COURT OF APPEAL FOR ONTARIO

CITATION: Candito v. Nmezi, 2016 ONCA 293
DATE: 20160422
DOCKET: C61046

Hoy A.C.J.O., Blair and Roberts JJ.A.

BETWEEN

Marilena Candito

Plaintiff

and

Chinedu Nmezi, Paulette Rhoden and Economical Insurance Group

Defendants (Appellant)

and

State Farm Mutual Automobile Insurance Company

Third Party (Respondent)

Karim N. Hirani and James B. Tausendfreund, for the appellant

Philip Pollack, for the respondent

Heard and released orally: April 19, 2016

On appeal from the order of Justice Kelly P. Wright of the Superior Court of Justice, dated August 20, 2015.

ENDORSEMENT

[1] This appeal arises out of a coverage dispute between insurers.

[2] At issue was whether the defendant in an action that arose out of a motor vehicle accident had cancelled her automobile insurance policy with the respondent, State Farm Mutual Insurance Company, before the accident occurred.

[3] Section 11(2) of *Statutory Conditions–Automobile Insurance*, O. Reg. 777/93, a regulation under the *Insurance Act*, R.S.O. 1990, c. I-8, provides as follows:

> This contract may be terminated by the insured at any time on request.

[4] The motion judge concluded that the defendant had terminated her automobile policy with the respondent. While not convinced that s. 22(2) of the *Insurance Act* imposed an elevated onus on the respondent to prove that the cancellation was "clear and unequivocal", the motion judge found that if there were such an elevated onus, the respondent had satisfied it. Accordingly, the plaintiff was entitled to uninsured motorist coverage under the plaintiff's policy with the appellant, Economical Insurance Group. The motion judge granted summary judgment in favour of the respondent and dismissed the appellant's cross-motion for summary judgment.

[5] On appeal, the appellant argues that: (1) the motion judge erred in concluding that there was no onus on the respondent to prove that the

cancellation was “clear and unequivocal”; (2) the motion judge committed a legal error by relying on what it says is inadmissible hearsay evidence in the respondent’s evidence; (3) the motion judge erred by failing to draw an adverse inference against the respondent because it did not adduce affidavit evidence of the defendant confirming that she had cancelled the policy; and (4) the motion judge’s conclusion that she was fully satisfied that the policy was cancelled and not in effect on the date of the accident amounts to a palpable and overriding error.

[6] In the circumstances, it is not necessary for us to address whether there is an elevated onus on an automobile insurer to prove that the insured has terminated the policy. As we have indicated, the motion judge found that even if there were an elevated onus, the respondent had met that onus. There is no basis for this court to interfere with that determination.

[7] In making that determination, the motion judge relied on the evidence of an underwriter with the respondent, provided in substantial part in reliance on records of the respondent and its insurance agent. Those records show that before the accident occurred, the defendant requested that her policy be cancelled. The respondent sent the defendant a computer manually generated Acknowledgment of Cancellation Request, which indicated the effective date of cancellation, and a credit was given, reflecting the cancellation of the policy.

[8] The appellant did not argue before the motion judge that the respondent's evidence amounted to inadmissible hearsay. It is not appropriate for it to make this argument for the first time on appeal. In any event, to the extent that the respondent's evidence amounted to hearsay, it was admissible via the business records exception.

[9] The defendant at no time denied that she cancelled her insurance before the accident and the appellant adduced no evidence to suggest that the defendant was in fact insured by the respondent on the date of the accident. On the record before her, the motion judge did not err in failing to draw an adverse inference against the respondent because it did not obtain an affidavit from the defendant. The motion judge's conclusion that she was fully satisfied that the policy had been terminated and was not in effect on date of the accident is amply supported by the record.

[10] This appeal is accordingly dismissed. The respondent shall be entitled to its costs of the appeal, fixed in the amount of $7,500, including disbursements and HST.

"Alexandra Hoy A.C.J.O."
"R.A. Blair J.A."
"L.B. Roberts J.A."