

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
2069586 ONTARIO INC., 1138319)	
ONTARIO INC. and CARMELO)	
CALABRESE)	
)	
Plaintiffs)	
)	Kyle Armagon, for the Plaintiffs
– and –)	
)	
SOVEREIGN GENERAL INSURANCE)	
COMPANY and BANK OF MONTREAL)	
)	
)	
Defendants)	
)	Ramon Andal, for the Defendant Sovereign
)	General Insurance Company
)	
)	HEARD: May 30, 2025, virtually
)	

2025 ONSC 4468 (CanLII)

REASONS FOR DECISION

MCCARTHY J.

The Motion

- [1] The Plaintiffs, 2069586 Ontario Inc. (“206”), 1138319 Ontario Inc., and Carmelo Calabrese, move for summary judgment against the Defendant, Sovereign General Insurance Company (“Sovereign”).

- [2] The Plaintiffs obtained judgment in a separate action against Aztec Financial Corp. (“Aztec”), Barbara Romanow (“Romanow”), Fuad Husein (“Husein”), and Community Life Projects Inc. (“Community Life”). That separate action is referred to as the “Aztec action”.

- [3] The judgment in the Aztec action was for \$467,975.00 plus costs in the amount of \$9,742.18 (the “Aztec judgment”).
- [4] The Plaintiffs have received partial satisfaction on the Aztec judgment of \$114,196.26, leaving the balance owing to them of \$353,520.92 (the “remnant judgment”).
- [5] The Plaintiffs seek payment of the remnant judgment balance from Sovereign pursuant to the provisions of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), and the Mortgage Brokers Errors and Omissions Liability Policy (the “Policy”), which was issued by Sovereign and under which Aztec was a named insured.

Summary Judgment

- [6] The Plaintiffs chose to bring a summary judgment motion rather than a motion for a determination of an issue before trial or a stated case.
- [7] Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 47.
- [8] On a motion for summary judgment, the court must first determine if there is a genuine issue requiring a trial based only on the evidence before the court without first using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment motion process provides the court with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure: *Hryniak*, at para. 66.

Background

- [9] On or around July 8, 2016, 206 entered into an agreement with Aztec and Community Life for the purpose of procuring a mortgage from Community Life (the “agreement”). Aztec acted as the mortgage broker. Community Life was the lender.
- [10] Pursuant to the agreement, on July 8, 2016, the Plaintiffs provided Aztec with the sum of \$459,975.00, which was to remain in Aztec’s trust account until July 27, 2016, after which it was to be repaid to the Plaintiffs (the “trust funds”). Advancing the trust funds was a condition of Community Life funding an acquisition and development project in Whitby.

The Issues

- [11] The court needs to determine whether there is a genuine issue requiring a trial of Sovereign’s obligation to pay the remnant judgment to the Plaintiffs under the Policy.
- [12] This requires a determination of whether the Mortgage Brokers Errors and Omissions liability insurance section of the Policy (the “E & O section”) provides coverage directly to the Plaintiffs with respect to Aztec’s liability to pay the remnant judgment balance.

The MBLA Act

[13] The MBLA Act requires all brokers to carry errors and omissions insurance policies that are to include a direct right of action against the insurer by injured third parties.

The Policy

[14] Sovereign issued the Policy to Aztec as the named insured for the period of February 4, 2016 to February 4, 2017. The Policy has two distinct sections under which coverage for the Plaintiffs' claims must be determined.

[15] The first section of the Policy is the E & O section. The coverage grant is provided under the following Insuring Agreement:

PART I – INSURING AGREEMENTS

A. Errors and Omissions

The Insurer will pay on behalf of an Insured all sums that an Insured shall become legally obligated to pay as damages because of a wrongful act that:

1. arises solely out of, or in connection with, the rendering or failure to render professional services;
2. is first committed by an Insured after the retroactive date and before the date this policy terminates; and
3. results in a claim for damages against the Insured that is first made and first reported in writing to the Insurer during the policy period or any applicable extended reporting period.

[16] The Policy also contains the following Exclusions, which remove coverage for certain claims:

PART III – EXCLUSIONS

This policy, including any obligation to defend or pay claims expenses, does not apply to claims directly or indirectly based upon, attributable to, arising out of, or in connection with:

...

the gaining of any personal profit or advantage to which the Insured is not legally entitled or out of any disputes involving fees, commissions or other amounts paid or owing to an Insured for services provided by an Insured;

...

G. any:

- (1) intentional, dishonest, fraudulent or criminal act or omission;
- (2) intentional or knowing violation of any statute or regulation;
- (3) act committed with knowledge that it was a wrongful act;

however, this exclusion shall not apply to:

- (4) any Insured who was neither the author of nor an accomplice to the foregoing act(s); or
- (5) claims expenses or the Insurer's duty to defend any such claim unless and until there is an adverse admission by the Insured or evidence of such conduct;

...

I. damages expected or intended from an Insured's standpoint;

...

K. the commingling of funds, the loss of money or securities in an Insured's care or custody or control, or the actual or alleged inability to pay, collect or safeguard funds;

...

