CITATION: LIARDI v. RIOTRIN PROPERTIES (KINGSTON) INC. et al & ZURICH INS. CO., 2013 ONSC 7544
COURT FILE NO.: 10-0908A1
DATE: 2013 Dec 04

ONTARIO

SUPERIOR COURT OF JUSTICE

EAST REGION

BETWEEN:	
PETER LIARDI Plaintiff	
– and –	
RIOTRIN PROPERTIES (KINGSTON) INC., FUTURE SHOP, a division of BEST BUY CANADA LTD. and STONE EDGE LANDSCAPING POOLS & SPAS LTD. Defendants	Jason P. Mangano, for the Defendant, Future Shop
– and –	
ZURICH INSURANCE COMPANY Third Party	Ryan D. Garrett, for the Third Party
	HEARD: November 20, 2013 at Brockville

TAUSENDFREUND J.

REASONS FOR DECISION

OVERVIEW

[1] The defendant, Future Shop, a division of Best Buy Canada Ltd. ("Future Shop") brings this Motion under Rule 21.01(1)(a) and Rule 20 for a declaration that its insurer ("Zurich") has a duty to defend Future Shop against the underlying action.

[2] This motion involves the resolution of two issues:

(a) Do the Plaintiff's pleadings against Future Shop raise both covered and non-covered claims to the extent that Zurich is obliged to defend only those claims that potentially fall within coverage?

(b) If so, on these facts, may extrinsic evidence be introduced to enlarge or explain the pleadings?

BACKGROUND

[3] The Plaintiff brought this action for damages for injuries arising from an alleged slip and fall on December 26, 2008.

[4] The Statement of Claim includes these pleadings:

3. Defendant Riotrin Properties (Kingston) Inc. ("Riotrin") is the owner of... 616 Gardeners Road, Kingston, Ontario ("the Shopping Mall Property").

4. The defendant Future Shop... is the occupant of a unit [in the shopping mall]...

5. ...on December 26, 2008, the Plaintiff was a customer at the Future Shop store...

6. The Plaintiff had purchased a large screen television. After purchasing the television, he was instructed by an employee of Future Shop to move his car to the back of the store to load the television... When the employee was having difficulty loading the television, the Plaintiff attempted to walk around the vehicle to assist. As the Plaintiff was walking

toward the rear door, he slipped on ice and fell onto the ground. The Plaintiff sustained injuries...

7. The Plaintiff states that the area where the fall occurred was covered with ice and had a thin cover of snow. There was insufficient salt or sand in the area. The Plaintiff states the area was not safe for patrents...

9. The Plaintiff states that his injuries were caused by the negligence of... Future Shop, the particulars of which are as follows:

(a) it failed to have adequate persons available to load the Plaintiff's merchandise;

(b) it knew or ought to have known that a dangerous situation existed and failed to take appropriate steps to ameliorate the situation;

(c) it failed to ensure the premises were properly salted and/or sanded;

(d) it failed to adequately monitor the area in question and failed to repair this particular area even though it was directing customers to the area to load their purchases.

[5] Future Shop had entered into a shopping centre lease with Riotrin. Pursuant to that lease. Riotrin agreed to take responsibility for the common areas of the shopping mall. Section 7.1 of this lease provides:

7.1 – LANDLORD'S RESPONSIBILITY

> The Landlord shall... keep and maintain the Common Areas in a neat, clean and orderly condition and properly repair any damage thereto in accordance with leasing commercial real estate management practices.

[6] "Common Areas" are defined in the lease to include all lands provided or designated for use by Future Shop and its customers in common with others. Specifically named as common areas are parking areas, sidewalks, truck courts, and loading areas.

[7] "Parking areas" are defined in the lease to include "paved portions [of the shopping mall] which have been and are to be allocated for parking of motor vehicles... and includes entrances, roads and other means of access thereto..."

[8] Riotrin also agreed to provide insurance for the Future Shop in respect to its leased premises. In addition, Riotrin agreed to include Future Shop as a Named Insured in its comprehensive general liability insurance policy. Riotrin indeed added Future Shop as an Additional Insured to its comprehensive general liability insurance policy with Zurich. This policy was in place at the time of the Plaintiff's alleged slip and fall.

ANALYSIS

Inclusion of Extrinsic Evidence

[9] Zurich seeks to introduce extrinsic evidence on the question of whether the Plaintiff's claim as pleaded against Future Shop is covered in its entirety as a risk which Zurich ensured.

[10] In support of that position, Zurich relies on these comments in *Monenco Ltd. v. Commonwealth Insurance Co*. 2001 S.C.C. 49:

> 35. ...the proper basis for determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain the "substance" and "true nature" of the claims...
>
> 36. ...extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an Insurer's duty to defend...

[11] The Ontario Court of Appeal in its recent decision of *1540039 Ontario Ltd. v. Farmers' Mutual Insurance Co*. 2012 ONCA 210 considered whether extrinsic evidence in that case should have been admitted by the Application Judge. The court at para 26 quoted an excert from *Brown and Donnelly, Insurance Law in Canada* at p.18-20:

> Underlying facts may be admissible in certain limited circumstances, where the underlying facts do not deal with any matters at issue in the action against the insured... There is some logic in considering uncontroversial underlying facts when the matter at issue has nothing to do with the underlying action against the insured. There would be no prejudice to the insured in determining the issue based on underlying facts, and no conflict between the insurer and insured.

