Case Name:

Walker v. Sovereign General Insurance Co.

RE: Marie Walker and Albert Walker, Plaintiffs, and The Sovereign General Insurance Company, Defendant

[2010] O.J. No. 2776

2010 ONSC 3283

[2010] I.L.R. I-5019
86 C.C.L.I. (4th) 267
2010 CarswellOnt 4653

Court File No. 2000/07

Ontario Superior Court of Justice

C.W. Hourigan J.

Heard: May 25, 2010.
Judgment: June 7, 2010.

(68 paras.)

Insurance law — Actions — By third parties against insurer — Relief against forfeiture — Motion by Walker for summary judgment against Sovereign General Insurance for $145,793 allowed — Walker sustained injuries from a slip and fall — In an action against Sovereign's insured, Walker was awarded damages which remained unpaid — Sovereign submitted that it had no liability as the insured breached the insurance policy by failing to provide notice of the original action — However, Sovereign did receive effective notice and was therefore liable — Furthermore, Walker was entitled to relief against forfeiture as there was no evidence of bad faith by Walker and Sovereign suffered no prejudice.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 98

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

Counsel:

Stephen B. Abraham and Michael Emery, Counsel, for the Plaintiffs.

William S. Chalmers, Counsel, for the Defendant.

ENDORSEMENT

C.W. HOURIGAN J.:--

PART I - OVERVIEW

1 The plaintiffs have commenced an action against The Sovereign General Insurance Company ("Sovereign") under section 132 of the *Insurance Act* as a result of Sovereign's failure as an insurer to pay the damages awarded to the plaintiffs in a previous action against its insured.

2 The plaintiffs bring this motion for summary judgment against Sovereign for $145,793.95.

3 Sovereign has brought a cross-motion for summary judgment to dismiss the action.

4 For the reasons that follow, the plaintiffs' motion for summary judgment is granted and the defendant's motion is dismissed.

PART II - BACKGROUND

i. The First Action

5 Marie Walker slipped and fell on January 30, 1999 at the Power Centre in Burlington. As a result of that accident she suffered injuries, including a head injury.

6 On March 10, 1999 the plaintiffs retained Stephen B. Abraham as counsel. Mr. Abraham determined that the Power Centre property was owned by Emshih Developments Inc. ("Emshih"). A Statement of Claim was issued against Emshih and other parties on September 12, 2001.

7 Emshih filed a Statement of Defence on or about August 20, 2002 wherein it pleaded that it had contracted with Sun Shelter Industries Inc. ("Sun Shelter") to maintain the Power Centre property.

8 On November 13, 2002 the plaintiffs amended the Statement of Claim to add Sun Shelter as a defendant.

9 The Amended Statement of Claim was served on Kevin Moore, the principal of Sun Shelter, on or about March 11, 2003. It is unclear on the basis of the evidence before me whether Sun Shelter declared bankruptcy at or around the time of the service of the Amended Statement of Claim or whether it became bankrupt in 1999.

10 Counsel for the plaintiffs wrote to Sun Shelter on April 9, 2003 requesting the delivery of a Statement of Defence by April 30, 2003, failing which Sun Shelter would be noted in default.

11 On or about May 29, 2003 Evans Philp, counsel for Emshih, served an Amended Statement of Defence and Crossclaim. The crossclaim was asserted against Sun Shelter.

12 On June 13, 2003, pleadings were noted closed against Sun Shelter for failing to file a Statement of Defence.

13 The action was set down on or about March 30, 2004 and was scheduled for trial on April 11, 2005.

14 At some point in late March of 2005, counsel for Emshih discovered that Sovereign was Sun Shelter's insurer. On March 29, 2005 Kathleen Robb, counsel for Emshih, spoke with Michael Henker at Sovereign to advise him about the action against Sun Shelter and the trial date scheduled for April 11, 2005. Details of this conversation regarding the action were memorialized in an email dated March 29, 2005 sent by Mr. Henker to Bob Streib and Karen Grouette.

15 There is no evidence that Sun Shelter ever provided notice of the claim to Sovereign. It appears that the first notice received by Sovereign was from counsel for Emshih.

16 In its answers to undertakings Sovereign advised that it has no documentation indicating that any attempt was made to contact Mr Moore, the principal of Sun Shelter, after Sovereign received notice of the claim.

