

CITATION: James Dick Construction Limited v. Courtice Auto Wreckers Limited,
2015 ONSC 5377
COURT FILE NO.: CV-11-430155
DATE: 20150911

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JAMES DICK CONSTRUCTION) Jamieson Halfnight and Anne Juntvnen, for
LIMITED and MARA LIMESTONE) the Plaintiffs
AGGREGATES LTD.)
)
Plaintiffs)
)
- and -)
)
COURTICE AUTO WRECKERS) David Bierstone, for the Defendants
LIMITED and COURTICE INDUSTRIES)
INC., NAVIS PACK AND SHIP, DAIVD)
NORMAN CORNEIL, NANCY ANNE)
CORNEIL and FLAV INC.)
)
Defendants)
) **HEARD:** August 26, 2015

G. DOW, J

REASONS FOR JUDGMENT

[1] The defendants, Courtice Auto Wreckers Limited and Courtice Industries Inc. (as tenants) sought summary judgment against James Dick Construction Limited and Mara Limestone Aggregates Ltd. (as landlords) ending the claim by James Dick Construction Limited and Mara Limestone Aggregates Ltd. for damages arising from a fire on August 5, 2009. These defendants claim the plaintiffs are barred from proceeding given a clause in the lease between (only) James Dick Construction Limited and Courtice Auto Wreckers Limited dated November 2, 2006 which states “The Lessor of the facility will at all times, for the life of this agreement, maintain general property insurance sufficient to cover the replacement costs of the buildings in the event of loss.”

[2] The plaintiffs opposed this motion on the grounds the lease also covenanted the defendants with the responsibility and expense to maintain the existing dry fire sprinkler system for the buildings involved which it failed to do. Further, there are parties to the litigation not parties to the terms of the lease and, given the multiplicity of parties (eight in total) and

proceedings (five in total) determination of the single issue does not provide any or sufficient efficiencies and risks inconsistent findings and results.

Facts

[3] The situation can be summarized as follows:

- a) James Dick Construction Limited and Mara Limestone Aggregates Ltd. are companies operated by Greg Sweetnam who was the individual that negotiated and signed the lease on behalf of the landlord;
- b) Harvey (Skip) Ambrose is the operator of the defendant businesses, Courtice Auto Wreckers Limited and Courtice Industries Inc. and sought to rent space from James Dick Construction Limited, being a 54,000 square-foot wooden building known as the “dome building” and a 42,000 square-foot building known as the “A-frame building”. These were two of six buildings on the site in which Mr. Ambrose stored recyclables/blue box material purchased from the City of Toronto;
- c) The buildings, located in south Oshawa, were connected by a wooden breezeway with a separate dry fire sprinkler system which operates by filling the pipes with compressed air to hold the water back a valve situated in a separate, in this case, locked room at the south end of the buildings;
- d) The sprinkler system was aging and developing periodic leaks, that is, pinholes that allowed the air to escape and then water to spray on Courtice Auto Wreckers Limited “inventory” reducing its value;
- e) This problem was known to both Mr. Ambrose and Mr. Sweetnam given repairs were ordered by Oshawa Fire Services 2004 and 2008. Further, Courtice Auto Wreckers Limited incurred expenses to maintain the system using its own employees as well as retaining a firm, M.C.C. Fire Equipment;
- f) The sprinkler system was disabled by Courtice Auto Wreckers Limited employees some days before the fire given the leaks and parts required for its repair. Oshawa Fire Services were not notified as required and subsequent to the fire, Courtice Auto Wreckers Limited pleaded guilty to *Ontario Fire Protection and Prevention Act* charges and fined \$20,000;
- g) On the day of the fire, employees of Navis Pack and Ship were on the premises and moving equipment off the site. This business and its owners, David and Nancy Corneil, are co-defendants in the action and have been added to some of the other actions;
- h) Similarly, Laurie McCulloch had placed a portable classroom being used as a lunchroom on the site at the request of Courtice Auto Wreckers Limited and was removing it at the time the fire was discovered. He and his business, Laurie McCulloch Holdings Ltd. have

also been added to some of the proceedings;

- i) The plaintiffs did purchase property insurance but only in the amount of \$700,000 with respect to the dome building and \$100,000 with respect to the A-frame building which has been paid by the insurer but is less than the claimed replacement cost of \$6,250,000 and \$254,003 respectively from the defendants;
- j) All of the actions have been ordered tried together and are to be set down for trial by December, 2015 including a claim by the plaintiff against the Courtice defendants for unpaid rent in the amount of \$217,315;
- k) The other parties involved in the litigation including separate counsel for Courtice Auto Wreckers Limited and Courtice Industries Inc. as plaintiffs who did not attend and took no position on this motion.