[12] The extrinsic evidence which Zurich intends to introduce relates to the manner in which Future Shop operated its businesses, including its policies, if any, concerning loading merchandise into customers' vehicles. I note that this proposed evidence would touch upon certain matters at issue in this action against Future Shop. Furthermore, Zurich seeks to call such extrinsic evidence in support of its position that part of the allegations raised in the pleadings fall outside of the risks covered by Zurich in the policy in question. To that extent, extrinsic evidence

might not only prejudice Future Shop, but bring it as an insured into conflict with its insurer. For those reasons, I decline to consider the extrinsic evidence Zurich intends to introduce.

DUTY TO DEFEND

[13] The law on a duty to defend, in a general sense, is well developed. Leitch, J. in *2091533 Ontario Ltd. v. Vertigo Investments Ltd*. 2013 ONSC 2731 at paras 32 & 33 helpfully lists a number of "duty to defend" principles applicable on this motion:

> An insurer is obligated to provide a defence if the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim.
>
> **Reference**: *Nichols v. American Home Assurance Co*., [1990] 1 S.C.R. 801
>
> The duty to defend is much broader than the duty to indemnify: "[it] is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend." The mere possibility that the claim is within the policy is sufficient to raise the duty to defend.
>
> **Reference**: *Nichols v. American Home Assurance Co*., *ibid* at 808
>
> An insurer's obligation to defend is triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred.
>
> **Reference**: *Nichols v. American Home Assurance Co*., *ibid* at 808

The determination of whether an insurer's duty to defend has arisen lies with an examination of the claims contained within the pleadings.

Reference: *Nichols v. American Home Assurance Co., ibid* at 810

The Court must accept the allegations contained in the pleadings as true: "if the claim alleges a state of facts which, if proven, would fall within the coverage of the policy, the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations."

Reference: Monenco Ltd. v. Commonwealth Insurance Co., [2001] 2 S.C.R. 699 at para. 28

The Court is not bound by the plaintiff's choice of wording or labels contained within the pleadings. The nature of the plaintiff's claim is both determinative and the paramount consideration: "the existence of the duty to defend depends on the nature of the claim made."

Reference: *Nichols v. American Home Assurance Co., supra* at 808

The insurer will owe a duty to defend if the claim alleges a state of facts which, if proven, would fall within the coverage of the policy. The insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

Reference: *Halifax Insurance Co. of Canada v. Innopex Ltd*. 2004 CarswellOnt 4158 (Ont. C.A.) at para. 34

[14] Zurich states that a number of the allegations made by the plaintiff in the Statement of Claim fall outside the responsibility of the landlord under the lease. Zurich points to those

pleadings in the Statement of Claim detailed above which allege that the plaintiff was instructed by a Future Shop employee to drive his car to the back of the store to load the television. As the employee was having difficulty loading the television, the plaintiff attempted to walk around the vehicle to assist. In the process he slipped on ice and fell to the ground.

[15] Zurich relies on *Atlific Hotels and Resorts Ltd. v. Aviva Assurance Co. of Canada* (2009), 97 O.R. (3d) 233. The plaintiff in that case claimed damages for injuries sustained in a "slip and fall" incident. The court stated at para 3:

> The claims made by the injured plaintiff in her pleadings can be grouped under three headings:
>
> (i) negligence on the part of all of the defendants relating in various ways to removal of snow and ice;
>
> (ii) negligence on the part of the Deerhurst defendants in the operation and management of the hotel, including inadequate lighting and the lack of non-slip matting on the walkways, the failure of management to cancel the evening program at the conference centre so that the guests could have stayed in their rooms, the failure to cut the program short so that the participants could have returned to their lodgings sooner and more safely, and a failure to offer the plaintiff temporary overnight accommodations in the main lodge until the walkways were cleared of snow and ice and made safe for use; and
>
> (iii) occupier's liability.

[16] The court on this duty to defend application distinguished these pleadings from those in *Riocan Real Estate Investment Trust v. Lombard General Insurance Co. of Canada* (2008) 91 O.R. (3d) 63. Hennessy, J. held in that case at para 38 :

> I am in the view that in most situations where there is a duty on an Insurer to defend some, or only one, of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even when the pleadings include claims that may be outside the policy coverage.

[17] In distinguishing *Atlific Hotels* from *Riocan Real Estate*, Belobaba, J. held that in the case before him he was unable to find, as Hennessy, J. did in *Riocan* that "one particular claim that fell within coverage captured the true essence of the action." He stated at para 17:

> 15. ...the snow and ice claims appear, at first glance, to be predominant but the claims alleging negligence in hotel operations and management are formidable and can stand on their own. There are... three categories of liability, and only one, the claims relating to snow and ice removal, falls within coverage. The insurer... is therefore obliged to provide the applicants with a defence to these claims [snow and ice removal] only. The Deerhurst defendants are obliged to provide their own defence to the other two categories of claims.

