CITATION: Monk v. Farmers and Muskoka Ins., 2014 ONSC 3940
COURT FILE NO.: CV-11-093
DATE: 20140627

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Diana Lynn Monk, Plaintiff (Responding party)	David A. Morin, Counsel for the Plaintiff
– and –	
Farmers' Mutual Insurance Company (Lindsay), Defendant (Moving party)	Martin P. Forget, Counsel, for the Defendant, Farmers Mutual Insurance Company (Lindsay)
– and –	
Muskoka Insurance Brokers Ltd., Defendant (Moving party)	Demetrios Yiokaris, Counsel for the Defendant, Muskoka Insurance Brokers Ltd.
	HEARD: April 25, 2014; June 16, 2014

JUDGMENT ON SUMMARY JUDGMENT MOTIONS

INTRODUCTION AND OVERVIEW

[1] The defendants, Farmers' Mutual Insurance Company (Lindsay) ("Farmers' Mutual") and Muskoka Insurance Brokers Ltd. ("Muskoka Insurance"), bring these motions for summary judgment, submitting that there is no genuine issue requiring a trial in this proceeding and asking for an order that the action be dismissed.

[2] The action arises out of an insurance coverage claim for property damage to a log home owned by the plaintiff, Diana Lynn Monk, in the town of Bracebridge, Ontario. The damage was allegedly caused by the negligent workmanship of Pleasantview Log

Restoration Systems ("Pleasantview"), a contractor retained by Ms. Monk to perform restoration work on the premises.

[3] Ms. Monk's insurance policy (the "Policy") was a standard homeowner's policy issued by her insurer, Farmers' Mutual. The policy was arranged for Ms. Monk by her broker, Muskoka Insurance.

[4] Ms. Monk commenced this action on November 14, 2011, almost three years after she first discovered damage to her property.

[5] The plaintiff's claim against Farmers' Mutual is based on the alleged breach of her contract of insurance with Farmers' Mutual. Her claim against Muskoka Insurance is based on an alleged breach of Muskoka Insurance's contractual and fiduciary duty to her, and its failure to advise her in a timely way that she had a valid claim against Farmers'.

BASIS FOR THE MOTIONS

[6] The basis for the summary judgment motion of Farmers' Mutual is:

a) Ms. Monk's claim constitutes costs of repairing faulty workmanship caused by Pleasantview, which is specifically excluded by the policy (the "coverage issue").

b) The action was commenced more than two years after discovery of the claim and is therefore out of time (the "limitation issue").

Muskoka Insurance adopts the position of Farmers' Mutual that there is no coverage for the alleged losses sustained by Ms. Monk under the Farmers' Mutual policy. It relies on an alleged admission by Ms. Monk at her examination for discovery that she does not have an enforceable claim against Muskoka Insurance if it is determined that there is no coverage under the policy.

RELEVANT FACTS AND CHRONOLOGY OF EVENTS

General Agreement on Facts

[7] There is general agreement by the parties on many of the facts giving rise to this claim. Where there is disagreement, this has been noted.

The Contract with Pleasantview

[8] The scope of the work was described in the contract entered into by the parties as follows:

> Scope of Work
>
> Restoration of exterior of logs and board and batten structure using the Envirowash Wood Restoration System described in more detail hereafter.

[9] Specifically, the contract included the following terms:

> Preparation
>
> On commencement of on-site work all areas of the building where water from washing process might enter the structure will be inspected and temporarily sealed prior to commencement of stripping and neutralization process.
>
> Caulking and Sealing
>
> All interfaces of similar or dis-similar material including but not confined to:
>
> c) Around doors and windows.
>
> e) And all other areas or interfaces where moisture might enter the structure including cracks and shakes in the log components and board and batten surfaces.
>
> Clean up, Removal and Window Cleaning
>
> On completion of the foregoing works all contractor's equipment shall promptly be removed from the site which shall be left in a clean and tidy condition absent of debris resulting from the works.
>
> All windows and glass doors shall be thoroughly cleaned on the interior and exterior.

[10] Around November 3, 2008, Ms. Monk orally extended the scope of Pleasantview's work to include work to the dormer. The invoice for this work was entitled "Re Extras to Contract Re Repair and Renovation of Dormer Windows at above address".

Discovery of Deficiencies and Communications with Pleasantview and Muskoka Insurance

[11] At the conclusion of the work in November 2008, Ms. Monk noticed what she believed were deficiencies in Pleasantview's work. There was sawdust and drips of stain on the windows and outside light fixtures. A part was broken off from one of her exterior light fixtures and four holes had been drilled into her bedroom wall. Of particular concern to her were stains on her carpeting where chemical spray had entered the house.

