interest in excess of its policy limits. This issue will become moot if the trial court awards interest in an amount within the policy limits. Further, Federal's argument relies on the trial court's award of prejudgment interest under a tort analysis. We have rejected that analysis, and have allowed prejudgment interest under a contract theory. The effect of the policy limits in this circumstance has not been clearly addressed in the briefs, and is a question we do not reach.

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