Court File No. CV-18-00600777-0000

SUPERIOR COURT OF JUSTICE

AMY HELEN MARGARET GREYSON AND
JAMES DANIEL EBERHARDT

Plaintiffs

v.

ECHELON GENERAL INSURANCE COMPANY

Defendant

R U L I N G

BEFORE THE HONOURABLE JUSTICE M. KOEHNEN
on February 12, 2024, at 393 University Ave., Toronto

APPEARANCES:

B. HUGHES — Counsel for the Plaintiffs

P. ROMBIS — Counsel for the Defendant

MONDAY, FEBRUARY 12,2024

R U L I N G

KOEHNEN, J. (Orally):

There are two motions before me in this matter. The first is a motion by the defendant, Echelon General Insurance Company, to strike approximately 24 paragraphs of the affidavit of Gosia Bawolska. Ms. Bawolska is the solicitor of record for the plaintiffs in this action. Echelon argues that Rule 4 of the Rules of Civil Procedure requires that affidavits be confined to statements of fact within the personal knowledge of a deponent. Echelon adds that although Rule 39 allows a deponent to provide evidence on information and belief, it offers that ability only if the deponent states the source of the information. Echelon argues that Ms. Bawolska has not stated the source of her information.

I dismiss Echelon's motion in this regard. Echelon argues that the court should apply the best evidence rule here and that the best evidence would have come from the plaintiffs, who have personal

knowledge of the matters at issue. The matters to which Ms. Bawolska deposes are matters that she had learned about during the course of her representation of the plaintiffs. They are all background information to the underlying issue that I will address in the second motion.

I specifically asked Echelon's counsel whether any of the paragraphs she was objecting to involved contested information. Ms. Rombis replied that she would have to go through the affidavits line-by-line but believed that generally speaking the information was not contested.

I have reviewed each of the paragraphs that Echelon seeks to strike. In my view none of that information is contested. By way of a few random examples, paragraph 2 of the affidavit states the plaintiffs purchased the property in question in October 2015. Subsequent paragraphs talk about how the plaintiffs retained contractors and approached an insurance broker to obtain insurance for the renovation they intended to conduct on the

property. Paragraph 7 states that the plaintiffs received a policy from Echelon and renewed it three times. Paragraph 22 of her affidavit summarizes a statement from the affidavit of Echelon's deponent. Paragraph 34 of the affidavit states that in October 2019, Echelon informed the plaintiffs that it would not renew their insurance. These are all uncontested background facts, as are the additional paragraphs that Echelon seeks to strike.

In addition, Echelon submits that a portion of Exhibit 'F' to Ms. Bawolska's affidavit contains information that is subject to settlement privilege. I have not drilled down on that allegation. Exhibit 'F', however, plays absolutely no role in the reasons that I give on the main motion.

I turn now to the main motion. On the main motion, Echelon seeks an order staying this action because of the plaintiffs' alleged failure to abide by the principles set out in cases such as *Aecon Buildings v. Brampton*,2010 ONCA 898 and *Handley Estate v. DTE*

Industries Limited,2018 ONCA 324.

That motion arises in the following circumstances: The plaintiffs had purchased a residential home in downtown Toronto; they intended to renovate it. They sought renovation insurance from Echelon and received it. A fire occurred on the property during the renovations. Echelon denied coverage under the insurance policy for a number of reasons. First, Echelon noted that the policy required all contractors to have a minimum comprehensive general liability policy of two million dollars, when in fact the contractors did not have such insurance. In particular, the contractor who appears to have caused the fire did not have any comprehensive general liability insurance. Second, the Echelon policy appears to prohibit any hot work from being done on the property. The fire in issue was caused when the roofing contractor was heating tar on the roof of the house. Some of that tar spilt onto a tarpaulin which caught fire and fell into the cavity of the house, further expanding the fire. Third, the Echelon policy required that an able

fire watcher be present on the property while certain renovation work was being done. Echelon says that provision was not complied with.

Echelon did however provide some insurance coverage for the benefit of the mortgagee of the property.

I note here that Echelon sent what it referred to as a reservation of rights letter to the plaintiffs in 2017. It appears however that this was not so much a reservation of rights letter as it was a denial of coverage with the qualification that Echelon would provide some coverage for the benefit of the mortgagee. More particularly, the letter states:

> You will note from the wordings that failure to comply with these warranties shall render all insurance under this policy null and void. With that being said, the STANDARD MORTGAGE CLAUSE will apply to protect the interest of TD Canada Trust. As such, we are in a position to move forward with the adjustment of the claim under the STANDARD MORTGAGE CLAUSE.

