IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

File: MC-665-2021

Woodman’s Welding & Machining Ltd. v. Charlie Cooke Insurance Agency Ltd.

Neutral Citation: 2024 NBKB 059

BETWEEN:

WOODMAN’S WELDING & MACHINING LTD.,

Plaintiff

- and -

CHARLIE COOKE INSURANCE AGENCY LTD.,

Defendant

DECISION

BEFORE:	Justice Jean-Paul Ouellette
AT:	Moncton, New Brunswick
DATE OF HEARING:	March 12, 2024
DATE OF DECISION:	April 2, 2024
APPEARANCES:	Edwin G. Ehrhardt, K.C., for the Plaintiff
	Josie Marks & Marie-Pier Cyr, for the Defendant

OUELLETTE, J.

INTRODUCTION

[1] Woodman's Welding & Machining Ltd. got business interruption coverage on its business from Northbridge General Insurance Corporation through its agent, Charlie Cooke Insurance Agency Ltd. Woodman's claims that Cooke negligent, misrepresented them in the nature of business interruption coverage provided and available. It is claiming damages.

[2] Cooke is seeking a summary judgement of this claim arguing the nonexistence of a genuine issue requiring a trial. For the reasons that follow, this Court agrees and this action should be dismissed.

FACTUAL BACKGROUND

[3] Cooke is a brokerage insurance agent that arranges insurance coverage to Woodman's operating a welding and machining shop. It had Woodman's as a client for many years. In 2019, D. Loveless, an employee of Charlie Cooke Insurance Agency Ltd., conducting an annual review of Woodman's insurance, suggested to Woodman's to add to their existent insurance policy coverage for business interruption as a potential enhancement.

[4] K. Bannister, president of Woodman's agreed to add this coverage along with other addition to the existent policy affective in March 2019. Policy No. 0908811 was issued by the insurer Northbridge as requested by Charlie Cooke Insurance Agency Ltd. to "add the BIALS" as quoted for Woodman's.

The acronym BIALS stands for “Business Interruption Actual Loss Sustained”.

[5] Mr. Bannister did not understand the policy but relied on its agent, Charlie Cooke Insurance Agency Ltd., with respect to receiving the coverages he required and which he understood he was receiving.

[6] For Mr. Bannister, his company would be entitled to receive a cheque for business interruption insurance for “gross monthly income” based on the average gross monthly income for three (3) years prior to a loss for a period of 12 months. It would allow Woodman’s to receive enough funds to pay its bills, loans and obligations for that period or until the building was rebuilt.

[7] On October 26, 2020, a fire occurred at Woodman’s business located at 659 Havelock Road in Petitcodiac, New Brunswick, interrupting their operations. The said policy was in place at the time of the loss.

[8] After this fire, Woodman’s were informed by Northbridge the coverage available for business interruption and Mr. Bannister alleges that the coverage does not represent what had been represented by Mr. Loveless at the time of the addition to the policy.

[9] As alleged in the statement of claim, the coverage “was gross, not net” and as stated in the Statement of Particulars, the coverage was for “gross monthly income” to allow Woodman’s “to operate up to 12 months.”

[10] Mr. Loveless denied advising Mr. Bannister or any representative of Woodman's that business interruption coverage would allow him to receive "gross monthly income" but rather coverage would be based upon actual loss sustained. Furthermore, Mr. Loveless is not aware of any business interruption insurance product on the market that would cover an insured for "gross monthly income" rather than applying a contractual formula to ascertain the actual loss sustained as set in a policy.

[11] Mr. Bannister states that he only became aware of this information in December 2020 when he received a report from forensic accountant retained by Northbridge processing the claim under the insurance policy issued.

[12] In January 2021, Woodman's and Charlie Cooke Insurance Agency Ltd. had some exchange discussing the issue arising out of the coverage for business interruption and Mr. Bannister came to understood that there were various types of business interruption insurance and various considerations, issues and questions that should be answered and/ or reviewed in order to obtain appropriate coverage for business interruption.

[13] It was in this context that Woodman's concluded it had been misrepresented on coverage for business interruption and decided to file an action against Charlie Cooke Insurance Agency Ltd. for negligent misrepresentation.

