

CITATION: Ibarra v. Ibrahim, 2016 ONSC 218

COURT FILE NO.: CV-09-385875

DATE HEARD: January 8, 2016

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOSE IBARRA and SANDRA FLORES v. KENEDITH ABDI IBRAHIM and
SAFIYO MAHAMUD ABDI

BEFORE: Master R. Dash

COUNSEL: Eric Zadro, for the defendants and proposed statutory third party

Jamie Min (student-at-law), for the plaintiffs

REASONS FOR DECISION

[1] Zuber & Company LLP (“Zuber”) were appointed by Economical Mutual Insurance Co. (“Economical”) to defend its insureds; the defendants, in this action. Zuber filed a defence, conducted a discovery of the plaintiffs and on December 4, 2015 were successful in obtaining a consent order on motion to compel the plaintiffs to answer undertakings and refusals.

[2] The defendants failed to attend a number of dates for their discovery between December 2014 and April 2015. Initially Zuber were unable to locate the defendants and no response had been received from the defendants to letters sent by Zuber to their last known Toronto address between March 2010 and January 2014. Zuber retained investigators to trace their clients and in February 2014 an address in Quebec was obtained. Correspondence sent between March 2014 and October 2015 was also not responded to including one letter sent by courier and signed for by one of the defendants. Zuber cannot obtain instructions. The solicitor-client relationship has broken down and Zuber is entitled to be removed as lawyer of record.

[3] The motion brought by Zuber includes also relief requested by Economical to be added as statutory third party. Economical has denied coverage to the defendants based on their non-cooperation and instructed Zuber to bring this motion. There is no evidence that Zuber gave any coverage opinion to Economical. They have never received confidential information from the defendants.

[4] Economical, having denied coverage, has satisfied the pre-condition under section 258 (14) of the *Insurance Act* and is entitled to be added as statutory third party. The question is whether Zuber can bring this motion on behalf of Economical and represent them as statutory

third party in light of my decision in *Ho v. Vo*, [2006] O.J. No. 4333 a decision never appealed or directly overruled by subsequent jurisprudence.¹

[5] Nonetheless, in my view it is time to reconsider *Ho v. Vo*. My concern in *Ho v. Vo* was not only that counsel gave a coverage opinion, but that counsel in acting for the statutory third party (“STP”) would be conflicted in acting against their former clients, the defendants, in a situation almost identical to the case before me, other than the coverage opinion – the basis for removal of counsel and appointment of a STP was based on non-cooperation from the insured defendants and like in the matter before me today, counsel had never spoken to their client. My view in *Ho v. Vo* was that in representing the STP they would be putting their client, the insured, in jeopardy, not only for any judgment in excess of the \$200,000 statutory minimum, but also for repayment to the insurer of any settlement or judgment up to the statutory minimum, and in effect would be acting “against” the interest of their former client, (a matter clearly contrary to the Rules of Professional Conduct).

[6] Having reconsidered the matter I am of the view that counsel is not necessarily or automatically conflicted by going off record for the insured defendant and then acting for the insurer as STP. As confirmed in cases such as *Kapileshwar v. Sivarajah*, [2008] O.J. No. 4501 (SCJ – Master) and *Azad v. Dekran*, [2013] O.J. No. 1633, 2013 ONSC 1830 (SCJ) (both cases dealing with the obligations of a statutory third party, but not motions under section 258 (14)), the insurer as STP must act in the best interests of their insured, and they cannot take any position in the action contrary to the interests of its insured in any way. Insured and insurer in its role as STP share a common interest in fighting the insured’s liability as a defendant and in contesting the extent of damages claimed by the plaintiff. The insurer as STP has the same rights as its insured defendant to file a defence, contest liability and damages claimed against the insured, have production and discovery and participate at trial: *Insurance Act* s. 248(15). The action is only to contest the claim between the plaintiff and the defendants, not determine any coverage issues between defendant and his insurer.

[7] Therefore I am of the view that provided that (a) counsel has not given a coverage opinion contrary to the interest of their insured client (the defendant) or (b) received confidential information from the defendant, there is no automatic conflict of interest and counsel may not only be removed as lawyer of record for the defendant, but also act for the insurer, solely in its role as statutory third party.

[8] That is not to say that a conflict may never arise as the action progresses. Should that happen, counsel should immediately remove themselves as lawyer of record for the STP. Of course they cannot consent to any judgment in excess of \$200,000. Further, it means that counsel can never act for the insurer in any subsequent action by the insurer against its insured to recover any judgment or settlement paid out to the plaintiff, as in that case counsel will undeniably be acting against the interest of their former clients, the defendants.

¹ Subsequent to giving my handwritten reasons at the hearing of this motion, I have had the opportunity to review *Xhemajli v. Lockyer*, 2014 ONSC 4039 in which Henderson, J., without reviewing *Ho v. Vo*, allowed counsel to represent the statutory third party in a similar situation and for similar reasons as the matter herein.

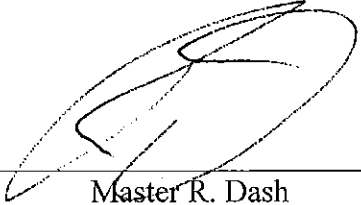
[9] Therefore, I would be prepared to grant Zuber's request to add Economical as a STP provided that Zuber gives an undertaking (a) to immediately remove themselves from the record should a conflict later arise within the confines of the action as between Economical and the defendants and (b) to not represent Economical in any action against the defendants to seek indemnification of amounts paid out under any judgment or settlement.²

ORDER

[10] Order to go as requested paragraphs (a) to (c) of relief requested. Formal order must comply with rule 15.04(4) and include counsel's undertaking in the preamble to the order.

[11] Economical Mutual Insurance Company shall deliver its statement of defence within 20 days.

[12] Affidavit of Kathryn J. Eaton to be sealed.



Master R. Dash

DATE: January 8, 2016

² Mr. Zadro has agreed to provide that undertaking.