CITATION: Myers-Gordon et al. v. Martin et al., 2017 ONSC 872
COURT FILE NO.: CV-13-179
DATE: 2017-02-03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KELLY MYERS-GORDON, a mentally incapable person by her Litigation Guardian, CYNTHIA GORDON, CYNTHIA GORDON, personally, AMY GORDON, CHRISTY GORDON, STEPHEN MYERS-GORDON and STEPHEN GREGORY MYERS	)	S. Lagoo and J. Waxman, for the Plaintiffs
Plaintiffs	)	
- and -	)	
RANDY MARTIN, KAREN MARTIN, CHRISTINA BEAUREGARD, CODY VAN EVERY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	J. Greve, for the Defendants
Defendants	)	
	)	HEARD: January 17, 2017

The Honourable Mr. Justice H.S. Arrell

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The Plaintiffs have brought this motion under Rule 22 of the *Rules of Civil Procedure*, for a determination as to whether the Defendant, State Farm Mutual

Automobile Insurance Company ("State Farm Insurance"), is obligated to respond to the at-issue claims for underinsurance pursuant to the Family Protection Coverage (OPCF 44R Endorsement).

FACTS:

[2] The parties agree to the following facts for the purposes of this motion.

[3] This action is for personal injury damages arising out of a pedestrian-motor vehicle collision that occurred on September 26th, 2009, following a keg party. The Defendant, Christina Beauregard, was the owner of the residence where the party took place at the time of the collision.

[4] The Plaintiff, Kelly Myers-Gordon, was one of four pedestrians struck by a 2005 Dodge Durango, operated by the Defendant, Randy Martin, and owned by his mother, the Defendant, Karen Martin. The Defendant, Randy Martin, was impaired at the time of the collision.

[5] As a direct result of this collision, two teenagers were killed, a third was seriously injured, and the Plaintiff, Kelly Myers-Gordon, 17 years of age at the time, suffered significant injuries.

[6] On August 29, 2013, Ms. Karen Martin was released by way of Summary Judgment. The Ontario Court of Appeal upheld that decision on November 4, 2014. Mr. Randy Martin is unrepresented and uninsured.

[7] The Plaintiff, Cindy Gordon, the mother of Kelly Myers-Gordon, contracted with the Defendant, State Farm Insurance, a policy of automobile insurance which included mandatory uninsured automobile coverage in the amount of $200,000.00 and underinsured coverage by way of OPCF 44R Family Protection Coverage with limits of $500,000.00.

[8] The Defendant, Christina Beauregard, has a valid homeowner's policy with $1,000,000.00 in liability insurance which is responding to this claim.

[9] The Defendant, Cody Van Every, is alleged to have supplied Mr. Randy Martin, a minor at the time of the collision, with alcohol. He also has a valid homeowners policy are with liability insurance of $1,000,000.00.

[10] This motion assumes that all Defendants are found jointly and severally liable to pay the Plaintiffs their damages and that said damages exceed the collective policy limits.

QUESTION FOR THE COURT:

[11] Is the Defendant, State Farm Insurance, obligated to respond to claims for underinsurance (Family Protection Coverage) when there exists a valid non-motor

vehicle policy of insurance that exceeds the value of the underinsurance policy held by joint tortfeasors?

POSITION OF THE PARTIES:

[12] The Plaintiff argues that she is an eligible claimant who is entitled to recover damages from the inadequately insured motorist (the uninsured driver defendant) under SECTION 1.5 of the OPCF 44R Family Protection Coverage because SECTION 4, which determines the limits of liability, is the aggregate of all "limits of motor vehicle liability insurance"..."for all of the automobiles". Since the only other insurance available to satisfy the claims of the Plaintiff are homeowners policies of insurance and not motor vehicle liability insurance, the OPCF 44F endorsement applies for the total limits of $500,000.00 and not just the uninsured portion of $200,000.00, which portion is not in dispute by State Farm.

