In the Provincial Court of Alberta

Citation: Ho v. Security National Insurance Company, 2015 ABPC 202

Date: 20150923
Docket: P1390103785
Registry: Calgary

Between:

Phillip Ho

Plaintiff

- and -

Security National Insurance Company and Riverwest Condominium Corporation No. 0313153

Defendants

Reasons for Judgment of the Honourable Judge D.B. Higa

[1] The Plaintiff seeks damages arising from an incident occurring on September 25, 2014 when water leaked from his fridge and caused damage to his condominium unit and an adjacent unit. The condominium units are located in a development registered as condominium plan No. 0313153. The Defendant, Riverwest Condominium Corporation No. 0313153 ("Riverwest") is the corporation created pursuant to the Condominium Property Act, RSA 2000, c-22 ("*Act*"). The Defendant, Security National Insurance Company ("SNIC") issued to the Plaintiff a homeowner's policy of insurance.

[2] Riverwest repaired the damage caused by the water leakage to the adjacent unit. The repair costs totaled $19,642.62. Riverwest sought indemnification from the Plaintiff and the Plaintiff paid the amount of $19,642.62. Riverwest was provided with an estimate of $5,846.62 for repairs to the Plaintiff's unit. The Plaintiff did not complete repairs to his unit.

[3] Pursuant to the *Act* and Riverwest's By-laws ("By-laws"), Riverwest carried an insurance policy covering water damage, subject to a $35,000.00 deductible.

[4] The Plaintiff, Phillip Ho seeks damages against Riverwest of $25,000.00 being the limit of the Court's monetary jurisdiction. The Plaintiff submits Riverwest breached its statutory duty and its covenant to insure against losses arising from the leakage of water.

[5] Alternatively, the Plaintiff argues his losses are covered under the policy of insurance issued by SNIC, arranged through TD Insurance-Meloche Monnex.

[6] The issues to be addressed are:

1. Did Riverwest breach its obligation pursuant to the *Act* and the By-laws, to insure for losses arising from an accidental release of water?

2. Was Riverwest entitled to indemnification from the Plaintiff for the amounts it paid to repair damage to the adjacent unit?

3. Is the Plaintiff entitled to coverage pursuant to the SNIC insurance policy?

Issue 1: Did Riverwest breach its obligation pursuant to the *Act* and the By-laws, to insure for losses arising from an accidental release of water?

[7] Section 47(1) of the *Act* states,

> 47(1) A corporation
>
> (a) where a building is divided into units, shall place and maintain insurance on the units, other than improvements made to the units by the owners, and the common property against loss resulting from destruction or damage caused by any peril prescribed by or otherwise required by the regulations to be insured against,
>
> and
>
> (c) shall, if required to do so by by-law, place and maintain insurance on the improvements made to the units by the owners against loss resulting from destruction or damage caused by any peril prescribed by or otherwise required by the regulations to be insured against, and ...
>
> and for that purpose the corporation has an insurable interest in the units and the common property.

[8] Section 47(6) of the *Act* provides,

> 47(6) Notwithstanding the *Insurance Act* or any policy of insurance, if insurance is placed by a corporation and an owner against loss resulting from destruction of or damage to the units or the common property,
>
> (a) the insurance placed by the corporation is deemed to be first loss insurance, and
>
> (b) the insurance placed by the owner of a unit in respect of the same property that is insured by the corporation is deemed to be excess insurance.

[9] Section 61(1) of the Regulations to the *Act*, Alberta Regulation 168/2000 ("Regulations") states,

> 61(1) For the purposes of section 47(1) (a), (b) and (c) of the *Act*, a corporation must place and maintain insurance against the following perils: ...
>
> (i) water damage caused by sewer back-up or the sudden and accidental escape of water or steam from within a plumbing, heating, sprinkler or air conditioning system or a domestic appliance that is located within an insured building;

[10] Section 62 of the Regulations states,

> 62. Property that is insured as required pursuant to section 47 of the *Act* must be insured for replacement value subject to any reasonable deductible that is agreed to by the board and the insurer.

