

CITATION: RBC Life Insurance Company v. Fabisiak, 2024 ONSC 1166
COURT FILE NO.: CV-19-00633410
MOTION HEARD: 20230426, 20231207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RBC Life Insurance Company, Plaintiff

AND:

Krzysztof Fabisiak, Defendant

BEFORE: Associate Justice B. McAfee

COUNSEL: J. Hogan, Counsel, for the Moving Party, the Plaintiff

J. Hewlett, Counsel, Agent for Counsel for the Responding Party, the Defendant

HEARD: April 26, 2023, and December 7, 2023

REASONS FOR DECISION

[1] This is a motion brought by the plaintiff for various relief. As set out in my endorsement dated May 9, 2023, on consent, various undertakings were ordered to be answered and, on consent, leave was granted to amend the statement of claim with respect to the proposed amendments in the title of proceedings and at paragraph 6. What follows are my reasons for decision with respect to the contested relief.

[2] From in or about August 2011 to December 2017, the plaintiff paid disability benefits to the defendant under a policy of insurance issued by the plaintiff (the Policy). In this action the plaintiff seeks, among other things, repayment of the benefits paid to the defendant. The plaintiff relies in part on alleged misrepresentations made by the defendant. The defendant has counterclaimed seeking, among other things, a declaration reinstating the Policy and damages for disability benefits owing to the defendant.

Leave to Amend the Statement of Claim

[3] The defendant opposes the impugned proposed amendments on the basis that if they had originally been pleaded, they would have been struck as being contrary to s. 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the *RHPA*). The defendant argues that s. 36(3) of the *RHPA* is an absolute bar to the proposed amendments. The defendant argues that the proposed amendments are therefore frivolous, vexatious, or an abuse of process or may prejudice or delay the fair trial of the action, contrary to Rule 25.11.

[4] The plaintiff argues that the impugned proposed amendments are not prohibited by s. 36(3) of the *RHPA*.

[5] Rule 26.01 of the *Rules of Civil Procedure* provides:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[6] The general principles regarding amendments to pleadings are summarized by Associate Justice Fortier in *Li v. Michaud*, 2021 ONSC 8143 (Ont. S.C.J.) at paras. 13 and 14 (see also *Bouragba v. Conseil scolaire de district de L'Est de l'Ontario*, 2020 ONSC 876 (Ont. S.C.J.) at para. 31 and *Rayner v. McManus*, 2016 ONSC 422 (Ont. S.C.J.) at para. 14).

[7] Section 36(3) of the *RHPA* provides:

Evidence in civil proceedings

(3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

[8] In support of their respective positions concerning the application of s. 36(3) of the *RHPA*, both parties rely on the decision of the Court of Appeal for Ontario in *M.F. v. Sutherland*, [2000] O.J. No. 2522 (Ont.C.A.); leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 531, which was the only decision referred to on this issue on the initial return date. In *Sutherland* Laskin J.A. states as follows with respect to the purpose of s. 36(3) of the *RHPA* at para. 29:

[29] I find no relevant indicators of legislative meaning to displace the presumption in favour of the ordinary meaning of s. 36(3). The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings – a health professional, a patient, a complainant, a witness or a College employee – fearing that a document prepared for College proceedings can be used in a civil action. This purpose would be defeated by reading a fraud or bad faith exception into s. 36(3). The mere allegation of fraud or bad faith, however unfounded, could make the provision inapplicable.

[9] In *Sutherland* Laskin J.A. draws a distinction between a document and a fact at para. 45:

[45] ...s. 36(3) refers to a “report, document or thing,” suggesting a distinction between, for example, a written complaint and the fact of a complaint having been made. The document, the written complaint, is inadmissible, but the fact a complaint was made may be provable at trial. That distinction, however, does not arise in Dr. Sutherland’s pleading because he has pleaded the written complaint and the sworn recantation and their contents to support his defence, and it is these documents he seeks to prove at trial. ...

