

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Wendell Connors Contracting Ltd. v. 265 Commercial Street Ltd.,
2004NSSC3

Date: 20040108
Docket: 183776
Registry: Sydney

Between:

Wendell Connors Contracting Limited

Plaintiff

v.

265 Commercial Street Limited

Defendant

and

ING Insurance Company of Canada

Third Party

Judge:

The Honourable Justice Frank Edwards

Heard:

January 5, 2004, in Sydney, Nova Scotia
And by telephone conference January 7, 2004

Written Decision:

January 8, 2004

Counsel:

Joseph Rizzetto, for the Plaintiff
John B. Laskin, for the Defendant
Lee Anne MacLeod-Archer for the Third Party

By the Court:

- [1] This is an application by the Plaintiff for an Order for summary judgment pursuant to Civil Procedure Rule 13.
- [2] Counsel for the Defendant 265 Commercial Street Limited (“265”) has conveniently set out the relevant background facts in its brief.
- [3] **The Property and the Fire:** 265 owns an office building located at 265 Commercial Street, North Sydney, Nova Scotia (the “Property”).
- [4] ING provided insurance to 265 for the Property under Policy No. 501071550 (the “Policy”). The Policy was effective from August 1, 2001 to August 1, 2002 and provided coverage to 265 in the event that the Property was destroyed or damaged by fire.
- [5] On October 21, 2001, a fire occurred at the Property. The fire caused damage to the building and its contents, including fire, water and smoke damage. It also caused loss of rental income and required 265 to incur professional fees. 265 had coverage for all of these types of losses under the Policy.
- [6] 265 contacted its insurance broker about the fire on October 21, 2001. According to the insurance broker’s letter of October 21, 2001, the insurance

broker contacted ING immediately after learning of the fire. Rheal Aucoin, ING's representative in Sydney, arrived at the site of the fire on October 21, 2001.

- [7] **ING and the Repair Work at the Property:** Mr. Aucoin arranged on behalf of ING for C. Aucoin Construction Ltd. ("Aucoin") and Wendell Connors Contracting Limited ("Connors") to visit the Property on or shortly after the October 21, 2001 fire. Mr. Aucoin also arranged on behalf of ING for Aucoin and Connors to prepare estimates. Aucoin and Connors were both on ING's list of "preferred contractors". Both Aucoin and Connors provided their estimates directly to ING.
- [8] ING then selected Aucoin and Connors to perform repair work to the Property. Connors also performed repair work on the Property for 265 in addition to the repair work covered by the Policy. 265 paid Connors for that additional repair work.
- [9] On November 5 and 9, 2001, ING wrote to 265 summarizing the steps taken by ING after the October 21, 2001 fire. ING stated in its correspondence that it had requested appraisal reports from Aucoin and Connors, and that ING was instructing contractors with respect to repair work on the Property.

[10] ING issued cheques payable to Aucoin and 265 jointly on November 22, 2001 to pay for the repair work conducted by Aucoin. ING issued cheques payable to Connors and 265 jointly on January 2, 2002 and May 1, 2002, to pay for the repair work performed by Connors. ING's cheques excluded the H.S.T. payable on the repair work performed by Aucoin and Connors. ING believes that 265 should pay the H.S.T. and then get reimbursed by the Government via the Input Tax Credit. A Canada Customs and Revenue Agency memo dated March 2001, deals with HST treatment of insurance claims. Paragraph 15 of that memo reads:

“15. When the insurer indemnifies the insured for the loss related to the damaged property, the indemnification is generally provided in one of two ways:

- The insurer repairs or replaces the damaged property. In this case, the insurer purchases repair services or replacement property directly. The insurer would not be entitled to claim an offsetting ITC as the insurer would not be acquiring the property or service for consumption, use or supply in the course of a commercial activity.

OR

- The insurer compensates the insured for the cost of repairing or replacing the damaged property. In this case, the insured acquires the repair services or replacement property directly, and is the recipient of the services or property. The insured, if a registrant, may be eligible to claim an ITC provided the other requirements of section 169 are met. If the insured is a public service body, it

may be eligible to claim a rebate. In this situation, it may be appropriate for the insurer to use the net-of-GST/HST method for settling the property and casualty insurance claim.”

- [11] ING argues that the second bullet is applicable. 265 says the first bullet describes what actually occurred.
- [12] 265 did not endorse ING’s cheques. 265 believes that because it was ING that contracted with Aucoin and Connors, ING was responsible for paying them, including H.S.T.
- [13] While Mr. Aucoin may have taken the position on occasion with 265 that Connors and Aucoin had contracted with 265 rather than ING and that 265 and not ING was responsible for paying Connors and Aucoin, 265 never accepted ING’s position. 265 consistently maintained that ING had contracted with Connors and Aucoin. There is one instance (November 28, 2001) where 265 arguably wavered in its position. That sequence, however, goes to weight and credibility. It is not my role to resolve it here.
- [14] **Disputes over Payment for the Repair Work:** Payment for the repair work done by Aucoin and by Connors on the Property has been the subject of separate legal disputes, including this action. Both disputes concern who, as

between 265 and ING, is liable to pay Aucoin and Connors for the repair work and who is liable for the applicable H.S.T.

[15] **The Aucoin Action:** ING and 265 were defendants in a Small Claims Court action commenced by Aucoin on July 11, 2002 (the “Aucoin Action”).

Aucoin claimed that 265 was obligated to endorse the ING’s cheque payable to Aucoin and 265, and that 265 was also responsible for paying the H.S.T. on the repair work performed by Aucoin. 265 defended the Aucoin Action on the ground that ING, not 265, had contracted with Aucoin.

