IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacMillan v. Constellation Life Assurance Company, 2006 NSSC 309

Date: 20061011
Docket: SN-211567
Registry: Sydney

Between:

Alexis John MacMillan

Plaintiff

v.

Constellation Life Assurance Company
Unum Corporation
Unumprovident Corporation

Defendants

Judge:	The Honourable Justice Gordon A. Tidman
Heard:	September 20th, 2006, in Sydney, Nova Scotia
Written Decision:	October 11, 2006
Counsel:	Alexis John MacMillan, Self-represented plaintiff Michelle Awad - for the Unum Corporation and Unumprovident Corporation - defendants

Tidman, J.:

[1] The applicants/defendants Unum Corporation and UnumProvident Corporation seek summary judgment against the respondent/plaintiff dismissing the plaintiff's claims against them. The defendant, Constellation Life Assurance Company of Canada, is not a party to this application.

Circumstances

[2] In the main action, the plaintiff sues the defendants for benefits under a disability insurance policy. The policy was rescinded by the defendant, Constellation Life of Canada in August, 1985.

[3] The plaintiff in September, 1982 purchased disability insurance from Constellation Life Assurance of Canada. To a question on the insurance application form asking if he had other disability coverage, the plaintiff answered "none". His application was accepted and a policy was issued to him dated

November 26, 1982. In 1983 the plaintiff claimed benefits totalling $766.67 which were paid.

[4] In May, 1985 the plaintiff made another claim for benefits. Constellation learned at that time that the plaintiff also had disability coverage with several other insurance companies, some of which had paid claims to the plaintiff. As a result of that information, which was contrary to the plaintiff's statement that he had no other disability coverage, Constellation voided his coverage. The company returned all premiums paid by the plaintiff less the benefits paid and the plaintiff negotiated the refund cheque apparently without complaint at the time. The notice of cessation of coverage to the plaintiff was dated August 20, 1985.

[5] As of January 1, 1990 Constellation sold all of its disability policies then in force to Unum Life Insurance Company. Unum is related to the defendant, Unumprovident Corporation, the details of which are immaterial to this application. Ms. Awad acts for both of those defendants.

[6] Although the disability policy in issue was sold to the plaintiff by Constellation Life Assurance Company of Canada and the asset sale of policies

was from Constellation Assurance Company, there were company name changes or transfers which again are not material to this application.

[7] The sale of assets from Constellation to Unum was effected by a Transfer and Assumption Agreement dated January 1, 1990. In the agreement Constellation transferred all of its then current disability policies and investments to Unum. Under the definition clause of the agreement "policies" is defined as "policies then in force listed in Schedule "A" and all new policies issued between the effective date and closing as well as all policies of individual disability insurance that are reinstated" plus some other items.

[8] Under the terms of the agreement Unum assumed the policy responsibilities of Constellation.

[9] "Policy liabilities" is defined in the agreement as "all the liabilities and obligations of Constellation under the policies including actuarial liabilities and incurred and reported claims under the policies which are unpaid, incurred but not reported claims under the policies, unearned premiums and all other liabilities under the policies."

[10] The plaintiff's policy is not listed in Schedule "A".

[11] Sometime in 1991 the plaintiff again claimed the 1985 loss under the void policy.

[12] Constellation is now apparently part of the Prudential Assurance group. Prior to this action the plaintiff contacted and made the same claim to Prudential. The plaintiff was informed by Prudential that his policy was included in the Constellation sale to Unum and he should claim from Unum.