[13] State Farm urges the court to find that the amounts payable pursuant to the underinsurance policy are reduced by the aggregate sum of all available policies, including non-motor vehicle policies. It agrees that the at fault driver is uninsured and it therefore must pay the $200,000.00 for that coverage to the Plaintiff but not the balance of $300,000.00 for the OPCF 44F underinsured coverage of the at fault driver, although admitting he is inadequately insured. Despite the at fault driver being inadequately insured, State Farm argues that it is not exposed for payment of that coverage because there are two other joint tortfeasors who have homeowners policies well in excess of the $300,000.00 State Farm coverage and who are presumed liable to the Plaintiff for the purposes of the question before the court. It argues that Section 6 and 7 of the OPCF 44F endorsement makes it clear as per Section 7(b) "the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;" This section does not limit coverage of joint tortfeasors who have motor vehicle liability policies but instead says "insurers" which State Farm argues means any type of insurance including homeowner policies.

ANALYSIS:

[14] An inadequately insured motorist, for accidents occurring on September 26, 2009, is defined in Section 1.5 of the OPCF 44R Family Protection Coverage as follows:

> "inadequately insured motorist" means
>
> (a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance or bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, obtained by the owner or driver is less than the limit of family protection coverage[.]; or
> (b) the driver or owner of an uninsured automobile or unidentified automobile as defined in SECTION 5, "Uninsured Automobile Coverage" of the Policy.
>
> PROVIDED THAT

(A) where an eligible claimant is entitled to recover damages from an inadequately insured motorist and the owner or operator of any other automobile, for the purpose of

(i) above, and

(ii) determining the insurer's limit of liability under Section 4 of this change form,

the limit of motor vehicle liability insurance shall be deemed to be the aggregate of all **limits of motor vehicle liability insurance** and all bonds, cash deposits or other financial guarantees as required by law in lieu of such insurance, for all of the automobiles;

(B) where an eligible claimant is entitled to recover damages from the identified owner or identified driver of an uninsured automobile as defined in Section 5 of the Policy, for the purpose of

(i) (a) and (b) above; and

(ii) determining the limit of coverage under Section 4 of this change form;

other uninsured **automobile coverage** available to the eligible claimant shall be taken into account as if it were motor vehicle liability insurance with the same limits as the uninsured automobile coverage[.]

[Emphasis added]

[15] Section 1.8 of the OPCF 44R states:

"limit of motor vehicle liability insurance" means the amount stated in the Certificate of Automobile Insurance as the limit of liability of the insurer with respect to liability claims, regardless of whether the limit is reduced by the payment of claims or otherwise;

[16] Section 4 of the OPCF 44R states:

LIMIT OF COVERAGE UNDER THIS CHANGE FORM

4. The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as required by law in lieu of such insurance, of the inadequately insured motorist and of any person jointly liable with that motorist. [Emphasis added]

[17] Sections 6 and 7(b) of the OPCF 44R Endorsement reads as follows:

AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

6. The amount payable to an eligible claimant under this change form shall be calculated by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist, and deducting from that

amount the aggregate of the amounts referred to in SECTION 7 of this change form, but in no event shall the insurer be obliged to pay an amount in excess of the limit of coverage as determined under S 4 and 5 of this change form.

7. The amount payable under this change form to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from

a) (a) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;

(b) the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;

[18] The Court of Appeal has delivered two decisions that are relevant.

[19] The Plaintiff relies on *Heuvelman v. White*, [2005] I.L.R. I-4347, 191 O.C.A. 194 where the Plaintiff in that case was injured in a motor vehicle collision and settled her case for more than $2.5 million. The Plaintiff had access to $300,000.00 from the at fault driver's motor vehicle insurer and $1,000,000.00 from a personal liability umbrella insurance policy also from the negligent Defendant. The Plaintiff Heuvelman was insured under a Family Protection Endorsement (OPCF 44R) with coverage limits of $500,000.00 for underinsurance coverage. The parties agreed that the underinsurer was entitled to deduct the $300,000.00 third party motor vehicle policy from the $500,000.00 underinsurance policy. The parties disagreed, however, on the underinsurer's right to deduct the $1,000,000.00 personal liability umbrella policy, thereby eliminating any exposure. The court concluded at para. 7 "...on a plain reading of Section 4 and Section 1.8 of the OPCF 44R, coverage under White's umbrella policy does not reduce the appellant insurer's obligation to *Heuvelman* under her Family Protection Endorsement."

