COURT OF APPEAL FOR ONTARIO

CITATION: Papapetrou v. 1054422 Ontario Limited, 2012 ONCA 506
DATE: 20120723
DOCKET: C54259

Laskin, Simmons and Cronk JJ.A.

BETWEEN

Maria Papapetrou

Plaintiff

and

1054422 Ontario Limited, The Cora Group Inc. and Collingwood Landscape Inc.

Defendants (Respondents/Appellant)

Andrew A. Evangelista and David W. Powrie, for the appellant

Nancy Crespo, for the respondents

Heard: April 10, 2012

On appeal from the order of Justice Jane Milanetti of the Superior Court of Justice, dated August 8, 2011, with reasons reported at 2011 ONSC 4731.

Simmons J.A.:

1. INTRODUCTION

[1] Maria Papapetrou claims she was injured when she slipped and fell on black ice that had accumulated on stairs of The Galleria, a building owned by 1054422 Ontario Limited and managed by The Cora Group Inc. (collectively, "The Cora Group").

[2] Collingwood Landscape Inc. contracted with The Cora Group to provide winter maintenance and snow removal services for The Galleria. In its service contract, Collingwood promised to name The Cora Group as an additional insured on Collingwood's commercial general liability insurance policy; however, Collingwood breached its obligation to do so.

[3] On a motion for summary judgment, Milanetti J. ordered Collingwood to assume The Cora Group's defence in Ms. Papapetrou's personal injury action and to indemnify The Cora Group for any damages awarded in the action.

[4] In making her decision, the motion judge found that "the true nature of [Ms. Papapetrou'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.

[5] On appeal, The Cora Group concedes that the order to indemnify was premature and should therefore be set aside.

[6] Accordingly, the main issue on appeal is whether the motion judge erred in ordering Collingwood to assume the defence of The Cora Group.

[7] For the reasons that follow, I would allow the appeal and set aside the motion judge's order. I would substitute an order requiring that Collingwood pay for The Cora Group's defence of the third party's action, save for any costs

incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract.

2. BACKGROUND

[8] Collingwood and The Cora Group are defendants in an action brought by Ms. Papapetrou in which she claims damages for personal injuries resulting from a slip and fall on black ice that had accumulated on stairs at the entrance of The Galleria.

[9] In her statement of claim, Ms. Papapetrou makes several allegations of negligence against Collingwood and The Cora Group, either individually or collectively. Her allegations include:

- failing to prevent the formation and accumulation of ice;
- failing to properly inspect or maintain the steps;
- failing to remove the ice;
- failing to warn of the danger created by the ice;
- failing to have a regular system of inspection and maintenance;
- failing to ensure that the defendants' employees, agents and servants carried out their responsibilities to keep the premises safe; and
- failing to ensure that the defendants' employees, agents and servants had the requisite training, skill and knowledge to inspect and maintain the premises.

[10] In addition, 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. The text of these provisions is set out in Appendix 'A'.

[11] Prior to the date on which Ms. Papapetrou says she was injured, Collingwood entered into a service contract with The Cora Group. Under the terms of the contract, Collingwood agreed to provide winter maintenance, and snow removal services at The Galleria.

[12] As well, under the terms of its service contract, Collingwood agreed to indemnify "the Owner" and its agents "against all claims, losses, liabilities, demands, suits and expenses … arising out of the performance or non-performance of the contract." The relevant parts of the indemnity provision read as follows:

> *The Contractor assumes sole responsibility for all persons engaged or employed in respect of the Work and shall take all reasonable and necessary precautions to protect persons and property from injury or damage.* The Owner shall not be responsible in any way for any injury to or the death of the Contractor's employees … or to any other person … in any way resulting from any act or omission of the Contractor…. *The Contractor shall indemnify and save harmless the Owner … against all claims, losses, liabilities, demands, suits and expenses* from whatever source, nature and kind in any manner *based upon, incidental to or arising out of the performance or non-performance of the contract by the Contractor*…. [Emphasis added.]

[13] Further, Collingwood agreed to obtain comprehensive general liability insurance "covering the liability of the Contract [sic], his employees, agents and representatives for bodily injury … for a minimum of $2,000,000" and to "include the Owners as an additional insured" on the policy.

[14] Contrary to its obligations under the service contract, Collingwood obtained an insurance policy covering a maximum of $1,000,000, instead of a minimum of $2,000,000. In addition, Collingwood failed to name The Cora Group as an additional insured.

[15] Following examinations for discovery in the action, The Cora Group brought a motion for summary judgment asking: (i) that Ms. Papapetrou's action against them be dismissed; or, (ii) in the alternative, that Collingwood assume The Cora Group's defence of Ms. Papapetrou's claims against them. In support of the motion, The Cora Group relied on the insurance obligation and the indemnity provisions in the service contract.

