

COURT OF APPEAL FOR ONTARIO

CITATION: Candito v. Nmezi, 2015 ONCA 793

DATE: 20151119

DOCKET: M45706 (C61046)

Brown J.A. (In Chambers)

BETWEEN

Marilena Candito

Plaintiff

and

Chinedu Nmezi, Paulette Rhodzn and Economical Insurance Group

Defendants (Appellant/

Moving Party)

and

State Farm Mutual Automobile Insurance Company

Third Party (Respondent/

Responding Party)

James Tausendfreund, for the moving party

Philip Pollack, for the responding party

Heard: November 17, 2015

ENDORSEMENT

OVERVIEW

[1] Civil litigation in the public courts can only deliver timely and cost-effective justice if the parties perform certain basic procedural obligations. One such obligation requires a party to settle an order under appeal in a timely fashion so that an appellant can perfect its appeal within the timeframe stipulated by the *Rules of Civil Procedure*. This obligation has been recognized for some time. Almost fifteen years ago, The Advocates' Society specifically addressed this obligation in its *Principles of Civility for Advocates*. Principle 16 provides, in part, that counsel "should promptly prepare and submit a proposed order to opposing counsel and attempt to reconcile any differences before the draft order is presented to the Court."

[2] In the present case, the respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), failed to perform that basic obligation in a misguided attempt to thwart the ability of the Economical Insurance Group ("Economical") to exercise its right of appeal.

[3] State Farm's litigation tactics compelled Economical to bring a motion to extend the time to perfect its appeal. Although the substantive relief sought by Economical ended up going on consent, for the reasons set out below I conclude that State Farm's unreasonable litigation conduct justifies awarding Economical partial indemnity costs of \$5,000.00.

BACKGROUND EVENTS

[4] The issue in Economical's third party claim against State Farm was a straight-forward one: at the time of a motor vehicle accident in February 2005, were the defendants, Chinedu Nmezi and Paulette Rhodzn, insured by a valid policy of auto insurance issued by State Farm, or were they covered by uninsured motorist coverage under the plaintiff's policy with Economical?

[5] Beginning in early 2012, State Farm scheduled five return dates for a motion for summary judgment to dismiss Economical's third party claim. State Farm finally proceeded with its motion on August 20, 2015 before Wright J., who granted summary judgment dismissing Economical's third party claim. Wright J. gave oral reasons for her decision.

[6] Economical exercised its right to appeal, and it served a notice of appeal and certificate respecting evidence on September 17, 2015, within the 30-day period stipulated by r. 61.04(1) of the *Rules of Civil Procedure*. It filed those materials with the court on September 24, 2015.

[7] Under r. 61.09(1), Economical was required to perfect its appeal within 30 days after filing its notice of appeal, in this case by October 26, 2015. To perfect its appeal, Economical needed to include in its appeal book a copy of the order appealed from as signed and entered, and a copy of the reasons of the court appealed from: rr. 61.10(1)(c) and (d). Obtaining those two items did not lie within

the sole control of Economical – it needed to obtain a transcription of the oral reasons of Wright J. from the court, and required the co-operation of State Farm to sign and enter the order of Wright J.

[8] Economical sought a transcript of the motion judge's reasons on September 21; it received them on October 19, 2015, just a few days before the deadline for perfecting the appeal.

[9] Although State Farm succeeded on its motion for summary judgment, it did not act to take out the order. Of course, it is open to any party affected by an order to prepare a draft of the formal order and send it to all other parties represented at the hearing for approval as to form and content: r. 59.03(1). Although Economical could have started the process of preparing a draft order immediately upon serving its notice of appeal, it did not begin that process until two days after receiving the transcribed reasons of Wright J.

[10] In any event, that delay proved of no consequence because of the subsequent conduct of State Farm. On October 21 – still within the perfection period – Economical sent a draft order to State Farm's counsel for approval as to form and content. It was a simple draft order: motion granted; costs awarded. Economical also requested State Farm's consent to a 60-day extension to perfect the appeal in light of the time it took to obtain the transcribed reasons.

