

KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 28

Date: 2024 02 23
Docket: QBG-MJ-00143-2018
Judicial Centre: Moose Jaw

BETWEEN:

RADIUS CREDIT UNION LIMITED

PLAINTIFF

- and -

SASKATCHEWAN GOVERNMENT INSURANCE

DEFENDANT

Counsel:

Ryan Tulloch
Kelsey A. Barnes

for the plaintiff
for the defendant

JUDGMENT
FEBRUARY 23, 2024

KEENE J.

I. INTRODUCTION

[1] The plaintiff, Radius Credit Union Limited [RCU], sued the defendant, Saskatchewan Government Insurance [SGI], for all unpaid insurance proceeds under a contract of insurance between “Owners Condominium Corporation 101306623 o/a West Park Condo” [West Park Condo] and SGI regarding property damage sustained in units #6 and #7 within the West Park Condo development located in Moose Jaw, Saskatchewan. SGI submits the claim cannot succeed because SGI was under no legal

obligation to pay insurance proceeds to RCU based on the terms of the insurance policy and the operation of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [CPA].

[2] SGI applies under Part 7 of *The King’s Bench Rules* for a summary judgment dismissing RCU’s claim. RCU has also brought a summary judgment application for damages. Both applications were heard together and this is the court’s decision on the applications.

II. BACKGROUND

[3] A condominium development known as West Park Condo is located in Moose Jaw. On May 28, 2014, RCU registered a mortgage on units #6 and #7 owned by HWZ Developments Ltd. [HWZ]. The mortgage agreement between RCU and HWZ had an insurance coverage clause that is reproduced in part as follow:

8. INSURANCE

The Mortgagor will insure and during the continuance of this mortgage keep insured with an insurance company not disapproved by the Mortgagee, each and every building on the said lands to the extent of their full insurable value for extended coverage and against loss or damage by fire, and as the Mortgagee may require from time to time against such additional perils, risks, or events; ...

(Affidavit of Keary Kwasny, sworn March 15, 2023, Exhibit H)

[4] On or about August 15, 2016, SGI issued Commercial Pak Policy No. C 70130080-5 [Policy] to West Park Condo in relation to the condominium development. The Policy was in effect from August 15, 2016 until August 15, 2017. There was no loss payable designated in the Policy and in particular no loss payable stated on the “Policy Cover Page”. The Policy included Rider “B” 84 [Rider] which is the rider for “Residential Condominium Corporation Insurance”. The Rider, in part states:

21. Loss Payable:

Loss, if any, shall be payable in accordance with the provisions of the provincial legislation under which the “Condominium Corporation” is constituted. If the legislation has no such provisions, loss, if any, shall be payable as stated on the Policy Cover Page.

(Affidavit of Keary Kwasny, sworn March 15, 2023, Exhibit C)

[5] On September 28, 2016, units #6 and #7 sustained water damage. HWZ owned these units at that time. Jason Zhao, a principal with West Park Condo, reported the loss to SGI on December 5, 2016. SGI accepted the claim. SGI retained Midwest Claims Service [Midwest] to investigate and adjust the loss. On March 28, 2017, SGI received a report from Midwest. The report attached a progress invoice from Calcas Unique Contracting Ltd. [Calcas Unique] for \$80,000. The invoice requested that payment be made to ISTDC Canada Inc. [ISTDC]. On March 30, 2017 SGI issued a cheque payable to ISTDC for \$77,500, being the amount of the invoice less the \$2,500 insurance deductible. West Park Condo subsequently provided to SGI an interim proof of loss statement executed on April 4, 2017 claiming \$77,500 under the Policy that authorized SGI to pay the proceeds to ISTDC.

[6] On or about January 8, 2018, SGI was advised by Midwest that Mr. Zhao on behalf of West Park Condo, submitted another Calcas Unique progress invoice. The second progress invoice requested a further payment of \$75,000 to be made to ISTDC. On January 15, 2018, SGI issued a cheque payable to ISTDC for \$75,000.

[7] As it turned out, SGI did not receive any more invoices regarding this insurance claim and was unable to contact the representative of West Park Condo (Mr. Zhao) after the cheque was issued on January 15, 2018. The parties seem to be in agreement that Mr. Zhao is unaccounted for and may have absconded.

[8] Accordingly, SGI paid out a total of \$152,500 on the insurance claim.

