CITATION: Dufferin Construction v. The Dominion of Canada, 2015 ONSC 6311
COURT FILE NO.: CV-15-529203
DATE: 20151013

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Dufferin Construction Company Inc., A Division of Holcim (Canada) Inc.	)	Martin Forget and Eric Boschetti, for the Applicant
Applicant	)	
– and –	)	
The Dominion of Canada General Insurance Company	)	Neil Colville-Reeves, for the Respondent
Respondent	)	
	)	**HEARD:** August 19, 2015

REASONS FOR JUDGMENT

CAROLE J. BROWN, J.

The Application

[1] The applicant, Dufferin Construction Company Inc. ("Dufferin"), brings this application for the determination of whether a duty to defend it arises under a policy of insurance issued by the respondent, the Dominion of Canada General Insurance Company ("Dominion").

[2] In 2006, Dufferin entered into a construction contract with the City of Toronto for various repairs, construction and improvements in relation to streetcar tracks and islands on St. Clair Avenue between Tweedsmuir and Vaughn Road, including removing existing Toronto Transit Commission ("TTC") platforms, replacing them and supplying and installing concrete unit pavers.

[3] In the context of this project, Dufferin entered into a subcontract with The Downsview Group ("Downsview"). The evidence contained in the supporting affidavit of the applicant is that the scope of the work was to lay interlocking brick/stone and pavers on the streetcar islands throughout the construction project. This is not stated in the subcontract, although Schedules A and B are not appended. However, Appendix I does contain a landscaping quotation for materials to be provided, which are for unit pavers and three trees.

[4] All work done by Downsview was done pursuant to the subcontract.

[5] While Dominion argues that the scope of work as between Dufferin and Downsview is unclear, the evidence, including the supporting affidavit and contract with appendices, is sufficient to indicate that the subcontractor was retained to do landscaping of the islands in the project area, as defined in the contract. To do its work, the subcontractor purchased pavers and trees.

[6] The subcontract further required that Downsview provide, maintain and pay for general liability insurance, and Dufferin was named as an added insured. The policy, taken out with Dominion under number CCP8458264, was a project-specific commercial general liability ("CGL") policy that covered *inter alia* personal injuries. The certificate stated that:

> It is agreed that Dufferin Construction Company Limited is added as an Additional Insured with respect to Commercial General Liability and Umbrella Liability and then only with respect to liability arising out of the operations of the Named Insured at the above-noted project.

[7] The Dominion policy contains a duty to defend clause, which provides:

> We will pay those sums that the insured becomes legally obligated to pay as "compensatory damages" because of "bodily injury" …to which this insurance applies. We will have the right and the duty to defend the insured against any "action" seeking those "compensatory damages." However, we will have no duty to defend the insured against any action seeking "compensatory damages" for "bodily injury" … to which this insurance does not apply.

[8] The Dominion policy was the primary policy pursuant to Section IV, Article 7(a) which reads as follows:

> 7. Other Insurance
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of

> the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> b. Excess Insurance
>
> …
>
> 2 Any other primary insurance available to you covering liability for "compensatory damages" arising out of the premises or operations … for which you have been added as an additional insured by attachment of an endorsement.

[9] While Dufferin is also insured under its own CGL policy with Zurich, that policy is not specific to this project. That policy has a self-retention provision for claims under $500,000.

[10] The action from which this application arises is for damages for bodily injury sustained by the plaintiff, Sabrina Suarez, who allegedly tripped and fell on a sunken paver stone on one of the streetcar islands in the subject project area following the repairs. The original action, commenced October 5, 2010, was brought against the TTC, the City of Toronto and Dufferin. The amended claim also added Downsview as a named defendant.

[11] Dominion responded to the claims and defends the named insured, Downsview. However, it denied a defence to Dufferin on the ground that the policy only applies with respect to liability arising out of the operations of Downsview at the subject project and there is nothing to indicate that the alleged incident arose from Downsview's negligence as opposed to Dufferin's.

[12] Hence, this application.

The Law

[13] The Canadian jurisprudence clearly sets forth the legal principles governing the insurer's duty to defend. The pleadings govern the duty to defend, not the insurer's view of the validity or nature of the claim or the possible outcome of the litigation. If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. Where there is doubt as to whether the pleadings bring the incident within the coverage of the policy, such doubt must be resolved in favour of the insured.

[14] Where it is clear from the pleadings that a suit falls outside policy coverage by reason of an exclusion clause, the duty to defend does not arise. It is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim falling within the policy may succeed will suffice. In this sense, the insurer's duty to defend is broader than the duty to indemnify. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim: *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, 72 O.R. (2d) 799 (S.C.C.).

[15] In *Nichols*, McLachlin J. stated at para. 21:

> I conclude that considerations related to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

[16] Any doubt as to whether the pleadings bring the incident within the coverage of the policy must be resolved in favour of the insured. As clearly stated by Iacobucci J. in *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699 at para. 31:

> Where pleadings are not framed with sufficient precision to determine whether the claims are covered by a policy, the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred. This principle is congruent with the broader tenets underlying the construction of insurance contracts, namely, the *contra proferentum* rule, and the principle that coverage provisions should be construed broadly, while exclusion clauses should receive a narrow interpretation. In *Opron Maritimes, supra,* the New Brunswick Court of Appeal conveyed these principles by stating at para. 15 that, "[a]ny doubt as to whether the pleadings bring the incident within the coverage of the policy ought to be resolved in favour of the insured.

