CITATION: Chubb Insurance Company of Canada v. Novex Insurance Company, 2012 ONSC 4670
COURT FILE NO.: CV-10-401709 / CV-12-452644
DATE: 20120912

2012 ONSC 4670 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA and DAVID BRUCE FINGOLD

Applicants

– **and** –

NOVEX INSURANCE COMPANY, formerly ING NOVEX INSURANCE COMPANY OF CANADA

Respondent

AND BETWEEN:

DAVID BRUCE FINGOLD

Applicant

– **and** –

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1100 and NOVEX INSURANCE COMPANY, formerly ING Novex Insurance Company of Canada

Respondent

Richard J. Worsfold, for the Applicant David Bruce Fingold

David E. Liblong, for the Applicant Chubb Insurance Company of Canada

Peter K. Foulds, for the Respondent Novex

Robert J. Howe and *R. Richler*, for the Metropolitan Toronto Condominium No. 1100

HEARD: July 19, 2012

Application under Rule 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.R. 190, Reg. 194 and *Courts of Justice Act*, R.S.O. 1990, c.C43, s.97

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T. MCEWEN J.

REASONS FOR DECISION

INTRODUCTION

[1] On October 30, 2009 a fire occurred at the property known municipally as 3 Chedington Place ("the Property"), causing serious damage. The Property is owned by the Applicant David Bruce Fingold ("Fingold"). It was built in 1928 and by all accounts is a beautiful and significant three-storey house which is approximately 12,000 square feet in size. It has been designated by the City of Toronto as a heritage property. Fingold grew up at the Property. For the last several years it has not been used by Fingold as a residence. He has used a portion of the Property as an office. In 1995, the Property became part of the condominium property of the Metropolitan Toronto Condominium Corporation No. 1100 ("MTCC 1100"). The Condominium Declaration ("the Declaration") entered into between Fingold and MTCC 1100 provides that Fingold can develop the property into three condominium units.

[2] Although it is part of the condominium complex, the Property is the only single freestanding, non-attached structure. The remainder of the condominium development involves more traditional condominium units located in two towers. The entire condominium complex is of the highest quality and the Property is a central, focal point of the development.

[3] A dispute has arisen between Fingold and the MTCC 1100 with respect to who should be entitled to direct and control the repair, rebuilding and replacement of the Property. At the time of the fire, Fingold was insured by Chubb Insurance Company of Canada ("Chubb") and MTCC 1100 was insured by the Novex Insurance Company ("Novex").

[4] Subsequent to the fire a dispute arose between Novex and Chubb as to which was responsible to fund the repair work. Ultimately, the issue was resolved on a 70/30 split as between Novex (70) and Chubb (30). The settlement was formally entered into in May 2011. Notwithstanding the dispute, certain repair and remediation work was carried out in the interim.

[5] Various experts were retained to consider repairs to the Property. Initially, it was felt that the roof installation and exterior repairs could take place in the fall of 2011. Fingold approved of the design and construction schedule proposed by MTCC 1100 who proposed to use a company by the name of ServiceMaster of East Toronto ("ServiceMaster"). Unfortunately, with winter approaching the work could not be completed.

[6] The installation of the roof and exterior repairs were then scheduled to start on April 2, 2012. In the interim, Fingold initiated arbitration against Chubb with respect to his insurance issues with Chubb. As noted, Fingold had the ability to convert the Property into three condominium units. In or about February of 2012, Fingold advised MTCC 1100 that a builder of homes and condominiums in Toronto, Sam Mizrahi ("Mizrahi"), might become involved with

Fingold in the development of the Property into three condominium units which would be listed and sold.

[7] Subsequently, in March 2012, Fingold advised MTCC 1100 that he was no longer authorizing ServiceMaster to proceed with the proposed work and that he would not approve of any more work on the building. As a result, the roofing installation and exterior repairs were cancelled. In the affidavit evidence filed by Fingold, he deposes that if MTCC 1100 begins repairs and restores the Property without direction from him he will suffer irreparable harm since he cannot control the repair and restoration of the Property which he owns. Specifically, he alludes to the fact that he has developed a plan with Mizrahi to see the interior of the Property subdivided, as permitted by the Declaration, and ultimately sold. To date, however, although a rendering has been provided by Mizrahi, no specific drawings have been prepared; nor is there any written agreement between Fingold and Mizrahi; nor has there been any marketing plan, agreement or profit sharing between Fingold and Mizrahi; nor has there been approval from the Historical Board; nor has virtually anything else occurred with respect to Fingold's plans. As a result, MTCC 1100 wants to proceed with the repair work to the building since almost three years has passed since the fire and the building remains an eyesore in its current damaged condition with scaffolding erected entirely around it to maintain its structural integrity.

