CITATION: Rideau Acres v. Lombard Canada, 2012 ONSC 2265
COURT FILE NO.: 065/08
DATE: 20120413

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
RIDEAU ACRES LTD. and NEAL DICK Plaintiffs	Mark Harrington, for the Plaintiffs
– and –	
LOMBARD CANADA LTD. and GIFFORD ASSOCIATES INSURANCE BROKERS INC. and HUB INTERNATIONAL ONTARIO LIMITED and CLAIRE WILLIAMS Defendants	Van Krkachovski, for the Defendant, Lombard Canada Ltd. Jeffery Klein, for the Defendants, Gifford Associates Insurance Brokers Inc, Hub International Ontario and Claire Williams
	HEARD: February 24, 2012

REASONS FOR JUDGMENT

Mr. Justice A.D. Sheffield

[1] There are two motions before the court seeking orders of summary judgment against the Plaintiffs.

[2] The Defendant, Lombard Canada Ltd ("Lombard") seeks an order of this court granting:

(a) an order for summary judgment dismissing the plaintiff's claims against Lombard inasmuch as they disclose no genuine issue requiring a trial;

(b) an order granting costs of the claim and of this motion on a substantial indemnity basis; and

(c) such other relief as the court may deem appropriate and just.

[3] The Defendants, Gifford Associates Insurance Brokers Inc. ("Gifford"), Hub International Ontario Limited ("Hub") and Claire Williams ("Ms. Williams") seek:

(a) an order of summary judgment dismissing the plaintiff's claims;

(b) a further order dismissing the Lombard's cross-claim; and

(c) costs of the action, cross-claim and this motion.

[4] The Plaintiffs vigorously oppose these motions, claiming there are conflicting factual issues in this case requiring a trial before the court may have a full appreciation of the evidence. They request that the motions for summary judgment be dismissed on behalf of each of the moving parties with costs.

Overview

[5] This action arises out of an underlying action in which the Plaintiffs, Rideau Acres Ltd. and Neal Dick, were sued in negligence for damages arising out of a July 9, 2005 motor vehicle accident that caused injuries to third parties. The Plaintiffs began this action seeking a declaration that liability coverage for the dump truck involved in the accident was improperly removed. They want to be indemnified for all claims and associated defence costs in the underlying action. The Defendants brought motions for summary judgment to dismiss the within action against them.

Facts

[6] The Plaintiffs are Rideau Acres Ltd. ("Rideau Acres"), which operates as a campground, and Neal Dick ("Mr. Dick"), the president of Rideau Acres. Mr. Dick is also the registered owner of the 1979 dump truck involved in this matter. The Defendant, Lombard, is an insurance company that is licensed to underwrite automobile insurance in Ontario. The Defendants, Gifford, Hub, and Williams are the insurance brokers that placed automobile insurance for the Plaintiffs. The Defendant insurance brokers have full power and authority to receive and accept insurance proposals for Lombard.

[7] The Plaintiffs used two different insurance brokers and companies for placing insurance on behalf of the campground. Grain Insurance and Guarantee Company ("Grain Insurance") provided separate insurance under a Comprehensive Liability Policy for the campground with a liability limit of $5,000,000.

[8] The Defendants were only used for vehicle coverage.

[9] Lombard issued an automobile policy to the Plaintiffs for the dump truck in question for the policy period of August 26, 2003 to August 26, 2004 ("03/04 Policy"). At the time it was issued, the 03/04 Policy provided for third party liability coverage.

[10] In January 2004, the brokers state that they received verbal instructions from Mr. Dick to delete all coverage on the dump truck with the exception of comprehensive coverage, which only covered fire and theft. There is some disagreement now as to whether Mr. Dick meant to remove

all liability coverage or just collision for the winter months. There is also disagreement between the parties over whether Mr. Dick understood that no liability coverage, also referred to as "road coverage", meant that he would have no coverage in the event the dump truck was involved in an accident causing injury to a third party. Regardless, on January 16, 2004, the broker's computerized system amended Lombard's system, on Mr. Dick's instructions, to remove all coverage except comprehensive coverage for fire and theft. They did not use an Ontario Policy Change Form 16 ("OPCF-16 ") notifying Mr. Dick of this change in coverage, but rather advised him by way of a letter dated January 23, 2004 that his coverage had been amended, in accordance with his instructions, confirming that all coverage had been excluded on the dump truck save the comprehensive portion covering only fire and theft. He was reimbursed the sum of $950.41 as a premium reduction.

