CITATION: AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc., 2008 ONCA 563
DATE: 20080718
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COURT OF APPEAL FOR ONTARIO

DOHERTY, MOLDAVER and CRONK JJ.A.

BETWEEN:

AXA INSURANCE (CANADA)

Applicant (Appellant)

and

ANI-WALL CONCRETE FORMING INC., LORNE PARK CONCRETE FORMING INC., N.T.I. INSURANCE BROKERS LIMITED, JACOB ASSIF, LILIANE ASSIF, EXCLUSIV HOMES, CASTLESIDE CONSTRUCTION INC., YORKWOOD HOMES (GREENBOROUGH) LIMITED, YORKWOOD HOMES BROOKSIDE LIMITED, TRIMARK HOMES LTD., IVY CAPITAL CORPORATION, K.J. BEAMISH CONSTRUCTION CO., ST. MARYS CEMENT INC. (CANADA), OXBOW CARBON AND MINERALS INC., THE TOLEDO-EDISON CO., FIRST ENERGY CORP., BAY SHORE POWER COMPANY

Respondents (Respondents)

Geoffrey D.E. Adair, Q.C. and Robert M. Ben for the appellant

Bruce A. Thomas, Q.C. and Thomas J. Donnelly for the respondent Ani-Wall Concrete Forming Inc.

Morris A. Chochla for the respondent N.T.I. Insurance Brokers Limited

Derek R. Freeman for the respondents Jacob Assif, Exclusiv Homes, Yorkwood Homes (Greenborough) Limited, and Yorkwood Homes Brookside Limited

Catherine P. Clark for the respondents Castleside Construction Inc. and Trimark Homes Ltd.

Glenn A. Smith for the respondent St. Marys Cement Inc. (Canada)

Anna Casemore for the respondent Oxbow Carbon and Minerals Inc.

D.J.T. Mungovan for the respondents Bay Shore Power Company and The Toledo-Edison Co.

No one appearing for the respondents Liliane Assif and First Energy Corp.

Heard: May 15, 2008

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice dated October 18, 2007, with reasons reported at 87 O.R. (3d) 764.

MOLDAVER J.A.:

BACKGROUND

[1] Ani-Wall Concrete Forming Inc. is a company that constructs concrete footings and concrete foundation walls for homes being built in the Greater Toronto Area. In the spring and early summer of 2002, Ani-Wall contracted with several home builders to supply the concrete and construct the footings and foundation walls for a number of homes under construction. Because Ani-Wall does not manufacture concrete, it retained the services of Dominion Concrete Group Limited to supply the concrete it needed to fulfill its contractual obligations. Dominion's task was to prepare the concrete to specifications and deliver it to pre-arranged job sites. At the sites, the concrete would be off-loaded and poured by Ani-Wall employees into forms constructed by Ani-Wall. Once the concrete hardened, the forms would be removed, leaving in place the concrete footings and foundation walls.

[2] The concrete supplied by Dominion for the projects turned out to be defective. This meant that the builders had to repair, and in some cases remove and replace, the footings and foundation walls constructed by Ani-Wall, at considerable cost. The builders were also required to repair any further damage caused by or resulting from the measures taken to correct Ani-Wall's defective work. The builders sued Ani-Wall for breach of contract and negligence, seeking damages for the consequential losses they had sustained.

[3] At all material times, Ani-Wall was insured under a commercial general liability insurance policy issued by AXA Insurance (Canada). That policy covered Ani-Wall for losses arising from "property damage". AXA acknowledged that the damage to the

houses constituted "property damage" within the meaning of the policy. Hence, coverage per se was not an issue.

[4] However, AXA maintained that the scope of its duty to indemnify Ani-Wall was limited by three exclusionary provisions in the policy: the "Your Product" exclusion, the "Your Work" exclusion and a "Rip and Tear" exclusion contained in an endorsement to the policy, referable specifically to concrete products.

[5] AXA asserted that by virtue of these three exclusionary provisions, it had no obligation to indemnify Ani-Wall for any damages asserted by the builders in the underlying actions, except for "the cost of repairing damage to other portions of the structure existing as at the time the concrete was found to be defective". This meant that, among other things, Ani-Wall would not be indemnified for the cost of repairing, removing or replacing the defective footings and foundation walls it had constructed.

[6] Ani-Wall disagreed with AXA's interpretation of the three exclusionary provisions, prompting AXA to apply to the Superior Court of Justice for a declaratory order defining and limiting the scope of its duty to indemnify Ani-Wall. The application was heard on October 1, 2007.

