CITATION: Barsheshet v. Aviva Canada, 2015 ONSC 4439
COURT FILE NO.: CV-13-490106
DATE: 20150709

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lilach Barsheshet, Plaintiff

AND:

Aviva Canada Inc., Defendant

BEFORE: Justice W. Matheson

COUNSEL: *Alon Rooz*, for the Plaintiff

Christophe Dunn and *Andrew Punzo*, for the Defendant

HEARD: April 20, 2015

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ENDORSEMENT

[1] The plaintiff moves for summary judgment, claiming relief because the defendant purported to void the plaintiff's automobile insurance.

[2] There is no dispute that the plaintiff applied for and obtained automobile insurance from the defendant. The insurance policy was effective as of December 23, 2012. There is also no dispute that the plaintiff paid the required premiums.

[3] The dispute arises because the defendant purported to void the policy based on an alleged misrepresentation at the time of the application. The defendant contends that the plaintiff wrongly reported on her application that she was the only licensed driver living in the household when she was in fact living with her boyfriend.

[4] On the merits of the claim, the defendant bears the burden of proof on the threshold issue. In purporting to void the policy, the defendant relied upon s. 233 of the *Insurance Act,* R.S.O. 1990, c. I.8. Section 233 provides that where an applicant for an insurance contract "knowingly misrepresents" in the application "any fact required to be stated therein", a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. It is well-accepted that the defendant bears the burden to prove that there was a misrepresentation: *1126389 Ontario Ltd. (c.o.b. Drew Auto Centre) v. Dalton,* [2000] O.J. No. 668, at para. 82; *Chenier v. Madhill Mercer* (1974), 2 O.R. (2d) 361 (H.C.J.). If there was a misrepresentation, other issues arise. If not, the defence fails.

[5] On this motion, the defendant does not contend that it has met this burden. Counsel fairly stated that the defendant would not have brought a summary judgment motion based upon the evidence it has in hand. The defendant submits that a trial is required to determine the issue of whether there was a misrepresentation because the plaintiff's credibility is at issue, and this motion for summary judgment should therefore be dismissed.

[6] The extent of the evidence put forward on this motion bears specific attention given the obligation on the parties to put their best foot forward. The defendant's evidence falls well short of what would be required to prevail on the merits of the claimed misrepresentation.

Brief background

[7] The plaintiff applied for and obtained her automobile insurance from the defendant on December 23, 2012. In her application, she stated that there were no other persons who were licensed to drive living in the household. On this motion, both the plaintiff and Mr. Daca attested that when the plaintiff applied for her automobile insurance, Mr. Daca was not living with her. This evidence was not challenged through cross-examination.

[8] In the year or two prior to applying for the policy, the plaintiff lived in an apartment at 15 Northtown Way in North York. She initially lived there with Mr. Daca and her two young children. Mr. Daca is the father of her second child.

[9] As stated in her affidavit, the plaintiff is deaf and mute. Mr. Daca is hearing impaired but can communicate verbally. As a result, Mr. Daca took care of tasks such as communicating with the staff at the apartment building.

[10] In 2012, the relationship between the plaintiff and Mr. Daca broke down. Both of them attest on this motion that Mr. Daca moved out in November of 2012. In his affidavit on this motion, Mr. Daca provided the address of his new apartment, which he shared with roommates.

[11] In December 2013, the plaintiff purchased a car and obtained her insurance from the defendant.

[12] The plaintiff also began the process of looking for a less expensive apartment. In January of 2013, she (alone) entered into a new tenancy agreement for an apartment at 8 Chichester Place, Toronto, which she moved into later in 2013.

[13] The plaintiff and Mr. Daca ultimately reconciled in late May 2013, by which time the plaintiff was pregnant with Mr. Daca's second child.

[14] During the approximately six-month period after the plaintiff obtained her car insurance, the plaintiff's car was involved in a number of minor accidents. Mr. Daca was not driving the car on any of these occasions. This is not disputed.

[15] Both the plaintiff and Mr. Daca fairly disclosed in their affidavits that Mr. Daca, although not living with the plaintiff during the period of time set out above, was at her apartment on a

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regular basis. He had parental responsibilities and spent a lot of time with the children. He helped with caregiving tasks. He sometimes stayed over. Given that he could communicate orally with others, he continued to help with issues at the apartment building.

[16] Mr. Daca had a poor driving record. The plaintiff attested that she did not let him drive her car during the relevant period of time, even when he was helping out. When they went somewhere together, she would drive the car. Mr. Daca similarly attested that the plaintiff did not give him permission to drive her car. He allowed for the possibility that while he does not remember doing so, he may have driven the car without her permission.

[17] It is agreed that under the plaintiff's automobile insurance, she could have given Mr. Daca permission to drive her car, though her evidence is that she did not do so.

