

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JUDY DICK

Plaintiff

-and -

ING/HALIFAX INSURANCE COMPANY,
and SUE CLAYTON

Defendants

)
)
) Mr. Paul S. Miller, Esq., for
) the Plaintiff
)
)
)
)
)
) Mr. Eric K. Grossman, Esq.
) and Mr. Ryan Naimark, Esq.,
) for the Defendant(s)
) Ing/Halifax Insurance
Company, Shelley MacDonald,
Cindy Kirmier and Sue Clayton
)
)
) HEARD: July 3, 2002
)

2002 CanLII 8516 (ON S.C.)

FESTERYGA J.

ENDORSEMENT

Background

- 2. I am the case management judge of the following actions under Rule 37.15.
Glover v. Pafco et al, Court File No.: 00-1531.
Fraser-Rolson v. Pafco et al, Court File No.: 00-2085.

Fraser-Rolson v. Pafco et al, Court File No.: 00-492.

Dick v. Ing/Halifax et al, Court File No.: 01-3307.

Dick v. Ing/Halifax et al, Court File No.: 00-439.

Nogra v. Allstate, Court File No.: 00-474.

Young et al v. Pafco, Court File No.: 00-2682.

Young et al v. Pafco, Court File No.: 01-1849.

Glover v. Pafco, Court File No.: 5325/98.

3. Several telephone conferences have been held and in one of them I set aside May 29 and 30 for the return of the Summary Judgment motions, in all the above actions, however, those two dates had to be cancelled since counsel were not ready.
4. To expedite matters, on May 17th, 2002 pursuant to a case conference held on the same day, I set July 3rd, 2002 for one day to hear the Summary Judgment motions in Dick v. Ing/Halifax, Court File No.: 01-3307 and 00-439. I also ordered that all matters with respect to those two files to be completed before the return of those motions.
5. A motion was brought before me returnable July the 3rd, 2002 by solicitors for the plaintiff, requesting an order to compel the defendant to furnish answers to refusals given at the cross-examination of James Kempf forthwith and for an order adjourning the motions for Summary Judgment if the court ordered the said refusals to be answered. I dismissed that motion for the reasons endorsed on the plaintiff's motion record.
6. On the morning of July the 3rd, 2002 I was advised by counsel for the plaintiff that in action 00-439 the claims against McLarens Toplis Canada and Susan Dearden had been resolved.
7. The Statement of Claim in Court File No.: 00-439 was issued on the 29th of February, 2000 and the Statement of Claim in Court File No.: 01-3307 was issued on the 12th of February, 2001.
8. In the action commenced in Court File No.: 01-3307 the defendants ask for an order dismissing the action on the ground that other proceedings are pending in Ontario between essentially the same parties in respect to the same subject matter and in the alternative, they ask for a Summary Judgment dismissing the plaintiff's claim against the defendant, Sue Clayton.

9. In the earlier action, Court File No.: 00-439 the defendants ask for a Summary Judgment dismissing the plaintiff's claim against the defendants', Shelley MacDonald and Cindy Kirmier.

Multiplicity of proceedings

10. Both these actions are for accident benefits that the plaintiff alleges is owing to her under an insurance contract with Ing/Halifax Insurance Company. There are also claims against the employees of the insurance company for tortious acts. I am of the view, that this is a situation where a plaintiff, with ingenuity, has dressed the action to make it look like a tort case, when it is clear that it is only a case where there may be a breach of contract.
11. The plaintiff should not have issued the second claim on the 12th of February, 2001 bearing file number 01-3307, but merely amended file number 00-439 issued on the 29th of February, 2000. In my view, the same evidence would be needed to support the issues in both cases. See Canam Enterprises Inc. v. Coles [2000] 51 O.R. (3d) 481 (Ont. Ct. App.)
12. Action number 01-3307 represents a multiplicity of legal proceedings and shall be avoided, pursuant to Section 138 of the Courts of Justice Act. I find that it is an abuse of process.

Summary Judgment Dismissing the Claims Against the Individual Defendants

13. The task before me, in ruling on a motion for Summary Judgment, is never to assess credibility, weigh the evidence, or find the facts. Instead, my role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to the material facts requiring a trial. The evaluating of credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact. See Aguonie v. Galion Solid Waste Material Inc. (1998) 38 O.R. (3d) 161 at p. 173 per Borins J. (ad hoc) as he then was.
14. Justice Borins went on to point out that Rule 20.04(4) permits me to determine a question of law and grant judgment accordingly where I am satisfied that the only genuine issue is a question of law.
15. Later on at page 174 he points out that it must be clear to me that it is proper to deprive the plaintiff of her right to trial.
16. He makes an interesting comment that "Summary Judgment, as valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to nor can it deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists material to the claim or defence which is within the traditional province of a

trial judge to resolve”. I am satisfied the actions against the personal defendants are “sham claims”.

17. I am satisfied that the threshold issue has been satisfied by the defendants and there is no genuine issue for trial in these matters. I also find that the plaintiff has failed to establish her claim as being one with a real chance of success. See Guarantee Co. of North America v. Gordon Capital Corp. [1999] SCJ No. 60 and Hercules Management Ltd. v. Ernst Young [1997] 2 SCR p.165.
18. I am not satisfied that any of the employees did anything outside of their scope of their employment which could be remotely described as independent actionable wrongs. I find that there is no action in law against them.
19. The pleadings in both of these cases appear to be computer-generated on a program that would print allegations with little or no factual basis.
20. Mr. Justice Coe, when discussing these pleadings, put it very succinctly in his endorsement of September 25th, 2001 as follows, "remarkably bland, unspecific and symmetrical, with respect to the alleged personal misconduct against the personal defendant employees in the various actions."
21. I agree with counsel for the defendants that counsel for the plaintiff has used the “scatter gun approach” in naming personal defendants. A glaring example of this approach is naming Shelly MacDonald who was a secretary at all material times and not a claims adjuster.
22. I do not find it appropriate to draw an adverse inference from the fact that affidavits in this motion were not filed on behalf of the individual defendants. Mr. James Kempf, swore that he was a unit manager with Ing/Halifax Insurance Company overseeing the file pertaining to the plaintiff. Relevant facts could have been obtained through him so that the plaintiff could “put her best foot forward”, since she has little or no recollection of her dealings with the personal defendants.
23. The claims in actions 00-439 and 01-3307 against Shelly MacDonald, Cindy Kimier and Sue Clayton are therefore dismissed.

Conclusion

24. 1. Action number 01-3307 is dismissed.
25. The actions against Shelley MacDonald and Cindy Kirmier in action number 00-439 and against Sue Clayton in action number 01-3307 are dismissed.

Costs

26. I may be spoken to with respect to costs.

FESTERYGA J.

Released: July 8, 2002