[13] By letter dated July 11, 1991 to the plaintiff, Unum confirmed that his policy had been rescinded on August 20, 1985 by Constellation. The plaintiff at various times between 1991 and 1998 attempted to collect from Unum under the policy in issue. He went so far as to purchase a small amount of Unum shares, attended an annual company meeting in the United States and was even able to have discussion about his policy with Unum's president. The plaintiff continued to attempt to discuss the issue with Unum's officials and was told repeatedly that his policy had been rescinded by Constellation in 1985. By letter dated June 21, 1998 from

Andrew Bernstein, Assistant General Counsel of Unum, the plaintiff was informed that he had no claim against Unum for two reasons. One, his policy was rescinded as a result of his untruthful statements in his application for coverage. Mr. Bernstein listed several companies that had issued coverage to the plaintiff including three that were in effect when he applied to Constellation for coverage in 1982. Two, the claim was statute barred because of time limitations. Mr. Bernstein also warned the plaintiff to discontinue his harassment of company officials.

[14] The plaintiff subsequently commenced action against the Unum defendants and Constellation on November 28, 2003 claiming benefits under the policy issued by Constellation in 1982 and rescinded by Constellation in 1985.

Issue

[15] The applicant/defendant Unum now applies for summary judgment dismissing the plaintiff's claim on the following two grounds:

1. That Unum has no liability under the terms of the 1982 disability policy issued by Constellation and

2. That the plaintiff's claim is barred by the ***Limitation of Actions Act***.

Positions of Parties

Issue # 1

[16] Ms. Awad on behalf of the applicants submits that since the purchase of assets by Unum from Constellation in 1990 did not include the plaintiff's policy which had been rescinded 5 years earlier, Unum has no responsibility under the terms of the policy. She submits further that even if Unum somehow is responsible to respond to the claim, the policy was properly rescinded in 1985 on the basis of fraud. The basis of the fraud charge being that the plaintiff was untruthful when, on his application for coverage, he denied having coverage from other disability insurers.

[17] The plaintiff submits that Unum must respond to the claim since they have responsibility under Constellation's rescinded policies and that his policy should be reinstated.

[18] He argues on three grounds:

1. That the policy had been in force for over two years when Constellation purported to rescind it and at that time the policy could only be rescinded for misstating age and fraud, neither of which he claims applied.

2. That answering "none" to the question of other disability insurers amounted only to an innocent mistake and not fraud. He states further that Constellation's agent, who sold him the policy, filled in the answers and some the agent filled in on his own without questioning the plaintiff. He says the question on the application in issue may have been answered by the agent without asking the plaintiff for the answer.

3. That he was of unsound mind from August, 1985 to the present and that being under a disability as described under the terms of the ***Limitation of Actions Act***, the limitation period did not run against him.

Analysis

[19] Ms. Awad has provided the court with a comprehensive brief on the law. Unfortunately the plaintiff represents himself on this application and his brief is lacking as to the applicable law.

[20] Ms. Awad cites the Supreme Court of Canada case of **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R., 423 as setting out the applicable test in a defendant's summary judgment application i.e..

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that **there is no genuine issue of material fact requiring trial**, and therefore summary judgment is a proper question for consideration by the court...Once the moving party has made this showing, the respondent must then "**establish his claim as being one with a real chance of success**." (Emphasis added)

Limitation Issue

[21] In applying that test dealing with the time limitation issue, there is no question that the initial limitation period expired prior to the commencement of the action.

[22] There is a question as to whether a one year limitation applied being a claim under an insurance policy. Ms. Awad did not argue that issue being content to argue on the basis of the 6 year limitation period applicable to contract and negligence actions. To the six year limitation period, there is potential for an additional 4 year discretionary period permitted by Section 3 of the ***Limitations of Act***. Thus there is potential for a 10 year limitation period.

[23] The cause of action arose on or about August 20, 1985 when by letter of that date Constellation rescinded the policy.

[24] This action was commenced on November 28, 2003, more than 18 years after the date the cause of action arose.

[25] I am thus satisfied that with regard to the time limitation period there is no genuine issue of material fact requiring trial.

[26] Under that circumstance the plaintiff/respondent must now establish a claim having a real chance of success. The plaintiff argues that the limitation periods did not run against him since he was of unsound mind for the whole of the period. The burden is on the plaintiff to establish on a preponderance of evidence that he was of unsound mind as claimed.