[11] Between June and August 2004, Lombard sent a number of emails to the brokers asking whether liability coverage for the dump truck was to be added. Ms. Williams, both by letters and a subsequent follow-up telephone message, attempted to confirm the level of coverage Mr. Dick intended to place on the truck and the purpose or use he intended for the vehicle since it only had comprehensive coverage. Mr. Dick did not respond to any of the queries raised, and accordingly, on August 26, 2004, the 04/05 Policy with only comprehensive coverage was issued for the dump truck. The premiums for the year were $46.00 and Mr. Dick was invoiced as such for the continued comprehensive coverage only.

[12] The evidence discloses that Mr. Dick had made the decision in the spring of 2004 only to use the dump truck as an additional piece of campground equipment to be used for purposes solely within the perimeters of the campground; the licence plates were not renewed. The truck could not, therefore, be legally driven on public highways or roadways. The dump truck did not leave the campground, but the keys were regularly left under the dash, and the doors were usually unlocked. In a signed statement, Mr. Dick's son, Chris Dick, noted that the dump truck in question had been licensed "*...up until the fall of 2003. We decided in the spring of 2004, that we would not license the truck due to the cost involved with obtaining the necessary repairs in order to license the truck. The truck is used around the campground for maintenance during the spring, summer and fall months only and is not used in the wintertime. The dump truck stays on the campground property on a full-time basis.*"

[13] On July 9, 2005, Mr. John Joseph MacDonald ("Mr. MacDonald") was at home at 273 Rideau Street in the city of Kingston. He had been drinking beer and consuming cocaine with a neighbour and two other friends during the afternoon. He was heavily intoxicated. He ultimately ended up continuing his drinking binge at Rideau Acres on premises leased to Mark Cleveland ("Mr. Cleveland"). At approximately 6 p.m., Mr. MacDonald stole Mr. Cleveland's boat and left the campground with a case of beer. At around 9 p.m., he was found about a kilometre away in a half sunk boat and brought back to the campground. The civilian who transported him back the campground advised him that he would be notifying the police. Mr. MacDonald then stole the dump truck and fled the scene.

[14] Mr. MacDonald drove the dump truck off Rideau Acres' land and onto Kingston Mills Road. According to the facts read into the record at the time Mr. Macdonald entered pleas of guilt to several criminal charges, it is clear that he took the truck off the campground property and, while driving at high rates of speed, lost control causing it to fishtail and strike an SUV

which was parked on the shoulder of Kingston Mills Road. In colliding with this other vehicle, three members of a family were seriously injured and a fourth person was killed. Mr. MacDonald pled guilty on April 24, 2006, to ten charges including impaired driving causing death, impaired driving causing bodily harm, and stealing the dump truck.

[15] Mr. Dick had never met Mr. MacDonald who stole the vehicle.

[16] The family members and a witness brought separate actions against Mr. Dick and Rideau Acres for negligently creating a situation of danger by leaving the keys in the dump truck in a place where anyone could access the vehicle. Lombard denied a duty to defend and indemnify Mr. Dick and Rideau Acres. However, Grain Insurance did both defend and indemnify.

[17] The Plaintiffs began this present action on February 11, 2008, seeking declarations that liability coverage was improperly removed such that they are entitled to be indemnified for all the claims and associated defence costs brought in the underlying action.

[18] Lombard and the brokers brought motions for a summary judgment on October 17 and 3, 2011, respectively, to dismiss the present action against them with costs.

Law

[19] A summary judgment shall be granted by the Court if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1900, Reg. 194.

[20] The leading case on summary judgments under Rule 20 is *Combined Air Mechanical Services Inc. v. Flesch*, 108 O.R. (3d) 1 (C.A.).

[21] In *Combined Air*, the Court of Appeal did not comment on the various interpretive approaches taken by the Superior Court "because our decision marks a new departure and a fresh approach to the interpretation and application of the amended Rule 20": para. 35. At paras. 38 and 39, the Court stated:

> 38. ...The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.
>
> 39. ...This pivotal determination must be made on a case-by-case basis.

[22] The Court of Appeal then laid out three types of cases that are amenable to summary judgment:

- Where the parties agree that summary judgment should be used, although the court still has the discretion to refuse summary judgment: paras. 41, 72.
- Where the claims or defences are shown to be without merit or have no chance of success. The motion judge must use the full appreciation test before deciding

whether to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence: paras. 42-43, 73.

