

SUPREME COURT OF NOVA SCOTIA

Citation: Keizer v. Portage LaPrairie Mutual Insurance Company,
2013 NSSC 118

Date: 20130611
Docket: Hfx. No. 328506
Registry: Halifax

Between:

Paul Keizer and Barbara Keizer

-and-

**The Portage LaPrairie Mutual Insurance Company and
Founders Insurance Group Inc.**

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Judge: The Honourable Justice Robert W. Wright

Heard: March 19,20,21,25 and 26, 2013 at Halifax, Nova Scotia

Written

Decision: June 11, 2013

Subject: Fire Insurance - material change in risk - relief from forfeiture - negligence of insurance broker.

Summary: Upon taking early retirement in October, 2008 the plaintiff decided to set up a home based woodworking shop in the garage attached to his house doing carpentry and furniture repair work. He also was hired by Home Depot around that time to do contract work installing kitchen cabinets and counter-tops in its customers' homes. Knowing that this would expand his insurance needs, he contacted his insurance broker (Founders) and informed the agent, with whom he spoke by telephone, of both these new business activities, relying on Founders to obtain the necessary coverages.

On the same day, the agent requested a quote from Portage as underwriter. However, in requesting the quote by e-mail, the agent referred only to the pending work which the plaintiff would be doing for Home Depot in its customers' homes. The agent failed to inform Portage about the intended operation of a woodworking shop in the garage, the sole source of heat for which was a wood stove. On the basis of the information provided, Portage offered and ultimately issued a commercial lines policy insuring the plaintiff's tools and providing various liability coverages (all pertaining to the Home Depot work).

When the policy came up for renewal the following year, Founders did not contact the plaintiffs to confirm the currency of the information about their business activities. Instead, Founders simply supplied to Portage further information on a questionnaire about the plaintiffs' business activities that related to the Home Depot work only. From the information so provided, Portage was not made aware that the plaintiffs were operating a woodworking shop in their garage which was generating revenue (although Portage was aware that the garage had been heated by a wood stove for several years).

On September 17, 2009 shortly after the plaintiff lit the wood stove before starting some furniture restoration work, and while briefly absent from the garage, a fire broke out in the area of the wood stove resulting in property damage of \$81,102. Upon investigating the loss, once Portage learned that the garage was being used as a woodworking shop whilst heated by a wood stove, it denied coverage on the basis that there had been a material change in risk under the homeowners policy. The plaintiffs then sued both Portage for indemnity under the policies as well as Founders in an action for negligence.

Issues:

- (1) Was there a material change in risk in breach of Statutory Condition No. 4 of the homeowner's insurance policy?
- (2) If so, are the plaintiffs entitled to the equitable remedy of relief from forfeiture against Portage, pursuant to s.171 of the **Insurance Act**? and
- (3) Was there actionable negligence on the part of Founders by failing to place the proper insurance coverages needed by the plaintiffs?

Held:

(1) The Court accepted the evidence of Portage that it was beyond its risk tolerance to insure premises with a combination of a woodworking shop in an area heated by a wood stove. Having never been informed of the risk presented by that new combination of factors, Portage was entitled to treat this situation as a material change in risk in breach of Statutory Condition 4 under the fire insurance provisions of the *Insurance Act*.

(2) Principally because this material change in risk continued up to the date of the fire, and the existence of a nexus between the fire damage and the use of the wood stove, as well as the prejudice to the insurer, the plaintiffs were unable to discharge the onus of establishing their entitlement to relief from forfeiture under s.171 of the *Insurance Act*. The action against Portage was therefore dismissed.

(3) Founders was negligent in two respects in their handling of the matter. The agent who first placed the insurance was negligent in failing to inform Portage of the home based woodworking shop to be operated in the garage which would have alerted the insurer to the material change in risk. Secondly, Founders failed to confirm with the plaintiffs the currency of the information about their business activities when replying to Portage's questionnaire at the time of the policy renewal. Both failings were causative of the plaintiffs' loss of coverages under their insurance policies and hence, their fire damage loss of \$81,102. Judgment was therefore awarded to the plaintiffs against Founders in that amount.

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DECISION. QUOTES MUST BE FROM THE DECISION, NOT THE COVER
SHEET.**
