Court Recognizes Contractor's Obligation To Fund The Defence Of The Municipality Where Contractor Failed To Obtain Insurance

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In the recent decision of *Bentley v Hastings (County)* 2017 ONSC 2980, the Court dealt with motions in two separate actions, each of which raised identical issues related to (i) entitlement to damages arising from the failure to obtain insurance in favour of the co-defendant municipality party as required under the contract; (ii) the appropriate measure of damages; and (iii) entitlement to choice of counsel.

The plaintiffs in both actions were represented by the same lawyer. Each plaintiff sustained a slip and fall in the same parking lot, albeit on different dates. Each plaintiff sued the Corporation of the Town of Hastings, the Hastings Local Housing Corporation (collectively the "County") and the County's winter maintenance contractor, Steve Walt Property Maintenance (the "Contractor"). The Contractor's insurer, Economical Mutual Insurance Company (the "Insurer"), was brought in as a third party in both actions. Interestingly, the Contractor in the main action and the Insurer in the Third Party Claim were defended by the same counsel.

There was no dispute about the contract. The Contractor was contractually required to obtain third party liability insurance for itself and for the County as an additional insured under the same policy of insurance. The Contractor obtained the required coverage for itself but failed to obtain coverage for the County. Both the Contractor and the Insurer refused to defend the County in the main actions.

The Court had no difficulty finding that the Contractor breached the contract in failing to obtain insurance in favour of the County and that the County suffered damages as a result of this breach. The Court found that the appropriate measure of damages in this case was the payment of the County's past and future defence costs in the main action, which would have been covered had insurance been obtained on behalf of the County. The Court also found that the County was entitled to appoint and instruct counsel of its choice in the face of the conflicts of interest and the coverage issues between the parties. The Contractor was ordered to pay the County's past and ongoing costs.

This case adds to the recent jurisprudence confirming a municipality's rights under its contracts with winter maintenance contractors, and, importantly, a municipality's right to appoint and instruct counsel of its choosing in the presence of a conflict of interest.

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