COURT OF APPEAL FOR ONTARIO

CITATION: D'Onofrio v. Advantage Car & Truck Rentals Limited, 2017 ONCA 5
DATE: 20170105
DOCKET: C61676

Gillese, Benotto and Roberts JJ.A.

BETWEEN

Anthony D'Onofrio, James D'Onofrio and Anna D'Onofrio

Plaintiffs (Appellants)

and

Advantage Car & Truck Rentals Limited, ~~Jane Doe~~ Anita Marques and Unifund Assurance Company

Defendants (Respondents)

Sabrina Singh, for the appellants

Stephen Ross and Murleen McLean, for the respondents Advantage Car & Truck Rentals Limited and Anita Marques

Ali Z. Khan, for the respondent Unifund Assurance Company

Heard: November 24, 2016

On appeal from the order of Justice Harrison S. Arrell of the Superior Court of Justice, dated August 13, 2015, and from the order of Justice Robert B. Reid of the Superior Court of Justice, dated December 30, 2015, with reasons reported at 2015 ONSC 8084, and, if leave be granted, the related costs order, dated March 11, 2016.

Gillese J.A.:

[1] These appeals raise an important question: are determinations made in a summary judgment motion binding on all parties to the proceeding in which the motion was brought? In answering that question, the court must consider the effect of a party taking "no position" on the summary judgment motion.

BACKGROUND IN BRIEF

The Accident and the Action

[2] In early August 2008,[1] Anthony D'Onofrio was injured when the van he was driving was rear-ended by another vehicle (the "offending vehicle"). A young female driver spoke briefly with Mr. D'Onofrio after the accident but drove off without providing ownership and insurance information.

[3] Mr. D'Onofrio had recorded the licence plate number of the other car at the scene of the accident. A police investigation traced the licence plate to Advantage Car & Truck Rentals Limited ("Advantage"). The vehicle registered to that licence plate matched the vehicle owned by Advantage and identified by Mr. D'Onofrio.

[4] Mr. D'Onofrio had a standard automobile policy with Unifund Assurance Company. That policy contained an unidentified motorist provision.

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[1] On the record, the exact date of the accident is unclear. It appears that it occurred on either August 12 or 13, 2008.

[5] Mr. D'Onofrio and his parents (the "Plaintiffs") started an action for damages in which it named as defendants: Advantage; Jane Doe, the unknown driver of the offending vehicle; and Unifund. The Plaintiffs included Unifund in the action because Unifund would be the responsible payor if there were a finding that there was no identifiable defendant.

[6] Unifund defended and cross-claimed against Advantage and Jane Doe.

[7] Through Unifund's investigations, it came to believe that Anita Marques was the probable driver of the offending car. Ms. Marques was an employee of Advantage at the time of the accident. At his examination for discovery, Mr. D'Onofrio confirmed that Ms. Marques was the driver of the offending vehicle.

[8] The Plaintiffs substituted Ms. Marques for the defendant Jane Doe and counsel for Advantage assumed representation for Ms. Marques.

[9] Advantage/Ms. Marques defended the action based on what I will term the "Identity Defences". Those defences were that the identities of the driver and/or the owner of the offending vehicle were unknown, as was whether the driver was operating the offending vehicle with the owner's consent.

The Summary Judgment Motion

[10] After examinations for discovery were completed, Unifund advised the parties that it intended to bring a summary judgment motion for an order

dismissing the action against it because the identities of the owner and driver of the offending vehicle were known (the "Summary Judgment Motion").

[11] In a letter to the parties dated July 2, 2015 (the "First Unifund Letter"), counsel for Unifund referred to some of the facts that supported its contention that there were no genuine identity issues requiring a trial. That letter reads, in part, as follows:

> Unifund should be released from this action on the basis that this is not an uninsured motorist claim.
>
> The plaintiff wrote down the license plate of the other vehicle at the scene of the accident. The vehicle registered to that license plate matches the vehicle owned by Advantage, and identified by the plaintiff. That vehicle was returned to the store a few hours before the subject accident, and it was not rented again until a week later. During this time, the vehicle was available at the Advantage shop. The keys for the vehicle were available during the day in an unlocked box. Ms. Marques confirmed that she would attend at the store on a frequent basis, whether working or not, in order to bring her boyfriend lunch and to hang out. Odometer readings and the vehicle history print out indicate a missing 116 kms between the time the vehicle was brought in on August 12th, 2008, and when it was rented again on August 19th, 2008.
>
> Advantage has not taken the position that Ms. Marques took the vehicle without consent. Advantage did not report the vehicle as stolen, despite knowing soon after the accident that there was concern about it. It also appears that Advantage's employees would take company vehicles out. Ms. Marques' supervisor signed the vehicle out, including before and after the accident.

> Finally, we note that the plaintiff attended the examination for discovery of Ms. Marques and confirmed that she was the other driver.

