CITATION: Benjamin v. Primerica Life, 2016 ONSC 5386
COURT FILE NO.: CV-11-933-00
DATE: 20160826

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Claudine Benjamin v. Primerica Life Insurance Company of Canada, Masoud Movahedi, and Hooper-Holmes Canada Ltd.

BEFORE: Sproat, J.

COUNSEL: Dahlia Bateman, for the Plaintiff

Pamela Miehls, for the Defendants

HEARD: 20160824

E N D O R S E M E N T

[1] This is a motion by Primerica to strike a jury notice. The plaintiff commenced an action against Primerica on March 3, 2011 claiming as the beneficiary under her husband's life insurance policy, and served a jury notice. Primerica defended citing the Conditional Coverage section of the deceased's application for insurance, and in particular the following provision:

> **EFFECTIVE DATE OF CONDITIONAL COVERAGE**
>
> Subject to the above conditions, any Conditional Coverage will become effective on the date the application is signed, or the date the results of all required tests and exams or other requested information concerning insurability are completed and received by the Company, whichever is later.

[2] The plaintiff then commenced another action on March 9, 2012 claiming that the defendant Movahedi (the Primerica agent who sold the deceased the policy) and Hooper-Holmes (a health service company retained by Primerica to conduct testing for underwriting purposes) were negligent. The plaintiff did not serve a jury notice in this action. In simplified terms the plaintiff alleges in this action that Movahedi was negligent in not advising the deceased that the coverage was conditional upon completing further medical tests and that Hooper-Holmes was negligent in failing to follow up with the deceased to have the medical tests completed.

[3] The parties then consented to a September 26, 2012 order consolidating the two actions to continue under the court file number assigned to the initial Primerica action. It was common ground before me that as a matter of law a jury action cannot be consolidated with a non-jury action. At the time of the consolidation no one recognized that this was contrary to law or considered what effect consolidation would have on the jury notice served in the Primerica action.

[4] On March 15, 2016 Price J. made an endorsement indicating the plaintiff had leave to bring a motion to permit her to serve a jury notice in the second, Hooper-Holmes, action. (I recognize that due to the prior consolidation there was in fact no longer a separate Hooper-Holmes action).

[5] In any event, there were two motions before me:

1. by Primerica to strike the jury notice on the basis that the plaintiff claimed declaratory relief contrary to section 108(2) of *the Courts of Justice Act* ("*CJA*") or, in the alternative, on the basis that it is not practical to proceed with a jury and a judge alone trial at the same time; and
2. by the plaintiff to serve a jury notice in the Hooper-Holmes action.

[6] I take the following approach. It is common ground that the consent order should not have been granted and so I set it aside. There are, therefore, once again two actions.

[7] Counsel for the defendant in the Hooper-Holmes action did not appear because, as confirmed to me by both counsel appearing on the motions, it does not oppose the motion to serve a jury notice in its action. The jury notice could have been served until July, 2012. By September, 2012 the actions had been consolidated. Given the fact that the plaintiff's motion is unopposed and the unusual circumstance that, as a result of the ill-conceived consent to a consolidation order, it was unclear to the parties if the consolidated action was to proceed jury or non-jury, I grant the order permitting the plaintiff to serve a jury notice in the Hooper-Holmes action. As such, the alternative argument by Primerica that a jury and non-jury trial cannot be heard together becomes moot.

[8] We, therefore, have two jury actions which counsel agree should be consolidated. The pleadings in the action also need to be consolidated. The plaintiff shall therefore serve an Amended Statement of Claim, the defendant shall serve an Amended Statement of Defence and the plaintiff shall serve an Amended Reply. In all cases the amended pleadings should contain only the existing claims and pleadings appropriately edited in consolidated form.

[9] I now turn to whether the jury notice in the consolidated action should be struck on the basis that the plaintiff is claiming declaratory relief.

[10] The Statement of Claim does claim a “declaration” that Primerica is required to pay the $400,000.00 death benefit. This could just as easily have been framed as a claim for damages. In any event, the authorities are clear that the court must consider the essence of the claim to determine if it seeks declaratory relief within the meaning of s. 108(2) of the *CJA.* Ms. Miehls acknowledged that the case law reflects divergent views as to what constitutes declaratory relief for the purposes of section 108(2) of the *CJA*.

[11] I subscribe generally to the views expressed by Lang J. in *Harrison v. Antonopoulos*, (2003), 62 O.R. (3d) 463 (S.C.J.) at para. 22-29 and Boswell J. in *Reid v. The Manufacturers Life Insurance Company et. al*, 2010 (ONSC 4645).

[12] In simplified terms the plaintiff alleges that the deceased provided Primerica with information over the telephone and an Attending Physician Statement from his family doctor. Primerica, through Hooper-Holmes, advised that it would follow up and contact the plaintiff to arrange for medical testing after the Hooper-Holmes nurse and the deceased could not find a mutually convenient date, but failed to do so. The position of the plaintiff is that Primerica had all the tests, exams and other information that it requested and, as such, Conditional Coverage was in force.

[13] Primerica pleads a very different set of facts, as follows. It alleges that Hooper-Holmes, on behalf of Primerica, left messages for the deceased on November 3, 5, 7, 11, 13 and 15, 2009 which the deceased did not return. Primerica then advised its sales agent Movahedi on November 19, 2009 that the application by the deceased was on hold. On November 23, 2009 Movahedi advised Primerica that the deceased was ready to proceed with a medical examination which was arranged for November 27, 2009. The deceased, however, cancelled the appointment on November 27, 2009. Hooper-Holmes left several further messages seeking to reschedule between November 30 and December 10, 2009. On or about December 15, 2009 Movahedi told Hooper-

Holmes that the deceased would be in contact when he was ready to proceed with his application. The deceased did not reschedule the appointment prior to his death on March 10, 2010

[14] On the face of the pleading, it appears that the result at trial will be dictated by findings of fact related to what and when requests for information and testing were made by Primerica and what response was provided by the deceased.

[15] To paraphrase Lang J. in *Harrison*, the parties want to know whether the factual circumstances are such that the plaintiff is entitled to the death benefit not what the contract language means. I agree with Lang J. that in s. 108(2) of the *CJA* declaratory relief means a declaration of the rights of a party without coercive effect or remedial entitlement. To paraphrase Boswell J. in *Reid* the parties do not agree on whether a constellation of facts vitiated the insurance coverage. In substance, this is not a claim for declaratory relief. I, therefore, dismiss the Primerica motion to strike the jury notice.

[16] While not a ground advanced on this motion to strike the jury notice, Ms. Miehls made reference to the fact this trial might involve complex factual and legal issues. As provided Rule 47.02(3) the fact that I decline to strike the jury notice does not preclude the trial judge from doing so. Further, as stated in

Ontario Courtroom Practice (3rd Edition), General Editors, Fuerst J. and Sanderson J., at p. 448, referring to a motion to strike brought before the trial judge:

> In most cases the judge should hear submissions and then defer a decision on the motion until later in the trial when most or all of the evidence has been heard. This allows the judge to see whether anticipated problems have materialized or complex matters have been simplified. For example, see *McDonald-Wright (Litigation guardian of). V. O'Herlihy,* [2007] O.J. No. 478, 220 O.A.C. 110 (C.A.).

[17] Counsel should attempt to agree on costs. Failing agreement, Ms. Bateman shall provide a costs outline and brief written cost submissions within 10 days. Ms. Miehls shall respond with a further 10 days. Reply, if any, within a further five days.

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Sproat, J

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ENDORSEMENT

Sproat, J.

DATE: August 26, 2016