CITATION: Tree-Techol Tree Technology v. Via Rail Canada Inc., 2017 ONSC 755
COURT FILE NO.: 14-45810
DATE: 2017-02-01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TREE-TECHOL TREE TECHNOLOGY AND RESEARCH COMPANY INC., 1374007 ONTARIO LTD., AND BRYAN M. MCNAIR, Plaintiffs

AND:

VIA RAIL CANADA INC., and CANADIAN NATIONAL RAILWAY COMPANY

BEFORE: The Honourable Mr. Justice D.J. Gordon

COUNSEL: Eric Savas, Counsel for the Plaintiffs

Thomas J. Hanrahan, Counsel for the Defendants

Stephen R. Moore, Counsel for the non-party, Intact Insurance Company

HEARD: January 17, 2017

ENDORSEMENT

[1] Intact Insurance Company, in its motion dated June 21, 2016, seeks an order granting leave to add it as an intervener and compelling the plaintiffs to amend their statement of claim.

Factual Background

[2] On February 26, 2012 a Via passenger train derailed near Aldershot with the train engine and several coaches sliding down an embankment causing considerable damage to the plaintiffs' property and business operations. Part of the plaintiffs' losses were covered by a policy of insurance with Intact Insurance Company ("Intact"). Intact paid approximately $88,000.00 to the plaintiffs for property and equipment damage and other losses.

[3] The plaintiffs also sought recovery for business interruption and other related losses under the policy. A disagreement arose. On February 22, 2013 the plaintiffs commenced an action against Intact. Intact retained Blaney McMurtry LLP. A statement of defence was served on June 23, 2014. The action was resolved following a pre-trial conference on March 7, 2016 by minutes of settlement. Intact agreed to pay the plaintiffs $50,000.00 on a without prejudice basis to the motion herein.

[4] A notice of action was issued in this proceeding on February 21, 2014. The plaintiffs sought $5,000,000.00 for their claims, said to be for "… all damages, costs, expenses, and or losses sustained … as a result of the aforesaid derailment …".

[5] The statement of claim followed on March 21, 2014. The plaintiffs sought recovery for various categories of damages they were "… otherwise unable to recover from its insurer …".

[6] Intact, and its lawyers, neglected to commence an action for the subrogated claim prior to the expiration of the limitation period. Indeed, Intact acknowledges that no inquiry was made by it, or on their behalf, within that period of time.

[7] Thereafter, counsel for Intact requested the statement of claim be amended, by deleting the restriction to non-insured losses, so that their subrogation claim would be protected. Ultimately, counsel for the plaintiffs reported that his clients were not agreeing to the proposed amendment.

Leave to Intervene

[8] Rule 13.01 provides:

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

Subrogation

[9] Section 152 of the *Insurance Act* provides:

Subrogation

152. (1) The insurer, upon making a payment or assuming liability therefor under a contract to which this Part applies, is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce such rights.

Where amount recovered is not sufficient to indemnify

(2) Where the net amount recovered, after deducting the costs of recovery, is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

[10] The policy of insurance issued by Intact to the plaintiffs contains a similar provision, namely:

11. SUBROGATION

The Insurer, upon making any payment or assuming liability for payment under this form, shall be subrogated to all rights of recovery of the Insured

> against others and may bring action to enforce such rights. All rights of subrogation are waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this policy.
>
> Where the net amount recovered, after deducting the costs of recovery, is not sufficient to provide a complete indemnity for the **loss or damage** suffered, that amount shall be divided between the Insurer and the Insured in the proportion in which the **loss or damage** has been borne by them respectively.
>
> Any release from liability entered into by the Insured prior to loss shall not affect the right of the Insured to recover.

Discussion and Analysis

[11] Having regard only to the pleadings, it appears the plaintiffs' non-insured losses greatly exceeds their insured losses. In most cases, the insured and the insurer co-operate in bringing one action for recovery. That did not happen here, perhaps due to the ongoing dispute between the plaintiffs and Intact with respect to coverage. The plaintiffs protected their claim against the defendants by commencing this action within the limitation period.

[12] There is no dispute, Intact had, at least, a subrogated claim once they paid $88,000.00 to the plaintiffs. Section 152, *Insurance Act*, and the policy itself, allowed Intact to commence an action. It forgot to do so. The plaintiffs refuse to amend the statement of claim to include the amount received from Intact.

[13] To be granted intervener status, Intact must come within one of the criteria in Rule 13.01(1). At present, Intact does not have an interest in the subject matter of this case, as I understand the term to mean, as the claim is only for non-insured losses and, in any event, the limitation period has expired as to the subrogation claim. Intact with not be adversely affected

by any judgment and there is no question of law or fact in common for the simple reason its claim has expired.

[14] For Intact to meet the Rule 13.01(1) provisions, there must be an obligation on the insured to protect the insurer. Despite Mr. Moore's able submissions, I am not persuaded any such obligation exists. Intact had the right independently to commence an action but failed to do so. It cannot now correct its neglect by compelling the plaintiffs to prosecute the subrogated claim.

