**COURT FILE NO.:** 4022A/07 (Milton)
**DATE:** 20090401

**SUPERIOR COURT OF JUSTICE - ONTARIO**



**RE:** 1562860 ONTARIO LTD. c.o.b. as SHOELESS JOE'S

Plaintiff

v.

INSURANCE PORTFOLIO INC. and CHRISTOPHER CONIGLIO

Defendants

v.

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Third Party

**BEFORE:** BIELBY J.

**COUNSEL:** Katherine I. Henshell, for the Plaintiff

Mikel C. Pearce, for the Defendants

Rajesh K. Datt, for the Third Party

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

[1] This motion was brought by the third party, The Dominion of Canada General Insurance Company (Dominion) for the following relief:

1. For an order pursuant to s. 106 of the *Courts of Justice Act*, staying the main action and/or the third party action on the grounds of a final release entered into by the plaintiff and third party, alternatively,

2. for an order pursuant to Rule 21 dismissing the third party claim for disclosing no reasonable cause of action, alternatively

3. for an order pursuant to Rule 20 for summary judgment dismissing the third party claim on the grounds that no triable issue is disclosed.



**FACTS**

[2] The Plaintiff operated a restaurant which was insured by Dominion. The insurance was arranged by the Defendants who are insurance brokers.

[3] In August of 2005, the restaurant suffered a flood of the premises resulting in a significant loss. The insurance claim included a claim for business interruption loss. Dominion's policy covered such a claim but had a maximum limit of $400,000.00 and was subject to a "rate of recovery loss" condition. Under the policy the Plaintiff was obligated to have adequate coverage for business interruption. In the event it did not, the rate of recovery clause would reduce the maximum limit for business interruption coverage based upon an agreed formula. Dominion took the position that the Plaintiff did not have adequate coverage so the formula was triggered and the maximum limit for business interruption coverage was reduced to $248,000.00. This amount is substantially less than the actual business loss.

[4] The Plaintiff's total claim was settled for $522,716.39 which included the amount of $248,000.00 for the business interruption loss.

[5] The Plaintiff, in February, 2006 executed in favour of Dominion a final Release which Release included the flowing clause:

> And for the said consideration, I further agree not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of any statute and the amendments thereto from the person, persons or corporation discharged by this release.



[6] In July 2006 the Plaintiff started this action against its insurance brokers claiming they failed to secure adequate business interruption loss insurance.

[7] In October 2007 the Defendants issued a Third Party Claim against Dominion seeking contribution and indemnity, relying on the *Negligence Act*.

[8] The Third Party Claim alleges that Dominion had a duty of care to the brokers to properly adjust the claim, to ensure the settlement was reasonable and fair, and for failure to include the broker in the Release. Specifically, it is alleged that Dominion incorrectly calculated the business loss claim.

**CLAIM**

[9] In her argument counsel for the Plaintiff agreed that her client had no claim whatsoever against Dominion. She argued that the Plaintiff's position is that the Defendants were professionally negligent in failing their duty to it. The Plaintiff takes no issue with Dominion and conceded it paid to the Plaintiff its entitlement under the policy. She states that the Plaintiff was underinsured and that was the fault of the Defendants.

[10] The Defendant brokers argue that the accountants hired by Dominion to calculate the business loss claim did not calculate the claim properly and underpaid the Plaintiff. In fact the affidavit evidence discloses that the Defendants believe the Plaintiff is entitled to full indemnity with respect to the business loss claim. The Defendants as indicated argue that Dominion owed a duty of care to them. At tab 1 of the Respondent's broker's motion record is a copy of the Broker Agreement between the defendant brokers and Dominion. At paragraph 2.2.1 it reads:

> Both of us agree to exercise the utmost diligence, honesty and good faith in properly and promptly servicing policies, in our communications and dealings with policyholders, in performing the duties under this Agreement, and in maintaining our goodwill and reputation.

[11] Counsel for Dominion denied his client owes any duty to the Defendants.