[7] On October 18, 2007, the application judge delivered extensive reasons in which he dismissed AXA's application, finding that "none of the three exclusions to the admitted coverage apply."

[8] AXA appeals from that judgment. Its position on appeal is narrower than the position it advanced before the application judge. In this court, AXA relies on the "Your Work" exclusion to relieve it from having to indemnify Ani-Wall for the cost of repairing, removing or replacing the defective footings and foundation walls. Failing that, AXA relies on a portion of the "Rip and Tear" exclusion to relieve it from having to indemnify Ani-Wall for the cost of removing defective footings and foundation walls, but not from the cost of repairing or replacing them. AXA no longer relies on the "Your Product" exclusion or the "restoration expenses" segment of the "Rip and Tear" exclusion in this court. I propose to tailor my analysis accordingly.

THE "YOUR WORK" EXCLUSION

[9] The "Your Work" exclusion in the policy provides as follows:

> This insurance does not apply to:
>
> j) "Property damage" to that part of "your work" arising out of it or any part of it where the cause of the damage is a defect in "your work".

> This exclusion only applies to:
>
> …
>
> (ii) that part of "your work" which is defective.
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

[10] Under the "Definitions" section of the policy, "Your Work" is a defined term, the material part of which reads as follows:

> 17. "Your work" means:
>
> (a) Work or operations performed by you or on your behalf; and
>
> (b) Materials, parts or equipment furnished in connection with such work or operations.

[11] The applicability of the "Your Work" exclusion turns on the status of Dominion. Specifically, the issue to be determined is whether Dominion's role was that of a subcontractor or a mere supplier.

[12] "Subcontractor" is not defined in the policy. AXA submits that because Dominion merely supplied ready-made concrete to Ani-Wall "on a series of contracts for the sale of goods", Dominion was not a subcontractor, but a mere supplier. According to AXA, a subcontractor is "one who performs for and takes from the prime contractor a specific part of the labour or material requirements of the original contract". The determinative test is "the substantiality and importance of [the] relationship with the prime contractor." See *MacEvoy Co. v. United States ex rel. Tomkins Co.*, 322 U.S. 102 (1944) and *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974). AXA acknowledges that these two authorities do not consider the word "subcontractor" in the insurance context, but rather as it is used in the *Miller Act*, 40 U.S.C.S. §270a *et seq.*, an Act designed to protect persons who provide labour or materials to public projects. AXA nonetheless urges a similar interpretation in the insurance context.

[13] AXA refers to three additional American authorities in which the word "subcontractor" *is* considered in the insurance context and is differentiated from a mere supplier for the purposes of "Your Work" exclusions. See *Wanzek Construction Inc. v. Employers Insurance of Wausau*, 679 N.W. 2d 322 (Minn. Sup. Ct. 2004); *Limbach Company LLC v. Zurich American Insurance Co.*, 396 F. 3d 358 (4th Cir. 2005); and

National Union Fire Insurance Co. v. Structural Systems Technology, Inc., 964 F. 2d 759 (8th Cir. 1992), aff'g 756 F. Supp. 1232 (E.D. Mo. 1991). According to these authorities, the following three criteria should be used to identify a subcontractor:

(1) The product supplied should be custom made according to specifications identified in the prime contract;

(2) The supplier should provide on-site installation or supervision services; and

(3) The product supplied should form an integral or substantial part of the prime contract.

I note that in each of the authorities mentioned, only two criteria were met, and then, to varying degrees.

[14] AXA submits that when the three criteria are applied to this case, Dominion fails to meet the requirements of a subcontractor. The concrete that it supplied to Ani-Wall consisted of "off the shelf" ready-mix that Ani-Wall could have purchased from any one of a dozen suppliers; it required no meaningful customization. Nor did Dominion provide on-site labour or installation services; it simply delivered the concrete to the job-site in one of its trucks. The fact that the concrete formed an integral part of Ani-Wall's final product could not, of itself, cause Dominion to be a subcontractor. According to AXA, regardless of the importance of the concrete to Ani-Wall, Dominion effectively provided a delivery service for ready-made product and was therefore a mere supplier.