[8] At the hearing of the application, Fingold sought the following relief:

> (a) an interlocutory and final injunction prohibiting the respondents or either of them from taking any steps to repair, replace or rebuild any portion of the applicant's home being Unit 5, Level 1 of MTCC 1100 and referred to as the "House Unit" in the Declaration of MTCC 1100 (hereinafter referred to as the "home") other than steps necessary to comply with outstanding City of Toronto remediation Orders, without the consent of the applicant;
>
> (b) a Declaration that the applicant is solely entitled to direct and control the repair, rebuilding and replacement of the home; …

[9] MTCC 1100 sought a declaration that the policy of insurance issued by Novex provides coverage for the physical loss and damage resulting from the fire to the Property, and that the adjustment of the loss is in the exclusive right of MTCC 1100, and that only it should be authorized to deal with Novex in the restoration of the Property.

[10] MTCC 1100 also sought an order that Fingold ought to be responsible for any cost over-runs incurred by Novex caused by delay in effecting the repairs, should Novex seek reimbursement.

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[11] Novex generally supports the relief sought by MTCC 1100 with respect to the repairs. Novex also seeks to have the initial application in action number CV-10-401709 dismissed with the exception of the issue of costs.

[12] Chubb takes no position with respect to the relief sought by any of parties in this application.

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THE DECLARATION

[13] Notwithstanding Fingold's request for an interlocutory injunction, both he and MTCC 1100 provided submissions with respect to the interpretation of the relevant portions of the Declaration.

[14] The *Condominium Act*, 1998 S.O. 1998, c. 19 ("the *Act*"), has various provisions that are relevant to this matter. The *Act* also provides, however, that the condominium's Declaration can alter the provisions of the *Act*.

[15] The Declaration, in this case, does in fact deal with the issue of maintenance and repairs not only to the Property, but also to the other condominium units. With respect to the Property, Article VII provides as follows:

> (a) The owner of the House Unit shall maintain and repair the House Unit, including the exterior elements and the roof at his own cost.

[16] With respect to the other condominium properties, Article VII provides as follows:

> (b) … each owner shall maintain his unit, and, subject to the provisions of the Declaration and Section 42, of the Act, each owner shall repair his unit after damage, all at his own expense.

[17] Article VII also deals with the issue of delay concerning the effecting of repairs and provides as follows:

> The corporation shall make any repairs that an owner is obligated to make and that he does not make within a reasonable time; and in such an event, an owner shall be deemed to have consented to having repairs done to his unit by the corporation; and an owner shall reimburse the corporation in full for the cost of such repairs, including any legal or collection costs incurred by the corporation in order to collect costs of such repairs, and all such sums of money shall bear interest at the rate of 24% per annum.

[18] Fingold submits that based on the above wordings in subparagraph (a) he has the right to repair the Property. MTCC 1100 submits that when one compares the wording of subparagraph

(a) and (b), the burden to repair rests on the individual condominium holders with the exception of Fingold. This submission is based on the fact that subparagraph (b) states that every other owner "shall repair his unit **after damage** (emphasis added) at his own expense", but with respect to Fingold, subparagraph (a) states that Fingold, "shall maintain and repair the house unit at his own cost", without any mention of repair to the house unit after damage. Therefore, based on the difference in the wordings of subparagraph (a) and (b) the duty to repair damage to the Property remains with MTCC 1100.

[19] Additionally, MTCC 1100 submits that Fingold has failed to make the repairs within a reasonable time. Accordingly, based on the above, Fingold is deemed to have consented to having the repairs done by MTCC 1100 as per the provisions of the Declaration.

[20] In support of their respective positions, Fingold and MTCC 1100 also rely on clauses contained in the policies of insurance that they have with Chubb and Novex, respectively. In my view, the wording of the contracts of insurance that each of them had with the respective insurers is not determinative of the issues that I must decide in this application. Fingold and MTCC 1100 entered into contracts of insurance with their own insurers. It is important to note that neither Fingold nor MTCC 1100 is the signatory with respect to the other's policies. I cannot, therefore, see how the insuring agreements could bind a non-party i.e., in the case of Novex: Fingold and in the case of Chubb: MTCC 1100.

ANALYSIS

[21] The Ontario Court of Appeal in *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87*, 42 O.R. (2d) 337, dealt with a dispute between the condominium owners and the building owners with respect to the issue of repairs. The court discussed the fact that the courts should bring a broad and equitable approach to the resolution of these problems and stated as follows:

> 13 The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the Court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

[22] In keeping with the above suggested analysis I have taken into consideration, the wording of the Declaration, the relationship of MTCC 1100 and Fingold with respect the Property, the nature of the total condominium development and the nature of the work required along with the

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other suggested factors. In doing so, I have concluded that MTCC 1100 does have the obligation to repair after damage. For the reasons below, however, the right to repair is restricted to the roof and exterior of the Property. I agree with MTCC 1100 that the wording of the Declaration demonstrates that a choice was made to shift the burden for repair of damage to the individual unit holder with the exception of the owner of the house unit, Fingold. As such, the duty to repair after damage to the house unit remains with MTCC 1100. Although neither party had any evidence concerning the creation of subparagraphs (a) and (b), in my view, this is fair and equitable given the unique nature of the Property and its overall importance to the condominium unit.

