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Case Name:

Walker v. Sovereign General Insurance Co.

Between
The Sovereign General Insurance Company, Defendant (Appellant), and
Marie Walker and Albert Walker, Plaintiffs (Respondents)

[2011] O.J. No. 4106

2011 ONCA 597

283 O.A.C. 192
107 O.R. (3d) 225
100 C.C.L.I. (4th) 1
[2011] I.L.R. I-5199
2011 CarswellOnt 9478

Docket: C52325

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., J.I. Laskin and J.C. MacPherson JJ.A.

Heard: March 30, 2011.
Judgment: September 19, 2011.

(50 paras.)

Insurance law — Actions — By third parties against insurer — Practice and procedure — Appeals and judicial review — Appeal by insurer from summary judgment of plaintiffs' claim and dismissal of motion to dismiss claim dismissed — Plaintiff injured when she slipped in parking lot, and commenced claim against property owner and maintenance company — Maintenance company, which had gone bankrupt, did not defend claim or advise insurer, but property owner did advise insurer — After plaintiffs settled claim with property owner, they commenced claim against insurer — Motion judge did not err in holding property owner's notice to insurer was notice in accordance with policy conditions for liability coverage or that plaintiffs were entitled to relief from forfeiture.

Insurance law — Liability insurance — Appeal by insurer from summary judgment of plaintiffs' claim and dismissal of motion to dismiss claim dismissed — Plaintiff injured when she slipped in parking lot, and commenced claim against property owner and maintenance company — Maintenance company, which had gone bankrupt, did not defend claim or advise insurer, but property owner did advise insurer — After plaintiffs settled claim with property owner, they commenced claim against insurer — Motion judge did not err in holding property owner's notice to insurer was notice in accordance with policy conditions for liability coverage or that plaintiffs were entitled to relief from forfeiture.

Appeal by the insurer from summary judgment of the plaintiffs' claim and dismissal of the insurer's motion to dismiss the claim. The female plaintiff was injured when she slipped and fell at a retail complex maintained by Sun Shelters Industries Inc. As Sun Shelters had gone bankrupt, it did not defend the action and did not notify its insurer. However, the property owner notified the

insurer of the plaintiff's claim and forwarded all the pleadings. The insurer, however, declined to participate. The plaintiffs settled with the property owner and then commenced an action against Sun Shelter's insurer under section 132 of the Insurance Act, seeking recovery of their judgment against the insurer. The plaintiffs moved for summary judgment on their claim and the insurer brought a cross-motion to dismiss the action on the basis that it had not received notice of the claim against Sun Shelters in accordance with the conditions of the insurance policy. The motions judge dismissed the insurer's cross-motion and granted the plaintiffs summary judgment, finding that although Sun Shelters had not given notice to the insurer, the insurer had notice of the claim from the property owner and that this notice complied with the policy conditions. Alternatively, the motions judge held that the plaintiffs were entitled to relief from forfeiture. The insurer appealed on the basis that the motion judge erred in holding that the notice provision applied to the claim, in finding that the notice given by the property owner was effective notice for coverage, and that he erred in granting relief from forfeiture.

HELD: Appeal dismissed. The motion judge did not err in holding that the property owner's notice to the insurer was notice in accordance with the policy conditions for liability coverage as the policy conditions provided that notice could be given on behalf of the insured by a person with sufficient proximity to the claim. The property owner was such a person. The motion judge also did not err in holding that, in the alternative, the plaintiffs were entitled to relief from forfeiture as the insurer had notice of the claim, even if such notice did not perfectly comply with the conditions of the policy. There was no bad faith on the part of any party.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I.8, s. 129, s. 132, s. 132(1)

Appeal From:

On appeal from the order of Justice C. William Hourigan of the Superior Court of Justice dated June 7, 2010.

Counsel:

William S. Chalmers, for the appellant.

Stephen B. Abraham and Michael G. Emery, for the respondents.

