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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MATO GOLIC v. ING INSURANCE COMPANY OF CANADA

BEFORE: M.G.J. QUIGLEY J.

COUNSEL: David B. Hayward, for the Plaintiff

Eric K. Grossman, for the Defendant

HEARD: September 10, 2008

E N D O R S E M E N T

[1] On this motion, originally returnable over a year ago on December 7, 2007 and heard before me on September 10, 2008, the plaintiff, Mato Golic, seeks an order permitting him to amend his Statement of Claim against the defendant insurer, ING. The plaintiff's claims arise out of injuries he suffered in a motor vehicle accident that occurred more than 13 years ago, in 1995. If permitted, the Amended Statement of Claim would allow Mr. Golic to claim Income Replacement Benefits and/or Other Disability Benefits and/or Caregiver Benefits from the insurer.

[2] This is not the first occasion that Mr. Golic has either claimed or been paid benefits arising out of the injuries he sustained in that accident. ING's predecessor company, Guardian Insurance Company of Canada ("Guardian"), paid Other Disability Benefits to Mr. Golic up until January 31, 1997 when payment of those benefits was terminated by the insurer. Normally, the two year limitation period in section 281(2) of the *Insurance Act* would have commenced to run with respect to the commencement of new claims when the insurer wrote to advise Mr. Golic of the termination of benefits. However, Mr. Golic claims that the insurer's January 23, 2000 letter that advised in great

detail of the insurer's decision to terminate and not reinstate benefits did not trigger the running of the limitation period. He says the insurer's failure to fully explain the remedies available to him arising out of that decision, and the procedures applicable to those remedies as stipulated in his *Statutory Accident Benefits Schedule* (the "*Schedule*") and ss. 279 to 283 of the *Insurance Act*, prevents the applicable two year limitation period from commencing to run. He relies on the decision of the Supreme Court in *Smith v. Co-Operators General Insurance Co.*

[3] Since he first made claims in 1995, Mr. Golic has participated in at least three separate mediations of essentially the same claim, each time represented by counsel. Mediation is one of the alternative procedures that are described in the *Insurance Act* provisions and which are available to an insured whose benefits have been terminated. Regardless of these admitted facts, Mr. Golic says that the insurer failed to provide him with a layman's explanation of the procedures and relief available to him after the insurer terminated his benefits. He says that technical failure necessarily prevented the limitation period from commencing to run, and thus permits his present claim for an amended Statement of Claim to be accepted.

[4] The sole issue on this motion is whether that claim correctly states and relies upon our law on this subject, whether the limitation period has expired, and whether the plaintiff's request to be permitted to amend his Statement of Claim ought to be permitted in these circumstances.

Background

[5] Mr. Golic suffered injuries in a motor vehicle accident that occurred on August 26, 1995. He applied for *Statutory Accident Benefits* from Guardian as a result of those injuries. At the time he submitted that application, he advised that he was unemployed

and had not worked in the past three years. He claimed to be the caregiver for his two young sons, Robert and Marco. On January 4, 1996, he was advised that he was eligible for some form of weekly disability benefit. He was also told that the insurer must receive confirmation of the type and amount of benefits he was receiving from other sources, such as Workers' Compensation and Canada Pension Plan, and must also obtain details of his normal life activities prior to the loss. Guardian received information to the effect that Mr. Golic was significantly disabled and in receipt of both a CPP disability benefit and Workers' Compensation benefits as of August 26, 1995 when the accident occurred, so it requested particulars of those payments.

[6] Mr. Golic has been represented by a succession of lawyers since the outset of his claim. From September 1995 until May of 2006, apart from a six month period between November 1999 and March 2000 when he was self-represented, Mr. Golic has been represented by five or six different lawyers, depending how one counts, not including his representation by his current counsel which commenced in May of 2006. Although represented by counsel, he did not take any steps to advance a claim for weekly disability benefits under provisions of the *Schedule* (*Accidents between January 1, 1994 and October 31, 1996*) until he advanced an application for mediation before the Ontario Insurance Commission (now the Financial Services Commission of Ontario), claiming weekly disability benefits – other disability benefits. The nature and focus of his dispute with the insurer is evident from his application for mediation. It states that the insurer believed that his problems pre-existed the 1995 accident.