[11] By-law 51 of the By-laws provides,

> The Board, on behalf of the Corporation, shall obtain and maintain at all times, insurance on all of the units (including the bathroom and kitchen facilities, panelling, wallpaper and mouldings initially installed therein by the Developer or replaced from time to time by any Owner, but excluding furnishings and other property brought into or installed in units by unit owners), and all the insurable common property and all insurable property, both real and personal, of any nature whatsoever of the Corporation, to the full replacement value thereof, without deduction for depreciation, and without restricting the generality of the foregoing, such insurance shall provide and include the following:
>
> (a) coverage for fire, extended perils and such other perils prescribed by or otherwise required to be insured against by the regulations proclaimed pursuant to the *Act*;

[12] Section 32 of the *Act* states,

> 32(1) The bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real property and personal property of the corporation and the common property.
>
> 32(6) The bylaws bind the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the bylaws.

[13] Water escaped from the Plaintiff's fridge on September 25, 2014. It was determined the water leak arose from a malfunctioning water fill valve. No evidence was tendered indicating the water leak arose from any actions or omissions of the Plaintiff. The evidence supports a finding that the water leak from the Plaintiff's unit was a "sudden and accidental escape of water" from a domestic appliance. Section 61 of the Regulations specifically dictates Riverwest must maintain insurance against the sudden and accidental escape of water from a domestic appliance.

[14] The Bylaws, being a contract between Riverwest and the Plaintiff, prescribes that Riverwest is obliged to obtain insurance on all units for such perils prescribed by the

Regulations, save and except owners' furnishings and other property brought into or installed in units by the owners.

[15] Therefore, Riverwest pursuant to the *Act*, Regulations and By-laws had a duty and obligation to insure the Plaintiff's unit for the exact situation that occurred on September 25, 2014, being the sudden and accidental escape of water from a domestic appliance.

[16] Riverwest argues the required insurance coverage was obtained, subject to a deductible of $35,000.00. Accordingly, a claim was not made to its insurer as the total quantum of loss to the Plaintiff's unit and the adjacent unit did not exceed the deductible.

[17] Section 62 of the Regulations addresses the amount of insurance required pursuant to Section 47 of the *Act*. Section 62 states insurance must be for replacement value. Insurance coverage can be subject to a deductible, however deductibles are to be reasonable. No evidence was submitted relating to the reasonableness of the deductible. No provisions of the By-laws address deductibles or that deductible amounts can be negotiated by Riverwest in relation to its obligations to provide insurance.

[18] No authority was provided to assist in determining what constitutes a reasonable deductible. **Northwestern Metal & Salvage Ltd.v Alltar Roofing Ltd.**, [1994] AJ 432 ("Northwestern") a decision of the Court of Appeal was submitted for a different point, but the decision references a deductible of $100.00. In relation to a deductible of that amount, the Court refers to it as "standard".

[19] The deductible in this action is $35,000.00. The extreme difference in scope between a $100.00 deductible, described as "standard" by the Court of Appeal and $35,000.00 is obvious. In my view, absent any evidence as to the reasonableness of a $35,000.00 deductible, a deductible of $35,000.00 is not reasonable in the context of the facts and circumstances of this action.

[20] Riverwest has a contractual and statutory obligation to provide insurance to cover accidental escape of water. Section 62 of the Regulations states such insurance must cover replacement value. The insurance obtained by Riverwest covered none of the losses it was obligated to insure. The insurance obtained by Riverwest was essentially of no value, in relation to a loss arising from an accidental escape of water from a home appliance.

[21] A deductible of $35,000.00 might be reasonable in relation to a different type of peril and different scope of insurable property. A deductible of $35,000.00 is not reasonable for a loss arising from a malfunctioning icemaker.

[22] Again, the By-laws are silent relating to Riverwest's insurance policies being subject to deductibles and specifically, the quantum or monetary scope of any deductibles.

[23] Riverwest has failed to satisfy its obligation to provide insurance to cover loss arising from water damage caused by the sudden and accidental escape of water from a domestic appliance located within an insured building.

