CITATION: Rodriguez v. Zhang, 2015 ONSC 5644
COURT FILE NO.: CV-12-464088
DATE: 20150914

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ernesto Rodriguez, Plaintiff

AND:

Quanxing Zhang (Defendant/Responding Party), Allstate Insurance Company of Canada, and Tom Gorham (Defendants/Moving Parties

BEFORE: Allen J.

COUNSEL: *Charles Gluckstein*, for the Plaintiff

Michael P. Taylor and *Richard Kreder*, for the Defendant Zhang

Frank Benedetto, for the Defendants Allstate and Gorham

HEARD: September 3, 2015

RELEASED: September 14, 2015

ENDORSEMENT

BACKGROUND

The Underlying Action

[1] The underlying action to this motion involves a motor vehicle accident on September 13, 2011 in which the plaintiff Ernesto Rodriguez ("Rodriguez"), who was driving a Vespa, was struck by Quanxing Zhang's vehicle while he was executing a U-turn.

[2] Rodriguez had purchased the Vespa, a motor driven two-wheel vehicle, a few weeks before the accident. On August 15, 2011, he inquired with Tom Gorham ("Gorham"), an insurance agent with Allstate Insurance Company ("Allstate"), about insuring the Vespa. The Vespa was registered to Rodriguez on August 23, 2011. Before the accident, Allstate had not provided a quote nor was the Vespa added to the Allstate policy that covered two of Rodriguez's other vehicles.

[3] Rodriguez claims damages against Zhang for injuries he sustained. Rodriguez also claims damages for negligence and breach of contract by Allstate and Gorham. Rodriguez asserts Allstate failed to notify him prior to the accident that his Vespa was not insured under a policy of insurance.

[4] In its pleadings, Allstate denies Rodriguez's Vespa was ever insured under a policy written by Allstate. Allstate also asserts Rodriguez's injuries were caused by or contributed to by Rodriguez's and/or Zhang's negligence.

[5] In his pleadings, Zhang denies causing Rodriguez's injuries and asserts the injuries were caused by Rodriguez's negligence. Zhang also asserts Rodriguez has no valid claim against him pursuant to s. 267.6 of the *Insurance Act*, R.S.O. 1990, c. I-8 on the basis that at the time of the accident Rodriguez was not insured. Section 267.6 (1) provides:

> 267.6 (1) Despite any other Act, a person is not entitled in an action in Ontario to recover any loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile if, at the time of the incident, the person was contravening subsection 2 (1) of the *Compulsory Automobile Insurance Act* in respect of that automobile.

Section 2 (1) of the *Compulsory Automobile Insurance Act* R.S.O. 1990, c. 25 provides:

> 2. (1) Subject to the regulations, no owner or lessee of a motor vehicle shall,
>
> (a) operate the motor vehicle; or
>
> (b) cause or permit the motor vehicle to be operated,
> on a highway unless the motor vehicle is insured under a contract of automobile insurance.

The Motion

[6] The motion is brought by Allstate and Gorham ("Gorham") under Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for partial summary judgment in relation to Rodriquez's negligence/breach of contract claim against them.

[7] Allstate[1] makes a highly unusual move in bringing this motion in view of its defence to Rodriguez's claim against Allstate and Zhang. What Allstate seeks in this motion is judgment that there is no genuine issue for trial that at the time of the accident the Vespa was insured by Allstate. Allstate's assertion in this motion, some four years after Rodriguez's action was initiated, that it obtained information after filing its pleadings that establishes Rodriguez's entitlement to coverage for the Vespa, is puzzling.

[8] Be that as it may, Allstate seeks on the motion judgment based on the application of the terms of s. 2.2.1 of the Standard Automobile Insurance Policy ("the OAP"). At the time of the accident, Allstate insured a Mercedes and Lincoln owned by Rodriguez. Section 2.2.1 allows insurance coverage to be extended from other vehicles owned by an insured, and insured by the

[1] My references to Allstate alone throughout the decision are mean to include Gorham.

insurer, to a newly acquired vehicle if certain pre-conditions are met. Allstate asserts Rodriguez satisfies the pre-conditions for coverage for the Vespa. Zhang takes the contrary view and asserts s. 2.2.1 does not apply and further that Rodriguez, having had no insurance on the Vespa, has no claim against him.

