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Docket: CI 19-01-24992
(Winnipeg Centre)
Indexed as: Daku v.
Saskatchewan Government Insurance Corporation
Cited as: 2023 MBKB 120

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DAVID DAKU,	)	W. Timothy Stodalka
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
SASKATCHEWAN GOVERNMENT INSURANCE CORPORATION,	)	Kyle L. Dear
	)	Ian Duncan (Articling Student-At-Law)
	)	for the defendant
	)	
defendant.	)	Judgment Delivered:
	)	July 27, 2023

GRAMMOND J.

INTRODUCTION

[1] The plaintiff, a Saskatchewan resident, was struck by a motor vehicle in Winnipeg, Manitoba on December 8, 2017, while walking as a pedestrian (the "Collision"). He filed a claim for insurance benefits payable by the defendant, Saskatchewan Government Insurance Corporation ("SGI") pursuant to the statutory no-fault scheme in Saskatchewan and an inter-jurisdictional agreement between SGI and

the Manitoba Public Insurance Corporation ("MPIC"). SGI later denied the plaintiff's insurance claim.

[2] The plaintiff then filed the claim against SGI in this matter, which SGI moved to stay, dismiss, or strike. The plaintiff filed a cross-motion to amend the claim. These reasons for decision relate to both of those motions.

BACKGROUND

[3] A timeline of the events relevant to this matter is as follows:

a) **December 8, 2017**: the Collision occurred;

b) **July 15, 2019**: SGI advised the plaintiff that his insurance claim was denied because the medical information on file did not support that his ongoing problems were related to the injuries that he sustained in the Collision (the "Decision");

c) **October 24, 2019**: the appeal period within which the plaintiff could have appealed the Decision to either the Saskatchewan Court of Queen's Bench (now Court of King's Bench) or to the Automobile Injury Appeal Commission expired; and

d) **December 6, 2019:** the plaintiff filed this action.

ISSUES

[4] Should the plaintiff's claim be stayed, dismissed, struck, or amended?

ANALYSIS

[5] In the request for relief as written, the plaintiff has sought an order that SGI erred in determining that he is substantially able to perform the essential duties of his

employment, and an order determining the proper amount of insurance benefits to which he is entitled.

[6] The plaintiff argued that the claim as written does not relate to an appeal of the Decision, and that it reflects allegations of the breach of the duty of good faith by SGI. In particular, the plaintiff argued that SGI breached its duty of good faith by failing to review dashboard camera footage of the Collision (the "Footage") and failing to forward the Footage to medical assessors, which led to the conclusions that he was misdiagnosed with a concussion, and that there was "no evidence to support anything other than a very minor head injury". He also submitted that these conclusions were misleading, for which SGI gave no explanation.

[7] I will note at the outset of my analysis that the claim as drafted contains no reference to the duty of good faith, to a breach of that duty, to allegations of bad faith, or to the Footage. In my view, the claim very clearly constitutes an appeal of the Decision, and it reflects no material facts that relate to any other cause of action.

[8] SGI moved to stay, dismiss, or strike the claim on the basis that this court has no jurisdiction to hear the claim as drafted, and that it does not disclose a reasonable cause of action. SGI pointed to s. 191 of ***The Automobile Accident Insurance Act***, R.S.S. 1978, c. A-35 (the "***Act***"), which provides that a decision made by SGI relative to no-fault benefits is final, except for an appeal to the Saskatchewan Court of King's Bench or the Appeal Commission within 90 days. SGI also relied upon the s. 99 of ***The Personal Injury Benefits Regulations***, R.R.S. c. A-35, Reg. 3, which provides that a claimant who appeals to the Court of King's Bench shall file at the judicial centre

nearest to where they reside, unless the parties agree otherwise. No such agreement was reached in this case.