[18] Zurich also relies on the recent decision of *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506. I find it appropriate to review in some detail what the Ontario Court of Appeal stated in *Papapetrou*. The plaintiff claimed she was injured when she slipped and fell on black ice accumulated on stairs of a property managed by the defendant, The Cora Group. Collingwood Landscape contracted with The Cora Group to provide winter maintenance and

snow removal services. As part of the arrangement, Collingwood was to name The Cora Group as an additional insured in the general liability policy which Collingwood was to obtain. Collingwood breached its obligation to do so. On a summary judgment motion, Collingwood was ordered to assume The Cora Group's defence. The court stated:

> 4. ...the motion judge found that "the true nature of the plaintiff's claim is that [Collingwood and The Cora Group] were negligent in failing to maintain an ice free pedestrian stairway". In the motion judge's view, "based on the [service] contract", a duty to defend and indemnify therefore arose...
>
> 6. ...the main issue on appeal is whether the motion judge erred in ordering Collingwood to assume the defence of The Cora Group...
>
> 10. ...Ms. Papapetrou relies on ss. 3 and 4 of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, which set out an occupier's duty to take reasonable care that persons entering on premises are reasonably safe...
>
> 11. ...Collingwood entered into a service contract with The Cora Group... Collingwood agreed to provide winter maintenance, and snow removal services...
>
> 43. ...I do not agree with the motion judge's conclusion that, because the claims in the action can all be characterized generally as claims in negligence for failing to maintain an ice-free pedestrian stairway, this means that all the claims in the action would necessarily be captured under the insurer's duty to defend.
>
> 44. In order to determine whether an insurer's duty to defend arises in relation to the claims raised in a particular action, the court is required to assess the substance or the

> "true nature" of each claim contained within the pleadings to see if it falls within the scope of coverage...
>
> 47. ...assessing the true nature of a particular claim is not an exercise to be undertaken in the abstract. Rather it should be approached with a view to the specific limitations of the insurance coverage at issue.
>
> 49. With a view to the limits of coverage, the "true nature" of the claims in the action are best classified as allegations concerning: (i) negligent maintenance due to Collingwood's performance or non-performance of the service contract; (ii) negligent conduct on the part of The Cora Group extending beyond Collingwood's obligations under the contract; as well as (iii) a statutory cause of action under the Occupiers' Liability Act extending beyond those obligations delegated to Collingwood under the contract. The duty to defend only extends to allegations that can be classified as falling under the first category of claims.
>
> 50. To the extent that this conclusion may differ from *Riocan Real Estate Investment Trust,* I disagree with that decision.

[19] I find that the pleadings here are distinguishable from the pleadings in both *Atlific* and *Papapetrou, supra*. Although the plaintiff here pleads the *Occupiers' Liability Act*, I note that reference to that act is not included in the pleadings as against Future Shop. The plaintiff here fell on accumulated ice covered by snow in the parking lot of the shopping mall. The plaintiff did so while walking around his car in his intent to assist the Future Shop employee who was having difficulty loading the television into the plaintiff's car. The reason the plaintiff walked around the car, in my view, is not relevant. This fall occurred on the parking lot, a risk for which Future

Shop was included as a named insured on the policy issued by Zurich. In my view, this risk covered by the policy mirrors the true nature of the plaintiff's claim. In *Atlific*, as Belobaba, J. found, the claims of negligence advanced against the hotel operations and management are "formidable and can stand on their own". That is not the case here. The plaintiff's claim arises from an alleged slip and fall. It has nothing to do with the manner in which Future Shop carried on its business. If I am incorrect in that view of the pleadings, as the plaintiff alleged that Future Shop employees knew or ought to have known that a situation of danger existed on the parking lot at the rear of the building and failed to take appropriate steps to ameliorate that situation, it clearly falls under the responsibility assumed in the lease by the landlord for which it obtained insurance coverage from Zurich.

[20] The determination of the question of Zurich's obligation to defend Future Shop in this action will dispose of the third party claim against Zurich. Accordingly, I find that question is suitable for resolution under Rule 21.01(1)(a):

Clausen v. Royal & Sun Alliance Co. of Canada (2004) 73 O.R. (3d) 611.

[21] Counsel for Future Shop put Zurich on notice by letter of December 20, 2010 of its intent to tender its defence under the terms of the shopping centre lease between Riotrin and Future Shop and the insurance policy obtained by Riotrin under that lease.

[22] I find that Zurich has the obligation to provide a defence to Future Shop in this action. Future Shop is entitled to be reimbursed on a substantial indemnity basis for costs incurred in defending this action to date as of December 20, 2010: see *Austco Marketing and Service (Canada) Ltd. v. Lloyd's Underwriters* 2013 CarswellOnt 14337 paras 4 & 5.

[23] If required, I may be spoken to on costs within 30 days.

The Honourable Mr. Justice Wolfram U. Tausendfreund

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Defendants

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ZURICH INSURANCE COMPANY

Third Party

REASONS FOR DECISION

Tausendfreund J.