

Kantolic v. Peace Hill General Insurance Company, 2000 ABQB 59

Date: 20000127
Action No. 9503 23381

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

TIHANA M. KANTOLIC

Plaintiff

- and -

PEACE HILLS GENERAL INSURANCE COMPANY

Defendant

APPEARANCES:

C. MacKay
Frieser Robinson
Counsel for the Plaintiff

B.A. Carr
Chomicki Baril
Counsel for the Defendant

REASONS FOR DECISION
of
M. FUNDUK, Master in Chambers

[1] These are two applications, one by each party. The Plaintiff applies for an order letting her amend her statement of claim.

[2] The Defendant applies for an order requiring the Plaintiff to answer objected to questions on her cross-examination.

One

[3] The Plaintiff alleges that she has an insurance contract with the Defendant which, among things, provides for two years disability insurance if she is disabled from working and for rehabilitation and medical expenses. She claims for two years income and medical expenses.

[4] The Defendant has defended and counterclaimed. It denies the existence of the contract and then goes on to allege alternative defences, including misrepresentation. It counterclaims for what it paid to the Plaintiff based on the alleged misrepresentation.

[5] The proposed amendments are first to add two sentences to paragraph 5 so it will read:

5. The Plaintiff has applied for accident insurance benefits for loss of income and rehabilitation and medical expense from the time of the accident to the present and ongoing. Despite the fact that the Plaintiff, remains disabled and unable to work, the Defendant has neglected or refused, and continues to neglect and refuse to pay certain of those accident insurance benefits to which the Plaintiff is entitled under the policy noted. The Defendant has failed to act in good faith as it should pursuant to the policy. The Plaintiff claims for aggravated and punitive damages as a result of the Defendant's conduct.

[6] The two underlined sentences are the proposed additions to paragraph 5. The second proposed amendment is a consequential amendment to the prayer for relief if paragraph 5 is amended as sought.

[7] The Defendant was examined for discovery.

[8] The Plaintiff testifies:

3. I am advised by my counsel and do verily believe that an Examination for Discovery was conducted on March 21, 1996, of Ann Gardiner, an officer of the Defendant. In the Examination for Discovery the officer of the Defendant confirmed that I was insured under the Defendant's policy; that the Defendant had no grounds or information that I did not have an injury; that the Defendant had no grounds or information that my injury was not certified by a duly qualified medical practitioner; that the Defendant had no evidence of how I failed to mitigate my injury, loss or expense; and that the Defendant had no evidence that I misrepresented myself to the Defendant.

4. The Defendant denied me benefits when they had no evidence to deny

me benefits. The Defendant has not acted in good faith. I am advised by my counsel and do verily believe that these are grounds for aggravated and punitive damages.

[9] The proper method to prove what a party said at its examination for discovery is to put the relevant parts of the discovery in evidence rather than a witness giving hearsay evidence of what the examined party allegedly said.

[10] However, Mr. Carr, for the Defendant does not object to the method of proof or the accuracy of what the Plaintiff says in paragraph 3 of her affidavit.

[11] The Plaintiff was cross-examined. The cross-examination is limited to the one ground advanced by Mr. Carr on this application, a limitation period defence.

[12] Mr. Carr says that the proposed amendment is a new cause of action and should not be allowed because the limitation period has gone by. He cites *Dawson v. Mitcheli*, (1985) 59 A.R. 525 (Q.B.) for the definition found in *Bailey v. Reynolds* of what a “cause of action” is. Mr. Carr also refers to *Spiers v. Zurich Insurance Co.*, [1999] O.J. No. 3683, Sept. 16, 1999. Mr. MacKay, for the Plaintiff, refers to *Madill v. Alexander Consulting Group Ltd.*, (1999) 237 A.R. 307 (C.A.).

[13] It is not disputed by Mr. Carr that an insurer owes its insured a duty in dealing with an insured’s claim. The point is discussed in an article, not cited by counsel, by *Rudy v. Buller, Surveillance and The Lying or Exaggerating Plaintiff*, (1999) 22. The Advocates’ Quarterly, p. 68. The author says, pp. 70-71:

There is no question that an insurer owes its insured a duty of good faith and that the most important expression of this duty is the payment of a proved, valid claim. However, there is also a duty of utmost good faith on the part of the insured to tell the insurer the complete truth. On occasion, the insurer may have reason to doubt the existence of the insured’s complaints or, at least, the level of disability caused by those complaints. It is not surprising that there is often a correlation between insurer-skepticism and claimed symptoms or levels of disability that can in no way be objectively, medically verified. This is the case where the complaints are of chronic pain, chronic fatigue, fibromyalgia, depression, etc. As is well known, insurers are having to deal with more and more of these “subjective” complaints.