17 On March 30, 2005, Mr. Abraham was advised by Ms Robb that Sovereign was Sun Shelter's liability insurer. It was agreed between Mr. Abraham and Ms Robb that the trial should not proceed on the scheduled date as a result of the recent discovery that Sun Shelter was insured by Sovereign. The trial was adjourned to March 27, 2006 in order to permit Sovereign an opportunity to participate in the action.

18 Ms Robb wrote to Mr. Streib at Sovereign on March 30, 2005 about the claim against Sun Shelter and inquired about Sovereign's intentions regarding the case. The original Statement of Claim, Statement of Defence and the Jury Notice in the action were attached to this letter. In a letter from Ms Robb the next day, copies of the Amended Statement of Claim and the Amended Statement of Defence and Crossclaim were also provided to Sovereign.

19 In a letter dated April 1, 2005 from Ms Robb to Mr. Streib she advised:

> Further to our telephone discussion of March 31, 2005 regarding the above noted matter, we are concerned about your advice in respect of this law suit and your insured, Sun Shelter Industries Inc., given that we contacted you with a view to being helpful to Sovereign.
>
> If Sovereign does not take an active position in respect to this law suit when the trial commences on April 11, 2005, the plaintiffs will have a totally free run against your insured, Moore by virtue of the fact that no defence has been filed. We believe we have a very strong defence under Section 6 of the Occupier's Liability Act. Your insured has been noted in default and all of the allegations against him have, accordingly, been deemed to be admitted.
>
> We are at a loss to understand how you could take the position that there is prejudice to Sovereign in this matter. This loss involves a slip and fall on ice in a parking lot. This is not a case where there is any loss of opportunity to investigate the circumstances of the loss. Without any prejudice having been suffered by Sovereign, we do not understand how Sovereign will escape the application of Section 132 of the Ontario Insurance Act.

20 On April 5, 2005, Mr. Abraham received a letter from Ms Robb wherein she advised that she had just received communication from Bernice Bowley, a lawyer in Winnipeg, Manitoba, who had told her that she was currently reviewing the matter on behalf of Sovereign and would let Ms Robb know Sovereign's position "in due course".

21 On May 5, 2005 Mr. Abraham called Ms. Bowley and left her a message asking her to call him back with a status report with respect to the Sun Shelter claim. Ms. Bowley did not return his call.

22 The plaintiffs settled their claim against the Emshih defendants represented by Ms Robb on the basis of payment to the plaintiffs in the amount of $85,225. On October 18, 2005, Justice Langdon signed an order dismissing the action as against all defendants except Sun Shelter.

23 The trial proceeded before Justice Mossip as against Sun Shelter only on March 30, 2006.

24 In her Reasons for Judgment, [2006] O.J. No. 2023, Justice Mossip stated:

> There is no question of liability. Not only was the issue of liability not defended, but

> on the evidence at trial, it is clear that the parking lot was completely treacherous and unfit for use by pedestrians who clearly were using it that day. There was apparently no efforts to make the parking lot safe even during the time the Walkers were in the movie with their grandchildren, which would have been a couple of hours. I accept that there was no sanding or salting before the Walkers went into the movie and none when they came out. No amount of care by Mrs. Walker could likely have prevented her fall. It is surprising there were not more people injured that day, perhaps there were.

25 Justice Mossip granted judgment against Sun Shelter on the following terms:

i. the sum of $100,000 in general damages to Ms Walker;

ii. payment to Marie Walker for lost wages in the amount of $4,334 and for OHIP's subrogated claim in the amount of $1,593.39;

iii. payment to Albert Walker for his FLA claim in the sum of $20,000;

iv. prejudgment interest at the prescribed rate from January 30, 1999 to the date of the judgment on all damages; and

v. costs fixed in the sum of $35,000 all inclusive.

26 The plaintiffs have not recovered any part of this judgment from Sun Shelter.

(ii) The Sovereign Action

27 On March 29, 2007 the plaintiffs commenced this action against Sovereign for payment under section 132 of the *Insurance Act*.

28 In its Statement of Defence, Sovereign admits that it insured Sun Shelter pursuant to a Commercial General Liability Policy which was in effect from April 20, 1998 to April 20, 1999.

29 Sovereign pleads that the policy required, as a condition precedent to coverage, that there be full compliance by the insured with all terms of the policy including notification of claims, the delivery of all legal proceedings received and full co-operation in the defence of any action.

(iii) The Policy

30 The Commercial Insurance Policy issued by Sovereign to Sun Shelter states as follows:

> THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE STIPULATIONS AND CONDITIONS PRINTED HEREIN WHICH ARE HEREBY SPECIFICALLY REFERRED TO AND MADE A PART OF THIS POLICY together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto. ...