[9] The plaintiff did not pursue an appeal of the Decision to either the Saskatchewan Court of King's Bench or the Appeal Commission within 90 days, or at all. He filed only the claim in this matter, in this court, well after the 90 day limitation period had expired. Given that s. 191 sets out two options that a claimant may pursue after a denial of benefits by SGI, neither of which includes a fresh claim filed in another province, the plaintiff's claim as drafted is not properly before this court.

[10] I have also considered ***Banting v. Saskatchewan Government Insurance,*** [1988] M. J. No. 290 (QL), 10 A.C.W.S. (3d) 338, where Krindle J. stated:

> I find that the contract of insurance between plaintiff and defendant reserves to the Saskatchewan Court the jurisdiction to hear claims against the defendant for insurance monies. That being the case, this court would be precluded from determining the issue raised by the pleadings at trial. Accordingly, the motion to dismiss the claim as being frivolous and vexatious is allowed.

[11] I recognize that the insurance coverage at issue in ***Banting*** was collision coverage, which is not at issue in this case. Having said that, the court relied upon s. 62 of the ***Act***, which provides that "an action to recover benefits or insurance money shall be taken in the court". The "court" is defined as the Saskatchewan Court of King's Bench.

[12] It is clear, therefore, that the Saskatchewan Court of King's Bench was the proper forum in which the plaintiff should have filed the claim as written, and that this court does not have jurisdiction over the claim.

[13] For all of these reasons, it is plain and obvious that the claim as written has no reasonable chance of success and should be struck for a lack of jurisdiction and for failing to disclose a reasonable cause of action.

[14] Before striking the claim, however, I will consider whether the plaintiff should be permitted to amend it as requested.

[15] Court of King's Bench Rule 26.01 provides that a pleading can be amended at any stage of an action, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[16] In ***Lloyds Bank Canada v. Sherwood***, 1990 CanLII 11214 (MBQB), 64 Man. R. (2d) 288, the court stated:

> 55 … the following factors must be considered upon an application to amend pleadings:
>
> 1. The seriousness of the prejudice to the other party;
>
> 2. whether the prejudice that would result can be compensated for by costs or an adjournment;
>
> 3. whether there was a delay on the part of the party moving for the amendment and, if so whether the delay has been satisfactorily explained;
>
> 4. the nature of the proposed amendment and whether it raises a valid, arguable point that has merit.

[17] In ***Jaman et al. v. Hussain et al.***, 2005 MBQB 37, the court stated:

> [13] In deciding a motion of this kind, a court must consider whether a new cause of action would be created if the amendment is allowed. In *Stelman v. McCarthy* ((1997), 1997 CanLII 22771 (MB QB), 119 Man.R.(2d) 141 (Q.B.)), this court described a cause of action as follows: a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.

> [14] When the proposed amendments create a new factual situation that would permit the plaintiff a remedy even if the other allegations fail, a new cause of action is being advanced (*Stelman v. McCarthy*). When the proposed amendments change the nature of the case and the new claim could not have been discerned by the other party upon reading the initial claim, a new cause of action is being advanced (*Miller v. Jaguar*).

[18] In ***Britton v. Manitoba***, 2011 MBCA 77, the court stated:

> 38 The question of whether the amendments constitute a new cause of action can be reframed to ask whether the amendments introduce a new set of facts that provide the basis for an action in court. …
>
> 39 As is well known, "[t]he amendments are to be seen in the context of the statement of claim as originally filed" (*Maxwell v. Dhalla et al.*, 2006 MBCA 33, at para. 5).

[19] As I have already determined, the claim as drafted constitutes an appeal of the Decision and does not contain material facts that relate to allegations of a breach of the duty of good faith. As such, I have concluded that the plaintiff is proposing that a new cause of action be added to the claim.