[14] Notwithstanding Mr. Bannister's understanding, it is undisputed that Charlie Cooke Insurance Agency Ltd. had suggested the business interruption

coverage provided under the policy and Woodman's relied and accepted its recommendation. However, for Woodman's, this recommendation was a misrepresentation of what he understood to be coverage for the "gross monthly income" of his business for 12 months.

[15] Woodman's original statement of claim included a claim against Northbridge General Insurance Corporation. This dispute has been resolved between the parties before Cooke filed its defense.

[16] The claim against Cooke is for negligent misrepresentation in the nature of the business interruption coverage available under the policy. Woodman's seem to suggest that it's entitled to a claim for what they believe was the coverage purchased and not which was actually provided under the policy.

[17] For the record and of importance, an objection arose in relation to a paragraph in Mr. Bannister's affidavit, in relation with premium of $1,600.00 taken out of their account for a vehicle destroyed in the fire. This is deemed to be an issue between Woodman's and Northbridge and there is no evidence whatsoever that Cooke would have received that premium or involved in this withdrawal. The Court will discard this allegation being irrelevant for the purpose of this motion.

ISSUE

[18] The issue to be determined on this motion is whether on a balance of probabilities, there is a genuine issue requiring a trial?

ANALYSIS AND CONCLUSION

[19] The test for summary judgment pursuant to Rule 22 is whether there is a genuine issue requiring a trial:

> **22.04 Disposition of Motion**
>
> General
>
> (1) the **court shall grant summary judgement** if
>
> (a) the court is satisfied **there is no genuine issue requiring a trial with respect to a claim** or defence, […]
>
> [Emphasis added]

[20] In *O'Toole v. Peterson*, 2018 NBCA 8, the Court stated what the summary judgement is as follows:

> [5] That said, the ultimate objective is justice according to law. Needless to say, Rule 22 is not designed to eliminate trials that are necessary for a fair resolution of the dispute. Nor does it operate outside the adversarial system. Rather, the objective of the Rule is to bring about, within that system, an early determination where there is no issue requiring a trial with respect to a claim or defence. Hryniak v. Mauldin explains when that will be the case:
>
> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute. [paras. 49-50].

[21] In *Lange v. Cannon*, (1998) 203 NBR (2d) 121 (NBCA), our Court of Appeal expressed the view that the parties must put their best foot forward on a motion for summary judgement under Rule 22. They use the words “must lead trump or risk losing”.

[22] In its statement of claim, Woodman’s alleges that Cooke’s onto which its relied was represented to its detriment. It further states that Cooke is estopped from now asserting that they only owe Woodman’s the net loss of income rather than gross. In summary, the allegations is that Cooke is in breach of contract and made negligent misrepresentation.

[23] In its statement of defense, Cooke denies all the allegations made by Woodman’s and expressly denies having represented to Woodman’s that it had business interruption coverage for gross, not net income. Furthermore, Cooke states that coverage for gross income is not available on the market.

[24] The evidence before this Court for Cooke is drawn from the affidavit of D. Loveless, a commercial insurance broker employed by Cooke who first explain his history relationship with Woodman’s and his offer in March 2019 on an annual review of the insurance coverage to add at his suggestion “business interruption coverage”. He states meeting with Mr. Bannister, the president of Woodman’s to review the existence insurance coverage and explain the potential enhancements to his existing insurance policy with this coverage and others.

[25] Mr. Loveless, in his affidavit, denied having discussions about gross monthly income with Mr. Bannister. Again, he is not ware of any BI insurance product on the market that would cover an insured for “gross monthly income” rather than applying a contractual formula to ascertain the actual loss sustained.

[26] Mr. Bannister, in his affidavit, states that the funds received from Northbridge for business interruption were insufficient for Woodman’s to pay all of its ongoing expenses and employee wages after the fire. No more details were provided or discussed by Mr. Bannister on the issue of what he should have received to the exception of mentioning “gross monthly income” entitlement.

[27] Mr. Bannister confirms receiving a policy of 168 pages from Northbridge Insurance Company resulting from Cooke agency representation. He did not understand its content but relied on the agent’s representations to be properly insured.

