CITATION: Mitchell v. Enertech Sheet Metal Inc. v. Sun Life Financial, 2023 ONSC 6447
COURT FILE NO.: CV-21-00000818-00A1
DATE: 2023/11/17

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Pamela Mitchell, Plaintiff

- and -

Enertech Sheet Metal Inc. and Enertech Maintenance Contractor Inc. and Michael Ziegler, Defendants

- and -

Sun Life Financial Inc. and Sun Life Assurance Company of Canada, Third Parties

BEFORE: Justice I.R. Smith

COUNSEL: Robin Anderson, Counsel for the Plaintiff

Michael C. Kelly, Counsel for the Defendants/Respondents

Stephen Shantz, Counsel for the Third Parties

HEARD: November 15, 2023 by Videoconference

ENDORSEMENT

Background

[1] The plaintiff has alleged wrongful termination in a suit against the defendants. Among other things, she claims damages for the loss of the group benefits she enjoyed while employed by the defendants, which benefits were provided by the third-parties.

[2] The plaintiff claims that her employment was wrongfully terminated on June 15, 2020, because, among other things, the defendants were intolerant of her various medical issues, which sometimes required her to attend medical appointments during work hours. In her amended statement of claim, dated December 9, 2021, the plaintiff pleads that she has become disabled and unable to work and that, as the defendants wrongfully failed to maintain her benefits, she is therefore entitled to damages in the amount of the value of those benefits, which benefits included

disability insurance. At no point in her pleadings does the plaintiff say when she became disabled or that she has any claim against the provider of her benefits.

[3] The defendants deny that the plaintiff was either wrongfully terminated or has become disabled. However, they advance an alternative position in their third-party claim made against the third parties. There they plead that "if [the plaintiff] became totally disabled within the meaning of the Policy and she is entitled to benefits thereunder, Sun Life is liable therefore."

[4] The third-party claim is framed as one of contribution and indemnity under the *Negligence Act*, R.S.O. 1990, c. N.1, ss. 2 and 3, and under common law and equity.

[5] The third parties move to strike the third-party claim on the basis that it discloses no reasonable cause of action.

The Law

[6] The motion is brought under Rule 20.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194., which allows a defendant to move to strike any pleading which fails to disclose a reasonable cause of action. To succeed, the defendant must show that it is plain and obvious that the claim has no reasonable prospect of success, which is a high threshold for the moving party (*Regina v. Imperial Tobacco*, 2011 SCC 42, at para. 17; *Potis Holdings v. LSUC*, 2019 ONCA 61, at para. 18; *Hojlund v. Air Canada*, 2022 ONSC 7043, at para. 39). No evidence is admissible, and I am required to take the facts as pled against the moving parties as true, or capable of proof, and to read the pleadings generously (*Atlantic Lottery v. Babstock*, 2020 SCC 19, at paras. 87 – 88; *Hojlund v. Air Canada, supra*, at para. 40; *Regina v. Imperial Tobacco*, supra, at para 21.). Having done so, I am required to consider whether the claim is viable. It is not if it could not give rise to the judgment sought against the moving parties (*Das v. George Weston Limited*, 2018 ONCA 1053, at para. 75).

Positions of the Parties

[7] The third parties argue that neither the plaintiff nor the defendants have claimed that the third parties have committed any tort, nor that they engaged in any fault or neglect that has contributed to the plaintiff's damages. There is no claim by either that the third parties have breached any contract, either with the plaintiff or the defendants. The third parties have never

been asked to provide the plaintiff with benefits related to her alleged total disability during any period when she was covered by the third parties' policy.

[8] The defendants, supported by the plaintiff on this motion, argue that they have pled sufficient facts to establish a reasonable cause of action against the third parties. Although they are unaware, at this early stage of the litigation, of the date upon which it is said that the plaintiff became totally disabled, they have pled that if that date is within the period during which the plaintiff had benefits coverage (*i.e.*, while she was still employed by the defendants or in the extended coverage period which followed her termination (June 15 – September 3, 2020)), then the third parties are liable in contract for the plaintiff's disability benefits. It is argued that such a claim has a reasonable chance of success.

Discussion

[9] In my view, for the reasons which follow, the relief sought by the third parties should be granted.

[10] The third parties are not alleged to have committed any tort or to have engaged in any negligence, or to have breached any contract. As counsel for the third parties submits, if the plaintiff has become totally disabled, and if the date of her total disability came after her benefits with the third parties lapsed, then the third parties have no liability. Only the defendants are potentially liable in that case and only if the disability manifested itself within the employment law notice period and/or if their alleged wrongful termination of the plaintiff resulted in the premature cessation of her coverage (*MacIvor v. Pitney Bowes*, 2018 ONCA 381; *Soave v. Stahle Construction Inc.*, 2023 ONCA 265; *Brito v. Canac Kitchens*, 2012 ONCA 61; *Pasap v. Saskatchewan Indian Gaming Authority*, 2022 SKQB 200), a circumstance which has nothing to do with the third parties.

