

SUPREME COURT OF NOVA SCOTIA

Citation: *Smith v. The Co-operators Group Insurance*, 2020 NSSC 11

Date: 20200108

Docket: Pic No. 476479

Registry: Pictou

Between:

Dianne Smith

Plaintiff

v.

The Co-operators Group Insurance

Defendant

Judge: The Honourable Justice N.M. Scaravelli

Heard: January 6, 2020, in Pictou, Nova Scotia

Counsel: Dianne Smith, Plaintiff, Self Represented
Sheree Conlon, Q.C., for the Defendant

By the Court:

[1] On January 6, 2020, I heard a Motion filed by the Defendant in these proceedings seeking a Summary Judgment on the pleadings. Following the hearing, I granted the Motion with reasons to follow. These are my reasons.

[2] The Defendant in the Action, The Co-operators General Insurance Company of Canada (incorrectly named The Co-operators Group Insurance in the Statement of Claim), filed a Motion for Summary Judgment on the pleadings pursuant to Civil Procedure Rule 13.03.

[3] The Plaintiff, Dianne Smith, is self-represented.

[4] The Action arises from an alleged motor vehicle collision that occurred on Foord Street, Stellarton, Nova Scotia on May 24, 2016. The claim prepared by Ms. Smith was filed on May 22, 2018. It alleges her motor vehicle was rear-ended by another vehicle which would have been owned or operated by Gary McMullin. At the time of the accident, Mr. McMullin was insured by The Co-operators under a standard motor vehicle liability policy of insurance. Ms. Smith did not commence an Action against Mr. McMullin. Instead, she named The Co-operators as Defendant in her Notice of Action.

[5] The Defendant submits that the Plaintiff's claim does not disclose a cause of action against it and should be dismissed by way of Summary Judgment on the pleadings.

[6] Ms. Smith was served with the Notice of Motion and the matter was set for Chambers in Pictou, Nova Scotia on August 15, 2019 for directions and setting of a hearing date. Ms. Sheree Conlon, Q.C., counsel for The Co-operators and Ms. Smith appeared by telephone. Dates were assigned. Ms. Smith initially indicated that she would appear in person. She later elected to appear at the hearing by telephone. Ms. Smith acknowledged receiving the Defendant's hearing brief.

[7] Ms. Smith's correspondence and e-mails to the Court concerning the Motion did not deal directly with the merits of the Motion. Instead, Ms. Smith's correspondence dealt with the nature and extent of her injuries. As a result, the Court made efforts to explain the nature of the Motion to Ms. Smith and the potential jeopardy to her for not addressing the Motion before the Court.

[8] Having heard the parties, the Court requested of Ms. Smith, as a self represented litigant, whether she would seek an adjournment by the Court pursuant to Civil Procedure Rule 13.03(4) in order to make a motion to amend her Notice of Action to add the operator/owner of the vehicle as a party to the Action. The

Defendant indicated it would not object to an adjournment but would contest the motion based on limitation period. The Court indicated its willingness to allow an adjournment and took time to attempt to explain the process. Ms. Smith declined to request an adjournment and asked the Court to proceed on the Motion.

[9] Under Civil Procedure Rule 13.03(1), a Judge must set aside a Statement of Claim where it discloses no cause of action or otherwise makes a claim that is clearly unsustainable when the pleading is read on its own. Under Rule 13.03(2), a Judge must grant Summary Judgment where a Statement of Claim is set aside.

[10] In *Canada (Attorney General) v. Walsh*, 2016 NSCA 60, the Court summarized the test for Summary Judgment on the pleadings.

[18] ...

- Claims should only be struck if it is “plain and obvious” that they cannot succeed.
- The power to strike out claims is “a valuable housekeeping measure which weeds out hopeless claims”. This power promotes efficiency in the conduct of litigation and correct results, both serving the interests of litigants and the administration of justice.
- The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed.
- The pleadings are assumed to be true, and no evidence is admissible on the motion. Claimants cannot rely on the possibility that new facts may turn up. They must plead facts material to the causes of action they assert.

[11] The Plaintiff's Statement of Claim set out the particulars of the accident and her resulting injuries. She references Mr. McMullin when describing the accident. The claim also states that the Plaintiff was contacted by an agent for The Co-operators, Amy Elderkin. In this regard, the claim states:

[34] Amy Elderkin took statement over phone from Diane.

[35] Dianne Smith has not authenticated the transcript of phone statement given to Amy Elderkin.

[36] Amy Elderkin partially filled out insurance claim papers without Dianne Smith's permission.

[37] Amy Elderkin put a wrong birth date on form which was not given to her on statement and emailed them to Dianne smith.

[38] Amy Elderkin put wrong address in two different locations on forms which where not in the statement given her by Dianne Smith and emailed to Dianne Smith.

[39] Dianne Smith requested empty forms to be mailed.

[43] Breach of trust regarding Amy Elderkin's misuse of her authority as agent of The Co-operator's position in gathering and reporting information.

[12] The Co-operators filed a Notice of Defence on January 24, 2019. The Defendant states, in part, that it has no contractual relationship with the Plaintiff, that the Plaintiff has not sought or obtained Judgment against Gary MacMullin for damages arising from the accident while acknowledging it would have had a duty to defend and indemnify Gary MacMullin pursuant to the terms of the policy. The Defendant pleads the Statement of Claim discloses no reasonable cause of action against the Defendant.

[13] On a Motion for Summary Judgment, the Court is required only to consider the pleadings. The question of whether a pleading should be struck as disclosing no cause of action is a question of law.

[14] Under Section 133(1) of the *Insurance Act*, RSNS 1989, c.231, any person who has a claim against an insured for which indemnity is provided under a contract of insurance, must obtain a judgment against the insured before any cause of action directly against the insurer can exist.

[15] The Plaintiff has not obtained Judgment against Mr. McMullin nor has she claimed against him.

[16] The Statement of Claim does not advance any claim against Mr. MacMullin nor does it plead any cause of action against Mr. MacMullin.

[17] The Statement of Claim does not set out a cause of action against The Co-operators. The only relevant paragraph resembling a cause of action is stated in paragraph 43 as follows:

[43] Breach of trust regarding Amy Elderkin's misuse of her authority as agent of The Co-operator's position in gathering and reporting information.

[18] There is no factual basis contained in the pleading that set out any relationship, contractual or tort, between the Plaintiff and The Co-operators that could give rise to a claim of negligence or damages being claimed by the Plaintiff.

[19] As a result, I find that on a reading of the Statement of Claim and assuming the facts pleaded are true, it is plain and obvious that there is no valid cause of action pleaded against The Co-operators that could succeed.

[20] Summary Judgment granted.

Scaravelli, J.