COURT OF APPEAL FOR ONTARIO

CITATION: Hanson v. Totten Insurance Group Inc., 2018 ONCA 446
DATE: 20180510
DOCKET: C64230

MacFarland, LaForme and Epstein JJ.A.

BETWEEN

Nicola Anne Hanson and Paul Hanson

Plaintiffs (Appellants)

and

Totten Insurance Group Inc., Ives Insurance Brokers Ltd., John Malac, Lynne Malac and Lloyd's Underwriters

Defendants (Respondents)

Steven Pickard, for the appellants

Mikel Pearce and Brett Stephenson, for the respondents Totten Insurance Group Inc. and Lloyd's Underwriters

Michael Stocks, for the respondents John Malac and Lynne Malac

Heard: April 11, 2018

On appeal from the judgment of Justice Pamela L. Hebner of the Superior Court of Justice, dated August 11, 2017, with reasons reported at 2017 ONSC 4809.

MacFarland J.A.:

A. INTRODUCTION

[1] This is an appeal from a judgment dismissing the appellants' motion for summary judgment in a mortgage enforcement action. The respondents, Lloyd's Underwriters ("Lloyd's") and Totten Insurance Group Inc. ("Totten"), had issued a

policy of insurance to the respondents, John and Lynne Malac, the mortgagees of the Hanson property. Following a loss to the Hanson property, Lloyd's paid the Malacs their mortgage loss and claim, through subrogation, against the Hansons. The Hansons brought a motion for summary judgment in which they sought a determination as to whether the Lloyd's policy covered their interest in the property so that the payment on the policy extinguished the mortgage debt.

[2] In the usual situation of a homeowner with a mortgaged property, the homeowner, as required by standard mortgage terms, obtains and pays for a policy of insurance in his or her name. That policy will cover the homeowner's interest in the property as well as the interest of the mortgagee. It is common practice for such policies to contain what is known as a standard mortgage clause. Such a clause will protect the interest of a mortgagee despite an act of the insured homeowner that would otherwise breach policy conditions. See, generally: Gowling Lafleur Henderson LLP, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, loose-leaf (2018-Rel. 1), 5th ed. (Toronto: Thomson Reuters, 1994), vol. 2 at pp. 50-7 to 50-13; and Walter M. Traub, *Falconbridge on Mortgages*, loose-leaf (2017-Rel. 25), 5th ed. (Toronto: Thomson Reuters, 2017), at pp. 38-7 to 38-15.

[3] However, in this case the appellants, who had obtained a private mortgage in the sum of $250,000 from the Malacs, were unable to obtain property insurance.

The Malacs obtained a policy of insurance for $200,000 in their own names which was underwritten by Lloyd's. That policy stated that it protected only the interest of the Malacs as mortgagees.

[4] The main issues in this appeal are: (1) whether the Lloyd's policy also covers the appellants' interest in the property; and (2) whether Lloyd's is entitled to exercise its right of subrogation having paid out the mortgagees' interest.

[5] For the reasons that follow, I would dismiss the appeal.

B. BACKGROUND

(1) History of the property

[6] The subject property is owned by the appellant, Nicola Hanson. In August 2006, she granted a mortgage in favour of the Malacs. Paul Hanson is the husband of Nicola Hanson and the guarantor of that mortgage. For a number of years after the mortgage was placed, the appellants arranged the necessary insurance coverage for the property. Such insurance was taken out and paid for by the plaintiffs as mortgagor and covered both their interest in the property as well as that of the Malacs as mortgagee.

[7] In September 2010, Allstate Insurance Company of Canada ("Allstate"), then the insurer of the property, cancelled its policy of insurance. The record suggests that its reasons for cancellation may have included the Hansons' claims history,

possible non-payment of premiums, breach of policy conditions and misrepresentation. Issues between the Hansons and Allstate are the subject of a separate proceeding.

[8] However, when the Hansons were unable to obtain replacement insurance, the Malacs, concerned about their interest as mortgagee, offered to obtain insurance for which the Hansons would pay, as they were obligated to do under the standard terms of the mortgage.