- [10] In advance of the second return date of this motion, counsel for the defendant updated their book of authorities to add the decision *Randhawa v. Minerva Pain Management Group Inc.*, 2023 ONSC 5054 (Ont. S.C.J.), which had been released after the first return date. *Randhawa* is a decision from a motion to strike portions of a statement of defence as being contrary to s. 36 of the *RHPA*.¹ In determining whether certain portions of the statement of defence ought to be struck, *Randhawa* references *Sutherland*. The decision of *Randhawa* also references another Court of Appeal decision on the issue: *K.K. v. M.M.*, 2022 ONCA 72.
- [11] In *K.K.* the Court of Appeal considered s. 36(3) of the *RHPA* and the issue of the admissibility of College of Physicians and Surgeons Ontario (CPSO) materials in a family law proceeding. The Court of Appeal states as follows at paras. 47 and 48:

[47] On a plain reading, this section creates a blanket prohibition against admitting in a civil proceeding any records, reports or documents directly relating to a proceeding under the *RHPA*. The text of the provision leaves no room for exception or discretion in relation to the specific items mentioned: a record of a proceeding, a report, a document or thing prepared for or statement given at such a proceeding, or an order or decision made in such a proceeding.

[48] That said, anything not specifically mentioned is fair game. As mentioned, the trial judge noted that the statutory prohibition did not preclude admissibility of evidence of the fact that a complaint was made and did not capture the website information referring to the undertakings given by Dr. Goldstein. We agree. The law is clear that the fact that a complaint was launched, an investigation held, and a decision rendered by the IRC are not covered by s. 36(3) of the *RHPA* and may be otherwise provable in court, without reference to a prohibited document: *F. (M.) v. Sutherland* (2000), 188 D.L.R. (4th) 296 (Ont. C.A.), at para. 45, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 531; *Pouget v. Saint Elizabeth Health Care*, 2012 ONCA 461, 294 O.A.C. 293, at para. 25; *Ontario v. Lipsitz*, 2011 ONCA 466, 281 O.A.C. 67, at para. 114, leave to appeal refused, [2011] S.C.C.A. No. 407; *Armitage v. Brantford General Hospital* (2004), 71 O.R. (3d) 44 (S.C.), at para. 29.

¹ On December 18, 2023, plaintiff’s counsel sent an email to the court attaching a copy of the pleading at issue on the motion in *Randhawa*. Defendant’s counsel then sent an email advising that she had not been provided with notice of the email from plaintiff’s counsel and had not provided consent to the sending of the email to the court. I have not considered the email or attachment from plaintiff’s counsel in these circumstances.

[12] The impugned proposed amendments do not plead a specific record of a proceeding under the *RHPA*, a report, document or thing prepared for or statement given at such a proceeding, or an order or decision made in such a proceeding. The statutory prohibition does not preclude the underlying facts as pleaded in the proposed amended pleading, which may be provable at trial without reference to a prohibited document. The impugned proposed amendments are not prohibited by s. 36(3) of the *RHPA*.

[13] Leave is granted to amend the statement of claim with respect to the balance of the proposed amendments.

Refusals

[14] The applicable *Rules of Civil Procedure* are Rule 1.04(1) and (1.1), Rule 29.2.03, Rule 31.06(1) and Rule 34.15(1)(a).

[15] In *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 (Ont. S.C.J.); leave to appeal refused, 2011 ONSC 3685 (Ont. Div.Ct.) Justice Perell summarizes the principles concerning the scope of questioning on examinations for discovery at paragraph 129 (see also *CIBC v. Deloitte & Touche*, 2013 ONSC 917 at para. 68 (Ont. S.C.J.), *Yim v. Song*, 2015 ONSC 7605 (Ont. S.C.J.) at para. 26, *L'Abbé v. Allen-Vanguard*, 2011 ONSC 4000 (Ont. S.C.J.) at para. 42, *Sangaralingam v. Sinnathurai*, 2011 ONSC 1618 (Ont. Div.Ct.) at para. 27 and *Bombardieri v. Baldini*, 2003 CanLII 12944 (Ont. S.C.J.) at para. 10).

[16] While certain questions may be permitted at the discovery stage, matters of admissibility and weight are left to the trial Judge.

[17] The impugned refusals were argued in three categories as set out in the updated Form 37C chart.