[27] In support of his contention the plaintiff has provided two letters from a psychiatrist, M.A. Mian, M.D., F.R.C.P.C.

[28] The first letter dated December 12, 2001 in relation to another action is directed to the Justices of the Nova Scotia Supreme Court sitting in Chambers January 7, 2002.

[29] The material portions of that letter read:

> ...I first saw Mr. MacMillan in May 1985 when he was involuntarily admitted to the former Cape Breton Hospital on the referral of his family physician because of his bizarre behaviour. He was treated symptomatically and discharged with a diagnosis of Schizoid Personality Disorder.
>
> In September 1987, I saw him again upon the referral of his family physician, Dr. J.A. Roach. I have been seeing him on a monthly basis since this time. His current diagnosis is Paranoid Schizophrenia for which I have been prescribing Orap 2 mgs daily.
>
> It would be my opinion, based upon my view, that it was not possible for Mr. MacMillan to have done anything different with respect to time than what he has done. This opinion is based upon the diagnosis of this individual, as well as other pressing and significant issues that were besetting this man throughout the course of the years I have been seeing him. This included child custody issues, his concerns regarding the well-being and home living situation of his daughter, in addition to litigation involved the Children's Aid Society of Cape Breton and litigation involving issues of defamation with the publishers of Frank Magazine.

[30] The second letter is dated August 20, 2003 and directed to David Hutt, L.L.B. in regard to another action. It provides:

> ...In response to your letter dated July 24th, 2003, in my opinion, Mr. MacMillan was of unsound mind. He did not have the psychological competence or decision-making capacity to follow through the usual operation of the one-year limitation period in the insurance contracts at any time between August 1985 to the present. His cognitive capacity was compromised and he did not have the cognitive capacity to understand the consequences. He had flawed and incompetent decision-making processes. He still harbours and at times may camouflage the irrationality of his underlying delusional distortions. He

> continues to attempt to cope with suspected hostile environments by presenting a bravado of self-sufficiency, superiority, and certainty...

[31] No affidavit of Dr. Mian was provided in this application, nor was Dr. Mian made available for cross-examination on the letter purportedly authored by him.

[32] The definition of "unsound mind" in relation to disability under the Ontario ***Limitation of Actions Act*** was dealt with by the Supreme Court of Canada in **Bannon v. Thunder Bay,** [2002] 1 S.C.R., 716. The term was defined by the Supreme Court as follows: "in context, lack of mental capacity from whatever source to perform the requisite steps called for by the ***Limitations Act***".

[33] The actions taken by the plaintiff in relation to his claims for benefits completely belie his assertion that he lacked mental capacity to perform the requisite steps called for by the ***Limitations Act***, namely to commence action against the defendants within the time limitation.

[34] The plaintiff actively pursued his claim over the years by performing several significant and thoughtful actions but did not perform the simple act of commencing action against the defendant.

[35] The plaintiff himself specifically describes those steps in paragraphs 7 and 8 of his Statement of Claim:

> 7. The Plaintiff has tried over the intervening years to seek resolution of his claim by providing additional information to the Defendant, meetings with various Provincial Government of Nova Scotia Employees, Deputy Ministers, 2 Premier's and 2 Superintendents of Insurance which have intervened on behalf of the Plaintiff.
>
> 8. The Plaintiff purchased 10 Common shares of Unum Corporation in 1997. The Plaintiff attended the Unum Corporation annual meeting of shareholders in Portland, Maine and spoke with than chairman the night prior to the annual meeting James Orr. As a result of this the Plaintiff meet the next day with Assistant General Counsel Andrew J. Bernstein. Mr. Bernstein in a phone conversation eventually offered 5 or 10 thousand dollars if the Plaintiff would agree to settle this matter.

[36] Although the plaintiff says that Mr. Bernstein made an offer to settle by telephone, that is not mentioned in Mr. Bernstein's letter to the plaintiff dated June 2, 1998 (page 32, Tab F, Ms. Awad's affidavit). In that letter Mr. Bernstein denies that Unum has any responsibility under the policy in issue, warns the plaintiff to stop harassing the Company's officers, points out that the plaintiff has not commenced legal action to challenge the policy's rescission and that the time limit therefore has expired.

