CITATION: Hanson v. Totten Insurance Group Inc., et al, 2017 ONSC 4809
COURT FILE NO.: CV-15-21974
DATE: 20170811

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NICOLA ANNE HANSON and PAUL HANSON	)	*Raymond G. Colautti*, for the Plaintiffs
Plaintiffs	)	
	)	
– and –	)	*Mikel C. Pearce*, for the Defendants, Totten Insurance Group Inc. and Lloyd's Underwriters
TOTTEN INSURANCE GROUP INC., IVES INSURANCE BROKERS LTD., JOHN MALAC, LYNNE MALAC and LLOYD'S UNDERWRITERS	)	*Michael B. Stocks*, for the Defendants, John Malac and Lynne Malac
Defendants	)	
	)	**HEARD:** February 6, 2017

HEBNER J.

[1] This is a motion for summary judgment brought by the plaintiffs under Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The plaintiffs request the following orders:

1. A declaration that Lloyd's Underwriters have no subrogated right to bring mortgage enforcement proceedings in respect of a mortgage dated August 4, 2006, subsequently renewed on December 15, 2012 and now matured on December 15, 2014 on the property owned by the plaintiff at 743 Lake Erie Drive, Kingsville, Ontario, which charge is registered as CE229889;

2. 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;

3. 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

4. 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.

[2] There is another action brought by the plaintiff, Nicola Anne Hanson, against Allstate Insurance Company of Canada ("Allstate") respecting the same property. That action bears Windsor Court File Number CV-11-16296. A comprehensive description of that action can be found in the ruling I made on a summary judgment motion dated May 18, 2017. I granted partial summary judgment (declaring that there was a valid and subsisting property insurance policy binding on Allstate at the time the policy was issued in December 2008 and that there were no material misrepresentations made by the plaintiff at the time of the application or in the application for insurance within the meaning of s. 124(5) of the *Insurance Act,* R.S.O. 1990, c. I.8) and ordered that the matter proceed to trial on the remaining issues.

Background Facts

[3] The plaintiff, Nicola Anne Handson, is the owner of a property located at 743 Lake Erie Drive, Kingsville, Ontario (the "subject property"). The plaintiff, Paul Hanson, is her husband and a guarantor on the mortgage. The plaintiffs purchased the subject property in the summer of 2006. Initially, until the fall of 2008, the property was insured through Gore Mutual Insurance Company ("Gore"). Sometime in November 2007, there was fire damage to the subject property caused by a pan left on the hot stove. A claim was made under the Gore policy and $43,000 was paid. The Gore policy was either cancelled or not reinstated in the fall of 2008.

[4] In December 2008, the plaintiffs obtained property insurance for the subject property from Allstate. In May 2010, the property sustained water damage. On June 6, 2010, there was a significant wind storm in the Kingsville area and the subject property was further damaged. Claims were submitted to Allstate. Those claims are the subject matter of the plaintiff's (Nicola Anne Hanson) action in CV-11-16296. Allstate cancelled the policy in September 2010 and it denied coverage claiming misrepresentation.

[5] There was a mortgage on the subject property held by John and Lynne Malac, private mortgagees. The mortgage was placed on the property on August 4, 2006 to secure a loan in the amount of $250,000. The mortgage was initially for a two year term but was extended on mutual consent for several subsequent two-year terms. The final extension was made in December 2012 for maturity in December 2014.

[6] When the Allstate policy was cancelled, the plaintiffs were unable to find another insurance carrier. The Malacs offered to place insurance in their own name to protect their mortgage investment with the plaintiffs to reimburse them for the cost. The Malacs obtained a policy with Totten Group Insurance Inc. (a Lloyd's coverholder) ("Totten/Lloyd's") on October 12, 2010 in the amount of $200,000. The annual premium was $1,810. The Malacs paid the premium and received reimbursement from the plaintiffs.

[7] In March 2011, a water pipe in the subject property burst. The property had been uninhabited for a time due to the previous water and storm damage. The Town of Kingsville attended at the property and shut off the municipal connection.

[8] In May 2011, the plaintiff, Nicola Anne Hanson, commenced the action against Allstate (CV-11-16296). In 2012, the plaintiffs undertook repairs. The property remained uninhabitable until June 2013 when a fire occurred. Thereafter, it was economically unfeasible to repair the building. The Malacs processed a claim with Totten/Lloyd's consequent on the fire damage. On January 20, 2016, Totten/Lloyd's settled the Malacs' claim by paying the full policy limits of $200,000.