The judgment of the Court was delivered by

J.I. LASKIN J.A.:—

A. INTRODUCTION

1 The respondents, Marie and Albert Walker, obtained a judgment against Sun Shelters Industries Inc., a property maintenance company, for damages resulting from a slip and fall accident in a parking lot. However, Sun Shelters went bankrupt and could not pay the judgment. The Walkers, therefore, brought an action under s. 132 of the *Insurance Act,* R.S.O. 1990, c. I.8, seeking recovery of their judgment against Sun Shelters' insurer, the appellant, the Sovereign General Insurance Company.

2 The Walkers moved for summary judgment on their claim and Sovereign brought a cross-motion to dismiss the action. The main issue on the motions was whether Sovereign had received notice of the claim against Sun Shelters in accordance with the conditions of the insurance policy.

3 The motion judge, Hourigan J., held that although Sun Shelters itself had not given Sovereign notice of the claim, Sovereign had received notice from the owner of the parking lot, a co-defendant in the original action, and this notice complied with the policy conditions. Alternatively, the motion judge held that the Walkers were entitled to relief from forfeiture under s. 129 of the *Insurance Act*. Accordingly, he granted the Walkers' motion and dismissed Sovereign's cross-motion.

4 Sovereign appeals on three grounds:

(1) The motion judge erred in holding that the notice provision in the statutory conditions of the insurance policy applied to the Walkers' claim;

(2) The motion judge erred in finding that the notice given by the property owner was effective notice under the policy conditions for liability coverage; and

(3) The motion judge erred in granting relief from forfeiture because such relief is available only for imperfect compliance with a policy condition, and not for what occurred here - total non-compliance.

B. BACKGROUND

(a) The accident

5 On January 30, 1999, the Walkers went to a movie with their grandchildren at the Power Centre in Burlington, Ontario. On the way back to their car after the movie was over, Marie Walker slipped on some ice in the parking lot and fell. She sustained permanent injuries, including a serious head injury.

(b) The first action

6 The Walkers sued Emshih Developments Inc., the owner of the Power Centre, and Sun Shelters, the maintenance company retained to keep the property clear of ice and snow. Emshih cross-claimed against Sun Shelters for contribution and indemnity.

7 As Sun Shelters had gone bankrupt, it did not defend the action. However, Emshih discovered that Sun Shelters was insured by Sovereign. Emshih's counsel notified Sovereign of the Walkers' claim, forwarded all the pleadings to it, and even arranged for a lengthy adjournment of the trial to permit Sovereign to participate in the action. After taking legal advice, Sovereign declined to participate.

8 The Walkers settled with Emshih. They then obtained a judgment against Sun Shelters for $100,000 in general damages and related relief, [2006] O.J. No. 2023. In her reasons, Mossip J. found that "the parking lot was completely treacherous and unfit for use by pedestrians ... that day," that "Mrs. Walker's fall was horrific," and that "no amount of care by Mrs. Walker could likely have prevented her fall."

(c) The second action

9 The Walkers then brought the action against Sovereign which is the subject of this appeal. They claimed damages of $145,793.95,[1] under s. 132 of the *Insurance Act*, which allows a third-party to recover against an insurer where its insured has failed to satisfy a judgment for damages. Alternatively they relied on s. 129 of the Act, which gives a court jurisdiction to grant relief from forfeiture, where there has been imperfect compliance with a condition in an insurance policy.

(d) The motion judge's decision

10 In granting summary judgment to the Walkers, the motion judge held that because Emshih had cross-claimed against Sun Shelters, it may have been entitled to part of the insurance proceeds and therefore it had standing to give notice of the claim. The motion judge held that under either of the notice provisions in the policy, Emshih's notice was effective notice to Sovereign. Accordingly, the Walkers were entitled to judgment under s. 132 of the *Insurance Act*.

11 Alternatively, the motion judge held that the Walkers were entitled to relief from forfeiture under s. 129 of the Act. He found that "to the extent that there has been a breach of a condition, such breach amounts only to imperfect compliance with the policy." Further, he found no evidence of bad faith on the part of Sun Shelters, the Walkers or Emshih. And finally, he found "that Sovereign has suffered no prejudice." Therefore, forfeiture would be inequitable.