[9] Allstate's position on this motion makes for other unusual twists.

[10] For instance, success by Allstate in achieving the judgment it seeks would have both unfavourable and favourable consequences for Allstate. A grant of judgment that Allstate insured the Vespa at the time of the accident would engage Allstate's duty to defend Rodriguez's claim against Zhang. Such a judgment would at the same time produce the favourable effect of eliminating Rodriguez's claim against Allstate.

[11] As well, although Allstate is an opposing party to Rodriguez in the underling litigation, it clearly would not be in Rodriguez's interest to oppose Allstate's position on this motion, so he does not. Success by Allstate would mean Rodriguez could drop his claim against Allstate and concentrate his efforts on his claim against Zhang.

[12] Zhang's position presents another twist to this unusual litigation scenario. Zhang, the other defendant in Rodriguez's action, both responds to Allstate's position on the motion and raises his own counter position. Zhang submits the court should not grant partial summary judgment that Rodriguez satisfied 2.2.1 and further argues based on this that Rodriguez has no legal claim against him for damages. In the circumstances, it seems Zhang might well have advanced his position against Allstate by way of his own motion or cross-motion. I will address this latter point later in the decision.

[13] Success by Zhang on this motion would have mixed consequences for Allstate and Rodriguez. A finding that the Vespa was not insured would mean, for Rodriguez, maintaining his claim against Allstate and incurring that expense but also result in Rodriguez being disentitled from seeking redress from Zhang, freeing Allstate from the duty to defend Rodriguez's claim against Zhang.

[14] Below I will also discuss the court's authority, if it so decides, to grant, on a question of law, a summary judgment that is counter to the summary judgment requested by the moving party.

THE LAW ON SUMMARY JUDGMENT

General Principles

[15] To succeed in the motion the moving party must satisfy the court there are no genuine issues of fact requiring a trial: [*Soper v. Southcott*, [1998] O.J. No. 2700 at para. 14 (Ont. C.A.)]. The party resisting summary judgment has the onus to satisfy the court there are material facts to be tried and to demonstrate there is a real chance of success at a trial. Courts have held the party resisting the motion must "lead trump or risk losing": [*1061590 Ontario Limited v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 at 557 (Ont. C.A.)].

[16] The Supreme Court of Canada has expanded the role of the motions judge on a motion for summary judgment. The motions judge must put their mind to the underlying goals and principles in considering whether it is appropriate to grant summary judgment. The Court held that if the motions judge on a summary judgment motion can arrive at a fair and just determination on the merits, there will be no genuine issue requiring a trial. The Supreme Court held:

> This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [*Hryniak v. Mauldin*, 2014 SCC 7, at para. 49, (S.C.C.)]

[17] The motions judge must consider whether the law can be applied to the facts as disclosed on the motion record so as to give the judge confidence that the dispute can be resolved without a trial. Where the motions judge can find the "necessary facts" on the motions record and dispose of the dispute "the dispute proceeding to trial would generally not be proportionate, timely or cost effective": [*Hryniak v. Mauldin*, at para. 50].

[18] On first blush, it seemed rather unusual to find Zhang, who lacks privity in the contract between Allstate and Rodriguez, to step in and advance a position that questions the viability the contract. One might ask what standing a third party in Zhang's position would have to do this. However, on second glance, Zhang's genuine interest in the outcome of this motion is apparent. Zhang's position on this motion is grounded in his pleading that Rodriguez's Vespa was not insured by Allstate at the time of the accident and in his further pleading that pursuant to s. 267.6 (1) of the *Insurance Act*, Rodriguez is not legally entitled to sue him for damages.