[16] Prior to the return of the motion, The Cora Group advised all parties that they would not be pursuing their request that Ms. Papapetrou's claims against them be dismissed. Ms. Papapetrou did not attend the motion.

3. THE MOTION JUDGE'S DECISION

[17] As I have said, the motion judge ordered that Collingwood both assume the defence of the action on behalf of The Cora Group and indemnify The Cora Group with respect to any damages awarded in the action.

[18] In making her decision, the motion judge observed that Collingwood claimed that some of Ms. Papapetrou's allegations against The Cora Group were "for a breach of their responsibilities as occupiers apart from allegations relative

to the icy stairs". She noted that, on this basis, Collingwood contested its obligation to defend and/or indemnify The Cora Group in relation to all the allegations in the statement of claim.

[19] The motion judge agreed that some of the allegations of negligence "fall within the general occupiers' liability basket"; however, she concluded that such allegations were still linked to "the essential negligence alleged – the defendant's failure to address icy conditions on the pedestrian stairway leading into the building."

[20] The motion judge also observed that the service contract required Collingwood to "assume sole responsibility … to protect persons and property from injury and damage" and also to "indemnify and save harmless the owner … against all claims … arising out of the performance or non-performance of the contract".

[21] Relying on *RioCan Real Estate Investment Trust v. Lombard General Insurance Co.* (2008), 91 O.R. (3d) 63 (S.C.), the motion judge found that the true nature of Ms. Papapetrou's claim is that the defendants were negligent in failing to maintain an ice-free pedestrian stairway and that, as a result, Ms. Papapetrou fell and sustained injuries.

[22] Having regard to the nature of the claim and the terms of the service contract, the motion judge concluded that Collingwood is "obligated to defend

and indemnify the property owners." Moreover, the motion judge stated that Collingwood "should not escape responsibility to defend/indemnify merely because [it] failed to meet [its] contractual responsibility [to name The Cora Group as an additional insured in its comprehensive general insurance policy]."

4. DISCUSSION

[23] Collingwood raises two main issues on appeal. First, it argues that the motion judge erred in ordering Collingwood to indemnify The Cora Group at this stage of the action. Second, the motion judge erred in ordering that Collingwood assume the defence of The Cora Group in the absence of any contractual duty to defend.

(i) The Order that Collingwood Indemnify The Cora Group

[24] As I have said, The Cora Group concedes that the order that Collingwood indemnify them with respect to any damages awarded in the action is premature.

[25] I agree with this concession. No evidence concerning the issues of liability or damages was led on the motion.

[26] Moreover, contrary to the motion judge's finding, the service contract does not provide that Collingwood will "assume sole responsibility … to protect persons and property from injury and damage." Rather, it provides that Collingwood "assumes sole responsibility for all persons engaged or employed in

respect of the Work" and that it shall "take all reasonable and necessary precautions to protect persons and property from injury and damage."

[27] In addition, Collingwood's obligation to indemnify The Cora Group under the terms of the service contract is not absolute. It is limited to claims "based upon, incidental to or arising out of [Collingwood's] performance or non-performance of the [service] contract".

[28] To make an order that Collingwood must indemnify The Cora Group, a court will first have to determine whether Collingwood's contractual obligation to indemnify has been triggered. As no evidence concerning the issues of liability or damages was led on the motion, this cannot yet be determined. Accordingly, I would set aside the motion judge's order to indemnify.

(ii) The Order that Collingwood assume The Cora Group's Defence

[29] Collingwood argues that the motion judge erred in ordering that it assume the defence of The Cora Group. Specifically, Collingwood notes that, although the service contract includes an indemnity provision, the indemnity provision does not say that Collingwood must defend actions brought against The Cora Group. Further, Collingwood relies on the fact that The Cora Group did not object to the form of insurance Collingwood obtained – namely, coverage which failed to list The Cora Group as an additional insured.

[30] Finally, even if a duty to defend arises from the insurance obligation in the service contract, Collingwood says that the motion judge erred in ordering Collingwood to assume the defence of the entire action against The Cora Group. At most, any defence obligation should extend only to claims arising out of Collingwood's performance or non-performance of the service contract.

(a) Collingwood's Duty to Defend

[31] I agree that the motion judge erred in ordering Collingwood to assume The Cora Group's defence.

[32] In my view, however, Collingwood is liable in damages to The Cora Group for the cost of The Cora Group's defence of the Papapetrou action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract.

[33] On appeal, The Cora Group did not argue that Collingwood's obligation to defend arises out of the indemnification provision in the service contract. Rather, it relied on Collingwood's failure to satisfy its contractual obligation to have The Cora Group named as an additional insured in its comprehensive general insurance policy.