- Where the trial process is not required in the "interests of justice." This power arises from the phrase "genuine issue requiring a trial" combined with the enhanced powers under rules 20.04(2.1) and (2.2). The motion judge is to assess whether he should exercise the powers to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence or whether these powers should be exercised only at trial: paras. 44-50, 74.

[23] At para. 50, the Court of Appeal sums up the questions a motion judge must ask in considering the new test described as a "full appreciation test."

> 50. ...In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[24] The Court of Appeal went on to identify the kinds of cases that would be amenable to summary judgment and those that would not. It said, at paragraphs 51 and 52:

> 51 ...In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
>
> 52 In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

[25] The full appreciation test, therefore, requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them.

[26] In paragraph 53 of *Combined Air*, the Court of Appeal stated that the motions judge must assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case.

[27] In the present case, the position of both Defendants is quite straightforward. They are of the view that, in the original action, they were under no contractual obligation or onus to defend the Plaintiffs essentially because all relevant liability coverage had been excluded from the truck in question approximately a year and a half prior to the accident. Accordingly, they now take the position they are not liable for any damage claim. It is their view that the evidence is clear that the liability portion of the insurance coverage placed on the dump truck had been removed at the request of Mr. Dick, and, notwithstanding their efforts to obtain further instructions from Mr. Dick as to whether he wanted the coverage re-instated in 2004, he failed to either contact them or provide them with the necessary instructions. Consequently, they simply renewed the policy covering only the comprehensive portion of liability for which he was invoiced $46.00.

[28] They point to the evidence of Mr. Chris Dick as well who acknowledged in writing that the truck was no longer road-worthy without extensive repairs and, for that reason, had not been licensed for use on public highways or roads since 2003. They point as well to the fact that Mr. Dick was an educated man who had considerable business experience and acumen. They argue that he knew full well, and admitted he understood, that the coverage he had requested be withdrawn had in fact been withdrawn. He had received a refund cheque of $950.41. He acknowledged reading the letters from the brokerage and seeing the amounts being charged for the coverage being provided. He noted that he had only been charged $46.00 for coverage on the dump truck for the 04/05 Policy. The Defendants' view Mr. Dick, as an educated, astute businessman, and one who had developed the practice of removing the liability coverage on his policies each year either in the late autumn or early in the New Year as a cost saving measure. He noted as much in his Examinations for Discovery.

[29] It is their position that his present argument he did not understand the meaning of "road coverage" and third party liability coverage lacks credibility given his level of education and years of practical business experience and argue that the court on these motions should not attribute much probative value or weight to his position that he did not understand what levels of coverage existed on the dump truck at the time of the unfortunate accident in July 2005.

[30] Additionally, it is their position that Mr. Dick suffered no loss in the action for damages as he had other insurance on the campground and its equipment that covered his liability to third parties. They take the position that there is ample evidence indicating that discussions had taken place between Mr. Dick and Grain Insurance concerning how the dump truck could be characterized for insurance purposes as another tractor for use on Rideau Acres' land only. Accordingly, the dump truck had third party liability coverage under the Grain Insurance policy.

[31] Finally, they respond to Mr. Dick's argument that they failed to notify him of the exclusions in his policy by using the OPCF-16 form, as was suggested by the Financial Services Commission of Ontario, by adopting the position that a letter dated January 23, 2004 sent to Mr. Dick by the Defendant, Ms. Williams, was both clear and specific in that regard. In their view, the obligation to notify Mr. Dick of the changes to the truck coverage by using form OPFC-16 was not mandatory, and Ms. Williams' letter was easily understandable as it related to the coverage that had been excluded.

[32] Mr. Dick has adopted the position that there is a genuine issue requiring a trial on the question of what information had been provided him and what reasonable understanding he had

and relied upon. He argues that a trial is required to determine just what he thought he had in the way of coverage on the dump truck at the relevant time.

[33] Mr. Dick took the position that, in the absence of any guidelines or policies from Lombard to the brokers, OPCF-16 should have been used. The failure to do so, in addition to the ambiguity raised by the term "road coverage", rendered the removal of the coverage of no force and effect. It is Mr. Dick's view that a trial of the issue as to whether the Defendants were required to use OPCF-16 is central to the issues to be resolved. In his view, this may only be done by a trial court where the trial judge has a more fulsome opportunity to receive evidence that has been tested by cross- examination in order to evaluate the merits of each position advanced.