[12] The affidavit of Steven Carlstrom, filed by Unifund on the Summary Judgment Motion, placed those facts in evidence before the court. The notice of motion also made it clear that Unifund sought to be released because the action did not involve an uninsured motorist vehicle claim.

[13] The Plaintiffs indicated that they would respond to the Summary Judgment Motion, if necessary, depending on the responding materials filed by Advantage/Ms. Marques.

[14] By letter dated July 31, 2015, counsel for Advantage/Ms. Marques responded to Unifund and advised that those parties would take no position on the Summary Judgment Motion “on the basis that no costs will be sought against them”, otherwise they would require an adjournment to file responding materials.

[15] By letter dated August 11, 2015 (the “Second Unifund Letter”), Unifund advised all parties that “we will agree to a consent motion to dismiss the action without costs against our client”.

[16] Counsel for Advantage/Ms. Marques did not respond to the Second Unifund Letter. Nor did they file responding materials on the Summary Judgment Motion or attend at its hearing.

[17] At the hearing of the Summary Judgment Motion, counsel for Unifund advised the court that the order it sought was “on consent”. No party other than Unifund attended at the hearing of the motion.

[18] By order dated August 13, 2015 (the “First Order”), the summary judgment motion judge made the order which Unifund sought. The second paragraph in the preamble to the First Order stated that the Plaintiffs took no position on the Summary Judgment Motion and that Advantage and Ms. Marques consented to it. The effect of the First Order was to dismiss the action as against Unifund, leaving Advantage and Ms. Marques as the sole defendants.

[19] The full text of the summary judgment motion judge’s reasons for the First Order reads as follows: “On consent draft order shall issue.”

The First Order Was Based on a Mistake

[20] Over a month after the hearing of the Summary Judgment Motion, counsel for Advantage/Ms. Marques took the position that the First Order contained an error because they had not consented to the Summary Judgment Motion. Rather, they had taken “no position” on the motion.

[21] Ultimately, all parties agreed that the summary judgment motion judge had decided the motion based on a mistaken premise, namely, that all of the parties had consented to it. The parties also all agreed that, in fact, none of the

Plaintiffs, Advantage or Ms. Marques had consented to the motion, each having expressly taken no position on it.

The Clarification Motion

[22] Counsel for Advantage/Ms. Marques put the Plaintiffs on notice that they considered the First Order to have no effect on the Identity Defences and that they intended to continue to rely on those defences at trial. As a result, the Plaintiffs brought a motion (the "Clarification Motion") to settle the effect of the First Order.

[23] In the Clarification Motion, the Plaintiffs asked for an order precluding Advantage and Ms. Marques from raising the Identity Defences at trial. They argued that Advantage and Ms. Marques were estopped from asserting the Identity Defences by virtue of the position they had taken on the Summary Judgment Motion or, alternatively, by having failed to "put their best foot forward" on that motion. Alternatively, the Plaintiffs asked that the First Order be set aside so that Unifund would continue as a party to the action.

[24] By order dated December 30, 2015 (the "Second Order"), the clarification motion judge dismissed the Clarification Motion. The Second Order also made a "clerical correction" to the First Order by amending the wording of the second paragraph in its preamble to state that Advantage and Ms. Marques had taken no position on the Summary Judgment Motion.

[25] By order dated March 11, 2016 (the "Costs Order"), the Plaintiffs were ordered to pay costs of the Clarification Motion to Unifund in the amount of $6,312.25 and to Advantage/Ms. Marques in the amount of $9,949.72.

The Appeals

[26] The Plaintiffs appeal all three orders.

THE ISSUES

[27] The Plaintiffs raise two issues on appeal:

1. did the clarification motion judge err in failing to find that the First Order bound Advantage and Ms. Marques such that they are now estopped from raising the Identity Defences at trial?

2. if the answer to the first question is "no", did the summary judgment motion judge err in failing to provide adequate reasons on the Summary Judgment Motion?

ANALYSIS

Issue #1 – Did the First Order bind Advantage and Ms. Marques?

[28] The clarification motion judge accepted that the Summary Judgment Motion decided the Identity Defences (at para. 29). Nonetheless, he found that Advantage and Ms. Marques were not estopped from litigating those issues at trial because they did not "actively participate" in the Summary Judgment Motion and they had "no right or interest" in keeping Unifund in the action (at para. 31). He said that since Advantage/Ms. Marques were "disinterested in the outcome"

of the Summary Judgment Motion and “did not participate in it”, they could not be parties for the purposes of estoppel (at para. 31).

[29] I do not agree. The Identity Defences which Advantage and Ms. Marques seek to raise at trial were directly affected by the Summary Judgment Motion. Consequently, they were interested in the outcome of the Summary Judgment Motion. Further and in any event, as parties to the action, Advantage and Ms. Marques were bound by the First Order. This is so regardless of the position that Advantage and Ms. Marques took on the Summary Judgment Motion.