[20] The law is clear that a claim against an insurer for a breach of the duty of good faith is a separate cause of action from the pursuit of an insurance claim, although it is derived from a breach of the insurance contract. The duty of good faith provides that an insurer has an obligation to deal with claims fairly and to act in good faith when investigating, assessing claims, and deciding whether to pay benefits[1]

[21] In this case, the plaintiff did not pursue an appeal of the Denial in Saskatchewan, and instead did so in Manitoba where the court is without jurisdiction for the reasons set out above. It is difficult to envision, therefore, how the plaintiff would pursue a bad

[1] ***Gurniak v. Saskatchewan Government Insurance***, 2016 SKQB 391, at para. 68, ***Harsch v. Saskatchewan Government Insurance***, 2021 SKCA 159, at para. 20, and ***Martens v. The Manitoba Public Insurance Corporation***, 2021 MBCA 102.

faith claim in Manitoba, given that the underlying request for insurance benefits is not properly before this court and, pursuant to the proposed amendments, would remain as a part of the claim.

[22] Despite this deficiency in the plaintiff's case, I will consider whether this court has the jurisdiction to hear the plaintiff's claim for a breach of the duty of good faith. The limitation period applicable to a bad faith claim in Manitoba is six years[2], and as such, the proposed amendments are not out of time.

[23] The parties agree that the test applicable to jurisdictional issues is set out in ***Club Resorts Ltd. v. Van Breda***, 2012 SCC 17, where the court stated:

> [69] When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test…
>
> …
>
> [90] … in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[24] The court in ***Club Resorts Ltd.*** also stated that this list of factors is non-exhaustive, that a plaintiff must establish that one or more of these factors exists, and that the factors are rebuttable.

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[2] ***The Limitation of Actions Act***, R.S.M. 1987, c. L150, at s. 2(1).

[25] The plaintiff argued that this court should assume jurisdiction over the bad faith claim because:

a) SGI carries on business in Manitoba[3];

b) the Collision took place in Manitoba;

c) SGI and MPIC entered into a contract relative to the inter-provincial recovery of benefits; and

d) the witnesses to the Collision and the treating physicians are resident in Manitoba.

[26] SGI argued that it conducts business primarily in Saskatchewan, and that this dispute arose from an SGI insurance contract. As such, Saskatchewan has a stronger connection to this dispute than does Manitoba, regardless of where the Collision occurred. SGI also argued that the plaintiff should be precluded from pursuing a bad faith claim given that he did not pursue an appeal of the Denial. In other words, the payment of insurance benefits underlies the bad faith claim, and if benefits are not being paid and will not be paid, the bad faith claim is without a basis upon which to proceed.

[27] I accept that although Manitoba is not SGI's primary place of business, it does carry on business here in a variety of ways. Having said that, although the Collision occurred in Manitoba, I am not satisfied that any breach of the duty of good faith could be said to have occurred in Manitoba. If SGI breached its duty of good faith, it did so

[3] The plaintiff pointed to the test in ***T.D.I. Hospitality Management Consultants Inc. v. Browne***, 1994 CanLII 10958 (MBCA).

while considering and administering the plaintiff's claim in Saskatchewan. Moreover, I am not satisfied that the contract into which SGI and MPIC entered is relevant to the issue of jurisdiction over a bad faith claim, because it very clearly pertains to the administration of no-fault benefits, which is related to but distinct from a bad faith claim.

[28] I am not satisfied, therefore, having considered the applicable presumptive connecting factors together, that this court should assume jurisdiction over a claim for the breach of the duty of good faith as between the plaintiff and SGI. For that reason, I need not consider the second part of the test set out in ***Club Resorts Ltd.***, namely whether the action should be stayed on the basis of *forum non conveniens*.

[29] The plaintiff submitted in the alternative, if I concluded that this court does not have jurisdiction over the claim, that the action should be transferred to the Saskatchewan Court of King's Bench pursuant to s. 32 of ***The Court of King's Bench Act***, C.C.S.M. c. C280, and the inherent powers of this court.

[30] I note that in Saskatchewan, the limitation period applicable to a claim for a breach of the duty of good faith is two years, and the plaintiff did not file such a claim in Saskatchewan on or before July 15, 2021. Accordingly, the applicable limitation period in Saskatchewan has expired.

