

CITATION: Husein v. Janmohamed, The Canada Life Assurance Company and
Aga Khan Foundation Canada
2024 ONSC 1912
NEWMARKET COURT FILE NO.: CV-21-00004137-0000
DATE: 20240402

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MAHAMUD HUSEIN)
)
) Plaintiff) Eduardo. Lam, for the Plaintiff
)
- and -)
)
)
NURUDDIN JANMOHAMED, THE) Howard Borlack, for the Defendant
CANADA LIFE ASSURANCE) Janmohamed
)
COMPANY and AGA KHAN)
FOUNDATION CANADA)
)
Defendants)
)
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)
) **HEARD:** January 11, 2024

2024 ONSC 1912 (CanLII)

REASONS ON MOTION

McCARTHY, J.

The Motion

- [1] The Defendant Nuruddin Janmohamed (“Jan”) moves under r.21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order striking the Plaintiff’s claim as disclosing no cause of action. In the alternative, Jan moves for summary judgment dismissing the Plaintiff’s claim under r. 20. In the further alternative, the Defendant asserts that any cause of action is statute barred by the applicable limitation period.
- [2] The Plaintiff has discontinued his claim against the Defendants Canada Life Assurance Company (“Canada Life”) and Aga Khan Foundation Canada (“the Foundation”). This leaves only his claim against Jan now limited to damages for misrepresentation.

Background

- [3] With the assistance of Jan, the Plaintiff obtained a Canada Life ‘Millennium Universal Life’ policy (“the policy”) in August 2001. The policy insured the life of the plaintiff to age 100 and carried a death benefit of \$250,000. The Plaintiff wished to name the Foundation as the beneficiary of the policy. This required that the Foundation own the policy.
- [4] The Plaintiff duly executed a delivery receipt on August 23, 2021, followed by a “Title Change Form” on August 24, 2021, which had the effect of transferring both ownership of and any rights and interests under the policy to the Foundation.
- [5] The Plaintiff agreed to pay a monthly premium of \$1,154.34 to fund the policy. That amount was adjusted shortly thereafter to \$1,215.00 per month (“the base premium”). The Plaintiff did not object to payment of the base premium. The Plaintiff calculates that he had paid total premiums of \$295,245.00 as of October 2021. The Plaintiff continues to pay the base premium.
- [6] At some unspecified point, the premium payable to maintain the policy increased to \$3,215 per month (“the adjusted premium”). According to the Plaintiff, Jan first divulged this detail in December 2020, when he admitted that there had been a “grave error” on his part and that unless the adjusted premium was paid, the policy would be cancelled without any refund of premium. The difference between the base premium and the adjusted premium is referred to as the “premium differential”.
- [7] For an unspecified time, the premium differential was paid out of the accumulated cash value of the policy. Since approximately February 2021, the premium differential has been paid by Jan, his company, or Canada Life. As a result, the policy remains in good standing.

The Position of the Defendant

- [8] Jan argues that the Plaintiff’s should be dismissed under both rules. The claim has no legal foundation. The Plaintiff lacks standing to maintain it. The Plaintiff is not the owner of the policy and has no legal or insurable interest in it. Nor was there any no misrepresentation on Jan’s part - the Plaintiff admits that he agreed to purchase the policy and pay the base premium. The policy remains in good standing. The death benefit of \$250,000 will be paid to the Foundation upon the Plaintiff’s death. Any illustration of how the policy might work was just that; there was no representation that the Plaintiff relied upon to his detriment. In any event, the Plaintiff has not sustained any damages.
- [9] The Plaintiff can make no claim to any cash value in the policy. The cash value can only be used: a) as collateral for a loan; b) to pay premiums due, or premium shortfalls, or c) to take a cash loan from the policy itself. The Plaintiff has no right to access the cash value of the policy. The cash value has no bearing on the death benefit.

The Position of the Plaintiff

- [10] The Plaintiff contends that Jan misrepresented the terms of the policy and specifically the fact that the base premium would never increase. From the outset, the Plaintiff made it

clear to Jan that the base premium was never to exceed the amounts he received from his Canada and Old Age Security pensions.

