

SUPREME COURT OF NOVA SCOTIA

Citation: *Dowse v. Co-Operators General Insurance Co.*, 2023 NSSC 418

Date: 20231003

Docket: 497171

Registry: Bridgewater

Between:

Peter Dowse and Susan Himmelman

Plaintiffs

v.

Co-operators General Insurance Company and Daniel Carey doing business as
Daniel Carey's Insurance Company

Defendants

and

Jessica Ginsburg and Laurie MacDonald

Third Parties

Judge: The Honourable Justice Diane Rowe

Heard: March 30, 2023, in Bridgewater, Nova Scotia

Oral Decision: October 3, 2023

Counsel: Deidre Wade, K.C. for the Plaintiffs
Kevin Quigley, for the Defendant, Co-operators General
Insurance Company
Rogerick Rogers, K.C., for the Defendant, Daniel Carey
Ian Dunbar, for the Third Parties

By the Court, orally:

[1] On March 1, 2019, there was a fire at a residence owned by Mr. Peter Dowse, and his two sisters, in Lunenburg County. The property was insured by the owner, Mr. Dowse and his wife, Ms. Himmelman, arranged by an agent Daniel Carey, who was doing business as Daniel Carey's Insurance Company, with the policy held by insurance company Co-operators General Insurance Company.

[2] At the time of the fire, the home was being occupied by Ms. Jessica Ginsburg and Ms. Laurie MacDonald. They also held an insurance policy, with the Personal Insurance Company.

[3] An investigation of the fire by the Personal's insurance adjuster, Mr. Allan Plaggenhoef, revealed that the cause of the fire was disposal of hot wood ash by the occupiers into a large wheeled plastic bin, located by the house.

[4] Mr. Dowse and Ms. Himmelman contacted their insurer, Co-operators, filing a claim of loss on March 2, 2019. On April 1, 2019, Co-operators denied the claim as the property was being rented, which it determined was an undisclosed material change in risk, and a breach of the policy.

[5] On April 30, 2019, Personal was informed by Co-operators that it was denying coverage to Mr. Dowse for the loss. It provided Personal's adjuster with contact information for Mr. Dowse, and Mr. Plaggenhoef then began contact with Mr. Dowse directly in 2019 concerning settlement of the claim and began negotiations toward settlement.

[6] Personal obtained a loss estimate from WinMar Property Restoration of an actual cash value replacement for the loss, exclusive of contents. After Mr. Dowse obtained a structural engineer's opinion, WinMar revised its estimate to \$249,088.67, inclusive of overhead, profit, and HST on replacement cost. Mr. Dowse advised Personal that this revision was due to his contact with WinMar. Mr. Dowse also provided a contents estimate to Mr. Plaggenhoef of \$35,917.63.

[7] Based on the totality of this information, Mr. Plaggenhoef offered Mr. Dowse \$235,560.90 in settlement of his claim against the insured Ms. Ginsburg and Ms. MacDonald. Mr. Dowse requested that the cheque be made out to him solely, and Mr. Plaggenhoef received confirmation from Mr. Dowse's sisters, the two co-owners, that they agreed with this.

[8] Mr. Dowse signed a release of claim on June 24, 2020, with his two sisters also signing releases at about the same time Mr. Plaggenhoef states that there was

no representation by Mr. Dowse that his wife had a claim against Personal Insurance for loss, and Ms. Himmelman was not listed as an owner on the Property.

[9] The terms of the Release are written in plain language as follows:

THE UNDERSIGNED hereby for themselves; their heirs, executors, administrators, successors, and assigns

Release and forever discharge (name of insurer and insured) Jessica Ginsburg, Lori MacDonald and/or The Personal Insurance Company (hereinafter referred to as the "Releasee") from any action, cause of action of any nature and kind whatsoever for injury or, as the case may be, damages as specified above sustained as at the date hereof or that may be sustained hereafter, as a result of **fire** on or about the 1st day of March 2019.

- (i) Agree not to make any claim or take proceedings against any person or corporation who might claim contribution or indemnity under provisions of any statute or otherwise.
- (ii) Agree that the said payment does not constitute an admission of liability on the part of the Releasee, and
- (iii) Declare that the terms of this settlement are fully understood, that the amount stated herein is the sole consideration of this release and that such amount is accepted voluntarily as a full and final settlement of the claim for damages specified above.