31 Under the heading CONDITIONS the following words appear:

> 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.

32 Paragraph 8 of the STATUTORY CONDITIONS reads as follows:

> WHO MAY GIVE NOTICE AND PROOF
>
> 8. 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 of 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.

33 Condition 3 in the CONDITIONS section provides as follows:

> 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 write, 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 the accident.

34 The Insuring Agreement under the COMPREHENSIVE GENERAL LIABILITY COVERAGE RIDER to the policy provides coverage for bodily injury liability as follows:

> I. **Coverage A** - Bodily Injury Liability
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of bodily injury.

The inclusive limit for bodily injury liability under this coverage for each occurrence was stated to be $2 million dollars.

PART III - POSITIONS OF THE PARTIES

35 The plaintiffs seek summary judgment pursuant to section 132 of the *Insurance Act*, which provides a statutory cause of action to a person against the insurer of another person who has been found liable for damages for the amount of the judgment obtained against the liable person up to the face value of the policy. It is the plaintiffs' position that the defendant had notice of the claim and is therefore liable pursuant to section 132. In the alternative, the plaintiffs submit that if there has been imperfect compliance with a condition that they should be granted relief from forfeiture pursuant to the *Insurance Act* or the *Courts of Justice Act.*

36 The defendant submits that Sun Shelter was in breach of the policy conditions and that in an action brought pursuant to s. 132 of the *Insurance Act* the plaintiffs as unpaid judgment creditors cannot be in a better position than the insured. Accordingly, the defendant argues that because it has no obligation to indemnify Sun Shelter, it has no liability to the plaintiffs. The defendant also takes the position that the plaintiffs are not entitled to relief from forfeiture.

37 Both parties submitted that there is no genuine issue requiring a trial and that the case

should be decided on this motion.

PART IV - ANALYSIS

38 I agree with the submission made by both counsel that it is appropriate that this case be determined on a motion for summary judgment.

39 There is no genuine issue requiring a trial. The facts have essentially been agreed upon by the parties. The real issues are legal in nature and it is appropriate that they be determined on a motion for summary judgment.

40 There are two issues for determination. The first issue is whether the defendant had any obligation to indemnify the insured and therefore has liability pursuant to section 132 of the *Insurance Act.* The second issue is whether the plaintiffs are entitled to relief from forfeiture.

i. Obligation to Indemnify

41 The position of the defendant regarding the breaches by Sun Shelter was somewhat fluid. In its Statement of Defence, Sovereign references section 3 of the liability conditions but placed particular emphasis on the lack of notice. In its factum, Sovereign submits that is has no liability because Sun Shelter failed to provide notice and co-operate in defence of the first action. In oral submissions, counsel for the defendants also argued that Sun Shelter breached its obligation to provide copies of the pleadings in the first action.

42 The argument that Sun Shelter failed to co-operate in the defence of the original action is entirely without merit. It is clear that upon being notified of the original action Sovereign determined that it would take no steps to defend the matter. There is no evidence that it made any effort to contact the principal of Sun Shelter. Instead it chose to take the position that because Sun Shelter had not provided notice it had no obligation to indemnify it in the action. In those circumstances, Sovereign can hardly complain that there has been a lack of cooperation by the insured.

43 In my view, the critical question on this part of the analysis is whether Sovereign received notice of the first action which met the notice requirements under the policy.

44 The plaintiffs rely upon the following portions of statutory condition 8: "Notice of loss may be given ... 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."

45 The plaintiffs submit that Sovereign was given written notice of the claim in the first action by Ms Robb, counsel for Emshih and that Emshih was a person to whom a part of the insurance money would be payable because of its crossclaim against Sun Shelter for contribution and indemnity. They argue, therefore, that Emshih is a person who had standing to give notice of the loss under section 8 of the statutory conditions.

46 Sovereign submits that its insured was in breach of its obligation to provide timely notice and that the plaintiff can stand in no better position on a section 132 case than the insured. Sovereign argues that the plaintiffs' reliance on statutory condition 8 is misplaced because that condition applies to property insurance coverage and does not apply to liability coverage.

47 I note that the policy states as follows in regard to applicability of the statutory conditions: "[t]he 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" [emphasis added].

