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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

WINNIPEG REGIONAL HEALTH AUTHORITY INC. and ST. BONIFACE GENERAL HOSPITAL,	)	Kelly L. Dixon Counsel for the plaintiffs
plaintiffs,	)	
-and-	)	
BOCKSTAEL CONSTRUCTION (1979) LTD.,	)	Michael G. Finlayson Counsel for the defendant
defendant.	)	
	)	JUDGMENT DELIVERED: April 13, 2012

MASTER BERTHAUDIN

[1] In this action, the plaintiffs claim for damages arising out of water infiltration into their premises which occurred at a time when the defendant was performing work on the premises. The defendant has moved for summary judgment dismissing the action and this is my decision on the motion.

FACTS

[2] The plaintiffs own and operate the St. Boniface General Hospital in Winnipeg, Manitoba. On January 26, 2005, they contracted in writing with the defendant for the defendant to construct an addition to the hospital, which work involved cutting a large opening into the roof deck of the existing hospital facility, constructing and attaching the addition to the hospital via the opening.

[3] On July 30, 2005, a significant rain storm occurred and water entered the premises through the hole which had been cut in the roof, damaging both the existing structure and the work which had already been performed by the defendant on the addition.

[4] The written agreement between the parties is a standard form stipulated price contract which is commonly used in the construction industry. Although I note that the contract indicates that only the St. Boniface General Hospital is owner of the premises, it is asserted in the statement of claim that both St. Boniface General Hospital and Winnipeg Regional Health Authority Inc. are owners. This is admitted in the statement of defence and it does not appear that anything turns on it. For that reason, for the purposes of this decision I will refer to the plaintiffs together as the contracting owner.

[5] The following general conditions to the stipulated price contract are of some relevance to this decision:

GC 9.1 PROTECTION OF WORK AND PROPERTY

9.1.1. The *Contractor* shall protect the *Work* and the *Owner's* property and property adjacent to the *Place of the Work* from damage which may arise as the result of the *Contract*, and shall be responsible for such damage, except damage which occurs as the result of:

.1 errors in the *Contract Documents*;
.2 acts or omissions by the *Owner*, the *Consultant*, other contractors, their agents and employees.

9.1.2. Should the *Contractor* in the performance of the *Contract* damage the *Work*, the *Owner's* property, or property adjacent to the *Place of the Work*, the *Contractor* shall be responsible for the making good such damage at the *Contractor's* expense.

. . .

GC 11.1 INSURANCE

11.1.1 Without restricting the generality of GC 12.1 – INDEMNIFICATION, the *Contractor* shall provide, maintain, and pay for the insurance coverages specified in GC 11.1 – INSURANCE. Unless otherwise stipulated, the duration of each insurance policy shall be from the date of commencement of the *Work* until the date of the final certificate for payment. Prior to commencement of the *Work* and upon the placement, renewal, amendment, or extension of all or any part of the insurance, the *Contractor* shall promptly provide the *Owner* with confirmation of coverage and, if required, a certified true copy of the policies certified by an authorized representative of the insurer together with copies of any amending endorsements.

. . .

GC 12.2 WAIVER OF CLAIMS

12.2.1. Waiver of Claims by *Owner*

As of the date of the final certificate for payment, the *Owner* expressly waives and releases the *Contractor* from all claims against the *Contractor* including without limitation those that might arise from the negligence or breach of contract by the *Contractor* except one or more of the following:

.1 those made in writing prior to the date of the final certificate for payment and still unsettled;

. . .

12.2.3 GC 12.2 – WAIVER OF CLAIMS shall govern over the provisions of paragraph 1.3.1. of GC 1.3 – RIGHTS AND REMEDIES or FC 9.2 – DAMAGES AND MUTUAL RESPONSIBILITY

[6] In accordance with GC 11.1.1, the defendant obtained general liability insurance in the form of a builders' risk policy with Royal & SunAlliance Insurance Company, which policy not only covered the defendant as contractor, but also St. Boniface General Hospital as owner and Smith Carter Architects and Engineers Incorporated as consultant.