[19] It is Zhang's position that the evidentiary record on this motion supports a finding contrary to the relief Allstate seeks.

A Question of Law

[20] Allstate seeks partial summary judgment on a question of law, on the interpretation of s. 2.2.1 of the OAP as it applies to the undisputed facts of this case.

[21] The Ontario Court of Appeal has addressed the question of whether the court has jurisdiction on a summary judgment motion on a question of law to grant judgment opposite to the judgment sought by the moving party. On a motion involving a question of law on a limitation issue, the Ontario Court of Appeal considered the combined effect of Rules 20.04 (2) and (4): [*Whalen v. Hillier*, 2001 CanLII 24070 (ON CA)].

[22] Rule 20.04 (2) provides the court shall grant summary judgment if the court is satisfied there is no genuine issue requiring a trial and the parties agree to have all or part of the claim determined by summary judgment, and the court determines it is appropriate to grant summary judgment. Rule 20.04 (4) provides where the court is satisfied the only genuine issue is a question of law the court may determine the question of law and grant judgment accordingly.

[23] The moving party defendants in *Whalen* sought summary judgment against the plaintiffs based on a limitation defence and the motions judge ruled in the opposite and granted summary judgment against the defendant's limitation defence. The Court of Appeal held:

> "…in my view it was open to the motions judge, as a matter of jurisdiction, to grant summary judgment against the moving party defendants with respect to their limitation defence. There is nothing in the wording of Rules 20.04 (2) and (4) or in the case law to restrict such an order to a case in which the plaintiffs seek relief in their own motion or cross-motion.

[*Whalen v. Hillier*, at para. 13; also see *Ash Temple Ltd. v. Croney*, 2000 CanLII 1416 (ON CA)]

[24] The appeal court found the motions judge had jurisdiction to grant summary judgment against the defendant even though it was the defendant that brought the motion. The appeal court decided the responding party was not required to bring its own motion or cross-motion and that the motions judge is at liberty to decide for or against the party that brings the motion when the motion concerns a question of law.

[25] The *Whalen* ruling together with the expanded authority offered by *Hryniak* give this court the jurisdiction to consider the relief Zhang seeks on the motion.

ANALYSIS

Application of Section 2.2.1 of the OAP

[26] As noted earlier, there is no dispute that Allstate insured two of Rodriguez's vehicles, a Mercedes and a Lincoln. The dispute centres on the Vespa Rodriguez purchased weeks before the accident. The sole issue on this motion involves a question of law requiring the interpretation of a statutory provision, s. 2.2.1 of the OAP, as it applies to the Vespa and whether Rodriguez satisfies the statutory pre-conditions of a "newly acquired automobile". Section 2.2.1 defines what constitutes a "newly acquired automobile":

> A newly acquired automobile is an automobile or trailer that you acquire as an owner and that is not covered under any other policy. It can be either a replacement or an additional automobile. The replacement automobile will have the same coverage as the described automobile it replaces. We will cover an automobile as long as:
>
> - We insure all automobiles you own, and
> - Any claim you make for the additional automobile is made against a coverage we provide.
>
> Your newly acquired automobile(s) will be insured as long as you inform us within 14 days from the time of delivery and pay any additional premium required.

Issues not in Dispute

[27] The parties agree there is no dispute on the following elements of s. 2.2.1. The Vespa was newly purchased weeks before the accident and Rodriguez notified Allstate of the purchase of the Vespa in accordance with the 14-day notice period. Rodriguez acquired it as an owner and at the time of the accident the Vespa was not covered by any insurance policy. It was purchased as a vehicle in addition to the other vehicles Rodriguez owned.

[28] The issues to be determined are whether Allstate insured all automobiles owned by Rodriguez before the accident and whether Rodriguez paid any additional premium required.

Did Allstate Insure All Other Automobiles Rodriguez Owned?