At the same time, insurers’ denials of benefits are coming under increasing scrutiny by plaintiffs’ counsel and courts not only on the issue of whether or not the insurer came to the right decision but the manner in which the decision was arrived at. An insurer who denies benefits based on unjustified suspicion may not only have to pay those benefits plus interest and costs but may also be found liable for punitive damages for acting in bad faith. Furthermore, the current law in British Columbia would appear to be that, even

where an insurer acts in good faith, if it comes to a decision that the court considers wrong, aggravated damages may be awarded. Insurers, therefore, as never before, are under pressure to “get it right” and this is a very difficult proposition where the complaints are subjective.

(emphasis mine)

[14] In the same volume is another article, not cited by counsel, by **Mark E. P. Cavanagh**, *Misrepresentation and Non-Disclosure on Applications for Disability Insurance*, p. 249 where the author says that insurance contracts create relationships “where mutual obligations of trust and good faith are paramount”: p. 250.

[15] In *Madill* the primary issue is whether there is a duty of good faith to an insured by the insurer’s employees and insurance adjusters. That is not relevant to the issue before me.

[16] *Maill* discusses concurrent liability in contract and in tort. The nub of the decision, for the present application, is this, para. 26:

In summary, then, the answers to the issues addressed thus far are as follows. There is a duty of good faith owed by the insurer to the insured. Although that duty emanates from an implied term of the contract of insurance between the insurer and the insured, it has an independent and concurrent existence arising out of the principles of tort law. Adjusters, too, owe a duty of good faith to the insured and can be held liable to the insured for breach of that duty. Although the proximity of the relationship between the adjuster and the insured results from the contractual arrangement between the adjuster’s employer and the insured, the duty owed to the insured by the adjuster originates in tort law. This can give rise to a new and separate cause of action.

(emphasis mine)

[17] Tort law is a creature of the common law. Some case law strives to find an “independent duty”, an “independent actionable wrong” or an “independent actionable tort” where the dispute is between insurer and insured. See, for example, the discussion in *Adams v. Confederation Life Insurance Co.*, (1994) 152 A.R. 121 (Q.B.) and *Ferguson v. National Life Assurance Co. of Canada*, 36 C.C.L.I. (2d) 95 (Ont. S.C.), aff’s 102 O.A.C. 239, not cited by counsel.

[18] The problem with that approach, where the relationship between the parties is one of contract, is identified in *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.*, 19 Alta. L.R. (3d) 38 (C.A.), not cited by counsel. The Court says, pp. 43-44:

I agree with the learned trial judge. My only hesitation is whether one need, in this discussion, employ the term “good faith”. In my view, we should hold carefully to the distinction between the two sources of rules about

contracts, the law and the contract. Sometimes a rule of law imposes a duty or a constraint upon the parties to a contract despite their agreement, as is the case of the rules about illegal contracts and unconscionable contracts. On other occasions, however, the courts impose a rule upon the parties because we conclude that this fulfils the agreement. In other words, the duty arises as a matter of interpretation of the agreement. The source of the rule is not the law but the parties. I worry that the term “good faith” in this case might blur that distinction.

A general obligation expressed in terms of good faith is not an obvious part of contract law in England and Canada, although Professor E. P. Belobaba advocates otherwise. See Belobaba, “Good Faith in Canadian Contract Law”, 1985 Special Lectures of the Law Society of Upper Canada, 73. It is part of the civil law. See *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339. And it has become part of the general law of contract in the United States. See the *Restatement of the Law, Contracts* 2d (St. Paul: American Law Institute Publishers, 1981). The restatement also offers the vocabulary for the American approach to pooling clauses, and the exercise of a unilateral power to pool. See, for example, *Boone v. Kerr-McGee Oil Industries Inc.*, 217 F. 2d 63 at 65 (10th Circ., 1954), where the Court said:

Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for an exercise of such power.

Kelly J., in *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (T.D.), expressed a strong preference for this approach. The decision was affirmed on appeal without explicit approval of all his views on this point. See (1992), 112 N.S.R. (2d) 180 (C.A.). And it is true that there are some casual references to “bad faith” in cases collected by Professor Belobaba.

The argument the other way is that “good faith” is too vague a term. It might be said that it would encourage judges to wander unnecessarily far into the thicket of extra-contractual rules of conduct. This is the point made by the redoubtable Professor Clark. See D. Clark, “Some Recent Developments in the Canadian Law of Contracts” (1993), 14 *Advocates’ Q.* 435. See also S. J. Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith”, [1980] 94 *Harvard L. Rev.* 369 at 389.