Category No. 1: CPSO Proceedings - Refusal Nos. 1, 2, 3, 4, 5, 6, 7

[18] The questions in this category are relevant based on the pleadings and in particular based on the statement of claim at paragraphs 5, 14, 19, 22 and 23 and the statement of defence and counterclaim at paragraphs 24, 35, 37-39. The questions are relevant to the issue of the defendant's duties and any restrictions at the time of disability, whether there were misrepresentations by the defendant concerning his duties and any restrictions, and the defendant's entitlement to disability benefits within the meaning of the Policy.

[19] The questions in this category are not prohibited by s. 36 of the *RHPA*. The questions do not seek a specific record of a proceeding under the *RHPA*, a report, document or thing prepared for or statement given at such a proceeding, or an order or decision made in such a proceeding. Underlying facts are not prohibited.

[20] To the extent that the defendant argues that any refusals are contrary to Rule 31.06(1)(b), no refusal is directed solely to the credibility of the defendant.

[21] The questions in this category shall be answered.

Category No. 2: Defendant's Financial Records - Refusal Nos. 8, 9, 10, 11

- [22] On the motion, plaintiff's counsel confirmed that with respect to refusal number 11, only the records regarding the Zaremba Clinic are being sought.
- [23] I am satisfied that the records are relevant based on the pleadings. At paragraph 37 of the statement of defence and counterclaim, the defendant pleads the provisions of the Policy regarding total disability, reduced disability, regular occupation and prior average monthly income. At paragraph 38 of the statement of defence and counterclaim, the defendant pleads that the defendant retains his "Reduced Disability" status provided he experiences at least a 20% loss of net income in his regular occupation and receives appropriate medical care. The defendant pleads that he meets both the loss of income and medical care criteria under the Policy. The questions in this category are relevant to the defendant's entitlement to disability benefits and the issue of loss of net income.
- [24] The time periods requested in refusal numbers 8 and 9 are within the relevant time period based on the meaning of prior average monthly earned income under the Policy which includes reference to 60 calendar months immediately before the start of total or reduced disability. The start of total disability is pleaded to be May 2011.
- [25] To the extent that refusal numbers 10 and 11 do not reference a specific time period, the questions shall be answered limited to commencing 60 calendar months prior to May 2011.
- [26] The questions in this category shall be answered. Refusal numbers 10 and 11 shall be answered limited to commencing 60 calendar months prior to May 2011. Refusal number 11 shall also be limited to the Zaremba Clinic.

Category No. 3: Litigation Involving Defendant against Morgentaler Clinic - Refusal Nos. 12 and 13

- [27] I am satisfied that the questions in this category are relevant for the reasons given for Category No. 1. In addition, at paragraph 22 of the statement of claim the plaintiff pleads various allegations made by the defendant in an action commenced by the defendant against the Morgentaler Clinic. At paragraph 23 of the statement of claim, the plaintiff pleads various allegations made in the statement of defence in the action commenced by the defendant against the Morgentaler Clinic.
- [28] The questions in this category are not prohibited by s. 36 of the *RHPA* for the reasons given for Category No. 1.
- [29] The questions in this category shall be answered.

Costs

- [30] If successful on the motion, the plaintiff seeks costs of the motion on a partial indemnity basis in the all-inclusive amount of \$8,650.21. If successful on the motion, the defendant seeks costs of the motion in the all-inclusive amount of \$7,476.65. The plaintiff was

substantially successful, with two refusals being limited to a specific period of time. Having regard to all of the circumstances of this motion, a fair and reasonable amount that the defendant could expect to pay for costs is the all-inclusive amount of \$7,000.00. I am satisfied that payment other than within 30 days is more just in all of the circumstances of this motion. Costs are payable in any event of the cause.

Summary of Order

[31] Order to go as follows:

1. Leave is granted to amend the statement of claim with respect to the balance of the proposed amendments.
2. The refusals given on the examination for discovery of the defendant listed under category number 1 and category number 3 shall be answered. The refusals listed under category number 2 shall be answered save that refusal numbers 10 and 11 are limited to the time period commencing 60 calendar months prior to May 2011 and refusal number 11 is also limited to the Zaremba Clinic. The refusals shall be answered within 60 days.
3. Costs of this motion are fixed in the all-inclusive amount of \$7,000.00 payable by the defendant to the plaintiff in any event of the cause.

Associate Justice B. McAfee

Date: February 26, 2024