[29] There is no question about the Lincoln and Mercedes. Rodriguez also owned an Audi that was located in Mexico and insured by an insurer there and two uninsured motorcycles, a Yamaha R6 and a Cagiva 124, he used for racing. Allstate argues that the Audi and the two motorcycles should not be categorized as automobiles Rodriguez owns that are not insured by Allstate.

[30] "Automobile" is defined under Part IV, s. 224 (1)(b) of the *Insurance Act*:

> "automobile" includes,
>
> (a) a motor vehicle required under any act to be insured under a motor vehicle liability policy, and
>
> (b) a vehicle prescribed by regulation to be an automobile.

The Audi

[31] On the face of it, the Audi meets the statutory definition of an "automobile" as "a motor vehicle required under any act to be insured under a motor vehicle liability policy." Allstate raises a question it submits places the Audi outside the category of "all automobiles you own". Allstate takes the position that because the Audi was located in Mexico at the time of the accident and insured by another insurer there, it is not an automobile that could have been insured by Allstate. According to this argument, the Audi should not be affected by the requirement of Allstate insuring "all automobiles you own" because being located outside Ontario Allstate could not have insured it.

[32] Zhang presented another view. He relied on the Ontario Court of Appeal decision in *Hunter Estate v. Thompson* where the court held that the clear language of s. 2.2.1 must be upheld. In that case the insured argued that the words, "We insure all automobiles you own" should be read as having the words "and that are insured" following them. The court disagreed and held:

> We disagree that it is necessary to read in these words to give effect to s. 2.2.1.

> … On the facts we have now, the plain words of s. 2.2.1 require that the owner insure with the insurer all of the automobiles he owns. If the insured owns automobiles that he insures with another insurer or that he leaves uninsured, the pre-condition is not met.
>
> [*Hunter Estate v. Thompson*, 2003 CanLII 23007, at paras. 7 and 8, (Ont. C.A.)]

[33] Zhang also relied on a Supreme Court of British Columbia case which dealt with whether an aircraft was insured under a policy with an aviation insurer and in particular whether it fell within the "newly acquired aircraft" provision under the policy. The insured owned aircrafts that were not wholly owned by him. He argued that aircrafts that were uninsured at the time of the accident that were not wholly owned by him should not have the effect, under the newly acquired aircraft provision, of excluding coverage for the aircraft at issue: [*Webber v Canadian Aviation Insurance Managers Ltd*., 2002 BCSC 1415, at paras. 7 and 8, (B.C.S.C.)].

[34] The court held that under the policy "ownership" means any ownership interest and was not restricted to full ownership. In other words, the court was not prepared to interpret the "newly acquired aircraft" provision as containing an implied limitation or to read such a restriction into the plain words of the provision.

[35] I do not accept Allstate's argument. The unambiguous language of s. 2.2.1 must be endorsed. There is nothing in s. 2.2.1 that qualifies or limits "all automobiles you own" to automobiles located in Ontario or to automobiles that could be insured by the insurer.

[36] Another consideration comes to mind. Allstate's unusual stance on this motion again puts it in the peculiar position of advancing an interpretation of the provision customarily more suited to an insured, as we see in the *Hunter Estate* and *Webber* cases. I point out here that it is the insurance industry that wrote the standard policy and the policy is in effect with the approval of the Superintendent of Insurance under s. 227 (5) of the *Insurance Act* as being in conformity with the automobile insurance provisions of Part IV. It seems that if insurers intended such a qualification in s. 2.2.1 it could easily have been written into the contract.

[37] I conclude for all the reasons cited that the Audi is included as an automobile owned by Rodriguez that was not insured by Allstate

The Motorcycles

[38] Motorcycles satisfy the definition of an "automobile" under s. 224 (1) (b) of the *Insurance Act* as they are motor vehicles required to be insured under a motor vehicle liability policy.

[39] Allstate makes the argument that Rodriguez's two motorcycles fall outside the definition of an automobile. Allstate cites the Ontario Superior Court in *Grummett v. Federation* to demonstrate that Rodriguez's motorcycles are not automobiles. This case sets down a three-part test to determine what constitutes an "automobile" under the *Insurance Act*, Part IV as follows:

a) Is the vehicle an "automobile" in ordinary parlance?