[31] The plaintiff pointed to s. 20 of ***The Limitations Act***, S.S. 2004, c. L-16.1, which provides that in certain circumstances a claim may be amended after the expiry of the limitation period. In ***Hartman Farms Ltd. v. Meyers Norris Penny LLP***, 2021 SKQB 319, the court permitted amendments to a claim after the expiration of a

limitation period, but in my view, that case is distinguishable from the case at bar on the basis that the amendments did not include a new cause of action. Moreover, in this case the expired limitation period is in Saskatchewan, not Manitoba, and this court does not have jurisdiction to grant an amendment pursuant to another province's legislation.

[32] The plaintiff also pointed to ***The Court Jurisdiction and Proceedings Transfer Act***, S.S. 1997, c. C-41.1 (the "***CJPTA***"), and in particular s. 22, which provides that where a proceeding is transferred to the Saskatchewan Court, it shall not hold a claim barred because of a limitation period if:

a) the claim would not be barred pursuant to the limitation rule that would be applied by the transferring court; and

b) at the time the transfer took effect, the transferring court had both territorial and subject-matter competence in the proceeding.

[33] "Territorial competence" is defined in the ***CJPTA*** as those aspects of a court's jurisdiction that depend on a connection between the territory of the court and either a party to or the facts of a proceeding. "Subject-matter competence" is defined as those aspects of a court's jurisdiction that depend on factors other than territorial competence.

[34] The plaintiff argued that if the claim was transferred to Saskatchewan pursuant to s. 22, it could be pursued regardless of the expired limitation period. The plaintiff submitted that although there are no cases in which s. 22 has been considered by the court, in ***Pan-Afric Holdings Ltd. V. Ernst & Young LLP***, 2007 BCSC 685, an action was transferred from British Columbia to the State of Maryland, U.S.A., on the condition

that the claim in British Columbia was stayed pending a determination of the case in Maryland on its merits.

[35] SGI argued that Manitoba does not have either territorial competence or subject matter competence in this matter, such that the requirements of s. 22 are not met. Moreover, SGI submitted that for policy reasons a plaintiff should not be able to bring a claim within the limitation period in a jurisdiction with no connection to the claim, and then transfer it to the jurisdiction in which it should have been brought after the limitation period has expired. SGI cited ***McCooeye v. Hankook Tire Canada Corp.***, 2020 ABQB 496, where the court refused to accept the transfer of an action from Saskatchewan because Alberta would not be a more appropriate forum for the dispute and would not bring about the fair and efficient working of the Canadian legal system as a whole.

[36] I am not prepared to request that the Saskatchewan Court accept a transfer of this action, because I agree that this court has neither territorial nor subject-matter competence in this matter, such that the requirements of s. 22 are not met. I have also concluded, as SGI argued, that an inter-provincial transfer should not be used by a litigant as a form of "back door" to cure an expired limitation period in the jurisdiction where a claim should have been filed in the first instance.

[37] I will add that the plaintiff argued he has suffered prejudice by the delay that ensued in this matter while settlement discussions were ongoing as between him and SGI. I note, however, that SGI's motion to strike was filed in October 2020, and there is no evidence that it agreed not to pursue the motion if no settlement was reached.

Similarly, there is no evidence that the parties agreed to suspend the Saskatchewan limitation period during negotiations, and it is unclear why the plaintiff did not file a claim in Saskatchewan to protect the two-year limitation period.

[38] For all of the foregoing reasons, I am satisfied SGI would be prejudiced if the claim was amended, and I am not satisfied that the prejudice could be compensated for by costs or an adjournment. In addition, I am not satisfied that the plaintiff's delay in this matter has been satisfactorily explained or that the nature of the proposed amendment raises a valid, arguable point that has merit.

CONCLUSION

[39] SGI's motion to strike is granted and the plaintiff's motion to amend is denied.

[40] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

_____

J.