[9] In August 2014, the Malacs advised the Hansons that the mortgage would mature in December 2014 and would not be renewed. The Malacs commenced power of sale proceedings by serving a notice of sale on February 9, 2015. The notice of sale claimed that the amount of $237,718.88 was owing for principal outstanding on the mortgage. In addition, the notice of sale claimed interest of $3,923.36, default bonus of $6,392.31, $400 for NSF charges, $20.60 for property taxes and $1,000 for costs. The Hansons brought a motion originally returnable March 24, 2015 for an interlocutory injunction preventing the Malacs from taking mortgage enforcement steps. An order was made on consent by Howard J. on May 19, 2015 adjourning the motion to a long motion date and providing that no steps be taken to enforce the mortgage against the property until the return of the motion. That motion has not yet been scheduled for hearing.

[10] Since the termination of the mortgage, the Malacs have continued to pay the property taxes, interest has continued to accrue and the Malacs have incurred legal expenses. The Malacs claim that the total amount owing as of February 6, 2017 was $124,210.16.

Material Facts

[11] The parties agree that the following facts, some of which are contested (as noted) are material:

1. According to the terms of the mortgage, the Hansons had an obligation to insure the property.

2. When Allstate voided their policy, the Hansons did not obtain replacement insurance. That much is clear. The Hansons say they were unable to obtain replacement insurance. The defendants challenge that assertion.

3. The Malacs had no obligation to insure the property. They had the option to do so which they exercised. The mortgage was subject to standard charge terms, which included the following at para. 16:

> 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.... Evidence of continuation of all such insurance having been effected shall be produced to the chargee at least 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....

4. The Malacs obligated the Hansons to pay the premiums, which they did by issuing cheques to the Malacs for reimbursement.

5. A fire occurred at the subject property on June 19, 2013.

6. Totten/Lloyd's investigated the fire and agreed to honour the policy in November 2013. The Malacs were provided with a cheque for $100,000 and were advised that a second cheque for $100,000 would be mailed to them under separate cover.

7. In subsequent correspondence in January and February 2014, Totten/Lloyd's reversed their advice and instead took the position that the Malacs were not entitled to payment under the policy since the mortgage was not in default. They insisted that the $100,000 already paid be returned.

8. The mortgage matured on December 15, 2014. The Malacs commenced power of sale proceedings in February 2015.

9. This action was commenced by the plaintiffs in February 2015 claiming that Totten/Lloyd's should pay the loss. The Malacs cross-claimed against Totten/Lloyds.

10. By January 2016, Totten/Lloyd's paid out the full limits of the policy ($200,000) to the Malacs. Totten/Lloyd's claims a right of subrogation against the Hansons.

The Issue

[12] The plaintiffs request a declaration that Totten/Lloyd's has no subrogated rights to enforce the mortgage against them. They request an order directing the Malacs and/or Totten/Lloyd's to provide a discharge of the mortgage to the extent of the amount of payment on the policy ($200,000). The principle question is "Are the Hansons liable to pay the mortgage to Totten/Lloyd's under the subrogated claim?"

Position of the Parties

The Plaintiffs

[13] The plaintiffs take the position that they are not required to pay the mortgage amount to Totten/Lloyd's under the subrogated claim. The Hansons point to the fact that they paid the premiums on the policy over the years and submit that, as a result, they are entitled to the benefit of the policy. The plaintiffs point to the following cases:

1. *Sanofi Pasteur Limited v. UPS SCS, Inc., et al,* 2014 ONSC 2695.

[14] In that case, the defendants agreed to store certain vaccines belonging to the plaintiff in a temperature controlled environment. The parties entered into a Master Services Agreement. The plaintiff paid storage fees to the defendant. In return, the defendant was obligated to adhere to various special requirements for storing vaccines, specifically that the vaccine be stored at a temperature ranging between 2° and 8°C. The cooler in which the vaccines were stored had malfunctioned and the temperature had dropped to -4.2°C. The plaintiff claimed that the vaccines were thereby rendered unsellable and the damages were in excess of $8 million.

[15] Under the terms of the agreement, the plaintiff agreed that it would insure its stored vaccines against the risk of loss. It had not. The agreement contained a limitation of liability clause whereby the defendant's liability was limited to $100,000. The defendant paid the plaintiff $100,000. The plaintiff claimed the balance. At par. 31, the court said:

> The Court of Appeal has specifically held that the contractual allocation of risk embodied in a covenant to insure extends to all claims related to the manifestation of that risk. This includes SCS' co-defendants, even though they are not parties to the agreement in which the covenant to insure is contained: *Williams-Sonoma Inc. v. Oxford Properties Group Inc.*, 2013 ONCA 2980.

[16] The plaintiff's claim was dismissed. The court found that "the plaintiff's claim cannot succeed given its covenant to insure."

2. *Orion Interiors Inc. v. State Farm Fire and Casualty*, [2015] O.J. No. 46.

