Empke v. Security National Insurance Company

[2003] I.L.R. I-4244

Ontario
Superior Court of Justice

October 21, 2003

Automobile insurance -- Limitations -- Application of deductible to total loss claims -- Plaintiffs having sufficient knowledge to bring claims when insurer subtracted deductible and took possession of damaged vehicle.

These were motions for summary judgment on the ground that the claims were barred by the expiry of the one-year limitation period. The plaintiffs' claims involved the breach of a statutory condition by automobile insurers who applied a deductible to the amount paid out for a vehicle determined to be a total loss. As held in McNaughton Automotive Ltd. v. Co-Operators General Insurance Co. [[2003] I.L.R. I-4217], the limitation period began to run from the date of the loss, being the date the defendant insurers took title to the damaged vehicles. In the cases before the Court, the claims had been commenced more than one year following the date on which title to the salvage was taken.

Held: The claims were barred. At the date the plaintiffs received payment, they knew that the deductible had been subtracted, and that the insurer had taken possession of the salvage. The fact that the salvage was sold or the amount of the proceeds obtained by the insurer was not relevant to the determination of whether the statutory condition had been breached. The concealment by insurers of the facts concerning the sale of the salvage was not concealment or fraudulent conduct that would extend the limitation period.

Counsel: Michael McGowan, M. Paul Downs, R. Douglas Elliot and Gabrielle Pop-Lazic for the plaintiffs;
Theodore P. Charney, Julian K. Roy, Alan L.W. D'Silva, Annie M.K. Finn and Timothy M. Banks for the defendants;

Before: before Haines J.

INTRODUCTION

Haines J.: [1] The defendants in these actions have all brought motions for summary judgment on various grounds. The common ground that I intend to address in these reasons is the submission that each of these claims is barred by operation of the applicable limitation period.

[2] In reasons released earlier, I determined that the limitation period was one year subject to the application of the doctrine of fraudulent concealment: McNaughton Automotive Ltd. v. Co-Operators General Insurance Co. subnom Segnitz v. Royal & SunAlliance Insurance Co. of Canada, [2003] O.J. No. 2914; [2003] I.L.R. I-4217 at paras. 51-89. The applicable limitation period, therefore, begins to run from the date of loss, being the date the defendants took title to the damaged vehicles, or if fraudulent concealment is established, from the date the concealed material facts were discovered.

THE FACTS

Anne Empke v. Security National Insurance Company

[3] The plaintiff, Anne Empke, was involved in a single vehicle accident on April 2, 1997. Her vehicle was insured by the defendant pursuant to a standard form policy of automobile insurance. The damaged vehicle was appraised and determined to be a total loss. The actual cash value as established by the appraiser was between $2,900.00 and $3,200.00.

[4] On April 9, 1997 the plaintiff agreed to settle her claim upon payment of $3,480.00 which was calculated as follows:

Total amount of loss (including taxes)	$3,680.00
Less deductible	$ 200.00

Amount paid	$3,480.00
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A few days after she received payment, the plaintiff forwarded the ownership for the vehicle to the defendant. This action was subsequently commenced on August 28, 2001.

Boyd Johnston v. Federation Insurance Company of Canada

[5] The motor vehicle of the plaintiff, Boyd Johnston, was insured by the defendant pursuant to a

standard form policy of automobile insurance. That vehicle was involved in a collision on February 28, 1999 and damaged beyond economic repair. The actual cash value of the vehicle was determined to be $1,900.00 and the claim was resolved on the following basis:

Total amount of loss (including taxes)	$21,850.00
Less deductible	$ 300.00

Amount paid	$21,550.00
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The sum of $21,500.00 was paid on March 9, 1999 and the defendant took title to the salvage. This action was commenced November 15, 2001.

Gary Jory v. Primmum Insurance Company

[6] The plaintiff's vehicle was damaged beyond economic repair on October 17, 1999. The defendant insured the vehicle pursuant to a standard form policy. The plaintiff retained a lawyer to represent him in the settlement of his claim. There was considerable discussion over the value of the vehicle. The defendant's representative determined the actual cash value was $8,665.00. The plaintiff disagreed and his lawyer submitted a signed proof of loss claiming a value of $14,000.00 for the vehicle. Further negotiations proved unsuccessful until the plaintiff advised the defendant on January 10, 2000 that he had discharged his lawyer and was prepared to settle the claim for $8,665.00 plus taxes. The proof of loss provided for payment of the following amount:

Total amount of loss (including taxes)	$9,849.75
Less deductible	$ 300.00

Amount paid	$9,549.75
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The defendant actually paid $9,749.75 in error. A signed ownership was submitted to the defendant with an executed proof of loss on January 17, 2000. This action was commenced on August 10, 2001.