- [11] The Plaintiff contends that he would never have purchased the policy had Jan made divulged that the base premium might increase over the policy term. Again, according to the Plaintiff, he was required to pay the adjusted premium for a period of two months before a “solution” was arrived at whereby the Plaintiff would revert to paying only the base premium.
- [12] The Plaintiff then learned that Canada Life had been making up the difference between the adjusted premium of \$3,215 and the base premium of \$1,215 (a difference of nearly \$2,000 per month!) by drawing it from the cash value of the policy. With the cash value having been depleted by December 2020, Jan was obliged to reveal to the Plaintiff for the first time that the adjusted premium would now have to be paid without access to the cash available in the policy.
- [13] There appears to be an arrangement in place whereby Jan, his company, or Canada Life monitor the status of the policy each month and either Jan or his company pay the premium differential, thereby maintaining the policy in good standing.

Rule 21.01(1)(b)

- [14] The applicable part of this rule reads as follows:

21.01 (1) A party may move before a judge,

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(b) under clause (1)(b)

Analysis (I): The Plain and Obvious Test

- [15] The test to apply under r. 21.01(1)(b) is the “plain and obvious test”. It has been accurately described in *Dawson v. Baker*, 2017 ONSC 6477, [2017] O.J. No. 5617, at para. 46:

The “plain and obvious test” under Rule 21.01(1)(b) sets out a low threshold. The court considers whether the necessary elements of a cause of action are pleaded, assuming the facts as alleged are true. Consequently, if the allegations do not give rise to a recognized cause of action or if the claim fails to plead the necessary elements of an otherwise recognized cause of action, it will be struck under Rule 21.01(1)(b).

- [16] I would not strike the pleading as disclosing no cause of action. It is far from plain and obvious that the claim could not succeed. I cannot agree with the Defendant that the Plaintiff lacks the legal standing to bring the claim. That is undoubtedly true as it pertains to any claim against Canada Life or for any relief under the policy – he lacks the legal standing to sue under the policy because he is neither the owner nor the beneficiary.
- [17] The claim for misrepresentation is, however, entirely different. As the purchaser of a good or service (the policy) and as payor of the premium, the Plaintiff stood in a relationship with the Defendant which did not depend on the Plaintiff's standing to bring an action under the policy. The claim for misrepresentation arises from the circumstances surrounding the purchase of the policy, the inducements and representations made by the Defendant, and the reliance placed upon them by the Plaintiff. The wording and workings of the policy, and in particular, the amount of premium that would be required to maintain the policy over its term, form part of the evidence in support of that claim.
- [18] One initial concern with the claim for misrepresentation, however, is the absence of any classification of the kind of misrepresentation being alleged (i.e., whether it is fraudulent, negligent, or innocent).
- [19] The Defendant did not make an issue of the failure of the Plaintiff to specify the class of misrepresentation he is alleging. Regarding fraudulent misrepresentation, there is a general rule that allegations of fraud must be strictly pleaded and strictly proved, see: *Toronto Dominion Bank v. Leigh Instruments Ltd (Trustee of)*, [1998] O.J. No. 4221 (Gen. Div.) at para. 18. Still there is appellate authority to support the proposition that even if the word “fraudulent” is not contained in the pleading, it may be clear from the context what the Plaintiff is alleging and it is proper for a motion judge to view the entire pleading in context: see *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (cob Energyshop Consulting Inc./ Powerhouse Energy Management Inc.)*, [2014] O.J. No. 476, 2014 ONCA 85, at paras. 54 and 63. The Alberta Court of Appeal held similarly in *581257 Alberta Ltd. v. Auja*, [2013] A.J. No. 21 at para. 38, when it determined that it was sufficient if the statement of claim set out allegations which if proven, would amount to fraud.
- [20] By analogy, I would apply that reasoning here: although the class of misrepresentation is not specifically pleaded, a generous reading of the pleading satisfies me that it sets out allegations, which if proven, would meet the test for negligent misrepresentation.
- [21] In the case of *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 33, the court outlined five general requirements for imposing liability for negligent misrepresentation:
- (1) there must be a duty of care based on a special relationship between the representor and the representee;
 - (2) the representation in question must be untrue, inaccurate, or misleading;
 - (3) the representor must have acted negligently in making said representation;
 - (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
 - (5) the reliance

must have been detrimental to the representee in the sense that damages resulted.