[11] On the other hand, if the plaintiff became totally disabled in the period during which she did have coverage, the defendants have no exposure for liability for the disability benefits, since such benefits should have been paid by the third parties, not the defendants. In that case, the plaintiff should have made a claim for disability benefits of the third parties, which claim the third parties could have considered and either allowed or refused. If refused, the plaintiff's remedy would have been to sue the third parties. Either way, that problem has nothing to do with the

defendants and, further, has not yet crystallized since the plaintiff has not alleged that she became disabled during the period of coverage and the third parties are not alleged to have been asked to provide benefits based on a claim that she became totally disabled while she had coverage.[1] Accordingly, the third-party claim is unreasonable.

[12] Importantly, the plaintiff has framed her claim against the defendants as one of wrongful dismissal and claimed damages attributable only to the defendants' alleged wrongful conduct.[2] The third parties correctly observe that the defendants therefore have no claim against the third parties for contribution, which applies only where a defendant is at risk of paying more than its proportionate share of a plaintiff's damages.

[13] Justice Laskin explained this principle in *Taylor v. Canada*, 2009 ONCA 487, a case where the plaintiff sued Health Canada for damages related to the faulty implantation of a medical device. Although the plaintiff in that case claimed only the damages for which Health Canada itself was responsible, Health Canada sought to add as third parties the physician who performed the surgery and the hospital where it had taken place. A judge of this court dismissed the claim as disclosing no reasonable cause of action as against the surgeon and the hospital and the Court of Appeal upheld that decision. Laskin J.A. wrote as follows (at paras. 20 – 22, emphasis added by me):

> [20] However, contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages. In the present case, Ms. Taylor has limited her claim and those of the class members to those losses attributable to Health Canada's negligence. In other words, she is not seeking all of her damages from Health Canada; she seeks only the portion of her damages attributable to Health Canada's neglect and not the portion of her damages that may be attributable to the neglect of the doctor or the hospital. In my example, if Health Canada is T1, in this action Ms. Taylor is seeking only 20 per cent of her damages. Because she is not seeking 100 per cent of her damages, the full compensation principle articulated in *Athey v. Leonati*, [[1996] 3 S.C.R. 458] does not apply; equally, resort to s. 5 of the *Negligence Act* is unnecessary.

[1] For the sake of completeness, I note that in the third parties' defence, they plead that the plaintiff did make a claim in February 2022 for long term disability benefits, but that in that claim the plaintiff said that she had been totally disabled and unable to work as of December 9, 2021, well after the coverage period had ended. Her claim was therefore denied, and the plaintiff has never challenged that conclusion. The defendants submit, correctly, that the third party defence cannot be relied upon as true for the purposes of determining whether there is a reasonable cause of action, but the third party claim does throw into stark relief the fact that the plaintiff has never pled that she was denied benefits at a time when the third parties were obliged to provide them.

[2] This is so both generally and in connection with the issue of plaintiff's claim related to the loss of her benefits specifically. At para. 26 of the amended statement of claim, she makes the following claim: "The Plaintiff pleads that as a result of the Plaintiff's wrongful dismissal, and a failure on the part of the [defendants] to maintain the Plaintiff's … benefits during the notice period, the Plaintiff has lost the value of her … benefits [emphasis added].

> [21] The decision of this court in *Holthaus v. Bank of Montreal* (2000), 131 O.A.C. 119 (C.A.) is directly on point. There, the plaintiff sued the Bank of Montreal and another for their role in the improper cancellation of some share certificates. The plaintiff, however, limited its claim to those damages attributable to the Bank's negligence. Nonetheless, the Bank issued a third-party claim against the securities dealer, RBC Dominion Securities Ltd., for contribution and indemnity. The motion judge struck out this third-party claim and his decision was upheld by this court. In its brief endorsement, this court said, at para. 9:
>
> > As the statement of claim is limited to the damages which can be attributed to the fault of the Bank, the Bank can have no claim-over against RBC with respect to these damages. Sections 1, 2 or 5 of the *Negligence Act* do not assist the appellants.
>
> [22] Similarly, because Ms. Taylor has limited her claim to those damages attributable to Health Canada's fault, Health Canada can have no claim over against the doctor or the hospital for the damages claimed by Ms. Taylor and the other class members. To ensure that Health Canada's exposure is limited to the damages attributable to its fault, the court may have to apportion fault among the three potential tortfeasors: Health Canada, the doctor and the hospital. …

[14] Here, the plaintiff has limited her claim to damages flowing from her wrongful dismissal. As I have said, the third parties have nothing to do with the plaintiff's dismissal, wrongful or otherwise. The third parties, then, stand in the same position as RBC in *Hothaus, supra*, the *ratio* of which I amend for present purposes so that it reads as follows: as the statement of claim is limited to the damages which can be attributed to the fault of Enertech, Enertech can have no claim-over against SunLife with respect to these damages.

[15] Accordingly, the defendants' claim against the third parties cannot succeed and the relief sought on the motion must be allowed.

Conclusion and Costs

[16] For these reasons, an order will go in the form of the draft filed by the third parties with costs to be paid by the defendants fixed in the amount of $3,833.00, all inclusive.

[17] No costs award is made against the plaintiff.

I.R. Smith J.

Dated: November 17, 2023