[7] The December 5, 1997 decision of the mediator reflects that Mr. Golic's entitlement to a weekly disability benefit was mediated and failed. Thereafter, Mr. Golic submitted another application for mediation, claiming, among other benefits, entitlement to "other disability benefits – entitlement past 104 weeks". However, the report of the

mediator following this second mediation shows that this claim for mediation also failed. Mr. Golic's potential entitlement to a weekly "other disability benefit" was raised again in 1998. It was discussed at a third unsuccessful private mediation that was arranged between the parties in an effort to resolve the accident benefits and tort claims allegedly arising as a result of the injuries he sustained in the 1995 accident.

[8] Following that third mediation and subsequent negotiations, a series of communications passed between Guardian's counsel and Mr. Golic's counsel from August until December of 1998. In a letter dated December 18, 1998, Guardian's counsel advised that the insurer was considering making a lump sum payment reflecting retroactive attendant care claims for some period of time following the accident. Guardian's counsel wrote again to Mr. Golic's counsel on January 18, 1999, making a unilateral, retroactive payment of weekly or other disability benefits. He was paid a total of $13,505 for 73 weeks at $185 per week. This payment was made without requiring Mr. Golic to sign a full and final release in respect of his weekly benefits.

[9] A new lawyer retained by Mr. Golic on August 3, 1999 wrote to counsel for Guardian advising that he had been retained. He canvassed dates for a settlement meeting. He also enclosed a letter dated July 13, 1999, from a Mr. Alphons Henke, a shop foreman/welding supervisor, confirming that he had made an offer of employment to Mr. Golic with SOS Customer Services Inc. effective September 15, 1995, only a month after the accident. Not surprisingly, Guardian made efforts to confirm further details of the alleged job offer but those efforts were unsuccessful. A further meeting of counsel in September of 1999 was not successful in resolving the plaintiff's various continuing accident benefit claims. By November 11, 1999, Mr. Golic appears to have fired his counsel since he advised Guardian that he was now self-represented.

[10] January 23, 2000 is an important date relative to this motion. On that date, Ms. Tham of Guardian responded to information it had concerning Mr. Golic by providing him with a detailed letter denying his claims. Guardian took the position that Mr. Golic was not eligible to receive an income replacement benefit and that it was not obliged to provide Mr. Golic with any further weekly benefit payments. Moreover, it asserted that it was not required to pay him weekly income replacement benefits for any interval of time that had passed between the time of the accident and the January 23, 2000 date of that letter.

[11] Ms. Tham's four-page letter concluded by advising Mr. Golic that he was entitled to dispute any decision that the insurer had reached according to the procedures set out at ss. 279 to 283 of the *Insurance Act.* It also told him that he could contact the insurer with any questions he might have, although he did not request any forms from the insurer or pose any questions to it. Regardless of any other administrative assistance it may have offered to him, it is evident that ING did not provide Mr. Golic with a plain layman's explanation of the dispute resolution process set out in ss. 279 to 283 of the *Insurance Act* when it sent that letter. Instead it informed Mr. Golic that he could refer any disputes to mediation through the Financial Services Commission of Ontario. In lieu of an explanation of the alternative procedures, the ING letter also included copies of ss. 279 to 283 of the *Insurance Act* and a complete copy of the *Schedule*.

[12] More than seven years later, on March 8, 2007, now once again represented by new counsel who continues to act for him, Mr. Golic issued a statement of claim against ING Insurance Company of Canada seeking entitlement to "Attendant Care Benefits, Housekeeping & Home Maintenance Benefits and Case Management Services". Examinations for discovery of both parties were completed between January 21 and April 10 of this year.

