



FSCO A05-000498

BETWEEN:

SERGIY ZAPISNOY

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

DECISION ON A MOTION TO DISMISS

Before: Denise Ashby

Heard: April 25, 2006, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: No one appeared for Mr. Zapisnoy
Ryan M. Naimark for Certas Direct Insurance Company

Issues:

The Applicant, Sergiy Zapisnoy, was involved in a motor vehicle accident on March 10, 2003. He applied for statutory accident benefits from Certas Direct Insurance Company (“Certas”), payable under the *Schedule*.¹ Certas denied benefits on the basis that Mr. Zapisnoy was not involved in an “accident” as defined by the *Schedule*. The parties were unable to resolve their disputes through mediation, and Mr. Zapisnoy applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issues in this motion are:

1. Should Mr. Zapisnoy's claim for benefits be dismissed without a hearing or be deemed to have been withdrawn?
2. Is Certas entitled to its expenses pursuant to subsection 282(11) of the *Insurance Act*?
3. Should the firm of Mazin & Rooz be provided with a copy of this decision notwithstanding it was removed as solicitors of record?

Result:

1. Mr. Zapisnoy's claim is deemed withdrawn.
2. Certas is entitled to its expenses pursuant to subsection 282(11) of the *Insurance Act*. An expense hearing will be held at a date and time to be determined.
3. A copy of this decision shall be provided to Mr. Alon Rooz of the firm of Mazin & Rooz.

EVIDENCE AND ANALYSIS:

Chronology of Proceedings:

On March 14, 2003, Certas received an Application for Accident Benefits dated March 12, 2003, signed on behalf of Mr. Zapisnoy by Mr. Rooz, Barrister and Solicitor.² On May 6, 2003, Certas

² Exhibit 1, Respondent's Motion Record, Tab 2(A), page 7 of 7

issued an Explanation of Benefits (OCF-9/59) denying Mr. Zapisnoy's claim for benefits on the basis that he had not been involved in an accident as defined by the *Schedule*.³

In July 2003, the Applicant's claims were not resolved through mediation. The Commission received an Application for Arbitration, signed by Mr. Rooz, on March 14, 2005.⁴

On September 1, 2005, a scheduled pre-hearing was adjourned to January 30, 2006 because Mr. Zapisnoy was not in attendance.⁵ On September 17, 2005, Mr. Rooz wrote to the Commission seeking to be removed as solicitor of record.⁶ On December 2, 2005, an Order was granted removing the firm of Mazin & Rooz.⁷ On January 30, 2006, the pre-hearing was resumed before me. In a letter dated January 30, 2006, I ordered:

1. Certas shall bring a motion in the proper form pursuant to Rule 67 of the *[Dispute Resolution Practice Code]*.
2. Certas shall personally serve the motion materials on Mr. Zapisnoy at any address of which Certas has had knowledge since its receipt of the Application for Mediation.
3. In the event that Certas effects service of the Notice of Motion and related materials on Mr. Zapisnoy, he shall have 10 days from the date upon which service was effected to contact the Commission to set a date for filing of his response to the motion and a date for the hearing of the motion before me and its forum.
4. In the event, Certas is unsuccessful in effecting personal service on Mr. Zapisnoy then Certas may contact the Commission to confirm a date for the motion before me and its forum.⁸

³ Ibid, Tab 2(D), page 1 of 4

⁴ Ibid, Tab 2(E), page 5 of 16

⁵ Ibid, Tab 2(I)

⁶ Ibid, Tab 2(J)

⁷ Ibid, Tab 2(L)

⁸ Ibid, Tab 2(N)

On March 29, 2006, Winston Parchment deposed that he had served a copy of Certas' Motion Record on "*Alex, Uncle a person who appeared to be an adult member of the same household in which the defendant is residing....*"⁹

On April 11, 2006, Certas filed the affidavit of Donna M. Bruce with the Commission. She spoke with Mr. Zhytko, Mr. Zapisnoy's uncle, in Ukrainian. At paragraph 6, Ms Bruce states:

6. I am advised by Mr. Zhytko and do verily believe when he advised me that his nephew, Sergiy Zapisnoy, returned to the Ukraine in either April or May of 2003. Mr. Zapisnoy did not like Canada and therefore returned to his parents in the Ukraine, and is no longer living in Canada.¹⁰

I am satisfied that Certas complied with paragraphs 1 and 2 of my January 30, 2006 order. As a consequence, I heard the motion pursuant to paragraph 4 of that order.

