IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Campbell-MacIsaac v. Deveaux, 2002 NSSC 286

Date: 20021231
Docket: SH 96-127233
Registry: Halifax

Between:

Kathryn M. Campbell-MacIsaac, Ronald MacIsaac,
Chanelle Campbell-MacIsaac and Kielly Carlyn MacIsaac

Plaintiffs

v.

Lisa Deveaux and Lombard Insurance Company

Defendants

Before: The Honourable Justice Nathanson

Heard: December 17, 2002, in Halifax, Nova Scotia

Written Decision: January 13, 2003 (Oral decision: December 31, 2002)

Counsel: C. Gavin Giles, Esq., for the plaintiffs/respondents
Cathy L. Dalziel, Esq., for the defendant/applicant Deveaux
Michael E. Dunphy, Q.C. and Joey D. Palov, Esq., for the defendant/respondent Lombard Insurance

Nathanson, J.: (Orally)

[1] The defendant Lisa Deveaux has applied in Chambers:

1. pursuant to C.P. Rule 5.04 (2) for a declaration and an order that she has ceased to be a proper and necessary party to this action; and/or
2. pursuant to C.P. Rule 13.01 for an order dismissing the action against her on the ground that there is no arguable issue to be tried.

[2] The action arose out of a 1996 motor vehicle collision between two vehicles: one operated by the plaintiff Kathryn Campbell-MacIsaac, and the second operated by the defendant Lisa Deveaux. The plaintiff suffered serious personal injuries. She had an automobile insurance policy with the defendant Lombard Insurance, which policy included an SEF 44 endorsement providing additional coverage in the event of damages caused by an under-insured tortfeasor. She commenced this action against Deveaux claiming damages for negligence, and against Lombard for payment pursuant to the endorsement.

[3] In 1999, as a result of negotiations between Robert L. Barnes, Q.C., Solicitor for the plaintiff, and Ross H. Haynes, Esq., Solicitor for Deveaux and her insurer, CAA Insurance Company, the plaintiff executed two forms of Release - a General Release in favour of CAA Insurance and a Partial Release in favour of Deveaux. The plaintiff then turned her attention to her claim against Lombard.

[4] By virtue of the SEF 44 endorsement, Lombard is subrogated to the plaintiff's rights against Deveaux. Lombard was not privy to the 1999 negotiations between Barnes and Haynes and was not advised of the settlement. Now, Deveaux alleges that the claim against her was settled in 1999 via the negotiations and resulting releases. Lombard is concerned that if there was a full and final settlement as alleged and if that settlement is binding upon it, it will be deprived of any benefit of its right of subrogation.

[5] It will be necessary to review the two Releases and various correspondence between the Solicitors in order to ascertain whether Lombard's concern is realized. If it is, it would follow that Deveaux has ceased to be a proper and necessary party to the pending action or that there is no arguable issue to be tried.

[6] I propose to conduct the review in chronological order. The facts are not in dispute.

[7] In a letter dated July 8, 1999, Haynes wrote to Barnes:

"I took from our discussions that your client is prepared to accept the balance of the funds under our policy in exchange for a complete Release of our insured to the extent that Dr. Campbell-MacIsaac can. Can you please confirm that and advise us if that is your client's position. If my client is prepared to undertake this arrangement, we would require a complete Release for Ms. Deveaux for any further expenses from Dr. Campbell-MacIsaac..." [emphasis added]

[8] Barnes replied on July 14, as follows:

"I am not sure what you mean in your letter by a "complete Release". As discussed at the settlement conference, we are prepared to execute a Release accepting the balance of your limits in final settlement, but preserving whatever contractual rights of subrogation may exist in favor of Lombard. Certainly, I cannot proceed with a form of Release which would even appear to compromise their contractual right of subrogation because that would almost certainly be used later as the basis for a denial under the endorsement, notwithstanding the fact that there would appear to be no claim worthy of being pursued against your insured." [emphasis added]

[9] On August 13, Haynes forwarded a trust cheque for $922,926.35, representing the settlement figure agreed upon, and stated:

"The remaining matter to be resolved, of course, is the Final Release document which preserves your client's rights with regard to her under-insured motorist coverage and the Lombard claim. The general understanding of this settlement is that your client will not seek any further payment from my client, CAA Insurance Company, or our insured, Lisa Deveaux, in this matter, and that all claims against them by your client exclusively are resolved. If, at the end of the day, your client is entitled to further claims against Lombard and this results in Lombard's having an added claim against our insured, Lisa Deveaux, that matter remains unresolved in this settlement.

