COURT OF APPEAL FOR ONTARIO

CITATION: Legault v. TD General Insurance Company, 2024 ONCA 439
DATE: 20240530
DOCKET: COA-22-CV-0478

Harvison Young, Sossin and Gomery JJ.A.

BETWEEN

Shelly Legault

Plaintiff (Appellant)

and

TD General Insurance Company

Defendant (Respondent)

Ashu Ismail, for the appellant

Arie Odinocki and Victoria Dale, for the respondent

Heard: May 22, 2024

On appeal from the judgment of Justice Susan E. Healey of the Superior Court of Justice, dated November 22, 2022, with reasons reported at 2022 ONSC 6553, and from the costs order, dated January 26, 2023, with reasons reported at 2023 ONSC 680.

REASONS FOR DECISION

[1] This case arises from a trial decision dismissing an action brought by Shelly Legault, the appellant, against TD General Insurance Company ("TD"), the respondent, in relation to TD's denial of a claim under a homeowner's insurance Policy (the "Policy") following a fire at the appellant's home. The basis for

TD's denial was the appellant's fraudulent action in making a false declaration with respect to her living expenses while residing outside her home, resulting in forfeiture of coverage under the Policy.

[2] The trial judge found TD was justified in treating the Policy as forfeited on this basis, and also granted TD damages pursuant to a counterclaim brought against the appellant, in addition to an award of costs.

[3] The appellant appeals both the trial judge's decision and the award of costs.

[4] At the close of the hearing, we dismissed the appeal for reasons to follow. These are our reasons.

BACKGROUND

[5] On March 13, 2014, a fire rendered the appellant's home temporarily uninhabitable. The appellant's Policy provided coverage for her dwelling, the replacement cost of contents and personal property, and additional living expenses ("ALE"). ALE included the cost of temporary accommodations while the appellant's home was uninhabitable.

[6] Following the fire, the appellant initially lived in a hotel. She then arranged to live in a house at 268 Bay Street that she claimed belonged to an acquaintance, Wendy Ogden. Ms. Ogden was not in fact the owner, but was renting the home from another individual.

[7] The appellant claimed ALE under the Policy to cover the rent for 268 Bay. After receiving a signed tenancy agreement, TD paid $20,000.00 to Ms. Ogden, representing four months' worth of rent. This money was deposited into a TD account of which Ms. Ogden was the sole registered account holder.

[8] In September 2014, TD commenced an investigation into the legitimacy of the $20,000 payment. The investigation arose after Ms. Ogden contacted TD to report an alleged scheme whereby Ms. Legault would not actually reside at 268 Bay but would have access to the money in the TD account through the bank card set up for that purpose.

[9] On November 24, 2014, the appellant signed an interim Proof of Loss in which she claimed, in part, ALE paid to Ms. Ogden in the amount of $20,000.

[10] On May 19, 2015, TD denied the appellant's claim in its entirety, having concluded that she made willfully false statements with respect to her claim for ALE.

[11] The appellant commenced this action in April 2015, seeking $1 million in general, special and aggravated damages. Her claim sought the replacement value of her dwelling and personal property destroyed due to the fire, as well as compensation for the additional damage that occurred to the dwelling while TD was performing its investigation.

[12] In a mid-trial ruling, the trial judge refused to bar two of TD's witnesses from testifying on the basis that they were financially compensated for their preparation time and trial attendance.[1] She found that they were "professional witnesses" and that it was reasonable in the circumstances to pay them for their time.

[13] The trial judge found that a fraudulent insurance claim submitted by an insured in a proof of loss may result in complete forfeiture under the Policy. She held that the fraudulent statements had to be material in that they must be capable of affecting the mind of the insurer, either in the management of the claim or in deciding to pay it.

[14] The trial judge found that TD knew that it had an obligation under the Policy to cover substitute housing costs for the appellant and her family while they were displaced and that the appellant's representation that she had found suitable housing at 268 Bay was material to TD's decision to pay rent to Ms. Ogden.

[15] The trial judge then found that this representation was fraudulent. She found that the lease of 268 Bay was designed to appear to create a legitimate tenancy, but it did not. Instead, it was part of a sham created by the appellant and Ms. Ogden to secure payment from TD for purposes other than rent. In particular, the trial judge found that all the deposits into the TD account consisted of money deposited by TD for the rental of 268 Bay but that the appellant had access to, and used

[1] See *Legault v. TD General Insurance Company*, 2022 ONSC 3367.

some of, the money in that account for her own benefit, and for purposes other than rent. In making this determination, the trial judge reviewed not only on the testimony of witnesses, but video surveillance footage of the bank machine used by Ms. Ogden and the appellant to make withdrawals from the account and banking records from TD.

[16] Accordingly, the trial judge found that, when the appellant signed the interim proof of loss, she knowingly made a false declaration.

[17] Even though the appellant had no right to recovery under the Policy, the trial judge proceeded with an assessment of her alleged damages. She found that the appellant was not responsible for any additional damage caused by flooding in the house after the fire but that the financial consequences of the structural damage could not be claimed against TD. Moreover, she found that TD established its entitlement to judgment on the counterclaim in the amount of $207,767.84 plus interest.

[18] The trial judge also awarded costs in favour of TD on a partial indemnity basis, in the amount of $289,609.84, all-inclusive.

ANALYSIS

[19] The appellant raised three issues on appeal:

1. Did the trial judge err by failing to consider TD's alleged breaches of the Policy and by finding that the appellant's fraud erased these breaches?