[34] Mr. Dick also presented the argument that insurance brokers and agents owe a duty of care to their clients that arises when a customer reasonably relies on their information. A broker's duties include not only a duty to provide information about available coverage, but also to provide counsel and advice. An insurer also has a duty, which can be delegated to the broker, to keep its clients informed about any changes or deletions in coverage. The determination of whether a broker breached its duties depends upon the nature of the relationship, what information was given, and what advice was provided. Where these facts are in dispute, a trial is necessary. In this case, it is Mr. Dick's position that there is a genuine issue requiring a trial regarding what information he received and relied on.

[35] Having had an opportunity to read and consider the motion records filed on behalf of each of the parties, together with their respective factums, and having heard from counsel, I find that the position as advanced by the Defendant moving parties is the more reliable and trustworthy. I find there is ample evidence to support their position that, on Mr. Dick's instructions, they amended the coverage on the 1979 dump truck in question to provide only comprehensive coverage for fire and theft. The letter of January 23, 2004 from Ms. Williams sent to the attention of Mr. Dick makes plain that the endorsement issued had been done "*...in accordance with your instructions, deleting all the coverages except the comprehensive cover on the 1979 Chev Dump. We are also attaching our credit invoice in the amount of $950.41 which has been applied to your account.*" In my respectful view, Mr. Dick had been duly advised in plain and direct language of the levels of coverage available to him and that were in effect on that vehicle at the relevant time of July 2005.

[36] In light of the clarity of the letter of January 23, 2004, I find it difficult to attribute any weight to Mr. Dick's position that he was neither informed nor understood what levels of coverage were on the dump truck at the time of the unfortunate accident. In this regard, I have also taken note of the subsequent attempts made by the Defendants to obtain further instructions as to his wishes for future coverage.

[37] His argument, as outlined above, may have been more persuasive had the accident occurred before the renewal of the policy. However, such was not the case. Accordingly, I find that whatever duty was owed Mr. Dick was met by the brokers who, at the time they were preparing to renew his policy, sought his instructions with regard to the specific levels of coverage he wanted placed on the dump truck. He failed to respond.

[38] I find there to be ample evidence to support the conclusion that he had made the decision to treat the vehicle like the other farm equipment on the campground and considered it covered by the Grain Insurance policy for third party liability. On the evidence before me, I am satisfied that Mr. Dick, as a man of considerable business experience, was fully cognizant of the levels of coverage he had on that vehicle and had made the decision not to duplicate the coverage already provided by Grain Insurance and thereby avoid any further and unnecessary expense.

[39] I have also considered the Plaintiff's argument that, given the Defendant's negligence of leaving the keys in the dump truck, the court may conclude Mr. MacDonald had taken it with their implied consent thereby giving rise to liability for loss or damages under s.192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. Consent under this provision can be express or implied. However, as noted in the decision of *Palsky et al. v. Humphrey*, [1964] S.C.R. 580, "...one must approach the problem in a somewhat subjective fashion from the point of view of the person who was driving. That is to say whether under all of the circumstances the person who was driving would have been justified in deeming that he had an implied consent to drive". The Supreme Court further stated that "consent can be implied because it is clear that had it been sought it would have been granted as a matter of course". As noted above, Mr. Dick had never met Mr. MacDonald, who was intoxicated at the time he took the dump truck and who ultimately plead guilty to having stolen it. In those factual circumstances, I find it unreasonable to draw any other conclusion other than Mr. MacDonald was in possession of the dump truck without the consent of the owner either express or implied. It follows then, in my view, there is no liability on the Defendants with respect to the *Highway Traffic Act*, s.192(2).

[40] In addressing the question as outlined in para. 50 of the *Combined Air* decision, I find that on the evidence before me, I am able to attain a full appreciation of both the evidence and the issues required to make dispositive findings justifying an order of summary judgment. In my evaluation of the evidence, I conclude that the Plaintiff's case against these Defendants is weak with no chance of success. Accordingly, I deem an order granting each Defendant their request for summary judgment to be appropriate and just and dismiss the Plaintiff's claim as disclosing no genuine issue requiring trial.

[41] A further order will issue dismissing the Lombard cross-claim against the Defendants, Gifford, Hub and Williams.

[42] Finally, an order will issue dismissing the Plaintiff's request for summary judgment.

[43] In the event the parties are unable to agree on the question of costs on these motions, I will receive written submissions of no longer than three pages from the Defendants within 21 days of this date and from the Plaintiffs with 10 days thereafter.

Sheffield J.

Released: April 13, 2012

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Defendants

REASONS FOR JUDGMENT

Sheffield J

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