CITATION: *Certas Home and Auto Insurance Company and Desjardins General Insurance Group v. Co-Operators General Insurance Company*, 2025 ONSC 6110
COURT FILE NO.: Court File No. CV-24-00723350-0000
DATE: 20251105

2025 ONSC 6110 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CERTAS HOME AND AUTO INSURANCE COMPANY AND DESJARDINS GENERAL INSURANCE GROUP

Plaintiffs

Brian Bangay, for the Plaintiffs

– and –

CO-OPERATORS GENERAL INSURANCE COMPANY

Defendant

Jordan Kirlik and Jonathon Kahane Rapport, for the Defendant

HEARD: September 19, 2025

REASONS FOR JUDGMENT

JOHN CALLAGHAN J.

[1] This is a motion for summary judgment seeking to dismiss the within action. The action relates to the enforcement of an agreement to settle the plaintiff's subrogated loss arising from a house fire. The case turns on whether the parties arrived at an enforceable agreement.

Background

[2] The plaintiff, Certas Home and Auto Insurance Company ("Certas"), was the insurer of homes at 46 and 48 Silverthorn Avenue, Toronto. There was a fire at 48 Silverthorn Avenue in Toronto resulting in damage to both homes. The losses included insured and uninsured losses.

[3] The defendant, Co-operators General Insurance Company ("Co-Operators), insured a tenant at 48 Silverthorn Avenue who was allegedly responsible for the fire.

[4] This action addresses the purported settlement of the insured loss that was paid by Certas to its insured, the homeowner at 48 Silverthorn Avenue. Based on its subrogated rights, Certas sought to recover that amount from Co-Operators. As explained further below, Certas asserts that Co-Operators agreed to settle the claim for $200,000. Co-Operators claims that while an offer was made that offer was not accepted by Certas and there was no settlement.

[5] The parties agree that if there was no agreement, then the limitation period for claiming the insured loss has expired and any claim by Certas is statute barred. On the other hand, if there was an enforceable agreement, the claim is not statute barred, and the Co-Operators is in breach of that agreement and owes the plaintiff $200,000.

[6] The evidence for this motion was provided by the respective adjuster for each party. Neither adjuster was cross-examined on their affidavits.

The Alleged Settlement

[7] The August 2020 fire at 48 Siverthorn Avenue resulted in three separate and distinct losses:

a. the insured loss due to the fire damage at 48 Silverthorn Avenue which was covered by Certas;

b. the uninsured loss due to the fire damage at 48 Silverthorn Avenue; and

c. the insured loss due to the fire damage at 46 Silverthorn Avenue which was covered by Certas.

[8] The subject of this litigation is the insured loss which occurred at 48 Silverthorn Avenue ("insured loss). The insured loss was paid to the homeowner by Certas. Based on its subrogated rights, Certas wrote Co-Operators in July 2021 outlining its subrogated loss and seeking payment of $303,806.

2025 ONSC 6110 (CanLII)

[9] In November 2021, there was an initial offer by Co-Operators to settle the insured loss for $125,000. The offer was accompanied by a release which broadly released claims relating to 48 Silverthorn Avenue. That offer was rejected. The Certas adjuster explained that there was an uninsured loss being advanced by its insured that precluded Certas from providing a release.

[10] A subsequent offer for the insured loss of $200,000 was extended by Co-Operators on February 15, 2022.

[11] There were several follow-up requests by the Co-Operators adjuster, but no response was forthcoming from Certas. On July 7, 2022, the Certas adjuster eventually left a voice message for the Co-Operators adjuster stating that Certas was prepared to accept the increased settlement offer of $200,000 but that it could not sign a release as its insured was still looking to recover the uninsured portion of the claim. The Co-Operators' adjuster then memorialized the message in a note to his file.

[12] In her affidavit, the Certas adjuster testified that she left a message accepting the offer but that it would only be for the insured loss. Her affidavit does not refer to the request for a release nor did it respond to the assertion that Certas would not provide a release given the uninsured loss claim. There was never any written communication accepting the offer. There are no contemporaneous notes by the Certas adjuster. As noted, neither adjuster was cross-examined.

[13] On July 18, 2022, the Co-Operators adjuster wrote to the Certas adjuster acknowledging her voicemail that the $200,000 amount was agreeable and noted that he was aware that an uninsured claim was being pursued. He reminded her that a full and final release would be required for funds to be released, and there was a pending two-year limitation period.