If not, then,

b) Is the vehicle defined as an automobile in the wording of the insurance policy?
If not, then,

c) Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

[*Grummett v. Federation Insurance Co. of Canada* (1999), 46 O.R. (3d) 340 (Ont. S.C.J.) and *Adams v. Pineland Amusements Ltd.* (2007), 88 O.R. (3d) 321 (Ont. C.A.)]

[40] The *Grummett* test is referred to by the Ontario Court of Appeal in *Adams v. Pineland*. The court neither adopted nor rejected the test. I am not convinced the test is particularly useful in deciding the case at hand, although some of the findings and observations of Somers, J. in *Grummett* are helpful.

[41] Allstate argues the motorcycles should not be regarded as "automobiles not insured by Allstate" because they are race bikes used for racing off-road and not "motor vehicles required to be insured under a motor vehicle liability policy". Allstate submits they are uninsurable due to deficiencies or modifications made to them. They lack mirrors, lights and make excess noise and have exhaust emissions in excess of what is allowed for the roadway.

[42] The *Grummett* case considered a stock race car and whether it was insurable as an automobile. The stock car was manufactured with a low slung body and a cockpit designed to hold only one driver and no passengers. It had a modified engine, no head lights, braking lights or doors. Stock cars are built for competitive racing not for the road. The court asked the question whether, at the time of the accident, the vehicle required motor vehicle liability insurance. The court answered that question in the negative holding the race car was not an "automobile" within the scope of the insured's automobile policy.

[43] Allstate argues the modifications or deficiencies in the motorcycles are comparable to the modifications to the race car. That is, in the case of both the race car and the motorcycles the modifications make them not road worthy and thus not insurable as motor vehicles under a motor vehicle liability policy. According Allstate's argument Rodriguez should not be excluded from coverage for the Vespa as the motorcycles cannot be counted as "automobiles" owned by Rodriguez that are not insured by Allstate.

[44] Zhang argues the vehicle in *Grummett* can be distinguished from the motorcycles. He points out that unlike the stock car the motorcycles were manufactured to be driven on the road. The *Grummett* decision emphasized the fact that the racing car was strictly built for racing and for no other purpose. I agree with Zhang, while the motorcycles could be used for racing like any standard automobile that is not the purpose for which they were built.

[45] Zhang also drew on a distinction that arose in American jurisprudence between vehicles that can never be insured under a motor vehicle policy and those that can. In the American case the court was required to determine, owing to the extremely poor state of repair of a "junker car", whether the "junker car" an insured inherited from his mother qualified as "an automobile". The court determined the vehicle was not an "automobile". I find what the American court had to say instructive:

> Good sense presupposes that a vehicle designed for self-propulsion on land and which may be so self-propelled or restored to that condition with reasonable cost and effort may be considered an automobile. There was no evidence in the record that the Chevrolet would or could be restored, and the trial court's finding … has ample support in the record. Not only was it incapable of self-propulsion, but there was no reasonable possibility of restoring it to that condition.
>
> [*Civil Service Emp. Ins. Co. v. Wilson* Civ. No. 259 Fifth Dist. Nov. 21, 1963]

[46] I find the motorcycles, unlike the stock car, were built to be driven on the street, and, unlike the "junker", but for the lack of mirrors and lights and the noise and exhaust concerns, the motorcycles would be road worthy with relatively minor mechanical intervention. In other words the deficiencies in the motorcycles are not sufficient to take them out of the definition of an "automobile" as they are motor vehicles insurable under a motor vehicle liability policy.

[47] I conclude therefore that the motorcycles were also automobiles owned by Rodriguez that were not insured by Allstate which provides a further reason the Vespa was not covered under s. 2.2.1 at the time of the accident.

