

**CITATION:** Ruddell v. Gore, 2018 ONSC 3932  
**COURT FILE NO.:** CV-17-578719  
**DATE:** 20180622

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** MICHAEL RUDDELL and CAROLINE METCALFE, Plaintiffs/Moving Parties

**AND:**

GORE MUTUAL INSURANCE CO. and ALLSTATE INSURANCE COMPANY OF CANADA, Defendants/Responding Parties

**BEFORE:** Justice S. Nakatsuru

**COUNSEL:** *Deanna Gilbert*, for the Plaintiffs/Moving Parties

*David Murray*, for the Defendant/Responding Party Allstate Insurance Co. of Canada

*C. Kirk Boggs*, for the Defendant/Responding Party Gore Mutual Insurance Co.

**HEARD:** May 24, 2018

**ENDORSEMENT**

[1] The plaintiffs have brought an action under s. 258(1) of the *Insurance Act*, R.S.O 1990 c. I.8 for the payment of insurance monies to satisfy a \$300,000 (plus post-judgment interest) balance owing on a judgment dated June 16, 2017. This judgment arose from a settlement for injuries suffered by the plaintiffs in a motor vehicle accident in 2008. The issue before me is which insurer, Gore Mutual Insurance Company (“Gore”) or Allstate Insurance Company of Canada (“Allstate”) should pay. All parties agree that this can be determined on this summary judgment motion.

[2] Alan Stewart was driving an automobile in which Mr. Ruddell was a passenger. He was involved in a single car accident in which Mr. Ruddell sustained injuries. Gayle Bass, the mother of Mr. Stewart, was the owner of the car which was insured by Gore. The plaintiff held their own policy of automobile insurance with Allstate. The determination of this motion rests upon whether or not Gore’s insured are found to have breached their insurance policy as alleged and if so, whether they are entitled to relief from forfeiture.

[3] The plaintiffs take no position on this motion. Gore argues it is Allstate who must pay the judgment since the plaintiffs are entitled to recovery from their own insurer. Allstate argues that Ms. Bass is entitled to the coverage she paid for.

[4] Gore argues that Mr. Stewart and Ms. Bass breached their insurance policy by failing to cooperate with Gore in defending the action brought by the plaintiffs. Section 5(3) of the statutory conditions prescribed under the *Insurance Act* states:

The insured shall, whenever requested by the insurer, aid in securing information and evidence and the attendance of any witness and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action...

[5] Allstate responds that while Gore can establish Mr. Stewart's breach of his obligation to cooperate, the same cannot be said of Ms. Bass, the policy holder. Mr. Stewart was clearly a key potential witness for Gore. Mr. Stewart eventually could not be located and regardless, his assistance was not to be forthcoming. The material assistance that Ms. Bass could have provided to Gore was information about the whereabouts of her son. Over the passage of time, Gore lost contact with Ms. Bass despite Gore's efforts to locate her.

[6] In my view, Gore has failed to establish Ms. Bass's breach of the policy. I have come to this conclusion for the following reasons. The history of Ms. Bass's cooperation and the efforts to locate her are important:

- Following the accident, Ms. Bass cooperated fully with Gore and their claims adjuster. On July 3, 2008, she gave the adjuster a signed statement outlining her information about her son being in possession of the car at the time of the accident with her consent. In that statement, she advised the adjuster that her permanent residence at 8868 Highway 26 in Wasaga Beach had been sold with the closure date July 25, 2008. She was temporarily residing at 3991 Gertrude Street in Verdun. In that statement, she advised the adjuster of the various places where her son resided, that her son was a rigger in the entertainment industry, and he would work at different sites.
- On July 17, 2008, when Mr. Powell, an independent adjuster was unable to contact Mr. Stewart, Ms. Bass provided him a phone number she had for her son which was a theatre in Niagara Falls where he had worked. In a report dated December 9, 2008, Mr. Powell outlined his failed efforts to locate Mr. Stewart. He also noted that Ms. Bass had further told him that she did not know where her son was working but provided another phone number that went to a voicemail of a female.
- On July 29, 2010, Gore obtained a statement of claim issued by the plaintiffs. A Claims Specialist for Gore, Ms. Jennifer Smith, received updated contact information for the insured from Spriggs Insurance Brokers. She called Ms. Bass and advised her what to do in the event she was served with the statement of claim.
- On August 18, 2010, Ms. Bass was served with a statement of claim. The affidavit of the process server advised that it was left with an Yves Tremblay, an adult member of the resident in which Ms. Bass resided, which was at 323 chemin du Lac-Clair, Sainte-Marguerite-du-Lac-Masson, Quebec.