2. Did the trial judge err in her mid-trial ruling by allowing TD to pay two professional witnesses to testify?
3. Did the trial judge err in her cost award?

[20] At the outset of the appeal, the appellant acknowledged that she was not appealing the trial judge's findings of fact, which the appellant characterized as "sound and considered."

(1) TD's alleged breach of contract is not a basis to interfere with the trial judge's decision

[21] With respect to the first issue, the appellant argues that TD should not be permitted to rely on the insurance contract because it breached the contract by: 1) failing to provide a proof of loss form within 60 days of the loss; 2) failing to maintain the appellant's normal standard of living; 3) asking her to execute an interim proof of loss without explaining its significance; and 4) conducting a less than thorough investigation.

[22] The appellant alleges that the trial judge "did not consider [TD's] breaches and held instead that [the appellant's] action erased TD's failures." She argues that due to the breaches of contract, TD owes her damages and these damages should be offset against the damages she owes to TD.

[23] TD submits that the appellant, by her own admission, perpetrated fraud thus vitiating her right to recover under the Policy, so no damages are owed to her. In

the alternative, it denies that it breached the contract and submits that none of the conduct complained of gives rise to damages.

[24] The alleged breaches raised by the appellant were argued before the trial judge, who concluded that they were not relevant given her findings regarding the appellant's fraud:

> I have also given considerable thought to Ms. Ismail's submissions that TD did not treat Legault with utmost good faith when it failed to explain the effects of a Proof of Loss, when it asked her to sign the interim Proof of Loss that had been prepared under the direction of TD, and/or failed to be transparent with her about why she was being asked to submit to an [Examination Under Oath]. I have found it unnecessary to evaluate the effect of these acts or omissions after finding that the money was requested and used for purposes other than rent. Legault's fraud renders insignificant any failings on the part of TD.

[25] It is not necessary to analyze the question of TD's potential breaches of contract. The appellant did not plead any of the breaches of contract by TD she now raises nor seek any damages for such breaches in her statement of claim. In any event, any conclusions with respect to TD's conduct under the contract would not affect the trial judge's analysis that the fraud by the appellant vitiated TD's obligations under the Policy.

[26] In her submissions on appeal, the appellant's counsel acknowledged that the appellant engaged in the fraudulent conduct which vitiated her right to recover under the Policy. The trial judge made clear findings (which were the result of

extensive analysis and a careful appreciation of the evidence) that the appellant acted fraudulently, and that her fraud would result in complete forfeiture.

[27] We see no error with the trial judge's analysis or conclusions on the question of the appellant's fraud and its effect on her ability to recover under the Policy.

(2) The trial judge did not err by allowing the professional witnesses to testify

[28] The second issue involves the trial judge's mid-trial ruling, in response to an oral motion from the appellant, which permitted TD's former investigator and former independent adjuster to give evidence at trial as "professional witnesses".

[29] The appellant argues that the trial judge erred in condoning TD's payments to these professional witnesses to prepare evidence for trial. She points out that there is no rule that specifically allows for such payments and contends that "the promise of money is a direct invitation to fabrication." In other words, the appellant submits that paid professional witnesses create a reasonable apprehension of bias.

[30] In her mid-trial ruling, the trial judge dismissed the appellant's motion seeking to exclude their testimony. She agreed that the witnesses could be classified as "professional". She also acknowledged that case law does not offer much guidance on the question of paying such professionals for review, preparation and trial attendance.

[31] The trial judge relied on a decision from the Nova Scotia Court of Appeal, *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44, 186 N.S.R. (2d) 62, along with other case-law in the costs context, to provide a rationale for why it may be desirable in the interests of justice to permit testimony from witnesses who have been compensated for their time. The trial judge held that, in non-criminal cases specifically, it is acceptable to receive testimony from such witnesses where it is reasonable in the circumstances, and set out a non-exhaustive list of relevant factors to consider when determining whether to permit such witnesses to testify.

[32] The trial judge's mid-trial decision and reasons with respect to the professional witnesses reveal no error. In any event, the appellant has not challenged the trial judge's factual findings, presumably including those findings which may have relied on the professional witnesses' evidence.

(3) The threshold for leave to appeal costs is not met

[33] Finally, with respect to the third issue, the threshold for leave to appeal costs is a high burden. As this court stated in *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd.*, 2024 ONCA 25, at para. 13:

> [l]eave to appeal a costs order will not be granted except in obvious cases where the party seeking leave convinces the court there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218

> O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92.

[34] In this case, the appellant argues that the trial judge exercised her discretion "incorrectly". According to the appellant, the trial judge permitted TD to claim excessively high fees due to the novelty of the issues in the case. (The trial judge noted being aware of no reported cases in Ontario that had decided the question of whether a willfully false statement in respect of ALE, if proven, vitiates an insured's right to recover all benefits claimed under a homeowner's insurance policy.) The appellant argues that the novelty factor may be used to reduce a losing party's fees, not to increase a successful party's fees.

[35] While it is open to a trial judge to reduce the losing party's costs on the basis of novelty, it is certainly not an error in principle for a judge to recognize the added costs to a successful party in addressing novel issues as well. In either context, the trial judge's discretion with respect to costs is entitled to deference.

[36] We see no basis to interfere with the trial judge's discretion. The threshold for leave to appeal costs is not met here.

DISPOSITION

[37] For these reasons, the appeal is dismissed.

[38] TD is entitled to costs of the appeal in the agreed-upon amount of $15,000 all-inclusive.

“A. Harvison Young J.A.”
“L. Sossin J.A.”
“S. Gomery J.A.”