COURT OF APPEAL FOR ONTARIO

CITATION: Bustamante v. The Guarantee Company of North America, 2015 ONCA 530
DATE: 20150713
DOCKET: C59839

Hoy A.C.J.O., Epstein and Huscroft JJ.A.

BETWEEN

Angela Bustamante

Plaintiff (Appellant)

and

The Guarantee Company of North America

Defendant (Respondent)

Andrew L. Rudder, for the appellant

Rose Bilash and Caroline Theriault, for the respondent

Heard: July 8, 2015

On appeal from the judgment of Justice James A. Ramsay of the Superior Court of Justice, dated December 4, 2014.

ENDORSEMENT

[1] The motion judge granted summary judgment, dismissing the appellant's claim for statutory accident benefits as time-barred. She appeals.

[2] The appellant was involved in a car accident on June 3, 2004. At the time of the accident, she worked as a hairdresser. The appellant's insurance policy

provided for statutory accident benefits as set out in the *Statutory Accident Benefits Schedule*, O. Reg. 403/96 (the "SABS").

[3] On August 18, 2004, the appellant, then represented by counsel, filed an Application for Accident Benefits (OCF-1) and a Disability Certificate (OCF-3) with the respondent insurer. The respondent sent the appellant an Election of Benefits form (OCF-10). The appellant returned the OCF-10 on August 20, 2004, indicating she elected income replacement benefits as opposed to non-earner benefits.

[4] On September 1, 2004, the respondent, based on the appellant's information that she was employed at the time of the accident, was disabled, and had elected the income replacement benefit – advised the appellant via an Explanation of Benefits form (OCF-9) that it would pay weekly income replacement benefits of $344.87. The respondent also told the appellant that she did not qualify for the non-earner benefit, which would have paid $185 per week, as she qualified for the income replacement benefit. In addition, the OCF-9 contained information concerning the criteria, including timelines, for disputing the refusal of non-earner benefits.

[5] A post-104 week disability assessment found that the appellant no longer met the disability test for entitlement. As a result, the respondent stopped paying the benefits on July 26, 2006.

[6] The appellant returned to work in September of 2006.

[7] Over three years later, on September 25, 2009, counsel for the appellant notified the respondent that the appellant intended to pursue a claim for non-earner benefits. Her lawyer's letter took the position that there had been no "denial" of non-earner benefits and the limitation period had not started to run.

[8] The respondent, in a series of letters over the following several months, asked the appellant for an updated disability certificate and documentation pursuant to s. 33 of the SABS. The appellant failed to respond.

[9] The respondent advised the appellant by letter dated January 19, 2010 that she was not entitled to non-earner benefits. The respondent also provided the appellant with a notice with respect to her right to dispute the refusal.

[10] On June 17, 2011, the appellant sought mediation with the Financial Services Commission of Ontario. The parties were unable to resolve their dispute and the appellant initiated a claim against the respondent on November 28, 2012, claiming damages for breach of contract in refusing accident benefits and for mental distress.

[11] The respondent moved under Rule 20 for summary judgment to dismiss the appellant's action. In reasons dated December 4, 2014, the motion judge granted summary judgment and dismissed the action on the basis that the limitation period for the appellant's claim to non-earner benefits began either on

September 1, 2004 when the non-earner benefits were refused or on July 26, 2006 when the income replacement benefits were discontinued. In either case, the appellant failed to bring her action within two years.

[12] We agree that the appellant's claim for non-earner benefits is time-barred.

[13] The OCF-9 explained the appellant's right to dispute the insurer's assessment of her claim and to have the claim addressed through mediation followed by arbitration, litigation or neutral evaluation. At the bottom of the page, under the heading, "WARNING: TWO YEAR TIME LIMIT", it explained she had two years from the insurer's refusal to pay a benefit, or from reduction of a benefit, to arbitrate or commence a lawsuit.

[14] As previously mentioned, the respondent terminated the appellant's income replacement benefits on July 26, 2006. The appellant did not re-assert a claim for non-earner benefits until June 17, 2011 when she sought mediation, a time well in excess of two years following the termination of benefits. Even her letter dated September 25, 2009, in which she informed the respondent that she wished to pursue non-earner benefits, was delivered two years after the respondent terminated her benefits.

[15] Section 281.1(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, and s. 51(1) of the SABS establish a two-year limitation period for the commencement of litigation or arbitration after the insurer's refusal to pay a benefit claimed.

[16] The appellant's submission before the motion judge and in this court is that the respondent cannot rely on its September 1, 2004 denial of the non-earner benefit as triggering the limitation period as she was not eligible for the non-earner benefit at that time. Effectively, the appellant's position is that the limitation period for the non-earner benefit did not run during the period when she was entitled to the income replacement benefit.

[17] This argument cannot succeed in the light of this court's decisions in *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111, 118 O.R. (3d) 713, and *Sagan v. Dominion of Canada General Insurance Co.*, 2014 ONCA 720, 123 O.R. (3d) 314.

[18] The facts in *Sietzema* are on all fours with those in this case. There, the claimant applied for and received income replacement benefits. She was denied her claim for non-earner benefits. The claimant received her income replacement benefits and then more than two years after they were denied, she sued her insurer for non-earner benefits.

[19] This court upheld the summary judgment dismissing the claimant's claim on the basis that it was brought outside the limitation period, reasoning that the refusal to pay non-earner benefits in the OCF-9 triggered the limitation period in s. 51(1) of the SABS, which required mediation to be commenced "within two years after the insurer's refusal to pay the amount claimed."

[20] In response to the appellant's argument that the start of the limitation period for the non-earner benefit does not start to run during the period when she was entitled to the income replacement benefit, we repeat and reinforce what this court said in *Sietzema*, at para. 16: "If we accepted the appellant's argument, the limitation period for making a claim for Non-Earner Benefits never began to run. This would defeat one of the primary purposes of the SABS regime, namely, to ensure the timely submission and resolution of claims for accident benefits."

[21] Here, as in the cases noted above, by providing the OCF-9 to the appellant, the respondent gave clear notice of the appellant's rights to mediation, followed by arbitration, litigation or neutral evaluation if she wished to dispute the refusal or reduction of benefits. It also gave her clear notice of the two-year limitation period. The respondent's refusal to pay non-earner benefits in the OCF-9 triggered the limitation period in s. 51(1) of the SABS.

[22] For these reasons the appeal is dismissed. In accordance with counsel's agreement, the respondent is entitled to its costs of the appeal fixed at $6,000, including disbursements and HST.

"Alexandra Hoy A.C.J.O."
"Gloria Epstein J.A."
"Grant Huscroft J.A."