IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ursich* v. *Security National Insurance Company*, 2005 YKSC 72

Date: 20051215
Docket No.: S.C. No. 03–A0079
Registry: Whitehorse

Between:

AMBER URSICH

Plaintiff

And

SECURITY NATIONAL INSURANCE COMPANY

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Daniel S. Shier — Counsel for the Plaintiff
Peter Morawsky — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is essentially an application for costs for the dismissal of an insured's claim against her insurer for inadequate motorist coverage under an SEF 44 provision in her insurance policy. The provision allowed the insured, Ms. Ursich, to make a claim against her insurer, Security National Insurance Company ("Security National"), in the event that the insurance coverage of any motorist tort-feasor was inadequate to cover Ms. Ursich's damages.

[2] Ms. Ursich was injured in two consecutive motor vehicle accidents in 1999 and 2000. She commenced the within action against Security National in 2003. In 2004,

she settled both of her claims against the tort-feasors in the motor vehicle accidents. Security National now seeks to have the within action dismissed with costs. Ms. Ursich does not oppose the dismissal, but does not agree to pay costs.

[3] The issue is whether there is reason in this case to depart from the usual rule that costs follow the event?

FACTS

[4] The collisions occurred on March 19, 1999 and April 17, 2000, respectively. The actions on both collisions were separately commenced on March 15, 2001. The one respecting the first collision was against six defendants and the other was against a single defendant.

[5] Ms. Ursich's SEF 44 action against Security National was commenced on September 2, 2003.

[6] On September 9, 2003, Ms. Ursich's counsel spoke with an official of Security National, Ms. Brown, who by then had presumably received Ms. Ursich's writ of summons and statement of claim on the SEF 44 action. Apparently, Ms. Brown wanted some more information from Ms. Ursich's counsel before instructing counsel for Security National to file its statement of defence. On September 10, 2003 Ms. Brown left a message with Ms. Ursich's counsel that she did not foresee any "limits issue" in the case and that she would prefer to wait for the results of an examination for discovery and an independent medical examination. She also asked for a waiver of the requirement that Security National file its statement of defence. Later that same day, Ms. Ursich's counsel wrote to Ms. Brown, in somewhat confrontational language, indicating that he was surprised by Ms. Brown's view that there was unlikely to be a "limits" problem. Of

course, what counsel was referring to was Ms. Brown's position at that time that she did not anticipate that Ms. Ursich's claim would exceed the limits of the defendant motorists' insurance coverage. While that letter from Ms. Ursich's counsel did provide Security National with a waiver of the requirement that it file a statement of defence, there was further reference to the suggested participation of Security National in a mediation on the collision claims. I infer from this that there may have been additional communication between Ms. Ursich's counsel and Ms. Brown on this point, which is not in evidence before me. However, it is implicit that Ms. Ursich's counsel sought to involve Security National in his efforts to settle the collision claims.

[7] Notwithstanding that it had received the waiver it sought, Security National instructed its counsel to file an appearance on September 16, 2003, which was followed by the filing of the statement of defence on October 2nd. The statement of defence alleged that Ms. Ursich breached the insurance policy by failing:

1. to provide Security National with prompt written notice of the particulars of the two collisions;
2. to provide a copy of the writs of summons and statements of claim to Security National upon commencing the collision actions; and
3. to commence the SEF 44 action against Security National within the 12 month limitation period under s.6(c) of the SEF 44 endorsement.

[8] On January 6, 2004, Ms. Ursich's counsel provided copies of the pleadings in the collision actions, as well as other documents, in response to a request from Security National's counsel.

[9] On January 14, 2004, Ms. Ursich's counsel again wrote to counsel for Security National encouraging it to get involved with an upcoming pre-trial conference on the collision actions.

[10] On February 9, 2004, Ms. Ursich's counsel wrote to counsel for Security National and referred to various conversations and emails that had been previously exchanged between them about an upcoming mediation on the collision actions. Once again, Ms. Ursich's counsel strongly suggested that Security National should be involved with the mediation, as he was still concerned that the defendants in the collisions would have insufficient insurance coverage.

