CITATION: Georgian Downs Limited v. State Farm Fire and Casualty Company, 2013 ONSC 2110
BARRIE COURT FILE NO.: CV-12-1344
DATE: 20130415

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GEORGIAN DOWNS LIMITED, Applicant

AND:

STATE FARM FIRE AND CASUALTY COMPANY, Respondent

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: J.P. Mangano, for the Applicant

A. Murray, for the Respondent

HEARD: March 13, 2013

ENDORSEMENT

[1] The applicant Georgian Downs Limited ("Georgian Downs") seeks an order requiring the respondent State Farm Fire and Casualty Company ("State Farm") to pay all defence costs that the applicant has incurred in defending a slip and fall claim (the underlying action) against Georgian Downs and its winter maintenance contractor North-Gate Contractors ("North-Gate"). State Farm issued a policy to North-Gate covering its winter maintenance operations at Georgian Downs. Georgian Downs was added as an additional insured but only with respect to liability arising out of North-Gate's work.

[2] State Farm ultimately settled the underlying action for $65,503.50 based on North-Gate's admission of liability. Georgian Downs did not contribute any monies to the settlement.

[3] Georgian Downs seeks reimbursement for the defence costs it has incurred from the time of the claim until settlement. It submits that it incurred costs in the order of $25,000 to defend the underlying action over a three-year period.

[4] State Farm opposes the relief sought and seeks an order dismissing the application on two grounds. First that the application brought by Georgian Downs falls outside of the applicable limitation period. Second that State Farm has no general duty to defend claims against Georgian Downs that fall outside the coverage provided for its insured North-Gate. Alternatively State Farm submits that the costs claimed should be apportioned given that there are claims against Georgian Downs outside the scope of coverage for its insured North-Gate for which it ought not to be responsible.

[5] The following timelines will provide context for the discussion that follows.

Description	**Date**
Date of the underlying slip and fall accident	December 22, 2008
Underlying action commenced against Georgian Downs and North-Gate	June 25, 2009
State Farm counsel corresponds to Georgian Downs' counsel re defence of the claims	March 10, 2010
Examinations for discovery of the action	April 21, 2011
North-Gate admitted it was the sole occupier of the area where the slip and fall occurred	September 28, 2012
North-Gate settled the underlying action for $65,503.50 and plaintiff provided a full and final release	September 28, 2012
This Application brought claiming indemnity from State Farm for Georgian's defence costs in defending the underlying action	December 7, 2012

[6] Because the underlying action has been settled there is no longer duty to defend. The issue has crystallized and can be categorized as a duty to indemnify Georgian Downs for its defence costs incurred throughout the proceedings.

THE LIMITATION PERIOD

[7] State Farm submits that this application falls outside the applicable limitation period and ought to be dismissed upon that ground. It is not disputed that this issue brings into focus s.4 of the *Limitations Act*, S.O. 2002, c.24. Section 4 provides as follows:

> Unless this *Act* provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[8] State Farm submits that the two year period commenced on the day of the accident December 22, 2008 and therefore the limitation period would have expired December 22, 2010. Alternatively State Farm submits that the limitation period commenced on March

10, 2010 when it submits it denied Georgian Downs' claim for defence costs and therefore expired March 10, 2012. This application was not commenced until December 7, 2012, outside of either limitation period.

[9] Georgian Downs submits that the letter between counsel dated March 10, 2010 was not a clear and unequivocal denial of coverage and by its actions State Farm continued to negotiate the matter and in fact settled the matter on September 28, 2012.

[10] On that basis Georgian submits that this application is well within the two year period which it submits commenced on September 28, 2012, the date the underlying claim was settled.

[11] The letter dated March 10, 2010 and correspondence between counsel thereafter bears close scrutiny. The letter of March 10, 2010 from counsel for State Farm started in part:

> State Farm is only obligated to defend those claims that, taken from the pleadings, fall within the scope of the policy (*Atlific Hotels v. Avia* [2009] O.J. No. 2005 (Ont. Sup.Ct.)). Paragraphs 5 b) and c) of the Statement of Claim in this case relate to the failure to clear snow or ice and therefore fall within the scope of the policy. However, paragraphs 5 a), d), e), f) and g) put forward additional claims.
>
> In view of the foregoing, we propose that our clients simply serve their own defence. Should the evidence support that the plaintiff's injuries, if any, were caused solely by snow and/or ice build-up, North-Gate will face liability in any event.

[12] Counsel for Georgian Downs and State Farm continued to correspond back and forth regarding Georgian Downs' defence costs. Meanwhile State Farm continued to negotiate a settlement of the underlying action and stated in their e-mail of September 5, 2012:

> In any event I will continue to try to settle this matter on behalf of both defendants with plaintiff's counsel as expeditiously as possible.

[13] It is clear that State Farm, by its actions, continued to defend Georgian Downs and North-Gate. The focus of the issues through discoveries was the slip and fall and not any independent cause of action against Georgian Downs.

