

2012 CarswellOnt 17334, 2012 ONSC 3369, 228 A.C.W.S. (3d) 1128

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2101801 Ontario Ltd. v. Ontario

2101801 Ontario Ltd. and Diane Sura, (Plaintiff) and Her Majesty the Queen in the Right of Ontario and Axa Insurance (Canada) and Lloyd's Under Writers and Tripemco Burlington Insurance (Halton) Group and Southwestern Insurance Group Ltd. and McLarens Canada and Maltman Group International, (Defendants)

Ontario Superior Court of Justice

A.W. Bryant J.

Heard: May 30, 2012

Judgment: June 8, 2012

Docket: London 5536/11

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Counsel: Shama Ansari, for Defendant, Her Majesty the Queen in the Right of Ontario

Robert A. Van Praet, for Defendant, AXA Insurance (Canada)

Catherine R. Bruni, for Defendant, Tripemco Burlington Insurance (Halton) Group and Southwestern Insurance Group Ltd.

Ian S. Epstein, for Defendants, Lloyd's Underwriters and Maltmans Group International (wrongly identified as Malton Group International)

Demetrios **Yiokaris**, for Defendant, Granite Claims Solution (wrongly named as McLarens Canada)

Subject: Civil Practice and Procedure; Corporate and Commercial; Insurance

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Miscellaneous

Two individuals obtained judgment against corporate plaintiff in small claims court — Two creditors began enforcement procedures against corporation to satisfy outstanding judgment — Local sheriff seized number of corporation's trucks under writ — Corporation claimed that other assets were loaded on seized trucks — Corporation filed motion in small claims court to stop sale of seized assets — Sheriff auctioned vehicles which were sold together with their contents — Corporation commenced claim in small claims court against sheriff, government employee, and insurance company — Insurance company's motion to dismiss claim was successful — Deputy judge dismissed claim against defendants and further ordered that corporation could not bring another

proceeding against defendants without first obtaining right to do so from judge of Superior Court of Justice — Corporate plaintiff and sole shareholder commenced action against defendants — Defendants brought motion to strike — Motion granted — Rule 21 applied — Once dispute is judged with finality, it is not subject to relitigation for same cause of action adjudicated or constituent issues or material facts embraced therein — Action raised same issues and relied upon same material facts that were resolved by deputy judge in small claims court — There must be finality to this litigation concerning seizure and sale of trucks previously owned by corporate plaintiff — Action was dismissed on principles of res judicata and issue estoppel — Plaintiffs did not obtain leave of Superior Court Justice as ordered by deputy judge prior to commencing this action — It was plain and obvious that action could not succeed.

Cases considered by A.W. Bryant J.:

Burke v. Buss (2002), 2002 CarswellOnt 4381 (Ont. S.C.J.) — referred to

Curtis (Litigation Guardian of) v. State Farm Mutual Insurance Co. (2003), 2003 CarswellOnt 2968 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 15.01(2) — considered

R. 21 — referred to

R. 21.01(1)(a) — referred to

R. 21.01(1)(b) — referred to

MOTION by defendants to strike plaintiffs' claim.

A.W. Bryant J.:

1 The Plaintiff, 2101801 Ontario Limited, carrying on business as Tire King ("Tire King"), operated in the recycling industry. The Plaintiff, Diane Marlene Sura, states that she is the sole shareholder and director of Tire King. There is evidence that Roger Funstein is also a director but Tire King and Ms. Sura are the only Plaintiffs in this action.

2 On August 4, 2009, two individuals named Frank Wellsby and Andy William Lane (the creditors) obtained judgment against Tire King in Small Claims Court at London for the sum of \$6,071.00.

3 On or about August 26, 2009, the two creditors began enforcement procedures against Tire King to satisfy the outstanding judgment. On September 15, 2009, local Sheriff Hart seized a number of Tire King's trucks under a writ. Tire King alleges that it was in the process of relocating its business at the time of the seizure of its vehicles. As a result, all of Tire King's other assets had been loaded on board the seized trucks. Ms. Sura advised the court that Tire King is not actively engaged in the recycling business. She further advised that Tire King has no assets but has outstanding debt.

4 On September 21, 2009, Tire King filed a motion in Small Claims Court, returnable October 2, 2009 in an

effort to stop the sale of the seized assets. Unfortunately, the motion materials were not filed with the enforcement office and the Sheriff continued with the scheduled sale of the trucks. On September 26, 2009, the Sheriff auctioned the vehicles, which were sold together with their contents, for the sum of \$7,742.50.