[15] The application judge considered this issue in his reasons. He found as a fact that Dominion was a subcontractor and that Ani-Wall could therefore rely on the "subcontractor" exception to the "Your Work" exclusion. The application judge's analysis is brief and appears to rely on this court's decision in *Bridgewood Building Corp. v. Lombard General Insurance Co.* (2006), 79 O.R. (3d) 494, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 204, as a full answer:

> In my opinion, the subcontractor exemption applies to the factual circumstances of the case at bar. The reasoning in *Bridgewood Building Corp. v. Lombard General Insurance Co., supra*, discussed above, in which the subcontractor exemption was applied, applies to the case at bar; visualize: (a) there was insurance coverage for property damage caused by Ani-Wall's defective work; (b) although the Your Work Exclusion would exclude the insurance coverage, this exclusion does not apply where Ani-Wall's work (which by definition includes work performed on its behalf and materials furnished in connection with the work) was

> performed by a subcontractor; and (c) indeed, Ani-Wall's work was performed by a subcontractor; namely, Dominion Concrete. See also: *Limbach Company, LLC v. Zurich American Insurance Company*; *Wanzek Construction Inc. v. Employers Insurance of Wausau*. [Citations omitted.]

[16] *Bridgewood*, of course, is not a full answer. The application judge's reference to two of the American authorities cited by AXA on appeal indicates that he may have recognized this. Whether he did or not, it is worth clarifying that although the facts in *Bridgewood* bear many similarities to the facts of this case, including Dominion's involvement as the supplier of defective concrete, this court in *Bridgewood* did not address (nor was it asked to address) the issue of Dominion's status. Rather, the case was argued on the basis that the "Your Work" exclusion applied even if the defective work was attributable to a subcontractor employed by the insured. By contrast, this case raises four-square the issue of Dominion's status.

[17] With that in mind, I return to AXA's submission that this court should transpose into our law the three criteria identified in the American authorities, cited above at para. 13, by which subcontractors are distinguished from mere suppliers. With respect, I would not do so. I come to this conclusion not because I reject the criteria outright or find them unhelpful in differentiating a subcontractor from a mere supplier for insurance purposes, but rather because I am reluctant to carve them in stone. Instead, I prefer to retain a degree of flexibility in the realm of insurance coverage, especially in cases like this, where coverage is acknowledged but the insurer seeks to rely on exclusionary provisions to limit its scope. As Ani-Wall points out, if insurers want to lay down hard and fast criteria, they can do so by defining the word "subcontractor" to their choosing. Insured persons who pay substantial premiums would then know where they stand and would not be left guessing about the extent of the coverage available to them. To date, for reasons unknown, AXA has chosen not to define the word "subcontractor" in the policy. Unless and until it does so, I believe the word should be construed broadly, lest it become a trap for the unwary.

[18] In this case, the contracts between Ani-Wall and the builders specified that Ani-Wall would supply the concrete needed to construct the footings and foundation walls. Under the heading "General Terms and Conditions of Contract", clauses A and B provide as follows:

> A/ We *supply* and place 15 MPa concrete in footings as per contract allowance.
>
> B/ We form walls at height and thickness indicated, *supply* and place 15 MPa concrete. [Emphasis added.]

Elsewhere in the contracts with the builders, Ani-Wall reserves to itself "the right at its discretion to sublet any portion of this contract to a reputable contractor."

[19] The significance of Ani-Wall contracting to supply the concrete is explained by Ani-Wall's senior manager, Mr. Steve Indio. In an affidavit sworn by him on September 20, 2007, Mr. Indio states that in many centres outside the Greater Toronto Area, ready-mix concrete is sold directly to builders. By contrast, Ani-Wall has taken on that responsibility in its contract with the builders, and it "pay[s] the supplier" and "include[s] the cost of the ready-mix in [its] bill."

[20] While I acknowledge that this case is close to the line, given my view that the word "subcontractor" should be construed broadly and that any ambiguity in its meaning must, as a matter of law, be resolved in favour of Ani-Wall, I think it can reasonably be said that Ani-Wall subcontracted to Dominion its contractual obligation to *supply* concrete to the builders. In doing so, it triggered the "subcontractor" exception to the "Your Work" exclusion. At the very least, AXA has not met its burden of showing otherwise. For that reason, it follows that the "Your Work" exclusion is ousted by the "subcontractor" exception.

[21] However, even if I were to apply the American criteria, my conclusion would remain the same.