- [22] It is not plain and obvious on the pleading that the Plaintiff could not succeed in a claim for negligent misrepresentation. The constituent elements of that tort are contained in the pleading. The relationship between the parties is described adequately; the background and narrative leading to the purchase of the policy are set out including the recommendations, omissions, and explanations of the Defendant; the reliance and trust the Plaintiff placed on the Jan's advice is described along with the nature of the alleged misrepresentations and their aftermath. The Plaintiff claims that he sustained damages as a result.
- [23] Read generously, this poorly drafted and rather clumsy claim discloses a cause of action which sounds in misrepresentation to wit: the Defendant in the capacity of an agent induced the Plaintiff to purchase the policy based upon certain information, assurances and explanations offered by the Defendant some of which proved not to be true (i.e., the base premium payable would not increase). The Plaintiff relied on the representations made by the Defendant to his detriment. Had he known the truth, he would not have purchased the policy. There is a direct correlation between the acts and omissions of the Defendant, the actions taken by the Plaintiff as a result. Read as a whole, and despite its meandering style, the document does contain the constituent elements of misrepresentation sufficient to sustain it as a pleading. The claim might better have been advanced as one for breach of fiduciary duty; nonetheless, misrepresentation is a distinct and recognizable tort which has been adequately pleaded.
- [24] The Plaintiff seeks an order that the policy is void and terminated. That is clearly not an available remedy since the parties to the contract are the Foundation and Canada Life. But the Plaintiff also seeks damages from Jan for the premiums paid under the policy since its inception. While damages are highly unlikely to be awarded on that basis, that does not preclude Plaintiff from seeking damages on some basis for a quantum to be proven and determined. Indeed, an appropriate remedy for misrepresentation would be damages. It is not plain and obvious that the Plaintiff would not be awarded damages if the Defendant were found to have committed the tort of misrepresentation.

Analysis (II): Are There Genuine Issues Requiring a Trial?

- [25] Rule 20 permits a Defendant to move for summary judgment with supporting affidavit or other evidence following delivery of a Statement of Defence.
- [26] In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.
- [27] The court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties

and a judge may weigh the evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence unless it is in the interest of justice for such powers to be exercised only at trial.

- [28] I agree with the Defendant that there is no genuine issue as to whether the Plaintiff is entitled to be repaid the base premiums paid for the policy. This would be tantamount to a voiding of the policy as if coverage had never been afforded or a death benefit could never have been paid. This is a wholly untenable damages claim.
- [29] The Plaintiff's alternative claim for damages for what would have been the cash value of the policy had it not been depleted has its own problems. First, as neither the owner nor the beneficiary of the policy, the Plaintiff would have no direct entitlement to the cash value of the policy. Second, there is presently no basis upon which the court can calculate what the cash value of the policy would be had it not been used for payment of the policy differential. The Plaintiff has failed to provide any calculation in that regard. Third, to the extent that the Plaintiff could benefit from the cash value of the policy, he could do so only indirectly and contingently: it could be used to pay a shortfall in premium prompted by the Plaintiff's failure to make a payment. But that has not happened.
- [30] The Defendant argues that at best, the Plaintiff's claim for misrepresentation is premature because he has suffered no calculable or compensable damage. He has continued to pay the obligatory base premium to maintain the policy in good standing. The policy has been maintained by payment of the policy differential, first by Canada Life, then by Jan. In that way, the Plaintiff has received exactly what he bargained for: in return for his payment of the base premium, Canada Life is obliged to pay the death benefit. The Plaintiff's argument that had he known that the policy scenario painted by Jan was not accurate he would not have purchased the policy cannot be maintained. Finally, the Plaintiff cannot recover damages based on the premiums he has paid since 2001.
- [31] Thus, the Defendant contends that if there was a misrepresentation, it has not resulted in any damages. It would be tortious conduct without accompanying damages. This results in there being no genuine issue requiring a trial.
- [32] I disagree.
- [33] There most certainly remains a genuine issue as to whether Jan misrepresented the nature of the policy and how it would operate. Specifically, there remains a question as to whether Jan misrepresented the nature and workings of the policy, the meaning and purpose of cash value, whether the base premiums would remain constant or would increase, and whether the Plaintiff relied on the misrepresentations to his detriment. These issues will require court scrutiny of evidence pertaining to discussions and events from several decades ago. Assessing the credibility of the witnesses and the reliability of their evidence will be crucial for adjudication. If there was misrepresentation, the court would then consider a remedy.
- [34] As the contracting party, the Plaintiff retained a direct interest in the amount of the base premium that would be required to fund the policy. As well, the Plaintiff retained an

indirect interest in the cash value of the policy since it could be available to pay any premium shortfall or premium due.

