

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JENNIFER KAVANAUGH

Plaintiff

- and -

ING INSURANCE COMPANY OF
CANADA, CALISE & ASSOCIATES
LEGAL SERVICES INC. AND
MARCELLO CALISE

Defendants

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)
) Siona V. Sullivan,
) for the Plaintiff
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) Heather Kawaguchi,
) for the Defendant, ING
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) Shonna Bertrand,
) for the Defendants, Calise
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) **HEARD:** December 5, 2005

THE HONOURABLE MADAM JUSTICE L. M. WALTERS

OVERVIEW

[1] The defendant ING Insurance Company of Canada seeks an order for summary judgment dismissing all claims against it on the basis there is no genuine issue for trial as against ING since the plaintiff executed a full and final release of all accident benefits on January 10, 2003. The plaintiff, Jennifer Kavanaugh takes no position on this motion. The defendant, Calise and Associates Legal Services Inc. and Marcello Calise resist the motion and ask that it be dismissed with costs.

THE FACTS

[1] The plaintiff, Jennifer Kavanaugh was involved in a motor vehicle accident on September 5, 2002. Ms. Kavanaugh retained the defendant Mr. Calise, to assist her in her claim for accident benefits under an automobile insurance policy issued by the defendant insurer, ING. Mr. Calise is not a lawyer but a paralegal.

[2] The plaintiff retained Calise to represent her under a formal retainment agreement. On September 17, 2002 Calise corresponded to ING stating he was retained by Ms. Kavanaugh with respect to her claim for accident benefits. Included with that correspondence was a notice of change of address, direction and authorization, which was executed by the plaintiff on September 17, 2002. In his correspondence, Calise specifically directed ING to not contact the plaintiff under any circumstances and to correspond only with Calise.

[3] An application for accident benefits and supporting documentation was submitted to ING on September 23, 2002 by Calise. The application specifically indicated that the plaintiff was being represented by Calise.

[4] ING made various payments to or on behalf of the plaintiff for items such as house keeping, caregiver expenses and attendant care expenses.

[5] On November 1, 2002 Calise contacted ING initiating settlement negotiations for a lump sum payment in exchange for a full and final release.

[6] ING responded to this request by advising Calise that ING was requesting a s.42 assessment of Ms. Kavanaugh, but in the meantime would be pleased to receive his proposal.

[7] ING retained Rehability Occupational Therapy Inc. to complete an in-home occupational therapy assessment of the plaintiff. The assessment was completed on December 16, 2002 and a report was prepared on December 19, 2002. The completed report was sent to Calise and Ms. Kavanaugh on January 7, 2003.

[8] On January 7, 2004 Calise, on behalf of the plaintiff, forward to ING correspondence offering to settle Ms. Kavanaugh's claim for the sum of \$23,557.84, plus payment of all outstanding medicals to date.

[10] On January 8, 2003 ING indicated that it was not prepared to consider any amounts for future medical expenses and other items and offered to settle the claim for \$16,525.96.

[11] On January 10, 2003 ING and the plaintiff through her representative Calise agreed to settle the plaintiff's entire accident benefits claim arising out of the September 5, 2002 motor vehicle accident, on a full and final basis for \$20,025.96. This settlement included \$3,500 for medical benefits.

[12] On January 8, 2003 ING forwarded to both the plaintiff and Calise, a copy of the full and final release, settlement disclosure notice and addendum "A" to settlement disclosure notice, for the plaintiff's signature. ING also advised that it was prepared to provide complete access to any medical reports or records relating to the file.

[13] The settlement disclosure notice sent to the plaintiff is the same form as is approved by the superintendent of insurance and which is posted on the Financial Services Commissioner of Ontario website.

[14] On January 10, 2003 the plaintiff executed the full and final release. Each page of the release was initialed by the plaintiff. These documents were forwarded to ING on January 13, 2002.