[14] The Certas adjuster responded in writing on August 11, 2022, and confirmed that there was an uninsured loss. She went on to state: "We will **have our counsel issue** and hold **a Statement of Claim** ahead of that date **for this file** as well as for 46 Silverthorn **in order to protect our claims**." (emphasis added). There was no mention of having accepted the offer of $200,000. After reviewing the August 11 correspondence, the Co-Operators adjuster was of the understanding that there was no settlement and that an action would be commenced.

2025 ONSC 6110 (CanLII)

[15] Shortly thereafter, on August 31, 2022, Certas retained counsel to commence an action against Co-Operators for both the uninsured loss and the subrogated insured loss.

[16] The underlying limitation period passed on September 15, 2022.

[17] On December 2, 2022, a Certas representative requested its counsel provide a copy of the statement of claim that was to be issued against Co-Operators. The claim was to have been issued by September 15, 2022 by which time the limitation period was to expire. No statement of claim was forthcoming, as none was issued.

[18] A follow-up letter from the Co-Operators adjuster was sent on December 8, 2022, in which he inquired if an action had been commenced and asked for a copy of any issued statement of claim. He reiterated that Co-Operators was prepared to settle for $200,000 subject to a release. There was no response from Certas.

[19] There was no communication between the parties from December 8, 2022, and January 21, 2024. On January 22, 2024, the Certas adjuster emailed the Co-Operators adjuster inquiring about the release to finalize the $200,000 settlement. The Co-Operators adjuster responded that its file was closed, and that any claim was now beyond the limitation period.

[20] Contrary to its instructions in August 2022, counsel retained by Certas failed to commence the litigation against Co-Operators. In July 2024, Certas issued a statement of claim against its counsel for its failure to do so. The claim was for $700,000. The statement of claim alleged that counsel failed to commence an action for both the insured and uninsured losses arising from the fire at 46 and 48 Silverthorn Avenue. There was no claim by Certas as to a settlement of the insured loss or no reference to having instructed its counsel to sue Co-Operators on the alleged settlement of the insured loss.

Issues

[21] There are two issues in this proceeding. The first is whether this matter may be resolved by motion for summary judgment. The second is whether there was an enforceable agreement to settle the insured loss at 48 Silverthorn Avenue for $200,000.

2025 ONSC 6110 (CanLII)

Summary Judgment

[22] Summary judgment is available under r. 20.04 of the *Rules of Civil Procedure,* O. Reg. 575/07 where there is no "genuine issue requiring a trial". The Supreme Court in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49 provided the following guidelines as to when summary judgment is appropriate:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[23] If the court concludes there is a genuine issue for trial, the court may use the enhanced fact-finding powers under r. 20.4 (2.1), if appropriate, to resolve the dispute: *Ontario in Royal Bank of Canada v. 1643937 Ontario Inc.,* 2021 ONCA 98 (CanLII). The court on this second step asks itself whether it can use the powers under that sub-rule to arrive at a fair and just result. It may well be that a mini-trial or trial of an issue is the appropriate and fair way to resolve the issue. However, the subrule does not excuse a party from leading evidence that is available and should properly have been lead in addressing or responding to the summary judgment motion: *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2021 ONSC 6345, at para. 11; *Oxygen Working Capital Corp. v. Mouzakitis* 2021 ONSC 1907 (CanLII).

[24] In this case, I am satisfied that I can arrive at a fair and just determination on the record. Each party was aware of its obligation to advance all the available and relevant evidence for the purpose of this motion. Indeed, the parties were content to proceed without cross-examining the affiants. There was no suggestion that there was any evidence of a third party that was not available to the parties for this motion.

[25] It was suggested by Certas' counsel that I ought to conduct a trial of an issue and hear the evidence of the two witnesses. It was unclear why this would assist, particularly as neither party sought to cross-examine the other's witness which would ordinarily be the manner in which a party would highlight any credibility or reliability issues that might require a trial of an issue.

2025 ONSC 6110 (CanLII)

[26] While there is a conflict in the positions of the parties, the evidence is not particularly contentious. As discussed below, the test to be applied in this case is whether there was an enforceable agreement which requires the court to look at the objective facts. The court must examine the facts and ask whether a reasonable person looking at the facts objectively would conclude that the parties had arrived at a mutual agreement. In that regard, the facts do not pose an issue. I do not believe I need to use the powers under r. 20.04 (2.1) as there is no issue of credibility, reliability or other issue that needs to be resolved using those powers.

Was there an agreement?

Legal Principles

[27] The formation of an agreement requires three things: the intention to contract; settlement of essential terms; and sufficiently certain terms. The assessment of these three criteria is an objective one and does not include the subjective intentions of the parties: *Bawitko Investments Ltd v. Kernels Popcorn Ltd. (1991),* 1991 CanLII 2734 (ON CA), 79 DLR (4th) 97 (Ont. CA); *Olivieri v. Sherman*, 2007 ONCA 491 at para. 41.