[22] Under the terms of its contracts with the builders, Ani-Wall was required to supply concrete of a particular strength and viscosity. While I accept that the concrete ordered by Ani-Wall is readily available and relatively easy to make, a degree of skill is nonetheless required to ensure that it is manufactured to specification and arrives that way at the job site. If, upon arrival, the concrete does not appear to meet the required viscosity, Dominion's driver is required to use his judgment and add the right amount of water to correct the deficiency. This information, though not contained in the original record, has recently been submitted to this court with the consent of the parties in a letter dated June 11, 2008. The additional facts upon which the parties have agreed are reproduced below:

> The Ontario Building Code specifies the minimum strength (15 MPa) and 'slump' for concrete for single-family residences. 'Slump' refers to the viscosity of the concrete and is measured in inches. A 5" slump is, for example, drier than a 6" slump (the maximum under the O.B.C.). A forming contractor can order different strengths and slumps as is desired for the particular job. Ani-Wall, for example, would sometimes order a 3" or a 5" slump.

> If the concrete ordered appeared too dry at the site, Ani-Wall would insist that the driver provide concrete of the proper slump as ordered. It was then up to the driver to add such water as he, in his judgment, deemed appropriate to produce the desired slump.

[23] Measured against the first two criteria in the American authorities for identifying a subcontractor, manufacturing the concrete to specification and possible driver input would likely not be enough to categorize Dominion as a subcontractor. But when those factors are combined with the materiality of the concrete to Ani-Wall's contracts with the builders and the integral part it plays in Ani-Wall's final product, I believe that Dominion meets the test. Manifestly, concrete is essential to the work performed by Ani-Wall. If it does not comprise the only component of Ani-Wall's final product, it certainly comprises the principal one.

[24] Viewed as a whole, I am satisfied that Dominion's involvement constituted a substantial portion of the contracts between Ani-Wall and the builders. Dominion was required to manufacture the concrete to specification and to ensure that it was of the proper viscosity when it arrived on site. Dominion was also responsible for furnishing all of the concrete needed by Ani-Wall to construct its final product. For its part, Ani-Wall took up the responsibility of supplying the concrete to the builders (unlike the situation in other parts of Ontario) and it paid Dominion and included the cost of the concrete in its bill to the builders.

[25] For these additional reasons, I am satisfied that Dominion was properly characterized as a subcontractor and that AXA is accordingly barred from relying on the "Your Work" exclusion.

THE "RIP AND TEAR" EXCLUSION

[26] In the alternative, AXA relies on a portion of the "Rip and Tear" exclusion found in an endorsement to the policy. It reads as follows:

> This insurance does not apply to any liability for property damage for ripping and tearing expenses …

"Ripping and Tearing expenses" is a defined term in the endorsement. It means:

> [T]he actual expenses incident to the intentional destruction and removal of concrete products which are found to be defective.

[27] "Property Damage" is also a defined term under the "Definitions" section of the policy. It means:

> (a) Physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) Loss of use of tangible property that is not physically injured.
>
> All such loss of use shall be deemed to occur at the time the "occurrence" that caused it.

[28] Ani-Wall submits that when the definitions of "Property Damage" and "Ripping Tearing expenses" are inserted into the "Rip and Tear" exclusion, the clause becomes incomprehensible and yields the following result:

> This insurance does not apply to any liability for physical injury to tangible property, including all resulting loss of use of that property, or loss of use of tangible property that is not physically injured for the actual expenses incident to the intentional destruction and removal of concrete products which are found to be defective.

[29] AXA acknowledges that the "Rip and Tear" clause is badly drafted and that read literally, it is difficult to comprehend. AXA nonetheless urges a less-literal interpretation and submits that when the clause is read purposefully, its meaning is plain and obvious – AXA will not indemnify Ani-Wall for the cost of tearing down and removing the defective footings and foundation walls.

[30] AXA's proposed interpretation is not illogical. It presumably reflects the limitation on coverage that AXA sought to achieve. But AXA cannot get out from under the wording it chose to use, at least not without having this court rewrite the clause. That is not our function.

[31] I agree with Ani-Wall that in its present form, the clause is incomprehensible, a view that was shared by the application judge. As counsel for AXA fairly concedes, that is fatal to its applicability. AXA, of course, is at liberty to rewrite the clause in a manner that makes sense. It cannot, however, look to this court to correct the problem.

[32] For these reasons, I am satisfied that AXA cannot rely on the "Rip and Tear" exclusion to limit coverage.

CONCLUSION

[33] In the result, I would dismiss the appeal. If the parties cannot agree on costs, they may file brief written submissions with the court not exceeding three pages double spaced within twenty days of the release date of this decision.

RELEASED:

"DD"
"JUL 18 2008"

"M.J. Moldaver J.A."
"I agree Doherty J.A."
"I agree E.A. Cronk J.A."