The Law:

Certas seeks an order that the proceeding either be dismissed without a hearing pursuant to Rule 68.1 or be deemed withdrawn pursuant to Rule 70.3 of the *Code*.

Rule 68.1 provides:

- 68.1 Subject to **Rule 68.2**, an adjudicator may dismiss a proceeding without a hearing where the proceeding is frivolous, vexatious or is commenced in bad faith.

Rule 68.2 requires the adjudicator to deliver written notice to all parties of the intention to dismiss pursuant to Rule 68.1. Rule 68.3 makes provision for a party to object to the dismissal.

⁹ Exhibit 2, Affidavit of Service, sworn March 30, 2006

¹⁰ Exhibit 4, Affidavit of Donna-Marie Bruce, sworn April 11, 2006

Rule 70.3 provides:

- 70.3 Where a party does not agree to the withdrawal, an adjudicator may:
- (a) permit the withdrawal on such terms and conditions as he or she considers just;
 - (b) award expenses to either party as permitted by **Rule 75** and following.

In *Lyashov and ING Insurance Company of Canada*, (FSCO A04-001877, August 30, 2005), I declined to dismiss that proceeding without a hearing because I was of the opinion that the facts in that case did not meet the threshold of being frivolous, vexatious or commenced in bad faith. I chose to follow a line of arbitral law which relied on the provisions of Rule 70.3 to deem an application withdrawn. I awarded ING its expenses but declined to order the firm of Mazin & Rooz to pay those expenses. I concluded that there was no evidence that the firm was acting beyond the normal scope of counsel retained to represent a client.

Analysis:

Mr. Zapisnoy's Application for Arbitration dated March 8, 2005, claimed medical benefits and examination expenses.¹¹ His uncle, Mr. Zhyenko, advised Ms Bruce that Mr. Zapisnoy had returned to the Ukraine in the spring of 2003. Therefore, he may not have had actual knowledge of the nature and scope of the Application filed in March 2005.

I question how the firm of Mazin & Rooz was able to obtain instructions from Mr. Zapisnoy when he had returned to the Ukraine almost two years prior to the Application being filed. As the firm had been removed from the record it was not served with the Motion Record and a representative did not appear before me to clarify this discrepancy. I am of the opinion that the firm should be made aware of my concerns. Therefore, the Commission will provide a copy of this decision to the firm of Mazin & Rooz.

¹¹ Exhibit 1, Respondent's Motion Record, Tab 2(E), pages 8 and 9 of 16

In the absence of evidence of Mr. Zapisnoy's actual knowledge of the Application, I am unable to find that Mr. Zapisnoy made an application which was frivolous, vexatious or was commenced in bad faith. However, I am satisfied that Mr. Zapisnoy does not intend to pursue this claim. Therefore, I find it reasonable to deem the Application to have been withdrawn pursuant to Rule 70.3.

CONCLUSION:

The application for arbitration is deemed to be withdrawn because the claim has not been pursued.

EXPENSES:

At the motion, Certas sought its expenses and requested an expense hearing in the event I determined that it was entitled to an award. I exercise my discretion to award Certas its expenses. An expense hearing shall be held at a date and time to be determined.

Denise Ashby
Arbitrator

May 10, 2006

Date



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BETWEEN:

SERGIY ZAPISNOY

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Zapisnoy's claim is deemed withdrawn.
2. Certas is entitled to its expenses pursuant to subsection 282(11) of the *Insurance Act*.
An expense hearing will be held at a date and time to be determined.
3. A copy of this decision shall be provided to Mr. Alon Rooz of the firm of Mazin & Rooz.

Denise Ashby
Arbitrator

May 10, 2006

Date