[17] This is a landlord and tenant case. The tenant had purchased an all-risk insurance policy from State Farm and the landlord was listed as an insured on the policy. The tenant experienced flooding because of a dislodged drain plug, which had been installed by a company on behalf of the landlord. The tenant reported the flood to State Farm and State Farm paid the tenant the limits of the policy. The tenant sued the landlord for loss incurred by flood over and above the limits of the policy. The landlord's motion for summary judgment dismissing the claim was granted. At para. 31, the court said:

> The cases discussed above demonstrate that when a party to a lease agreement undertakes to obtain insurance against certain damages, such an undertaking operates as an assumption by that party of the risks associated with the insured losses. The undertaking bars the party from claiming damages against the other party to the lease, even if the former's loss is caused by the latter's negligence. An explicit provision to the contrary is required to avoid this consequence.

3. *Bossio v. Nutok Corporation*, 2015 ONSC 1305.

[18] In this case, a decision of Kershman J., the plaintiff and the defendant were business associates. During the course of their business relationship, the plaintiff borrowed significant sums of money from the defendant secured by way of mortgages on his properties. A fire destroyed a house on the plaintiff's lands. Insurance proceeds were

paid out by the insurance company in the amount of $375,500. The plaintiff mortgagor received $175,500 and the defendant mortgagee received $200,000 pursuant to a written authorization and direction. Instead of applying the insurance monies to the mortgage debt, the mortgagee applied his share of the funds against outstanding secured loans and other loans. The plaintiff brought an application for relief, including accounting of the mortgage funds. The defendant brought a counterclaim for possession of the property and payment of the mortgage. The court found in favour of the plaintiff. The mortgage was found to be paid in full and was discharged from title.

[19] The decision in this case turned on s. 6 of the *Mortgages Act*, R.S.O. 1990, c M.40, which reads as follows:

> 6(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.
>
> (2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under the mortgagee's mortgage.

[20] At para. 178, Kershman J. said:

> [W]here a mortgagee accepts the monies and uses them, it is in payment of the monies due and owing under the mortgage debt. The mortgagee cannot recover the monies, apply them to unsecured debts, and still come to the court asking to maintain his position as a secured creditor. This type of double recovery is not permissible.

[21] The plaintiffs submit that the Malacs received $200,000 from Totten/Lloyd's. They must apply that money to the mortgage debt. Accordingly, the Malacs cannot maintain an action against the plaintiffs for that $200,000. If the Malacs cannot maintain such an action, then neither can Totten/Lloyd's.

The Defendants, Totten/Lloyd's

[22] The defendants Totten/Lloyd's take the position that the covenant to insure in the mortgage standard charge terms is from the mortgagor to the mortgagee. There is no covenant to insure by the mortgagee. Similarly, s. 6 of the *Mortgages Act* is for the benefit of the mortgagee. As there was no obligation on the part of the Malacs to obtain insurance, if they choose to do so (as they did) they may do so for their benefit only. Furthermore, there is nothing preventing the Malacs from granting the insurer a right of subrogation. Accordingly, the defendants Totten/Lloyd's take the position that the motion ought to be dismissed.

The Defendants, Malacs

[23] The Malacs have received the $200,000 insurance payment from Totten/Lloyd's. They take the position that the property over which they held the mortgage was uninsured. They obtained an insurance policy to cover their interest to ensure that the risk of loss to them was covered. They say there are additional monies owing on the mortgage, including interest, penalty and costs, and they wish to have their consent order of Howard J. set aside so that they can proceed with their power of sale proceedings in an attempt to collect those additional monies owing.

Analysis

[24] For reasons that follow, I agree with the position taken by the defendants Totten/Lloyd's.

[25] I start with s. 6 of the *Mortgages Act*, set out above. The heading of the section is "Application of insurance money". In ss. 1, the mortgagee may require that any insurance monies received by the mortgagor be applied in "making good the loss or damage". In ss. 2, the mortgagee may require that insurance proceeds received be applied towards discharge of debt due under the mortgage. The mortgagee has the right to elect how the proceeds of the insurance are to be applied to the extent of the mortgagee's interest (*Bossio*, at para. 177). The section gives options and protections to a mortgagee. It imposes obligations on the mortgagor. It seems clear to me that the purpose of this section is to benefit the mortgagee, and the mortgagee alone. I fail to see how this section assists the Hansons in their claim.

[26] 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 may obtain insurance itself and require the mortgagee to pay the premium. This term is for the benefit of the mortgagee and the mortgagee alone.

[27] The covenant to insure the subject property was imposed on the Hansons by the standard charge terms of the mortgage. In *Sanofi*, Morgan J. said, at para. 3:

> The Ontario Court of Appeal has stated in an unqualified way that, "[a] contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against."