[12] Ms. Monk complained to Pleasantview about the stains on the carpeting and Pleasantview assured her that the stains would be removed professionally by a carpet cleaner. Pleasantview attended on January 6, 2009 to clean the carpet but the stains could not be removed.

[13] Ms. Monk alleges that on or about January 7, 2009 she spoke to a sales agent at Muskoka Insurance and inquired about making a claim with respect to her damaged carpet. She was advised that she did not have coverage for this damage and that the contractor she had hired was responsible for the damage. Muskoka Insurance denies that this communication took place.

[14] Around April and May of 2009, Ms. Monk noticed that the windows of her house were scratched and pock-marked. She also noticed that stain had dripped on the windows and that the grain appeared to be raised and hair-like fibres were visible on the surfaces of her wooden window frames. She also noticed additional damage to her light fixtures.

[15] After she noticed this damage Ms. Monk alleges that she again dropped by the offices of Muskoka Insurance and spoke with a sales agent about making a claim in relation to the windows. She was told that since the damage had been caused by a contractor who was working on her home the damage was not covered under the policy. Muskoka Insurance denies that this communication took place.

[16] In January 2010, Ms. Monk noticed that condensation had formed between the panes of her windows. The large thermal pane windows in the doors were sinking and falling down inside the doors, apparently because the silicone holding them in place had deteriorated. Doors had also warped and were popping open on their own.

[17] Ms. Monk alleges that sometime in January or February of 2010 she telephoned Muskoka Insurance and inquired about making a claim in relation to the damage to her windows. She was again told that no insurance company covered damage caused by a contractor and she should claim against the contractor's liability insurer. Muskoka Insurance denies that this third communication took place as well.

[18] After Pleasantview's unsuccessful attempt on January 6, 2009 to clean the carpet, Ms. Monk did not make any further attempts to seek redress from Pleasantview for the damages to her house. In her view, the proprietor of Pleasantview had been very

confrontational when he had attended at her home with respect to the carpet and she did not want any further confrontations.

[19] In around late July or August 2011, knowing that her three-year warranty from Pleasantview would expire in November of that year, she prepared a 42-page warranty claim and delivered it to the proprietor of Pleasantview personally. She was assured that someone would come and inspect the damages after August 19, 2011. No one from Pleasantview came by to inspect.

[20] Thereafter, on September 2, 2011, Ms. Monk attended at the offices of Muskoka Insurance and again asked about making a claim. She informed Muskoka Insurance that she had a friend whose refrigerator repair person damaged the floor of her kitchen while repairing the fridge and her friend's home insurance policy covered the damage. She pointed out that she had not hired Pleasantview to touch her carpets or windows or doors, only the logs on her home, and on the basis of the response by her friends' insurance company, she should also be covered for what she termed peripheral damage.

[21] Muskoka Insurance agreed to contact a claims person with Farmers' Mutual, and on September 3, 2011, Ms. Monk received an email from Muskoka Insurance encouraging her to contact Farmers' Mutual directly because "perhaps there could be coverage" for the "resultant damage" to the "stained windows and damage done to the exterior doors as well the carpet".

[22] On September 8, 2011, Ms. Monk received a second email from Muskoka Insurance advising her that the claim had been denied. She then retained a lawyer, who submitted a formal written claim for coverage on October 12, 2011 and commenced legal action by issuing a claim on November 14, 2011.

Damages

[23] Ms. Monk has summarized her claim for damages in this action as follows:

a) $12,180.30 - replacement of damaged carpeting;

b) $1,501.64 - replacement of exterior lights;

c) $868.88 - replacement of exterior doorknobs; and

d) $82,720.62 - replacement of windows and doors.

Cause of Damages

[24] Ms. Monk retained Giffin Koerth Inc. ("Giffin Koerth") to conduct an Engineering Assessment of the damage. Giffin Koerth prepared a report (the "Giffin Koerth Report")

and opined in the report that scratches on the windows were likely the result of the failure of Pleasantview to follow industry standard practices. The extent of the scratching damage was such that it warranted the removal and replacement of all of the affected windows and doors. Similarly, the damage to the carpet likely resulted from the failure of Pleasantview to follow industry standard practices.