[23] If I am incorrect with respect to the above-noted analysis, I further find that MTCC 1100 is entitled to carry out the repairs to the roof and all exterior elements on the basis that Fingold did not carry out the necessary repairs within a reasonable time. Undoubtedly, none of the purported delays up until the spring of 2011 can be attributable to Fingold, or for that matter MTCC 1100, as there were problems with remediation, insurance coverage and other issues. Since that time, however, MTCC 1100 has worked diligently to get the Property in a position where the exterior repairs and roof installation can be completed. Fingold initially, for several months, agreed to the suggested exterior repairs, roof installation and the choice of contractor (ServiceMaster). It was not until March of this year that he outlined his plan of development and withheld permission. The difficulty is that since that time Fingold has not taken concrete steps to ensure that he could in fact carry out these repairs. His development plan is at best uncertain and employs no timelines whatsoever that would suggest he is in any position to carry out the repairs in this calendar year. Mr. Worsfold submits that it would be reasonable in the circumstances to adjourn the application for 60 days and give Fingold the opportunity to pull his plan together and then reconvene to determine the issue. I disagree. If this matter were delayed for a further 60 days for another hearing this would place the matter back before the court in September or October. In these circumstances MTCC 1100 and its condominium owners would be running into the same problem that they faced last year when repairs were ready to be carried out but had to be postponed because of the approaching winter months.

[24] The resolution of this matter is long overdue. Fingold initially acquiesced to MTCC 1100 renovation plans for several months and since withholding consent has not taken reasonable steps within a reasonable time to ensure that they can be carried out. Accordingly, MTCC 1100, pursuant to the relevant provisions contained in the Declaration above, ought to be able to carry out the exterior repairs and roof installation with the purported consent of Fingold.

[25] As noted, the work shall be restricted to the installation of the roof and the repair of the exterior of the Property which all parties agree is reasonable and in keeping with the like, kind and quality of the original structure when it was damaged. My findings do not, in any way, relate to any repairs or renovations with respect to the interior of the Property which could well negatively impact Fingold who plans to market the Property. In my view, it is reasonable to interpret the Declaration, as I have, with respect to the exterior and roof of the building so that the residents of the condominium can have the certainty that the exterior and roof of the Property will be properly repaired in an expeditious fashion. Fingold retains the right to otherwise repair

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and renovate the interior so as not to interfere with his rights contained in the Declaration concerning the conversion of the Property into three condominium units. Counsel for MTCC 1100 agreed that this restricted interpretation, at this time, was reasonable. If difficulties arise once Fingold finalizes his plans another application can be brought to the court.

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<u>THE INTERLOCUTORY AND FINAL INJUNCTION</u>

[26] Based on my conclusions above, Fingold's request for an interlocutory or final injunction must fail.

[27] In any event, I do not believe that this is the appropriate case for an interlocutory injunction. The test for granting an interlocutory injunction is laid out in *RJR-MacDonald v. Canada,* [1994] 1 S.C.R. 311 at pp. 314-315. Accordingly, (1) there must be a serious issue to be tried in the underlying proceeding, (2) the applicant must face irreparable harm not compensable in damages if an interlocutory injunction is denied, and (3) the balance of convenience, taking into account the public interest, must favour the applicant.

[28] Given my decision above, I need not consider the first part of the test in *RJR-MacDonald*.

[29] In considering the issues of non-compensable, irreparable harm and balance of convenience it is important to note that the roofing repairs, contemplated by MTCC 1100 to be carried out by ServiceMaster, have been approved by all regulatory authorities and Fingold has no difficulty with the nature of the repairs to the Property's roof and exterior. This is important because Fingold is not asserting that the quality or nature of the repairs will prejudice him in any way insofar as the issue of "like, kind and quality" is concerned. His allegations of prejudice, as will be noted further below, are strictly financial in nature. Furthermore, it is not disputed that with every month that goes by Novex is incurring approximately $50,000 per month in ongoing expenses with respect to preserving the current damaged nature of the Property by the use of scaffolding and other related equipment.

[30] It also bears noting that there are no issues with applicable policy limits. The Novex policy has over $28 million in applicable limits for repairs to property damage, but by virtue of the replacement cost endorsement the limits are open-ended. The Chubb policy has almost $9 million in applicable policy limits. No party at the hearing of the application took the position that there may be insufficient insurance monies available to carry out the necessary repairs.