Issue – Covenant to Insure

[4] The defendants submit the law is clear since Supreme Court of Canada decisions that decided where the lease contains a clause that the landlord will insure the premises for damages such as occurred in this fire, the landlord cannot sue the tenant even if fire was caused by tenant's negligence. This principle was reviewed and accepted by the Court of Appeal in *Madison Developments Limited v. Plan Electric Co.*, (1997), 36 O.R. (3d) 80 (C.A.).

[5] In response, the plaintiffs suggest the actions of the defendants in this situation, of having shut off the sprinkler system, not notifying the proper authorities as agreed and pleading guilty to that offence raises the prospect it is beyond negligence and may result in an exception to the well settled case law. I agree that none of the cases that established this legal principle would appear to have involved facts such as those above. Were this the only issue, I would have attempted to complete summary judgment in favour of one of the parties.

Issue – Parties not Signatories to the Lease

[6] The defendants and plaintiffs agree the individuals, Ambrose and Sweetnam who negotiated the lease are the effective voices of their corporations. They are businessmen and, from their affidavits, cross-examinations and discovery evidence testified to a variety of sometimes contradictory things about whom the actual parties should be and terms of the tenancy. Counsel for the tenant urges me to conclude all of the litigants can and should be bound by the terms of the lease. However, in my view, this requires the weighing of evidence and an evaluation of the credibility particularly that of Mr. Ambrose and Mr. Sweetnam. In this regard, I was reminded by counsel for the defendants of the comments of Justice Lauwers in *Baywood Homes Partnership v. Haditagli*, 2014 ONCA 450 where, in paragraph 44, he states, "Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript

evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.” I agree.

Issue – Summary Judgment

[7] The above factors and the risk of finding in favour of the tenant at this stage could restrict the trial judge should ancillary issues and claims proceed and militate against granting the defendants’ request. In my view, it is not appropriate to make the necessary findings of fact and apply the law as a proportionate, more expeditious and less expensive means to achieve a just result as mandated by *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87.

[8] Counsel for Courtice Auto Wreckers Limited and Courtice Industries Inc. raised his involvement on behalf of an insurer and how judgment would end his involvement. However, this does not seem to be completely accurate as claims for contribution and indemnity would have to be dealt with in this and other claims.

[9] I am reinforced in my decision by the comments of Justice Lederer in *Yusuf (Litigation Guardian of) v. Cooley*, 2014 ONSC 6501 where, in paragraph 25 he states, “This is a case where the interests of justice dictate that the new fact-finding power should not be used to grant summary judgment to a single defendant. To do so would run the risk of unnecessary duplication in the proceedings and inconsistent findings of fact. While, undoubtedly, there are cases where the role of a single party can be severed from the rest, it is important to note that concerns for “...the most proportionate, timely and cost-effective approach” are not always met by acting in the interest of a single party. These goals are often better satisfied with the case, as a whole, in mind.”

[10] The reasons in *Hryniak v. Mauldin, supra*, include, at paragraph 78-79 that when a motion judge dismisses summary judgment, he or she should seize himself or herself of the matter as a trial judge. However, given the other actions, particularly ones not before me, and the order for trial together, it is my view this would not be appropriate in the circumstances. I am unable to see what economies could be achieved in this regard. Further, the property and parties are situate in the Durham Region and an issue may arise as to the proper place for trial.

Costs

[11] With the responding party successful, James Dick Construction Limited and Mara Limestone Aggregates Ltd. should recover its costs of this motion. The plaintiffs provided a costs outline claiming partial indemnity costs including HST and disbursements totalling \$22,464. By comparison, counsel for the moving parties, Courtice Auto Wreckers Limited and Courtice Industries Inc. submitted a costs outline for this motion \$45,917.19 inclusive of fees, HST and disbursements. I heard submissions as to the basis for the discrepancy which appeared to involve the care and consideration given to the matter by counsel for the moving party. I am satisfied the amount sought by the plaintiffs is reasonable and proportionate in the circumstances. As a result, costs are recoverable by the plaintiffs, James Dick Construction Limited, Mara

Limestone Aggregates Ltd. from the defendants, Courtice Auto Wreckers Limited and Courtice Industries Inc., in the amount of \$22,464, payable forthwith.

Mr. Justice G. Dow

Released: September 11, 2015

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COURTICE INDUSTRIES INC., NAVIS PACK AND
SHIP, DAIVD NORMAN CORNEIL, NANCY ANNE
CORNEIL and FLAV INC.

Defendants

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