[25] Giffin Koerth reported that it is industry standard practice to mask windows, doors, and areas of the structure not to be refinished in order to prevent damage, and that both Ms. Monk and the owner of Pleasantview reported that no masking had been done during the refinishing process. With respect to the failure of the window seals, Giffin Koerth reported that it was unable to specifically determine the cause of the seal failures; it was possible the failures were the result of the damage caused by the log stripping process and the failure to mask the windows during the exterior restoration work.

[26] Ms. Monk has commenced an action against Pleasantview, alleging poor workmanship, and claiming the same damages against Pleasantview that she is claiming against the defendants in this action, as well as recovery for damage to the logs on her home.

ANALYSIS

Issues

[27] The issues to be decided in these motions can be summarized as follows:

a) Is there a genuine issue requiring a trial as to whether some or all of the property damage falls within the "faulty workmanship" or the "property excluded" exclusions in the policy?

b) Is there a genuine issue requiring a trial as to whether this action is barred, having been commenced following the expiry of the two-year limitation period?

FIRST ISSUE: Is there a genuine issue requiring a trial as to whether the property damage falls within the "Faulty Workmanship" or the "Property Excluded" exclusions in the policy?

The "Faulty Workmanship" Exclusion

[28] The contract of insurance provides as follows, under the heading "Losses Excluded":

> We do not insure:
>
> 2. the cost of making good faulty material or workmanship;

[29] As a preliminary finding, I find that with the exception of the failure of the window seals the damages complained of by the plaintiff in her action against the defendants were caused, directly or indirectly by Pleasantview's failure to follow industry standard practices and to take the protective measures required by the contract. The failure of the seals may or may not have been caused by the actions of Pleasantview and I am unable to make a finding as to the cause of their failure. This finding is consistent with the conclusions set out in the Giffin Koerth report.

[30] The question that concerns the court in relation to this exclusion is what damages are included in the term "faulty workmanship". Ms. Monk submits that the term "faulty workmanship" extends only to the work that she retained Pleasantview to do, which was to rejuvenate the logs. The incidental or corollary damage resulting from that faulty workmanship, i.e. damage to windows and doors, fixtures and carpets, was not faulty workmanship. The damage is properly characterized as "resulting damage" which is not covered by the exclusion.

[31] At paras. 46 through 48 of her factum, Ms. Monk discusses the resulting damage exception to the faulty workmanship exclusion in a homeowner's policy as follows:

> 46. **Ms. Monk's Case is a Resulting Damage Case.** The definition "faulty workmanship" was developed in the context of the "resulting damage" exception. **All** property policies state that faulty workmanship is excluded. **Most** policies further spell out that "resulting damage" is excepted, as in the following provision from the *Bird Construction* case (cited below, at para. 51(5)):
>
> > This policy does not cover:
> > **(a)** cost of making good faulty or defective workmanship or material, **but this exclusion shall not apply to damage resulting from such faulty or defective workmanship or material.**
>
> 47. Some policies go into even great detail, actually defining "resulting damage", as in the following faulty workmanship exclusion:
>
> > PERILS EXCLUDED
> >
> > (i) the cost of making good faulty workmanship or materials, or error in design, but this exclusion shall not apply to loss or damage from such faulty workmanship or material, or error in design. Furthermore, this exclusion shall be limited to that particular item, part or structural component that is faulty or erroneously designed, and not the entire property.

48. In the case of Ms. Monk's policy, the faulty workmanship exclusion provides only:

> LOSSES EXCLUDED
>
> We do not insure:
>
> 1. the cost of making good faulty material or workmanship.

[32] In essence, Ms. Monk's position is that an exception for resulting damage should be read into the faulty workmanship exclusion. She argues that the definition "faulty workmanship" was developed in the context of the "resulting damage" exception, and the clause should be interpreted in such a way that it does not apply to resulting damage.

[33] The moving parties argue that the policy exclusion for faulty workmanship in Ms. Monk's policy is clear and unambiguous. The exclusion is unqualified and it does not contain an exception for resulting damage, and there is no reason to imply or "read in" the exception. The faulty workmanship clause therefore includes within its scope all damages flowing from the faulty workmanship, resulting or otherwise.

[34] The moving parties also argue that the damages complained of do not comprise resulting damages. They point out that Ms. Monk's contract with Pleasantview specifically required the contractor to protect the areas which were damaged. The contractor was to inspect and temporarily seal all areas of the building where water from the washing process might enter the structure, caulk and seal around all doors, windows, and areas where moisture might enter, and to clean all windows and glass doors after completion of the work.

