CITATION: Henry v Thyssenkrupp Elevator (Canada) Limited, 2018 ONSC 1659
COURT FILE NO.: CV-15-00543297
DATE: 20180314

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CORA HENRY	)	No one appearing for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
THYSSENKRUPP ELEVATOR (CANADA) LIMITED, SUNDER & COMPANY INC. and GREENWIN INC.	)	*Jordan M. Black*, for the Defendants, Sunder & Company Inc. and Greenwin Inc.
	)	
Defendants	)	
	)	*Sharan K. Dhami*, for the Defendant, Thyssenkrupp Elevator (Canada) Limited
	)	
	)	
	)	
	)	**HEARD: February 14, 2018**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The defendants Sunder & Company Inc. ("Sunder") and Greenwin Inc. ("Greenwin") are the owner and property manager respectively of a residential apartment building municipally known as 51 Trailridge Crescent, Toronto, Ontario ("the property").

[2] At all material times, the defendant Thyssenkrupp Elevator (Canada) Limited ("TE") was retained as the property's elevator maintenance company pursuant to an Elevator Maintenance Agreement between TE and Sunder/Greenwin.

[3] The plaintiff has sued all three parties for damages allegedly incurred when she exited the property's elevator. The plaintiff alleges that due to a lack of leveling between the elevator floor and the ground floor she fell to the ground causing her to sustain personal injuries.

[4] In defending this proceeding, Sunder and Greenwin ("the moving defendants") brought a crossclaim against TE seeking contribution and indemnity with respect to any judgment or settlement obtained by the plaintiff. Within the moving defendants' crossclaim, they rely upon the express terms of the Elevator Maintenance Agreement which, according to the moving defendants, required TE to add both Sunder and Greenwin as additional insureds on TE's insurance policy. The moving defendants take the position that TE owes a duty to defend and indemnify them under the Elevator Maintenance Agreement.

[5] The moving defendants subsequently brought a motion against TE seeking an order mandating TE or its insurer to reimburse the moving defendants' defence costs to date, and pay their legal costs moving forward in this proceeding.

[6] The motion was argued before me on February 14, 2018. It became apparent during the hearing that the relief being sought was akin to partial summary judgment. As explained in greater detail hereinafter, I ordered the parties to file supplementary evidence with respect to the limitation period issue raised by TE, and took my decision under reserve until that supplementary evidence was filed.

[7] I have now had an opportunity to review the parties' supplementary evidence. These are my Reasons.

Elevator Maintenance Agreement

[8] The moving defendants and TE signed an Elevator Maintenance Agreement ("the Agreement") dated May 1, 2010. There is no dispute that the Agreement was drafted by consultants retained by the moving defendants, and TE had no part in negotiating or drafting the terms of the Agreement.

[9] The term of the Agreement was for five years, expiring on July 31, 2015. The moving defendants had the option of renewing the Agreement for an additional term of two years by providing written notice to TE at least 90 days prior to the expiry date.

[10] Clause 1.7.1 of the Agreement provides as follows:

> "The Contractor (*TE*) shall take out and maintain during the Term of this Agreement comprehensive or commercial general liability insurance to respond to any and all covered incidents occurring on the Property as a result of the Contractor's presence or operations, in the minimal amount of $5,000,000 per occurrence, including the following extensions:

> owners and contractors protective; products and completed operations; personal injury; occurrence basis property damage; blanket contractual, non/owned automobile liability."

[11] Clause 1.7.5 of the Agreement also states:

> "Any and all deductibles in the Contractor's insurance policies shall be borne solely by the Contractor and shall not be recovered or attempted to be recovered from the Owner (*Sunder*)."

[12] Pursuant to clause 1.7.7 of the Agreement, insurance was to be with an insurer acceptable to the moving defendants, and the policy was to be in a form satisfactory to them as well. Copies of all certificates of insurance were to be delivered to the moving defendants prior to the commencement of the term of the Agreement.

Preventative Maintenance Contract

[13] Schedule "A" to the Agreement is a preventive Maintenance Contract between the parties. That Maintenance Contract required TE to provide elevator maintenance services at least once per month, and on other occasions during the year when elevator issues arose. TE was to render all services under the Maintenance Contract and respond to all calls from the moving defendants for any conditions that required adjustments or repair. It was the moving defendants' responsibility to notify TE of any observations of poor levelling of elevator cars at landings.