[14] The issue of the limitation period argument was not raised in any correspondence between counsel until State Farm's responding record to this application. I am satisfied that the letter of March 10, 2010 was not a clear and unequivocal denial of Georgian Downs' request for defence costs. Georgian Downs' request for defence costs was repeated in subsequent correspondence without any denial by State Farm. Although State Farm requested a contribution from Georgian Downs it did not receive one. State Farm

settled the action on behalf of both defendants. Although the Statement of Claim could be broadly interpreted as raising additional independent claims against Georgian Downs the issues were narrowed significantly after discovery. It is clear from the record that the settlement was based solely on the liability of State Farm's insured, North-Gate, as the occupier of the location where the slip and fall accident occurred.

[15] Georgian submits that there is a lack of Ontario authorities on this particular discoverability issue. It submits that discoverability commences when settlement is arrived at. Georgian Downs relies on U.S. authorities for support for this conclusion.

[16] *Couch on Insurance*, 3rd ed. 2012 provides the following American summary on the law of refusal to defend:

> Although there is authority to the contrary in an action by an insured against an insurer for refusal to defend, the insured's cause of action under general statutes of limitations accrues when judgment is obtained against the insured, as opposed to the date the insurer refused to defend, the date the insurer denies coverage, or the insured's payment of a compromised settlement. [Citations omitted]

[17] The Ontario Court of Appeal, in a different context, provides some guidance with respect to this issue from a policy point of view. In *Dundas et al v. Zurich Canada et al* 2012 ONCA 181 Strathy J. speaking for the Court stated at paras. 38-39:

> On the facts, this did not occur [the liability to indemnify] until the issues of interest and costs had been resolved by consent judgments that were taken out on August 21, 1995. It was at this time that the Reid estate had a liability to pay the third parties and it was at this time that it was entitled to demand indemnity from Zurich. Interpreting the statutory conditions in this fashion results in consistency between conditions 6(2) and 6(3). It also promotes certainty, by fixing a date that is readily ascertainable, as opposed to being dependant on subjective questions of discoverability.

CONCLUSION ON THE LIMITATION PERIOD

[18] In my view, when there is an absence of a clear and unequivocal denial of a duty to defend or a duty to indemnify, a limitation period commences on the day of judgment or settlement. I adopt the words of Strathy J. above noted because such an interpretation promotes certainty, by fixing a date that is readily ascertainable, as opposed to being dependant on subjective questions of discoverability.

DOES STATE FARM HAVE A DUTY TO DEFEND GEORGIAN DOWNS?

[19] It is not disputed that Georgian Downs employed North-Gate to provide snow removal services at its premises. It required North-Gate to have insurance. A policy was issued by State Farm covering North-Gate. Georgian Downs was added as an additional insured with respect to liability arising out of North-Gate's work.

[20] In order to determine whether or not there is a duty to defend it is helpful to review the Statement of Claim issued by the plaintiff in the underlying action. As the applicant sets out in his factum at para. 15 the allegations were as follows:

> a) The defendants or their agents failed to take reasonable care to see that the plaintiff would be safe in using the premises for the purpose for which they were intended.
>
> b) The defendants or their agents caused or permitted **slush, snow and ice** to collect on the sidewalk of Georgian Downs and become a danger to persons using it.
>
> c) The defendants or their agents failed to take corrective action, despite having notice of the danger posted by the **slush, snow and ice,** and knowing that the **slush, snow and ice** was a danger and a threat to the safety of the customers.
>
> d) The defendants or their agents caused to exist and permitted to exist a hidden or unusual danger.
>
> e) The defendants or their agents failed to warn the plaintiff adequately or at all, of the presence of the said danger caused by the **slush, snow and ice** on the sidewalk outside Georgian Downs.
>
> f) The defendants or their agents failed to take any steps to assist the plaintiff when they knew or should have known that the plaintiff might face a situation of danger.
>
> g) The defendants or their agents failed to take reasonable precautions for the safety of those persons using the premises.
>
> h) The defendants failed to have a proper system of inspection to detect and correct **slush, snow and ice** or the presence of other dangerous substances. [Emphasis in original]

[21] Georgian Downs submits that the duty to defend, and now the duty to indemnify, was triggered because the true nature of the claim, on a fair reading of the pleadings, was North-Gate's negligence in failing to maintain an ice-free parking lot. As a result the

plaintiff in the underlying action fell and sustained injuries, even though multiple theories were pleaded by the plaintiff. Georgian Downs submits that was borne out by the subsequent discoveries and ultimately the settlement by North-Gate's insurer without participation by Georgian Downs.

[22] State Farm pleads that it declined to defend Georgian Downs because a number of the claims in the pleadings did not fall within the coverage provided by it. The pleadings could be interpreted as independent claims of negligence against Georgian Downs for which North-Gate was not obligated to defend. Alternately State Farm argues that it should only be required to provide a defence for those claims that are covered under the policy and the costs should be apportioned accordingly.