[18] After the second accident reported by the plaintiff, the defendant undertook an investigation, including an examination of the plaintiff and other steps, as described below. On August 23, 2013, the plaintiff received a letter from the defendant stating that she had knowingly misrepresented information by telling the defendant that she was "the only licensed driver in the household when in fact there was another licensed driver, namely Mr. Daca." The defendant advised that the policy was "*void ab initio*" and provided a cheque returning the premium payments that had been made. The defendant further indicated that given Mr. Daca's poor driving record, the "risk would not have been written as it does not meet underwriting guidelines".

[19] The plaintiff then looked for replacement insurance, and found that other companies mostly refused to provide a quote given the defendant's cancellation of her prior insurance. She did obtain one quote with a very high annual premium of $14,867, which she could not afford. She therefore began to use alternate forms of transportation and to forgo travel due to the difficulties she faces with respect to transportation.

[20] The plaintiff's evidence also included an affidavit from an insurance broker attesting to the effect that if the plaintiff wanted insurance and Mr. Daca had been living there, she could have opted to exclude him from her insurance and still maintained her premium level.

Defendant's evidence

[21] The defendant's main witness on this motion was Doug Lines, a Regional Investigator of Claims and Underwriting at the defendant.

[22] Mr. Lines became involved after the report of the second accident, because the damage to the car appeared inconsistent with the self-reporting collision report. Mr. Lines commenced an investigation. Mr. Lines requested an Autoplus Gold Report, which showed that the plaintiff had previously been listed on Mr. Daca's automobile insurance, with another insurance company. It further showed that the plaintiff applied for her own automobile insurance shortly after Mr. Daca's automobile insurance had been cancelled. Further, a Ministry of Transportation search showed Mr. Daca's poor driving record and listed his address as the same as the plaintiff's Northtown address.

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[23] On May 28, 2013, Mr. Lines sent a memo to a Senior Underwriter at the defendant. He indicated that on her application, the plaintiff had represented that she was the only licensed driver in the household. He then set out what he described as the "actual facts." He stated that the plaintiff "resided with" Mr. Daca at the time of the application.

[24] Mr. Lines then took a number of additional steps in his investigation. At his request, the plaintiff attended an Examination under Oath on July 25, 2013. Although the defendant complains about the refusals made by the plaintiff's lawyer on that examination, the defendant took no steps to compel those answers.

[25] In addition, in June and July 2013, Mr. Lines interviewed some people at the two apartment buildings.

[26] In his affidavit, Mr. Lines put forward some hearsay from an unidentified person at the management office of the Northtown building. This evidence does not meet even the most basic evidentiary requirements. I place no weight on it. Mr. Lines also spoke to three named individuals. He appended to his affidavit what are described as recorded "statements" from two of them.

[27] One recording is with the assistant manager at the Northtown building, Jane Ridge, and the other is with the assistant superintendent at Chichester Place, Harry Curtis. In neither instance did Mr. Lines attest in his affidavit that he believed the recorded statements to be true, however, for the purposes of this motion I have assumed that he did so.

[28] I have difficulty with the substance of both recorded "statements". They are both essentially interviews of the individuals by Mr. Lines, including much leading by Mr. Lines regarding the hoped-for answers from these witnesses. They are both unsatisfactory from the standpoint of the factual conclusions the defendant seeks to draw from them.

[29] Most pertinent from a timing standpoint is the recorded interview with the assistant manager at Northtown, Ms. Ridge. At the very outset of that recording, Mr. Lines stated, as a fact, that two people were living at the apartment, referring to the plaintiff and Mr. Daca. He made the statement that two people were living there twice. After those leading propositions, Ms. Ridge was shown a photo of the plaintiff. She said she was not sure if it was the plaintiff, but if she "had to guess" she would say yes. She did recognize Mr. Daca, who, consistent with the plaintiff's evidence, had come to the building's office for various reasons over the years. She said that Mr. Daca was living there, but qualified her answer by acknowledging that she had never gone to the apartment to see. She also said, incorrectly, that the plaintiff had only one child living with her. She further said, incorrectly, that the plaintiff and Mr. Daca left the building to move into a house for more space.

[30] Taking Ms. Ridge's evidence as a whole, she based her affirmative answer that Mr. Daca was living there primarily on Mr. Daca's visits to the building office, and the unchallenged evidence is that Mr. Daca undertook those tasks because the plaintiff was unable to communicate orally, not because he was living there.