[11] No response from State Farm's counsel.

[12] Economical's counsel left a phone message for State Farm's counsel on October 23; State Farm's left a message on October 26, the deadline for the perfection of the appeal. When counsel finally spoke on October 27, State Farm was not prepared to consent to an extension of time to perfect the appeal nor did it approve the draft order as to form and content.

[13] On October 28, Economical received from the court a notice of intention to dismiss the appeal for delay unless it was perfected by November 17, 2015.

[14] On November 2, State Farm's counsel advised Economical that his client would be opposing any motion to seek an extension of time for perfecting the appeal on the ground that Economical "has not provided reasonable grounds for an extension." State Farm's counsel remained silent on the form of the draft order. Economical immediately brought this motion to extend the time to perfect.

[15] At the hearing of the motion, State Farm's counsel explained his client's silence on approving the order – since it was opposing the motion to extend the time to perfect the appeal, State Farm planned to wait until that motion was dealt with by the court before settling the order appealed from. Given that State Farm's failure to settle the order in a prompt fashion was the main obstacle to perfecting the appeal, one would have thought that the unreasonableness of this position would have been apparent to State Farm.

[16] On November 5, Economical filed the inevitable two inches of materials in support of its motion to extend: motion record, factum, and book of authorities.

[17] At the same time, it served an offer to settle the motion on the basis of extending the time to perfect until January 17, 2015 and State Farm's payment of \$3,000 in costs. No immediate uptake by State Farm.

[18] On November 11, 2015, State Farm finally approved the draft order and advised it would agree to an extension of time to perfect until December 17, 2015. State Farm made no offer to pay any of Economical's motion costs.

[19] At the hearing of the motion on November 17, State Farm's counsel advised that his firm submitted the approved order to the Superior Court of Justice for signing and entry the week before. The Registrar of that court was not prepared to process the order on an expedited basis. Counsel evidently did not draw the Registrar's attention to the policy of this court set out in s. 11.2(2) of its *Practice Direction Concerning Civil Appeals in the Court of Appeal* that summary judgment appeals will be expedited without the necessity of an order to that effect.

[20] The parties have now agreed to an order extending the time to perfect the appeal until December 17, 2015, and I grant that order.

COSTS ANALYSIS

[21] The parties cannot agree on costs. Economical seeks its partial indemnity costs of the motion in the amount of \$5,000.00, all in. State Farm submits that such a request is unreasonable and that each side should bear its own costs.

[22] I disagree with State Farm's submission. Economical's request for costs is most reasonable. The unreasonableness in the events which transpired consisted solely in State Farm's failure to perform its obligation to settle an order subject to appeal in a timely fashion. For State Farm to take the position that it would not settle the order under appeal until Economical had argued its motion to extend the time to perfect amounted to unacceptable litigation gamesmanship. From the submissions it made at the hearing of the motion, it is apparent that State Farm delayed responding to Economical's requests to settle the order so that it could manoeuvre Economical into a position where it might be required to argue the merits of its appeal in order to secure an extension of time to perfect. That was the thrust of the submissions made by State Farm's counsel based upon a book of authorities tendered at the hearing.

[23] In my view, such unreasonable litigation tactics by State Farm would have merited an award of full indemnity costs against it. However, Economical only requested partial indemnity costs, so I am limited by its request.

DISPOSITION

[24] For the reasons set out above, I order that the time for the perfection of this appeal is extended until December 17, 2015. I direct State Farm to contact the Registrar of the Superior Court of Justice for the Toronto Region and ask that the order of Wright J. be issued and entered on an urgent basis so that the appeal book can be finalized before the date for perfection. Finally, I order State Farm to pay Economical its partial indemnity costs of the motion in the amount of \$5,000.00, inclusive of HST and disbursements, by Tuesday, November 24, 2015.

“David Brown J.A.”