[9] The Malacs were told by both Allstate and their own agent that because they were not the owners of the property they could not insure in the Hansons' names and they could only insure for their interest as mortgagees. This information was passed from the Malacs to the Hansons. The Hansons were also informed that they should contact the Malacs' agent, Ives Insurance Brokers Ltd., to arrange insurance to cover their own interest in the property. The Hansons did not do so.

[10] The policy which the Malacs obtained, names "John Malac & Lynne Malac" as insureds. The risk location is the address of the subject property in Kingsville, Ontario. The business insured is described as "mortgagee". The property is noted to be a primary residence occupied by others. The coverage is described as "Commercial Property – Named Perils Form Building". The face of the policy bears the notation "Mortgagee Interest – No Co-Insurance Endorsement."

[11] The policy limit was $200,000 and the coverage initially was from October 10, 2010 to October 10, 2011. The policy was renewed twice before the events which give rise to this suit occurred in June 2013. The Malacs paid the premium for the policy and were subsequently reimbursed by the Hansons.

[12] The policy contains the following term:

> *THIS ENDORSEMENT CHANGES THE POLICY*.
>
> *PLEASE READ IT CAREFULLY*.
>
> MORTGAGE INTEREST – NO CO-INSURANCE ENDORSEMENT

[13] This endorsement modifies the coverage provided as follows:

> PROPERTY SECTION
>
> Co-Insurance: It is noted and agreed that this policy is written on a No-Co-Insurance basis and that the sum insured is in the interest of the named Insured in their capacity as Mortgagee on the premises insured by this policy. In the event of a loss, this policy shall protect only the interest of the Named Insured and no other party.

[14] Usual statutory and general conditions are attached and include General Condition “G”, which includes the following:

> G) SUBROGATION
>
> VII. The Insurer, upon making any payment or assuming liability therefor under this Policy, shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce such rights.

[15] Also included is a standard mortgage clause, the relevant provisions of which provide:

> It is hereby provided and agreed that:
>
> 1. Breach Of Conditions By Mortgagor Owner Or Occupant – This insurance and every documented renewal thereof – as to the interest of the Mortgagee only therein – is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the Mortgagor, Owner or occupant of the property insured, including transfer of interest, and vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk…
>
> 2. Right Of Subrogation – Whenever the Insurer pays the Mortgagee any loss award under this policy and claims that – as to the Mortgagor or Owner – no liability therefore existed, it shall be legally subrogated to all rights of the Mortgagee against the Insured; but any subrogation shall be limited to the amount of such loss payment and shall be subordinate and subject to the basic right of the Mortgagee to recover the full amount of its mortgage equity in priority to the Insurer…

[16] In June 2013, the property was substantially damaged by fire and was ultimately demolished. The Malacs claimed their mortgage loss from the insurer and were initially paid $100,000 and told a second cheque for $100,000 would follow shortly. Soon after, the insurers took the position that the Malacs had suffered no loss because the Hansons continued to make their monthly mortgage payments (and the mortgage was not due until December 2014). The Malacs returned the $100,000 they had been paid.

[17] The mortgage came due in December 2014 and when it was not paid, the Malacs began power of sale proceedings in February 2015. The insurers later paid the Malacs the $200,000 of insurance monies and claimed to be subrogated to the Malacs' rights to enforce the mortgage debt.

[18] There is an obvious shortfall in the monies owed to the Malacs – the insurance limit did not cover the full amount of the debt. The Malacs wish to recover that shortfall.

(2) The current proceedings

[19] The appellants commenced this proceeding very soon after, on March 2, 2015. Within days of commencing their proceeding they moved for an order to prevent the Malacs from taking any steps to enforce the mortgage. Their motion was adjourned, *sine die*, and an order entered on consent, establishing that the Malacs would take no steps to enforce the mortgage pending the return of the motion. The motion has not been returned. Meanwhile interest accrues, and the Malacs continue to pay the taxes and the arrears increase.