[35] One of the difficulties I have with the plaintiff's position is that the cases which are cited in support of her position are all cases in which the faulty workmanship exclusion contains a specific exception for "resulting damage". As noted, no such exception to the exclusion exists in the policy issued by Farmers' Mutual to Ms. Monk; it is an unqualified exclusion.

[36] Ms. Monk also submits that one of the reasons why the resulting damage exception is not specifically included in the faulty workmanship exclusion in her policy is because it should be plain and obvious to persons reading the contract that the exclusion should not include resulting damage. For the following reasons I do not agree.

[37] Firstly, when one considers the rationale for the faulty workmanship exclusion, the damages to Ms. Monk's property are the exact type which, for policy reasons, should be

excluded from her homeowners' property insurance. This rationale is described by the authors of **Insurance Law in Canada** as follows:

> This [faulty or improper workmanship or design] exclusion is intended to preclude coverage for the cost of repairing faulty work or design. It would be an inappropriate spreading of the risk if the insured were able to recover such loss. The contractor or designer would theoretically be able to charge a full price for the work, save money by being careless, and then rely on the insurer to pay for the cost of correcting the mistakes.[1]

[38] Clearly, Pleasantview should be held responsible for the costs of making good both the direct and indirect damages flowing from its faulty workmanship, including resulting damage. An "all-perils" property insurance policy should not be viewed as a de-facto performance bond for the work of third-party contractors, or as a commercial general liability policy for a third party.

[39] Secondly, there are good reasons why an insurer might not wish to include coverage for damage resulting from faulty workmanship. Courts have frequently struggled with the issue of what constitutes resulting damage. The line which distinguishes resulting damages from damages to the "work" is often difficult to determine. Historically, the proper application and interpretation of the resulting damage exception has spawned a significant amount of litigation. By removing this exception, parties to an insurance contract are provided with greater certainty as to what is excluded in the contract of insurance.

[40] Thirdly, most homeowners' policies contain a specific exception within the faulty workmanship exclusion for resulting damage. Presumably it would not be necessary to include the exception in the policy wording of these policies if it was plain and obvious to persons reading the policy that the exclusion does not include resulting damage.

[41] Fourthly, the fact that the resulting damage exception to the faulty workmanship exclusion is found in most home insurance policies, but is not included as an exception in Ms. Monk's policy, suggests to me that this omission was not accidental but was intentional. I am strengthened in this view by the fact that the "Property Excluded" provisions of Ms. Monk's policy do contain a specific exception for resulting damage. If it is plain and obvious that resulting damage is not included in the faulty workmanship exclusion, as suggested by the plaintiff, it should also be plain and obvious that resulting

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[1] Craig Brown and Thomas Donnelly, *Insurance Law in Canada*, looseleaf (Toronto, Ont: Carswell, 2013 – Release 6) at 20.6(b)(i), page 20-31.

damage is not included in the property excluded provisions of the policy. Accordingly, I accept the position of the moving parties that the absence of an exception to the faulty workmanship exclusion for resulting damage can best be understood as an intention by the insurer not to limit the scope of the exclusion.

[42] In summary, a plain and simple reading of the provisions of the faulty workmanship exclusion reveals that it is clear and unambiguous; it should therefore be given its plain and simple meaning. In my view, there is nothing in the wording of the policy and no compelling policy reason why the resultant damage exemption is to be "read into" the faulty workmanship exclusion.

[43] For these reasons, I am of the view that the faulty workmanship exclusion includes within its scope both damage to the "work" which forms the subject matter of the contract, as well as damages resulting from faulty workmanship related to the work. I find that the damage to Ms. Monk's house is therefore excluded from coverage pursuant to what I find is clear and unambiguous wording in the faulty workmanship exclusion.

[44] In the circumstances, it is not necessary for me to make a determination as to whether the damages claimed by Ms. Monk should be classified as resulting damages or damages to the "work"; both types of damages are included in the faulty workmanship exclusion in Ms. Monk's policy.

The "Property Excluded" Exclusion

[45] The "Property Excluded" exclusion in the insurance contract contains a "resulting damage" exception. This exclusion, and the exception thereto, are set out in the policy as follows:

Property Excluded

> We do not insure loss or damage to:
>
> 2. Property...
>
> (ii) while being worked on, where the damage results from such process or work *(but resulting damage to other insured property is covered)*
>
> [Emphasis added.]

[46] The plaintiff argues that the damage to Ms. Monk's property constitutes resulting damage to "property...while being worked on", and the exception for resulting damage in this provision operates to extend coverage for such damage, notwithstanding what would appear to be the clear and unambiguous terms of the faulty workmanship exclusion.