Gene Farquhar v. Liberty Mutual Insurance Company

[7] The subject motor vehicle was damaged beyond economic repair on August 5, 1997. The damage to the vehicle was covered pursuant to a standard form automobile policy of insurance issued by the defendant. On August 29, 1997 the defendant paid the sum of $4,978.50 in settlement of the claim pursuant to the proof of loss and took possession of the salvage. That amount was calculated as follows:

Total amount of loss (including taxes)	$5,278.50
Less deductible	$ 300.00

Amount paid	$4,978.50
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This action was commenced December 18, 2001.

[8] Although the plaintiff was the operator of the vehicle at the time of the accident, his wife, Sharon Farquhar, was the owner and named insured. Counsel for the plaintiff have therefore moved to substitute Sharon Farquhar as the proposed representative plaintiff in this proceeding.

ANALYSIS

[9] The facts set out above are not in dispute and on the basis of those facts it is apparent that each of these claims was commenced more than one year following the date upon which title to the salvage was taken by the defendants. These claims are, therefore, barred unless the running of the limitation period was suspended by the concealment of material facts by the defendants. In Ross v. Coseco Insurance Company, [2003] O.J. No. 3848, sub nom. Segnitz v. Royal & Sun Alliance Insurance Co. of Canada, [2003] I.L.R. I-4231, I made the following observations at paras. 26 and 27 which are pertinent to these matters:

> The two intended class proceedings that I am addressing in these reasons were both commenced well beyond one year from the date of the proposed representative plaintiffs' respective losses. The defendants have, therefore, moved for summary judgment on the basis that the claims of the plaintiffs are barred by the applicable limitation period. The issue on these motions is whether there is a genuine issue for trial relating to fraudulent concealment, the operation of which is explained in Halsbury's Laws of England Vol. 16 (4th) (London: Butterworths, 1992) para. 927:
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> Where a plaintiff is kept in ignorance of his cause of action through the

> defendant's fraud, time begins to run only from the time when the plaintiff discovers the truth or ought reasonably to have.
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> "Fraud" is defined in Black's Law Dictionary (7th ed.) as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment". However, in Halloran v. Sargeant et al. (2002), 217 D.L.R. (4th) 327 at paras. 31 and 33 Armstrong J.A. held that conduct amounting to legal fraud is not necessarily required. He found that, depending on the relationship between the parties, conduct that was not "in accordance with what is right or reasonable" could be sufficient to toll or suspend the operation of a limitation period.
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> Although the legal or persuasive burden is on the defendants to demonstrate that there is no genuine issue for trial, r. 20.04(1) provides that a responding party "may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial": Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 52 O.R. (3d) 97 at paras. 30-31.

[10] The defendants take the position that there is no evidence to support the allegation of fraudulent concealment or unconscionable conduct and, therefore, no genuine issue for trial with respect to the tolling of the applicable limitation period.

[11] In each of the cases, the plaintiffs maintain the defendants failed to provide them with information relating to the disposal of the salvage. The plaintiffs contend that they assumed their claims were being properly handled and had no way of knowing the defendant insurers were violating statutory condition 6(7) of O. Reg. 777/93 made under the Insurance Act, R.S.O. 1990, c. I.8 as amended.

[12] Statutory condition 6(7) provides:

> There shall be no abandonment of the automobile to the insurer without the insurer's consent. If the insurer exercises the option to replace the automobile or pays the actual cash value of the automobile, the salvage, if any, shall vest in the insurer.

[13] It is common ground that the defendant insurers had a longstanding practice of applying the policy deductible and taking title to the salvage upon the settlement of total loss claims prior to McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704 (C.A.). In McNaughton, the Court of Appeal held that where the insurer elects to take title to the damaged vehicle, the terms of statutory condition 6(7) require the insurer to pay the insured the

actual cash value with no reduction for the amount of the deductible designated in the policy.

[14] Concealment is a discoverability issue since the running of the limitation period is postponed until the fraud is discovered. In Risorto v. State Farm Mutual Automobile Insurance Co. (2002), 60 O.R. (3d) 730, Winkler J. held that the one year limitation period in statutory condition 9(4) was subject to the discoverability principle. (For a discussion of his reasons and their application to the circumstances of these cases, see McNaughton Automotive Ltd. v. Co-Operators General Insurance Co., [2003] O.J. No. 2914, sub nom. Segnitz v. Royal & Sun Alliance Insurance Co. of Canada, at paras. 75, 76, 77 and 81).

