

CITATION: Nazir v. Stewart Title Guaranty Company, 2024 ONSC 5394
COURT FILE NO.: CV-23-00697329-0000
DATE: 20241001

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Farina Nazir, Plaintiff

-and-

Stewart Title Guaranty Company & Shahid Malik & 2212478 Ontario Inc.,
Defendants

AND RE: 2212478 Ontario Inc, Plaintiff by counterclaim

-and-

Farina Nazir, Defendant to the counterclaim

BEFORE: Robert Centa J.

COUNSEL: Tamur Shah, for Farina Nazir

Michael R. Kestenberg, for Stewart Title Guaranty Company

N. Joan Kasozi and Nicholas Patterson for 2212478 Ontario Inc.

HEARD: September 16, 2024

ENDORSEMENT

- [1] Stewart Title Guaranty Company brings this motion for partial summary judgment to dismiss the claim of its policy holder, Farina Nazir, and the crossclaim of 2212478 Ontario Inc.
- [2] In my view, the issues raised by Stewart Title cannot be readily bifurcated from those in the main action and raise the serious prospect of inconsistent findings of fact and mixed fact and law on this motion and in the remaining part of the action.
- [3] I do not believe this motion provides a just process to determine the issues in dispute. The insurance policy issued by Stewart Title should be interpreted in light of the facts to be found at trial. Whether Stewart Title is required to provide coverage in the circumstances of this case cannot be assessed without the benefit of a complete understanding of the nature and scope of the allegedly fraudulent transactions that triggered this dispute. In this case, neither documentary nor oral discoveries have been completed and I am not satisfied that justice can be done among the parties on this motion at this stage of the proceeding.

- [4] I am not satisfied that dividing the determination of this case into several parts will prove cheaper for all the parties. Granting partial summary judgment will not get the entire case in and out of the system more quickly.
- [5] For the reasons set out below, I dismiss the motion. To ensure that the action proceeds in an efficient and cost-effective manner, I intend to give directions and impose terms that are just in accordance with rule 20.05(2).

Facts

- [6] Ms. Nazir purchased 3442 Trilogy Trail in 2016. On May 10, 2016, Ms. Nazir obtained “Gold Comprehensive Protection” title insurance from Stewart Title. The policy explained that the “policy insures your Title to your Land” and insured Ms. Nazir against actual loss arising from any risks described in the covered title risks set out in the policy for events before, or in some cases after, the date of the policy. The policy listed 33 “covered title risks.” Most relevant for this motion is covered title risk #5:

Someone else claims to have rights affecting your Title arising out of forgery, fraud, duress, incompetence, incapacity, or impersonation.

- [7] The policy of insurance also had several exclusions from coverage, including one for risks created by the policy holder. The policy provided that Ms. Nazir was not insured against “loss, costs, legal, fees and expenses” resulting from “risks that are created, allowed, or agreed to by you.”
- [8] In November 2020, Ms. Nazir borrowed \$400,000 from the defendant, 2212478 Ontario Inc. As security, Ms. Nazir granted the lender two mortgages on 3442 Trilogy Trail and 15254 Danby Road. The lender’s real estate lawyer on this transaction was the defendant, Shahid Malik.
- [9] On July 15, 2021, Ms. Nazir entered into an agreement of purchase and sale to sell 15254 Danby Road. Ms. Nazir states that Mr. Malik was the lawyer for the lender on this transaction, which required her to obtain a discharge of the mortgages. On September 1, 2021, Ms. Nazir’s lawyer forwarded \$403,108.51 to Mr. Malik by way of a certified cheque payable to “Shahid Malik Law Office Professional Corporation, in trust.”
- [10] Ms. Nazir’s evidence is that these funds “were explicitly intended for the discharge of both mortgages and were meant to be held in his trust account until used for the discharge.” On November 12, 2021, Mr. Malik signed and registered the discharge of charge on 15254 Danby Road. The instrument indicates that Mr. Malik had authority to register the discharge on behalf of the lender.
- [11] On January 7, 2022, Ayoub Ali wrote a letter to Ms. Nazir. Mr. Ali stated that he was the lawyer for the lender and advised Ms. Nazir that the charge on 3442 Trilogy Trail “matured on November 25, 2021, and has not been paid out or renewed. It is now in default.” Mr. Ali demanded that Ms. Nazir pay \$408,025.28 to the lender to discharge the charge on

3442 Trilogy Trail or before January 21, 2022, failing which the lender would commence mortgage enforcement proceedings.

- [12] Ms. Nazir requested that Stewart Title pay compensation to her for the loss. Stewart Title declined to do so.