I look forward to working with you in the next few days to the actual and final wording of our settlement agreement." [emphasis added]

[10] Barnes sent to Haynes draft copies of two proposed Releases. His covering letter of September 7 is substantially as follows:

"Further to our recent telephone conversation, I am enclosing draft copies of two Releases which I would propose to use in this case. Firstly, you will find a full Release in the usual form with respect to your client, CAA Insurance Company. I have also prepared a partial Release with respect to Ms. Deveaux pursuant to Section 131(1) of the *Insurance Act*.

I also agree with your comment that it would likely be prudent to simply let the legal action sit in its present form because anything that we may do vis-a-vis Ms. Deveaux may be considered to be prejudicial to the interest of Lombard in pursuing whatever rights of subrogation it thinks it enjoys. It seems to me that the correspondence between us is sufficient to confirm that we will not be pursuing

the legal action against Ms. Deveaux and when it is appropriate to do so, we would certainly undertake to either discontinue or to dismiss that claim." [emphasis added]

[11] On September 8, the plaintiff executed two Releases. The first was a General Release in favour of CAA Insurance Company. The second was a Partial Release in favour of Deveaux personally, and is substantially as follows:

"KNOW ALL PERSONS BY THESE PRESENTS that I, KATH[YRN] M. CAMPBELL (hereinafter called the "Releasor"), of Antigonish, in the County of Antigonish, Province of Nova Scotia, in consideration of the sum of One Million Dollars ($1,000,000.00) of lawful money of Canada paid by CAA Insurance Company, a body corporate, the receipt whereof is hereby acknowledged, to the extent only of the aforementioned payment, do hereby remise, release and discharge LISA DEVEAUX, of the Province of Ontario (hereinafter called the "Releasee"), her heirs, executors, administrators or assigns, of and from all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands which against the said Releasee, the said Releasor ever had, now has or which her heirs, executors, administrators or assigns, or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing whatsoever existing up to the present time and, without restricting the generality of the foregoing, in any way, directly or indirectly, arising out of or attributable to any injury, loss, damage or claim sustained by the said Releasor involving a motor vehicle accident on the Trans Canada Highway, at or near Moncton, Province of New Brunswick, on or about the 7th day of May, 1995.

IT IS UNDERSTOOD AND AGREED that the said payment is made pursuant to s. 131(1) of the *Insurance Act* and is not deemed to be an admission of liability on the part of the Releasee." [emphasis added]

[12] Haynes acknowledged receipt of the executed Releases in a letter dated September 20, and then continued:

"I see no difficulties with these documents, so we accept them.

I would, of course, be interested in being kept up to date not only on Dr. Campbell-MacIsaac's condition, but also any negotiations you have with Mr. Dunphy. As you know, I continue to be involved in this matter to defend the interests of Ms. Deveaux, and Ms. Deveaux has independent legal counsel..." [emphasis added]

[13] What occurred to that point is crystal clear. The intent of the two Solicitors is explicit in their correspondence. Barnes intended that the Partial Release in favour of Deveaux would not affect Lombard's rights of subrogation. Haynes agreed that the settlement did not resolve any further claims that the

plaintiff might have against Lombard which would result in an additional claim against Deveaux. Pursuant to these intentions, the document executed by the plaintiff in favour of Deveaux is stated to be a Partial Release which releases Deveaux only to the extent of the consideration paid for the Partial Release. Nothing is said about releasing any claim for subrogation. Haynes accepted the Partial Release, which acceptance apparently recognized the intent of the Solicitors who drafted it.

[14] There was introduced into evidence at the hearing of the present application extensive correspondence among various Solicitors for the parties subsequent to September 20, 1999. It reveals, *inter alia*, that Deveaux attempted to negotiate Lombard's subrogated claim. Haynes asked to be kept in the trial loop since he had an obligation to defend her interests, and a Solicitor in Ottawa, acting on her behalf personally, on more than one occasion pressed the Solicitor for Lombard as to the possibility of settlement of the claim for subrogation. In 2002, almost three years after the Partial Release and the resulting purported settlement, Deveaux alleged that she had paid the sum of $1,000,000, the payment had been accepted, the plaintiff had agreed that the payment satisfied the claim, and she had been released so that, therefore, in law the action against her had been extinguished. These allegations were driven partly by statements by Barnes in letters dated February 15 and March 6, 2002, to the effect that the plaintiff was not seeking any additional money from Deveaux; the subject of the letters was proposed amendments to the Statement of Claim to which Deveaux was objecting.

