

**Auciello v. Paul Revere Insurance Co.**

Between  
Vito Auciello, plaintiff, and  
The Paul Revere Insurance Company, defendants

[2001] O.J. No. 1940  
Court File No. 97-CV-132703CM

**Ontario Superior Court of Justice  
Nordheimer J.**

Heard: May 14, 2001.  
Judgment: May 23, 2001.  
(25 paras.)

Counsel:

Samuel S. Marr, for the plaintiff.  
Clive Elkin, for the defendant.

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1 **NORDHEIMER J.**:— The defendant moves, pursuant to rule 49.09 of the Rules of Civil Procedure, to enforce a settlement which stipulated that this action was to be dismissed without costs.

2 From October 1987, the plaintiff was insured under a standard form of disability insurance policy issued by the defendant. The policy was in force from October 1987 until, according to the defendant, it lapsed for nonpayment of premiums in the fall of 1994.

3 The plaintiff was paying his premiums monthly. Apparently he did not pay his September and October 1994 premiums. The defendant sent two letters to the plaintiff advising him of the default but the plaintiff says that he did not receive either of the letters.

4 The plaintiff claims that he first became aware of the lapse of the policy in the early part of March 1995. When he became so aware, he applied for reinstatement of the policy. In his application for reinstatement of the policy, the plaintiff did not state that he was then totally disabled although he now claims that he was. The plaintiff says that his application was in error and that, in fact, he has been totally disabled from November 23, 1994.

5 The plaintiff's application for reinstatement of the policy was denied. This action was commenced on September 25, 1997. In this action, the plaintiff seeks reinstatement of the policy and payment of the disability benefits to which he says that he is entitled since he became disabled.

6 In April 2000, the plaintiff made an assignment in bankruptcy. This fact, however, was not disclosed to the defendant or its lawyers until December 2000. In the intervening period, it appears there were some discussions between the plaintiff, his lawyer and a trustee in bankruptcy as to whether any proceeds from this proceeding would go to the plaintiff directly or whether they would form part of his estate for the benefit of his creditors. Apparently, the plaintiff's lawyer concluded that the proceeds, if any, would go to the plaintiff's estate. He therefore suggested to the plaintiff that the plaintiff cease pursuing his claim. Around this same time, and somewhat confusingly given the alleged value of the plaintiff's claim, it appears that the plaintiff's trustee in bankruptcy also decided that it had no interest in pursuing the claim.

7 In mid-June 2000, the plaintiff sought the advice of another solicitor regarding his case. After discussing matters with that second solicitor, the plaintiff signed a letter directed to his first solicitor, which the second solicitor had prepared, in which the plaintiff provided his instructions that he wished to negotiate a dismissal of this action without costs. The solicitor was also instructed to advise the solicitors for the defendant that the plaintiff was in bankruptcy so that any claim for costs by the defendant would be futile in any event.

8 Thereafter, on June 28, 2000, the plaintiff met with his original solicitor. The solicitor gave the plaintiff a blank authorization and direction to sign. The authorization and direction was prepared in accordance with the plaintiff's written instructions as contained in the earlier letter. The plaintiff left his solicitor's office with the blank authorization and direction. The next day, at his home, the plaintiff signed the authorization and direction and send it back to his solicitor. The authorization and direction stated, in part:

"I, Vito Auciello after discussing this matter thoroughly with Peter Hutcheon on June 28, 2000 hereby authorize and director Peter Hutcheon to follow the written instructions I previously gave to him in my letter dated June 20, 2000 namely to negotiate a dismissal of this matter on a without costs basis.

I fully understand and it has been explained to me that by doing so, I will forfeit my right to proceed against Paul Revere Insurance Company in the future with regard to the subject matter of this particular piece of litigation."

9 Approximately two months later, on September 6, 2000, the plaintiff's solicitor delivered a written offer to settle in accordance with Rule 49 by which the plaintiff offered to settle the action on the basis of a dismissal without costs. It is not apparent from the record why it took two months to prepare and forward this offer. At the same time, it does not appear that the plaintiff's solicitor sent a copy of the offer to settle to the plaintiff, which would have allowed the plaintiff not only to be aware of the contents of the offer to settle but also of the fact that it had been forwarded to the defendant. In any event, in response, on September 28, 2000, the solicitors for the defendant accepted the offer to settle on condition that the plaintiff sign a full and final release. The release was in a standard form and was sent to the plaintiff's lawyer for execution by the plaintiff.