[20] The Court of Appeal concluded under Section 4 of the OPCF 44F that the words "...limits of motor vehicle liability insurance..." meant liability insurance from a motor vehicle liability policy as defined in SECTION1.8 of the OPCF 44F which reads "limits of motor vehicle liability insurance means the amount stated in the Certificate of Automobile Insurance...". The umbrella policy in this case was not covered under the Certificate of Insurance of the at fault driver and therefore the Court concluded such amount could not be used to deduct from the OPCF 44F coverage limit.

[21] The Court also found support for its decision in *Keelty v Bernique* (2002), 57 O.R. (3d) 803 (OCA) at para. 25 which determined that an umbrella policy was not a motor vehicle policy.

[22] The court confirmed the principle that any ambiguity in coverage must be resolved in favour of the insured. See *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (CA).

[23] In *Heuvelman* the court dealt with the issue raised by State Farm in the case at bar where it stated at para. 8 "Entitlement, which is the issue on this appeal, is governed by Section 4 of OPCF 44F. Priorities, applicable to counsel's example, is governed by Section 7 of the endorsement."

[24] The Defendant relies on *Loftus v. Robertson*, (2009) ONCA 618 25, which relates to coverage pursuant to the Uninsured provisions of Section 265, even in circumstances where the Plaintiff failed to sue at fault third parties. The difference between the coverage available under Section 265 and the OPCF-44R is discussed at paragraphs 41 – 43 of the Decision as follows:

> [41] Third, case law interpreting Section 265 of the *Insurance Act* has noted that the section was enacted to alleviate "the plight of motorists injured by drivers of uninsured automobiles" and that the purpose of this section is to provide "a safety net for victims injured by the actions of uninsured motorists" and at the same time "internalize costs to the activity (driving a motor vehicle) which created them": *Barton v. Aitchison*, at p. 287; *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741 (C.A.), at p. 750; *Chambo v. Musseau*, at p. 308.
>
> [42] We see no indication in the language of Section 265 of the Insurance Act or of the Schedule that it was the intention of the legislature to require victims of uninsured drivers to engage in potentially speculative and costly litigation against potential joint tortfeasors who may be insured rather than relying on the coverage paid for in their own policies of insurance.
>
> [43] In our view, Section 7(3) of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M. 41 and Section 7 of the Family Protection Coverage Endorsement (OPCF-44R) contained in Ms. Loftus's policy support our interpretation. Both of these provisions make it clear that an injured party may resort to the protection or coverage provided only as a matter of last resort. Had the legislature intended a similar result with respect to the uninsured coverage required by Section 265 of the Insurance Act, it could have said so. The relevant provisions read as follows: [Emphasis Added]
>
> Section 7(3) of the *Motor Vehicle Accident Claims Act:*
>
> 7(3) The Ministry shall not pay out of the Fund any amount in respect of a judgment unless the judgment was given in an action brought against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in question and prosecuted against every such person to judgment or dismissal.
>
> Section 7 of the Family Protection Coverage Endorsement:
>
> 7. The amount payable under this change form to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from

....

> (b) the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an injured person.

[25] State Farm submits that the limitations on amounts payable under the OPCF 44R as set out in subsection 7(b) of the Endorsement were not triggered on the facts of *Heuvelman* where there were no persons jointly liable with the Defendant White and therefore no amounts available to *Heuvelman* from "Insurers of persons jointly liable", unlike the case at bar.