[15] Risorto was cited with approval in Lyons v. Canada Life Assurance Co. (2002), 42 C.C.L.I. (3d) 164 (C.A.) where the Court held that the discoverability principle applied to a statutorily mandated one year limitation period in a disability policy and Catzman J.A., writing for the Court, stated at para. 15:

> ... That principle is that a cause of action does not accrue to start the running of a limitation period until the material facts, upon which the action is based, have been discovered or ought to have been discovered by the exercise of reasonable diligence: Peixeiro v. Haberman, [1997] 3 S.C.R. 549. Though the principle has been applied most frequently in limitation periods created by statute, there have been trial judgments in this province that have applied it to statutorily mandated limitation periods in policies of insurance: Paccar Financial Services Ltd. v. System 55 Inc. (1993), 18 C.C.L.I. (2d) 45 (Day J.); Risorto v. State Farm Mutual Automobile Insurance Co. [2002], O.J. No. 3302, [2002] I.L.R. I-4119 (Winkler J.).

[16] The material facts that the plaintiffs state the defendants concealed are firstly, the fact that the vehicle was sold and, secondly, the amount of the proceeds from that sale.

[17] The plaintiffs submit that the Ontario Court of Appeal has held that the application of the discoverability principle should not be decided on a motion for summary judgment: Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 (C.A.) and Smyth v. Waterfall (2000), 50 O.R. (3d) 481 (C.A.).

[18] In Smyth, Borins J.A. states the following at paras. 10 and 12:

> Central to the application of the discoverability rule is when the plaintiff acquired, or ought reasonably to have acquired, knowledge of the facts on which her claim is based. As such, in the context of this appeal, the application of the rule requires the resolution of the factual issue of when Ms. Smyth "knew or ought to have known the fact or facts" upon which she based her negligence claim against Dr. Waterfall so that it can be determined whether her action was commenced within the one-year limitation period: Aguonie v. Galion Solid

> Waste Material Inc. (1998), 38 O.R. (3d) 161 (Ont. C.A.) at pp. 170 and 172, 156 D.L.R. (4th) 222 (C.A.). As in Aguonie, the evidence before the motions judge required the resolution of the factual issue central to the application of the discoverability rule. In apparently resolving the factual issue in the respondent's favour, the motions judge assumed the role of a trial judge. Moreover, as this court pointed out in Aguonie at p. 174, "generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue."
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> ...
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> As there will be a trial, it would be inappropriate for me to comment further on the evidence relied on by the appellant in support of her position that there is a genuine issue for trial about whether she commenced her action within the one-year limitation period stipulated by the two statutes. It is sufficient to say that the evidence relied on by the appellant, particularly the evidence which I have summarized, raises a genuine issue as to when she acquired the requisite facts and entitles the plaintiff to proceed to trial where the issue will be decided.
> ...

[19] In these cases, however, there is no issue as to when the plaintiffs acquired the requisite facts upon which the action is based. The two material facts each plaintiff needed to know in order to challenge the defendants' application of statutory condition 6(7) were:

i. the defendant subtracted a deductible; and
ii. the defendant took possession of the damaged vehicle.

Both of these facts were known to the plaintiffs when the defendants paid the settlement funds and took the salvage. At that point, the insurers had breached statutory condition 6(7) by failing to pay the full actual cash value and all of the material facts required to pursue the cause of action where known. In addition, there is no evidence of any concealment of material facts. The fact that the salvage was sold and the amount of the proceeds received are both immaterial to the determination of whether statutory condition 6(7) was breached.

[20] The plaintiffs also argue that there was concealment or unconscionable conduct on the part of the defendants in that they knew or should have known the practice they were following to resolve total loss claims was contrary to the terms of statutory condition 6(7). This submission is based on one reported case and commentaries in two legal texts that are supportive of the plaintiff's position.

[21] I addressed this issue in Ross v. Coseco, supra, at paras. 29-36 and adopt those reasons here. In my view, there is no evidence of any deception or unconscionable conduct on the part of the defendants that raises a triable issue.

[22] Rule 20.04(2)(a) provides:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence;

[23] In my view, the clearest and most helpful explanation of the court's task on motions for summary judgment is found in Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.) where Morden A.C.J.O. stated at p. 551:

> ... If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists.

[Authorities omitted.]

I am satisfied that the defendants have demonstrated that there is no issue of fact which requires a trial for its resolution in any of these actions.

MOTION TO SUBSTITUTE PLAINTIFF IN FARQUHAR V. LIBERTY MUTUAL

[24] I addressed the issues that arise on a motion to add or substitute a plaintiff in the context of a proposed class proceeding in Giuliano v. Allstate, [2003] O.J. No. 3266, sub nom. Segnitz v. Royal & Sun Alliance Insurance Co. of Canada. For the reasons expressed there, I see no reason why this motion should not be granted. It is apparent that Mr. Farquhar was named in error and there is no demonstrated prejudice in permitting the substitution of Sharon Farquhar as plaintiff at this time. Order accordingly.

DISPOSITION

[25] For the foregoing reasons there will be an order granting the motions for summary judgment. These actions are, therefore, dismissed. I will hear counsel's submissions with respect to costs in due course.