**ISSUES**

**SHOULD THE PROCEEDINGS BE STAYED AS AN ABUSE OF PROCESS?**

[12] Counsel for Dominion relies on the Final Release and argues that as a result of the Release the Plaintiff ought not to have brought this action which resulted in the Third Party Action. Specifically he relies on that portion of the Release set out in paragraph 5 herein. He argues that the purpose of the release in part is to protect Dominion from being brought into lawsuits such as this. By signing the release the Plaintiff settled her claim and agreed not to bring

any claims against Dominion or any claims that “might” bring in Dominion based on a claim for contribution and indemnity, as in this case. At the very least he argues the Third Party action ought to be stayed. Section 106 of the *Courts of Justice Act* allows a Court to stay proceedings on terms as are considered just.

[13] Counsel for the Defendants agrees the main action should be stayed and so too relies on the Release even though they were not a party to the Release.

[14] Counsel for the Plaintiff argues that if a stay is appropriate it should only apply to the third party claim as she acknowledges that by virtue of the Release, Dominion is protected from liability.

[15] On this issue Dominion relied on the following case law:

*Sinclair-Cockburn Insurance Brokers Ltd. v. Richards*, 61 O.R. (3d) 105 Ont. C.A.

[16] In this decision the Plaintiff had entered into a Release with the third party Wiggins who was brought into an action by the Defendants claiming contribution and indemnity. The Release included the following clause:

> Sinclair shall not make any claim or take any proceedings against any other person….who might claim contribution or indemnity from Wiggins…

[17] Sinclair, in its Reply, undertook that it was not seeking to recover from the Defendant any amounts for which she could claim contribution and indemnity under the *Negligence Act*.

[18] Wiggins brought a motion to stay the action pursuant to s. 106 of the *Courts of Justice Act* and Rule 21.01 on the grounds that because of the Release the action was an abuse of process.

[19] With respect to the undertaking, the Court of Appeal ruled that it amounted to a unilateral amendment to the release and nothing in the settlement agreement authorizes such an amendment.

[20] The court ruled that parties should be held to their promises and that the complete action should be stayed as an abuse of process. It also stated that the stay worked no injustice on the plaintiff because its effect was simply to hold the plaintiff to its bargain.

[21] In reaching its decision the Court of Appeal considered the case of *Owen* v. *Zosky*. (See paragraph [30]). The court distinguished the *Owen* case on two grounds; in that case the court stayed the Third Party Claim, and that decision was not appealed. Secondly, in *Owen* the third party admitted that it had no exposure from the continuation of the main action and that admission was not made by the third party in the case before the Court of Appeal.

[22] *Woodcliffe Corp*. v. *Rotenburg*, [2005] O.J. No.2800 Ont. C.A.

[23] In this case the plaintiffs brought action against the defendants, its former lawyer and law firm claiming damages for professional negligence.

[24] The plaintiff was a land developer who was involved in a series of deals with third parties. Difficulties arose between the parties resulting in law suits. These actions were all settled and mutual releases signed.

[25] The defendants brought third party claims seeking indemnity. The releases in that case included the following clause:

> The Releasors shall not make any claim…with respect to any matter which may have arisen between the Releasees and the Releasors or in which any claim could arise against the Releasees for contribution or indemnity or other relief over…

[26] A motion was brought by the third parties to stay the action, and this relief was granted by the motion judge.

[27] At the Court of Appeal, the plaintiff conceded that portions of its claim made allegations that gave rise to the third party claims but submitted there remained allegations of negligence and breach of duty that were independent of any allegations of wrongdoing by the third parties.

[28] The Court of Appeal did not accept this argument and was of the opinion that to succeed the plaintiff must first establish third party wrongs, in order to prove the Firm was negligent.

[29] The Court felt that the plaintiff's claim was inextricably linked to allegations of wrongdoing by the third parties, and fell within the category of claims precluded by the releases. It ruled that the motions judge properly followed the decision of the appeal court in *Sinclair-Cockburn*.

[30] The Court of Appeal went on to say that it would be unfair to allow the main action to proceed but uphold the stay of the third party actions. It ruled that to do so would preclude the defendants from seeking remedies that it would be entitled to on the basis of the Releases which it had nothing to do with. It also stated that the plaintiff in signing the releases could have refused to sign unless the defendants were specifically excused from the "claim over" provisions of the releases. Accordingly, the decision of the motions judge was upheld.