[28] Both parties agree that they were communicating about an agreement to settle a dispute, although they take opposing views as to whether there was in fact a concluded agreement to settle. While there are emails evidencing the back and forth between the parties, communication was also exchanged orally via voicemail. This is not uncommon. The principles to be applied were more fully articulated by the Court of Appeal in *Cook v. Joyce*, 2017 ONCA 49 (CanLII) as follows:

> [65] A settlement agreement is subject to the general law of contract. For a settlement agreement to exist, the court must find the parties (i) had a mutual intention to create a legally binding contract and (ii) reached agreement on all the essential terms of the settlement: *Olivieri v. Sherman* (2007), 2007 ONCA 491 (CanLII), 86 O.R. (3d) 778 (C.A.), at para. 41. Whether the parties have manifested mutual assent to specific terms usually is determined from their overt acts: *Bogue v. Bogue* (1999), 1999 CanLII 3284 (ON CA), 46 O.R. (3d) 1 (C.A.), at para. 17. Or, as described by this court in *McLean v. McLean,* 2013 ONCA 788, 118 O.R. (3d) 216, at para. 10, a court must employ an objective approach to the evidence, determining "what a reasonable observer would have believed

2025 ONSC 6110 (CanLII)

the parties intended, taking into consideration the evidence of all the parties as well as the surrounding documentary evidence."

[66] Where the parties reduce their bargain to writing, a court determines the parties' intentions in accordance with the language used in the written document, having regard to the objective evidence of the factual matrix: *Salah v. Timothy's Coffees of the World Inc.,* 2010 ONCA 673, 268 O.A.C. 276, at para. 16.

[67] Oral contracts, such as the one at issue in the present case, present different challenges regarding the issues of formation and interpretation. As put by Angela Swan and Jakub Adamski in *Canadian Contract Law*, 3rd ed. (Markham, ON: LexisNexis, 2012), at §2.27:

> There is no general rule against the enforcement of oral promises, but the fact that a promise is oral suggests that its making may not have been accompanied by anything that sufficiently brought home to the parties the significance of what they were doing and, of course, the terms of an oral promise are no more certain than the parties' recollections of them.

[29] Whether a concluded agreement exists does not depend on an inquiry into the actual state of mind of either party. As noted by Swan and Adamski, relying on the subjective intention of a party is a "slippery slope: *Cook v. Joyce,* at para. 72. What one side understands as to the offer or acceptance of the terms of an offer may not be similarly understood by the other side. If the parties do not have a similar understanding, the parties are not *ad idem* and there is no agreement.

[30] The court may have regard to the overt acts of the parties along with the documentary evidence to determine whether the parties have manifested a mutual agreement: *Cook v. Joyce*, at para. 65*, Bogue v. Bogue* (1999), 1999 CanLII 3284 (ON CA), 46 O.R. (3d) 1 (C.A.), at para. 17; *McLean v. McLean*, 2013 ONCA 788, 118 O.R. (3d) 216, at para. 10; *Walton v. Landstock Investments Ltd.* (1976), 1976 CanLII 669 (ON CA), 72 D.L.R. (3d) 195 at p. 198.

[31] Both parties accept that the Co-Operators' offer was intended to settle the insured loss claim, although no action had yet been commenced. In the case of a settlement agreement, where

2025 ONSC 6110 (CanLII)

the parties have arrived at a mutual intention, the terms of a release will not preclude the enforcement of the agreement: *Kaur v. The Manufacturers Life Insurance Company,* [1999] O.J. No. 3564 (Ont. C.A.) at para. 3.

[32] Co-Operators relies on *Bouzanis v. Greenwood*, [2022] OJ No 4062 where the court found that a request for a confidentiality clause was part of a condition precedent to the offer. The court found that it would have had no issue imposing a standard release but the request for a confidentiality clause was distinct and created a term that could not be implied. The refusal to agree to the clause meant that there was no settlement. The case illustrates that the intention of the party's must be scrutinized to determine if the parties are agreed on the essential terms. While the terms of a release may be implied, the court must still ascertain if the parties have evidenced a mutual intention. Of course, this depends on the peculiar facts of each case.

Discussion

[33] The issue in this case is whether there was a mutual intention to enter into a binding agreement to settle the uninsured loss. While the communication between the parties would appear to suggest that the parties agreed on an amount of $200,000, I accept the unchallenged evidence of the Co-Operators adjuster that the Certas adjuster responded by voicemail agreeing to the amount but refusing to provide a release.