- [35] I do not accept the Defendant's submission that the claim for any loss is premature. There is a genuine issue as to whether a policy with a fixed and static base premium is equivalent to a policy subject to premium increases. The seemingly *ad hoc* and unwritten arrangement whereby Jan, his company or Canada Life pay the premium differential will certainly be a piece of evidence for the court to consider; but it would not in itself be the answer to the question of whether the Plaintiff got what he bargained for or whether he has suffered any damages.
- [36] What would happen, for example, if Jan's situation changed, if he died, became incapacitated, declared bankruptcy? Would he continue to be able, let alone inclined or obligated, to pay the premium differential to keep the policy in good standing? And what motivation would Canada Life have to pay the premium differential? None. Canada Life has no contractual obligation to do so; and likely no financial one either. It has received a combination of a base and adjusted premium for several decades now. Should the adjusted premium not be paid, the policy would lapse without refund and the company would be relieved of its obligation to pay the death benefit.
- [37] If a court were to accept the Plaintiff's evidence that he would not have purchased the policy had he been advised that there would be a premium increase during the policy term, how could the Plaintiff not be entitled to some remedy in damages, however nominal?
- [38] In terms of damages, there is uncontradicted evidence that the Plaintiff was obliged to pay the entire adjusted premium for the two months, December 2020, and January 2021. This represents \$4,000 more than the Plaintiff intended to pay under the policy; as modest a sum as this might be, it still could form the basis of a damages award should the court find that Jan made a misrepresentation.
- [39] Alternatively, the depletion of the policy's cash value to pay the enhanced premium could be viewed as a loss of an indirect benefit to the Plaintiff, since that cash value would have kept the policy in good standing had the Plaintiff chosen to take a premium holiday. Indeed, that option is no longer open to him. This too could form the basis of a damages award.
- [40] I was referred to no authority for the proposition that because a person has no insurable interest or ownership rights in a policy, that person would be precluded from bringing a claim for misrepresentation against the person through whom she purchased that policy.
- [41] In my view, the fact that the Plaintiff has failed to quantify his damages is not fatal to his ability to seek damages. The court has a wide discretion in how it compensates a wronged Plaintiff. It is up to the trier of fact to quantify and award damages based upon the evidence and the law of damages. I am not persuaded that there is no basis for an award of damages to the Plaintiff.

- [42] This is not a motion to strike or dismiss a claim for a failure to provide particulars, for failure to fulfill an undertaking or to refuse to answer a proper question on discovery. Nor is the question before the court whether the method for calculation of damages proposed by the Plaintiff will be adopted by the court.
- [43] I am not able to reach a fair and just determination on the merits by way of a summary judgment motion. Conclusions of fact will require credibility findings and weighing of evidence. The law of misrepresentation can only be applied to the facts as they are found. The question of damages, if any, cannot be determined without findings of fact. I cannot say that summary judgment is a more proportionate, expeditious and less expensive means to achieve a just result in this case.

The Limitation Period

- [44] The moving party spent little to no time arguing that the Plaintiff's claim was statute barred. It is not pleaded in its statement of defence. The issue is not raised in its factum. Regardless, the Plaintiff alleges that he first received notice of the premium differential in December 2020. The claim was issued in November 2021, well within the applicable limitation period of two years after which the Plaintiff discovered the alleged misrepresentation. On the evidentiary record before me, there is no basis to dismiss the action for being out of time.

Summary and Disposition

- [45] For the foregoing reasons, I find that it is not plain and obvious that the claim cannot succeed. The motion under r. 21.01(b) is dismissed.
- [46] I am not persuaded that there is no genuine issue requiring a trial. The question of whether Jan misrepresented the nature and details of the policy is very much a triable issue, partly to be determined by an assessment and weighing of *viva voce* evidence. The twin questions of whether the Plaintiff suffered any damages from that misrepresentation and how those damages can be quantified are also genuine issues requiring a trial. The motion for summary judgment is therefore dismissed.
- [47] Finally, there is no basis in the evidence for a finding that the claim is barred by any limitation period. That aspect of the motion is also dismissed.
- [48] If the parties are unable to agree on the issue of costs, they make take out an appointment to address that issue before me through the trial coordinator at the Newmarket Superior Court of Justice.

McCarthy, J.

Released: April 2, 2024