[31] *Owen v. Zosky*, [2000] O.J. 4838 Ont. C.A.

[32] This case involved third party rights under a release. The plaintiff had sued her dentist for damages claiming negligence in an implant procedure. During the process she fired her lawyer and settled with the dentist. The plaintiff signed a release and therein it stated;

> AND FOR THE AFORESAID CONSIDERATION, the Releasor agrees not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of the Negligence Act and the amendments thereto.

[33] The plaintiff then sued her lawyer and another dentist who was involved in the procedure and they issued a third party claim against the original dentist.

[34] Adding the lawyer in the third party claim was questionable to the Court as he was not responsible for the dentist's negligence, however, the claim against the other dentist potentially would fall within the contemplation of the release.

[35] The original dentist brought a motion under s.106 of the *Courts of Justice Act* to stay the main action and the third party action as an abuse of process.

[36] The motion judge ordered the actions stayed.

[37] Only the stay of the main action was appealed. Further, counsel for the plaintiff undertook not to pursue any claim which could result in claims by the defendants for contribution or indemnity against the lawyer, and that his client was prepared to abide by the release.

[38] The Court of Appeal set aside the stay order in the main action and stated that the plaintiff would be held to her undertaking to abide by the release.

[39] *Ieradi v. Gordon*, [2007] O.J. No. 4337.

[40] This is a decision of Lerderer J. of the Ontario Superior Court of Justice. In this case the plaintiff wanted to acquire a business by purchasing its share. He entered an agreement to that effect. The deal did not close. The plaintiff sued the proposed vendor but that claim was settled. The parties entered into a release. The plaintiff then sued her lawyer claiming he failed to tender. The lawyer added the vendors as third parties seeking contribution and indemnity.

[41] The release in part stated;

> The parties release each other from any an all claims, suits, damages etc. they have or may have in respect of this action or any other matter known to them at the date of this settlement. The parties further agree not to sue any person or corporation that may or does claim over for relief, indemnification or contribution from the other party no so suing.

[42] The third party brought a motion to stay the main action and the third party action as an abuse of process.

[43] At paragraph 13 therein the motions judge ruled that the third party claim would be stayed and that the third parties could expect the plaintiff to live up to his promise.

[44] He then determined, however, that this did not mean the main action had to be stayed as well.

[45] The learned judge reviewed the *Woodcliffe* case and the Court of Appeal's finding that the claims against the third parties would first have to be determined. The claims were interwoven and could not stand because of the release.

[46] Lerderer J. also reviewed the *Sinclair-Cockburn* decision, and at paragraph 22 states, "in other words, it appears that the parties recognized it was possible to maintain parts of the main action in the face of the third party proceedings being stayed. " The learned judge concluded that "… it is consistent with the proposition that claims against the defendants which are independent of any claims to be made against the third parties cannot obtain the protection offered by the release and the "no action clause" it contains." The Court went on to say that if a stay of a third party action automatically stayed the main action, then any defendant can get that advantage simply by issuing a third party proceeding even though it has no chance of success.

[47] At paragraph 25 the learned judge determined that if the defendant lawyer was negligent, the third parties could not be liable for the professional negligence of the lawyers.

[48] The Court ruled that it was appropriate to stay the third party action, to provide the third party with the benefit of the settlement they made, but that the main action be allowed to proceed. It ruled at paragraph 26, “where a third party has no exposure in contribution and indemnity to any successful claim by a plaintiff, the court need not dismiss or stay the main action pursuant to a covenant not to sue.”

[49] In paragraph 27 the Court stated, “in the case before this court, the third parties cannot be held accountable for the negligence of the defendant solicitors. The defendant solicitors cannot claim over against the third parties. There is no prejudice to the defendant solicitors. They are still able to rely on the proposition that it was not possible to tender since clear title had not been provided by the third parties. The defendant solicitors have to respond to the claim and prove the defence. Accordingly, the main action will not be “struck out”.

[50] In the case before me, given the authorities cited, clearly the third party claim is to be stayed. Dominion is entitled to rely on the release.

