CITATION: Amyotte v. Wawanesa Mutual Insurance Company, 2013 ONSC 4361
DIVISIONAL COURT FILE NO.: 05-21618
DATE: 20130710

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MATLOW, ASTON, & LEDERER, JJ.

B E T W E E N :	)	
	)	
DOROTHY AMYOTTE	)	Jillian Van Allen for the Plaintiff/Appellant
	)	
Plaintiff/Appellant	)	
	)	
– and –	)	
	)	
WAWANESA MUTUAL INSURANCE COMPANY	)	M. Miller, for the Defendant/Respondent
	)	
Defendant/Respondent	)	
	)	**HEARD:** February 12, 2013 at Hamilton

MATLOW, J.

This appeal

[1] This is an appeal by the plaintiff from the judgment ("Order") of Justice M. Dale Parayeski dated April 3, 2012. The judgment was granted on motion made by the defendant to enforce what it alleged was a settlement of certain claims for statutory accident benefits made by the plaintiff against the defendant, her automobile insurer, by their respective counsel. For the reasons that follow, this appeal is allowed and the judgment in appeal is set aside.

The standard of review

[2] Both counsel agreed that on questions of fact and mixed fact and law, the standard of review is palpable and overriding error and, on questions of law, it is correctness. I agree.

The claims as set out in the statement of claim

[3] As will become evident below, it is essential for the purpose of this appeal to compare the plaintiff's claims as set out in the statement of claim with the defendant's offer of settlement.

[4] Paragraph 1 of the statement of claim reads as follows:

The Plaintiff Claims:

Damages as follows:

a. Damages for breach of contract of insurance in the amount claimed in the Mediators (*sic*) Report the subject of this claim:

b. Damages in the amount of $25,000.00 for bad faith for unreasonable conduct in the claims process:

c. Aggravated, punitive and exemplary damages in the amount of $25,000.00:

d. Interest as applicable both in contract and under the Rules of Practice:

e. Costs on a Full Indemnity Scale and interest on assessable disbursements; and

f. Such further and other order as this Honourable Court may allow.

[5] The breach of contract alleged in sub-paragraph 1 a. of the statement of claim refers to the defendant's failure to pay the statutory accident benefits which were, entirely, housekeeping benefits.

[6] Paragraph 10 of the statement of claim particularized the plaintiff's claims further as follows:

> 10. The Policyholder therefore claims for the payment of the benefits mediated and particularized in the Financial Services Commission of Ontario Report of Mediator dated November 8, 2004 and any other Benefits refused to date and for which a claim has not been issued.

[7] In paragraph 5 of his reasons, the motion judge, perhaps in error, recorded the final words of this provision as "for which a claim **has** been issued" (emphasis added) which may well be what the drafter of the statement of claim had intended to write.

[8] The reference to a report of the Financial Services Commission dated more than one year prior to the commencement of this action and the repeated use of the past tense throughout paragraph 10 lead to no other reasonable interpretation other than that the claims in paragraph 10 were only for statutory housekeeping benefits that had become payable at some time in the past. Paragraph 10 did not refer to any other category of statutory accident benefits or to statutory housekeeping benefits that might become payable at some time in the future.

The defendant's offer to settle

[9] The motion judge set out part of the history of the negotiations between counsel in his endorsement as follows:

> [2] Very shortly before this matter was scheduled to go to trial, plaintiff counsel asked defence counsel, by means of an email, if the latter had a "final offer". By reply email, defence counsel sent an offer in the following terms: "Payment to the Plaintiff of $15,000 inclusive of interest in full and final settlement of all accident benefits claims of the Plaintiff and all claims against the Defendant in the within

action" and partial indemnity costs. Plaintiff counsel replied with "We accept the offer and the action is settled…".

[3] Defence counsel asked plaintiff counsel what was wanted for costs. Plaintiff counsel e-mailed back "15 k all in". The next day, defence counsel emailed "How would you like the settlement broken down for Release purposes? $10,000 past and future (emphasis added) rehab and $5.000 for costs and disbursements?" The reply was "Yes thx".

[4] Several days later defence counsel sent plaintiff counsel a full and final release for execution as well as a settlement disclosure notice. Five days after that, plaintiff counsel wrote to defence counsel saying: "We only settled the lawsuit that was outstanding in action number 05-21618. Your release does not restrict the release of the policy to the issue in that lawsuit. May I please have a second draft indicating that only the lawsuit benefits have been released". Defence counsel remonstrated. Plaintiff counsel wrote again, saying: "My client rescinds the settlement as we were not ad idem and there was no disclosure on the remaining benefits which were not the subject of the action and which could not be extinguished by a Rule 49 offer". Defence counsel inquired: "May I ask what did you think you were settling when you accepted the offer?" Plaintiff counsel responded: "My instructions were to settle the action only and I was clear in my mind-I can't say whether I saw or read your Rule 49 offer but I do recall speaking with you and agreeing to settle-I believe I replied on our phone call as I would not have agreed to what the Rule 49 offer says because I had instructions to the contrary…". Defence counsel responded by writing: "Lou you and I never spoke, even at the mediations.".

