CITATION: Dorothy Amyotte v. Wawanesa Mutual Insurance Company, 2012 ONSC 2072
COURT FILE NO.: CV-05-21618
DATE: 2012-04-03

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Dorothy Amyotte Plaintiff

AND:

Wawanesa Mutual Insurance Company Defendant

BEFORE: The Honourable Mr. Justice M. Dale Parayeski

COUNSEL: J. Van Allen acting as counsel to the lawyer for the plaintiff (responding party)

M. Miller for the defendant (moving party)

HEARD: March 21st, 2012

ENDORSEMENT

[1] The defendant moves for an order to enforce a settlement which it says it entered into with the plaintiff. The plaintiff opposes this relief, on the following grounds:

a) that the offer which forms the basis of the alleged settlement does not comply with the provisions of Rule 49, thus making efforts under subsection 9 of that Rule unavailable and inappropriate;

b) that there was no meeting of the minds as between counsel (both of whom had real or ostensible authority to bind their respective clients) as to the terms of the alleged offer an acceptance; and/or

c) that even if there was a settlement, the plaintiff could rescind by operation of the Statutory Accident Benefits regulations.

[2] Very shortly before this matter was scheduled to go to trial, plaintiff counsel asked defence counsel, by means of an e-mail, if the latter had "a final offer". By reply e-mail, defence

counsel sent an offer in the following terms: "Payment to the Plaintiff of the sum of $15,000.00 inclusive of interest in full and final settlement of all accident benefits claims of the Plaintiff and all claims as against the Defendant in the within action" and partial indemnity costs. Plaintiff counsel responded with "We accept the offer and the action is settled…".

[3] Defence counsel asked plaintiff counsel what was wanted for costs. Plaintiff counsel e-mailed back "15 k all in". The next day, defence counsel e-mailed "How would you like the settlement broken down for Release purposes? $10,000 past and future (emphasis added) rehab and $5,000 for costs and disbursements?" The reply was "Yes thx".

[4] Several days later, defence counsel sent plaintiff counsel a full and final release for execution as well as a settlement disclosure notice. Five days after that, plaintiff counsel wrote to defence counsel saying: "We only settled the lawsuit that was outstanding as action number 05-21618. Your release does not restrict the release of the policy to the issue in that lawsuit. May I please have a second draft indicating that only the lawsuit benefits have been released". Defence counsel remonstrated. Plaintiff counsel wrote again, saying: "My client rescinds the settlement as we were not ad idem and there was no disclosure on the remaining benefits which were not the subject of the action and which were not the subject of the action and which could not be extinguished by a Rule 49 offer". Defence counsel inquired: "May I ask what did you think you were settling when you accepted the offer?" Plaintiff counsel responded: "My instructions were to settle the action only and I was clear in my mind-I can't say whether I saw or read your Rule 49 offer but I do recall speaking with you and agreeing to settle-I believe I replied on our phone call as I would not have agreed to what the Rule 49 offer says because I had

instructions to the contrary…". Defence counsel responded by writing: "Lou you and I never spoke, even at the mediations".

[5] The plaintiff particularized her claim at paragraph 10 of her statement of claim as follows: "for the payment of benefits mediated and particularized in the Financial Services Commission of Ontario Report of Mediator dated November 8, 2004 and any other Benefits refused to date and for which a claim has been issued". The plaintiff's position is that this language restricts the litigated claim in such a way that not all statutory benefits which the defendant might owe at any time are included. If one were to accept that they are not, the plaintiff argues that the broad wording of the defendant's offer does not comply with the requirements of Rule 49. Subsection 2(1) of that Rule reads as follows: "A party to a proceeding may serve on any other party an Offer to Settle any one or more of the claims in the proceeding (emphasis added) on the terms specified in the Offer to Settle". The argument continues that if the offer in this case does not comply, it cannot be the subject of a motion to enforce any settlement flowing from its acceptance pursuant to Rule 49.09.

[6] The defendant takes the position that the plaintiff's particularization of her claim, as set out above, is sufficiently broad to cover all potential SAB claims to which it might be exposed. Moreover, it is argued, the offer could hardly have been more fulsomely or plainly worded. It was accepted in similarly plain terms. Further still, the defendant argues, when the breakdown of the numbers was provided, and indeed accepted, it expressly included "future med rehab".

[7] I am of the view that if plaintiff counsel was of the opinion that the offer was too broad and/or that it failed to conform to Rule 49, he ought to have done something other than to accept it unconditionally.

[8] I agree with the defendant's argument that there is a difference between a lack of consensus as regards the meaning of the offer and one that appears to have come about once plaintiff counsel got around to actually reading and/or carefully considering the offer. Misapprehension, especially in this context, does not serve as a basis upon which to avoid settlement: see *Vanderkop v. Manufacturers Life Insurance Co.*, reported at [2005] O.J. No 4661.

[9] In its third point, the plaintiff asserts that the defendant, having sent with its release a settlement disclosure notice, is bound to afford the plaintiff all of her rights of rescission under the SABS regulations. I am of the view that in this regard I am bound by the Ontario Court of Appeal decision in *Ibokwe v. HB Group Insurance Management Ltd.*, reported at (2001), 55 O.R. (3d) 313. Essentially, it holds that once a party chooses to engage in litigation, he or she cannot avoid the provisions of Rule 49 by falling back upon the rights afforded by the SABS regulations. In so doing, I respectfully disagree with the contrary view of Rutherford J. taken in his decision in *Phillips v. CGU Insurance Company*, reported at (2004), 72 O.R. (3d) 447. Moreover, I believe it appropriate to distinguish the facts in that case from the present one on the basis that in the Phillips the defendant insurer accepted the plaintiff's offer to settle and then proceeded to tender settlement documentation in accordance with the SABS regulations. I also note that in Phillips Rutherford J. had the advantage of an affidavit from the plaintiff personally regarding his decision to avoid the purported settlement. I have no such affidavit here. I do not accept the proposition that by having sent the redundant settlement disclosure form with the release the defendant somehow voided application of the principal enunciated in the Ibokwe case.

[10] I am satisfied that the defendant has met the two part test mandated by Rule 49.09, and is entitled to the relief it seeks.

[11] If the parties are unable to agree upon the costs of this long motion, they may make brief written submissions (not more than 3 typed pages in length each) in that regard to me on or before April 30th, 2012. Any such submissions should be sent to my attention at the Sopinka courthouse. If costs are agreed upon, counsel shall advise me in writing at the same location.

The Honourable Justice M.D. Parayeski

Date: April 3, 2012