Echelon counsel agrees that this is in effect a denial of coverage to the plaintiffs, with the exception of limited coverage for the mortgagee.

In response to these events, the plaintiffs commenced two actions: one against Echelon, for coverage under the policy and damages for allegedly faulty administration of their claim; and a second action against the construction contractors and the insurance broker that the plaintiffs approached for renovation insurance.

This second action is referred to by the parties as the construction action. Echelon is not a party to the construction action. The plaintiffs ultimately settled the construction action against the contractors by way of a Pierringer agreement that was agreed to on August 2, 2021, and that was approved by Justice Vella in August of 2022. Echelon complains that the plaintiffs did not disclose the Pierringer agreement to them until September 15, 2022.

Echelon argues that the plaintiffs should have disclosed the settlement agreement with the contractors immediately on its being signed.

Echelon also argues that the plaintiffs should have advised Justice Vella about the coverage action against Echelon when she was being asked to approve the Pierringer agreement. Echelon says had that been done it could have sought protection against the changes to the litigation landscape brought about the settlement agreement by seeking the right to production of documents from the defendants in the construction action, and by seeking oral discovery from the defendants in the construction action.

On the facts of this case however, Echelon is in no worse position to seek documentary or oral discovery from the defendants in the construction action than it was when the settlement agreement was signed in August of 2021, or when the Pierringer agreement was approved in August of 2022. That circumstance arises from the timing of service of the statement of claim on Echelon. Echelon was served with the statement of claim on December 27th, 2018. Ordinarily, it would have two years to join any third parties to the coverage

action. That limitation period would have expired on December 27, 2020. The intervention of the COVID pandemic extended the limitation period to June 2021. Echelon has not yet defended the coverage action and has never joined any of the defendants in the construction action as third parties to the coverage action.

In my view, it was legitimate for the plaintiffs to commence two separate claims. The action against Echelon is a coverage dispute. It involves the interpretation of the coverage exclusion and warranty provisions in Echelon's insurance policy in favour of the plaintiffs. It also involves the administration of the plaintiffs' claim by Echelon. The construction action is different in nature. It alleges negligence on the part of the contractors and on the part of the insurance broker. There would be no apparent tactical or strategic advantage to the plaintiffs starting two separate actions. Especially not in light of the fact that Echelon had the ability to either join parties as third parties or have the proceedings consolidated,

had it wanted to.

I turn now to the law. The principles set out in *Aecon* and cases that follow it essentially say that if a party to an action enters into an agreement that significantly alters the litigation landscape or significantly alters the dynamics of the litigation, the party entering into that agreement must disclose that agreement to the other parties in that action who are not signatories to the agreement in question.

All prior cases involving this principle have involved situations where a plaintiff settles with some defendants in an action but does not settle with other defendants in that same action. In those circumstances the defendant who is not party to the settlement agreement has complained that the agreement has changed the dynamics of the litigation, and that that change is one of which the non-settling party and the court ought to have been made aware immediately.

Here however the situation is quite different. What the plaintiffs have done is settle the construction action against some of the defendants in the construction action. There is one remaining defendant in the construction action, the contractor who is alleged to have actually caused the fire. He is apparently judgement-proof. What is critical though, is that Echelon was not a party to the construction action. As a result, here Echelon wants to extend Aecon principles to give them the right as parties, in an entirely different proceeding, to be notified of settlements in an action to which they are not a party.

For the purposes of this motion, I do not need to determine whether the Aecon principles can be extended in the way that Echelon asks. I note only in this regard that the Court of Appeal for Ontario recently stated in *Benington Financial Court v. Medcap Real Estate Holdings Inc.*,2024 ONCA 90, at paragraph 15 that expanding the Aecon principles to other settlement contexts would represent "a dramatic and unwarranted expansion of the properly

narrow rule."

In my view, the facts of this case are not ones in which it would be appropriate to extend the Aecon principles to the circumstances of this case.