WARNING: The purpose of obtaining your signature on this form is to prevent you from making a claim against anyone in the future for any damages or injuries you have already sustained or may suffer in the future as the result of the incident described above in this form.

[10] However, two months before signing the release with Personal, on February 26, 2020, Mr. Dowse and Ms. Himmelman had initiated an action against Mr. Carey, and Co-Operators, seeking damages for breach of contract due to the cancellation of the policy, a breach by the agent in negligence in arranging for inadequate coverage, and the denial of their claim under the Co-operators policy.

Mr. Dowse and Ms. Himmelman have not thereafter cashed the return of any payments cheque for premiums as had been sent by Co-operators.

[11] Co-operators had not maintained contact with Personal after notifying the company that the owners claim had been denied. Mr. Dowse did not inform Personal of the pending litigation.

[12] The action by Mr. Dowse and Ms. Himmelman against the Co-operators and Mr. Carey has continued. Co-operators and Mr. Carey, as Defendants in the action, joined Ms. Ginsburg and Ms. MacDonald as Third Parties to the action.

[13] This is a motion by the Third Parties, Jessica Ginsburg and Laurie MacDonald, seeking the Court's order of either a permanent stay of proceeding of the Plaintiffs' action entirely as an abuse of process, or an Order for a permanent stay of proceeding of claims in the action filed against the Third Parties, solely.

Issues

[14] Should the entire action be stayed as an abuse of process?

[15] If not, then should there be a stay of proceeding of the third party claims as against Ms. Ginsburg and Ms. MacDonald?

Positions of the Parties

[16] The Third Parties rely upon *Nova Scotia Civil Procedure Rule* 88.02 (with reference to s. 41(e) of the *Judicature Act* RSNS 1989 c. 40). *CPR* 88.02(1)(b) provides, under the heading, “Remedies for abuse”:

88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following: (a) an order for dismissal or judgment; (b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;..

[17] The Court also is mindful of s. 149(1) of the *Insurance Act*, RSNS 1989, c 231 (headed Subrogation):

s. 149(1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights.

[18] Upon reading and hearing the submissions of the Third Parties, the Defendants, and the Plaintiffs, all three appear to agree that Ms. Ginsburg and Ms. MacDonald are entitled to rely upon the release in support of a stay of proceedings as against the Third Parties. In this aspect, regardless of the answer to the first issue as posed in the motion, the answer to the second issue – whether a stay of proceedings as against the Third Parties should be issued – is addressed in the affirmative.

[19] However, on the motion as framed, the Third Parties and the Defendant Respondents argue that the underlying issue for the Court to consider regarding the motion is what the effect of the Third Parties’ removal from the litigation may

have on any potential right of subrogation and the action continuing, and if the action continues whether it is an abuse of process. They draw the Court's attention to the bolded and underlined portions of the final paragraph above the execution line:

WARNING:

"The purpose of obtaining your signature on this form is to prevent you from making a claim against anyone in the future for any damages of injuries you have already sustained or may suffer in the future as the result of the incident described in this form."

[20] The Defendants rely upon *Orlandello c. Nova Scotia (Attorney General)* 2005 NSCA 98. In that matter, Justice Fichaud summarized the judicial history and third party beneficiary exception to the privity rule, and noted that a party can claim a contract's benefit as a third party beneficiary if:

- i. The contracting parties intended to extend the benefit in question to the third party, and
- ii. The activities in question are the very same contemplated in the contract.

[21] The Defendant/Respondents submit that the factual circumstances in *Orlandello, supra* are very similar to this matter, with a third party seeking to rely upon the release connected to the loss (in this case, a fire) as they were within the

contemplation of the parties at the time the release was signed and with the fire, in this case at the residence. They plead that the underlying purpose of the payment of consideration of money to Mr. Dowse from Personal was to “obtain litigation peace” and that Ginsburg and MacDonald would not become third parties to continuing action for loss thereby satisfying the first part of the test in *Orlandello*. Further, it is argued, the fire is referenced in the release with the release is to obtain discharge of any action, or cause of action of any nature and kind as “a result of the fire specified on or about” March 1, 2019.

