CITATION: Klees v. State Farm Insurance, 2024 ONSC 1688
NEWMARKET COURT FILE NO.: CV-20-2780
DATE: 20240326

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DONALD KLEES AND JULIE KENT	)	Self Represented
Plaintiffs	)	
– and –	)	
STATE FARM INSURANCE, DESJARDINS INSURANCE, and KEITH G. JUPP	)	Omar Tobah, for the Defendants
Defendants	)	
	)	**HEARD:** January 4, 2024

2024 ONSC 1688 (CanLII)

REASONS FOR DECISION

CASULLO J.

Overview

[1] The plaintiffs commenced an action against the defendants seeking, *inter alia*, a fully paid up policy of insurance for each of them in the amount of $50,000, as well as damages in the amount of $750,000.

[2] The plaintiffs claim the defendants' conduct toward them departs from ordinary standards of decent behaviour, warranting a substantial award of punitive damages.

[3] Against this backdrop, the defendants bring this motion for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194.

[4] The scheduling of this motion has enjoyed the benefit of three case-conferences before Sutherland J., on March 18, 2022, August 31, 2022, and July 26, 2023. At the first two conferences, timetables were established for the filing and serving of materials, including responding material from the plaintiffs. At the second conference the plaintiffs were

directed to resources to assist self-represented parties, including the *Rules of Civil Procedure* and the Superior Court of Justice's website.

[5] Despite this guidance, in place of filing a responding motion record with an affidavit, the plaintiffs simply uploaded a factum to Caselines. Over the objection of counsel for the defendants, I permitted the plaintiffs to provide *viva voce* evidence.

2024 ONSC 1688 (CanLII)

Background

[6] On July 10, 1992 the plaintiffs purchased a one-year term life insurance policy from State Farm (the "Policy"). The Policy identified Ms. Kent as the owner and the first insured, and Mr. Klees as the additional insured. The plaintiffs received a copy of the Policy, although it appears they did not read it. As Mr. Klees submitted to the court, "nobody reads those contracts."

[7] The Policy provided coverage for each of the plaintiffs of $35,000.

[8] The Policy renewed annually, providing coverage year-to-year until it was terminated. Premiums were calculated annually.

[9] The Policy also included an option to convert it to a permanent, whole life policy. If converted, the policy would remain in place for the entirety of the insured's life. There would be no annual renewals or premium recalculations. However, because whole life policies represented greater risk to the insurer, the premiums were higher.

[10] The option to convert the Policy to a whole life policy was subject to certain conditions. One condition was that the insured wishing to convert had to do so prior to the policy anniversary on which they were seventy-five years old.

[11] Another condition was that the conversion could only be for a policy in the same amount of coverage provided for by the Policy, in this case $35,000.

[12] In 1994, the plaintiffs advised their agent that they would like to convert the Policy to a permanent policy in the amount of $100,000 with $50,000 split between the two of them, to be paid up within 25 years. They were advised that conversion was not possible.

[13] Effective January 1, 2015, State Farm transferred all of its life insurance activities to Desjardins Insurance.

[14] In 2018 Ms. Cartini, assistant to Mr. Jupp, the plaintiffs' insurance broker, advised the plaintiffs that Ms. Kents' conversion rights were about to expire. Between May and July of 2018, a number of emails were exchanged. Ultimately the plaintiffs instructed Ms. Cartini to convert the Policy to a permanent policy. They made their decision based on the quote provided by Ms. Cartini – $171.55 per month. However, this was actually the monthly premium the plaintiffs had paid for the Policy for the year that was about to expire.

2024 ONSC 1688 (CanLII)

[15] On July 12, 2018, Julie wrote to Mr. Jupp seeking confirmation that the Policy had been converted.

[16] On July 12, 2018, Mr. Jupp confirmed that the Policy had been converted. This, however, was inaccurate as the Policy was not converted.

[17] When they had not received their new policy by the end of August, 2018, Ms. Kent reached out to Mr. Jupp's office. She was advised that the delay came from head office, but all would be put into place shortly. Once again, no policy was received.

[18] The plaintiffs contacted Desjardins directly for an update but were advised that there was no record of any conversation concerning the requested conversion.