Payment of Additional Premium

[48] As noted earlier, during the month before the accident Rodriguez inquired with Gorham about insuring the Vespa. Gorham advised there was a coverage problem related to the requirement that Rodriguez have a full class M licence. Before the accident, Allstate had not provided a quote or a policy. There is no evidence that Rodriguez paid any additional premium for coverage for the Vespa.

[49] Allstate relies on cases that have found under certain circumstances the non-payment of an additional premium did not violate s. 2.2.1: [*Sage v. Peel Mutual Insurance Co.* 2005 CarswellOnt 5907, at paras. 43, 49-50, (Ont. S.C.J) and *McLean (Litigation Guardian of) v. Jorgenson* 2005 CarswellOnt. 1237, at paras. 11, 31, 42-43, (Ont. S.C.J.)]. I agree with Zhang's position that the circumstances of the parties in the cases Allstate relies on are distinguishable.

[50] The *Sage* case involves an insured seeking relief from forfeiture for being in non-compliance with s. 2.2.1 where the court found that its power to grant this relief was contingent on the insured having acted reasonably in the circumstances. The insured in *Sage* was not advised there was a potential coverage issue. In the case at hand, three days after Rodriguez told Allstate he purchased the Vespa, Allstate notified Rodriguez there was a coverage issue relating to Rodriguez not having a full class M licence. Rodriguez subsequently obtained only a class M1 licence. Then, even though the Vespa was uninsured, Rodriguez went to the Ministry of Transportation and obtained plates. He drove the uninsured Vespa carrying a passenger at night in violation of the terms of the class M1 licence. This is not evidence of Rodriquez conducting himself reasonably in the circumstances.

[51] The facts in *McLean* disclose no availability of coverage or licence issues in relation to a snowmobile the insured purchased 24 hours before an accident. The insured had existing

insurance on another snowmobile. The court found the insured intended to obtain coverage under s. 2.2.1 and, unlike Rodriguez, in *McLean* there is no evidence of any unreasonable conduct by the insured.

[52] Rodriguez drove his Vespa prematurely knowing there was a coverage issue and before Allstate would have provided a policy and advised of the amount of a premium. In this sense and for this reason he was also in non-compliance with s. 2.2.1.

SUMMARY

[53] Applying the broadened authority on summary judgments afforded by *Hryniak*, I find the "necessary facts" exist on the record to finally adjudicate the coverage issue under s. 2.2.1 of the OAP and Rodriguez's entitlement under s. 267.6 (1) of the *Insurance Act* to pursue damages against Zhang. The evidentiary record discloses no genuine issue of fact requiring a trial in relation to those issues.

[54] I have found Rodriguez has not satisfied the requirement of s. 2.2.1 of the OAP, to have all automobiles he owned at the time of the accident – his Audi and two motorcycles − insured by Allstate. In the event I am wrong in my findings on either the Audi or the motorcycles, a finding that one or the other was an automobile not insured by Allstate is sufficient to support a finding of non-compliance with s. 2.2.1. The non-payment of an additional premium stands as a further basis on which to find Rodriguez failed to meet a pre-condition under the OAP.

[55] For all the foregoing reasons:

[56] I dismiss Allstate's and Gorham's motion for partial summary judgment which requested a finding that at the time of the accident Rodriguez satisfied the OAP s. 2.2.1 pre-conditions for coverage for the Vespa.

[57] I grant partial summary judgment in favour of Zhang based on the fact that at the time of the accident Rodriguez did not satisfy the pre-conditions for coverage for the Vespa under s. 2.2.1 of the OAP and that Rodriguez is not entitled under s. 267.6 (1) of the *Insurance Act* to pursue his claim against Zhang.

[58] This is a truly unfortunate outcome for Rodriguez. However, he may have other remedies available to him which he is at liberty to pursue.

COSTS

[59] The parties agreed on costs of $5,000 inclusive of disbursements and interest. I award costs against Allstate and Gorham in the amount of $5,000 payable within 30 days of this Order.

ORDER

[60] Order accordingly.

Allen J.

Date: September 14, 2015