[7] After the water infiltration occurred on July 30, 2005, the defendant reported the loss to its insurance broker. The broker reported the loss to Royal & SunAlliance as the insurer under the builders' risk policy. Coverage for the loss was denied by the insurer. Curiously, neither party to this litigation has knowledge of the reason for coverage having been declined by the insurer. It appears that no challenge to this decision was taken.

[8] The plaintiffs then submitted a claim to their property insurer, Healthcare Insurance Reciprocal of Canada ("HIROC"). HIROC paid the plaintiffs on the loss and now pursues this action in the names of the plaintiffs as a subrogated action. This means that HIROC "steps into the shoes" of the plaintiffs. HIROC's status in the litigation can be no better or worse than if the plaintiffs were pursuing the action directly themselves. Finally, it is admitted that the action is being defended for the defendant by its liability insurer, Axa Pacific Insurance Company.

PRINCIPLES RELATING TO SUMMARY JUDGMENT

[9] It is well known, and accepted by the parties, that there is a two stage test for summary judgment. With the motion made by the defendant in this case, the defendant must first prove, on a *prima facie* basis, that the claim against it must fail. If the defendant meets the initial onus, the plaintiffs must establish at the second stage that there is a genuine issue requiring trial for determination. (See ***Homestead Properties (Canada) Ltd. v. Robert***, 2007 MBCA 61, [2007] M.J. No. 138).

[10] The purpose of summary judgment motions was discussed by MacInnes J. (as he then was) in ***Manitoba Hydro Electric Board v. John Inglis Co. Limited et al***, 2000 MBQB 218, [2000] M.J. No. 578, at para 19:

> **19** On the other hand, it is clear that summary judgment motions are not to replace trials. The rule is not intended to terminate actions and deprive litigants of their right to trial, whether plaintiff or defendant, where there is a claim or defence which has some realistic prospect of success. In Podkriznik v. Schwede (1990), 64 Man. R. (2d) 199 (Man. C.A.), a summary judgment motion brought against the defendant, Twaddle J.A. for the court wrote (at p. 201):
>
> > Rule 20 should not be utilized as a steamroller to obtain a convenient conclusion to a case where it is likely that the defence will fail. If the defence has any prospect of success, the action should proceed to trial. But the theoretical possibility of a defence being successful is not by itself a reason to deny summary judgment to a plaintiff. The theory must be both an answer to the claim in law and supported by sufficient evidence to enable the judge to say that there is a real chance of the defence succeeding.
>
> And in Fidkalo, at p. 270, Twaddle J.A. wrote:
>
> > We must not allow Rule 20 to be used as a means whereby a defendant can avoid a trial on viva voce evidence because the plaintiff's case is weak.

[11] It is equally clear that the court must take a hard look at the merits of the action to determine whether there is a realistic chance that the action will succeed. If the chances are more theoretical than realistic, summary judgment dismissing the action is properly granted.

POSITIONS OF THE PARTIES

Defendant's position

[12] The motion for summary judgment dismissing the action arises out of the defence pleaded at para 4(b.1) of the amended statement of defence, which is set out below:

> 4(b.1) the plaintiff's claim is a subrogated one and is barred because at the material time there was in force in connection with the project a builders (sic) risk policy; this policy (Royal Insurance Policy Number COM020072867) covered the loss in question; the parties to this action each had an insurable interest in the new and in the connected existing structure; subrogation by the plaintiffs is thereby and therefore precluded.