[11] On May 20, 2004, Ms. Ursich's counsel wrote to counsel for Security National briefly suggesting that it might wish to consider contribution towards a settlement of the collision claims.

[12] On July 22, 2004, Ms. Ursich's counsel wrote to counsel for Security National informing it that the first collision action had been settled, but that the second action was set for a mini-trial in October 2004. Once again, he encouraged Security National to attend that mini-trial.

[13] On February 1, 2005, counsel for Security National wrote to Ms. Ursich's counsel indicating that he had learned that Ms. Ursich had filed consent orders on both of the collision actions, dismissing them without costs. Counsel for Security National said that he had not been informed of either of those events by Ms. Ursich's counsel. Finally, he sought a consent order dismissing the within action with costs of $2,661.14, pursuant to an attached draft bill of costs.

ANALYSIS

[14] Security National submits that this is a very straight forward matter. Since both collision actions have been dismissed, then Ms. Ursich is no longer "legally entitled to recover" against any of the defendants in those two actions (s.2, SEF 44 endorsement) and consequently she cannot continue to pursue her action against Security National under the SEF 44 endorsement. Further, since the action must be dismissed, then Security National should receive its costs, as costs normally follow the event under Rule 57(9) of the *Rules of Court*. Finally, there is no reason for this Court to depart from the general rule and exercise its discretion to disallow these costs.

[15] The argument of Ms. Ursich's counsel is somewhat more complicated, at least as I understand it. First, he says that the precise meaning of the 12 month limitation period in s.6(c) of the SEF 44 endorsement is unclear. Consequently, a prudent insured should err on the side of commencing the SEF 44 action sooner rather than later, even if it is well before knowing if there will in fact be an "underinsured" shortfall.

[16] Section 6(c) states:

> "Every action or proceeding against the Insurer for recovery under this endorsement shall be commenced within 12 months from the date upon which the eligible claimant or his legal representatives knew or out to have known that the quantum of the claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the action occurred."

Ms. Ursich's counsel referred to *Wawanesa Mutual Insurance Co.* v. *Shoemaker (Alta. C.A.)*, [1994] A.J. No. 126, a unanimous decision of the Alberta Court of Appeal, which interpreted this provision and agreed that it was indeed ambiguous. However, the Court then said, quite clearly, that s.6(c) must be interpreted in a manner most favourable to

the insured, that is, “the limitation runs from the final judgment or settlement … or some other final determination”.

[17] Ms. Ursich’s counsel then went on to discuss the case of *Mellon (next friend of)* v. *Gore Mutual Insurance Co.* at the chambers and appeal levels: [1995] A.J. No. 502 (Alta. S.C.); and [1995] A.J. No. 855 (Alta. C.A.). The chambers judge in that case was of the view that the *Shoemaker* case did *not* stand absolutely for the proposition that the limitation period shall run from the date of final judgment or settlement. However, the Alberta Court of Appeal said, again quite clearly, that the chambers judge erred on this point by misinterpreting that Court’s earlier decision in *Shoemaker*.

[18] Finally, Ms. Ursich’s counsel referred to the later case of *Forward* v. *Zurich Insurance Co.*, 2002 ABCA 123, also from the Alberta Court of Appeal, as further authority for the proposition that the limitation period remains unclear. However, I could find nothing in this judgment which could be seen as a departure from the Court’s earlier ruling in *Shoemaker.*

[19] Thus, with respect, I fail to see how there is any lack of clarity from the Alberta Court of Appeal on the interpretation of this limitation period.