[14] Clause 2.9.3 of the Maintenance Contract provides as follows:

> "The Contractor (*TE*) shall not assume the management or control of the Elevators and shall not be held responsible for any of the above conditions when not working in, on or about the Elevator, or for any situation which would not reasonably be revealed by the inspections required to be performed hereunder."

The Insurance Policy

[15] Prior to entering into the Agreement with the moving defendants, TE already had commercial general liability insurance with its insurer HDI-Gerling ("the policy"). Sunder was named as an additional insured under the policy. Greenwin was not.

[16] Attached to the policy is a Self-Insured Retention Endorsement which contained a Self-Insured Retention ("SIR") of $250,000.00 USD. In other words, all insureds would assume self-coverage of retained amount of $250,000.00, and that none of the coverage under the policy "kicked in" until the full $250,000.00 was exhausted and paid by the insureds.

The History of the Claim

[17] The plaintiff's incident allegedly occurred on January 16, 2014. TE was notified by Sunder of the plaintiff's incident by January 29, 2014.

[18] By letter dated May 6, 2014, Sunder's adjuster wrote to TE advising that he was investigating the incident, and asked TE to contact him to discuss the plaintiff's potential liability claim, as preliminary information in his possession suggested that TE may have been responsible for the elevator maintenance at the property.

[19] It does not appear that TE responded to this initial letter, and as a result Sunder's adjuster delivered follow-up letters renewing his requests.

[20] By letter dated January 28, 2015, TE's adjuster delivered a response advising that it, too, was conducting an investigation into the plaintiff's incident to determine, *inter alia*, which party or parties were potentially responsible for elevator maintenance on the date of the incident.

[21] The investigations continued throughout 2015, and Sunder's adjuster delivered repeated requests to TE's adjuster asking for an update. Internal notes produced from the files of TE's adjuster disclose that an investigation was proceeding throughout 2015, and that TE's adjuster took the position that there was no history of a levelling variance for the elevator in question, and no service call was placed by Sunder to TE on the day of the incident.

[22] The plaintiff issued her Statement of Claim on December 22, 2015. By letter dated May 9, 2016, counsel for Sunder advised counsel for TE, *inter alia*:

> "Our preliminary review of file materials indicates that your client (and perhaps more properly the insurers of your client) might owe our client a duty to defend. We make this comment for the specific reference to clauses 1.7.3 and 1.11.1 of the Service Contract between our two clients. We look forward to discussing this issue with you in greater detail."

[23] By letter dated August 23, 2016, counsel for TE delivered a copy of the policy in effect on the date of the plaintiff's alleged loss.

[24] The moving defendants delivered their Statement of Defence and Crossclaim (against TE) in or around mid-May 2016, which pre-dated counsel for Sunder being provided with a copy of the policy. While TE took the position on this motion that it had previously provided Sunder with a copy of policy, there is no direct evidence from anyone at TE on this point. Accordingly, on the record before me, the first time Sunder was aware of the terms of the policy appears to be in or around late August 2016.

[25] In the moving defendants' crossclaim, they seek contribution indemnity from TE with respect to any judgment or settlement obtained by the plaintiff. Paragraph 21 of the crossclaim states as follows:

> "The Defendants plead and rely upon the express and implied terms of the Service Contract between them and the Co-Defendant dated May 1, 2010. More specifically, the Defendants state that the Co-Defendant owes them a duty to defend and indemnify pursuant to clauses 1.7.3 and 1.11.1 of the said Service Contract."

The Motion

[26] In or around late October 2017, the moving defendants served this motion seeking the following relief:

(a) a declaration that TE "effectively breached" its contractual obligation owed to moving defendants as additional insureds in the policy by setting a SIR at $250,000.00;

(b) a declaration that the true nature or substance of the plaintiff's claim relates to elevator maintenance;

(c) a declaration that TE is liable to the moving defendants in damages; and

(d) an order requiring TE pay for the moving defendants' costs of defending the plaintiff's action, including costs incurred to date and going forward.

[27] As previously stated, during argument it became apparent that what the moving defendants were actually seeking was partial summary judgment on their crossclaim against TE, and in particular an order requiring TE to indemnify them for defence costs incurred to date and going forward. The remaining declaratory relief sought in the Notice of Motion functioned as the "building blocks" for the moving defendants' request for partial summary judgment.