[22] The Plaintiffs respond to this point by highlighting to the Court that the action as against the defendants is for damages under other claims in the notice of action, including breach of the contract of insurance, and negligence by the insurance agent. They argue strenuously that the release as against the Third Parties should not be interpreted so broadly as to relieve the Defendants’ from these claims, as set out in the notice of action.

[23] The Plaintiffs, in their submissions, argue that the case law cited by the Defendant/Respondents and the Third Parties, specifically *1562860 Ontario Ltd. v. Insurance Portfolio Inc* (2009) 94 OR (3d) 785 as support an order for a permanent stay of the entire proceedings, was varied by the Ontario Court of Appeal in *1562860 Ontario Ltd v Insurance Portfolio*, 2011 ONCA, with an appeal allowed

in part, permitting the main action to continue against the defendant, and the third party stay continued. The basis for that decision was that the result of the third party claim would have been the same regardless of the decision from the main action.

[24] Further, the Plaintiff distinguishes *Sinclair- Cockburn Insurance Brokers Ltd. V Richards* 2002 CanLII 45031 (ONCA), which was also relied upon by the Third Parties and the Defendants, by arguing that the common finding of fact in that decision is that the main action and the third party claim were inextricably linked to the extent that they can not be separated. They submit that in this matter, the Plaintiffs' claims and the Third Party claims are not so intertwined and can, and have been dealt with, separately.

[25] The affidavit of Mr. Dowse provides evidence that he pursued his claims for breach of the policy and negligence as against the Defendants from the time of denial of the claim, and he did not agree with the voiding of the policy. Further, the Plaintiffs submit that as the policy was voided by the insurer upon the first attempts at filing a claim, that there is no right of subrogation in law for the defendants available in any event, as they discarded any right to claim contribution or indemnity from third parties. Therefore, the position put forward by the

Defendant and the Third Parties that the issues are intertwined inextricably is not supportable.

[26] The Plaintiffs highlight to the Court that the Third Parties' involvement in the fire have no impact or involvement on their claim against the Defendants concerning the wrongful voiding of the policy. The losses the Plaintiffs claim as against the Defendants are separable and flow from contract or negligence of the agent concerning the policy and its coverage.

[27] The Third Parties' submissions are somewhat equivocal and set out the law, and the issues, clearly for the Court. In the first instance, they plead that the release should be interpreted so as to support a stay of the entire proceeding. In support of this position, they submit that the Court consider *Ieradi v Gordon*, 2007 CanLII 48637, in which the Court held only the Third Party proceeding will be stayed, as opposed to the entire action.

[28] In *Ieradi, supra*, it noted the following at paragraphs 23 and 26 of the decision:

[23] If a third party proceeding without merit can still be stayed based on a "no action clause" in a prior release and, on that basis, the main action stayed, then any defendant can get that advantage simply by issuing a third party proceeding even though it has no chance of success. I fear that is what is being hoped for here.

...

[26] On this basis, it is appropriate for the third party proceedings to be stayed to ensure that the third parties are provided with the benefits of the settlement they made, but that the main action be sustained and allowed to proceed. Where a third party has no exposure in contribution and indemnity to any successful claim by a plaintiff, the court need not dismiss or stay the main action pursuant to a covenant not to sue.

[29] It was submitted by the Third Parties that, were a stay of the entire action to be granted, the Defendants here would clearly obtain benefit of the Release, which they are not parties to and paid no consideration for. The Court's attention was drawn to the decision of *Fehr v. Gribilas*, 2022 ONSC 275 at paragraph 112, considering the circumstances in which a defendant should be entitled to that benefit, noting:

[112] ...a litigant, to have the benefit of the protection of a no-claim-over provision in a release for which the litigant was not a signatory, the litigant must satisfy two preconditions: (a) he or she must have been sued with respect to the subject matter of the release; and (b) he or she must have a viable claim-over to trigger the protection of the no-claim-over provision.