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[31] Next is Mr. Curtis, the assistant superintendent at the new apartment at Chichester Place. When asked if Mr. Daca lived there with the plaintiff, he said yes, "as far as I know." Again, the evidence did not suggest that Mr. Curtis had actually looked into that question. Mr. Lines also attested that he interviewed Julie Gale, the superintendent at Chichester Place. Again, Mr. Lines does not attest that he believed her information to be true, but I have assumed that he did so. According to Mr. Lines, Ms. Gale believed that Mr. Daca lived there. In support of that conclusion, Mr. Lines attested that Ms. Gale had seen Mr. Daca come and go from the building regularly. In fairness to Mr. Curtis and Ms. Gale, by the time they were interviewed in June and July of 2013, it is the plaintiff's own evidence that Mr. Daca was living with her. In any event, their evidence does not shed much light on that question in the key time period.

[32] Mr. Lines wrote a follow-up memo to the same adjuster, dated July 26, 2013, in which he described his additional evidence. He indicated that counsel on the plaintiff's examination under oath had objected to a number of questions. He indicated that he had previously reported on the interview of Mr. Curtis by email. That email is not before the court. He provided a summary of the recorded statement of Ms. Ridge and his discussion with Ms. Gale. However, his memo did not set out the limited and qualified nature of the evidence of those two individuals. Instead, he reported that Ms. Ridge confirmed that Mr. Daca was living with the plaintiff from 2010 through to the time of the move, including on December 23, 2012, and that Ms. Gale also said that Mr. Daca lived at the new location. This was, at best, an overstatement of the substance of those interviews.

[33] Mr. Lines also appended a report of a private investigator to his affidavit on this motion. The report was apparently prepared in relation to the plaintiff's accident benefits claim. It refers to a few days of surveillance in May of 2013. Again, Mr. Lines did not attest that he believed this report to be true, but I have assumed that he did so.

[34] The focus of the investigator's report appears to be on whether Mr. Daca ever drove the plaintiff's car, not whether he was living with the plaintiff at the relevant time. There is video surveillance included with the report, but it does not show Mr. Daca driving the car. Quite the contrary, it supports the plaintiff's evidence that when they went out together, she drove the car. There is no video of Mr. Daca driving the car, with or without the plaintiff. The typed report does assert, however, that Mr. Daca was seen driving the car on two occasions in May of 2013. Mr. Daca allows for this possibility. However, this does not determine the issue of whether Mr. Daca was living with the plaintiff when she made her application in December of 2012.

[35] The investigator's report does not focus on gathering information regarding who was living in the apartment at Northtown. It does not appear that the investigator even went to that address to make inquiries. Defendant's counsel explained that the report was obtained for a different purpose and a cost/benefit analysis led the defendant to decide against doing further surveillance. That is a sensible business consideration, but it does not change the evidentiary burden in this case.

[36] The senior underwriter who Mr. Lines dealt with also filed a brief affidavit, attesting to her part in the course of events described above. She relied on the information she received from

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Mr. Lines. Her affidavit does not add to the facts about whether or not there had been a misrepresentation. She did go on to say that the question of other licensed drivers in a household was a material one in her view, and she described the defendant's rules under which it declines a risk. Lastly, the defendant put forward an affidavit from an independent insurance consultant on the topic of materiality and the defendant's decline rules. This evidence supports the conclusion that if Mr. Daca had been living with the plaintiff at the relevant time, the defendant would have declined the plaintiff's application.

[37] There is no suggestion in the defendant's evidence that anyone attended at the address where Mr. Daca attested he was living as of December of 2012, or made any inquiries about whether or not he had lived there.

Issues

[38] The plaintiff submits that there is no genuine issue requiring a trial. She asks for judgment against the defendant, including declaratory relief and damages.

[39] The defendant submits that a trial is required on the basis that the defendant "will present overwhelming evidence that [Mr. Daca] lived with [the plaintiff] at the time of the insurance application" and the plaintiff's credibility is therefore at issue.

[40] There are other issues that the defendant submits could be decided on this motion, such as materiality and whether the defendant was entitled to treat the policy as void in any event, but these issues only arise if there was a misrepresentation in the first place.

Summary judgment

[41] There is no issue about the proper approach to this motion, which is set out in *Hryniak v. Mauldin,* 2014 SCC 7. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits using the summary judgment process. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure: *Hryniak,* at para. 28. In response to this motion under Rule 20 of the *Rules of Civil Procedure*, the responding party must show that there is a genuine issue that requires a trial.

[42] The responding party, here the defendant, was obliged to put its best foot forward in response to this motion: *Pizza Pizza Ltd. v. Gillespie,* [1990] O.J. No. 2011; *O'Laughlin v. Byers*, 2015 ONCA 210, at para. 5.

[43] On a summary judgment motion, the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial: *Hryniak*; *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 33, aff'd, 2014 ONCA 878.

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Discussion

[44] On this motion, the plaintiff and Mr. Daca have both attested that Mr. Daca did not live with the plaintiff at the relevant time. This evidence was not challenged through cross-examination.