[13] The defendant's position on the motion is based in large part on its interpretation of a decision of the Alberta Court of Queen's Bench in ***Medicine Hat College v. Starks Plumbing & Heating Ltd.***, 2007 ABQB 691, [2007] A.J. No. 1337. That being the case, I will review that decision in some detail. The factual circumstances arising in ***Medicine Hat College*** bear some similarity to this case. As a result of a natural gas explosion occurring during the course of renovations to its property, the plaintiff brought an action against the consultants and contractors performing the renovation. Damage had been caused to the existing structure as well as the addition being constructed. As in this case, the

action was in reality a subrogated action brought by the plaintiff's property insurer. A trial of an issue was directed, with the issue defined by counsel to be as follows:

> Was the loss suffered by the Plaintiff covered by the Comprehensive Business Policy No. CBP 0811141 such that there is a right of subrogation by the Plaintiff as against the Defendants; or, alternatively, should the loss have been covered by the Builder's Risk Policy No. CBP 086225 such that there would be no right of subrogation by the Plaintiff as against the Defendants.

[14] I note that although the contractor in ***Medicine Hat College*** was required by the stipulated price contract to obtain a builders' risk policy, the policy was in fact obtained by the owner rather than the contractor.

[15] In considering the directed question, McDonald J. noted that the issue being considered was novel and had not been specifically dealt with before by courts in Canada. I was advised at the hearing of this matter that ***Medicine Hat College*** has not been considered in any other judicial decisions since it was decided in 2007.

[16] In considering the extent of coverage that was provided by the builders' risk policy, McDonald J. relied upon the following quote from ***Commonwealth Construction Co. v. Imperial Oil Ltd.***, [1978] 1 S.C.R. 317, at pp. 323–4:

> In all these cases, there existed an underlying contract whereby the owner of the goods had given possession thereof to the party claiming full insurable interest in them based on a special relationship therewith. Although in the case at bar Commonwealth was not given the possession of the works as a whole, does the concept apply here? I believe so. On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in court. By recognizing in all tradesmen an insurable interest based on

> that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, *e.g.*, the completion of the construction, would be spared the necessity of fighting between themselves should an accident occur involving the possible responsibility of one of them.

[17] Ultimately, McDonald J. held that the loss in question was covered by the builders' risk policy, saying the following at para 62:

> **62** I hold that all parties involved in the construction of this project had an insurable interest not only in the addition being undertaken to the existing structure but the existing structure itself. To hold otherwise would be to defeat the reasonable expectations of the parties and would require clear language of exclusion, which is absent in this case.

[18] Based on the ***Medicine Hat College*** decision and the authorities referred to therein, the defendant takes the position that once the contractor takes out the builders' risk policy of insurance as required in the stipulated price contract, all parties named in the builders' risk policy then have an insurable interest in the addition being undertaken and the existing structure, such that there is then a waiver of subrogation for any damages caused by those parties. This means that the current action, being pursued by HIROC as a subrogated action cannot proceed because of this waiver and the defendant is therefore entitled to summary judgment dismissing the matter.

[19] The defendant's motion brief referred to an additional defence, which was that the stipulated price contract contained a waiver of claims in GC 12.2 which had the effect of waiving or releasing the type of claim made here. During the hearing before me, however, defendant's counsel took the position that the

waiver of subrogation effectively negates the defendant's contractual responsibility, such that consideration of GC 12.2 was a moot issue.

Plaintiffs' position

[20] The plaintiffs say that the position relied upon by the defendant for the purposes of the summary judgment motion is ill-founded, and they not only have a realistic chance of success on the action but a good chance of success. The plaintiffs say that the defendant has not met the initial onus of establishing on a *prima facie* basis that the plaintiffs' action must fail.

[21] The plaintiffs accept, first of all, that there are situations in which there may be a waiver of subrogation. For example, for the purposes of this motion, the plaintiffs accept that if Royal & SunAlliance had responded to the loss under the builders' risk policy and paid the claim to the plaintiffs, there would have been a waiver of subrogation barring a subrogated action against the defendant because the defendant was also named as an insured in the builders' risk policy. In essence, Royal & SunAlliance could not pay the claim to one insured under the policy and recover it from another insured under the same policy. With Royal & SunAlliance having denied the claim, however, the plaintiffs say it is a moot point and that such a waiver of subrogation is not applicable here.