5 On April 6, 2010, Tire King, Diane Sura and Roger Funstein commenced a claim in Small Claims Court against Sheriff Hart, a Government employee named DiCocco, and AXA Insurance for \$23,466. AXA Insurance brought a motion to dismiss the claim in Small Claims Court. On September 10, 2010, Deputy Judge Mackenzie dismissed the claim against Hart, DiCocco and AXA Insurance, Deputy Judge Mackenzie further ordered that the Plaintiffs could not bring another proceeding in the future against Hart, DiCocco and AXA Insurance "without first obtaining the right to do so from a Judge of the Ontario Superior Court."

6 On June 2, 2011, Ms. Sura and Tire King commenced an action against AXA Insurance, Lloyd's Underwriters, Her Majesty the Queen, Granite Claims (adjuster) and Maltmans Group International (adjusters) for \$9,198,848. The Plaintiffs allege that the employees of the Defendant Her Majesty the Queen caused the insolvency of the Plaintiff Corporation and the financial ruin of Ms. Sura when they wrongfully enforced the writ of seizure and sold the vehicles.

7 The Plaintiffs also seek damages as a result of the denial of their claims for compensation arising from the aforementioned seizure of the vehicles under two policies of insurance. The policies were issued by the Defendants AXA Insurance and Lloyd's Underwriters. Further, these policies were allegedly arranged and adjusted by the Defendants Granite Claims and Maltmans Group.

8 Ms. Sura did not obtain leave of the Court to represent Tire King as required by Rule 15.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Ms. Sura was notified on three separate occasions that she needed to obtain leave of the court to represent the Plaintiff Corporation. Ms. Sura did not obtain leave. Accordingly, Ms. Sura was not allowed to represent Tire King and thus the Plaintiff Corporation did not participate in this motion.

9 The Plaintiffs' action against the Defendants is struck pursuant to Rule 21 for the following reasons:

1. Deputy Judge McKenzie's Small Claims Court decision was not appealed. Binnie J., in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 20, stated that the doctrine of estoppel applies to prevent an abuse of the decision-making process. This doctrine provides that once a dispute is judged with finality it is not subject to relitigation for the same cause of action adjudicated or the constituent issues or material facts embraced therein.
2. The June 2, 2011, action raises the same issues and relies upon the same material facts that were resolved by Deputy Judge McKenzie in Small Claims Court. There must be finality to this litigation concerning the seizure and sale of the trucks previously owned by Tire King.
3. The current (June 2011) action is dismissed on the principles of *res judicata* and *issue estoppel*. Further, The Plaintiffs did not obtain leave of a Superior Court Justice as ordered by Deputy Judge Mackenzie prior to commencing this action.

10 It is plain and obvious that this action cannot succeed pursuant to Rule 21(a) and (b). The AXA Insurance policy for Tire King is coverage for personal property loss or damage to property. The policy excludes

coverage for motor vehicles. Tire King cancelled the policy on September 19, 2009, because the vehicles had been seized under a court order. The vehicles were sold by the Sheriff after the Plaintiffs cancelled the policy. Therefore, there was no insurance in place under the AXA Insurance policy when the trucks and their contents were sold.

11 The Lloyd's Underwriters' policy covers third party claims only; for example, a slip and fall. It does not compensate for indebtedness. The Lloyd's Underwriters' policy was cancelled on September 19, 2009, before the vehicles were sold. Therefore, there was no insurance in place under the Lloyd's Underwriters' policy when the trucks and their contents were sold.

12 There is no evidence that Granite or Maltmans acted in bad faith. I find that the adjusters do not owe a duty of good faith to the Plaintiffs in the circumstances of this case (*Burke v. Buss*, [2002] O.J. No. 2938 (Ont. S.C.J.); *Curtis (Litigation Guardian of) v. State Farm Mutual Insurance Co.*, [2003] O.J. No. 3064 (Ont. S.C.J.)).

13 The Court received submissions on costs at the conclusion of oral argument. The Court awards costs to the Defendants as follows:

1. Her Majesty the Queen \$3,000.00
2. AXA Insurance \$7,500.00
3. Lloyd's Underwriters and Maltmans Group \$7,500.00
4. Granite Claims \$7,500.00

Costs are payable by Ms. Sura forthwith.

Motion granted.

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