

CITATION: Cioffi v. Modelevich et al., 2018 ONSC7084
COURT FILE NO.: CV-16-557302
DATE: 2018/11/22

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ALESSANDRO CIOFFI

Plaintiff

- and -

NATHAN-SYLVESTER-MITCHEL
MODELEVICH, BERNHARD
WAGENKHECHT, AND RBC GENERAL
INSURANCE COMPANY C.O.B. AVIVA
GENERAL INSURANCE COMPANY

Defendants

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) Vadim Kats, for the Plaintiff
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) David Sazant, for the Defendants,
) Modelevich and Wagenkhecht
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) **HEARD:** November 22, 2018
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Spies, J.

ENDORSEMENT

[1] This is a motor vehicle action. The amount in issue is not large but I expect it is important to the defendant insurer. The issue is whether the insurer is required to pay the full cost of a recent mediation or only half of the cost. There is no dispute that s. 258.6(1) of the *Insurance Act* provides that where a plaintiff requests a mediation, the insurer shall pay the full cost. However, there is also no dispute that as a Toronto action, a mediation is mandatory pursuant to Rule 24.1 of the *Rules of Civil Procedure* and that the costs of the mediator are to be shared equally pursuant to s. 4(2) of O.Reg. 451/98 made under the *Administration of Justice Act*.

[2] The plaintiff argues that there is a conflict in the two statutes and that the *Insurance Act* prevails by virtue of *Rule* 1.02, which provides that the *Rules* do not apply if a statute provides for a different procedure.

[3] In this case the plaintiff requested a mediation pursuant to the *Insurance Act* in a letter to counsel for the insurer and referred to that a second time in an email to counsel before the

mediation was scheduled. The insurer did not object or respond that the mediation was not going to proceed under the *Insurance Act*.

[4] In my view there is a conflict between the *Insurance Act* and the *Rules*. Although one could argue that there is not – if one assumes there could be two mediations – one mandatory and one requested, the reality is that the mediation that proceeded in this case will count as the mandatory mediation. The conflict between the two statutes is with respect to the responsibility for costs.

[5] Mr. Sazant argued that the plaintiff's position will result in all plaintiffs proceeding in this fashion and that may be true, but that is only the case for motor vehicle actions where the *Insurance Act* applies.

[6] The clear intention of the *Insurance Act* was to allow a plaintiff to request a mediation to be paid for by the insurer in the hope that the action might be resolved. The policy reasons seem clear – I do not think it is meant to apply only where a plaintiff is impecunious as suggested by Mr. Sazant. Clearly the legislature assumed that in these circumstances the insurer is in a better position to absorb the costs and pay for the costs of the mediation.

[7] The insurer also argued that the motion is frivolous and that this issue could have been dealt with at the end of the action as it was in *Lakew v. Munro*, 2014 ONSC 7316 at para 82.

[8] I disagree. The mediator is entitled to be paid now so it is only fair that who should pay be determined now.

[9] For these reasons an order shall go in accordance with paragraph 1 of the plaintiff's Notice of Motion.

[10] As for costs – the plaintiff filed a cost outline seeking \$7,716.70 on a partial indemnity basis. The insurer's costs on the same basis are only \$2,395.

[11] I find the plaintiff's costs are excessive. Even without deciding whether or not plaintiff's counsel should have cleared the date for this motion with Mr. Sazant, which in my view should always be done absent real urgency, and without deciding whether this motion should have gone before a Master – there was no reason for Mr. Kats – a 19 year call - to prepare for and attend this motion. Given the amount in issue Mr. Silverberg – a 2015 call - should have been the one to attend. I note Mr. Sazant is a 2016 call.

In all the circumstances and in particular considering the reasonable expectation of the parties, I fix the plaintiff's costs of the motion in the amount of \$3,500 all inclusive.

Spies J.

Date: November 26, 2018