Summary Judgment

[28] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant a summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[29] In *Hryniak v. Mauldin* 2014 SCC 7 (CanLII), the Supreme Court of Canada held that on a motion for summary judgment, the Court must first determine whether there is a genuine issue requiring a trial based only upon the record before the Court, without using the fact-finding powers set out in the 2010 amendments. The Court may only grant summary judgment if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure.

[30] The overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case.

[31] On the record before me, I am satisfied that there are no risks involved with assessing the moving defendants' request for partial summary judgment in light of the litigation as a whole. In my view, the issues of (a) whether TE breached the Agreement, and (b) whether TE ought to fund past and future defence costs, are discrete and distinct from the balance of the issues in this proceeding, and in particular the crossclaim. I find there to be little or no risk of duplication or inconsistent findings to offset the benefit of proceeding in a proportionate and cost effective manner by the granting or refusal of partial summary judgment.

Issue #1 Is the $250,000.00 SIR a deductible for the purpose of the Agreement?

[32] There is no dispute that clause 1.7.5 of the Agreement requires TE to be responsible for payment of "any and all deductibles" in the policy. Although not strenuously argued during the hearing before me, in my view the "jump off" issue is whether the $250,000.00 SIR qualifies as a deductible in law. If it does that, then subject to the additional issues raised by TE, the Agreement mandates TE to pay it.

[33] In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* 2005 CanLII 21093 (ONCA), the Court of Appeal for Ontario made the following comments when addressing deductibles under the *Insurance Act* R.S.O. 1990 C.I8:

> "Under s. 261 of the Act, the legislature has authorized the use of deductibles in automobile insurance policies. Leaving aside the issue in this appeal, an insurer and an insured can agree to include a deductible in the policy. A deductible turns an insured into an "insurer" for the initial portion of the loss. Thus, it is sometimes called a 'self-insured retention'".

[34] More recently, in *Ernst & Young Inc. v. Chartis Insurance Company of Canada* 2014 ONCA 78 (CanLII), the Court of Appeal for Ontario heard an appeal on a motion for partial summary judgment dealing with an exclusion under an errors and omissions insurance policy. In describing the policy's exclusions, the Court of Appeal stated as follows (my emphasis in **bold**):

> "The Policy consists of a declaration page, two main forms (Directors and Officers Liability and Corporation Reimbursement) and twenty endorsements. The Policy period is March 31, 1987 to March 31, 1988; the limit of liability is $5 million for each Policy year; and there is a **$750,000 self-insured retention**.
>
> …..
>
> Endorsement #10 provides coverage of $5 million for "each wrongful act or series of continuous, repeated or interrelated wrongful acts", with an aggregate of $5 million for each Policy year. The Policy period **and the deductible** are the same as indicated on the declaration page."

[35] A self-insured retention is an amount than an insured retains and covers before insurance coverage begins to apply. That is a form of a deductible, or at least akin to a deductible, which allows the insurer to not defend a claim unless the insured intends to call upon the policy.

[36] Even if the SIR is not technically a deductible, they are obviously similar and functionally related. Both an SIR and a deductible share many common traits, and any distinction(s) between them do not undermine the purpose of clause 1.7.5 of the Agreement; this clause is quite expansive. The Court of Appeal for Ontario has treated self-insured retentions and deductibles as effectively one and the same on several occasions. I see no reason to depart from that approach.

[37] Accordingly, the answer to Issue #1 is "Yes".

Issue #2 Does the Statement of Claim trigger a duty to defend?

[38] As held by the Supreme Court of Canada in *Monenco Ltd. v. Commonwealth Insurance Co.* 2001 SCC 49 (CanLII), wide latitude must be given to allegations in a pleading when determining whether those allegations raise a claim that falls within the scope of insurance coverage. The duty to defend is broader than the duty to indemnify, and the mere possibility that a claim falls within the policy will suffice to trigger the duty to defend.

[39] TE submits that under clauses 2.9.1, 2.9.2 and 2.9.3 of the Maintenance Contract, it is not responsible for leveling malfunctions unless they occur while its mechanics are present at the scene and working on the elevator. This position is not entirely accurate, as the balance of clause 2.9.3 excludes "situations which would not reasonably be revealed by the inspections required to be performed hereunder." As such, if TE negligently performed an inspection of the subject elevator, it is arguable that there could be coverage under the policy.