[20] Oral and documentary discovery took place and in July 2016, the appellants moved for summary judgment. The motion was heard in February 2017, with the plaintiffs claiming:

> a) A Declaration that Lloyd's Underwriters have no subrogated right to bring mortgage enforcement

> proceedings in respect of a mortgage dated August 4, 2006, and subsequently renewed on December 15, 2012 and now matured on December 15, 2014 on the property owned by the plaintiff at [Kingsville, Ontario];
>
> b) An Order directing the defendants John and Lynne Malac and / or Lloyd's Underwriters to provide a discharge of the said mortgage, to the extent that the balance owing on the mortgage has been paid down by the proceeds of insurance;
>
> c) An Order for an accounting of all monies paid and received on account of the balance due and owing on the said mortgage, crediting all funds received by John and Lynne Malac from Lloyd's Underwriters respecting an insurance policy placed by them on the subject property; [and]
>
> d) An Order restraining the defendants John and Lynne Malac and / or Lloyd's Underwriters as subrogee from taking or continuing any mortgage enforcement proceedings pursuant to the aforesaid mortgage[.]

[21] The motion judge dismissed the motion in its entirety. After reviewing s. 6 of the *Mortgages Act*, R.S.O. 1990, c. M.40, and concluding that the purpose of this section is to benefit only the mortgagee, she noted, at para. 26, that the standard charge terms had a similar purpose:

> The same can be said for the standard charge terms of the mortgage, para. 16 set out above. The obligation to insure is on the mortgagor and not the mortgagee. If the mortgagor fails to obtain insurance, the mortgagee <u>may</u> obtain insurance itself and require the mortgagee to pay the premium. This term is for the benefit of the mortgagee and the mortgagee alone. [Emphasis in original.]

[22] She reviewed the authorities on which the appellants relied, including *Sanofi Pasteur Ltd. v. UPS SCS, Inc.*, 2014 ONSC 2695, 119 O.R. (3d) 789, aff'd 2015

ONCA 88, 124 O.R. (3d) 81, leave to appeal refused, [2015] S.C.C.A. No. 152. She concluded that because of paragraph 16 of the Standard Charge Terms, which formed part of the mortgage, the appellants assumed the risk of loss.

[23] She held, at para. 31, that the terms of the policy and the evidence of the appellants was consistent with the conclusion that the policy was only for the benefit of the Malacs and further, at para. 34, that Lloyd's subrogation right was enforceable against the mortgagors.

C. ANALYSIS

(1) Does the Lloyd's policy cover the appellants' interest in the property?

[24] In this court, the appellants argue that the motion judge erred in reaching the conclusion that the policy was only for the Malacs' benefit. They contend that the only reasonable interpretation of Standard Charge Term 16 is that a mortgagee must obtain insurance that will cover the interests of both the mortgagor and mortgagee when a mortgagor does not, for whatever reason, insure the subject property.

[25] Standard Charge Term 16 provides:

> The Chargor will immediately insure, unless already insured, and during the continuance of the Charge keep insured against loss or damage by fire, in such proportions upon each building as may be required by the Chargee, the buildings on the land to the amount of not less than their full insurable value on a replacement cost

> basis in dollars of lawful money of Canada. Such insurance shall be placed with a company approved by the Chargee. Buildings shall include all buildings whether now or hereafter erected on the land, and such insurance shall include not only insurance against loss or damage by fire but also insurance against loss or damage by explosion, tempest, tornado, cyclone, lightning and all other extended perils customarily provided in insurance policies including “all risks” insurance. The covenant to insure shall also include where appropriate or if required by the Chargee, boiler, plate glass, rental and public liability insurance in amounts and on terms satisfactory to the Chargee. Evidence of continuation of all such insurance having been effected shall be produced to the Chargee at least fifteen (15) days before the expiration thereof; *otherwise the Chargee may provide therefor* and charge the premium paid and interest thereon at the rate provided for in the Charge to the Chargor and the same shall be payable forthwith and shall also be a charge upon the land. It is further agreed that the Chargee may at any time require any insurance of the buildings to be cancelled and new insurance effected in a company to be named by the Chargee and also of his own accord may effect or maintain any insurance herein provided for and any amount paid by the Chargee therefor shall be payable forthwith by the Chargor with interest at the rate provided for in the Charge and shall also be a charge upon the land. Policies of insurance herein required shall provide that loss, if any, shall be payable to the Chargee as his interest may appear subject to the standard form of mortgage clause approved by the Insurance Bureau of Canada which shall be attached to the policy of insurance. [Emphasis added]

[26] This provision contemplates two scenarios, one where the mortgagor/chargor obtains insurance, and the second where the mortgagee/chargee obtains insurance.