As noted, Echelon could have protected itself by joining the contractors and the broker as third parties in the coverage claim against it. Echelon had until June of 2021 to do so and did not do so. Initially in oral argument, counsel for Echelon indicated that she could not answer why the contractors and the brokers were not joined as third parties because she was not counsel at the time. She did not, however, disagree that having joined the contractors and the broker as third parties to the coverage action would have given Echelon what it now wants. Immediately before I began these oral reasons, counsel revised her answer and said that Echelon could not have joined the defendants in the construction action as third parties to the coverage action because the coverage action was just that: a claim for coverage under an

insurance policy. Counsel submitted that a third party claim is only available for indemnity and contribution, and that since the coverage action related to the interpretation of an insurance policy it would have no right of indemnity or contribution against the defendants in the construction action. If that is so, however, it only underscores the absence of any change in the litigation landscape or litigation dynamic that affected Echelon as a result of the settlements in the construction action. If Echelon has no rights against the parties in the construction action with whom the plaintiffs settled, there can be no change in the litigation landscape that affects Echelon as a result of those settlements.

Echelon argues that it believed there would be global documentary and oral discoveries between the two actions. Had that occurred, Echelon says, the global discoveries would have provided Echelon with information about how the fire was started and potentially provide further proof of the plaintiffs' breach of their insurance coverage

warranties. In addition, Echelon argues that information from the construction action would have disclosed the nature of the communications between the plaintiffs and the insurance broker and would have provided information about how it came to be that the policy that the broker actually placed had terms that were different than those required by Echelon's underwriting department.

There are two significant limitations to this claim. First, when the plaintiffs actually asked Echelon for its consent to an order to try the two actions together Echelon never provided that consent. Second, even if there were global discoveries that would not give Echelon the right to ask any questions of the defendants in the construction action, unless Echelon had some sort of a claim against them. I have noted, the time to assert any such claim expired in June 2021.

I cannot see any unfairness at all to Echelon by dismissing its motion. As noted, Echelon could have started a third party claim against the

defendants in the construction action. In addition, as insurer Echelon also had a right to pursue subrogated claims on behalf of the plaintiffs. Echelon could therefore have commenced subrogated claims against the defendants in the construction action. It never did so.

Although Echelon complains that settlement agreements were entered into in the construction action without timely notice to Echelon, Echelon never asked the plaintiffs to provide advance notice of the settlement agreements. This is particularly noteworthy because counsel for the plaintiffs had advised counsel for Echelon of the existence of settlement discussions before the limitation period for Echelon to join third parties expired. By way of example, on December 3, 2020, plaintiffs' counsel wrote Echelon's counsel to advise that it had received a settlement offer from the general contractor defendant in the construction action, and that it wished to resolve the matter "completely". On December 8, 2020, plaintiffs' counsel spoke with Echelon's counsel by

phone and advised him that if Echelon did not wish to settle, the plaintiffs would settle with the defendants in the construction action and move forward with the coverage action. In January and February of 2021, plaintiffs' counsel sent follow-up e-mails to Echelon's counsel but received no response. On February 11, 2021, plaintiffs' counsel spoke with Echelon's new counsel (Mikel Pearce) and advised him that she was "working on settling the construction action".

In the foregoing circumstances I am satisfied that there has been no change to the litigation landscape or to the dynamics of any action in which Echelon is a party. To the extent that there has been any change in litigation dynamics because of the settlement of an action to which Echelon was not a party (which I do not agree is present), any such consequences are the result of Echelon's own failure to commence a subrogated claim on behalf of its insureds or to join third parties to the coverage action. As a result of the foregoing, I dismiss both motions that Echelon has brought

today.

PAUSE IN RECORDING

THE COURT: Madame Reporter, this will be cost endorsement:

C O S T E N D O R S E M E N T

KOEHNEN, J. (Orally):

The plaintiffs seek partial indemnity costs which they ask me to fix at $15,320.77. Echelon submits that the appropriate cost reward should be $10,000 because plaintiffs' counsel has been involved in other Aecon type motions that involved similar principles. I noted in this regard that Echelon's partial indemnity bill of costs comes to $30,574.60. That is to say it is pretty much double what the plaintiffs are seeking for partial indemnity costs. It strikes me that that difference more than takes into account whatever historical expertise plaintiffs' counsel may have with Aecon principles. I have reviewed the time allocation in the plaintiffs' cost outline and am satisfied that their costs are entirely reasonable. As a result, I fix costs in favour of the plaintiffs at $15,320.77, payable within 30 days.