

Claim No: SCCH - 476078

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *White v. The Dominion of Canada General*
Insurance Company, 2018 NSSM 99

BETWEEN:

BRIAN WHITE

Claimant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 30, 2018

Decision rendered on December 5, 2018

APPEARANCES

For the Claimant

Aaron Schwartz
Counsel

For the Defendant

Adam Downie
Counsel

BY THE COURT:

[1] The Claimant is suing his home insurer for the cost of replacing his above-ground swimming pool, which the Claimant says collapsed into a heap of wreckage after a stormy night in early May 2016.

[2] The insurer has raised a number of overlapping questions which the court must decide, namely:

- a. Is there coverage for what is alleged to have occurred?
- b. Has the Claimant satisfied the onus of establishing what occurred?
- c. Assuming the first two questions are answered in the affirmative, can the Claimant receive replacement value when he has not, in fact, replaced the pool?

[3] The Claimant resides in a rural area of Nova Scotia, near Kennetcook. In his backyard, he had a 30-foot round, above-ground pool which he says he purchased in about 2012. He recalls having paid about \$6,000.00 for the pool, and an additional \$2,000.00 to have installed. The installation monies were paid under the table, so to speak, to individuals who did that kind of work for a living. The Claimant testified that this was a good deal for him. There does not appear to be a surviving receipt for the pool when it was originally purchased, but after the collapse the Claimant obtained a quote from the same pool company for a similar pool. The cost for materials comes in at just under \$6,000.00, namely \$5,974.25, which includes HST. That company, McBurney Pools and Spas, would charge an extra \$3,500.00 plus HST for installation, for a total of \$10,056.75.

[4] The Claimant testified that the pool was in good shape when, on a rainy and stormy night in May 2016, the pool simply collapsed. He did not see this happen but recalls hearing noise in the middle of the night and seeing its collapsed condition the following day. He recalled that there would have been approximately 3 feet of water left in the pool when it collapsed, which was approximately two thirds of its full capacity. Despite a fairly significant amount of water escaping into his yard, there was no damage caused by this minor flood. There are photographs in evidence which show the pool having collapsed, and it looks pretty dramatic. It is hard to believe that this could be caused by wind, but there is no other credible explanation.

[5] The Claimant sought the advice of the pool company McBurney's and showed them pictures of the collapsed pool, but they were not able to offer any explanation for how or why this could have happened.

[6] The Claimant called his insurer, the Defendant, and was advised not only to fill out a proof of loss form, but to obtain an opinion from someone qualified to address the cause of the event, as well as an estimate for replacement. The Claimant says that he asked McBurney's to produce a report for him, but they stated that they couldn't offer any opinion were moreover too busy. They did however provide the replacement estimate.

[7] The process appears to have stalled there, and there was little progress made toward resolution of the claim in the two years following the event. The pool has not actually been replaced, and no cash settlement has been made. As such, and wisely to protect his legal rights, the Claimant brought this case in court.

[8] While it may not bear much on the final result, each party essentially holds the other responsible for the claim not progressing. I tend to believe that the Claimant is the one who did not diligently respond to the Defendant's correspondence to him, which seems on the surface to have been prompt and reasonable, in terms of what they were asking the Claimant to do.

[9] The policy in question appears to cover the loss of a pool, and the following terms are relevant:

- a. Under "coverages" it lists "swimming pool and attached equipment."
- b. Under "exclusions" it states that they do not cover loss or damage "caused by the weight or pressure of ice, snow sleet or water, whether wind driven or not, to any outdoor swimming pool and attached equipment."
- c. Under "exclusions" it states that they do not cover loss or damage to outdoor swimming pools caused by freezing.

[10] In a section of the policy titled "Basis of Payment" it allows for either "actual cash value" or "replacement ... if you qualify." To qualify for replacement, one must "repair or replace the loss or damage as soon as possible after it occurs" with materials of a similar kind or quality.

[11] Actual cash value is well understood in the insurance and legal world as depreciated cost. Depreciated cost would attempt to place a value on the cost of what was lost, minus a depreciation charge bearing some relation to the normal life expectancy and the age of the insured item.

The arguments

[12] The Defendant argues that the Claimant has not proved his claim, and that there is an onus on him to do so. It says that it has never actually denied the claim. It is still waiting for proof before it makes a final decision.

[13] It also says that replacement cost is not an option because the Claimant has not replaced the pool.

[14] The Claimant says that he has done all that he can to establish the cause of the loss. He says he has been waiting for the Defendant to send out someone to investigate and determine the cause.

Decision

[15] Insurance policies are to be interpreted according to the reasonable expectations of the parties: see *Chilton v. Co-operators insurance Co.*, 1997 CanLII 765 (ON CA). The principle is that policies should be construed liberally to protect the reasonable expectations of insured persons, even if that means interpreting contrary to the likely intent of the insurer which has drafted the policy. The language of the policy, if at all ambiguous, should be read against the interest of the insurer, which drafted the policy.

[16] In my view, the Claimant reasonably expected that if his pool was destroyed by unknown forces, likely wind, he would have some coverage. The exclusions, if any applied, would be for the insurer to establish, not for him to refute.

[17] The Defendant here has not provided any evidence to demonstrate that the cause of the damage was excluded under the policy. For example, they might have (but did not) provide evidence that the most likely cause was “the weight or pressure of ice, snow sleet or water”, perhaps but not necessarily driven by the wind.

[18] I believe that the Claimant has proved that he suffered a loss covered under the policy.

[19] However, he cannot claim replacement cost as he has not actually replaced the pool. The policy language is pretty clear that this is a precondition to recovery.

[20] What is left is actual cash value. He spent roughly \$8,000.00 on the pool and got four years of use out of it.

[21] There was no evidence before me of the life-span of this type of pool, but I believe that ten years is a conservative estimate. I accordingly award the Claimant 60% of his cost, totaling \$4,800.00, for the loss.

[22] I am not prepared to award any prejudgment interest as the Claimant himself caused all of the delay in getting this resolved. He is entitled to his costs of \$199.35 to issue the claim and \$97.75 to serve it, for a total recovery of \$5,097.10.

Eric K. Slone, Adjudicator