C. ANALYSIS

(a) Section 132 of the *Insurance Act*

12 Section 132(1) provides that a person who has a judgment for damages against an insured person, which has not been satisfied, may recover from that person's insurer the amount of the judgment up to the face value of the policy:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

13 The concluding words of s. 132(1) - "subject to the same equities as the insurer would have if the judgment had been satisfied" - are important. Persons, such as the Walkers, seeking recovery under s. 132 can stand in no better position than the insured. So, if the insurer, Sovereign, had a defence against its insured, Sun Shelters, that defence would apply to the Walkers' claim: see *W.R. Scott Equipment v. Guardian Insurance Co. of Canada* (1998), 157 D.L.R. (4th) 227 (Alta. C.A.), at paras. 40-41.

14 Sovereign contends that Sun Shelters breached the statutory conditions of the policy requiring it to give notice and co-operate in the defence. Compliance with the policy condition to give timely notice of a claim was a condition precedent to Sovereign's liability to Sun Shelters. Because of the non-compliance, Sovereign was not required to defend the original action or indemnify Sun Shelters. It is equally not required to satisfy the Walkers' claim under s. 132.

15 The terms of the policy provide the necessary context to Sovereign's argument.

(b) The insurance policy

16 Sovereign insured Sun Shelters under a commercial insurance policy. Sovereign admits that the policy covered the Walkers' claim. The policy provides the following coverages:

A. fire and extended coverage;

B. multi-peril;

C. burglary and robbery; and

D. comprehensive general liability

17 In other words, as counsel for Sovereign points out, the policy provides all the coverages that a business like Sun Shelters would need: property, theft and comprehensive general liability. The policy limit for liability for bodily injury was $2 million.

18 The policy contains two sets of conditions; a set of statutory conditions and a set of policy conditions. The statutory conditions begin with the following statement: "The Statutory Conditions apply to the peril of fire and as modified or supplemented by riders or endorsements attached apply as Policy Conditions to all other perils insured by this policy."

19 Section 8 of the statutory conditions deals with who may give notice of a loss:

> Notice of loss may be given, and proof of loss may be made by the agent of the insured named in the contract in case of absence or inability of the insured to give the notice or make the proof, and absence or inability being satisfactorily accounted for, or in the like case, or if the insured refuses to do so, by *a person to whom a part of the insurance money is payable*. [Emphasis added.]

20 The motion judge relied on this section to find that Sovereign had been given effective notice of the Walkers' claim. He held that because Emshih had cross-claimed against Sun Shelters, Emshih was "a person to whom a part of the insurance money is payable."

21 The policy conditions follow the "Comprehensive General Liability Coverage Rider." These policy conditions have a different notice provision from that in the statutory conditions. The notice provision is found in s. 3(a). The policy conditions also impose (in s. 3(b) and especially in s. 3 (c)) a duty of cooperation on the insured:

> 3. Insured's Duties in the event of Accident, Occurrence, Claim or Suit:
>
> (a) In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given promptly by or for the Insured to the Insurer or any of its authorized agents.
>
> (b) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Insurer every writ, letter, document or advice received by him or his representative.
>
> (c) The Insured shall co-operate with the Insurer and, upon the Insurer's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of injury or damage with respect to which insurance is afforded under this policy; and the Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expenses other than for the first aid to others at the time of accident.

22 Section 4 states that compliance with the terms of the policy - which includes s. 3 - is a condition precedent to an action against Sovereign:

> No action shall lie against the Insurer under any Insuring Agreement of this policy including the Insuring Agreement relating to "Defence - Settlement - Supplementary Payments" unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy. ...

23 Sovereign maintains that ss. 3 and 4 of the policy conditions apply to the Walkers' claim, and that notice was not given in accordance with s. 3(a). The motion judge held, without analysis, that effective notice had been given, not only under s. 8 of the statutory conditions, but also under s. 3 (a) and (b) of the policy conditions.

24 I turn now to the issues on the appeal.

(c) The issues on the appeal

I. Did the motion judge err in holding that s. 8 of the statutory conditions applied to the Walkers' claim?

25 As I have said, the statutory conditions, including s. 8, applied to "... all other perils insured by this policy." The motion judge concluded that this phrase was sufficiently broad to cover the Walkers' loss. Either the Walkers' loss was a "peril" to which s. 8 applied or the applicability of s. 8 to the Walkers' loss was ambiguous, in which case the ambiguity would be construed against the insurer, Sovereign.