Pleadings and motion for partial summary judgment

- [13] On April 4, 2023, Ms. Nazir issued a statement of claim naming Stewart Title, Mr. Malik, and the lender as defendants. On August 10, 2023, Ms. Nazir issued a fresh as amended statement of claim naming the same defendants. In her claim, Ms. Nazir asserts that:
- a. Mr. Malik was the lawyer for the lender, acted with real and apparent authority, and fraudulently absconded with the money intended to discharge the two mortgages. He is liable in unjust enrichment. She is entitled to damages against Mr. Malik for the amount of the loss, plus aggravated and punitive damages;
 - b. Stewart Title is responsible under the policy of insurance to cover the loss she has suffered and to make her whole. Stewart Title acted negligently in denying “a claim against fraudulent activity,” failed to interpret the insurance contract reasonably, and breached the contract;
 - c. The lender is responsible for the actions of its agent, Mr. Malik, that the lender was negligent in its dealings with Mr. Malik, and breached contractual and fiduciary duties owed to Ms. Nazir required to discharge the mortgage on 3442 Trilogy Trail.
- [14] On May 3, 2023, Stewart Title delivered its statement of defence. It maintained that the policy did not provide coverage for Ms. Nazir’s loss and that none of the damages were caused by Stewart Title.
- [15] On October 23, 2023, the lender served and filed a statement of defence, counterclaim, and crossclaim. The lender pleaded that it was unaware that Ms. Nazir had advanced any funds to Mr. Shahid and that he “intentionally failed to provide” the discharge amount to the lender. The lender asserted that if Ms. Nazir suffered a loss, it was due to Mr. Shahid’s fraudulent acts or Stewart Title’s failure to honour its policy obligations. The lender advanced a counterclaim against Ms. Nazir for the \$400,000, plus interest owing on the loan. The lender asserted that Ms. Nazir had breached the loan agreement and was unjustly enriched. The lender also asserts that Ms. Nazir owed it a duty of care to take reasonable steps to ensure that Mr. Shahid had authority to act for it on the transaction.
- [16] In its crossclaim against Stewart Title and Mr. Shahid, the lender sought contribution and indemnity under the *Negligence Act*, common law, and equity for any amounts it is found to owe Ms. Nazir.
- [17] Stewart Title brings this motion for summary judgment dismissing Ms. Nazir’s claim and dismissing the lender’s crossclaim against it. Stewart Title submits that there are no

genuine issues requiring a trial of the claims against it because of one or both of the following reasons:

- a. as between Ms. Nazir and the lender, the lender should bear responsibility for Mr. Shahid's theft; therefore, Ms. Nazir is entitled to a discharge of the 478 Trilogy Mortgage from 478 Ontario, which would eliminate any title insurance coverage questions or claims involving Stewart Title
- b. the Policy does not provide coverage for Malik's theft of the Discharge Amount and failure to discharge the previously registered 478 Trilogy Mortgage.

Principles applicable to summary judgment process

[18] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes.¹ Used properly, it can achieve proportionate, timely, and cost-effective adjudication. On a motion for summary judgment, I am to:

- a. determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1);
- b. if there appears to be a genuine issue requiring a trial, determine if the need for a trial could be avoided by using the enhanced powers under:
 - i. rule 20.04(2.1), which allow me to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; and
 - ii. under rule 20.04(2.2), which allows me to order that oral evidence be presented by one or more parties.²

[19] In para. 66 of *Hryniak*, the Supreme Court of Canada emphasized that I must focus on whether the evidence before me permits a fair and just adjudication of the dispute, and cautioned that judges should not use the enhanced powers where their use would be against the interests of justice:

On a motion for summary judgment under rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new

¹ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7.

