

O'Shea v. Co-operators General Insurance Co.

[O'Shea v. Co-operators General Insurance Co.]

78 O.R. (3d) 158
[2005] O.J. No. 4213
Docket: C42399

Court of Appeal for Ontario,
Simmons, Lang and Rouleau JJ.A.
September 27, 2005 (orally)*

Insurance -- Automobile insurance -- Settlement -- Case raising issues relating to interpretation of s. 9.1 of Reg. 664 and issues of credibility concerning effectiveness of service and existence and timing of settlement -- Motion judge erring in finding no genuine issue for trial.

The insured appealed a decision of the motion judge that there was no genuine issue for trial.

Held, the appeal should be allowed.

The case raised issues relating to the interpretation of s. 9.1 of the Automobile Insurance Regulations, R.R.O. 1990, Reg. 664, and the record before the motion judge raised issues of credibility. Given the credibility issues, the motion judge did not have a proper record to interpret s. 9.1, and erred in failing to find a genuine issue for trial.

Rules and regulations referred to

R.R.O. 1990, Reg. 664, s. 9.1

APPEAL from an order of Gates J. (2004), 73 O.R. (3d) 289, [2004] O.J. No. 5202 (S.C.J.) on the basis that there was no

genuine issue for trial.

Joseph J. Masterson, for appellant.

Kadey B.J. Schultz, for respondent. [page159]

[1] Endorsement BY THE COURT:-- This case raises at least two legal issues relating to the interpretation of s. 9.1 of the Automobile Insurance Regulations, R.R.O., 1990, Reg. 664, as amended by O. Reg. 780/93: first, the manner in which the notice required under s. 9.1(2) of R.R.O. 1990, Reg. 664 is to be served in the pre-litigation context; and second, the proper interpretation of the words, "Before a settlement is entered into". In addition, the record that was before the motion judge raised issues of credibility concerning the effectiveness of service in this case and concerning the existence and timing of any settlement.

[2] Given the credibility issues, which could only be determined at trial, the motion judge did not have a proper record to interpret s. 9.1. Accordingly, in all of the circumstances, the motion judge erred in failing to find a genuine issue for trial.

[3] Accordingly, the appeal is allowed and the order of the motion judge is set aside.

[4] The costs of the appeal and of the proceeding below are awarded to the appellant and fixed in the amount of \$5,000 for the appeal and \$7,500 for the motion with both sums inclusive of disbursements and applicable GST.

Appeal allowed.