[19] In October 2018, Ms. Cartini advised the plaintiffs that the quote for the conversion was actually almost $800 per month, significantly higher than the $171.55 she had quoted the plaintiffs six month earlier.

[20] All of this culminated in an email of complaint from the plaintiffs to Desjardins dated October 9, 2018.

[21] On October 18, 2018 Desjardins wrote a letter to the plaintiffs. The letter set out the conversion options available to the plaintiffs, reiterating that each had until their 75th birthday to convert. Ms. Kent's option had expired on July 9, 2018, but Mr. Klees had until July 2021 to exercise his option to convert.

[22] Desjardins acknowledged the difficulties the plaintiffs had experienced with Mr. Jupp, who was replaced with another agent, Ms. Moulton. To compensate for this, Desjardins extended Ms. Kent's option to convert to December 1, 2018, following which she would lose her option to convert.

[23] Desjardin also confirmed that the quote of $171.55 was unrealistic and had clearly been made in error. Owing to this confusion, Desjardins offered to credit the plaintiffs' first two premiums following the conversion. Further, if following the conversion the premium was cheaper than the premium they were currently paying, Desjardins would apply the difference between both premiums and credit same to future premiums.

[24] Finally, Desjardins offered to ensure that Mr. Klees was made a co-owner of the new policy, and not simply named an additional insured.

[25] Ms. Moulton sent the plaintiffs an email on November 27, 2018, confirming her conversation with the plaintiffs earlier that day. The plaintiffs had advised her they understood that the extension of time to convert coverage for Ms. Kent was only available until December 1, 2018. The plaintiffs confirmed to Ms. Moulton they were choosing not to exercise Ms. Kent's option. They further advised they were obtaining legal advice.

[26] On October 6, 2020 the plaintiffs commenced the within action, claiming damages arising from the failure of the defendants to (a) ensure the Policy was jointly owned by both Ms.

Kent and Mr. Klees (the "1992 Action:); and (b) provide them with a converted policy (the "1994 Action" and the "2018 Action")".

Test for Summary Judgment

[27] Rule 20.01(1) of the *Rules of Civil Procedure* provides that a defendant may move for summary judgment dismissing all or part of a plaintiff's claim.

[28] Rule 20.04 mandates that a court shall grant summary judgment if satisfied that there is no genuine issue requiring trial.

[29] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada provides guidance with respect to summary judgment motions at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The Court continued, at para. 66:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[30] In these passages, the Supreme Court has effectively articulated a road map for judges to follow in summary judgment motions. First, without using the expanded fact-finding powers, a judge is to determine if there is a genuine issue requiring a trial. If there is no genuine issue requiring a trial, summary judgment is granted.

Analysis

2024 ONSC 1688 (CanLII)

2024 ONSC 1688 (CanLII)

1992 Action

[31] The plaintiffs claim breach of contract by State Farm for failing to make each of them owners on the Policy.

[32] The application completed by the plaintiffs identified Ms. Kent as "Proposed Insured 1" and Mr. Klees as "Proposed Insured 2". Directly above the signature line were the words: "any policy issued on this application will be owned by Proposed Insured 1, or the Applicant, if other than Proposed Insured 1".

[33] The policy was issued in Ms. Kent's name, with Mr. Klees named as an additional insured. This is what the application provided for, and what the plaintiffs agreed to purchase.

[34] The limitation period governing this cause of action is governed by the *Limitations Act*, R.S.O. 1990, c. L.15 (the "*1990 Act*").

[35] The *1990 Act* provided a limitation period of six years for actions of breach of contract. The doctrine of discoverability is not provided for in the *1990 Act*.

[36] The plaintiffs thus had six years to bring an action, or until 1998. They did not do so, and the 1992 Action fails because it is out of time.

[37] If I am incorrect in this regard, the 1992 Action would also fail because no damages flow from the issue of ownership. Mr. Klees had full coverage under the Policy until it was cancelled at the plaintiffs' request in December 2023.

1994 Action

[38] The plaintiffs sue State Farm for breach of contract for failing to convert the Policy pursuant to the terms of their request: increased coverage of $35,000 each, to coverage of to $50,000 each.

[39] When State Farm failed to do so, the plaintiffs had six years to commence an action, or until 2000. They did not do so, and the 1994 Action fails as it is out of time.