26 Even if s. 8 did apply, Sovereign does not accept that Emshih could give effective notice. However, its main submission is that the motion judge erred in concluding that s. 8 applied to the Walkers' loss. Sovereign says that these statutory conditions apply to property losses such as fire and theft, but not to liability or losses to third parties. I agree with this submission.

27 Perhaps in isolation, the word "perils" is broad enough or ambiguous enough to support the motion judge's conclusion. But, the policy must be read as a whole. And when it is read as a whole, there is no ambiguity. The policy contains two separate sets of conditions. Each set must be given scope and meaning.

28 Viewed in this light, it is apparent that the statutory conditions apply only to the *property* coverages in the policy - for example fire and theft - and any other *property* related perils that may be added by rider or endorsement. Several other provisions in the statutory conditions support this interpretation. For example, s. 2 dealing with "Property of Others," ss. 11 and 12 dealing with "Appraisal" and "When Loss Payable," and s. 13 dealing with "Replacement" have no relevance to third party liability claims. They address coverage for direct loss to an insured's property, not coverage for loss or liability to a third party.

29 The policy conditions, which follow the Comprehensive General Liability Coverage Rider, apply to third party liability claims such as the Walkers' claim against Sun Shelters. This is evident from the other terms of the rider. The rider provides that the insured agrees, among other things, to the "liability insurance conditions attached to the policy and such additional declarations, exclusions, limitations, conditions and other terms of this rider." This provision includes the policy conditions.

30 Moreover, the Insuring Agreement in the liability section of the rider states that "this policy is subject to the terms and conditions set forth herein." Immediately following, it reads: "SEE CONDITIONS ON REVERSE SIDE." The conditions referred to are the policy conditions, which include the notice and duty to co-operate requirements in s. 3. It is these conditions that apply to losses or liability to third parties.

31 In summary, the insurance policy between Sovereign and Sun Shelters contains two stand alone coverages: A-C for property coverages, and D for liability coverage. Each of the coverages has its own set of conditions. The statutory conditions apply to the property coverages, and the policy conditions apply to liability coverage. I therefore agree with Sovereign that the motion judge erred in holding that s. 8 of the statutory conditions was the notice provision applicable to the Walkers' loss.

II. Did the motion judge err in finding that the notice given by Emshih was effective notice under s. 3(a) of the policy conditions for liability coverage?

32 The notice of loss requirement applicable to the Walkers' claim is s. 3(a) of the policy conditions for liability coverage. For convenience, I reproduce s. 3(a):

> (a) In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given promptly by or for the Insured to the Insurer or any of its authorized agents.

33 The motion judge held that the notice of the Walkers' claim given to Sovereign by Emshih's counsel was effective notice under s. 3(a). Sovereign submits that the motion judge erred in this holding. It argues that only its insured, Sun Shelters, could give notice under s. 3(a). As Sun Shelters did not do so, it breached the policy condition. Therefore, in accordance with s. 4, Sovereign was not obligated to indemnify its insured or pay the Walkers' judgment. Sovereign also makes a secondary argument: Sun Shelters breached its duty to co-operate under s. 3(c) of the policy conditions. I do not accept either of Sovereign's arguments.

34 Notice under s. 3(a) can be given "by or for the insured." Thus, on the plain wording of the provision, notice may be given by a person other than the insured. The section does not, however, define the class of persons capable of giving notice on behalf of the insured.

35 Section 3(a) should be interpreted in the light of its purpose. Like any notice provision in an insurance policy, the purpose of s. 3(a) is to make Sovereign aware of a claim against its insured so that it has the timely opportunity to deal with it. The delivery and content of the notice is important to Sovereign because the notice triggers Sovereign's duty to defend and to act in good faith toward its insured. Typically, once served with notice, Sovereign will have to open a file, retain an adjuster, and take any other steps necessary to respond to the claim against its insured.