10 On October 2, October 25, and November 22, 2000, the plaintiff's solicitor sent letters to the plaintiff asking him to make arrangements to sign the release. It does not appear that the plaintiff responded to any of these letters until December 8, 2000 when he sent a short letter to his solicitor in which, among commenting on other matters, he concluded:

"I look forward to hearing from you re: trial date."

11 On December 11, 2000 there was a telephone discussion between the plaintiff and his solicitor. On December 12, 2000, the plaintiff's solicitor sent a lengthy letter to the plaintiff in which he said:

"I have to add that my concerns with regard to your ability to give me instructions and to understand our discussions remains as valid today as it was when I first raised it over the summer."

and later:

"Until our conversation yesterday, I was not aware that you were even thinking about the possibility of carrying this matter forward any further given your clear expression of your wishes over the summer."

12 Meanwhile, a Trial Scheduling Court date had been set for December 20, 2000. On December 15, 2000 the solicitor for the defendant inquired of the plaintiff's solicitor as to the state of the release. He was advised that the release had not been signed. Later that day, the defendant's solicitor sent a letter to the plaintiff's solicitor in which the defendant accepted the plaintiff's offer to settle unconditionally. In other words, the defendant accepted the offer in accordance with its terms with no requirement that the plaintiff sign a release. At the time that the offer was accepted by the defendant, it is clear that the offer was still open for acceptance in that there had been no effort by the plaintiff to withdraw the offer.

13 There are two main bases on which the plaintiff attempts to avoid being bound by the settlement. First, it is asserted that the plaintiff was mentally incapable of providing proper instructions to his solicitor. In support of that assertion, the plaintiff points to the fact that in the spring and summer of 2000 he was under severe stress and was suffering from depression which affected his judgment and decision making. The plaintiff was also taking a number of medications at the time. The plaintiff relies on a medical letter from Dr. Golden, who is a psychiatrist. Dr. Golden has been treating the plaintiff since February 7, 1995. His diagnosis is that the plaintiff suffers from a major depressive disorder with significant anxiety symptoms. The plaintiff has been treated with a variety of antidepressants and anxiety medications. In his letter, Dr. Golden concludes:

"In the spring and summer of 2000, Mr. Auciello was under severe stress. He went bankrupt in April 2000 which for him was a severe blow to his self-esteem. He went through an exacerbation of his depression at that time which likely affected his judgment and decision making. People who get depressed are demoralized, think in negative and pessimistic terms and tend to 'give up'. In my opinion, this is what happened to Mr. Auciello in the spring and summer of 2000."

14 While it is clear that a settlement will be enforced even where the solicitor acted without authority, it is equally clear that a settlement will not be enforced where the client is suffering from a disability. In *Scherer v. Paletta*, [1966] 2 O.R. 524 (C.A.) Mr. Justice Evans said, at p. 527:

"A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client." (emphasis added)

15 The term "disability" has a specific meaning under the Rules of Civil Procedure. Rule 1.03 states:

"'disability', where used in respect of a person or party, means that the person or party is,

(a) a minor,

(b) mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person or party has a guardian or not, or

(c) an absentee within the meaning of the Absentees Act;"

16 Section 6 of the Substitute Decisions Act, 1992 states:

"A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

and section 45 states:

"A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

17 In my view, the medical evidence provided through the letter of Dr. Golden falls considerably short of establishing that the plaintiff was suffering from a disability at the time that he provided his instructions to his lawyer to settle this claim and from which instructions the offer to settle eventually emanated. Further, in this regard, I would point out that the evidence of Dr. Golden only relates to the spring and summer of 2000, whereas it was not until December 8, 2000, at the earliest, that the plaintiff raised any issue with his lawyer that could be taken as indicating in any fashion that he no longer wished to settle his claim.

18 I should also mention that the plaintiff's solicitor took extra steps to ensure that he had the plaintiff's instructions clear. He not only had the letter which the plaintiff had sent him after consulting with another lawyer, but he also prepared a written authorization and direction which the plaintiff took away with him. It was not until the next day that the plaintiff executed the authorization and direction and returned it to his solicitor. It is also apparent that the plaintiff's solicitor had insisted that the plaintiff bring someone with him to their meeting to talk about the settlement instructions to ensure that the plaintiff focused on the issue. It is difficult to see how much more the plaintiff's solicitor could have done to ensure that the instructions he received reflected the plaintiff's true intentions. The first ground upon which the plaintiff seeks to avoid the settlement therefore fails.