[15] The plaintiff did not rescind the offer within the two day cooling off period and accordingly, ING forwarded to the plaintiff \$20,025.96 in accordance with the terms of the settlement.

[16] On eight separate occasions prior to the settlement of the plaintiff's accident benefits claim, ING forwarded to the plaintiff and her representative Calise, a document

entitled "Procedure for Resolving Disputes Following Denial or Reduction Statutory Accident Benefits."

[17] The present action was brought on behalf of the plaintiff to set aside the release and to seek a declaration of entitlement to benefits under the statutory accident benefits schedule.

[18] The plaintiff now takes no position with respect to the defendant ING's motion before the court.

THE ISSUES

[19] Is the full and final release and settlement disclosure notice executed by the plaintiff on January 10, 2003 binding on the plaintiff or should it be set aside.

THE LAW

[20] On a motion for summary judgment the court must be satisfied that the moving party has established that there is no genuine issue for trial. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. (*Irving Ungerman Ltd. and Karl Ungerman Ltd. and Galanis* (1991), 4 O.R. (3d) 545 (C.A.).

[21] Counsel for ING in her argument considered the authority of an agent or representative to bind the plaintiff and whether a paralegal has the same authority to represent a claimant as a solicitor, as well as considering whether or not the information which was disclosed to the plaintiff and Calise was adequate. However, in her submissions, solicitor for Calise conceded that the only genuine issue for trial is whether or not the insurer acted in good faith in settling the claim and consequently whether the settlement should be set aside.

[22] In this case, the plaintiff is taking no position on the motion and accordingly, it is the defendant Calise who is alleging that ING breached its contractual duty of good faith

with the plaintiff. Any duty of good faith is owed to the plaintiff not to defendant Calise and the defendants standing to assert or raise this issue is questionable. The duty of good faith is a contractual duty between the insurer and its insured. There is no such duty between Calise and ING. However, assuming that the defendant does have standing to advance this claim, what evidence is before the court to support this claim?

[23] The defendant Calise argues that the claim was settled at a significant discount. There is no evidence before the court to support this claim.

[24] The defendant alleges that the plaintiff's claim was settled a mere four months after the accident when her medical condition had not stabilized. It is important to note that it was the defendant Calise who first approached ING with respect to a full and final settlement. There is no evidence whatsoever that ING attempted to pressure or influence the plaintiff into settling this claim. If the plaintiff felt pressure by her agent Calise to reach a settlement, this information was never passed on to ING. Further, an insurer is not required to resist settlement until such time as further and better information is available (see *Opoku v. Pal* (2000), 49 O.R. (3d) 97, (C.A.)).

[25] Calise argues that the insurers own medical assessment indicated that Ms. Kavanaugh was significantly disabled three weeks before the claim was settled.

[26] The evidence is clear that the plaintiff was advised on numerous occasions of her rights and obligations under the policy. This was a negotiated settlement, first initiated by the plaintiff's representatives. The defendant insurer shared all medical information they had with the plaintiff. The plaintiff received a copy of the assessment report. ING considered the information before it at the time and benefits were paid into the future.

[27] There is no evidence whatsoever that the plaintiff did not enter into this settlement willingly, that she was pressured or unduly influenced. That she relied on Calise is an issue between her and Calise but does not mean ING acted in bad faith.

[28] The defendant further argues that ING took no steps to obtain the clinical notes and records of the plaintiff's treating physician. It is of interest that Calise has not yet obtained these notes himself. There is no evidence before the court to suggest the settlement would have been different if those notes were obtained.

[29] It is important to note that the full and final settlement executed by the plaintiff included any claims for bad faith.

[30] In my view there is no evidence before the court on this motion to support a finding of bad faith on the part of ING and bald allegations without supporting evidence do not raise a genuine issue for trial as to whether or not the full and final release is binding on the plaintiff. Accordingly, an order will go dismissing all claims against ING.

[31] If the parties are unable to agree on costs, the parties may provide written submissions within ten days of today's date.

Walters J.

Released: December 9, 2005