[22] With respect to ***Medicine Hat College***, the plaintiffs say that the only issue decided was whether the builders' risk policy in that case ought to respond to the loss. In the present case, the issue of whether the builders' risk policy

should have responded is not before me. In other words, coverage under the builders' risk policy is not in issue in the litigation as no challenge was taken to Royal & SunAlliance having refused payment under the policy. The plaintiffs say that acceptance of the defendant's position would require me to conclude that Royal & SunAlliance should properly have covered this loss, but that I cannot do so without the involvement of that insurer and knowledge of the reasons for its denial of coverage.

[23] It is further argued by the plaintiffs that the obtaining of builders' risk insurance by the defendant does not override the clear contractual obligations set out in the stipulated price contract as between the plaintiffs and the defendant. The plaintiffs say that under GC 9.1.2, reproduced earlier in this decision, the contactor is responsible for damage to its work, the owner's property or property adjacent to the place of work, and will be responsible for making good such damage at its expense.

[24] With respect to the GC 12.2.1 (waiver of claims), it was noted by the plaintiffs that the claim at issue here is one made in writing prior to the date of the final certificate for payment and still unsettled, which is one of the exceptions to the waiver of claims general condition.

[25] Finally, it was noted that GC 12.2.3 indicates that the waivers of claims general condition as a whole governs over GC 9.2, but not GC 9.1. Notably, GC 9.1 is the general condition which requires the contractor to be responsible for making good any damage to the work, the owner's property, or the property

adjacent to the place of work. Thus, the plaintiffs say that claims arising under GC 9.1 are not restricted by the waiver of claims under GC 12.2.

[26] The plaintiffs argue that these are express agreements made between the plaintiffs and defendant and cannot be displaced by the defendant having obtained builders' risk insurance as required under the same stipulated price contract. If that were the intention, the plaintiffs suggest that it would have to be specifically set out in the contract, and not arise by implication.

ANALYSIS AND DECISION

[27] There is no doubt that there is an equitable proposition of insurance law that an insurance company, after having paid out a loss, may not pursue a subrogated action against an insured under its policy. But the precondition to such a discussion is that the insurance company must have responded to, and paid out, the loss. In this case, the builders' risk insurer, Royal & SunAlliance, refused payment of the claim, for reasons unknown. As argued by the plaintiffs, if Royal & SunAlliance had paid out the claim to the plaintiffs, there is no question that it could not then pursue subrogation against the defendant, given its status as a named insured under the builders' risk policy.

[28] The defendant seeks to take this general proposition one step further by arguing that the mere taking out of the builders' risk policy causes there to be a waiver of subrogation for any insurer responding to a loss on the project. In this case, it would apply to HIROC, the property insurer, which paid out the claim

when Royal & SunAlliance refused payment, and stepped into the plaintiff's shoes to pursue this claim.

[29] I cannot accept the defendant's position on this point. I do not find that such a conclusion arises out of ***Medicine Hat College***. All that was decided in that case was that the builders' risk policy should respond to the loss. With that conclusion, there is no doubt that the builders' risk insurer could not then subrogate against one of its own insureds.

[30] There are specific provisions contained within the stipulated price contract as to the responsibility of the contractor for damage it causes while performing work on the project. In pursuing the subrogated action HIROC is bound by, and takes the benefit of, the stipulated price contract, as the case may be. The position of HIROC can be no better or worse than that of the plaintiffs themselves. The stipulated price contract is a lengthy and detailed document. Surely if it was intended that the mere taking out of a builders' risk policy required by the stipulated price contract absolved the contractor of responsibility for any damage it caused during the performance of the work, as such responsibility is set out in that same contract, such would be clearly set out in writing in the contract. It is not.

[31] Returning to the test for summary judgment, the initial onus is upon the defendant to establish, on a *prima facie* basis, that the plaintiffs' claim should be dismissed. For the reasons set out above, I conclude that the defendant has not met that initial onus.

[32] The defendant's motion for summary judgment is therefore dismissed with costs to the plaintiffs.

S. D. Berthaudin
Master