

Case Name:

Dougall v. Allstate Insurance Co. of Canada

Between
Margitta Dougall, and
Allstate Insurance Company of Canada

[2003] O.J. No. 42
Court File No. 01-CV-208569

Ontario Superior Court of Justice
Speigel J.

January 8, 2003.
(17 paras.)

Practice — Actions, conduct of — Actions, commencement of — Choice of method of commencement of proceedings — Pleadings — Amendment of pleadings — Statement of claim — Circumstances when amendment denied.

Appeal by Allstate Insurance, defendant and insurer of the plaintiff Dougall, for an order compelling Dougall to attend for examination for discovery. Appeal by Dougall from a decision of the motions judge denying her leave to amend her statement of claim. Dougall sued originally for benefits payable to trial time and a declaration that she was entitled to accident benefits thereafter. The parties settled the issue of pre-trial benefits, such that only the claim for a declaration survived. Dougall then attempted to amend her claim to bring it under the simplified procedure and to add a claim for housekeeping expenses. The motions judge ruled that as Allstate did not consent to moving the action to the simplified procedure, the court lacked jurisdiction.

HELD: Appeals dismissed. The court had the authority to move the action to the simplified procedure. However, Dougall's draft amendment did not indicate that the claim was for less than \$50,000, the financial limit for the simplified procedure. Furthermore, to allow the amendment was to permit Dougall an end run around the simplified procedure rule. Her claim as originally drafted did not fall under the procedure.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 76.02(1), 76.02(7), 76.13(3).

Counsel:

Paul S. Miller, for the plaintiff.
Ryan M. Naimark, for the defendant.

SPEIGEL J. (endorsement):—

History

¶ 1 The plaintiff's action was originally based on a claim for accident benefits payable up to trial and for a declaration of entitlement for accident benefits payable after trial.

¶ 2 The defendant brought a motion to compel the attendance of the plaintiff at an examination for discovery. The plaintiff brought another motion to amend her statement of claim and to bring herself within the simplified procedure.

¶ 3 The plaintiff proposed in her draft amended statement of claim to delete the claim for accident benefits up to the date of trial, but added a claim for payment of housekeeping expenses. In the affidavit of her solicitor in support of the motion, he indicates that the original claim exceeded \$50,000 but, because of a mediation in which certain issues were agreed upon, the unresolved claim would no longer exceed \$50,000.

¶ 4 Master Clark decided in very brief reasons that since Rule 76.02(7) required the consent of the defendant to move the action to the simplified procedure, and since the defendant did not give that consent, he had no authority to move the action to the simplified procedure.

¶ 5 Accordingly, Master Clark granted the defendant's motion without costs and dismissed the plaintiff's motion without costs. The plaintiff appeals the dismissal and the defendant appeals the costs orders.

¶ 6 The appeals raise a number of issues.

Consent

¶ 7 Rule 76.02(7) states:

An action that was not commenced under this Rule is continued under this Rule if,

- (a) a party's pleading is amended;
- (b) the amended pleading complies with subrule (1);
- (c) all other claims, counterclaims, crossclaims or third party claims comply with this Rule; and
- (d) the consent of all the parties is filed.

¶ 8 I disagree with Master Clark's decision that the court has no authority to move an action to the simplified procedure if the opposing party refuses its consent as set out in paragraph (d).

¶ 9 Master Kelly dealt with this issue in *Braithwaite v. Centre for Addiction & Mental Health* [2002] O.J. No. 3842. He viewed paragraph (d) as a means by which parties could, after an appropriate amendment to the statement of claim, move an action into the simplified procedure without a formal order. If the consent was not forthcoming, then the moving party could move to amend the statement of claim under Rule 26.01. Subject to a costs sanction under Rule 76.13(3), the other provisions of Rule 76.02(7), and any other conditions that the court may impose, it would be granted if the opposing party could not show non-compensable prejudice.

¶ 10 I agree with Master Kelly that it does not seem appropriate that one party would be locked into the ordinary procedure at the whim of the opposing party and thereby suffer costs sanctions at the end of the action. If that were the case, the moving party would have to discontinue its action, pay the costs of the action to the opposing party, and commence a new action under the simplified procedure. This makes no sense. The purpose of the simplified procedure is to reduce costs, not to increase them.

Conditions of Rule

¶ 11 The plaintiff must demonstrate that it falls within the confines of Rule 76.02(7) (a) - (c). In particular the amended claim must comply with Rule 76.02(1). This reads:

The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff's claim is exclusively for one or more of the following:
 - i. Money.
 - ii. Real property.
 - iii. Personal property.
2. The total of the following amounts is \$50,000 or less, exclusive of interest and costs:
 - i. The amount of money claimed, if any.
 - ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.

¶ 12 The plaintiff requests a declaration in her draft amended statement of claim. Does a declaration fall within the Rule? I find that it does if the declaration is a declaration for, in essence, a monetary award.

¶ 13 For example, in *Gibbons v. York Fire & Casualty Co.* [1997] O.J. No. 4125 (O.C.G.D.), the plaintiff claimed a declaration that the defendant indemnify him under his insurance policy for losses sustained because of theft from and water damage to the insured premises. McDermid J. allowed the action to remain under the simplified procedure notwithstanding that the only request was for a declaration. I view this declaration as, in essence, a request for money couched in the language of a declaration.

¶ 14 So too would I view the request for a declaration in this case. It is simply a claim for money in the future. Without this interpretation, the simplified procedure could not be used for accident benefit claims.

¶ 15 The plaintiff proposes to amend her statement of claim to largely delete her claim for damages to the date of trial and continue her claim for a declaration for future benefits. She has not indicated in her draft amended statement of claim that her monetary claim is for no more than \$50,000. I find that the draft amended statement of claim does not meet the conditions of Rule 76.02(1). A solicitor's affidavit is not an amended statement of claim.

¶ 16 Further, from what I can determine, the plaintiff's draft amended claim seems to be an end run around the Rule. The plaintiff is receiving an amount by way of a settlement which amount allegedly brings the remaining claim to under \$50,000. The plaintiff now claims entitlement to the use of the simplified procedure, an entitlement that the plaintiff would not have had without the settlement. If the settlement amount, plus the further future claim, exceeds \$50,000, then the conditions of Rule 76.02(1) are not met.

Disposition

¶ 17 The appeals are dismissed. Counsel have agreed that costs here and before Master Clark for each of the two motions and the appeals would follow the outcome of the appeals and would be fixed at \$3,000. Accordingly, the plaintiff shall pay these costs to the defendant. These costs are not payable forthwith but will be paid in any event of the cause.

SPEIGEL J.

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