48 In my view, on the wording of the policy all perils insured by the policy are subject to the statutory conditions. Sovereign's case at its highest is that there is an ambiguity regarding whether statutory condition 8 is applicable. It is well established that where an ambiguity is found

to exist in an insurance contract, the language in issue shall be construed against the insurance carrier (see *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 (S.C.C.)).

49 I find that Emshih was a person to whom a part of the insurance money would be payable because of its crossclaim against Sun Shelter for contribution and indemnity. Emshih was therefore a person who had standing to give notice of the loss under section 8 of the statutory conditions which were conditions of the policy. Such notice was effective notice under section 8 and under conditions 3(a) and 3(b) of the liability conditions.

50 Accordingly, Sovereign cannot rely upon the exclusionary conditions contained in the policy and is, therefore, liable under section 132 of the *Insurance Act* for the full amount of the judgment from the first action, plus interest, less the amounts recovered by the plaintiffs in the settlement with Emshih.

(ii) Relief Against Forfeiture

51 I have found that the notice provided by Emshih was in compliance with the provisions of the policy. To the extent that I am incorrect in that finding, I turn now to a consideration of the availability of relief from forfeiture in the circumstances of this case.

52 The plaintiffs submit that if it is determined that the notice of the claim against Sun Shelter was not made promptly, such imperfect compliance should be cured by the granting of relief from forfeiture.

53 Sovereign submits that an insured is not entitled to relief from forfeiture if there is a complete absence of compliance with the policy conditions or, in the alternative, if there was imperfect compliance the insurer may deny coverage if the breach of a condition was substantial. It further submits that the failure of Sun Shelter to provide notice of the claim or to provide any assistance with respect to the defence of the action is a substantial breach.

54 Section 129 of the *Insurance Act* provides:

> 129. 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.

55 The *Courts of Justice Act* also provides general relief against penalties and forfeitures:

> 98. A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just

56 In *McNish and McNish v. American Home Assurance Co.* [1980] O.J. No. 507 (H.C.J.), aff'd [1991] O.J. No. 2256 (Ont. C.A.), Justice Steele held that in order for relief from forfeiture to be granted under the *Insurance Act*, there must be the following:

i. imperfect compliance with a term of the policy;

ii. a consequent forfeiture or avoidance of the insurance;

iii. the court must consider the forfeiture inequitable; and

iv. the court may relieve against the forfeiture on such terms as it considers just.

57 In *Falk Bros. Industries Inc. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778, Justice McLachlin considered the distinction between imperfect compliance and non-compliance:

> 17 Should failure to give notice of claim within the time prescribed by the bond be considered as imperfect compliance, against which the court may relieve in appropriate cases, or is it non-compliance, in which case the court has no power under s. 109 to grant relief? The distinction between imperfect compliance and non-compliance is akin to the distinction between breach of a term of the contract and breach of a condition precedent. If the breach is of a condition, that is, it amounts to non-compliance, no relief under s. 109 is available.
>
> 18 The case law has generally treated failure to give notice of claim in a timely fashion as imperfect compliance whereas failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent. Thus, courts have generally been willing to consider granting relief from forfeiture where notice of claim has been delayed: Canadian Equipment Sales & Service Co. v. Continental Insurance Co., [1975] O.J. No. 2355; Minto Construction Ltd. v. Gerling Global General Insurance Co., [1978] O.J. No. 3355; Moxness v. Saskatchewan Government Insurance Office, [1977] 3 W.W.R. 393 (Sask. D.C.); Junet Estate and Kallos v. Saskatchewan Government Insurance, [1983] S.J. No. 897; North Lethbridge Garage Ltd. v. Continental Casualty Co., [1930] 1 W.W.R. 491 (Alta. S.C., App. Div.). See also: Dashchuk Lumber Ltd. v. Proman Projects Ltd., [1987] S.J. No. 543.
>
> 19 On the other hand, cases in which failure to meet a time requirement has been held to be non-compliance rather than imperfect compliance have largely been cases in which the time period was for the commencement of an action rather than for the giving of notice: D.S. Ashe Trucking Ltd. v. Dominion Insurance Co. (1977), 55 W.W.R. 321 (Ont. C.A.).
>
> 20 The reasons for the distinction are bi-fold. First, failure to give notice of claim has been viewed as a breach of a term rather than a beach of a condition. Clearly, being akin to failure to meet a limitation period, failure to bring an action within the time required is a more serious breach than failure to give timely notice. A notice of a claim simply informs the insurer of the possibility of a future action, thereby allowing the insurer some time to investigate the merits of the claim and to negotiate a settlement: the actual bringing of an action, however, is the legal crystallization of the claim which sets its parameters and magnitude. Second, and probably more importantly, failure to give notice of the claim within the time required is a defect in provision of proof of loss for which relief against forfeiture is, by the terms of the statute, available. "Where there has been imperfect compliance with the statutory condition as to the proof of loss to be given by the insured or with any 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", s. 109 gives the court power to relieve from such forfeiture or avoidance ...
>
> 21 I agree that failure to give notice of claim within a given period is a less serious breach than failure to bring an action within a stipulated time. I also agree that it relates to "proof of loss" or "any other matter or thing required to be done or omitted by the insured with respect to the loss". I am therefore of the view that relief from forfeiture can be granted in respect of delayed notices of claims.