[40] Paragraph 6 of the Statement of Claim alleges that the plaintiff was pushing a wheeled dolly cart which suddenly jarred due to a level invariance between the elevator floor and the

ground floor. The plaintiff alleges that the area of the incident (i.e. where the elevator floor meets the ground floor) was not "properly or sufficiently maintained" to ensure her safety as a person using the elevator. While the negligence allegations against both TE and the moving defendants are allegations of independent negligence on the part of each defendant, they are nevertheless allegations that all defendants:

- Failed to take proper or any steps to ensure that persons using the elevator would be reasonably safe while doing so.
- Permitted the plaintiff to use the elevator when they knew or ought to have known it was unsafe.
- Failed to employ reasonably competent service, agents, contractors, sub-contractors and/or employees to inspect and provide maintenance and repair to the elevator; and
- Failed to properly instruct their employees, servants, contractors, sub-contractors or agents as to the proper method of monitoring the elevator inside the premises to ensure that it was working properly.

[41] In my view, the allegations in the Statement of Claim raise the "mere possibility" that there could be coverage. Those allegations could lead to a finding that TE did not perform its scheduled maintenance properly, or at all.

[42] As such, the answer to Issue #2 is "Yes".

Issue #3 Is the moving defendants' request barred by reason of the *Limitations Act*?

[43] Pursuant to section 5(1)(a) of the *Limitations Act 2002*, S.O. 2002 C. 24 (the "*Limitations Act*") a claim is discovered on the earlier of the day upon which a person with the claim first knew, or a reasonable person with the abilities and in the circumstances of that person, first ought to have known,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of a person against whom the claim was made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

[44] Section 5(2) of the *Limitations Act* and the jurisprudence developed thereunder is clear that a person with a claim shall be presumed to have known of the matters referred to above on the day the act or omission upon which the claim is based took place unless the contrary is proved. This is a presumption that can be rebutted by a plaintiff with necessary evidence.

[45] As the Court of Appeal for Ontario held in *Miaskowski v. Persaud* 2015 ONSC 758 (C.A.), a plaintiff is presumed to have discovered the material facts upon which his/her claim against a defendant is based on the day the accident took place. There is an obligation upon a plaintiff to act with due diligence in determining if he/she has a claim. No limitation period will be tolled while a plaintiff sits idle and takes no steps to investigate any of the matters referred to in section 5(1)(a) of the Limitations Act.

[46] A plaintiff is not required to possess a comprehensive understanding of his/her potential claim in order for the limitation period to commence. As held by the Court of Appeal for Ontario in *Lawless v. Anderson* 2011 ONSC 102 (C.A.), "the question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant."

[47] Discoverability is thus a fact-based analysis. The discovery of a claim does not depend upon a plaintiff's knowledge that his/her claim is likely to succeed, or awareness of the totality of a defendant's wrongdoing. Knowledge of the material facts, and not the elements of a cause of action, will inform the Court's assessment of the commencement of a limitation period. A plaintiff must show that he/she was both not subjectively aware of the factors set out in section 5(1)(a) of the Limitations Act, and that a reasonable person "with the abilities and in the circumstances of the person with the claim" would also not have been aware of these factors. In other words, the plaintiff bears the onus of leading evidence to displace both the objective and subjective components of the tests set out in section 5(1)(a) of the Limitations Act.

[48] TE submits that the moving defendants' crossclaim is for breach of contract, and is thus statute barred pursuant to section 5 of the *Limitations Act*.

[49] As previously stated, there is no evidence before me that the policy, or its terms, were provided to the moving defendants until late August 2016, even though the terms of the Agreement required the insurance to be acceptable to the moving defendants, and mandated TE to deliver a copy of the policy prior to the commencement of the term of the Agreement.