[40] If I am incorrect in this regard, the 1994 Action also fails because the coverage available to the plaintiffs upon conversion was the equivalent value of the Policy. In other words $35,000 each, not $50,000 each. The plaintiffs were never entitled to the benefit of the coverage they are claiming the loss of.

2018 Action

[41] In 2018 Mr. Jupp and his associate, Ms. Cartini, clearly dropped the ball in respect of the plaintiffs. Ms. Cartini quoted them the wrong monthly premium. Relying on this incorrect information, the plaintiffs asked that the Policy be converted. Mr. Jupp told the plaintiffs the Policy had been converted. He was clearly wrong.

[42] When the magnitude of these failures was brought to Desjardins' attention, it offered to right its wrongs. Having missed the deadline to convert due to Mr. Jupp's inadvertence, Desjardin extended the deadline by which Ms. Kent could convert her coverage from term to whole life. It offered to reimburse Ms. Kent for any excess amounts paid in premiums in the interim. It offered to credit her first two premiums following conversion. Desjardin also reminded Mr. Klees of his deadline to convert should he chose to do so.

[43] The plaintiffs did not accept Desjardins' offer. In fact, they submit it was not a proper offer, as it did not provide a figure for the monthly premiums they would pay post-conversion. However, Mr. Klees himself told the court the new monthly premium would be over $800 per month, so this information known to him.

[44] The plaintiffs submit that the whole reason for converting the Policy was to escape the escalating monthly premiums. But the reality is that permanent policies are more expensive than term policies. The plaintiffs expected to be able to convert at the monthly rate of $171.55. This was not a reasonable expectation.

[45] Mr. Klees argued that lower premiums for permanent policies were available, relying on brochures from Desjardins. However, these brochures were not in evidence, and have no bearing on my decision.

[46] Desjardins provided an offer that would put the plaintiffs in the position they would have been in had the Policy been converted as requested. However, this could only be effected at the higher monthly premium.

[47] The plaintiffs are clearly affronted at the treatment they received from their insurance agent. But this does not ground an action in breach of contract, or support an award of damages.

[48] The plaintiffs have not satisfied me that any damages stem from the insurer's failure to convert the Policy in 2018. Thus, the 2018 Action fails.

[49] If I am wrong in this regard, then I find that the plaintiffs have failed to mitigate their losses.

[50] As the Supreme Court of Canada reiterated in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 23, citing *Asamera Oil Corp. v. Seal Oil & General Corp*., [1979] 1 S.C.R. 633, at pp. 660-661, a plaintiff is under an obligation to take all reasonable steps to mitigate any losses they incur from alleged wrongdoing and cannot claim any damages that are due to their own negligence to take such steps.

[51] The Supreme Court also stated in *Southcott* that "losses that could reasonably have been avoided" are, in effect, caused by the plaintiff's inaction rather than the defendant's wrongdoing, and that "a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps".

2024 ONSC 1688 (CanLII)

[52] I asked the plaintiffs to quantify their damages. Mr. Klees suggested this amount was in the vicinity of $20,000. However, no rational was provided in support of this number.

[53] I find that any damages sustained by the plaintiffs in the 2018 Action were due solely to their decision not to accept Desjardins' offer, rather than any act or omission of the defendants.

Conclusion

[54] For the reasons set out above, there are no genuine issues requiring a trial, and the defendants' motion for summary judgment is granted.

Costs

[55] As the successful party, State Farm is presumptively entitled to its costs. The parties are encouraged to come to an agreement as to an appropriate award for costs. In the event they are unable to do so, they may contact the trial co-ordinator to secure a short costs hearing before me.

[56] At least 10 days before the date of the costs hearing, the defendant, State Farm, shall serve written costs submissions not exceeding 3 pages, exclusive of costs outlines and any authorities. At least five days before the costs hearing, the plaintiffs, Mr. Klees and Ms. Kent, shall serve written costs submissions not exceeding 3 pages, exclusive of costs outlines and any authorities.

[57] If neither side requests the costs hearing within 30 days of the date of the release of these reasons, costs will be deemed to have been settled.

Casullo J.

Released: March 26, 2024

2024 ONSC 1688 (CanLII)