CITATION: Korus v. State Farm Mutual Automobile Insurance Company, 2013 ONSC 7822
COURT FILE NO.: CV-13-00478162-0000
DATE: 20131218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Russell Korus (Plaintiff) and State Farm Mutual Automobile Insurance Company (Defendant)

BEFORE: Frank J.

COUNSEL: *Andrew Eckart*, for the Plaintiff
Todd McCarthy, for the Defendant

HEARD: December 17, 2013

ENDORSEMENT

[1] State Farm seeks a stay of this statutory accident benefits action, pursuant to Rule 21.03(3) on the basis that the action is an abuse of process.

[2] The plaintiff, Russell Korus, is State Farm's insured pursuant to a policy of auto insurance. The action arises out of a car accident that occurred on December 26, 2007. State Farm is obligated pursuant to the *Insurance Act,* R.S.O. 1990 c. 1.8, as amended, and in accordance with the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, and the policy, to pay income replacement benefits and medical and rehabilitation expenses to which the plaintiff is entitled.

History of the proceedings

[3] The plaintiff and his wife, also injured in the car accident, commenced a tort action arising out of that accident. Because the owner and driver of the car allegedly responsible for the accident are underinsured, in addition to them, the plaintiffs named State Farm Mutual Automobile Insurance Company as a defendant pursuant to the Underinsured Motorist Provisions of the auto policy of insurance issued by it to the plaintiffs and the Family Protection Endorsement to that policy.

[4] That tort action was set down for trial by the plaintiffs and in March, 2011 and a February 18, 2014 trial date was obtained.

[5] Meanwhile, Mr. Korus had made an application to the Financial Services Commission of Ontario ("FSCO") seeking income replacement benefits ("IRB claim"). That application was

resolved on the basis of a partial settlement in November 2010 for past income replacement benefits to October 4, 2010.

[6] Mr. Korus's claim for medical benefits, specifically a claim for payment of chiropractic treatments of approximately $13,000, was mediated in October 2011. As a result of the failure of that mediation, Mr. Korus filed for arbitration of that claim in May 2012.

[7] Mr. Korus made a second IRB claim to State Farm. It was denied on March 15, 2012. Mr. Korus filed an application with FSCO to mediate the denial on May 16, 2012. That mediation, which took place on March 13, 2013, failed. The following month, Mr. Korus commenced this action for IRB benefits, mental distress and punitive damages.

[8] On April 24, 2013 the FSCO pre-hearing of the medical benefits arbitration took place before Arbitrator Bayefsky who set the arbitration for hearing on September 18 and 19, 2013. The plaintiff did not disclose that he had commenced the accident benefits claim for income replacement benefits against State Farm.

[9] When served with the statement of claim in this action, State Farm objected to this action proceeding based on Mr. Korus having an accident benefits claim for medical expenses outstanding at FSCO. State Farm took the position that all accident benefit claims should be dealt with in one forum and that forum should be FSCO .

[10] In response, on September 11, 2013, in advance of the filing of a statement of defence, the plaintiff amended the statement of claim to add the medical benefit claim that was being pursued at FSCO and accordingly sought to withdraw that claim from arbitration, assuming that State Farm would consent. However, State Farm refused to consent unless Mr. Korus withdraw his claim for punitive damages and mental distress in this action. Mr. Korus refused.

[11] As a result, Mr. Korus moved before the FSCO arbitrator with carriage of it, Arbitrator Bayefsky, for an order permitting him to withdraw the arbitration. The order was granted on October 21, 2013 and has just been confirmed by the Director's Delegate, on appeal by State Farm.

[12] This action and the tort action were ordered to be tried together on the date long scheduled for the tort action, by Master Muir on October 23, 2013. The order is without prejudice to State Farm's right to proceed with this motion.

Positions of the parties

[13] State Farm's position is that it would be an abuse of process to allow Mr. Korus to proceed with his accident benefits claims in this action, as it is now too late for him to change forums from FSCO to the court.

[14] Mr. Korus submits that there is no basis for the concerns to which State Farm argues this action gives rise and no impediment to his changing forums.

[15] For the reasons that follow, I am in agreement with Mr. Korus.

Abuse of Process

[16] Rule 21.01(3)(d) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, provides that an action may be stayed or dismissed on the grounds that it is frivolous or vexatious or is otherwise an abuse of the process of the court.

[17] The principles on which the doctrine of abuse of process is based are set out by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 ["C.U.P.E"] The court, adopting the words of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56, described the doctrine as engaging the "inherent power of the court to prevent the misuse of its procedure in a way that would...bring the administration of justice into disrepute": see para. 37. The Court found the doctrine to be flexible and unencumbered by the specific requirements of concepts such as issue estoppel and, therefore, available where "allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": see para. 37.