[20] Ms. Ursich’s counsel also referred to the case of *Somersall* v. *Friedman*, 2002 SCC 59, which dealt with the meaning of “legally entitled to recover” in s.2 of the SEF 44 endorsement. The majority of the Supreme Court of Canada in that case held, at paras. 28 to 31, that the determination of legal entitlement is a retrospective exercise and that the insurer becomes obliged to indemnify the insured at the moment the insured’s claim against the tort-feasor comes into being, that is, at the time of accident. Thus, as I understand him, Ms. Ursich’s counsel argued an insured has a potential

cause of action against their insurer for underinsured motorist coverage right from the time of the accident. Therefore, the insured need not, indeed ought not, wait until a later time to commence the SEF 44 action and thereby risk missing the limitation period.

[21] The foregoing submissions about the interpretation of provisions in the SEF 44 endorsement seemed to be a premise for the following argument by Ms. Ursich's counsel. The insurer's own policy requires the insured to promptly notify the insurer of any accident, to provide in a timely fashion a copy of any writ of summons commencing a related court action, and to give the insurer a reasonable opportunity to participate in those proceedings as a party. Further, an insured is obliged by the insurer's own policy to commence an action against their insurer under the SEF 44 endorsement in order to receive "underinsured" coverage. Finally, the insured must be wary of not missing the 12 month limitation period, which itself is unclear, or risk losing their right to indemnification if their damages exceed the policy limits of the defendant motorist. Thus, since the SEF 44 action is essentially compulsory, in order to protect the insured's interests until such time as the action against the defendant motorist is resolved, the insured should not be penalized by having to pay the insurer's costs if and when it is no longer necessary to pursue the SEF 44 claim and that action is dismissed.

[22] Accordingly, Mr. Ursich's counsel says that he was only protecting his client's interests by filing the writ of summons and statement of claim. He did not seek a statement of defence from the insurer and his correspondence and other communications were intended to provide Security National with a reasonable opportunity to participate in the collision proceedings and to fulfil the insured's obligation

to keep it informed. Finally, he says that this is the first time in his experience that an insurer has sought costs on the consent dismissal of an SEF 44 action.

[23] However, on the evidence before me, it appears as though Ms. Ursich did *not* provide timely notice to Security National of the particulars of the two collisions. Indeed, it would seem as though Security National only became aware of these collisions when it was sued by Ms. Ursich under the SEF 44 endorsement.

[24] Further, Ms. Ursich's counsel seemingly did *not* provide copies of the respective writs of summons and statements of claim on the two collision actions until requested to do so by counsel for Security National in the within action.

[25] Finally, the correspondence from Ms. Ursich's counsel to Security National in the within action, while technically keeping it informed and providing it with an opportunity to participate in the other proceedings, also seemed geared towards encouraging Security National to contribute towards global settlements in those other actions, when there was absolutely no obligation on Security National to do so. Indeed, from the very beginning of its advertent involvement, Security National wished to wait and see whether there would be a limits problem before incurring legal costs in defending the SEF 44 action. While it was not technically required to file a statement of defence, it was understandably prudent of Security National to retain counsel in any event, given that Ms. Ursich's counsel was aggressively pursuing it to participate in the settlement of the collision actions. In particular, had it not retained counsel to file the statement of defence, it likely would have done so later to respond to the continuing submissions from Ms. Ursich's counsel. Further, Security National says it told Ms. Ursich's counsel on various occasions that, if it became involved, it would be seeking costs.

[26] I find that had Ms. Ursich notified Security National of the collisions in a timely way, as she was obliged to do under the policy, and had Ms. Ursich kept her insurer informed of the progress of the collision actions from an earlier date, and had her counsel not been quite so aggressive in trying to bring Security National to the settlement table as a contributor, then it is more likely that Security National would have been content to rely on Ms. Ursich's waiver of the requirement that it file its statement of defence. Further, if all that had been done, I expect that Security National would have incurred few if any costs and therefore would not have sought to recover same from Ms. Ursich. However, because the facts indicate otherwise, Security National is seeking its costs and I am not able to say that it is being unreasonable in doing so.

[27] Accordingly, I grant the application by Security National and dismiss the within action. Further, I can find no principled reason to exercise my discretion to refrain from awarding costs to Security National as the successful party in this proceeding. Therefore, the costs will follow the event.

GOWER J.