[17] Where there is a duty on an insurer to defend some or one of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include some claims that may be outside the policy coverage: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245 at para. 20.

[18] As regards determining whether a duty to defend arises under the policy, I am also mindful of the tests set forth in *Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 at pp. 581-582 and in *Progressive Homes Ltd.,supra*.

The Amended Statement of Claim

[19] The allegations of the plaintiff as against the defendants include the following:

> 3. The defendant, the Toronto Transit Commission … is a company duly incorporated pursuant to the laws of Ontario and was at all material times the owner and/or occupier and/or manager of the premises of the streetcar island located at Vaughn Road on St. Clair Avenue West in Toronto. At all material times, the TTC, through its employees, servants, or agents, were responsible for the proper care, maintenance and repair of the property.

> 4. The defendant, the City of Toronto, was at all material times the occupier and/or owner and/or manager of the streetcar island located at Vaughn Road and St. Clair Avenue West. At all material times this defendant was responsible in law for the maintenance and control of the streetcar island and surrounding areas of the subject property
>
> 5. The defendant, Dufferin Construction Company … is a company duly incorporated pursuant to the laws of Ontario and was at all material times contracted by the TTC and/or the City of Toronto to perform maintenance, service or repairs for and upon the premises. At all material times, Dufferin Construction through its employees, servants or agents, were responsible for the proper care, maintenance, and repair of the property.
>
> 6. The defendant, 1471872 Ontario Incorporated otherwise known as the Downsview Group … is a company duly incorporated pursuant to the laws of Ontario and was at all material times contracted by Dufferin Construction Company, by the TTC and/or the City of Toronto to perform maintenance, service or repairs for and upon the premises. At all material times, the Downsview Group, through its employees, servants or agents, were responsible for the proper care, maintenance and repair of the property.
>
> 8. The plaintiff claims that the aforementioned trip and fall and resulting injuries and damages were caused as a result of the negligence of the defendants, their agents, servants, contractors and employees, such negligence consisting of but not limited to the following:

[20] Thereafter follows an enumeration of 15 allegations of negligence, all of which are claimed as against "the defendants, their agents, servants, contractors and employees." There are no independent allegations of negligence as against each of the separate defendants. The statement of claim further alleges at paragraph 20 that "the defendants are jointly and severally liable for the plaintiff's damages."

Extrinsic Evidence

[21] As a preliminary issue, the respondent had argued that extrinsic evidence should not be admitted or referenced by this Court in its deliberations. In that regard, it refers to *Monenco Ltd., supra.,* in which Iacobucci J. observed at para. 37 that "the court considering such an application may not look to 'premature' evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation." Counsel for Dominion maintained that the only documents to be referred to by the Court in its determination of this application should be the contract, subcontract, policy of insurance and the statement of claim. Dufferin, while it had referenced photographs and a list of efficiency issues prepared by the City, did not argue this point vigorously.

[22] I am of the view that extrinsic evidence need not be referenced in arriving at a determination of the issues. I do note that it was also Dominion's view that, because there was no evidence that it was Downsview as opposed to Dufferin that had worked on the subject streetcar platform or installed the sunken paver that allegedly caused the injuries, it would not have a duty to defend. I note that the same observations with regard to extrinsic evidence would apply to that argument, and evidence would not be permitted in that regard at this point. It is not the function of this Court at this juncture to make findings of fact as regards who may have worked on certain areas of the project, and I do not intend to do so.

The Positions of the Parties

[23] It is Dufferin's position that the caselaw referenced at paragraphs 13 to 18, above, as regards principles of application for the determination of whether a duty to defend arises, are applicable. Dufferin acknowledges that the policy insures it as an additional insured "only with respect to liability arising out of the operations of the named insured [*i.e.* Downsview] at the above-noted project." It maintains that the allegations contained in the pleadings are vague in that they do not isolate allegations of negligence as against each of the defendants, including the named insured and added insured, but instead make each allegation against all the defendants. The allegations against both Downsview and Dufferin arise from the same facts in respect of the same project, and the preconditions to Dominion's duty to defend, namely that the claims must arise from Downsview's operations pursuant to the subcontract, are the same in relation to Downsview and Dufferin. It maintains that where it is not clear whether the claims are covered by the policy or, as in this case, by the added insured provision of the policy (since all of the allegations against all of the defendants are the same and there is no independent allegation alleged as against Dufferin or Downsview independently one of the other), there is nothing which would indicate that the allegations of negligence do or do not "arise out of the operations of the named insured at the above noted project."