[13] On May 5, 2008, Mr. Golic and ING Insurance Company of Canada participated in a fourth "mediation" hearing through the Financial Services Commission of Ontario. The issues in dispute concerned the plaintiff's entitlement to Income Replacement Benefits, Caregiver Benefits and Other Disability Benefits. The parties were not able to resolve those issues. Of particular note in the context of this motion is the assertion in Mr. Golic's December 18, 2007 application for mediation of this latest claim that the limitation period in respect of the benefits claimed had not yet begun to run.

[14] However, ING took the position that Mr. Golic's 2007 application to mediate weekly benefits was time-barred. It says he was and remains precluded from proceeding to mediation by operation of Rule 11.01 of the *Dispute Resolution Practice Code* and s. 72(1) of the *Schedule*, and s. 281(5) of the *Insurance Act*. ING states that this application for mediation exceeded the jurisdiction of the Financial Services Commission and should have been rejected under Rule 20.04 of that *Dispute Resolution Practice Code*. The mediator issued a report on May 5, 2008 that noted ING's jurisdictional objections but that did not address them substantively.

[15] It is against this background that Mr. Golic now seeks to amend his statement of claim some 13 years after the accident occurred, and almost nine years since he was advised by the insurer that he was not eligible to receive income replacement benefits.

Applicable Legal Principles and Positions of the Parties

(i) Amending Pleadings

[16] Rule 26.01 of the *Rules of Civil Procedure* permits the Court to grant leave to amend a pleading at any stage of an action on such terms as are just. Case law establishes that the Court should not refuse a pleading amendment as legally untenable

except where it is clearly impossible that the claim will succeed or where prejudice would result that could not be compensated for by costs or by an adjournment: *Chinook Group Limited v. Foamex International Inc.* (2004), 72 O.R. (3d) 381. The burden lies on the moving party to show the absence of prejudice, or that costs or an adjournment will adequately compensate the responding party. Where the moving party meets that threshold, amendment under the Rule is mandatory. As long as the pleadings amendment can be made without causing injustice to the other party, it should be allowed no matter how careless the omission or how late the application: see *Mazzuca v. Silvercreek Pharmacy Limited* (2001), 2001 CarswellOnt. 4133; [2001] O.J. No. 4567; *Robertson v. Joyce* [1948] O.R. 696 (C.A.).

[17] The important exception to the rule, by corollary, is that a pleading should not be amended where the defendant would be caused prejudice that cannot be compensated for in costs. As well, and more importantly here, amendments to pleadings which have the effect of relieving against the operation of a limitation period are not to be allowed, although our courts have discretion to permit such amendments in "special circumstances", the existence of which is a question of fact in each particular case: *Basarsky v. Quinlan*, [1972] S.C.R. 3; *Deaville v. Boegeman* (1984), 48 O.R. (2d) 75.

[18] In addition to the existence of special circumstances, however, the Plaintiff also bears the onus of establishing that amending a pleading to add a claim outside of an applicable limitation period will not result in irreparable prejudice to the Defendant. While the question of prejudice and the presence of special circumstances will frequently overlap, our courts have been clear that the Plaintiff must establish the presence of both elements in order to obtain the relief of setting aside the limitation period and being permitted to amend the claim: *Robertson v. O'Rourke* [1997] O.J. No. 3724; *Gregory v.*

Khudabakhsh, 2005 CanLII 29494 (S.C.J.); *Bernac Leasehold Inc. v. Haverty & Rankin Ltd. Architects* (2002), 67 O.R. (3d) 685.

(ii) The Limitation Period

[19] An insured person cannot pursue litigation or arbitration in respect of his or her entitlement to statutory accident benefits unless the issue in dispute has been the subject of a failed mediation before the Financial Services Commission: *Insurance Act*, R.S.O. 1990, c. I. 8, as amended, section 281(2). Section 11.1 of the *Dispute Resolution Practice Code* of the Commission stipulates that an application for mediation must be filed within two years of the insurer's refusal to pay the benefit in question. Similarly, the *Schedule* mandates that mediation, arbitration, or court proceedings must be commenced within two years of the insurer's refusal to pay that benefit. The Commission's own practice directions indicate that it will not "re-mediate" matters that have already been dealt with in a previous mediation, and make clear that mediation cannot be commenced outside of the two year time limit stipulated in both the *Insurance Act* and the *Schedule*.