**Should the Main Action be Stayed?**

[51] The defendants allege that Dominion miscalculated the business loss claim, and had the claim been properly calculated, the plaintiff would have received its entire loss. The plaintiff acknowledges its claim is limited to pursuing a claim for loss based on the defendant's/broker's sole negligence in not providing adequate insurance coverage. The third party argues that by allowing the main action to stand and only staying the third party action prevents the defendant brokers from pursuing their claim and arguing that Dominion had a duty to them, and that it failed that duty by improperly calculating the business loss.

[52] It seems to me that there is in fact a link between the issues of the main action and the third party action. The plaintiff's issue of whether or not the defendants provided adequate coverage is clearly linked to the third party claim which alleges there was adequate coverage but Dominion incorrectly calculated the business loss. On this basis I distinguish the *Ieradis* decision because there is a 'claim over' by the Defendants relating to the insurance policy issue. The defence of the main action rests on its allegations it arranged adequate insurance and that Dominion owed them a duty of care and was negligent in assessing the loss. I look to the *Woodcliffe* decision at paragraph 14 and by analogy believe it would be unfair to the Defendants in our action to preclude them from seeking remedies against Dominion that it would be entitled to on the

basis of the releases that the Defendant brokers had no input in nor had anything to do with whatsoever.

[53] The Defendants and Dominion were parties to a broker agreement. While there is no case law on the issue, as I was advised by counsel, there is a triable issue as whether Dominion owed a duty of care to the Defendants. Further, the Plaintiff could have refused to settle unless the Defendants were excepted from the "no claims over" provisions of the release.

[54] The release clearly states that the Plaintiff agrees not to make a claim against the defendants if the defendants might claim contribution indemnity. The defendants have in fact made such a claim.

[55] The issues between the Plaintiff and the Defendants and the plaintiff and the third parties all deal with the issue of business loss insurance. They are interwoven. Again, drawing on the *Woodcliffe* decision, paragraph 14, having proceeded with the settlement without excepting the Defendants, and having obtained the benefits of the settlements, the Plaintiff should also have to assume the burden of the release imposed in terms of precluding claims over.

[56] I also note that in *Woodcliffe*, counsel for the plaintiff argued that there were portions of the statement of claim in which there were allegations of negligence and breach of duty by the defendant that were independent of any

allegations of wrongdoing by third parties. That argument was not accepted by the Court.

[57] Accordingly, the main action will also be stayed. The Plaintiff will be held to her promise.

**RULE 20 AND 2 ISSUES**

[58] Having stayed both the main action and the third party proceeding, it is unnecessary for me to deal with the other issues. However, had a stay not been in order, I make the following comments.

[59] As indicated above, I believe there is a real issue as to whether or not the third party, Dominion, has a duty of care to the Defendant brokers. I am advised by counsel for both that they are unable to find any cases on this point. It is therefore a novel point of law.

[60] In my opinion, it is not appropriate for me as a judge on an interlocutory motion to determine a novel point of law had I not stayed the proceedings.

[61] With respect to the Rule 20 motion for summary judgment, I rely on *Nadvornianski v. Stewart Title Guaranty Company* and *Mitchell, Bardyn & Zaulucky*, [2006] CarswellOnt. 3934 paragraph16, wherein in quoting the Court of Appeal decision of *Romano v D'Onofrio*, [2005] O.J. No.4969, paragraph 7, it determined that it is inappropriate for a motions judge hearing a summary

judgment motion to decide a significant question of law where the law is not settled.

[62] With respect to the Rule 21 ground I rely on the Ontario Court of Appeal decision of *Fallooncrest Financial Corp. v. Ontario*, 1995 CarswellOnt 910, paragraph 12 where it was determined if the law is not clear in the relevant area, it cannot be said that it is plan and obvious that there is not a reasonable cause of action.

[63] Therefore, had I not stayed the main action and the third party action I would have dismissed the motion on the other two grounds.

**ORDER**

[64] Accordingly, an Order will go staying the main action and the third party action and dismissing the balance of the motion.

[65] I will accept written submissions as to costs within 21 days of the release of this endorsement.

Bielby J.

**DATE:** April 1, 2009

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**ENDORSEMENT**

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Bielby J.

**DATE:** April 1, 2009