[31] What drives the application is the fact that Fingold asserts that the ServiceMaster quote for the repair to the roof is excessive and that if ServiceMaster is allowed to conduct the repairs he will sustain financial losses by virtue of an agreement that he has entered into with Chubb. In his affidavit, Fingold deposes as follows:

> 32. In his Affidavit, Mr. Field suggests that Novex will be paying the cost of the replacement of the roof by ServiceMaster. This is not true. While from an initial standpoint, Novex will initially pay ServiceMaster, all amounts that are paid by Novex

> with respect to the replacement of the roof or the balance of the work necessary to complete the home will be charged back as against any amounts that I receive from Chubb Insurance following the arbitration of my fire loss claim.

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[32] Fingold has refused to produce a copy of the agreement with Chubb to Novex or MTCC 1100. Chubb submits that it cannot produce a copy of the agreement without Fingold's consent. Fingold's counsel could not provide me with any concrete examples as to how Fingold would suffer any losses if ServiceMaster is allowed to carry out the repairs or that the cost of those repairs exceed the amount that Fingold would, himself, have paid had he retained someone to carry out the repairs. It bears noting, with respect to the issue of the cost of repairs, that Fingold's affidavit evidence that ServiceMaster's quote for roofing repairs at $1.5 million was an error and in fact ServiceMaster's quote, with respect to roofing repairs, was approximately $500,000 which was approximately $100,000 more than two other estimates that were given by other companies. This was conceded by Fingold's counsel. Further, no evidence was provided as to the nature and quality of those repairs of the other companies. Fingold also delivered affidavit evidence wherein he advised that Mizrahi would match the cost of the quote of ServiceMaster and carry out the repairs. This leaves me with the conclusion that the quote from ServiceMaster cannot be considered to be unreasonable.

[33] In any event, based on the record before me it is impossible to conclude that Fingold will sustain any financial prejudice if ServiceMaster carries out the repairs to the roof. While Fingold makes this bald allegation in his affidavit he has proffered no evidence in support of this and refuses to produce a copy of the Agreement, or at least a relevant portion of the Agreement to the other parties. He also did not provide a copy to the court. While I likely have the authority to order such production, I choose not to do so. In my view, Fingold bears the responsibility of establishing his allegation of financial prejudice. He has failed to do so. Perhaps the Agreement with Chubb may have supported his claim, but he has chosen not to rely on this at the hearing of the application.

[34] Accordingly, I cannot conclude that Fingold will suffer or has suffered any financial prejudice. Even if he has, it can be quantified in monetary terms and cured. Furthermore, when one considers the balance of inconvenience, it is my view that MTCC 1100 would suffer greater harm from the granting of an interlocutory injunction. As noted above, I can see that Fingold will suffer no harm based on the restrictions that I will impose with respect to the repairs being only to the exterior and roof of the Property.

OTHER RELIEF

[35] MTCC 1100 urges me to make an order that if Novex pursues any party with respect to the ongoing maintenance cost of $50,000 per month, those monies should be paid by Fingold. In my view, it would be premature to make such an order since Novex has not yet pursing such a claim and I decline to do so.

[36] With respect to the cost of the original application, such costs are reserved to a later date by order of C. Brown J. The other issues on that application were resolved. Novex would like to dismiss the original application on a without prejudice basis for costs to be argued at a later time. MTCC 1100 would rather let the application remain outstanding and have the parties go back in front of C. Brown J. to make submissions.

[37] In my view, it would be inappropriate to allow the application to linger on when the issues contained therein have been resolved. In my view, the application ought to be dismissed on a without prejudice basis to the parties pursuing the issue of costs. In this regard, obviously the parties can either reapply to C. Brown J., as she dealt with the application and made the endorsement, or as they otherwise deem fit.

DISPOSITION

[38] Based on the above, I therefore order as follows:

1. A Declaration shall go that MTCC 1100 has the exclusive right to repair the exterior portion of the Property including the roof installation in accordance with the plan that has been developed to date and previously approved by Fingold.

2. Any issues involving the restoration of the interior of the Property can be dealt with by way of a further application to the court.

3. Any issues concerning Novex's expense with respect to ongoing maintenance can be dealt with by way of a further application to the court.

4. Submissions concerning issues of costs concerning the original application before C. Brown J. can be made to her, or otherwise by the parties.

5. With respect to the issue of costs of this application, the parties may make submissions to me in writing, not to exceed three pages in length, excluding bills of costs and case law. MTCC 1100 is to deliver its submissions within three weeks, followed by the other parties within 14 days and any reply from MTCC 1100, seven days thereafter.

T. McEwen J.

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Released: September 12, 2012

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