[20] Where an insurer refuses to pay a benefit that a person has applied for, or reduces the amount of a benefit that a person receives, the insurer is required to inform the person in writing of the procedure for resolving disputes relating to statutory accident benefits, as set out in section 279 to 83 of the *Insurance Act*. The limitation period contained in section 281(5) of the *Insurance Act* begins to run once the insurer has complied with the requirement to provide clear and unequivocal notice of refusal and has complied with section 72(1) of the *Schedule*: *Zeppieri and Royal Insurance Company of Canada* (OIC A-005237, February 17, 1994); aff'd (OIC P-005237, December 22, 1994). That provision is critical because it places an obligation on the insurer to inform the claimant of the dispute resolution process under sections 279 to 283. *Smith v. Co-operators*

General Insurance Company, [2002] 2 S.C.R. 129 at para. 14 confirms that to meet that obligation, the insurer must provide a description of the most important parts of the process, such as the right to seek mediation, the right to arbitrate or litigate if mediation fails, and that mediation must be attempted before resorting to arbitration or litigation. The explanation must also include a description of the relevant time limits that govern the entire process.

(i) Position of the Parties

[21] Here, the plaintiff asserts that there would be no prejudice caused to the defendant ING from permitting the amendment that cannot be compensated for in costs, notwithstanding the plaintiff's significant delay in bringing this latest benefits claim. Further, for the reasons set out above, the plaintiff says that the limitation period is inapplicable in this case because of the failure of the insurer to provide a layman's explanation of the procedures for mediation and making of claims as required by the *Insurance Act* and *Schedule* and as confirmed by the decision in *Smith*, following its January 23, 2000 denial of benefits.

[22] In this case, ING takes the position that the mediator exceeded his jurisdiction in even entertaining an application for mediation for weekly benefits, given that prior mediations on the same issue had failed in both December of 1997 and February of 1999. It says that Mr. Golic's right to apply for the latest mediation of weekly benefits expired on January 23, 2002 at the latest, that being the second anniversary of ING's detailed letter denying the plaintiff's entitlement to weekly benefits. Consequently, ING says no "mediation" of those issues could have occurred on May 5, 2008.

[23] If ING is correct in the submissions it makes, it follows that the claims which were the subject of the proposed mediation are statute barred by operation of section 282

(2) of the *Insurance Act*. ING says that the amendment Mr. Golic now seeks is in respect of claims which are barred by the operation of section 281(5) (now section 281.1(1)) of the *Insurance Act*. That section makes clear that court proceedings, arbitrations before the Financial Services Commission, or private arbitrations must be commenced within two years of an insurer's refusal to pay the benefit in question.

[24] ING's position is that to permit an amendment of pleadings, so long after the accident and so long after the insurer denied that it would pay any further benefits, causes it significant prejudice. In the case of an injury claim such as this, ING says that the condition of the plaintiff claimant may and frequently does change from week to week and month to month. A delay of significant duration approximating nine years, such as the one which confronts the court in this case, results in the loss of any meaningful ability to gather evidence that would permit it to defend the claim: see *Cervo v. State Farm* [2006] O.J. No 4378. It claims that it will effectively be denied the ability to speak to relevant witnesses at the time or to otherwise be able to assess the claimant's condition from time to time during the period since the termination of benefits decision was communicated to Mr. Golic. In its submission this amounts to significant prejudice and it argues that the plaintiff has not overcome its burden to show no prejudice. It says Mr. Golic has failed to provide and evidence that would suggest that it would not be prejudiced if the amendment were to be granted, and that this is not a case where special circumstances exist.

[25] In this case, ING takes the position that Mr. Golic was provided with clear and unequivocal notice of ING's refusal to pay weekly disability benefits as of January 23, 2000 at the latest. Despite being informed of the process, he took no steps to pursue a claim for more than seven years following the denial of that benefit by the insurer. It says the law is clear that any and all disputes about an insurer's refusal to pay no-fault

benefits, including disputes which allege the insurer's bad faith in connection with that refusal, must be brought within two years of the date of the refusal: see *Arsenault v. Dumfries Mutual Insurance Company*, 2002 CanLII 23580 (O.C.A.).