[27] The appellants argue that the language "…otherwise the Chargee may provide *therefor* and charge…" (emphasis added) can only mean that the mortgagee/chargee, if it chooses to obtain insurance coverage, must obtain the same coverage that the mortgagor/chargor is required to obtain. They argue the word "therefor" can only refer back to the language in the earlier portion of the provision which outlines the mortgagor's/chargor's obligation to insure.

[28] There are a number of difficulties with this argument.

[29] First, the obligation to insure lies on the mortgagor/chargor in the first instance and is mandatory – the mortgagor/chargor will "immediately insure". There is no obligation on the mortgagee/chargee to insure. That portion of the clause dealing with the mortgagee's/chargee's right to insure is merely permissive – the mortgagee/chargee "*may* provide therefor" (emphasis added). The appellants' argument converts the permissive language of this term into a mortgagee's/chargee's mandatory obligation to obtain like insurance.

[30] Second, as the Malacs discovered, mortgagees/chargees can only obtain insurance in their own names to cover their own interest in the subject property. The Malacs do not have an insurable interest in the equity of redemption – only the Hansons do. They told the Hansons this after their efforts to obtain coverage for them failed and their broker told them they could only get insurance for their interest as mortgagees/chargees.

[31] Finally, this term is for the benefit of mortgagees/chargees. The property is to be insured by the mortgagor/chargor and the cost of that insurance is to be borne by the mortgagor/chargor. The assumption of risk lies with the mortgagor/chargor, not the mortgagee/chargee.

[32] Next the appellants argue that because they paid the premiums for the insurance they are entitled to the benefit of any such coverage. The contract provides that the cost of such insurance is to be borne by the mortgagor/chargor and that includes the cost of *any* insurance obtained by the mortgagee/chargee.

[33] Any policy obtained by the mortgagor/chargor is to provide that loss is to be payable to the mortgagee/chargee as its interest may appear and is to have a standard form of mortgage clause attached.

[34] Reading Standard Charge Term 16 as a whole, there can be no doubt that, as the motion judge found, this term is for the benefit of the mortgagee/chargee and the mortgagee/chargee alone.

[35] It is important to remember that a mortgage is, in its essence, a loan agreement. In the usual circumstances, the mortgage provides a significant sum of money to a mortgagor/chargor to acquire a property. There is a cost to obtain that loan. It includes interest on the principal sum but also other obligations that the mortgagor/chargor is required to pay and maintain. Where the

mortgagor/chargor fails to make these payments, they are added to the principal sum of the mortgage and can be enforced in the same way: see *Marriott and Dunn*, at p. 50-4.

[36] In the usual case, where the mortgagor/chargor obtains the required coverage to cover both its interest and that of any mortgagee/chargee and a loss occurs, on the insurer's payment to the mortgagee/chargee of the mortgagee's/chargee's loss, the insurer is subrogated to the mortgagee's/chargee's rights. There usually are two conditions before the insurer can exercise those rights: (i) it must pay the mortgagee's/chargee's loss under the policy; and (ii) it must demonstrate that it owes nothing to the mortgagor/chargor. Once those conditions are satisfied the insurer may proceed with a subrogated claim against the mortgagor/chargor, limited, of course, to the amount it has paid to the mortgagee/chargee: *Pinder v. Farmer's Mutual Insurance Company*, 2009 ONCA 831, 100 O.R. (3d) 200, leave to appeal refused, [2010] S.C.C.A. No. 10.

[37] That is not the situation in this case. Here the insurance was obtained by the mortgagees/chargees to cover only their interest in the subject property – their mortgage interest. Although the standard mortgage clause contains the language that references the second condition required by *Pinder*, that condition does not arise on the facts of this case as the Hansons have no interest in the subject policy and the entire limits of the policy were properly paid to the mortgagees/chargees.