58 In my view, to the extent that there has been a breach of a condition, such breach amounts only to imperfect compliance with the policy. This case at its highest is one of a failure to provide

notice in a timely manner. It is not a case of a failure to bring an action within a stipulated time.

59 In *Canadian Newspapers Company Limited v. Kansa General Insurance Company Ltd.*, [1996] O.J. No. 3054 (C.A.) the court held that on the facts of that case the failure to provide certain information to the insurer was a substantial breach of the policy and disentitled the insured to claim relief from forfeiture (at p. 19):

> The breach complained of in the present appeal is a "substantial" breach of the insured's duty of cooperation and of the insurer's right to defend the action. CNCL failed to report on the progress of the litigation, to convey offers to settle, to inform Kansa of the theory of the defence and to advise that the action had proceeded to trial until after the trial had begun. This breach is more than mere "imperfect compliance", it is a substantial breach of the policy and on this basis alone [the insured] is not entitled to claim relief from forfeiture.

60 This is also not a case of a substantial breach such as the one found in *Canadian Newspapers* where there was clear evidence of failure to co-operate on the part of the insured. As noted above, there is no evidence here of non-cooperation.

61 An analysis of the equities of a case and the availability of the remedy of relief against forfeiture necessarily involves a review of the conduct of the insured and a consideration of whether the insurer suffered any prejudice as a result of the breach.

62 As noted by our Court of Appeal in *Canadian Newspapers*, it is "trite law that conduct amounting to a breach of good faith by an insured will disentitle the insured to relief against forfeiture" (at p. 19).

63 There is no evidence before me of any conduct on the part of the insured, the plaintiffs or Emshih that amounts to bad faith.

64 With respect to prejudice, the onus is on the plaintiffs to establish that the insured suffered no prejudice as a consequence of the breach (see *Canadian Newspapers* at p. 21). As Sovereign states in its factum "[p]rejudice exists where the insurer has lost the realistic opportunity to do anything that it might otherwise have done."

65 I am satisfied that Sovereign has suffered no prejudice. There is no specific prejudice alleged in its materials filed on this motion and I fail to see how any real prejudice could even be alleged. This was a slip and fall accident. 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. This is not a situation where there was a loss of an opportunity to conduct an investigation. It should also be recalled that when Sovereign's role as Sun Shelter's insurer was discovered, counsel for the plaintiffs and Emshih adjourned the trial for almost an entire year. However, Sovereign chose to make no effort to contact the insured or participate in the action in any manner.

66 In all of the circumstances of this case, I am satisfied that forfeiture would be inequitable and, therefore, to the extent necessary, the plaintiffs are entitled to relief against forfeiture pursuant to section 129 of the *Insurance Act*.

PART V - DISPOSITION

67 For the reasons given, the plaintiffs' motion for summary judgment is granted, the defendant's cross-motion is dismissed and I make the following orders:

i. Summary Judgment against the Sovereign General Insurance Company in the amount of $145,793.95;

ii. Prejudgment interest pursuant to the *Courts of Justice Act* on that sum

since March 30, 2006; and

iii. An Order dismissing the crossclaim of the Defendant Sovereign General Insurance Company.

68 If the parties cannot agree on the issue of costs, I will entertain brief written submissions. Costs submissions are due from the plaintiffs within seven days of the release of this endorsement and are not to exceed three pages, plus a bill of costs. The defendant may file responding submissions not to exceed three pages within five days of the receipt of the plaintiffs' submissions. The plaintiffs may file any reply submissions, not to exceed two pages within three days of the receipt of the responding submissions.

C.W. HOURIGAN J.

cp/e/qllxr/qlmxj/qljxr/qljyw/qlltl/qljyw/qlced