[9] RCU ended up foreclosing on the mortgage granted by HWZ. RCU obtained a Final Order of Foreclosure on the mortgage and title to units #6 and #7 were subsequently registered to RCU on August 7, 2018. It appears representatives of RCU were not aware of the condition of units #6 and #7 until RCU completed the foreclosure. After acquiring title to the two units, RCU spent \$337,371.42 repairing the units.

III. ISSUES

- i) Should this matter be determined by summary judgment?
- ii) Did SGI have an obligation to pay insurance proceeds to RCU?
- iii) If the court finds SGI had an obligation to pay insurance proceeds to RCU, what damages award is appropriate?

IV. ANALYSIS OF ISSUES

i) Should this matter be determined by summary judgment?

[10] Rule 7-5 of *The King's Bench Rules* states in part:

7-5(1) The Court may grant summary judgment if:

- (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

[11] In this matter the parties have agreed that all of the issues pertaining to the claim should be determined by summary judgment. I am satisfied that it is

appropriate to do so because the summary judgment process will achieve a just adjudication of the dispute before the court (*Tchozewski v Lamontagne*, 2014 SKQB 71 at para 31, 440 Sask R 34).

[12] I believe the facts are not much in contest and largely agreed upon by the parties. The issues have been boiled down and all that needs to be done is to apply the law to the facts and decide the matter. Accordingly I will without further ado get to the work at hand.

ii) Did SGI have an obligation to pay insurance proceeds to RCU?

(a) Contractual Obligation

[13] In my opinion this is easily answered. There is no evidence of a contractual relationship between RCU and SGI that would require SGI to pay any insurance proceeds to RCU. The uncontradicted evidence is that the Policy was issued by SGI in favour of West Park Condo. SGI did not agree to insure RCU or the mortgagor/owner, HWZ. The Policy did not name any loss payable on the Policy Cover Page. Therefore, since there was no contractual relationship between SGI and RCU; there was no obligation for SGI to pay insurance proceeds to RCU. Accordingly, the cause of action based on contract has not been proven by RCU and must be dismissed. I do so.

(b) Statutory Obligation

[14] To determine this issue, the court must firstly look to the Rider which for convenience I will repeat here:

21. Loss Payable:

Loss, if any, shall be payable in accordance with the provisions of the provincial legislation under which the “Condominium Corporation” is constituted. If the legislation has no such provisions, loss, if any, shall be payable as stated on the Policy Cover Page.

(Affidavit of Keary Kwasny, sworn March 15, 2023, Exhibit C)

[15] This takes the court to the *CPA* and the applicable section is reproduced as follows:

66 Subject to sections 83, 84 and 102, the corporation shall apply any insurance moneys received by it with respect to damage to buildings, fixtures on land, or landscaping to rebuilding and reinstating the buildings, fixtures on land, or landscaping so far as is possible.

[16] A reading of s. 66 of the *CPA* informs the court that SGI had no obligation under the statute to pay insurance proceeds to the mortgagee on title (RCU). The *CPA* directs that West Park Condo (the insured) apply any insurance proceeds to repair damage to the building so far as is possible. The *CPA* places the obligation on the condominium corporation to properly apply any insurance proceeds and not on the insurer (*i.e.* SGI). Accordingly, SGI had no legal obligation under statute to pay RCU any insurance proceeds.

[17] To round this out, even if there was some sort of statutory breach (which for clarity I specifically find there was not), the law does not recognize a statutory breach as a tort. Instead a statutory breach can only be considered relevant in determining whether the actions of a party could be negligent (*The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205). Accordingly absent any allegation in RCU’s claim regarding negligence; SGI cannot be liable for any alleged failure for noncompliance with the *CPA* in paying out the insurance proceeds.

(c) **Other Obligations**

[18] The above findings, in my opinion, are rather straight forward. However, RCU has presented further argument which I will break down under the following subheadings.

The Mortgage Clause

[19] RCU relies on the “Standard Mortgage Clause” [SMC] found in the Policy. I will reproduce in part the “clause”:

Property Mortgage Clause:

The following Mortgage Clause applies only where the INTEREST OF THE MORTGAGEE is on Building(s), and ONLY for the Mortgagee shown as Loss Payable on the Policy Cover Page at the Location(s) insured under this policy.