Issue 2: Was Riverwest entitled to indemnification from the Plaintiff for amounts it paid to repair damage to the adjacent unit?

[24] Riverwest relies on By-law 50(e) in support of its claim of indemnification from the Plaintiff, for costs incurred to repair the adjacent unit. By-law 50(e) provides,

> An owner shall indemnify and save harmless the Corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, to other Corporation property or to any unit by his act or omission or by that of any member of his family or his or their guests, servants, agents, invitees, licensees or tenants, but only to the extent that such expense is not met by the proceeds of insurance by the Corporation.

[25] In my view, By-law 50(e) does not support Riverwest's claim for indemnification arising from costs and expenses it incurred to repair the adjacent unit. By-law 50(e) allows for indemnification if expenses are incurred arising from an "act or omission" by an owner or his family, guests and others. However, the repairs to the adjacent unit were required, not by an action or omission of the Plaintiff, but arising from the accidental escape of water due to a faulty mechanical part. Further, no evidence was received indicating the Plaintiff was aware of an issue with his fridge or that there were any warning signs, alerting the Plaintiff to a potential water leak.

[26] By-law 50 also states that an owner's liability is restricted to the extent the expenses sought to be recovered are not covered by insurance proceeds. As the by-laws mandate that Riverwest provide insurance coverage for the exact loss for which reimbursement is sought, with no mention of deductibles, By-law 50 specifically contemplates that an owner will not be responsible for the repair expenses incurred by Riverwest.

[27] Secondly, assuming By-law 50(e) gave Riverwest the ability to seek reimbursement from the Plaintiff, the Plaintiff and SNIC then argue Riverwest is unable to pursue such claim based on principles enumerated in **Condominium Plan No. 00122336 v Shivji**, 2007 ABQB 572 ("Shivji").

[28] The facts of **Shivji** are similar to the present action, except that occupants of the subject unit had intentionally set the thermostat to zero causing pipes to freeze and burst. Again, no similar type of act or omission of the Plaintiff exists in this action. One other distinguishing factor is an agreed fact that, "The Respondent has agreed to a reasonable deductible with its insurer." In **Shivji,** the condo corporation also had a policy of insurance for loss caused by the sudden escape of water, and the loss was less than the $25,000.00 deductible.

[29] The condominium corporation commenced action against the owner for the repair costs and received judgment. The owner appealed the decision. Justice Lee noted Section 61 of the Regulations, Section 47 of the *Act* and the condominium by-laws. He also noted the comments of the Court of Appeal in **Condominium Corp. No. 9813678 v Statesman Corp**., 2007 ABCA 216 ("Statesman"). Justice Lee stating at paragraph 43 that the Court of Appeal in **Statesman** found that the combined operation of Sections 32 and 47 of the *Act*, Section 61 of the Regulations and the by-laws requiring the corporation to obtain insurance created a covenant to insure for the perils listed in the Regulation and by-laws.

[30] At paragraph 44 Justice Lee states,

> The fact that this particular loss was less than the water damage deductible of the Policy is irrelevant to the issue of whether or not there was a covenant to insure...

and at paragraph 46,

> Where one party to a contract covenants to obtain insurance against damage to the premises due to specific perils, that party cannot then sue the other party to the contract where damage is caused to the building by a specific peril caused by the other party's negligence. The covenator assumed the risk of loss or damage caused by the peril to be insured against. By assuming the risk of that specified peril, the party promising to obtain the insurance is then contractually barred from attempting to recover damages as a result of that specified peril from the other party to the contract.

[31] Justice Lee further states at paragraph 49 relying on **Statesman**,

> The Alberta Court of Appeal concluded that where a condominium corporation covenanted with a unit holder to insure the building against fire, the condominium had no cause of action against the Appellant unit owner and manager for a loss caused by fire.

[32] **Statesman** was an action where the condominium corporation commenced action against the unit holder. The Court of Appeal in **Statesman** in dismissing the action stated at paragraph 73,

> These contracts either expressly waive subrogation, or do so indirectly because they covenant that the respondent condominium corporation will get no-fault insurance and give the appeallant the benefit of it. If the respondent condominium corporation sues the appellant for the loss, that is a breach of those covenants; ...