The policy proceeds were insufficient to cover the entire mortgage debt and accordingly, the Malacs are free to pursue the appellants for recovery of the remainder of that debt – and, as stated in the standard mortgage clause provision entitled “Right Of Subrogation”, in priority to the claim of the insurers.

[38] As the motion judge found at para. 29:

> When the Hansons failed to insure the property, the Malacs were free to do so at their option. Moreover, they were free to obtain whatever insurance they saw fit. There was no obligation on the Malacs to protect the Hansons from loss.

[39] The appellants argument that the Hansons expected that the insurance policy would cover their interest was rejected by the motion judge. She concluded, at para. 32:

> The Hansons knew, at all material times, that the insurance policy obtained by the Malacs was not for their benefit. This is consistent with the intention expressed in the policy.

[40] Her finding in this regard is well-supported on the record before her including: the language of the insurance policy; the evidence of Lynne Malac; the evidence of Nicola Hanson; and the evidence of the senior claims adjuster assigned by Lloyd’s.

(2) Is Lloyd's entitled to exercise its right of subrogation?

[41] At the end of her reasons the motion judge declined to set aside the Order of Howard J. dated May 19, 2015. That order, made on consent, adjourned the appellants' motion for an interlocutory injunction to prevent the Malacs from taking steps to proceed with their Notice of Sale proceedings. The term of the adjournment required the Malacs to take no steps to enforce the mortgage pending the return of that motion.

[42] The motion judge concluded at para. 36, that the "motion has not yet been returned. Accordingly, it is not before me. Under those circumstances, I decline to set aside the consent order."

[43] In my view, it is immaterial that the parties adjourned the Hansons' motion for an interlocutory injunction on consent in the face of the subsequent findings made on the summary judgment motion and affirmed in this appeal. It is important to note that the very basis for the adjourned injunction motion rests on the allegation that the Malacs undertook to obtain property insurance for the benefit of the Hansons and that although the named insureds were the Malacs, the policy was for the sole benefit of the Hansons. As indicated above, I agree with the conclusion of the motion judge that the policy was instead for the sole benefit of the Malacs, and not for the benefit of the Hansons. Accordingly, the Hansons cannot re-litigate what has already been determined in the present proceeding.

[44] In any event, while there were no direct proceedings before the motion judge in relation to Justice Howard's order, the appellants did seek before her:

> d) An order restraining the defendants John and Lynne Malac and / or Lloyd's Underwriters as subrogee from taking or continuing any mortgage enforcement proceedings pursuant to the aforesaid mortgage.

[45] This request is essentially the very same relief the appellants sought in their adjourned motion for injunctive relief and, in my view, overtakes those earlier interlocutory proceedings. In effect, the motion judge fully dealt with the Hansons' ability to restrain the Malacs and Lloyd's from continuing mortgage enforcement proceedings as if the adjourned motion for injunctive relief had been returned.

[46] Their motion for summary judgment having been dismissed in its entirety, including their request for injunctive relief, there is no remaining impediment to the Malacs and the insurers proceeding with their power of sale proceedings.

[47] For these reasons I would dismiss the appeal.[1]

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[1] Appeals from dismissals of summary judgment motions are generally considered to be appeals of interlocutory orders: see *Skunk v. Ketash*, 2016 ONCA 841, 135 O.R. (3d) 180. The issue was not argued by either party on this appeal. In any event, where, as in this case, a motion judge finally decides all of the disputed issues, the order may be final: see *Del Ridge Construction Inc. v. General Accident Assurance Co. of Canada* (2005), 27 C.C.L.I. (4th) 42 (Ont. C.A.). In my view, the principle from *Del Ridge* applies in this case and the appeal properly lay to this court.

[48] I would award costs to the respondent insurers fixed in the sum of $15,000 and to the Malacs in the sum of $10,000. Both awards are inclusive of disbursements and HST.

Released: May 10, 2018 (“H.S.L.”)

“J. MacFarland J.A.”
“I agree. H.S. LaForme J.A.”
“I agree. Gloria Epstein J.A.”