(Affidavit Ted Struthers sworn May 9 2023, Exhibit E)

[20] RCU contends that the inclusion of the SMC is “a fundamental element in property insurance contracts” (RCU brief, para. 49) and relies on *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 (WL) at paras 24, 25, 35, 37-38 and 50 [*National Bank*] “for the principle that the validity of RCU’s contract with the [*sic*] SGI remains intact, irrespective of the HMZ [*sic*] or Zhao’s conduct, as a separate contract exists between RCU and SGI” (RCU brief, para. 53).

[21] Counsel for SGI argues that while *National Bank* does set out a principle that principle is not applicable because the facts are distinguishable with the case at bar. I agree. Since this is important to RCU’s argument, I will repeat from the Policy:

Property Mortgage Clause:

The following Mortgage Clause applies only where the INTEREST OF THE MORTGAGEE is on Building(s), **and ONLY** for the Mortgagee shown as Loss Payable on the Policy Cover Page at the Location(s) insured under this policy.

[Emphasis added]

(Affidavit Ted Struthers sworn May 9 2023, Exhibit E)

[22] The *National Bank* case is distinguishable because the subject clause in that case was reproduced at para. 73 as follows:

[73] ...

IT IS HEREBY PROVIDED AND AGREED THAT:

1. This insurance and every documented renewal thereof -- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN -- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk.

[23] There is no reference to a named loss payable in the mortgage clause at issue in the *National Bank* case. I find the clause set out in the *National Bank* case and the clause set out in the case at bar (*i.e.* set out in the Policy) are significantly and impactfully different. Additionally, upon a reading of the *National Bank* case, the court notes that the issue appeared to revolve around whether the insurer was able to refuse to indemnify the mortgagees and treat the Policy as null *ab initio* because of misrepresentations made by the mortgagor. In the case at bar, there was no contract of insurance between SGI and the mortgagor, HWZ, or the mortgagee RCU. Further, SGI did not deny coverage under the Policy based on any misrepresentations or admissions of the insured. The court therefore finds that the principles articulated in the *National*

Bank case are not applicable because of the clear difference in the respective mortgage clauses: the *National Bank* clause did not specifically require the mortgagee to be shown as loss payable on the Policy. I see no ambiguity in the wording of the property mortgage clause in the Policy regarding the case at bar.

[24] Therefore I do not find that the *National Bank* case assists the plaintiff.

Does RCU Have an Equitable Lien Against the Insurance Proceeds?

[25] RCU argues that the terms of the mortgage granted to HWZ establish either an equitable assignment of the Policy or an equitable lien on the insurance proceeds. This was not specifically plead by the plaintiff. However, even if these claims are properly before the court for determination; I find these claims do not apply.

[26] RCU attempts to develop this argument at length (RCU brief, paras. 57-75) citing a number of authorities. However, in my view, the cases relied on by RCU are distinguishable on one important point. The mortgagors or covenantors in those cases were also the insured under the insurance policies. In the case at bar, the mortgagor, HWZ, was not the insured party in the Policy. I agreed with Justice Weathersson’s reasoning in *Doblay Investments Ltd. v Amrit Investments Ltd.* (1977), 15 OR (2d) 584 (Ont H Ct) [*Doblay*] where the court held an equitable assignment requires (1) a covenant to insure in a mortgage; and (2) a direction in a policy to make loss payable to the mortgagee. The equitable assignment is limited to the insured party (*Dobley* at paras 5 and 11).

[27] As stated, in the case at bar, RCU cannot establish a equitable assignment (or lien) of the Policy because the plaintiff was not designated as a loss payee under the Policy. In fact, no one was named as a loss payee. HWZ was the only party that agreed

to the mortgage covenant. Accordingly RCU cannot prove the facts to support an equitable assignment of the Policy or an equitable lien on the insurance proceeds.

Can RCU Make a Claim in Negligence?

[28] RCU has not pled any claim of negligence against SGI. Therefore this is not before the court and I need not consider that issue.

iii) If the court finds SGI had an obligation to pay insurance proceeds to RCU, what damages award is appropriate?

[29] As a result of my above findings, it is not necessary to determine this issue.

V. CONCLUSION

[30] I am satisfied that there are no genuine issues requiring a trial and I can fairly determine the issues on the evidence before me. For the above reasons I grant SGI's application for a summary judgment dismissing RCU's claim. Accordingly RCU's claim is dismissed.

[31] The court orders costs payable by RCU to SGI based on column 1 of the tariff.

J.
T.J. KEENE