[18] State Farm relies on the following as constituting abuse of process:

(a) Mr. Korus set hearing dates in the arbitration of his medical and rehabilitation benefits claim without disclosing that he had issued a claim against State Farm for IRB benefits;

(b) When there was an objection to this action proceeding while the medical and rehabilitation benefits claim was proceeding to arbitration at FSCO, instead of agreeing to add his IRB claim to the medical and rehabilitation claim at FSCO , Mr. Korus "embarked on procedures in both fora that have resulted in wasted dates and an adjournment in the Superior Court"; and,

(c) It is unfair to the defendants in the tort action to have their trial date put at risk because Mr. Korus's accident benefits claims have been ordered to be tried together with the tort action

[19] With respect to Mr. Korus making no reference to the issuance of a claim for IRB benefits when appearing with respect to the arbitration of the medical and rehabilitation benefits, it is important to bear in mind that it is the abuse of this court's process that is in issue in this motion. Assuming, which I do not, that Mr. Korus's conduct was reprehensible as State Farm argues, that conduct is not in relation to the proceeding before this court and does not affect it.

[20] The second circumstance on which State Farm relies is Mr. Korus's failure to agree to forgo this action and the resulting waste.

[21] It is not disputed that there is no jurisdictional impediment to Mr. Korus adding his IRB claim to a medical benefits claim at FSCO or that although Mr. Korus cannot claim mental suffering or punitive damages at FSCO, he can make extra-contractual claims, though they are limited. But, I do not accept State Farm's submission that, based on the Court of Appeal decision in *Gordyukov v. Certas Direct Insurance Company et al.,* 2012 ONCA 563,

["*Gordyukov*"] Mr. Korus is required to proceed with his IRB claim at FSCO and his failure to do so is an abuse of this court's process.

[22] As the court stated in *Gordyukov*, the issue on appeal in that matter, an appeal from the decision of the Divisional Court on judicial review of the decision made by the Director's Delegate of FSCO, was the interpretation of the limitation period provision set out in s. 281.1(1) of the *Insurance Act,* R.S.O. 1990, c.1.8.

[23] In *Gordyukov,* the plaintiff issued a statement of claim against the defendant, her insurer, for payment of accident benefits, a declaration of entitlement to continued Accident Benefits, and aggravated and punitive damages. The claim issued after mediation had failed to settle a dispute over entitlement to certain medical benefits. Subsequently, the plaintiff applied for a determination of catastrophic impairment which was rejected. The plaintiff took the matter to mediation and when that failed, commenced an arbitration proceeding at FSCO, claiming entitlement to continued benefits based on her assertion that she had suffered a catastrophic impairment. The application for arbitration was filed more than six years after the issuance of the statement of claim.

[24] The defendant insurer brought an application to have the arbitration stayed, maintaining that the arbitration issue should be added to the pending court action for accident benefits. The plaintiff's position was that both could proceed concurrently and independently of each other. The insurer argued that the appropriate remedy was a stay of the arbitration as adding the claims pending in court to the arbitration at FSCO would raise limitation period issues. The arbitrator ruled that the plaintiff could add all of the matters pending before the Superior Court to the arbitration proceeding.

[25] The Director's Delegate, allowing the appeal from the decision of the FSCO arbitrator, determined that "although the *Insurance Act* allowed the claimant to choose whether to proceed either by arbitration or through the courts, once the two-year limitation period expired, the [plaintiff] could not move a matter from one forum to the other.": see: *Gordyukov,* at para. 9. The Divisional Court set aside the delegate's decision.

[26] The Court of Appeal allowed the appeal from the Divisional Court. In doing so, it found that the Delegate's conclusion that applicants must choose a forum to dispute a benefit claim within the time limit and cannot initiate a proceeding in the other forum claiming the same benefit after expiry of the time limit was entirely reasonable. The Court's comments on which State Farm relies as to the implications of the Divisional Court's decision are in the context of Divisional Court's interpretation of the limitation period in s. 281.1(1) of the *Insurance Act.* As the Court stated, *Gordyukov* is an exceptional case. Its effect is to prevent insureds from changing forums after the expiry of the limitation period. I see nothing in *Gordyukov* that limits an insured's right to the choice of forum where no limitation period is in issue. There is no limitation period issue in this case.

[27] State Farm submits that the factors to be considered in deciding whether Mr. Korus should be entitled to choose to proceed by way of a claim in this court having commenced and arbitration at FSCO are those set out in *Mangat v. Non-Marine Underwriters, Lloyd's London,*

[2000] O.F.S.C.I.D. No 144 and adopted by the Court of Appeal in *Gordyukov*. However, in *Mangat* the issue was whether to stay an arbitration because of a concern that there may be conflicting findings or duplication. There is no risk of either in this case as Mr. Korus does not wish to proceed with the arbitration and has been allowed to withdraw it.