[30] It was further noted at paragraph 115 of *Fehr, supra*:

[115] A stay of proceedings is a discretionary extraordinary order that is not granted upon request or as a matter of course. A stay for the benefit of a third-party beneficiary of a release should not be granted where the triggering of the preclusive clause is disingenuous, which is to say not genuine. The triggering of preclusive, claims-barring provision, will not be genuine, if the triggering claim is not legally viable. If the triggering claim is not legally viable, then the extraordinary order of the stay cannot be justified because it is not necessary to protect the litigant that was a signatory of the release, and it would be unjust to protect the third-party beneficiary who has no privity of contract.

[31] In its Third Party Claim, the Co-operators has claimed against the Third Parties based on the *Tortfeasor's Act* R.S., c. 471, s. 1, at subsection 3(c), in which it provides:

3 Where damage is suffered by any person as a result of a tort, whether a crime or not,

...

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this Section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. [emphasis added]

[32] The Third Parties submitted to the Court, the initial difficulty Co-operators faces is that the claim against it, as framed by the Plaintiffs, is not a tort claim, and Co-operators is not a tortfeasor who is or could be found liable for the fire.

[33] The Third Parties note that, the claim against Co-operators is properly viewed as a breach of contract claim based on its denial of coverage to the Plaintiffs.

[34] Further, it was submitted by the Third Parties that, Co-operators also does not, and will not, have any independent cause of action against the Third Parties in its own right, regardless of how the main action is being decided, as any claim would have to be pursued in the names of the Plaintiffs in the event that there was a subrogation.

[35] However, in this matter, the Plaintiffs have not sued the Third Parties. In fact, as it was correctly submitted, the Plaintiffs are unable to sue the Third Parties due to the release signed by Mr. Dowse.

[36] It should also be noted that the broker, Mr. Carey, had also claimed against the Third Parties under section 3(c) of the *Tortfeasor's Act*, which, required the act of two or more tortfeasors to combine to cause the 'same damage.' The rest is not satisfied here, as it relates to the Plaintiffs' claim against Mr. Carey in relation to the placement of insurance coverage, for failing to ensure Co-operators was aware that the property was being operated as a rental. The loss of insurance coverage, then would have taken place when the information was not communicated by the broker to the insurer, it is alleged, and the associated 'damage' is the loss of coverage. This is an entirely separate 'damage' from the claim made against the third parties in respect of the fire. Accordingly, the Third Parties cannot be liable to the broker for contribution and indemnity, whether under the *Tortfeasors' Act* or otherwise.

[37] I find that the claims as against the defendants, based upon the affidavit submissions of Mr. Plaggenhoef and Mr. Dowse, are not so inextricably intertwined with the facts of the fire in and of itself, so as to make the action in its entirety an abuse of process, despite the plain language contained in the release.

The timing and the obtaining of the release would appear to indicate that the release is specific to the circumstances of the fire and not made in contemplation of the other claims that are being pursued for breach of contract or of negligence as put forward by the Plaintiffs.

[38] While Mr. Dowse had already filed the notice of action as against the Defendants prior to signing the release he did so not considering the claims for the breach of contract or negligence of the agent in relation to the losses of fire as coming within the scope of that release. Neither did Personal, in its release, as it had knowledge that the claim was denied by Mr. Dowse's insurer but not of the subject matter of the dispute between the parties in contract or in negligence, in which their insured would not be parties to in any event.

[39] There may be merit in the claims concerning breach of contract, negligence and in the related damages associated with the difference between actual cash value loss valuations that were paid out by the third parties' insurer and replacement cost value associated with the policy between the Plaintiffs and Defendants in the main action, and such other damages as may be proven in court.

[40] The entire action concerning the claim for damage from the alleged breach of the policy of insurance and negligence was not the basis of the release obtained

by the Third Parties concerning the loss from the fire. If the Plaintiff succeeds and the policy is reinstated, or if negligence is found, then the valuation of damages associated with the breach of contract or such negligence, if proven, are certainly the subject of litigation on its own.

Conclusion

[41] The Court will issue a permanent stay of proceedings concerning the Defendants as against the Third Parties, rather than issuing a permanent stay of the entire action.

[42] The Third Parties have requested costs as against all parties who oppose the motion. I am requesting that if the parties cannot come to an agreement on costs, as part of submitting the order, I will seek submissions in writing setting out their position, to be provided 30 days from the date of this decision, to inform my consideration on costs.

Diane Rowe, J.