[37] The plaintiff also, during the intervening time period, commenced action against another disability insurer sometime before 2002. In that action the insurer defended on the basis that the one year period in which to make a claim had expired. The plaintiff, who also represented himself in that action, was successful in having the court exercise its discretion in extending the limitation period into the 4 year discretionary period. (See **MacMillan v. Allstate Insurance Company of Canada** (2002) N.S.J. # 143 - heard January 7, 2002 by Edwards, J.)

[38] In that action Dr. Mian's letter of December 12, 2001 was introduced as an exhibit. Dr. Mian's letter of August 20, 2003 purportedly was sent to solicitor, David Hutt, in relation to another matter involving the plaintiff.

Findings

[39] Despite Dr. Mian's letter that the plaintiff from 1985 up to the time of his letter in August 2003 was of unsound mind, on the basis of the plaintiff's definitive

actions between the time of the denial of his claim in 1985 and August 20, 2003 the court finds that he had "the mental capacity to perform the requisite steps called for by the ***Limitations Act***" as required under the **Bannon** decision *supra*.

[40] It should be noted that in Dr. Mian's letter of August 20, 2003 he was of the opinion that at that time and anytime since August, 1985 the plaintiff was of unsound mind. During that period the plaintiff had commenced an action against Allstate Insurance Company and by himself had successfully prosecuted a court application in that action. Those acts alone by the plaintiff, although he may have been suffering mental and emotional problems, satisfy the court that his mental problems did not prevent him from taking the necessary steps to commence action against the defendants within the stated limitation period.

[41] On the limitation grounds, I find that the action was not commenced within the limitation period including the discretionary 4 year period (6 and 4) 10 years and that during that time period I am not satisfied that the plaintiff lacked the mental capacity to commence an action against the applicants.

[42] Moreover though I have found the plaintiff's actions in the intervening years between 1985 and 2003 belie Dr. Mian's opinion and that he does not meet the test as set out by the Supreme Court of Canada in **Bannon** (*supra)* I would not accept Dr. Mian's opinion since it was not sworn to by Dr. Mian and he was not available to the applicants for cross-examination.

[43] Although it may be the plaintiff's burden to satisfy the court that his claim has a real chance of success, I would find even if the burden is on the defendant that the plaintiff's claim has no chance of success and that there is no genuine issue of material fact requiring trial.

[44] Thus on the first ground alone I would grant the application for summary judgment dismissing the plaintiff's action.

[45] If I had not granted the application on the limitation grounds, I would grant it on the ground that Unum has no responsibility under the policy in issue.

[46] The policy was issued by Constellation and rescinded by Constellation. The plaintiff received a cheque from Constellation for all the paid premiums less the

amount of a claim paid along with the notice of recession. The plaintiff negotiated the cheque immediately following without complaint to Constellation.

[47] In 1990 five years after the recission Unum purchased assets from Constellation including numbered policies. The plaintiff's policy was not included. In my view the policy in issue was rendered "*void ab initio*" by recission and return of premiums and could not be included in the term "reinstated policy". If the plaintiff claims that Constellation did not assume its contractual responsibility under the policy, Constellation is still a corporate entity under the Prudential Group umbrella capable of responding to the plaintiff's claim if it were to be found valid.

[48] To summarize, the defendant, Unum's application for summary judgment is granted and the plaintiff's claim against Unum Corporation and Unumprovident Corporation is dismissed.

[49] Ms. Awad claimed costs in the event her client was successful but my recollection is that I did not hear extensively from the parties with respect to costs. I would grant costs of the application to the successful applicants in the amount of

$1,000.00 plus reasonable disbursements. If some other arrangements were made with respect to costs that I do not recall or if there are particular arguments that the court should hear with respect to costs, I will expect to hear from the parties in order to deal with that issue.

J.