[28] Accordingly, the risk of loss must be assumed by the Hansons.

[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. The insurance policy obtained by the Malacs and issued by Totten/Lloyd's contains the following:

1) The coverage was identified as "mortgagee interest".

2) Under the heading "G) Subrogation":

> 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 an action to enforce such rights....

3) Under the heading "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 for the full amount of its mortgage equity in priority to the insurer; or the insurer may at its option pay the mortgagee all amounts due or to become due under the mortgagor on the security thereof, and shall thereupon receive a full assignment and transfer of the mortgage together with all securities held as collateral to the mortgage debt.

4) The insured perils include "fire or lightning".

5) Under the heading "Subrogation":

> The insurer, upon making any payment or assuming liability for payment under this form, shall be subrogated to all rights of recovery of the insured against others and may bring an action to enforce such rights. All rights of subrogation are waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this policy.

6) Under the heading "Mortgagee Interest – No Co-insurance Endorsement":

> It is noted and agreed that this policy is written on a no-coinsurance 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.

[30] The named insureds are John Malac and Lynne Malac. The Hansons do not appear as named insureds.

[31] The terms of the policy obtained by the Malacs are all consistent with the policy being for the benefit of the Malacs and the Malacs alone. The plaintiffs' own evidence is consistent with this conclusion. In the Examination for Discovery of the plaintiff, Nicole Anne Hansen, held on December 7, 2015, she was asked about her dealings, or lack thereof, with Totten/Lloyd's. The following exchange appears at p. 48:

> Q. So, he (Mr. Malac) never called you up and said I now have a policy and you're insured on it?

A. No. We just went to his lawyers and his lawyers showed us all the paperwork, policy and gave me the numbers to fill in to the cheques.

Q. Did Mr. Malac tell you who the insurer on that policy would be?

A. He didn't tell me who it was, no. I just saw the paperwork when I went in to the lawyer.

Q. Did Mr. Malac tell you who his broker was?

A. No.

Q. Did he tell you the amount of the insurance he obtained?

A. No.

Q. Did you ask him?

A. No.

Q. Did Mr. Malac suggest that you speak to his broker?

A. Not that I recall, no.

Q. Mr. Malac told you that he expected you to pay him the premium?

A. Yes.

Q. Did you make any attempt to speak to any insurance broker on your own?

A. No, I didn't.

[32] Mrs. Hanson's dealings with Mr. Malac at the time of the renewal of the mortgage, as detailed in her answers to the above questions, is consistent with her knowledge, at the time, that she had no interest in the policy. Similarly, at the time the water pipe broke causing damage to the property, in March 2011, the Hansons did not make a claim under the policy. This lack of action on their part is consistent, once again, with their knowledge that they had no interest in the policy. 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.

[33] As for the plaintiffs' argument based on *Bossio*, that case did not deal with the right of subrogation in an insurance policy. That case dealt with the mortgagee's obligation to use the insurance monies to pay down the mortgage. There is no question that is what occurred in this case.

[34] As for the right of subrogation, the policy in this case provides for rights of subrogation in the insurer against "others". There is no indication that "others" does not include the mortgagor. The existence of the right of subrogation is consistent with my conclusion that the policy was obtained by the Malacs for the benefit of the Malacs alone. There is no authority on point, but I see no reason in the evidence presented to depart from the clear intention expressed in the insurance policy.

Disposition

[35] For the foregoing reasons, the plaintiffs' motion is dismissed.

[36] The Malacs have requested an order that the consent order of Howard J. be set aside and they be entitled to proceed with their power of sale proceedings so as to collect the balance owing on their mortgage. That consent order was made on a motion brought by the plaintiffs for an interlocutory injunction related to the power of sale proceedings. That motion was to be adjourned to a long motion date to be determined by the parties in coordination with the Trial Coordinator's office. That motion has not yet been returned. Accordingly, it is not before me. Under those circumstances, I decline to set aside the consent order.

[37] If the parties are unable to agree on costs, they may provide written submissions along with a costs outline and any relevant offers to settle according to the following timelines:

1) The defendants may provide their submissions within 20 days;

2) The plaintiffs may provide their submissions within 20 days thereafter; and

3) The defendants may provide any reply submissions within 10 days thereafter.

P. Hebner

Pamela L. Hebner
Justice

Released: August 11, 2017

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NICOLA ANNE HANSON and
PAUL HANSON

Plaintiffs

– and –

TOTTEN INSURANCE GROUP INC., IVES INSURANCE BROKERS LTD., JOHN MALAC, LYNNE MALAC and LLOYD'S UNDERWRITERS

Defendants

RULING ON MOTION

Pamela L. Hebner
Justice

Released: August 11, 2017