[33] Accordingly, at paragraph 52 of **Shivji** Justice Lee determined,

> As a covenant to insure against water damage caused by the sudden escape of water from a plumbing or heating system existed, the Respondent assumed the risk of such damage, and is barred from suing the Appellants in these circumstances.

[34] Therefore, even in the context of the damage in **Shivji** being caused by the negligence of the unit occupants and that a reasonable deductible was negotiated, Justice Lee denied the claim of the condominium corporation.

[35] Riverwest argues **Shivji** should not apply and offers **Northwestern** as authority for the submission that the Plaintiff should be liable for the repair expenses. In **Northwestern**, Justice Côté made the following comment at paragraph 6,

> If there is any part of this loss which is not covered by the fire insurance, because there is an exception or deduction which is standard in insurance policies, then the defendant should not have the benefit of that. For example, some fire insurance policies will have a deductible of $100.00. If there were anything like that here, and it was standard, then to that very limited extent, the defendant would be liable.

[36] I do not see how **Northwestern** assists Riverwest and addresses the issues raised in **Shivji**. Essentially no facts or contextual background is set forth in **Northwestern.** There is no reported decision of the Court of Queen's Bench that provides any additional details. Accordingly, it is unclear if Northwestern raises a legal principle applicable to the facts of this action. Justice Côté's comment does not speak to established facts but to a hypothetical

situation. He states, "If there is any part of this loss which is not covered by the fire insurance...." and "If there were anything like that here...". (underlining is mine)

[37] Further, **Northwestern** is distinguishable from the facts of this action. Justice Côté speaks to a situation where a $100.00 deductible may have existed and if the amount of the deductible was "standard". He then states, "...then to that very limited extent, the defendant would be liable." (underlining is mine).

[38] In this action, as stated, there was no evidence tendered speaking to the reasonableness of the deductible or that it was a standard deductible. A deductible of $35,000.00 cannot be compared to a deductible of $100.00. The By-laws make no mention of deductibles. Further, Justice Côté made it clear that his comments as to liability were restricted to the hypotheticals he was posing and to "..that very limited extent...".

[39] Riverwest references **Condominium Plan v King**, 2012 ABQB 127 ("King") and Section 39 of the *Act*. I also do not see how that statutory provision or **King** assists Riverwest. **King** addresses issues of priority ranking of a corporation's claims against owners. Section 39 of the *Act* allows for the establishment of a fund to cover corporation administrative expenses and to have the owners cover such costs. Expenses incurred to repair the adjacent unit are not administrative expenses. Further, the circumstances stated in Section 39(d) allowing for an action against an owner do not exist, as the amounts expended do not arise in respect to the Plaintiff's unit or common property leased to the Plaintiff.

[40] **Stevens v Simcoe Condominium Corp. No. 60**, 42 OR(3d) 451 (Ont Div Ct) does not assist Riverwest. The Ontario District Court rendered its decision based on the condominium by-laws specifically providing that insurance obtained by the corporation may be subject to a deductible. As stated, Riverwest's by-laws are silent relating to insurance deductibles. As Riverwest had a contractual and legislative obligation to insure, the owners have impliedly accepted a mode of "self insurance" for expenses incurred to the deductible level to be shared by all owners and not the sole responsibility of a unit owner.

[41] **Stevens** although offered by Riverwest in support of its submissions, may be useful authority for the Plaintiff. The Court states on the fifth page of its judgment,

> We would add that if the deductible was excessive, it could be argued that the corporation had failed in its duty to obtain insurance.

[42] Although evidence was not heard on the point, bearing in mind the comments of the Court of Appeal in **Northwestern,** one could certainly argue that a deductible of $35,000.00 in relation to insurance covering an occurrence for water leaking from a home appliance is excessive and therefore, Riverwest failed in its duty to insure.