[28] State Farm's reference to an adjournment in the Superior Court is, as I understand it, based both on the assumption that an adjournment of the trial will be granted if it seeks one – I am advised by counsel for State Farm that he will be seeking an adjournment on the basis of this action not being ready for trial as scheduled - and the risk that the court will not be in a position to allow the trial to proceed for longer than scheduled for the tort action alone. It is not possible to say at this time whether a trial longer than originally expected will be able to be accommodated. Of course, the earlier the long trial team has notice of the requirement of additional trial time, the greater the prospect of accommodation.

[29] Should State Farm succeed in obtaining that adjournment, it may well result in this court losing trial time. Another action that could have been tried during the dates originally set aside for the tort action will not have been tried without any other matter taking its place. This is a circumstance that is to be avoided if possible as it compounds the challenges that this court faces in providing fixed and timely trial dates for trials of longer than two weeks. But, the loss of the court's trial time does not rise to the level of being an abuse of process.

[30] Nor does the prejudice to the defendants in the tort action resulting from a delay of the trial warrant a stay of this action. The potential prejudice to those defendants was considered by the Master before ordering trial together. The defendants in the tort action opposed the motion for trial together with this action, arguing that such an order would prejudice them by likely resulting in a delay of the trial, a longer trial and the loss of the jury. The Master concluded that while an adjournment should not be necessary as this action should be ready for trial by the scheduled date, if an adjournment was sought the trial judge would be in a position to address any prejudice. The defendants in the tort action made the same submissions on this motion as before the Master, supporting State Farm's position. The prejudice of which the defendants in the tort action complain may be addressed by the trial judge hearing the actions.

[31] Meanwhile, contrary to the submissions of State Farm, in my view, the plaintiff would suffer prejudice if this action were stayed. The primary prejudice is that there would be resulting duplication in the evidence that Mr. Korus would be required to call as the evidence in support of the income replacement benefit claim proceeding by way of arbitration at FSCO would be largely the same as the evidence at the trial of the tort action in support of Mr. Korus' claim in that action. The duplication is avoided not by requiring Mr. Korus to have the issues in this action determined at FSCO but, rather, by having those issues tried in this action together with the tort action. Theoretically, there is also prejudice to Mr. Korus resulting from having his claim for mental suffering and punitive damages restricted to what is allowed at arbitration.

[32] The potential loss of the jury of which the defendants in the tort action complain does not result from the plaintiff trying to change forums at too late a date, which is the basis of State Farm's objection. That issue would exist regardless of at what stage the plaintiff brought the accident benefits action.

[33] Allowing this action to proceed does not violate those principles that the doctrine of abuse of process is intended to protect. Judicial economy is not negatively impacted as there is no other proceeding that is in any way duplicative. There is no risk of offending the need for consistency as there will be no other decision on the issues in this action. Finality will be achieved through this action. Finally, the integrity of the administration of justice is not impugned or diminished by this action.

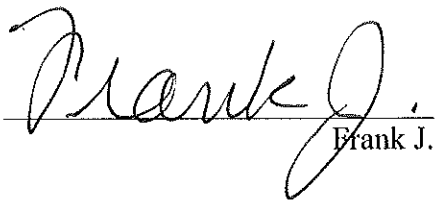
[34] The fact that time was spent and therefore costs incurred as a result of Mr. Korus first seeking arbitration of the medical benefits claim in that the parties attended at a pre-hearing and were put to the costs of the determination of the right of Mr. Korus to withdraw that arbitration does not approach the level of abuse that would warrant a stay.

[35] The motion is dismissed.

[36] Mr. Korus seeks costs on a substantial indemnity basis. In my view costs on that scale are not warranted. In *Young v. Young*, [1993] 4 S.C.R. 3 at para. 251, McLachlin J. described the conduct of a party that would warrant an award of costs on a substantial indemnity basis as being "reprehensible, scandalous or outrageous". That does not apply to the conduct of State Farm on which Mr. Korus relies.

[37] Mr. Korus has submitted a cost outline in which he seeks costs totaling $5,261.77. The guiding principle in determining costs is that of reasonableness. To that must be applied the considerations set out in Rule 57.01 of the *Rules of Civil Procedure.*

[38] Of particular note in this case is the fact that the issue on this motion was of importance to the plaintiff. But, in my view, the costs sought are excessive in spite of this, primarily because the hourly rate for senior counsel on a partial indemnity basis is beyond the range of what is reasonable. I do not have the benefit of a cost outline from State Farm as it chose not to prepare one in light of it not seeking costs of either this motion or the stayed action in the event of success. But, in terms State Farm's reasonable expectations, the cost award of Master Muir is of some assistance. Costs of $3,000 were awarded for the motion for trial together, a motion that had a lesser degree of complexity than this motion. I award costs to the plaintiff of $4,000 all inclusive.



Frank J.

DATE: December 18, 2013