19 The other ground upon which the plaintiff relies is the residual discretion of the court not to enforce a settlement. In *Milios v. Zagas* (1998), 38 O.R. (3d) 218 (C.A.), Osborne J.A. emphasized the words, found in the quotation from *Scherer v. Paletta*, supra which I have set out above, that the enforcement of a settlement is always "subject to the discretionary power of the Court". Mr. Justice Osborne went on to say, at p. 223:

"In determining whether to enforce a settlement under rule 49.09 all of the relevant factors disclosed by the evidence must be taken into account."

20 Mr. Justice Osborne then concluded, at p. 224:

"In addition to over-emphasizing the fact that the plaintiff's acceptance was clear and under-emphasizing the evidence of mistake, I think that the motions judge erred by not taking into account manifestly important factors, including:

- since no order giving effect to the settlement had been taken out, the parties' pre-settlement positions remained intact;
- apart from losing the benefit of the impugned settlement, the defendant will not be prejudiced if the settlement is not enforced;
- the degree to which the plaintiff would be prejudiced if judgment is granted in relation to the prejudice that the defendant would suffer if the settlement is not enforced;
- the fact that no third parties were, or would be, affected if the settlement is not enforced.

When all of these relevant factors are taken into account and weighed, I do not think that the acceptance of the defendant's settlement offer should be enforced."

21 The four factors which Mr. Justice Osborne refers to have equal application to the case before me. Here the defendant's pre-settlement position remains intact, there is no evident prejudice to the defendant if the settlement is not enforced, there is a significant prejudice to the plaintiff in that he will lose his opportunity to seek payment for past disability benefits (which the plaintiff estimates is in excess of \$400,000) as well as the benefit of the policy going forward and, lastly, there are no third parties affected.

22 In addition to those factors, I also have the evidence that the plaintiff has suffered from some psychological problems for which he continues to be treated. While, as I have already said, those problems are insufficient to establish that the plaintiff was under a disability at the time he gave his instructions to make the settlement offer, they do provide some evidence that the plaintiff was suffering from impaired decision making, the actuality of which is reinforced by the fact that the plaintiff's former solicitor was obviously concerned enough about the ability of the plaintiff to focus on and make rational decisions regarding the litigation that he insisted that the plaintiff be accompanied by another person at meetings where the settlement issue was discussed.

23 Finally, I am most concerned about the events that took place in December 2000 to which I have referred above. It appears to me that it was fairly clear at the point of the telephone conversation between the plaintiff and his solicitor on December 11th that there was a real issue as to whether the plaintiff wanted to settle his claim. It must be remembered that at this point there had not been an unconditional acceptance of the plaintiff's offer by the defendant. It seems to me that in these circumstances the course of prudence would have been for the plaintiff's solicitor to contact the defendant's solicitors and advise them that there was a problem with his instructions, and therefore with the settlement proposal, and that the whole matter had to be put on hold until the situation was clarified. If that had happened, the ability of the defendant to forward an unconditional acceptance of the outstanding offer would have been effectively neutralized. A client is, after all, entitled to change his or her mind about a settlement proposal at least up until the time that it is formally accepted.

24 For all of these reasons, I have concluded, with some reluctance I will say, that this is one of those rare cases where the court should exercise its discretion not to enforce the settlement. I say with reluctance because I believe that the defendant entered into what it thought was a bona fide settlement and is now being forced back into litigating this claim. However, there is simply too much uncertainty in the events surrounding this settlement to permit me to comfortably, and with the requisite degree of certainty, decide that the plaintiff's claim should be terminated on the basis of the settlement offer made and accepted.

25 The defendant's motion is therefore dismissed. Given that the problems surrounding the settlement emanated entirely from the side of the plaintiff, I would not be inclined to award any costs of the motion. However, I am prepared to receive written submissions on the issue if either party does not agree with that proposed result. The plaintiff's submissions are to be filed with 10 days of the release of these reasons and the defendant's response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. I would appreciate it if counsel could keep their submissions brief.

NORDHEIMER J.

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