36 Given its purpose and importance, if the notice is to be given for an insured instead of by the insured itself, the person giving it should have sufficient proximity to the claim to have knowledge of the information required by s. 3(a). Emshih was just such a person. It owned the property where the accident occurred; it was a defendant in the original action; and it cross-claimed against Sovereign's insured. In giving notice to Sovereign, Emshih was giving notice *for* Sun Shelters as contemplated by s. 3(a) of the policy.

37 At the very least, the class of persons capable of giving notice under s. 3(a) is ambiguous. In accordance with well accepted principles of interpretation of insurance contracts, that ambiguity must be construed against Sovereign: see *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888. Therefore, I agree with the motion judge that Emshih's notice was effective notice to Sovereign under s. 3(a) of the policy conditions for liability coverage.

38 The motion judge also found "the argument that Sun Shelters failed to co-operate in the defence of the original action is entirely without merit." This is a finding of fact, which is supported by the record and warrants deference on appeal. As the motion judge noted, Sovereign made no effort to contact its insured or seek its assistance in defending the action. Instead, it took the position that it would not participate in the action at all. It cannot now complain that Sun Shelters breached its duty to co-operate.

39 I would not give effect to this ground of appeal.

III. Did the motion judge err in granting relief from forfeiture?

40 My disposition of the second issue is sufficient to decide this appeal. However, even if I am wrong in holding that Emshih could give notice under s. 3(a) of the policy conditions for liability coverage, I agree with the motion judge that the Walkers would, be entitled to relief from forfeiture under s. 129 of the *Insurance Act*.

41 Section 129 provides:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

Relief from forfeiture under s. 129 applies both to statutory and policy conditions: see *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778, at paras. 10-16.

42 The two issues under this ground of appeal are: first, whether this is a case of imperfect compliance, as the Walkers maintain, or total non-compliance, as Sovereign maintains; and second, if this is a case of imperfect compliance, whether forfeiture of the insurance proceeds would be inequitable.

43 The law has treated the failure to give timely notice of a claim as imperfect compliance, not non-compliance: see *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, *supra*, at para. 18. However, Sovereign submits that this principle does not apply on these facts. It says that because Emshih was not entitled to give notice under s. 3(a) of the policy conditions for liability coverage, then in substance no notice was given, rendering this a case of non-compliance, not imperfect compliance.

44 It seems to me that Sovereign's position is far too rigid. As I said earlier, the question of compliance has to be looked at in the light of the purpose of a timely notice provision. Notice gives the insurer an opportunity to investigate the merits of a claim, negotiate a settlement, and if necessary, defend the action. Sovereign had that opportunity. It chose not to exercise it.

45 In other words, this is not a case where the insured had no actual notice of the claim or loss - Sovereign did have actual notice and made a conscious decision not to participate in the litigation. Even if the notice should have come from Sun Shelters, the notice from Emshih makes this a case of imperfect compliance, not non-compliance.

46 As this is a case of imperfect compliance, the only remaining question under s. 129 is whether forfeiture of the insurance proceeds would be inequitable. The motion judge held that it would be, and made two key findings of fact in support of that holding:

1. There was no bad faith by Sun Shelters, the Walkers or Emshih; and
2. Although Emshih gave Sovereign notice of the Walkers' claim over five years after the accident occurred, Sovereign suffered no prejudice from the late delivery of the notice. In the motion judge's words: "Whether the insurer received notice six months or six years after the accident it is difficult to imagine that it would have acted any differently."

47 Sovereign does not challenge these findings of fact, and I have no basis to interfere with them. On these findings, forfeiture would be inequitable.

48 I would, therefore, not give effect to this third ground of appeal.

D. CONCLUSION

49 The motion judge did not err in holding that Emshih's notice to Sovereign was "notice" in accordance with s. 3(a) of the policy conditions for liability coverage. Nor did he err in holding that, in the alternative, the Walkers would be entitled to relief from forfeiture.

50 I would dismiss the appeal with costs fixed in the agreed-upon amount of $20,000, inclusive of disbursements and applicable taxes.

J.I. LASKIN J.A.
D.R. O'CONNOR A.C.J.O.:— I agree.
J.C. MacPHERSON J.A.:— I agree.

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1 The amount of their judgment against Sun Shelters less Emshih's contribution.

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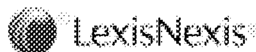

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