[30] From the outset, the central question in this action was whether the Plaintiffs would look to Advantage/Ms. Marques for a remedy or to Unifund. Unifund was named in the action solely because it would be the responsible payor if there were a finding of fact that there was no identifiable defendant.

[31] Unifund brought the Summary Judgment Motion pursuant to r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Unifund’s position on the motion was that Advantage and Ms. Marques were the properly identified owner and driver of the offending vehicle and, therefore, the action did not involve an uninsured motorist vehicle claim and Unifund should be let out of the action.

[32] Rule 20.04(2)(a) reads as follows:

> **20.04(2)** The court shall grant summary judgment if:
>
> > **(a)** the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;

[33] The First Order dismissed the Plaintiffs' claim against Unifund. As the order was made pursuant to r. 20.04(2)(a), it could only have been made if the summary judgment motion judge was satisfied that there was no genuine issue requiring a trial with respect to the Identity Defences. If there were such a genuine issue requiring a trial, the motion had to be dismissed and Unifund could not have been let out of the action.

[34] Thus, far from being disinterested in the outcome of the Summary Judgment Motion, Advantage and Ms. Marques were directly affected by it. Their ability to maintain the Identity Defences at trial depended on the motion being dismissed.

[35] For the same reason, they had an interest in keeping Unifund in the action. Unifund could only have been let out of the action if the summary judgment motion judge was satisfied that the action no longer involved an uninsured motorist vehicle claim. On the record before the court (and given that the other parties had not in fact consented to the motion), the judge could only have been satisfied of that if he accepted that Advantage and Ms. Marques were the owner and driver of the offending vehicle. If there were some other unidentified owner or driver of the offending vehicle, the summary judgment motion judge would have had to dismiss the motion. Therefore, the only way that Advantage and Ms. Marques could continue to assert the Identity Defences at trial was for Unifund to remain in the action.

[36] Further and in any event, the First Order and its underlying determination that there were no Identity Defences requiring a trial was binding on all parties to the action, including Advantage and Ms. Marques. In my view, it is self-evident that either there were genuine Identity Defences requiring a trial or there were not. If there were, the Summary Judgment Motion had to be dismissed and the Identity Defences resolved at trial. If there were not, then the Identity Defences could not be pursued at trial. It cannot be both that the Identity Defences were not a genuine issue for trial and at the same time remained a genuine issue for trial.

[37] Furthermore, all of the parties to the action had notice of the Summary Judgment Motion. All had the chance to fully participate. Had Advantage/Ms. Marques wished to retain the right to defend the action on the basis of the Identity Defences, they were obliged to contest the Summary Judgment Motion and show that there was a genuine issue requiring a trial on those matters. It goes without saying that in so doing, they were required to “put their best foot forward”.

[38] I would conclude on this issue by responding to Advantage/Ms. Marques’ submission that it was for the Plaintiffs to contest the Summary Judgment Motion if they were concerned about the Identity Defences. I reject that submission.

[39] It was not the Plaintiffs who wished the Identity Defences to be pursued at trial – it was Advantage/Ms. Marques. If Unifund succeeded on the Summary Judgment Motion, the trial would have been simplified. The Plaintiffs could then have looked only to Advantage/Ms. Marques for redress but they would not have faced the Identity Defences. If Unifund did not succeed on the motion, the Plaintiffs remained in the same position as before the motion was brought. Unifund remained available to claim against in the event that Advantage and Ms. Marques were successful in advancing their Identity Defences.

[40] Therefore, the Plaintiffs understandably took no position on the Summary Decem
Judgment Motion, although they did make it clear to Unifund that if Advantage/Ms. Marques resisted the motion they would respond accordingly.

[41] For these reasons, the Second Order cannot stand. However, although I would set aside the Second Order, I would not accede to the Plaintiffs' request that this court find that Advantage and Ms. Marques are estopped from raising the Identity Defences at trial. As I explain below, there has been no judicial determination of the Identity Defences so neither estoppel nor the doctrine of *res judicata* applies.

Issue #2 – The Summary Judgment Motion

[42] The Plaintiffs framed the second issue as arising only if this court found that the clarification motion judge had not erred. As I have explained, I found that

he did err. Nonetheless, because of the relief that the Plaintiffs seek, it is necessary to consider the validity of the First Order, which flowed from the Summary Judgment Motion.

[43] The summary judgment motion judge gave a single reason for making the First Order: the consent of the parties. That reason is – quite simply – wrong. I hasten to add that no fault for this mistake can be laid at the feet of the summary judgment motion judge because he was told by Unifund, the moving party, that all parties consented to the granting of the order as sought.

[44] A consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances: *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 64.