[34] However, Collingwood's breach of this contractual obligation does not create a duty to defend; rather, it gives rise to a remedy in damages.

[35] The fact that The Cora Group did not object to the form of insurance Collingwood obtained is irrelevant. Collingwood's contractual obligation remained. Collingwood is liable to The Cora Group in damages for failing to satisfy its duty to have The Cora Group named as an additional insured.

[36] The quantum of such damages is the amount The Cora Group will be required to pay for a defence of the claims Collingwood's insurer would have been obliged to defend on The Cora Group's behalf had Collingwood fulfilled its contractual obligations.

[37] Ordinarily, the scope of this obligation would be determined by the terms of the insurance contract (in particular, the additional insured endorsement). The difficulty in this case is that the terms of coverage for The Cora Group as an additional insured were not included in the insurance contract. Accordingly, the terms of the intended insurance coverage must be discerned from the insurance obligation and the indemnity provision in the service contract.

[38] As noted above, Collingwood was obliged to obtain comprehensive general liability insurance to insure against bodily injury. However, the scope of Collingwood's obligation to indemnify under the service contract was limited to "claims … based upon, incidental to or arising out of the performance or non-performance of the contract by the Contractor".

[39] Accordingly, in my view, the quantum of damages is the amount The Cora Group must pay to defend claims for bodily injury arising out of the manner in which Collingwood performed or failed to perform the service contract.

[40] As I have said, in my opinion, these costs will include all costs of The Cora Group's defence of the Papapetrou action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract

[41] I reach this conclusion for two reasons. The first is that an insurer's obligation to defend is limited to defending claims that – if proven true – would fall within coverage under the policy: *Non-Marine Underwriters, Lloyd's of London v. Scalera,* 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 74-76 and *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-12. On this issue, McLachlin J.'s comments in *Nichols*, at p. 812, are worth noting:

> *Requiring the insurer to defend claims which cannot fall within the policy puts the insurer in the position of having to defend claims which it is in its interest should succeed.* The respondent suggested that this potential conflict could be avoided if the insured was able to retain his own lawyer, with the cost to be borne by the insurer. However, this would not end the difficulty. An insurer would be understandably reluctant to sign a "blank cheque", and cover whatever costs are borne by whatever lawyer is retained, no matter how expensive. Yet the insurer could not challenge any of these expenses without raising precisely the same conflict. *For this reason, the practice is for the insurer to defend only those claims which potentially fall under the policy,*

> *while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside its terms.* [Emphasis added.]

[42] As Collingwood's obligation to pay for The Cora Group's defence is limited to the cost of defending claims that Collingwood's insurer would have been obliged to defend, Collingwood's obligation does not extend to paying for the cost of defending independent claims against The Cora Group that Collingwood's insurer would not have been required to defend on The Cora Group's behalf.

[43] In this regard, 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: *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 50, [2001] 2 S.C.R. 699, at paras. 28-35; *Scalera*, at paras. 74 and 79-82; and *Nichols*, at pp. 810-11.

[45] This assessment must be made substantially on the facts as stated in the pleadings themselves; however, extrinsic evidence sometimes may be

considered, including when such evidence has been referred to in the pleadings: *Monenco*, at paras. 36-38.

[46] In this regard, it is important to bear in mind that a pleading may contain both covered and uncovered claims. As Doherty J.A. stated in *obiter* in *Unger (Litigation Guardian of) v. Unger* (2003), 68 O.R. (3d) 257 (C.A.), at para. 10: "If there is a possibility that any of the claims are captured by [an insurer's] coverage, [that insurer] has a duty to defend *those* claims" (emphasis added). See also *Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada* (2009), 97 O.R. (3d) 233 (S.C.).

[47] However, 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.

[48] In this case, the coverage would be limited to the matters relating to Collingwood's performance or non-performance of the contract.

[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 (which may include claims under the *Occupiers' Liability Act* with regard to obligations which have been delegated to Collingwood); (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*, I disagree with that decision.

[51] The second reason for my conclusion about the extent of Collingwood's liability to pay for The Cora Group's defence is that where an action includes both covered and uncovered claims, an insurer may nonetheless be obliged by the terms of the policy to pay all costs of defending the action save for those costs incurred exclusively to defend uncovered claims: *Hanis v. Teevan*, 2008 ONCA 678, 92 O.R. (3d) 594, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 504.[1]

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[1] In *Hanis v. Teevan*, Doherty J.A. explained the process by which defence costs are to be apportioned when an action raises both covered and uncovered claims. In *Hanis*, the plaintiff sued the insured for wrongful dismissal and malicious prosecution. The insurance policy provided coverage for malicious prosecution. The insurer failed to defend. The insured launched third party proceedings against the insurer which were stayed pending the trial of the main action. At the trial of the main action, the plaintiff succeeded in its claim for wrongful dismissal.