ANALYSIS

[23] Because this case is now settled there is no ongoing duty to defend. The issue is whether or not there a duty to indemnify Georgian Downs for those costs it incurred throughout the litigation. The court has the benefit of the examinations for discovery and the settlement ultimately arrived at by State Farm which focused entirely on the liability of North-Gate for claims against it without any participation by Georgian Downs.

[24] In *RioCan Real Estate Investment Trust v. Lombard General Insurance Co. of Canada* 2008 91 O.R. 3d 63 Hennessy J. provided the following guidance in a slip and fall case:

> 16. Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip and fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. **The true nature of the claim** is that the defendant was negligent in failing to maintain an ice free parking lot and as a result the plaintiffs fell and sustained injuries. [Emphasis added]

[25] The true nature of the claim was also scrutinized by Hambly J. in *Cadillac Fairview Corp. v. Jamesway Construction Ltd.* 2011 ONSC 2633 at para. 15:

> The plaintiff alleges in paragraph 8(a) of her Statement of Claim that they failed to have a proper reporting system of dangerous conditions in the area where she fell. This is not covered by the snow removal contract between Jamesway and Cadillac Fairview. However the "true nature" of the plaintiff's claim as it was in *Rio* is the allegation that she slipped and fell on ice on the sidewalk outside the entrance to the mall. This is covered by the contract which places the obligation on Jamesway to keep the sidewalks of the mall free from ice.

[26] The Nova Scotia Court of Appeal also reviewed the true nature of the claim in *SREIT Ltd. v. ING Insurance Co. of Canada* 2009 N.S.C.A. 38. As the court stated at para. 23:

> The Amended Statement of Claim by Bowser alleges a particular theory of how the ice may have come into existence. It does not, in my view, change the substance of the allegations being made. The plaintiff Bowser is not seeking to establish liability for the gutter falling from the roof and striking him. He does not allege that a failure to properly maintain the gutter led to the formation of an icicle which struck him. Nor does he allege that he slipped on a puddle of water. The true nature of the claim is that the premises were not reasonably safe because there was an icy sidewalk that was unsalted.

[27] In *Atlific Hotels and Resorts Ltd. et al v. Aviva Insurance Company of Canada*, [2009] 97 O.R. 3d 233 Belobaba J. provided this summary of the law at para. 10:

> Ontario courts have also made clear that in cases with mixed claims, where the plaintiff advances both covered and non-covered claims, the insurer is obliged to defend only those claims that potentially fall within coverage. [Citation omitted]

[28] Belobaba J. agreed with the findings of Hennessy J. in *RioCan, supra*, and stated at para. 14:

> In other words, if after a careful examination of the entire pleading a court finds that a particular claim that potentially falls within coverage captures "the true nature of the overall claim", i.e. the essence of the entire action, then the insurer has obliged to defend the entire action. This makes sense.

[29] However, Belobaba J. distinguished the case before him from the *RioCan* case and stated at para. 16:

> In the case before me however as I have already noted, three categories of claims are being advanced by the plaintiff: i) negligence in the removal of snow and ice; ii) negligence in hotel operations and management, including inadequate lighting and the lack of non-slip matting on the walkways, the failure by management to cancel the evening conference programme all together so that the guests could have stayed in their rooms, the failure to cut the programme short so that the participants could have returned to their lodgings sooner and more safely and the 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) more generally, occupier's liability.

[30] On the case before him Belobaba J. found that there were formidable claims of negligence against the hotel which were free standing from the claims regarding ice and

snow removal. As a result, the insurer was only required to defend those specific parts of the claim relating to the ice and snow.

[31] In *Minto Developments Inc. v. Carlsbad Paving* 2012 ONSC 1574 Kershman J. dealt with a slip and fall accident and a dispute between insurers. After reviewing both the *RioCan* line of authorities and the *Atlific Hotel* decision Kershman J. stated at paras. 44 and 45:

> After examining the pleadings in this case, in the court's view the true nature of the overall claim is one of a slip and fall accident which falls within the nature of the overall claim being in relation to snow and ice removal. Accordingly, this Court follows the reasoning set out by Hennessy J. in *RioCan*, supra, and by Hambly J. in *Cadillac Fairview*, supra, to find that there is a duty of the respondent Intact Insurance to defend the applicant in the underlying action.

[32] In this case, the true nature of the claim was North-Gate's negligence in failing to maintain an ice free parking lot. This was borne out by the examinations for discovery and ultimately the settlement arrived at by North-Gate's insurer. This is not a case where defence costs ought to be apportioned between owner and contractor.

CONCLUSION

[33] The application by Georgian Downs that it be indemnified by State Farm for its defence costs is granted.

COSTS

[34] If the parties are not able to agree on costs, I will accept brief written submissions from the applicant not exceeding three pages within 20 days of the release of this endorsement. The respondent will then have a further 10 days for brief reply.

MULLIGAN J.

Date: April 15, 2013