[26] More importantly here, even if the failure to properly communicate the procedures to Mr. Golic in layman's terms prevented the limitation period from commencing to run, a position it denies, it says that Mr. Golic should not be able to rely on its technical breach of that requirement. It makes that argument on the basis that his own experience in the mediation of at least three of his benefits claims shows that he did not need to be protected by the "consumer protection goal" of the disclosure requirement.

Analysis

[27] In *Smith v. Co-operators General Insurance Co*., [2002] 2 S.C.R. 129, the insured plaintiff was the victim of a motor vehicle accident. She received statutory benefits from the defendant insurance company but the insurer ceased paying those benefits on May 8, 1996. In its notice of termination the insurer advised the plaintiff of her right to seek mediation through the Ontario Insurance Commission, should she disagree with the cessation of payments. She filed for mediation as required by the *Insurance Act*, but the mediation failed. Two years later, on September 8, 1998, she issued a statement of claim for ongoing statutory benefits. The insurer presented a motion for summary judgment on the grounds that her claim was barred by the two-year limitation period set out in section 281(5) of the *Insurance Act*. At the Superior Court of Justice, the motion was allowed and Ms. Smith's action was dismissed. That decision was upheld by the Ontario Court of Appeal, but with an important dissent by Justice Borins. When the matter reached the Supreme Court of Canada, it was that dissent that prevailed since the Court of Appeal's decision was reversed and the appeal by the plaintiff was allowed.

[28] The Supreme Court held that the two-year limitation under section 281(5) of the *Insurance Act* only commenced to run upon the issuance by the insurer of a valid refusal to pay benefits. In Ms. Smith's case, the court held that no such refusal was given since there had been inadequate compliance with section 71 of the *Schedule*. That section obliged the insurer to inform claimants of the entire dispute resolution process under ss. 279 to 283 of the *Insurance Act* and not merely the right under s. 280(1) to refer the dispute to mediation. Moreover, the Supreme Court confirmed that the information provided by the insurer must be given in a clear straight-forward form, directed towards an unsophisticated person. It should be in layman's language, and at a minimum should include a description of the most important points of the dispute resolution process, such as the right to seek mediation, the right to arbitrate or litigate if mediation fails, that mediation must be attempted before resorting to arbitration or litigation and the relevant time limits that govern the entire process.

[29] In his reasons for judgment, Justice Gonthier emphasized that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance and he noted that the Court of Appeal had also unanimously agreed on that point. However, true to that purpose of consumer protection, he concluded at paragraph 11 that no refusal under section 71 of the *Schedule* could be said to have been given by an insurer if there has not been adequate compliance with the particulars of that section. He confirmed that Justice Borins had correctly observed that section 71 is clear and unambiguous, reflecting a legislative intent to place an obligation on the insurer to inform the claimant of the dispute resolution process under ss. 279 to 283 of the *Insurance Act*. That section did not merely refer to the right to mediation contained in s. 280(1), but rather to the entire process. Even Justice Sharpe, who wrote the majority opinion at the Court of Appeal, had been concerned that claimants would be overwhelmed if insurers simply opted to attach a verbatim reproduction of the statutory

provisions of the *Insurance Act* to the refusal. To Justice Gonthier, it was questionable whether such action would even qualify as a valid refusal, as in his view "it would surely run afoul of the consumer protection purpose of the legislation."

[30] While noting that it was not the role of the Supreme Court to set out the specific content of insurance refusal forms, a task better left to the legislature, the court nevertheless concluded that the clear legislative intention had been to provide the insured claimant with a layman's description of the dispute resolution process that was available. The consumer protection goals of the legislation required it. Without such an explanation, no valid refusal could be said to have been given. It is evident in his reasons that the simple explanation for this conclusion was the need to ensure as a matter of consumer protection that a claimant whose insurance benefits had been terminated would be fully informed and have a clear layman's understanding of exactly what were his or her procedural options.