[50] TE places great reliance upon the decision in *Brookstreet v. Economical* 2018 ONSC 80 (CanLII). In *Brookstreet*, an individual slipped and fell at a hotel property. The owner of the property had previously contracted with the defendant to provide snow and ice removal services, and pursuant to that service agreement, the defendant was to add the owner as an additional insured on the defendant's insurance policy. The defendant never added the owner as an additional insured. Within weeks of the slip and fall incident, the owner's adjuster advised the

defendant of the slip and fall incident, and requested that the defendant report the claim to its insurer. More than two years after the Statement of Claim was issued, the owner demanded indemnification and defence costs from the defendant. The defendant defended that request on the basis of a *Limitations Act* defence.

[51] In *Brookstreet*, the Court concluded that any reasonable party standing in the owner's shoes would have made an inquiry into its status as an additional insured under the policy as of the date that the owner's adjuster made inquiries with the defendant as to insurance coverage. The Court held that the owner's claim for breach of contract was discoverable as at the above date, and the owner's failure to make such inquires in a timely fashion resulted in the claim for indemnification and defence costs being statute-barred.

[52] Normally, claims for contributions and indemnity are governed by section 18 of the Limitations Act, which provides as follows:

> "Contribution and Indemnity
>
> 18 (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place. 2002, c. 24, Sched. B, s. 18 (1).
>
> Application
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise. 2002, c. 24, Schedule B, s. 18 (2)."

[53] In *Brookstreet*, the Court found that the owner's claim for contribution and indemnity was in fact a claim for a breach of contract, and section 18 of the *Limitations Act* did thus not apply. As such, the Court embarked upon a fact-based discoverability analysis rather than using the date of service of the Statement of Claim to start the two year limitation period.

[54] In my view, the decision of the Court of Appeal for Ontario in *Canaccord Corp v. Roscoe* 2013 ONCA 378 (CanLII) is dispositive of this argument. Section 18(2) confirms that claims for contribution and indemnity are governed by the provisions of section 18 "whether the right to contribution and indemnity arises in respect of a tort or otherwise." As stated by the Court of Appeal for Ontario:

> "The legal theory grounding the contribution and indemnity claim is not relevant for deciding whether s. 18 is triggered; the provision applies

> when there is a claim for contribution and indemnity, no matter what legal theory underlies the claim."

[55] The limitation period for the moving defendants' crossclaim for contribution and indemnity commenced when the Statement of Claim was served upon them. The underlying legal theory is irrelevant. While the moving defendants have argued that TE breached the Agreement by arranging for a policy with a $250,000.00 SIR, the nature of the moving defendants' crossclaim is still one for contribution and indemnity.

[56] Accordingly, the answer to Issue #3 is "No".

Conclusion

[57] The moving defendants rely upon the Court of Appeal for Ontario's decision in *Papapetrou v. 1054422 Ontario Limited* 2012 ONCA 506 (CanLII) in support of their request that damages be awarded against TE in an amount the moving defendants will be required to pay for a defence of the claims TE's insurer would have been obliged to defend on behalf of the moving defendants.

[58] TE did not breach a contractual obligation by failing to name the moving defendants as insures of the policy. Sunder was in fact a named insured. The position taken by TE was that insurance coverage under the policy did not "kick in" until the moving defendants first incurred $250,000.00 in defence costs and/or a judgment or settlement amount. Consistent with my disposition of issues #1 and #2, the duty to defend has been triggered and TE is responsible for payment of the moving defendants' deductible, namely their defence costs (and any judgment or settlement amount) up to $250,000.00.

[59] I therefore order TE to pay the moving defendants' damages in the amount of its defence costs incurred to date, and those defence costs going forward, up to a limit of $250,000.00 USD. At that point, TE's insurer will fund the balance of the defence costs, if any.

Costs

[60] At the conclusion of the hearing, the parties agreed that the successful party would be awarded its costs of the motion in the all-inclusive sum of $15,000.00. In accordance with that agreement, I order TE to pay the moving defendants' costs of the motion fixed in the amount of $15,000.00 all-inclusive and payable forthwith.

Diamond J.

Released: March 14, 2018

CITATION: Henry v Thyssenkrupp Elevator (Canada) Limited, 2018 ONSC 1659
COURT FILE NO.: CV-15-00543297
DATE: 20180314

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CORA HENRY

Plaintiff

– and –

THYSSENKRUPP ELEVATOR (CANADA) LIMITED, SUNDER & COMPANY INC., and GREENWIN INC.

Defendants

REASONS FOR DECISION

Diamond J.

Released: March 14, 2018