[28] Mr. Bannister explained his understanding with Cooke’s agents over the years and Mr. Loveless in particular for the last several years and his reliability on him which is not contested. He understood from their discussions on BI coverage that the insurer “would look at the income for three years, determine an average on a monthly basis and Woodman's would receive that amount to allow it to pay bills…”

[29] For a claim for negligent misrepresentation again an insurance broker to succeed, the Supreme Court in *Queen v. Cognos* Inc., [1993] 1 SCR 87 has established that five elements need to be established and all five must be proven to be successful. These five elements are:

> (a) there must be a duty of care based on a "special relationship" between the representor and the representee;
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> (b) the representation in question must be untrue, inaccurate, or misleading;
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> (c) the representor must have acted negligently in making the misrepresentation;
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> (d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
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> (e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[30] Cooke admits the existence of a duty of care with Woodman's. As for the other elements, the onus rests on Woodman's to bring forward the evidence in support i.e. put its best foot forward and Cooke arguing that this onus has not been met.

[31] M. Bannister, the son of Mr. Bannister, states in his affidavit, that he attended two meetings with his father and Mr. Loveless. In the first meeting, he reported as for the business interruption coverage that Mr. Loveless stated that "this coverage was for a period of 12 months and would cover all expenses including payroll and keep Woodman's from having to let employees go." As reported by M. Bannister (son), there was no mentioning of business interruption coverage in their second meeting.

[32] On record, the insurance policy of Northbridge insurance under “Business Interruption Form” in Section 1 Indemnity Agreement defines the coverage which the insured Woodman’s is entitled “due to the total or partial suspension of your “normal business operation”…Under section 6. Valuation, Business Income Valuation is defined, and the insurer will…“consider expenses including payroll expenses that are required so that your business can return to operations…” and add the “extra expenses you necessarily incur to continue…”

[33] Considering what M. Bannister (son) reported to be Mr. Loveless statement, there is no untrue, inaccurate or misleading representation on his part and nowhere in his affidavit evidence of Mr. Loveless suggesting that the coverage is to be calculated on a gross monthly income. He neither suggested how Mr. Loveless acted negligently which are two of the required elements to establish negligent misrepresentation.

[34] To the contrary, M. Bannister (son) most importantly confirmed the evidence presented by Cooke to the effect that the evidence is insufficient to establish on a balance of probabilities negligent misrepresentation.

[35] As for Mr. Bannister’s affidavit, dated February 22, 2024, in support of his position, numerous observation needs to be made in the context of all the evidence presented in these proceedings. The affidavit raises serious issue of reliability.

[36] At discovery, Mr. Bannister could not remember nor recall what was said at the March 2019 meeting with Mr. Loveless. This is in contrast to his evidence provided in his affidavit where he now recalls the following:

> 10. I was advised by David Loveless at the original meeting in 2019 with respect to Woodman's acquiring business interruption insurance that Woodman's would receive a cheque in the event of a fire for business interruption for gross monthly income based on the gross monthly income for three (3) years prior to the fire.
>
> […]
>
> 11. Further, I was advised by Dave Loveless in the event of a fire that business interruption would cover not just all bills, but keep all my employees paid so I would not lose my employees, which is why the average gross monthly was being discussed – Woodman's would not lose its employees and be able to pay its employees after the fire.
>
> 12. In particular, the coverage I was advised Woodman's was to receive would be based on the average gross monthly income for the three (3) months prior to any loss, and again, it was intended to allow me to make payments.

[37] Whether we accept this explanation of Mr. Bannister as to the content of Mr. Loveless representation, the insurance policy coverage found in the Indemnity Agreement referred above will cover the expenses as to what Mr. Bannister states as being the representation of Mr. Loveless. This is also the evidence of M. Bannister (son).

[38] Mr. Bannister also submitted email exchanges insinuating that Mr. Loveless did not know what he was talking about in relation with what was covered under the policy. The Court rather opine after reviewing these emails that Mr. Loveless was suggesting to get his clarification in reference to Mr. Bannister's email from the insurance representative making the forensic accounting to set the amounts owed. It was suggested by Mr. Bannister that Mr. Loveless should have explained all of the details of the insurance policy

in support to his claim of negligent misrepresentation. These arguments are without merits.

