CITATION: Yetman v. Marzec, 2014 ONSC 4122
BARRIE COURT FILE NO.: CV-09-1026
DATE: 20140708

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PETER YETMAN and CHRISTINE McKEACHNIE Plaintiffs	R. Littlejohn/M. Lemieux, for the Plaintiff
– and –	
PRZEMYSLAW MARZEC, AGNIESZKA MARZEC, JEFFREY GOODMAN and THE DOMINION OF CANADA GENERAL INSURANCE COMPANY Defendants	
-and-	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, added by Order pursuant to section 258(14) of the *Insurance Act*, R.S.O., c.I.8, as amended Statutory Third Party	E. Kent/M.A. Winterhalt, for the Statutory Third Party
	HEARD: May 20, 21, 22, 23, 26, 27, 28, 29, 30, June 2, 3 and 4, 2014

REASONS FOR DECISION RE DIRECTIONS

EBERHARD J.

[1] I was trial judge in this matter. The jury answered questions of liability and damages between the Plaintiff and Defendant Przemyslaw Marzec, drivers in a motor vehicle accident on August 7, 2007, granting judgment for the Plaintiff totaling $1,031,000.00.

The participants in the trial were the Plaintiff and State Farm Mutual Automobile Insurance Company, the latter being referred to in the presence of the jury as the "party opposing the Plaintiff's claim" or the party "participating as a result of order as if a party to the action". State Farm is the Defendant's insurer but has taken an off-coverage position.

[2] In anticipation of trial, State Farm obtained an order from Quinlan J. dated February 1, 2011 to become a Statutory Third Party and drafted the following provision:

> **THIS COURT ORDERS** that State farm shall be bound by any judgment at the trial of this action as between the Plaintiff and the Defendants, and that the question of the rights and obligations as between the said Defendant and State Farm shall not be disputed at the trial, but after the trial, and in such manner as may be directed by the trial judge, or failing a direction by the trial judge, by a judge in chambers.

[3] State Farm participated fully in the litigation of the issues between the Plaintiff and their insured.

[4] As planned at the conclusion of the trial, I have received lengthy written submissions and *facta* to consider directions.

[5] The statutory guidance is found in the *Insurance Act* R.S.O. 1990:

> 258. (1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied. R.S.O. 1990, c. I.8, s. 258 (1).
>
> (14) Where an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it shall, upon application to the court, be made a third party in any action to which the insured is a party and in which a claim is made against the insured by any party to the action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured enters an appearance or defence in the action. R.S.O. 1990, c. I.8, s. 258 (14).

> (15) Upon being made a third party, the insurer may,
>
> (a) contest the liability of the insured to any party claiming against the insured;
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> (b) contest the amount of any claim made against the insured;
>
> (c) deliver any pleadings in respect of the claim of any party claiming against the insured;
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> (d) have production and discovery from any party adverse in interest; and
>
> (e) (e) examine and cross-examine witnesses at the trial, to the same extent as if it were a defendant in the action. R.S.O. 1990, c. I.8, s. 258 (15).

[6] The Statutory Third Party asserts that the Plaintiff has no standing to seek directions as the February 1, 2011 order states the question of the rights and obligations as between the said Defendant and State Farm shall not be disputed at the trial, but after the trial. The Statutory Third Party seeks to limit the parties able to participate in the question to the Defendant insured and the Statutory Third Party insurer. The Defendant has not participated in the litigation. Although there are legal issues between the insured and the insurer certainly,[1] the Plaintiff has obtained judgment against the insured, despite full opposition of the Statutory Third Party insurer. The real and relevant dispute at this moment is whether the Plaintiff can recover judgment from the Defendant's insurer. To suggest that only the non-participating insured can argue the issue is to guarantee that a Plaintiff with judgment will rarely succeed. There is no-one in such a scenario to argue against denial of coverage. I reject that as the intention of the May 1, 2014 order or indeed the legislation.

[7] I adopt the approach of Spence J. who found the Plaintiff "stands in the shoes of the insured for the purposes of determining whether there should be relief against forfeiture."[2]

[8] I also reject that the Plaintiff is bound by s.258(1) to assert its claim against the Defendant's insurer by fresh claim. I find a new Statement of Claim is an available procedure if the circumstances require it but not the only procedure[3] if there is a more efficient method to bring the matter forward for adjudication that has procedural safeguards to promote fairness to all concerned parties.

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[1] *LSUC Special Lectures 1962* W. D. Griffiths
[2] *Safeco Insurance Co. of America v Furst*, [1996] O.J. No. 1269
[3] *Williams v Pintar*, [2014] O.J. No. 1267 para 29

[9] In the present case I cannot think of a single advantage to a fresh action. The Statutory Third Party has participated fully from an early stage of the proceeding including a full trial by jury. All the issues have been long known. There is not the slightest whiff of prejudice. To require a new claim with the potential for repetition of the various stages in the litigation process would be entirely contrary to the admonitions of courts at all levels[4] and the imperatives of an administration of justice that hopes to offer timely and affordable access to justice.

[10] What has not been fully disclosed is the Statutory Third Party's basis for denial of coverage. It must now see the light of day so that this lengthy litigation can move towards finality. The Plaintiff must know the issues. Although the *facta* filed by the Plaintiff for these directions averts to several theories and principles that Plaintiff assumes the Statutory Third Party may be asserting, my directions must facilitate the disclosure necessary to avoid ambush in this aspect of the litigation.

[11] The Statutory Third Party chose to rely on arguments based on standing and the requirement for a new claim rather than respond to the propriety of the Plaintiff's disclosure requests. There is connection by relevance to all the requests in the factum following paragraph 56. Order to go as requested, subject to privilege as may be demonstrated. The disclosure is required by August 15, 2014.

[12] Thereafter the Trial Co-ordinator shall fix a full day motion before me no later than the November 2014 civil trial sittings.

EBERHARD J.

Released: July 8, 2014

[4] *Hryniak v Mauldin* [2014 S.C.J. 7