In any event, it is not necessary for this case that I go further into this difficult area. This is because this case turns on a rule founded in the agreement of the parties, not in the law. In my view, as a matter of fact, this contract created certain expectations between the parties about its meaning, and about

performance standards. If those expectations are reasonable, they should be enforced because that is what the parties had in mind. They are reasonable if they were shared. Of course, those expectations must also, to be reasonable, be consistent with the express terms agreed upon. This contract should be performed in accordance with the reasonable expectations created by it.

(emphasis in original)

[19] Leave to appeal was refused, 21 Alta. L.R. (3d) xxx-vii.

[20] That approach is also the basis for the decision in *Warrington v. Great-West Life Assurance Co.* 139 D.L.R. (4th) 18 (B.C.C.A.), also not cited by counsel. Newbury J.A. (Huddart J.A. concurring) says that an insurer who wrongly refuses to pay disability benefits to its insured is in breach of contract, that the purpose of the contract is to provide the insured with “peace of mind” and so, p. 31:

In summary, I conclude that a disability insurance policy is one of the few contracts in which damages for mental distress are recoverable when they are proven to result from the breach of contract. The trial judge here dealt with these damages in another way. Perhaps considering McIntyre, J.’s comment, at p. 1103 of *Vorvis*, that he was not saying aggravated damages could never be awarded in a case of wrongful dismissal “particularly where the acts complained of were also independently actionable,” the trial judge apparently felt constrained to find an independent “actionable wrong”, a breach of a duty of good faith apart from the breach of contract. My difficulty with this approach is that logically, Mr. Warrington’s mental distress did not result from Great-West’s motive or bad faith (or breach of a duty of good faith) or mental state or motives in refusing Mr. Warrington’s claim. It resulted from the delay itself. The effect on him would have been the same whether the insurer had been well-motivated, reasonable, unreasonable, or even malicious in that delay. Thus in my view it was erroneous to find that an independent tort had been proven that resulted in injury in the form of mental distress to Mr. Warrington.

[21] Southin J. A. also adopted a breach of contract approach, p. 34:

On the question of fiduciary duty, I agree that, on the facts of this case, no such duty was owed by the respondent to the appellant.

The question of whether the award of \$10,000.00 damages should be upheld raises many questions which Madam Justice Newbury has addressed. I am of the opinion that, on the facts of this case, the award can be sustained, as I understand her to hold, simply by invoking the rule of *Hadley v. Baxendale* (1854), 9 Exch. 341.

I emphasize “on the facts of this case”. Madam Justice Newbury says

that the object of this contract was to provide to the respondent comfort or peace of mind. I would put the matter a little more narrowly and say that the object of the contract was to free the assured, should he become disabled, from financial anxiety, just as I would say that the object of the contract in *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233 (C.A.) was to provide pleasure.

[22] *Kempling v. Hearthstone Manor Corp.* 41 Alta. L.R. (3d) 169 (C.A.) also discusses damages for mental distress in a breach of contract suit.

[23] As *Gano v. Alberta Motor Ass. Insurance Co.*, 50 Alta. L.R. (3d) 258 (M) points out, the trial judge in *Adams* did not have the benefit of *Mesa Operating Ltd. Partnership*, *Kempling* and *Warrington*.

[24] *Whiten v. Pilot Insurance Co.*, 170 D.L.R. (4th) 280 (Ont. C.A.), also not cited by counsel, is a lawsuit on an insurance contract where punitive damages were awarded.

[25] *Whiten* draws on *Voris v. Insurance Corp. of British Columbia*, (1989) 58 D.L.R. (4th) 193 (S.C.C.) and *Wallace v. United Grain Growers Ltd.* (1997) 152 D.L.R. (4th) 1 (S.C.C.) to make a distinction between an “independent actionable wrong” and an “independent actionable tort”. It is not necessarily easy to grasp the thrust of what is meant when the generic “wrong” is used in case law. Other variations are sometimes used, such as “separately actionable course of conduct”: *Wallace*, (Man. C.A.).

[26] A tort is an actionable wrong, but of course not every actionable wrong is a tort.

[27] Be that as it may, the case law debates this in the context of whether damages are available and if so what kind of damages. Not all the cases are in the same fact context. *Voris* and *Wallace* are employment contract lawsuits. *Kempling* is a real estate contract lawsuit. *Adams*, *Warrington*, *Spiers* and *Whiten* are insurance contract lawsuits. Some cases wrestle with whether aggravated damages are available. Some wrestle with whether punitive damages are available. As *Warrington* points out, the two are not the same, although that is sometimes overlooked. *Kempling* is a case of aggravated damages for mental distress. *Whiten* is a case of punitive damages.