² *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24

powers under rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

- [20] On a motion for summary judgment, the court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. Each party is obliged to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial.³
- [21] Partial summary judgment raises particular concerns.⁴ Partial summary judgment is a rare procedure, reserved for an issue or issues that may be readily bifurcated from those in the main action, and that may be dealt with expeditiously and in a cost-effective manner.⁵ Partial summary judgment should only be granted in the clearest of cases and only if doing so does not give rise to any of the associated risks of delay, expense, inefficiency, and inconsistent findings.⁶

Decision

- [22] I dismiss Stewart Title's motion for summary judgment. Viewed fairly, Stewart Title's motion is a motion for partial summary judgment. If successful, Stewart Title would be completely out of the action. However, the proceeding among Ms. Nazir, Mr. Shahid, and the lender would continue. Stewart Title's motion, even if successful, will not dispose of the entire action.⁷
- [23] The issues raised by Stewart Title cannot be readily bifurcated from those in the main action. For example, Stewart Title submits that on the basis of agency principles, as between Ms. Nazir and the lender, the lender should bear responsibility for Mr. Shahid's theft, and therefore, Ms. Nazir is entitled to a discharge of the 478 Trilogy Mortgage from 478 Ontario, which would eliminate any title insurance coverage questions or claims involving Stewart Title.
- [24] However, deciding this issue in favour of Stewart Title, even if it is sufficient to dispose of the lender's crossclaim against Stewart Title, raises the prospect of inconsistent findings with the main action. The issue of whether Mr. Malik was acting as the lender's agent and, if so, was acting within the scope of his actual or apparent authority, remain questions of

³ *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d) 200, at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, 75 E.T.R. (4th) 167, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691, at para. 17; and *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at para. 62, rev'd on other grounds, 2015 ONCA 758, 342 O.A.C. 167.

⁴ *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONCA 610, 61 R.P.R. (6th) 12, at para. 34.

⁵ *Truscott v. Co-Operators General Insurance Company*, 2023 ONCA 267, 482 D.L.R. (4th) 113, at para. 54.

⁶ *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 38; *Malik v. Attia*, 2020 ONCA 787, 29 R.P.R. (6th) 215, at para. 62.

⁷ *Butera*, at para. 35.

fact and mixed fact and law to be determined in the main action between Ms. Nazir and the lender. This squarely raises the prospect of inconsistent findings between this motion and the trial of the main action. This factor strongly suggests that a motion for partial summary judgment is not appropriate in the circumstances.

- [25] In addition, I find that this motion will not provide a fair process that results in a just adjudication of this dispute. In my view, the meaning and scope of the title insurance policy should be interpreted against the complete factual record that will be determined at trial. It is unfair to interpret the scope of the policy in a vacuum and before there is a determination on a full evidentiary record that determines the nature, scope, timing, and involvement of the parties in the fraud allegedly committed by Mr. Malik.
- [26] Understandably, Stewart Title brought its motion at an early stage in the proceeding. However, I was advised that the parties have not yet exchanged affidavits of documents or conducted oral examinations for discovery. The parties may still develop a rich body of evidence that will illuminate not only what happened in the purported mortgage discharge transaction but, also whether the insurance policy should respond to that event.
- [27] Stewart Title submits, correctly, that the plaintiff could have availed itself of rule 39.03 and other tools to obtain evidence for use on this motion. In my view, that misses the point. It is not efficient or cost-effective to build a “trial within a trial” process to facilitate a motion for partial summary judgment. Rather, it is appropriate to ask if the motion for partial summary judgment advances the cause of speedy and efficient civil justice.
- [28] Stewart Title’s motion for summary judgment is not one of the rare and clearest of cases. Its motion for partial summary judgment gives rise to all of the associated risks of delay, expense, inefficiency, and inconsistent findings that caution against entertaining motions for partial summary judgment.⁸ For these reasons, the motion for summary judgment is dismissed and the action is to continue through the usual stages toward trial.

Next steps

- [29] I dismiss the motion for summary judgment and order that this proceeding proceed to trial expeditiously, pursuant to rule 20.05(1). I will remain seized of this proceeding to ensure that it moves forward efficiently.
- [30] I direct the parties to contact my judicial assistant within 10 days to arrange a case conference with me. At that case conference, I will give direction and impose terms addressing the matters set out in rule 20.05(2)(a) through (p). In advance of the case conference, the parties will be expected to collaborate and provide a comprehensive timetable and litigation plan to address those issues. I will determine any issues in dispute at the case conference.

⁸ *Butera*, at para. 38; *Malik*, at para 62.

- [31] I do not think it is appropriate at this early stage of the litigation to specify what material facts are not in dispute.⁹
- [32] If the parties are not able to resolve the issue of costs, a process for resolving that issue will be discussed at the case conference.

Robert Centa J.

Date: October 1, 2024

⁹ *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, r. 20.05(1).