[43] **The Owners Strata Corporation VR 2673 v Comissiona**, 2000 BCSC 1240 is also distinguishable. The British Columbia Supreme Court determined the corporation could take action against an owner, seeking payment for repair expenses exceeding the insurance deductible. The Court permitted the action as the Rules of the corporation expressly provided that damage to common property caused by negligence of an owner will be charged to that owner. In the present action, there was no act, omission or negligence on the part of the Plaintiff giving rise to the water leak. I have further held, that By-law 50(e) does not support a claim for

reimbursement. Riverwest does not point to any other By-law that may support a claim for damages or reimbursement as against the Plaintiff.

[44] Riverwest is not entitled to reimbursement from the Plaintiff for amounts it paid to repair damage to the adjacent unit.

Issue 3: Is the Plaintiff entitled to coverage pursuant to the SNIC insurance policy?

[45] The Plaintiff pleads relief against SNIC in the alternative. The Plaintiff submits if Riverwest is entitled to reimbursement and has not breached its covenant to insure, then the Plaintiff's losses and damages should be covered under the SNIC insurance policy. As I have ruled in favour of the Plaintiff on Issues 1 and 2, there is no need to address Issue 3. I will however, briefly comment on submissions relating to primary and excess insurance coverages.

[46] Again, Section 47(6) of the *Act* states,

> Notwithstanding the *Insurance Act* or any policy of insurance, if insurance is placed by a corporation and an owner against the loss resulting from destruction of or damage to the units or the common property,
>
> (a) the insurance placed by the corporation is deemed to be first loss insurance, and
>
> (b) the insurance placed by the owner of a unit in respect of the same property that is insured by the corporation is deemed to be excess insurance.

[47] The SNIC policy of insurance specifically contemplates its insurance being excess insurance as described in "Coverage A-2 Unit Additional Protection" on page 3 of 14 of the SNIC policy.

[48] As discussed, pursuant to the By-laws, Section 47 of the *Act* and Section 61 of the Regulations, Riverwest had an obligation to insure relating to the loss and damage that occurred on September 25, 2014. That mandatory insurance coverage is deemed by legislation to be first loss insurance. By negotiating coverage subject to a $35,000.00 deductible, SNIC argues this defeats the purpose of Section 47(6) and in essence, makes SNIC the primary insurer.

[49] This is not an issue the Court needs to address for disposition of this action. However, SNIC's argument is compelling and bolsters submissions that Riverwest failed to provide proper insurance and the resulting effect of such omission.

[50] The Court also does not have to address the issue of estoppel for disposition of the action. In any event, issues related to estoppel were not raised in the Plaintiff's pleadings.

Summary

[51] Riverwest failed to provide the necessary insurance coverage mandated pursuant to the By-laws, the *Act* and Regulations and therefore, breached its covenant to insure. Additionally, Riverwest did not have the right, authority or justification to demand reimbursement for the repair costs to the adjacent unit.

[52] The Plaintiff paid Riverwest $19,642.62 arising from Riverwest's demand for payment. In addition, the required repairs to the Plaintiff's unit are estimated to be $5,846.62. The

Plaintiff is granted judgment for $25,000.00 being the monetary limit of this Court. The Plaintiff is awarded interest pursuant to the provisions of the Judgment Interest *Act*, from January 1, 2013. The Plaintiff is granted reimbursement of the $200.00 filing fee.

[53] The action against SNIC is dismissed.

[54] The parties have leave to speak to costs, should they be unable to agree. I remind counsel of the Court's guidelines in relation to the awarding of costs. If agreement on costs is not reached, notice must be given to the Clerk of the Court seeking a hearing date within 30 days from the date of this decision.

Heard on the 3rd day of September, 2015.

Dated at the City of Calgary, Alberta this 23rd day of September, 2015.

D.B. Higa
Judge of the Provincial Court of Alberta

Appearances:

Counsel - Chris Jones
for the Plaintiff

Counsel - John R. Gilbert
for the Defendant - Security National Insurance Company

Counsel – Taryn C. Burnett
for the Defendant – Riverwest Condominium Corporation No. 0313153