[26] I have also reviewed the recent Supreme Court of Canada decision in *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7 which concluded that future CPP disability payments could not be deducted from the Nova Scotia SEF 44 Endorsement, which is similar in wording to the Ontario, as it concluded it was not a policy of insurance. That issue, is of course, distinguishable from the case at bar.

[27] In *Sabean* at para. 25 the court stated the following:

> An insured pays an additional premium for the protection of the excess coverage provided under the Endorsement, which indemnifies the insured for any shortfall in the payment of a judgment for damages against an underinsured tortfeasor: Somersall v. Friedman, 2002 SCC 59 (CanLII), [2002] 3 S.C.R. 109, at paras. 16-19. However, the amount owed under the Endorsement is not necessarily the full amount of the shortfall owed by the underinsured tortfeasor. The terms of the Endorsement provide for specific deductions from the shortfall in order to determine the amount payable by the insurer to the eligible claimant.

[28] The court further stated at para.41 in *Sabean*:

> In sum, with respect to amounts that the eligible claimant is "entitled to recover", cl. 4 (b) specifies nine sources that give rise to deductions from the amount payable by the insurer....

[29] I conclude that Section 4 states that the amount that State Farm is potentially liable to pay its insured under the uninsured and inadequate insurance coverage of the OPCF 44R endorsement is the amount by which that coverage exceeds all other joint motor vehicle liability policies. Therefore, from a preliminary analysis, State Farm is liable for the total of its OPCF 44F coverage of $500,000.00 as there is no other motor vehicle policies of insurance that are jointly liable to its insured.

[30] Under Section 6 of the change form one then calculates the amount the Plaintiff would be eligible to recover from the inadequately insured motorist. I have not been advised in the question before the court as to the amount of the Plaintiff's damages, however, I have been asked to assume they are in excess of "all the collective policy limits" payable to the Plaintiffs. Therefore they must be in excess of $2.2 million dollars based on the facts I am to assume.

[31] Section 6 then instructs that the amount deducted from that amount payable is the aggregate of the amounts referred to in Section 7. The preamble of Section 7 then states that amount payable is the "excess to the amount received by the eligible claimant from any source..." It is agreed that the only subsection applicable, in the case at bar, is Section 7(b). That section calculates the amount of that deduction, "from any source", as the total which the insurers who are jointly liable with the inadequately insured person are responsible to pay to the injured person. It is assumed from the facts presented in this question that the damages to the Plaintiffs are in excess of the limits of all the collective policy limits therefore in excess of $2.2 million dollars. That means, in my view, that State Farm is responsible to pay to their insured's any difference between what they receive proportionately from the two homeowners policies, after all other Plaintiffs claiming from the inadequately insured at fault driver are also proportionately compensated, and their judgment for their damages, up to the limit of $300,000.00.

CONCLUSION:

[32] I would answer the question posed, based on the facts presented for the courts consideration, in the affirmative and State Farm must respond to the claims of the Plaintiffs for the amount of their damages which are in excess of what they receive from the joint tortfeasors insurance policies up to its limits of $300,000.00 under its inadequate insurance coverage.

[33] Counsel agree costs to the successful party should be in the amount of $3,000.00. The Plaintiffs will therefore have their costs in that amount.

Arrell J.

Released: February 3, 2017

CITATION: Myers-Gordon et al. v. Martin et al., 2017 ONSC 872
COURT FILE NO.: CV-13-179
DATE: 2017-02-03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KELLY MYERS-GORDON, a mentally incapable person by her Litigation Guardian, CYNTHIA GORDON,
CYNTHIA GORDON, personally, AMY GORDON, CHRISTY GORDON, STEPHEN MYERS-GORDON and STEPHEN GREGORY MYERS

Plaintiffs

- and –

RANDY MARTIN, KAREN MARTIN, CHRISTINA BEAUREGARD, CODY VAN EVERY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

HSA:mw

Released: February 3, 2017