[15] Reference was made to *Globe & Rutgers Fire Insurance Co. v. Trudell* (1927), 60 O.L.R. 227 (Ont.C.A.). In this case, there was insufficient coverage. After receiving payment from the insurer, the insured sued the County of Frontenac for the balance of his loss and ultimately settled for less than full recovery. The insurer sought to recover the amount it had paid. At para. 25, Ferguson J.A. identified applicable provisions, as follows:

> (1) That different considerations and a different line of cases are to be applied where the insurance moneys s [sic] paid do not cover the fire loss from the considerations and cases h at [sic] are to be applied where the insurance moneys are sufficient to cover the whole fire loss.
>
> (2) That it is only in the latter case that the insurers are subrogated to the full rights and remedies of the insured.
>
> (3) That to make applicable the statement of my brother Hodgins in Hutton v. Toronto Railway Co., quoted and relied on by the learned trial Judge, that "once the right of subrogation has arisen he (the insured) can do nothing to the prejudice of the person subrogated," it is necessary that the insured shall have received sufficient to cover the whole of his fire loss.
>
> (4) That in cases where the lose [sic] of the insured exceeds the amount of the insurance moneys he has received, the insurers are not subrogated to the full rights of the assured so as to enable them or the Courts to interfere with or control the assured in the prosecution or settlement of his claim against third parties, except to require him in prosecuting or in settling his claims against such third

> parties to act with diligence and in good faith, having regard to the fact that the insurers are interested.
>
> (5) That if, acting in good faith, the assured does not make A [sic] settlement by reason of which he has received a sum which, added to the insurance moneys paid, is more than sufficient wholly to indemnify him, he must account for and pay over to the insurers the surplus moneys to the extent of the payment they have made.
>
> (6) That if it be made to appear that the claim of the insured was not prosecuted with diligence and that the settlement was not made in good faith—if, for instance, it appears that the settlement was made with the intent and, purpose of improperly benefiting the third party at the expense of the insurers—the assured must make good to the insurers any loss occasioned to them by his lack of good faith, honesty, and diligence.

Globe & Rutgers was cited, with approval, in *Somersall v. Friedman*, 2002 SCC 59, at para. 54.

[16] Here, as in *Globe & Rutgers*, the insured's loss exceeds the amount of insurance proceeds received. Intact, therefore, is not fully subrogated but has, or had, an "interest". I do not read *Globe & Rutgers* or *Somersall* as elevating that interest to a requirement that the insured must maintain an action on behalf of the insurer in these circumstances.

[17] There is no "clear and unambiguous" obligation in the policy of insurance or otherwise placing such a responsibility on the plaintiffs. See: *Somersall*, at para. 48.

[18] Further, section 52, *Insurance Act*, and the policy clearly define the insurer's right to bring an action. Neither impose an obligation on the insured to do that for the insurer. See: *Somersall*, at para. 57.

[19] The only obligation on an insured is to co-operate with the insurer, except in a pecuniary way, in the insurer's pursuit of its subrogation action. See: *Somersall*, at paras. 61 and 64.

[20] There is no evidence of bad faith by the plaintiffs as Intact was well aware of its right to pursue its subrogation claim. In pursuing only its non-insured losses, the plaintiffs cannot be said to have acted in bad faith.

[21] Reference was also made to *Zurich Insurance Co. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 1870. Strathy J., as he then was, gave recognition to the insurer's rights upon payment of part of the insured's loss. However, the right identified is to commence an action in the name of the insured "… and therefore to interrupt a limitation period …" (para. 20). No obligation rests on the insured to enforce the insurer's rights.

[22] *Zurich Insurance* dealt with the issue of control of the litigation. Of particular interest on the present motion is the comment by Strathy J. at para. 81:

> **81** There is, of course, another commonly employed alternative. In the case of large losses such as this, it is prudent and common for the insured to discuss subrogation at the time the insurance claim is paid, and to agree on such matters as legal counsel, sharing of costs, and procedures for the resolution of any disagreements. If the insurers have failed to take these simple and basic steps, they can hardly complain if their insured insists on its common law rights.

[23] Intact had a subrogation claim but they failed to commence an action prior to the expiration of the limitation period. I conclude there is no requirement on the plaintiffs to protect the interests of Intact. In result, Intact has no interest in this action and cannot complain when the plaintiffs insist on pursuing their own claim.

[24] In result, there is no basis to grant Intact intervener status. The motion is dismissed.

[25] In the circumstances, there is no need to address the second issue regarding the request of Intact to amend the statement of claim. I would only say the ability to amend pleadings is governed by Rule 26.02, not Rule 13.01(2).

[26] I expect counsel will be able to resolve the issue of costs, failing which brief submissions are to be delivered to my chambers in Kitchener within 30 days.

D.J. Gordon J.

Date: February 1, 2017