[15] It appears that the claim was settled on September 8, 1999. The nature and scope of the settlement is reflected in the contents of the Partial Release of that date, which in turn reflects the intent set out in the prior correspondence between Barnes and Haynes. Informal statements made in a different context in correspondence almost three years after the date of the Partial Release ought not be relied upon in order to interpret, or re-interpret, the nature or scope of the settlement.

[16] It is submitted on behalf of Deveaux that there has been an accord and satisfaction of the claim against Deveaux so that the cause of action has been extinguished and, for authority, relies upon Salmond & Heuston, *The Law of Torts* (20th ed.) p. 565; *Green's Case*, 12 Brit. Col. Rep. 199, per Anglin, J.; and *Forsythe et al.* v. *Moulton* (1893), 25 N.S.R. 359 (C.A.) at p. 362. I have no problem with the principle of accord and satisfaction. But, in the case at bar, counsel for Deveaux says that the plaintiff agreed through

counsel that the tender of $1,000,000 has satisfied the claim against Deveaux. With respect, that is not what the evidence discloses. The Partial Release states that the amount is accepted and Deveaux is discharged "to the extent only of the aforementioned payment". What the totality of the evidence adds up to this: the plaintiff is willing to accept the limits of Deveaux's insurance coverage and will not proceed with any claim against her, which claim remains extant. In short, the plaintiff has a claim but intends not to enforce it further.

[17] In the pre-trial brief on behalf of Deveaux, it is stated that Deveaux paid the sum of $1,000,000 on the collateral undertaking by plaintiff's counsel that Deveaux's liability to pay anything more was over. I am unable to see anything in the evidence as to a collateral undertaking to that effect. In his letter of September 7, Barnes merely stated the intention that "we will not be pursuing the legal action against Mrs. Deveaux". That confirms that the action remains in existence.

[18] It is also submitted on behalf of Deveaux that in consideration of the early payment of the policy limits Deveaux was assured that no monies were being sought from her and that a discontinuance would be made; that Deveaux acted in reliance upon those assurances and, in the circumstances, the plaintiff is estopped from continuing with the claim again Deveaux. In support of this submission, counsel cites *Wilson* v. *Sears Canada Inc.* (1990), 96 N.S.R. (2d) 361 (A.D.), and particularly the decision of Jones, J.A. who cited with approval *Phil Wittaker Logging* v. *B.C. Hydro* (1986), 5 C.P.C. (2d) 71 (B.C.S.C.) at p. 77, wherein Legg, J. cited *Engineered Homes Ltd.* v. *Mason*, [1983] 1 S.C.R. 641; 51 B.C.L.R. 27, at p. 277; 49 C.B.R. (N.S.) 257; 146 D.L.R. (3d) 577; 47 N.R. 379, and there referred to a definition of promissory estoppel in 16 *Hals*. (4th) 1017, para. 1514.

[19] The principle of promissory estoppel is not questioned, but whether the principle is applicable to the facts of the case at bar is doubted. My reading of Barnes' letters to Haynes leads me to conclude that there was no clear and unequivocal promise or assurance, that there was a simple voluntary statement of intention to discontinue the action at such time as the plaintiff considered it to be appropriate, and that what was stated was not intended to affect the legal relations between the parties. Moreover, I cannot see anything in the evidence that proves that Deveaux consequently changed her position and acted to her detriment. Her position after payment seems to have been much the same as it was before payment, namely, her two lawyers were acting to protect her from a subrogation claim by Lombard.

[20] In summary, I do not accept the submissions on behalf of Deveaux.

[21] In the result, it appears that the plaintiff's claim against Deveaux was not wholly settled and remains extant and, therefore, she has not ceased to be a proper and necessary party to the action. Further, in light of that finding, it cannot be said at this particular point of time that there is no arguable issue to be tried and, therefore, an order for summary judgment dismissing the action against her cannot be granted.

[22] The applicant will pay the costs of the application. If counsel are unable to agree upon appropriate amounts, I will hear their submissions on costs at or before the time an Order is taken out.

J.