[45] With respect, I must disagree with the clarification motion judge who treated the fact that Advantage and Ms. Marques took no position on the Summary Judgment Motion as the equivalent of having consented to the motion and, accordingly, made a "clerical" correction to the First Order to that effect (at para. 17). As these appeals demonstrate, there is a significant and meaningful difference between consenting to a motion and taking no position on it. Had Advantage and Ms. Marques actually consented to the Summary Judgment

Motion, they could not have purported to resile from its underlying determination that there were no genuine Identity Defences to go to trial. It was only because they had taken “no position” on the Summary Judgment Motion that they could purport to be entitled to raise those defences at trial.

[46] Because there was no agreement by the parties that the Summary Judgment Motion should be granted and there was no judicial determination of the Summary Judgment Motion on its merits, there is no basis for the First Order to have been made and it cannot stand.

[47] In the event that this court determined that both the First and Second Orders should be set aside, the Plaintiffs asked that the court either (1) dismiss the Summary Judgment Motion or (2) decide the Summary Judgment Motion on the merits, including with the appropriate findings of fact.

[48] I would dismiss the Summary Judgment Motion, without prejudice to Unifund’s right to renew it.

[49] It will be recalled that, under r. 20.04(2)(a), the court shall grant summary judgment only if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[50] As Advantage and Ms. Marques took no position at the Summary Judgment Motion, this court does not have the benefit of its submissions and evidence on the Identity Defences. In the circumstances, this court cannot be

satisfied that there is no genuine issue requiring a trial with respect to the Identity Defences nor does it have the parties' evidence so that it could consider the exercise of its powers under r. 20.04(2.1).

[51] I acknowledge the validity of the Plaintiffs' contention that Advantage and Ms. Marques were required to respond to the Summary Judgment Motion if they wished to maintain their Identity Defences. However, this court is aware that Advantage/Ms. Marques wish to advance those defences and that they mistakenly understood that by taking no position on the Summary Judgment Motion, it remained open to them to continue to assert those defences. In the circumstances, in my view, this court is not able to satisfactorily discharge its obligations under r. 20.04 and decide the Summary Judgment Motion. Thus, I would dismiss it.

[52] As the Summary Judgment Motion was never adjudicated on its merits, I would dismiss it but without prejudice to Unifund's right to renew it.

COSTS

[53] In the circumstances, the Plaintiffs are entitled to their costs of the Clarification Motion on a substantial indemnity basis with the lion's share of those costs to be borne by Unifund.

[54] Unifund is the author of this whole unfortunate saga. It is the one who mistakenly told the judge hearing the Summary Judgment Motion that all parties

consented to the motion. As the reasons of the summary judgment motion judge demonstrate, the First Order was a direct result of him having been given that incorrect information. In that situation, once Unifund learned that the parties had not consented to the Summary Judgment Motion, it should have done everything in its power to resolve the problem promptly and without cost to the other parties. Instead, Unifund opposed the Plaintiffs' attempts to resolve the problem and obtained a costs order against the Plaintiffs, their insured, for so doing.

[55] These appeals are the Plaintiffs' latest attempts to rectify the problems created by Unifund. It is my view that the Plaintiffs should not suffer in costs on these appeals, which they would if the court followed its usual practice in ordering costs of the appeals on a partial indemnity basis. The entire saga began with Unifund's mistaken advice to the summary judgment motion judge that the parties consented to that motion. Unifund's failure to rectify matters once that mistake became known led to the Clarification Motion and, ultimately, to these appeals. Unifund continued to oppose the Plaintiffs on these appeals, going so far as to seek costs of the appeals against the Plaintiffs on a substantial indemnity basis.

[56] In the circumstances, I would set the quantum of costs of the appeals on a substantial indemnity basis, again with the lion's share to be paid by Unifund.

DISPOSITION

[57] For these reasons, I would allow the appeals, set aside all three orders and dismiss the Summary Judgment Motion, without prejudice to Unifund's right to renew it.

[58] I would order costs of the appeals in favour of the Plaintiffs in the total sum of $24,400, all-inclusive. Of that sum, I would order Unifund to pay $16,400, all-inclusive, and Advantage and Ms. Marques together to pay $8,000, all-inclusive.

[59] Given the Plaintiffs' success on appeal, the Costs Order automatically falls and they become entitled to costs of the Clarification Motion. I would order Unifund to pay the Plaintiffs all-inclusive costs of the Clarification Motion of $4,500, and Advantage/Ms. Marques to pay the Plaintiffs all-inclusive costs of $3,000, of that motion.

[60] No costs were ordered on the Summary Judgment Motion and no party has sought costs of that motion in the appeals before this court. Accordingly, I would make no costs order in respect of the Summary Judgment Motion.

Released: January 5, 2017 (LB)

E.E. Gillese J.A.
I agree M.L. Benotto J.A.
I agree L.B. Roberts J.A.