[28] In *Kempling* Côté J.A. adds a caution, pp. 191-92:

I agree that the rules for damages for mental distress may well be different in wrongful dismissal cases and in other cases. And I agree that such a claim must pass the rule in *Hadley v. Baxendale* [(1854), 156 E.R. 145] to survive. But whether a plaintiff must pass any other tests (independent cause of action or otherwise) to get such damages, is a more difficult question. I find it hard to discuss that last question in the abstract. It may well depend on the facts or type of case.

[29] *Warrington* rejects the necessity for an extra-contractual wrong to get damages for

mental distress, p. 26:

[13] Grounds of appeal 2,3, and 4 listed above may conveniently be considered together with the issue that I have suggested lies at the heart of this case - the nature and availability of damages in this jurisdiction for mental suffering resulting from breach of contract. The assumption that in order to be compensated for his mental suffering, Mr. Warrington had either to prove an independent (i.e. extra-contractual) wrong or had to succeed in his claim for punitive damages is consistent with some old English law, but that law has long been abandoned. ...

[30] Here the proposed amendment to paragraph 5 does not factually allege anything other than the Defendant's failure to act "as it should pursuant to the policy". That is a breach of contract allegation, and is consistent with *Mesa Operating Ltd. Partnership, Kempling and Warrington*. The Plaintiff does claim both aggravated and punitive damages for that alleged breach. But this is a matter of available remedies if a breach is proved. *Kempling and Warrington* discuss that and I could not add anything useful to that discussion.

[31] I conclude that the proposed amendment merely expands on the allegation that the Defendant is in breach of the insurance contract, if there is one. It does not advance a new cause of action. *Mesa Operating Ltd. Partnership, Kempling and Warrington* justify not treating the proposed amendment as a "new cause of action". A contract breaker can breach a contract in more than one way. The breach may consist of several acts, all collectively called a breach of the contract. Adding to the particulars of the breach is merely an expansion of the complaint, not an "independent" complaint. If Gertrude Stein was a poetic legal author today she might say - a breach of contract is a breach of contract is a breach of contract is a breach of contract.

[32] The proposed amendment does not raise a new cause of action.

[33] Mr. Carr says that if the amendment is allowed the Defendant will have to deliver an amended defence and there will have to be further discoveries. Accepting that, it is just a matter of costs. If a case for an amendment is made out it should be allowed provided that the Defendant is not prejudiced in a way that cannot be compensated for in costs. That is basic law. Of course Mr. Carr's submission is based on the implicit assumption that the Plaintiff knew or should have known what she now wants to complain about at the time she started the lawsuit. I refer here to the Plaintiff's evidence in paragraph 3 of her affidavit. That assumption does not necessarily follow. It is not uncommon for a party to get additional facts for the first time at discoveries. Here the Plaintiff relies on the Defendant's discovery for the expanded complaint.

[34] The question of costs relating to the Defendant possibly having to amend its pleading and further discovery is best left to the trial judge.

[35] The plaintiff's application to amend her statement of claim is allowed.

Two

[36] The Defendant's application for an order requiring the Plaintiff to answer objected to questions on her cross-examination is dismissed. I do so because the questions go solely to a limitation period defence to the proposed amendment, and that does not come into play against the proposed amendment.

Three

[37] Without more, the costs for the Plaintiff's application is to be borne by her: Rule 141. Our Civil Procedure Guide (1996 ed.) says that the Rule codifies *Hunter v. Boyd*, (1903) 6 O.L.R. 639 (M). In *Hunter* the Court says, p. 640:

But the defendant must be fully indemnified in respect of such amendment. It may virtually amount to a new action. Further examinations for discovery, and further affidavits on production may be necessary.

The order will therefore provide that plaintiff file and serve such amendments as he may be advised within a week; that defendant shall have eight days within which to deliver such amended defence as he may be advised; and that the costs of this motion, with all costs either lost or incurred by reason of this order, shall be to the defendant in any event.

[38] I do not know if the Plaintiff has been examined for discovery. I do not know if the Plaintiff wants to further examine the Defendant. I do not know the extent to which the Defendant's "good faith" was canvassed at discovery.

[39] This is an appropriate case to leave the question of costs for the possible amendment of the defence and further discovery left to the trial judge, and I do so.

[40] The Defendant should have the costs for the Plaintiff's application (Rule 141) but the Plaintiff should have costs against the Defendant for its unsuccessful application (Rule 607) so the two balance out. Neither party will have costs of either application.

[41] I return the transcript of the cross-examination to Mr. Carr.

HEARD on January 14th, 2000.

DATED at Edmonton, Alberta this 27th day of January, 2000.

M. FUNDUK