The main issues in this appeal

[10] There are two main issues in this appeal.

1. Was the plaintiff entitled to rescind the settlement?

2. If not, was the defendant entitled to enforce it by obtaining the judgment in appeal.

The resolution of these issues requires an examination of Rule 49 of the *Rules of Civil Procedure* and section 9.1 (1) of *Automobile Insurance Regulation*, R.R.O. 1990, Reg. 664, the ("*Regulation*").

Rule 49

[11] The parties agree that the defendant's initial offer was stated, by counsel for the defendant in his covering email, to be a "Rule 49" offer which carries with it certain costs consequences. However, they disagree as to whether the offer actually qualified as a Rule 49 offer.

[12] In order to qualify as a Rule 49 offer, an offer must comply with rule 49.02 (1) which reads as follows:

> 49.02. (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle. (Form 49A).

[13] The defendant's offer provided for a payment "in full and final settlement of all accident benefits claims of the Plaintiff and all claims against the Defendant in the within action". As well, it provided for payment of the plaintiff's partial indemnity costs".

Section 9.1

[14] The *Regulation* applies to the settlement of claims for all statutory accident benefits. It provides that, before a settlement of a claim for statutory benefits is entered into between an insurer and an insured person, the insurer is required to give the insured person a written notice containing certain relevant information and "a statement that the insured person may rescind the settlement within two business days after the settlement is entered into by delivering a written notice to the insurer".

[15] However, it has been authoritatively held that the *Regulation* does not apply to settlements made pursuant to a *true* Rule 49 offer. This view is supported by the judgment of the Ontario Court of Appeal in *Igbokwe v HB Group Insurance*, 55 O.R. (3d) 313 (motion for leave to appeal to the Supreme Court of Canada dismissed at [2001] S.C.C.A. No. 470) to which the motion judge referred. Labrosse, J.A., writing for a unanimous Court of Appeal, stated the following in paragraph 20 of his reasons:

> Section 9.1 was never intended to affect Rule 49.
>
> The difficulties that would result from offers to settle, under Rule 49 received on the eve of trial and during trial, particularly jury trials, do not permit s. 9.1 and Rule 49 to work in tandem. Once an action has been commenced, the relationship between claimant and insurer become adversarial.
>
> Offers to settle litigation fall under Rule 49 and the rule is a complete code. Section 9.1 was not designed to accord special rights or impose obligations on claimants and insurers in settling their court proceedings.

Conclusions

[16] The determination of this appeal ultimately must turn on whether or not the defendant's offer qualified as a Rule 49 offer. If it did, a binding settlement was made by the parties. If it did not qualify, the *Regulation*, including the plaintiff's right to rescind, applied.

[17] I am persuaded that the defendant's offer contemplated that, in return for the defendant's payment to her, she would be required to give up her right to claim statutory accident benefits of all kinds, both past and future, whereas her claim, as set out in her statement of claim was for only past housekeeping benefits. As set out in paragraph 11, above, an offer to settle could qualify as a Rule 49 offer only if it would "settle any one or more of the claims in the proceeding" and the defendant's offer contemplated the settlement of much more than that. It could not, therefore, be a Rule 49 offer.

[18] It follows that, because the defendant's offer to settle did not qualify as a Rule 49 offer, the *Regulation* applied and plaintiff was entitled to rescind, as he did, for whatever reason he wished, any settlement that the parties had made.

[19] There remained, therefore, no settlement to be enforced and the defendant's motion ought to have been dismissed.

[20] The reasons of the motion judge do not contain any analysis such as this to determine whether or not the defendant's offer qualified as a Rule 49 offer.

[21] His finding that the defendant's offer qualified as a Rule 49 offer and his failure to give effect to the plaintiff's right to rescind provided by the *Regulation* offer reflect palpable and overriding errors. It follows that the judgment in appeal must be set aside.

Costs

[22] Both counsel advised us that they had reached an agreement that the costs of this appeal should be fixed at $3,500, all-inclusive, and awarded in the cause. Accordingly, the plaintiff is entitled to those costs.

Matlow, J.

Aston, J.

Lederer, J.

RELEASED: July 10, 2013

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– and –

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REASONS FOR JUDGMENT

MATLOW J.

RELEASED: July 10, 2013