[17] Endorsement Number 2 of the Policy provides coverage for dishonest or fraudulent acts of an insured in favour of third persons who are not parties to the insurance contract.

Endorsement Number 2 – Insureds Licensed in the Province of Ontario

...

(6) Dishonest or Fraudulent Act

Dishonest or fraud coverage afforded under this endorsement shall apply to claims, in excess of the deductible, for which an Insured is legally liable to a third party for failure to advance or secure mortgage funds as a result of any dishonest or fraudulent act by one or more Insureds acting directly or in collusion with others in the conduct of the business of the Named Insured as a licensed mortgage broker in the Province of Ontario while this coverage is in force and for which a claim is made against the Insured during the term of this policy, subject to the following provisions:

A. The amount payable under this policy by virtue of this endorsement shall in no event exceed the amount of mortgage funds which would have been advanced or secured but for the Insured's dishonest or fraudulent act;

- B. In the event of the failure of the Named Insured to pay a claim upon demand of any third party, then the Insurer shall make payment, after investigating coverage, directly to such third party and shall be entitled to reimbursement from an Insured for the amount of the applicable deductible and any other amount incurred by the Insurer.
- C. The coverage afforded under this policy by virtue of this endorsement shall not:
 - (i) benefit any person committing, making or condoning any such dishonest or fraudulent act;
 - (ii) benefit any creditor of any Insured hereunder;
 - (iii) apply to a claim which is covered by the policy to which the endorsement is attached;
 - (iv) apply to a claim arising out of the insolvency of an Insured or any affiliate of the Insured.

...

FSCO Guidelines

[18] The “Mortgage Brokerages and Administrators Errors & Omissions Insurance Guidelines”, as established by the then Financial Services Commission of Ontario in March 2008 (“FSCO Guidelines”), state at paragraph 10 that:

Injured third parties will have a direct right of action against the insurer under the policy, without affecting the insurer’s right to adjudicate the claim in accordance with the policy’s term[s] and conditions and the right of the insurer’s right of action against the insured.

[19] The FSCO Guidelines address “Fraud” endorsements at paragraph 13:

- a. The policy certificate will include additional coverage for loss resulting from fraudulent acts and will operate to protect the public within the minimum limits required for the Errors and Omissions policy (i.e. up to \$500,000 per claim/\$1,000,000 in the aggregate, including the insured’s obligation for deductible amounts). The insurer will have the right to subrogate against the insured.
- b. Claims under the endorsement may be made in the same manner as claims made under the policy, including notice of claim to the insurer and a direct right of action for injured third parties.

The Plaintiffs’ Position

[20] The Plaintiffs’ position is that Sovereign is obligated to indemnify the Plaintiffs under the Policy to make good on the remnant judgment. The wrongful acts of the Aztec Defendants arose in connection with the rendering or failing to render professional services as contemplated by the E & O section of the Policy. The Plaintiffs conceded that there is no

direct right of action under the Policy afforded by s. 132(1) of the *Insurance Act*, R.S.O. 1990, c. I. 8, since this is not a question of “liability for injury or damage to the person or property of another”.

The Defendant’s Position

[21] Sovereign submits that that the E & O section of the Policy provides no coverage for the Plaintiffs’ claim for the remnant judgment because the Policy exclusions remove coverage for any intentional, dishonest, fraudulent, or criminal act or omission or any act committed with knowledge that it was a wrongful act. In addition, the “Fraud” endorsement under the Policy limits recovery to “mortgage funds” or mortgage monies. The trust funds in question do not qualify under that definition. Therefore, the general exclusion prevails and operates to make recovery under the Policy unavailable to the Plaintiffs.

Analysis

[22] This is an appropriate case to grant summary judgment. The court is able to determine the issues raised without recourse to the new fact-finding powers. The determination of the issues raised involves only a consideration of the coverage available to the Plaintiffs under the Policy. If they cannot recover the remnant judgment under the Policy, judgment must be granted dismissing their claim against Sovereign.

[23] Liability under the Aztec judgment was based, *inter alia*, on allegations in paragraphs 12 and 14 of the statement of claim in the Aztec action, which read as follows:

12. The plaintiffs state that the refusal of Aztec and/or Romanow to return the plaintiffs’ funds constitutes a breach of contract and a breach of trust and the plaintiffs are entitled to damages accordingly.

...

14. The plaintiffs state that the defendants herein deliberately deceived the plaintiffs so as to acquire the funds in question, which conduct was deliberate, contemptuous, and high-handed, so as to entitle the plaintiffs to punitive damages.

[24] Because the Defendants in the Aztec action failed to file a statement of defence and were noted in default, they are deemed to admit these allegations (see s. 19.02(1)(a) of the *Rules of Civil Procedure*). Therefore, it is an admitted fact that the Defendants in the Aztec action not only breached a trust arrangement but also that they deliberately deceived the Plaintiffs so as to acquire the trust funds in question, which conduct was deliberate, contemptuous, and high-handed. This “admissions” by the Defendants in the Aztec action formed part of the basis for the default judgment. They establish facts which do not require proof of intention or fraud in the present action, namely that the insured under the Policy committed an intentional, dishonest, and fraudulent act in misappropriating the trust funds, thereby becoming liable to the Plaintiffs in the Aztec action.