[47] Assuming that the damage is properly categorized as "resulting damage", it is my view that the exception for resulting damage in the property damage exclusion in Ms. Monk's policy cannot extend coverage for such resulting damage in circumstances where the damage is caused by faulty workmanship. The terms of the faulty workmanship exclusion clause are clear and unambiguous; they exclude all damages resulting from faulty workmanship and therefore they trump the exception for resulting damage in the property damage exclusion clause. Simply put, an exception to an exclusion cannot override the clear and unambiguous provisions of another general exclusion clause.

[48] I am supported in this view by Rideout J. in *Bremner Farms Ltd. v. Economical Mutual Insurance Co.*, 2006 NBQB 419, 44 C.C.L.I. (4th) 220, where he states:

> 22. With the above noted decisions as background, and applying the general principles of interpretation of insurance policies set out in *Reid Crowther supra*, I am of the view that clause 2(h)(4) precludes coverage in the circumstances of this case. I have reviewed the wording of the policy in general and can find no ambiguity in the wording of clause 2(h)(4). I do not find that there is any support for the submission [that] an exception to an exclusion cannot be trumped by another general exclusion clause. In my view the wording of 2(h)(4) clearly applies to the fact situation before the Court. If coverage for loss or damage to customers' equipment was required, then it could have been provided by another policy or by an amendment to the present policy which would permit coverage to be applicable to customers' equipment.
>
> 23. It is possible and logical that in some situations an exception to an exclusion will permit coverage. But when there is a clear and unambiguous exclusion which precludes coverage, this clause must be given its plain and simple meaning;
>
> 26. I therefore find that the recovery of damage for the loss of the property of the plaintiff's customers is excluded pursuant to 2(h)(4) of the Policy.

[49] It is possible to reconcile the provisions of the two exclusion clauses. Damage occurring to property while being worked on does not necessarily have to result from faulty workmanship. There can be other causes for such damage, such as damage caused by accident. Coverage for damages which occur to property from causes other than faulty workmanship are governed by policy considerations which are different than those which govern damage caused by faulty workmanship, and in my view it does not create an inconsistency in the policy if such damages are treated differently than damages caused by faulty workmanship.

[50] In conclusion, I find that the exception for resulting damage in the property damage exclusion only applies to property which is damaged as a result of something other than faulty workmanship. I find as well that the damages to Ms. Monk's property resulted from faulty workmanship, and therefore the provisions of the faulty workmanship

exclusion apply to exclude coverage for damages resulting therefrom, both direct and resulting.

SECOND ISSUE: Is there a genuine issue requiring a trial to determine whether this action is barred, having been commenced following the expiry of the two-year limitation period?

[51] In view of my finding above that coverage for the damage is excluded by terms of the policy, it is not necessary for me to determine this issue.

DISPOSITION

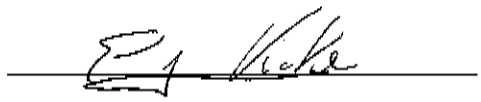
[52] These motions come before me as summary judgment motions. The coverage issues which have been raised in these motions are issues of law. In the circumstances, I find that this is an appropriate case in which to decide the case by way of a motion for summary judgment.

[53] I have determined that the insurance policy issued by the defendant Farmers' Mutual excludes coverage for the damages incurred by the plaintiff, Ms. Monk. The nature of the claim against the defendant Muskoka Insurance is such that if there is no primary insurance coverage, there can be no damages flowing from any breach of Muskoka Insurance's contractual and fiduciary duty to the plaintiff. There no longer remains an issue which requires a trial in this action.

[54] I am therefore granting summary judgment in favour of the defendants, and dismissing the plaintiff's claim against them.

COSTS

If the parties cannot agree on costs, they can make written submissions in relation thereto. Submissions are not to exceed 3 pages, exclusive of attachments. The parties have 15 days from the release of this judgment to file such submissions with the court and serve each other. Thereafter they have an additional 15 days to file responding submissions. If no submissions are received within 15 days, this judgment is deemed to be without costs.



E.J. Koke (SCJ)

Date: June 27, 2014

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Diana Lynn Monk,

Plaintiff (Responding party)

– and –

Farmers' Mutual Insurance Company (Lindsay),

Defendant (Moving party)

– and –

Muskoka Insurance Brokers Ltd.,

Defendant (Moving party)

REASONS FOR JUDGMENT

E.J. Koke SCJ

Released: June 27, 2014