

*Indexed as:*  
**Mohamed v. State Farm Fire and Casualty Co.**

**Between**  
**Shamin Mohamed, plaintiff, and**  
**State Farm Fire and Casualty Company, defendant**

[2001] O.J. No. 4478

Court File No. 00-CV-194641SR

Ontario Superior Court of Justice

**C. Campbell J.**

Heard: November 8, 2001.  
Judgment: November 14, 2001.

(15 paras.)

*Practice -- Judgments and orders -- Summary judgments -- Bar to application, existence of issue to be tried -- Inconsistencies in evidence.*

Motion by the plaintiff, Mohamed, for summary judgment to recover under an insurance policy issued by the defendant, State Farm Fire and Casualty. Mohamed claimed to have suffered loss of personal goods due to a break-in and theft. His alleged loss of \$48,000 had been reduced to \$25,000 for the purposes of the motion. His claim included 64 items, 61 of which were unsupported by any receipt, bill of sale or other proof of value. He argued that the loss had been proven and that the only issue was the value of the lost goods. State Farm argued that inconsistencies in Mohamed's evidence justified not only dismissal of the motion, but dismissal of the entire claim.

HELD: Motion dismissed. Justice and fairness could not be met where the facts were unclear. The action was not dismissed in its entirety, as the inconsistencies in Mohamed's evidence were best dealt with by cross-examination.

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rules 20, 76.06, 76.06(14).

**Counsel:**

Ralph Swaine, for the plaintiff.  
David Zarek, for the defendant.

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**1 C. CAMPBELL J.:**-- The Plaintiff moves for summary judgment pursuant to Rule 76.06. The claim relates to an alleged loss as a result of a claimed break-in and theft with resulting loss of personal goods covered under a renter's policy of insurance issued by the Defendant.

**2** The position of the Plaintiff is that when the claim, proof of claim and transcript of examination under oath by the insurer are considered, there is no issue for trial under the relaxed standard of Rule 76.

**3** The Plaintiff's alleged loss of \$48,000 is reduced to \$25,000 for the purpose of this motion and therefore compliance with the simplified procedure rule. It is submitted by the Plaintiff that the fact that the Plaintiff had only a very few receipts would not be unusual in circumstances such as this and that all the insurer has done in its defence is to raise allegations that are no more than speculation, suspicion and innuendo. Further, it is agreed that in the absence of specific evidence to support a defence of fraud in the claim, judgment should be granted to the Plaintiff.

**4** Counsel for the Plaintiff submits that the court can have regard to the documentary material, including the occurrence report, transcript of the 9-1-1 call and the transcript of the examination under oath of the Plaintiff, and determine not only that the claim on all the material has been satisfied on a balance of probabilities, but that the only issue is one of the value of lost goods and that this one can be dealt with by the court. Reference in this regard is made to the case of Leduc v. State Farm Mutual Insurance Co., [1999] O.J. No. 3095. There, Caswell J. was prepared to choose between two competing values of a stolen automobile. That case is to be distinguished from a facts before me where here, there are some 64 items in the claim, 61 of which are unsupported by any receipt, bill of sale or other description from which one could easily determine the value.

**5** In support of his position, the Plaintiff relies in large part on the so called lower test for summary judgment under Rule 76 than that applied on a motion under Rule 20.

**6** For the defence, it is submitted that even the most cursory review of the material before the court reveals significant inconsistencies in the evidence of the Plaintiff. The inconsistencies, counsel submit, can well result in not only a dismissal of the Plaintiff's motion, but a dismissal of the Plaintiff's claim as a whole.

**7** Rule 76.06(14) states:

On a motion for summary judgment under this rule, the presiding judge shall grant judgment unless,

- (a) the judge is unable to decide the issues in the action in the absence of cross-examination; or

(b) it would be otherwise unjust to decide the issues on the motion.

**8** This has been held to be a lower test than a motion for summary judgment under Rule 20. See *Heller v. Labbett Insurance Services Ltd.*, [1997] O.J. No. 3425; *Craig Gilchrist Equipment Rental Ltd. v. Robertson*, [1997] O.J. No. 1436. The general proposition with respect to the test under Rule 76 for summary judgment was stated in *McGill v. Broadview Foundation*, [2001] O.J. No. 108 (C.A.) as follows:

Para. 4 The purpose of rule 76.06 is to allow the parties to bring forward a relatively inexpensive application for summary judgment. Evidence to be considered includes the affidavits of the parties, any supporting material that can properly be placed before the court and the affidavits of witnesses. Summary judgment can only be granted when all of the evidence reviewed in total upon applying the principles of justice and fairness demonstrates a clear case wherein the motions judge may enter judgment. In circumstances where the case is not clear or where it dictates that justice and fairness would suggest otherwise, it is appropriate for the judge to refer the matter to trial.

**9** In my view, justness and fairness cannot be met when the facts are unclear and where cross-examination is the most appropriate route for determination of issues of credibility.

**10** In *Newcourt Credit Group Inc. v. Hummel Pharmacy Limited*, [1998] O.J. No. 314 (1998), 38 O.R. (3d) 82 (Ont. Ct. (Gen. Div.)), the Divisional Court held:

The wording suggests that the motions judge should make determinations of fact, including determinations of credibility, unless unable to do so without cross-examination.

**11** I am satisfied in the circumstances before me, that I am unable to accept the position put forward by the Plaintiff, without cross-examination that would take place in the normal course at a trial.

**12** I will not deal with the list of inconsistencies as they are suggested in the Plaintiff's position, as set out in the factum of the Defendant in considerable detail, except to say that they all raise a concern regarding credibility, especially those that relate to the value of the items allegedly lost. Those in particular require, to my mind, more detailed evidence and also cross-examination, before I could be satisfied that the claimed value of \$48,000 has been proved, notwithstanding that it is reduced to \$25,000, to meet Rule 76 limits.

**13** While there is some merit in the Defendant's position, that this action could be dismissed in its entirety, I decline to do so. I am aware that the obligation remains on the Plaintiff to prove its claim and that false statements in the proof of loss are sufficient to vitiate the entire claim. See *Voloudakis v. Allstate Insurance Company of Canada*, [1998] O.J. No. 3, [1999] I.L.R. I-3639 (Ont. Gen. Div.) I decline to dismiss the action at this stage, since (a) I find the inconsistencies in the Plaintiff's position would be better dealt with by way of cross-examination; and (b) there was not before me a formal motion on the part of the Defendant.

**14** For the foregoing reasons, the motion by the Plaintiff for summary judgment is dismissed. Counsel for the Plaintiff submitted that the award for costs should be modest, since the claim has

been brought under the simplified procedure rule. Counsel for the Defendant referred to an offer to agree to a dismissal without costs and suggested a fixed fee for the motion of \$1500.

**15** Having heard submissions, I conclude that the Defendant is entitled to its costs of the motion, which I fix in the sum of \$1000, payable forthwith. This action is not to proceed further until such costs have been paid.

C. CAMPBELL J.

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