- [25] These facts, which are uncontroverted, would trigger the exclusion under Part III, Article G, which stipulates that the Policy does not apply to claims, directly or indirectly based upon, attributable to, arising out of, or in connection with any intentional, dishonest, fraudulent or criminal act or omission.
- [26] Therefore, the exclusions apply to remove any obligation by Sovereign to pay the Plaintiffs under the Policy unless there is an overriding exception to, or limitation on, the exclusions. The question is whether Endorsement Number 2 provides such an exception or limitation.
- [27] The endorsement operates to afford coverage to a third party for claims “for which an Insured is legally liable to a third party for failure to advance or secure *mortgage funds* as a result of any dishonest or fraudulent act by one or more Insureds.” [Emphasis added.]
- [28] In my view, this case (and the only means by which the Plaintiffs can recover the remnant judgment directly from Sovereign under the Policy) comes down to whether Aztec’s dishonest or fraudulent act involved a failure to advance or secure mortgage funds.
- [29] Unfortunately for the Plaintiffs, it did not.
- [30] The Plaintiffs’ claim is clearly not covered under the exception or limitation under Endorsement Number 2 because Romanow and Aztec’s liability to pay the default judgment arises from their failure to hold and repay the trust funds in accordance with the trust agreement, not from failing to advance or secure any mortgage funds.
- [31] Mortgage funds are akin to mortgage money. “Mortgage money” under s. 1 of the *Mortgages Act*, R.S.O. 1990, c. M.40 means “money or money’s worth secured by a mortgage”. The Plaintiffs acknowledged that the trust funds were not secured by a mortgage. Nor was there any provision in the agreement to secure the trust funds with a mortgage. The trust funds do not qualify as mortgage funds, and therefore, the failure of Aztec to refund the trust funds cannot be seen as a failure to advance or secure mortgage funds. The exception/limitation contained in Endorsement 2 under the general policy exclusion does not apply, and therefore, the Policy does not provide coverage to the Plaintiff.
- [32] The Plaintiffs’ allegations against Sovereign are based entirely on a third party right of direct recovery under the Policy. The exclusions operate to deprive the Plaintiffs any right of recovery under the Policy. The inevitable outcome is that there is no remedy under the Policy and no sustainable cause of action against Sovereign. Therefore, there is no genuine issue requiring a trial and the Plaintiffs' action against Sovereign must be dismissed.

The Issue of Non-Compliance with the FSCO Guidelines

- [33] The Plaintiffs hinted obliquely at the fact that the Policy may not comply with the FSCO Guidelines if indeed Sovereign’s position prevails. The “Fraud Endorsement” guideline does not limit the fraud coverage to just mortgage funds or proceeds. Indeed, it appears to be mandating that a general and inclusive fraud endorsement should form part of these E & O policies.

[34] This submission does not impact the court’s determination of the issues before it. For one, the statement of claim does not seek any declaration of non-compliance or other form of remedy under the Guidelines; two, there is no evidence that Sovereign gave any undertaking to comply with the Guidelines or acknowledged receipt of its requirements; three, the issue of compliance or non-compliance with the Guidelines and the ramifications of not doing so would necessarily involve other parties, including a representative of the provincial government; and finally, the issues put before the court were limited to the Policy, the only insuring agreement between Sovereign and its clients (the Defendants in the Aztec action). The court was not asked to adjudicate on a theoretical E & O policy which might have incorporated all the requirements in the FSCO Guidelines.

Partial Summary Judgment

[35] Neither party raised a concern that this was a “partial summary judgment motion”, one which the courts have tended to discourage and often disallow unless several criteria are met. No exhaustive analysis of those criteria is required here. Suffice to say that the issue of Sovereign’s obligation to pay the remnant judgment under the Policy is a discrete issue, which is entirely distinct from any issues between the Plaintiffs and BMO. The determination of the issue at this stage will remove Sovereign from the litigation. This will save the parties time and expense, greatly reducing the length and complexity of the trial. There is no risk that there will be contradictory findings of fact in the claim against BMO or the cross-claim by BMO against Sovereign. Neither of these involves or invokes direct or indirect rights of recovery under the Policy.

Disposition

[36] In light of my finding that there is no coverage available under the Policy for the Plaintiffs to claim the remnant judgment from Sovereign, their claim against that Defendant cannot succeed. The appropriate, just, and fitting order to make is a dismissal of the action as against Sovereign.

[37] There shall be an order to go accordingly.

[38] The parties agreed that the successful party on the motion should be entitled to all inclusive costs of \$12,500.

[39] Sovereign has been successful in having the action against it dismissed. The Plaintiffs shall forthwith pay the Defendant Sovereign the fixed sum of \$12,500 for costs of the motion and action combined.

McCarthy J.