[34] When Certas finally responded in writing on August 11, 2022, it did not confirm the settlement, forward a release, or request funds to conclude the settlement. Instead, the Certas adjuster wrote the Co-operators adjuster advising that Certas would start an action relating to the insured and uninsured losses arising from the fire. Certas then instructed its lawyer to commence an action. As such, before any issue with the release could be resolved, Certas advised that it would proceed by way of litigation to recover all the losses. Co-Operators understandably took this correspondence to mean that there was no settlement.

[35] The statement of claim by Certas against its lawyer supports the contention that Certas did not accept there was a settlement. As alleged in that statement of claim, the lawyer was to sue Co-Operators for the insured loss as well as the uninsured loss at 46 and 48 Silverthorn Avenue. That claim made no reference to the lawyer being advised to sue for the breach of a $200,000 settlement.

2025 ONSC 6110 (CanLII)

It is a fair reading of the claim that Certas had instructed its lawyer to sue Co-Operators for its entire alleged subrogated loss of $303,806.

[36] Read together, the August 11 response and the instructions to the lawyer demonstrate that by word and overt action that Certas did not intend to settle for $200,000.

2025 ONSC 6110 (CanLII)

[37] In addition, rather than demand the enforcement of a settlement, Co-Operators wrote on December 8 seeking a copy of any claim and reiterating its offer. Clearly, Co-Operators was not of the view that the parties had agreed that the matter had settled. Certas' actions did not disavow this understanding. Had Certas intended to settle the claim with Co-Operators, Certas would have responded to the December 8, 2022 email from Co-Operators to that affect. Instead, the Certas adjuster did not contact her counterpart for over a year. By which time, Certas had requested but did never receive the statement of claim that was to have been issued by its lawyer. I infer that Certas was aware by December 2022 that no action had been commenced by its lawyer and the limitation period had expired. When Certas wrote in January 2024 seeking to finalize the settlement, it did so because its ability to sue for the entire subrogated loss was no longer available due to the lawyer's failure to issue the action. In my view, Certas sought to salvage its insured loss by now asserting that it had settled in August, when it had not done so. I do not accept Certas' argument that the January 2024 correspondence was a genuine attempt to finalize a settlement from July 2022. Certas had long ago chosen to commence an action rather than settle.

[38] While a settlement agreement does not fail for the want of a release, it is also necessary to ascertain if there was an intent by both parties to settle. I accept that Certas refused to provide a release in July 2022. As noted, its actions and correspondence thereafter clearly demonstrated it did not intend to settle but intended to sue Co-Operators to recover its entire subrogated loss. For its part, Co-Operators rightly understood that Certas was not settling but was seeking to recover the entire subrogated loss. Viewed objectively, neither party was of the understanding that there was a settlement.

[39] Even if one accepts Certas' argument that it agreed on July 17 to settle for $200,000 and that a release was a mere technicality, Certas repudiated that agreement. Repudiation occurs when one party evidences an intention not to be bound by an agreement. The test is an objective one. As

Gillese J.A. wrote in *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721, at para. 37: "To assess whether the party in breach has evinced such an intention [to repudiate the contract], the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it." Moreover, courts have recognized that, in certain circumstances, commencing an action may constitute repudiation of an agreement: see e.g. *Suleman v. British Columbia Research Council* (1990), 1990 CanLII 746 (BC CA), 52 B.C.L.R. (2d) 138 (C.A.), at p. 142; but see *Vrana v. Procor Limited*, 2004 ABCA 126, 25 Alta. L.R. (4th) 201, at para. 14. In my view, by advising Co-Operators on August 11 that it would commence an action for the loss and then instructing its lawyer to do so, Certas repudiated any agreement to settle. In turn, Co-Operators clearly accepted that repudiation as it retendered its offer in December. In my view, that communication in December was sufficient notice that Co-Operators accepted any repudiation by Certas of any earlier acceptance of the $200,000 offer: *Place Concorde East Limited Partnership v. Shelter Corporation of Canada,* 2006 CanLII 16346 (ON CA), at para 50. Moreover, the actions of both parties support the conclusion that neither party was of the view that Certas was bound by its earlier acceptance of the amount offered on July 17, 2022.

[40] In either scenario, viewed objectively, there was no manifest intention to settle and there was no agreement to do so. Accordingly, the motion for summary judgment is granted, and the action is dismissed.

[41] The parties have agreed that costs would be $5,000 to the successful party. Accordingly, the defendant is entitled to its costs of $5,000.

Callaghan J.

Released: November 5, 2025

2025 ONSC 6110 (CanLII)