[24] Dominion takes the position that there is no evidence to indicate that the project at the location of the trip and fall was worked on by Downsview as opposed to Dufferin and, therefore, that the alleged liability of Dufferin would arise "out of the operations of the named insured at the above-noted project," as stated in the policy of insurance, which would trigger the duty to defend. As regards evidence of this, I set forth my comments regarding extrinsic evidence at paragraphs 21 and 22, above. In my view, the issue is not that of whether evidence exists or not, but whether the allegations as framed by the plaintiff could include the situation where liability arises out of the operations of Downsview. It is Dominion's position that the plaintiff alleges negligence against Dufferin due to work performed under the contract, but does not allege that Dufferin's negligence or liability arises out of work performed by Downsview. It maintains, rather, that the claim alleges that Dufferin has liability arising out of its own operations and work and that that allegation must be included in order for the duty to defend to arise. I am not persuaded by that argument. The same allegations are made against Dufferin and Downsview without differentiation such that a claim falling within the policy may succeed. As there is some doubt as to whether the pleadings do bring the incident within the coverage, such doubt must be resolved in favour of the added insured.

[25] Dominion further maintains that Dufferin's CGL policy with Zurich is primary and must respond rather than Dominion. The Zurich policy is a general CGL policy, which is stated to be primary. Dominion argues that despite the fact that the policy contains a self-retention provision for the first $500,000, that was Dufferin's business decision when obtaining its general CGL policy of insurance.

[26] However, the project-specific Dominion contract, which Downsview was required to obtain pursuant to the subcontract with Dufferin and under which Downsview was to have Dufferin named as an added insured with respect to liability arising from Downsview's operations, was stipulated to be primary. It is commercially reasonable to assume that the parties, both sophisticated in the industry, intended by incorporation of that provision adding Dufferin as an added insured in the Downsview subcontract, that Dufferin would be insured under the Downsview project-specific policy for all operations arising from Downsview's work on the project covered by the insurance policy. Moreover, if in the circumstances of this case, the respondent's arguments were to succeed, this would render the added insured provision in the Dominion policy of little value.

Analysis

[27] As the jurisprudence clearly sets forth, the pleadings govern the duty to defend.

[28] The plaintiff's claims sound in negligence as regards the subject project, alleging bodily injury to the plaintiff. There are no relevant exclusion clauses.

[29] I am of the view that there is vagueness as regards the pleadings and the claims set forth therein, and particularly as regards whether the alleged negligence, which is alleged against all defendants, could be attributable to the work of Downsview, which would clearly trigger Dominion's duty to defend Dufferin. Due to the fact that all allegations are against all named defendants and no allegations of negligence are isolated or identified to be as against any one specific defendant, it is not possible at this early stage and on the pleadings as framed to isolate allegations of negligence by one defendant. I do not accept Dominion's submissions that the allegations or most of the allegations relate to acts or omissions not related to the operations of Downsview such that Dufferin could never be covered under the Dominion policy in relation to these allegations. Further, I do not accept its argument that the claim alleges that each defendant is independently liable for the incident. Indeed, the claim makes allegations against all of the defendants as a group without distinguishing among them and further alleges that the parties are jointly and severally liable.

[30] While Dominion submits that, as such, there is no evidence to establish that the alleged negligence arises from the operation of Downsview and no duty can be said to arise, I do not agree.

[31] As set forth in *Monenco*, where pleadings are not framed with sufficient precision to determine whether the claims are covered by a policy, as is the case here, the duty to defend will

be triggered where, on a reasonable reading of the pleadings, a claim within the coverage can be inferred. Any doubt as to whether the pleadings bring the incident within policy coverage is to be resolved in favour of the insured.

[32] In this case, all allegations are directed at both Dufferin and Downsview as well as the other defendants, and the liability, once determined at trial, could be found to arise from the actions of Downsview or Dufferin. Thus, the pleadings allege facts that, if true, would require Dominion to indemnify Dufferin for the claim, thus obligating Dominion to provide a defence to Dufferin as an added insured.

[33] Where there is doubt as to whether the pleadings bring the incident within the coverage of the policy, such doubt must be resolved in favour of the insured. The mere possibility that a claim falling within the policy may succeed will suffice. Where there is a duty on the insured to defend some of the claims and those claims embody the true nature of the claim, a duty to defend the entire claim arises. The widest latitude is to be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

[34] Given the terms of the relevant contract and subcontract, the wording of the policy which adds Dufferin as an additional insured for liability arising out of the operations of Downsview, and the vagueness of the pleadings as regards the allegations of negligence as against each defendant independently of the other, a possibility arises that the claims fall within the coverage in the circumstances of this case. Thus, I find that Dominion has a duty to defend Dufferin, and this policy must respond.

Conflict of Interest

[35] The parties are in agreement that, if the Court were to determine that a duty to defend arises, there would be an inherent conflict of interest due to the fact that Downsview and Dufferin have cross-claims against one another. Thus, Dufferin is entitled to retain its own independent counsel at Dominion's expense.

Costs

[38] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages including the costs outline. The submissions may be forwarded to my attention through Judges' Administration at 361 University Avenue within thirty days of the release of this Endorsement.

Carole J. Brown, J.

Released: October 13, 2015

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Applicant

– and –

The Dominion of Canada Insurance Company

Respondent

REASONS FOR JUDGMENT

Carole J. Brown, J.

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