Following the trial of the main action, the trial judge had to determine what part of the costs of defending the main action the insurer was required to pay. Costs incurred exclusively to defend the wrongful dismissal action were clearly the insured's responsibility. Accordingly, the main issue was how to apportion costs that were attributable to defending both the wrongful dismissal claim and the malicious prosecution claim.

On appeal, Doherty J.A., writing for the court, determined that where costs are incurred in the defence of both covered and non-covered claims the extent of the insurer's obligation to pay should be guided by the precise language of the insurance contract, and not by any principle of general application: para. 22.

[52] In this case, as Collingwood failed to satisfy its insurance obligation under the service contract, it is unable to demonstrate that it should escape responsibility for paying for The Cora Group's costs of defending the action save for those costs incurred exclusively to defend uncovered claims.

(b) The Need for Separate Counsel

[53] Collingwood also argued that its insurer is, in effect, already defending The Cora Group by defending Collingwood against the claims arising from its performance of the service contract. Collingwood argued that this is a sufficient answer to The Cora Group's claim for a defence.

[54] I disagree. In this case, it would not be appropriate for Collingwood to assume The Cora Group's defence, nor is it sufficient for Collingwood to simply defend the primary allegations of negligence for which both Collingwood and The Cora Group may be found liable; rather, the proper remedy is in damages, and Collingwood must pay The Cora Group a quantum of damages equivalent to the cost of The Cora Group's defence in the manner I have explained.

The language of the policy at issue in *Hanis* required that the insurer "defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against be Insured on account of [injury or damage falling under the policy coverage]". Doherty J.A, at para. 32, observed that:

> On a plain reading of the relevant part of the policy, [the insurer] was responsible for all costs associated with the defence of the [covered] claim. There is nothing in the language of the policy that qualifies that obligation or suggests that it does not apply to so called 'mixed claims'.... If the costs were reasonably associated with the defence of the [covered] claim, nothing in the policy exempts [the insurer] from paying those costs simply because they also assisted ... in the defence of uncovered claims.

[55] In any event, where, as here, distinct claims are made against a service provider and a property owner, the ability of a single counsel to defend both claims is hampered by an inherent conflict. In this case, the conflict is accentuated by the fact that both Collingwood and The Cora Group have cross-claimed against each other. The service provider and the property owner each have an interest in blaming the other for the circumstances giving rise to the claim.

[56] An insurer has a right to control its own defence (and appoint its own defence counsel), which, though not absolute, can only be shifted where there is a reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer: see *Brockton (Municipality) v. Frank Cowan Co.* (2002), 57 O.R. (3d) 447 (C.A.), at paras. 31-32 and 43; also see *Appin Realty Corp. v. Economical Mutual Insurance Co.*, 2008 ONCA 95, 89 O.R. (3d) 654, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 145. However, the present case is not governed by this rule.

[57] The Cora Group is not, in fact, insured under Collingwood's policy and the duty to defend does not flow from the policy, itself. Rather, Collingwood is simply being ordered to pay damages for the breach of a contractual obligation under the service contract. Thus, in considering whether The Cora Group is entitled to choose their own counsel for whom Collingwood must pay, it is unnecessary to

consider whether the potential conflict in this case meets the standard set in *Brockton*.

[58] Nevertheless, the potential for conflict between Collingwood and The Cora Group's interests is clear. In fact, it likely meets the *Brockton* standard: see *Brockton*, at para. 43. This conflict is best dealt with by The Cora Group continuing to retain independent counsel in respect of all allegations in the action. The obligation to pay (at least, in part,) for two defence counsel is a necessary consequence of Collingwood's breach of its contractual obligation.

5. DISPOSITION

[59] Based on the foregoing reasons, I would allow the appeal and set aside the motion judge's order. I would substitute an order requiring that Collingwood pay for The Cora Group's defence of the third party's action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract.

[60] As success on the appeal was divided, there will be no order as to costs of the appeal.

[61] I understand that costs below have not yet been dealt with because of the appeal. If the parties are unable to resolve the issue of costs below themselves, I would remit the issue to the motion judge to consider in the light of, what is now, the divided success on the motion.

Signed: “J. M. Simmons J.A.”
“I agree J. I. Laskin J.A.”
“I agree E. A. Cronk J.A.”

Released: “J.S.” July 23, 2012

Appendix ‘A’

Sections 3 and 4 of the *Occupier’s Liability Act,* R.S.O. 1990, c. O.2, provide as follows:

> 3.--(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.
>
> (3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.
>
> 4.--(1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.