[39] It seems fair to mention that Mr. Bannister is not knowledgeable in the insurance policy coverage and could have honestly misunderstood something else from what Mr. Loveless represented to him to be covered under the policy.

[40] Woodman's suggested that an agent had the obligation "to be clear and definite with advice". Mr. Loveless was clear as reported in his affidavit and again M. Bannister (son) understood what was being offered in the coverage of business interruption. Mr. Bannister got the same information but had a misunderstanding on how it would be construed. There is no negligent misrepresentation on Mr. Loveless or on behalf of Cooke.

[41] In the Fire Proof of Loss form dated March 29, 2022, provided to Northbridge Financial Corporation by Woodman's to finalize his insurance claim, Woodman's received $1,648,351.93 payment in full satisfaction for this claim, inclusion of $138,777.19 for business interruption. While there is no explanation as to what is covered and or included in this amount, there is either any evidence provided to this Court that would substantiate a claim against Cooke in support of having acted to its detrimental of any other amounts payable for business interruption.

[42] However, in answering to a Demand for Particulars, in responding to the "materially significant sum" claim in its statement of claim the calculation is set at follows:

> Gross monthly incomes based on previous 36 months, average per months 63,919.00 x 12 months = $767,028.12 less amount received from insurer $138,777.19 for coverage which was actually placed by Defendant.
>
> Total $628,250.91

[43] Woodman's never rebuilt their business of welding and machining operation. The business seize its operation a few months after this loss. There is no reliable evidence that would suggest any liability on Cooke for not pursuing its operation.

[44] Finally, Northbridge, in an email to Woodman's on December 24, 2019, and found in Mr. Bannister's affidavit, it sent a preliminary draft estimate of loss for the period of November 1 to December 18, 2020 for discussion purposes only. Northbridge states that they relied on average monthly revenue from June to October 2020. It also made reference to "requested monthly income statements or operating expenses during the loss period. To date, this information has not been provided…" It also reads "In addition to the following, I have reviewed bi-weekly payroll prior to the loss and for November 2020. Based on this review, it appears that payroll fully continued. Pending receipt of payroll for December, our estimates concerning continuing payroll are subject to revision."

[45] In all probability, what M. Bannister (son) stated in his affidavit for what it's considered important expenses covered, was of consideration under the policy.

[46] While the evidence differed from what Cooke offered as coverage and what Woodman's and Mr. Bannister's expectations were, the evidence of Cooke is more reliable. There is no evidence that would allow a court to conclude a misrepresentation by Cooke with the coverage provided to Woodman's. From what M. Bannister (son) understood from the explanation of Mr. Loveless at the meetings reported in his affidavit is reflected in the terms of the policy.

[47] The Court is satisfied on the evidence that Woodman's was provided with the coverage for business interruption as intended by the parties. It covered the risks expectancy of business interruption. If Mr. Bannister understood a coverage that does not exist in this type of insurance coverage, it does not equate to a misrepresentation. It is at best a misunderstanding on his part that has no bearing on the issue at bar.

[48] For this motion, Woodman's did not provide evidence for items that was not covered by the policy sold to them inclusive of the payroll expenses which in all likelihood was covered under the policy as represented by Mr. Loveless. To be dissatisfied with the manner in which its insurer adjusted the loss is an issue between Woodman's and the insurer not Cooke.

[49] Woodman's failed to demonstrate that negligent misrepresentation was made by Cooke as being untrue, inaccurate or misleading nor that Cooke acted negligently, nor Woodman's relied in a reasonable manner on an alleged negligent misrepresentation, nor its reliance been detrimental and resulted on damages.

[50] In conclusion, the Court is satisfied that there is no genuine issue requiring a trial with respect to this claim by Woodman's.

[51] Summary judgment is therefore granted, dismissing this claim with cost of $2,500.00 payable by Woodman's Welding & Machining Ltd.

Rendered in Moncton, New Brunswick on the 2nd day of April 2024.

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Jean-Paul Ouellette
Justice of the Court of King's Bench
New Brunswick, Trial Division