CITATION: Kumsathira v. Pembridge Insurance Company, 2007 ONCA 53
DATE: 20070129
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COURT OF APPEAL FOR ONTARIO

RE: **ERIC KUMSATHIRA and CHAIN KUMSATHIRA (Plaintiffs/Appellants) v. PEMBRIDGE INSURANCE COMPANY, ~~CITY OF TORONTO, KRG INSURANCE BROKERS INC., and WISEBLOTT & ASSOCIATES INSURANCE BROKERS INC.,~~ and NUNO AGUIAR and FILOMENA AGUIAR (Defendants/Respondents)**

BEFORE: **O'CONNOR A.C.J.O., FELDMAN and ROULEAU JJ.A.**

COUNSEL: **Vadim Kats**
for the appellants

John Dean for the respondent, Pembridge Insurance Company
D.K. Smockum and James Dakin for the respondents, Aguiar

HEARD: **January 24, 2007**

On appeal from the judgment of Justice Morawetz of the Superior Court of Justice dated November 23, 2005 and the costs order dated November 24, 2005.

E N D O R S E M E N T

Claim Against Pembridge

[1] The appellants argue that the trial judge erred in finding that they were late in reporting their claim for loss to Pembridge and was, therefore, disentitled to coverage under their homeowners' insurance policy.

[2] There was conflicting evidence as to when the appellants informed Pembridge of their claim. In our view, it was open to the trial judge to accept the evidence of Mr. Groff

that the appellants did not report the claim until December 12, 2002 – over four months after the water damage incident.

[3] Mr. Groff's evidence was based upon the business records of Pembridge. While Pembridge did not comply with the notice requirements of the *Ontario Evidence Act* with respect to introducing those records, it was open to the trial judge, in the circumstances of the trial, to exercise his discretion to admit this evidence. The issue of the specifics of the lack of timely notice only crystallized during the trial and there was no prejudice to the appellants by the failure of Pembridge to give notice of its intent to introduce the business records.

[4] By December 12, 2002, the date on which the trial judge found that Pembridge was given notice, the basement had been largely renovated. It was very difficult at that point for Pembridge to adequately assess the water damage claim and the potential loss.

[5] Under the provisions of their insurance contract, the appellants were required to give timely notice of their claim to Pembridge. We see no basis to interfere with the trial judge's conclusion that the appellants were in breach of their insurance contract and, therefore, disentitled to coverage.

[6] Given our conclusion in this respect, it is not necessary to address the appellants' argument with respect to the applicability of the exclusion clause in the contract.

Claims Against the Aguiars

[7] The trial judge found that the appellants established their claim against their neighbours – the Aguiars, in nuisance. There is no appeal with respect to this finding of liability.

[8] The appellants appeal the quantum of the trial judge's award of $4,000 damages. We are satisfied that the appellants should succeed on their damage appeal because the trial judge misapprehended an important piece of evidence.

[9] The evidence established that in October, when the appellants' contractor began to repair the basement, the sand under the floor boards was still wet. However, there was no standing or flowing water at that time. The trial judge, apparently misunderstanding the evidence that indicated there were watermarks on the walls at the four or five inch level and up the drywall to four or five feet, found that in October there was still four or five inches of water sitting under the floor.

[10] In considering the issue of damages, the trial judge attached considerable importance to this finding. For example, he said that: "The presence of this water made a bad situation even worse." He also said that because of the water remaining two

months after the leak was shut off: "… an inference may be drawn … that the basement is a wet basement to begin with where the problems are compounded after rainfall", the suggestion being that not all the damage was caused by the leakage in August 2002. Moreover, the trial judge's error also played a role in his conclusion that the appellants had not taken all the necessary steps to mitigate damages.

[11] The trial judge found that the appellants had not established damages flowing from the nuisance. He went on to find, however, that a realistic estimate of the amount of damage caused by the nuisance was $4,000. In our view, this damage award cannot stand because it was influenced at least in part by the trial judge's misapprehension of the evidence.

[12] We are not inclined to send this matter back for a reassessment of damages. We have reviewed the invoices of the appellants' contractor who performed the work in the basement beginning in October 2002. Clearly, a good deal of that work was for renovation and not repair of the water damage caused by the nuisance for which the Aguiars have been found liable. The appellants are only entitled to recover damages flowing from the nuisance.

[13] On the basis of the available evidence, we are of the view that a damage award in the amount of $12,500 plus prejudgment interest is warranted and we so order. At trial, the trial judge directed that the appellants pay the Aguiars' costs in the amount of $4,000 because the appellants had not bettered an offer to settle made by the Aguiars. The award of damages that we have made on this appeal in the amount of $12,500 exceeds the Aguiars' offer.

[14] The appellants appealed the trial judge's refusal to make a Bullock order at trial requiring the Aguiars to pay the costs award against the appellants in favour of Pembridge. We see no basis to interfere with the exercise of the trial judge's discretion.

[15] As to costs of the appeal, we direct that the appellants pay Pembridge its costs fixed in the amount of $5,000, inclusive of disbursements and GST. We also direct that the Aguiars pay the appellants' costs of the trial and the appeal fixed in the total amount of $10,000, inclusive of disbursements and GST.

"Dennis O'Connor A.C.J.O."
"K. Feldman J.A."
"Paul Rouleau J.A."