[31] Mr. Golic relies upon these principles in asserting that the failure of the insurer to provide him with the layman's explanation of procedures that *Smith* contemplates resulted in the limitation period not commencing to run against him. However, unlike in *Smith* where the plaintiff missed the limitation period by only a matter of months, here Mr Golic waited seven years to initiate court action respecting the denied benefits – five years after the limitation period would otherwise have expired. In *Smith*, the plaintiff had proceeded to mediation prior to commencing an action for her claim. Here, however, the record shows that Mr. Golic is a much more experienced litigant than Ms. Smith was, since he has been to mediation on four separate occasions since the accident, with the assistance of at least five different counsel over the years.

[32] While Mr. Golic argues that *Smith* supports his request to amend a 13 year old action to add new claims for benefits, almost nine years after the insurer notified him of the termination of benefits, the facts and history of this case shows it to be of an entirely different colour than that which the Supreme Court faced in *Smith.* Against that factual background, this case does not engage the same consumer protection concerns as were present in that case. Rather, it raises the corollary question of whether it would be just, in the face of obvious prejudice that ING would suffer trying to gather evidence in respect of such a stale claim, to permit Mr. Golic to continue to rely on the insurers actions in 2000 as the basis for avoiding the limitation period that would otherwise have expired in 2002 and terminated his right to bring new claims after that date.

[33] In *Smith*, Justice Bastarache wrote a strong dissenting opinion that would have denied the claimants appeal. He concluded that Ms. Smith was neither denied access to the dispute resolution procedures, nor prevented from instituting a civil action for lack of notice of the limitation period that was applicable at that time. She did proceed to mediation and she did receive the mediators report under cover of a letter from the Ontario Insurance Commission that he observed "clearly informed the appellant that she had the right to proceed to arbitration or to initiate a court action", and also informed her "of the limitation periods associated with the options presented to her." Here, given that the record shows that Mr. Golic had proceeded to mediation of his benefit claims on three separate occasions before receiving the January 2000 letter, and one since then, it verges on hyperbole to assert here that he would not have been and was not fully aware of exactly what procedural options were available to him, and the time within which those rights needed to be acted upon, after being informed by the insurer in January of 2000 of the termination of his benefits.

[34] The majority decision of the Supreme Court in *Smith v. Co-operators* reflects the need as a public policy objective to ensure as a matter of consumer protection that a claimant whose insurance benefits have been terminated would be fully informed and have a clear layman's understanding of exactly what were his or her procedural options. I agree fully with that majority opinion. However, nothing in that opinion suggests to my mind that the Supreme Court, or Borins J. at the Court of Appeal would have been willing to afford the same consumer protection to a litigant like the plaintiff in the circumstances of this case, to permit such a plaintiff to feign ignorance and use the consumer protection objectives of the legislation to mask the obvious knowledge he would have acquired through the course of three or four mediations of essentially the same claim. To permit Mr. Golic in the circumstances of this case to now make an amendment to his pleadings, using the laudable principles of that decision to mask his own failure to prosecute this new claim on a timely basis, would be an abuse of the consumer protection objectives reflected in the legislation, and that were upheld in *Smith*. In my opinion, the facts of this case are totally distinguishable from those in Smith, and in this case I find there is no injustice in applying the provisions of the *Insurance Act* and the *Schedule* to bar Mr. Golic's requested pleadings amendment.

[35] As noted above, the plaintiff here can only succeed in his request for a pleadings amendment if two threshold tests are met. First, he must show that the amendment sought would not cause prejudice to the defendant ING that cannot be compensated for in costs, and secondly, the existence of special circumstances and the onus of establishing that amending his pleading to add this claim outside of the limitation period will not result in irreparable prejudice to the defendant. I find that the plaintiff has failed to satisfy the onus upon him on both counts. The motion to amend is dismissed. The defendant ING shall have its reasonable costs of the motion on a partial indemnity scale, to be agreed upon by counsel, or in the absence of agreement, as fixed following assessment.

[36] Order to go accordingly.

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M.G.J. QUIGLEY J.

DATE: December 29, 2008