[16] ING defended Aucoin’s claim, and also cross-claimed against 265. ING’s position was that 265 rather than ING had contracted with Aucoin, and that 265 was therefore obligated to pay the H.S.T. on the repair work performed by Aucoin.

[17] There have been three decisions in connection with the Aucoin Action as set out below. In the last of these decisions, ING was ordered to pay Aucoin, including the H.S.T.

[18] A Small Claims Court Adjudicator decided on November 4, 2002 that 265 was required to pay Aucoin, including H.S.T. An appeal by 265 of the Small Claims Court Adjudicator’s decision was allowed by myself on February 20, 2003. I remitted the matter to the Small Claims Court to

determine who as between ING and 265 had contracted with Aucoin to perform the repair work on the Property.

[19] Following my decision, the dispute with Aucoin was heard by a different Small Claims Court Adjudicator. On June 20, 2003, the Small Claims Court Adjudicator determined that ING rather than 265 had contracted with Aucoin to perform the repair work. ING was ordered to pay Aucoin for its repair work, including the H.S.T. (less the deductible as required by the Policy).

[20] **This Action:** Connors commenced this action against 265 on July 30, 2002 claiming payment for repair work it performed on the Property. 265 defended this action on the basis that Connors' contract was with ING rather than 265. 265 commenced a third party claim against ING on August 26, 2002 alleging that ING failed to indemnify 265 for losses suffered as a result of the October 21, 2003 fire as required by the Policy. ING defended the third party claim on September 18, 2002.

[21] **The Law:** Counsel for 265 has accurately summarized the applicable law. Under Rule 13.01(b) of the Civil Procedure Rules, Connors is entitled to

summary judgment only if it can show that there is no arguable issue to be tried with respect to 265's defence to Connors' claim. Rule 13.01(b) states:

“13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:

...

(b) there is no arguable issue to be tried with respect to the defence or any part thereof ...”

- [22] To defeat an application for summary judgment, 265 need only raise an arguable issue to be tried. The Nova Scotia Court of Appeal held in *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 at para. 16, that a respondent's burden on an application for summary judgment is not a heavy one. The Court of Appeal in that case also held that it is not the function of a judge on an application for summary judgment to determine matters of fact or law that are in dispute, and that matters of controversy should be left for resolution at trial.
- [23] In its recent decision in *D.E. & Son Fisheries Ltd. v. Goreham*, [2003] N.S.J. No. 331 at para. 2, the Court of Appeal followed its earlier decision in *Oceanus Marine Inc. v. Saunders*. In allowing the appeal and setting aside summary judgment, the Court of Appeal elaborated on the test for granting summary judgment to a plaintiff as follows (citations omitted):

“Summary judgment may be granted to a plaintiff if a plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. In the present case, there were both a lack of clear proof of the claim and disputed facts going to the existence of the contract which was sought to be specifically enforced. Therefore, the plaintiff’s claim for summary judgment should not have been granted.”

[24] It is also well established that “it is not the role of the chambers judge on a summary judgment application to weigh the credibility of witnesses on what should be an important trial issue”. *Hardman Group Ltd. v. Alexander*, [2001] N.S.J. No. 406 at para. 17 per MacDonald A.C.J.S.C.

[25] **The Evidence:** It was ING that first contacted Connors to provide an estimate for the repair work done at the Property. Connors submitted its estimate directly to ING. ING then selected Connors to perform the work and to some extent instructed Connors in the performance of that work.

[26] Aucoin says that he made it clear to Mr. Nickerson, a Director of 265, that any contract for repair of the premises would be between 265 and Connors. Aucoin says that this conversation took place on November 13, 2001, in the presence of several witnesses including Connors. Connors supports Aucoin’s recollection.

[27] On the other hand, Mr. Nickerson denies that he accepted Aucoin's position on November 13, 2001, or at any other time. Mr. Nicholson acknowledges that he retained an architect to oversee Connors' work but he denies that he ever accepted that 265 was primarily responsible to pay Connors.

[28] The Third Party argues that 265 is bound by the terms of its insurance policy and the statutory conditions under the *Insurance Act* (N.S.). Specifically, she argues that the Insurer never gave 265 notice of an election to repair the property itself rather than simply reimbursing the Insured. Statutory

Condition 13 provides:

“Replacement -

13(1) The insurer, instead of making payment, may repair, rebuild, or replace the property damaged or lost giving written notice of its intention to do so within thirty days after receipt of the proof of loss.

(2) In that event the insurer shall commence to so repair, rebuild, or replace the property within forty-five days after receipt of the proof of loss, and shall thereafter proceed with all due diligence to the completion thereof.”

[29] Counsel for ING points out that, in this case, 265 has never filed a Proof of Loss. Apparently, 265 attempted to do so but ING took the position that it was too late. That issue is now the subject of a separate action.

[30] The requirements of the *Insurance Act* are irrelevant to the main issue in this case. Whether ING gave 265 notice of its election to repair is not determinative of the factual issue of whether or not it actually hired Connors to do the work. At best, it is one factor to consider when weighing the evidence on the hiring issue.

[31] I am satisfied that the weight of the evidence tends to support 265's position that it was ING who hired Connors. In the context of a summary judgment application, however, I am not able to make a conclusive determination of that pivotal issue. To do so, I would have to weigh the credibility of witnesses and, as noted, that task is clearly beyond my purview. However, I have no difficulty in concluding that there is at least an arguable issue about who hired (and thus, who should pay) Connors. Unfortunately, that issue will have to be determined at trial.

[32] **Conclusion:** The application is dismissed. Costs shall follow the cause.

Order accordingly.

J.