- On September 20, 2010, Ms. Smith spoke to Ms. Bass by phone and Ms. Bass confirmed that she had been served with the statement of claim. On the same day, Ms. Smith wrote to Ms. Bass at the Sainte-Marguerite-du-Lac-Masson address, advising her that the plaintiff's claim was over the limit of her coverage, that she should get her own independent legal representation to represent her interests beyond her policy limits, of her obligation to cooperate with the defence in the matter with Gore's lawyers, and any failure to cooperate may disentitle her to the benefits of her policy.
- On January 17, 2011, the lawyers retained by Gore to defend Ms. Bass wrote to her at the Wasaga Beach address, advising her that they were retained and wanted her cooperation in the defence. The next attempt to contact Ms. Bass was on September 6, 2011, when counsel had not heard back from Ms. Bass and they were trying to schedule examinations for discovery. Counsel received contact information from a Gore representative regarding the Sainte-Marguerite-du-Lac-Masson residence. When the telephone number associated with that address was called, the law firm was advised that Ms. Bass no longer lived there and information about her current whereabouts was not provided.
- On September 12, 2011, counsel sent a letter to Ms. Bass at the Verdun address although this was already known as a temporary address of hers. This letter was returned "moved address unknown". An MTO search showed the Wasaga Beach address and that Ms. Bass's driver's licence had expired on August 31, 2009. A skip tracer was retained but the skip tracer was told that Ms. Bass's last known address was the Verdun address and not the Sainte-Marguerite-du-Lac-Masson address. In a report dated May 21, 2012, they reported they could not locate a current address for Ms. Bass and that the Verdun address no longer belonged to Mr. Stewart's prior common-law wife. June 13, 2013, new counsel was retained to represent the insured. He wrote to Ms. Bass at the Verdun address. November of 2013, the motion to add Gore as a Statutory Third Party was sent to the Verdun and Wasaga Beach address. On November 29, 2013, a Master's order was obtained adding Gore as a Statutory Third Party and this was mailed to the Wasaga Beach and Verdun addresses. July 9, 2015, counsel again mailed motion materials to the Wasaga Beach and Verdun addresses. October 1, 2015, the skip tracer was again retained to locate Ms. Bass but they were again told only about the Wasaga Beach and Verdun addresses. They could not locate her and advised those addresses were no longer current. In October, counsel sent the same motion material to the Verdun and Wasaga Beach addresses. On December 16, 2015, counsel served Ms. Bass with the Master's order at the same addresses. December 17, 2015, counsel served Ms. Bass with a mediation memorandum at the same addresses. February 18, 2016, Gore's Statement of Defence and Jury notice was served on Ms. Bass at the same addresses.
- On October 13, 2016, an examination for discovery of the Allstate representative was conducted. That representative advised that they had tried to locate Ms. Bass. The investigator retained had spoken with a Gale Wylie aka Gayle Bass in person on October 2, 2014 and that she was residing at 12 Mill Street, Unit 2, Orangeville, Ontario. She advised that she spent most of her time in the Laurentians in Quebec although no specific address was obtained. The investigator also spoke to Ms. Wylie again on October 24,

2014. This investigator also obtained further information once no one returned messages left on voicemail that Ms. Wylie spends her time in Quebec but the investigator could not obtain another contact information.

[7] Looking at this history and the evidence filed, I conclude that Ms. Bass did not breach her obligation to cooperate with Gore. When first contacted by Gore or their representatives, she cooperated fully, providing a statement, and giving particulars about herself and her son. She continued providing information about the whereabouts of her son to Mr. Powell. It is important to recognize that Ms. Bass herself had little information to give that could assist in their defence of the action beyond assisting Gore in finding Mr. Stewart. When asked to do so, she did provide that information. There is nothing in the evidence to suggest that Ms. Bass was acting in concert with her son, encouraged him not to cooperate, or failed to assist Gore to locate Mr. Stewart. Mr. Stewart's actions do not touch or reflect upon Ms. Bass's cooperation. In the last contact with Ms. Bass in September of 2010, she was not asked about any information regarding her son's whereabouts. Given the circumstances of what appears to be Mr. Stewart's employment and what appears to be a peripatetic lifestyle, it is not unreasonable that Ms. Bass could not assist Gore any more than she did.

[8] However, Ms. Bass could not be found after September of 2010. I do not wish to be critical of Gore, counsel, or others who thereafter looked for Ms. Bass, but there were a series of obvious errors made in trying to locate her. Firstly, counsel waited some 4 months after the letter of September 20, 2010, was sent to her at the Sainte-Marguerite-du-Lac-Masson to try and reach her. It was sent to the wrong address. Then it was not until some 9 months after that when counsel received no reply that another attempt to contact her was made. The letter was again sent to the Wasaga Beach address that Gore knew was sold over a year before. Not surprisingly, she could not be located. Thereafter, for some reason that escapes me, any further effort to contact her or serve her with documents, were consistently sent to the Wasaga Beach or Verdun addresses where it was clear and apparent to everyone dealing with the file Ms. Bass no longer lived. No one seemed to have thought it might be helpful to try and make more inquiries directed to the Sainte-Marguerite-du-Lac-Masson address which was actually her last known address. Finally, the evidence does not establish that Ms. Bass was somehow evading process or trying to hide from those responsible in litigating the lawsuit. This is made apparent by the fact that Allstate was able to locate her in October of 2014 and speak with her. When contacted again, she cooperated.

[9] I appreciate that in the letter of September 20, 2010, she was asked to advise Gore if she changed her address. However, this one request in the context of the whole of the history and circumstances of Ms. Bass's cooperation and the failures to try and locate her, does not meaningfully advance Gore's case.

[10] I find that the evidence falls significantly short of establishing that Ms. Bass breached s. 5(3). In so concluding, I have considered the case law presented to me but this is essentially a determination based upon case-specific facts.

[11] As a result of this finding, there is no need to address the issue of relief from forfeiture. Were it necessary to do so, given the minor nature of any possible breach of the policy, I would have granted relief from forfeiture.

[12] Thus, judgment to go accordingly. The plaintiffs are entitled to recover their judgment from Gore.

[13] If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). Allstate and the plaintiffs shall file within 20 days of the release of these reasons. Gore shall file within 10 days thereafter. There will be no reply submissions without leave of the court.

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JUSTICE S. NAKATSURU

**Released:** June 22, 2018.