[45] This action was commenced as a simplified proceeding under Rule 76 of the *Rules of Civil Procedure*. Ordinarily, leave to cross-examine would therefore be required. However, in this case, the plaintiff volunteered to be examined for discovery well before the return of the motion, providing the defendant with an opportunity to cross-examine her without seeking leave. The defendant did not avail itself of this opportunity.

[46] Further, counsel to the defendant submitted that the defendant did not seek leave to cross-examine Mr. Daca because there was no expectation that Mr. Daca would change his evidence. When pressed about what might be different at trial, defendant's counsel submitted that at trial, Mr. Daca would be cross-examined on what was said by the two witnesses from management at the two apartment buildings. However, their evidence, such as it is, certainly could have been put to Mr. Daca in cross-examination on this summary judgment motion. Leave would be required, but it was not suggested that the need for leave was the reason that the defendant did not pursue a cross-examination.

[47] Putting the best foot forward includes the testing of evidence at the summary judgment stage, especially where a trial is being sought based on an alleged credibility issue as is the case here.

[48] The defendant does not assert that the examination of the plaintiff done by the insurance investigator in mid-2013 is a substitute for a cross-examination on this motion, which is understandable given its limited scope. But, at a later stage, the plaintiff was made available for discovery including cross-examination, and none was done.

[49] Cross-examination of witnesses may not always be needed on a summary judgment motion, but here the defendant submits that a trial is required because the plaintiff's credibility is at issue. A cross-examination of the plaintiff would have been an important step toward challenging her account of the events. Nor can the defendant count on waiting for trial to cross-examine Mr. Daca on the evidence of the witnesses from building management. That evidence, fairly put, does not provide a compelling platform based upon which to argue that a trial is required in any event.

[50] The bulk of the defendant's evidence is entirely consistent with the account put forward by the plaintiff, including Mr. Daca's roles and responsibilities in the relevant time period. In contrast to the plaintiff's evidence, the defendant's position that there was a misrepresentation is largely based on indirect, ambiguous and overstated evidence.

[51] In support of its position that a trial is required, the defendant also submitted that the evidence before the court was enough to create a suspicion that Mr. Daca lived with the plaintiff at the relevant time. But a suspicion it is not sufficient to create the need for a trial based on the

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record on this motion. And it is not sufficient to defeat this motion on the merits given that it is the defendant's onus to prove misrepresentation.

[52] The defendant further submitted that there was sufficient evidence to give the court the "flavour" of what the evidence will be at trial. Again, that is not the right approach. It was for the defendant to put its best foot forward on this motion, not simply foreshadow what evidence might be called at trial.

[53] On the evidence before me, I find that there is no genuine issue requiring a trial. Further, the defendant has failed to prove the alleged misrepresentation.

[54] As a result, a number of follow-on issues raised on this motion need not be dealt with, except for the question of remedy.

Remedy

[55] The policy was wrongly declared to be *void ab initio* by the defendant. The defendant ought to have honoured the policy, and properly addressed the claims made under it by the plaintiff. The plaintiff seeks declaratory and other relief.

[56] Beginning with the plaintiff's claim for declaratory relief, I declare as follows:

(i) the policy was valid as originally agreed to by the parties, commencing December 23, 2012;

(ii) the plaintiff did not make the alleged misrepresentation; and,

(iii) the defendant was obliged to honour its obligations under the policy in relation to the claims made under it by the plaintiff.

[57] I further grant the requested order that the defendant amend its records in accordance with the above declaration. As well, to the extent that the defendant has communicated the erroneous information to third parties, the defendant shall take reasonable steps to issue a correction to those third parties.

[58] The plaintiff seeks damages in the amount of $14,867 less the cost of the plaintiff's original annual premium. The $14,867 figure is the amount of the quote the plaintiff obtained from the provider that was still prepared to insure her after the defendant purported to void her policy. While it is apparent on the evidence that the plaintiff was at least inconvenienced by the steps wrongly taken by the defendant, I am not satisfied with this approach to the quantification of damages. The plaintiff chose not to take the alternate insurance, and did not pay the $14,867. On the evidence before me, I am not prepared to order this amount as damages.

[59] The plaintiff also requests that the defendant be ordered to pay $3,396.64, which is the total amount claimed by her in her three proof of loss forms filed under the policy and unpaid. There being no contrary evidence in the record, I am satisfied with that amount. However, it

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ought to be reduced by the amount of premiums for the period. The evidence before me is that the defendant refunded premiums in the total amount of $2,542.96 for the relevant period. I therefore order that the defendant pay to the plaintiff the difference, which is $853.68.

[60] The plaintiff's motion is therefore granted with the relief set out above. If the parties are unable to agree on interest and costs, the plaintiff shall make her submissions by brief written submissions together with a costs outline to be delivered by July 24, 2015. The defendant may respond by delivering brief written submissions by August 10, 2015.

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Justice W. Matheson

Released: July 9, 2015

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