Case Name:

Hiebert v. Lennox Canada Inc. (c.o.b. Boehmers Home Services)

RE: Robin Hiebert and Lennox Canada Inc. carrying on business as Boehmers Home Services, St. Lawrence Cement Inc./Ciment St. Lawrence Inc. carrying on business as Boehmers Fuels and/or Boehmers, and Boucher & Jones Inc. carrying on business as Boehmers Fuels and/or Boehmers

[2007] O.J. No. 3079

Court File No. C-1091/04

Ontario Superior Court of Justice

G.T.S. Valin J.

Heard: July 13, 2007.
Judgment: August 10, 2007.

(54 paras.)

Civil procedure -- Pleadings -- Counterclaim, crossclaim and set-off -- Striking out pleadings or allegations -- Motion by defendant St. Lawrence Cement seeking dismissal of the crossclaim by defendant Lennox Canada -- The action arose out of a heating oil spill on a residential property -- Motion granted; crossclaim dismissed -- There was no genuine issue -- St. Lawrence Cement had not serviced the plaintiff's furnace since 2000, when its Boehmers Home operation was sold to Lennox -- Lennox had made a formal admission that it had not found any existing signs of leakage in 2003 -- There was no evidence that St. Lawrence Cement had breached its standard or duty of care to the plaintiff.

Motion by defendant St. Lawrence Cement seeking summary judgment to dismiss the crossclaim made against it by defendant Lennox Canada -- The action arose out of a heating oil spill on a residential property owned by the plaintiff -- St. Lawrence Cement originally owned the companies which had repaired and maintained the plaintiff's furnace (Boehmers Home Services) and supplied heating oil to her (Boehmers Fuel), from 1996 on -- St. Lawrence Cement sold Boehmers Home to Lennox in 2000 and Boehmers Fuel to defendant Boucher & Jones in 2002 -- Lennox crossclaimed in negligence against St. Lawrence Cement, claiming that St. Lawrence Cement had breached the

standard of care upon it before it sold Boehmers Home to Lennox -- HELD: Motion granted and crossclaim dismissed -- There was no genuine issue in the crossclaim and it was not factually supported -- St. Lawrence Cement had not serviced the plaintiff's furnace since 2000, when its Boehmers Home operation was sold to Lennox -- Lennox had done work at the plaintiff's residence in 2001 and had not noticed any existing leakage problem -- Lennox had further made a formal admission that it had not found any signs of leakage during repairs conducted at that residence in 2003 -- Lennox was precluded from advancing any evidence contrary to that formal admission -- The plaintiff had testified that she had noticed no evidence of a spill up until a week before the spill was discovered -- There was no evidence that St. Lawrence Cement had breached its standard or duty of care to the plaintiff during its ownership of the Boehmers companies.

Counsel:

Martin P. Forget, for the defendant St. Lawrence Cement Inc., the moving party.

Larry Reimer, for the defendant Lennox Canada Inc., the responding party.

ENDORSEMENT

1 **G.T.S. VALIN J.**:-- The defendant, St. Lawrence Cement Inc. ("St. Lawrence Cement"), brings this motion seeking summary judgment dismissing the crossclaim made against it by the defendant Lennox Canada Inc., ("Lennox").

2 This matter arises out of a heating oil spill that was discovered on April 17, 2003 at the residence of Robin Hiebert, the plaintiff, located at 10 Temperance Street in the Town of Milverton, Ontario. She reported the spill to her property insurer who paid for remediation of the premises. She brought this subrogated action seeking recovery of those costs.

3 St. Lawrence Cement at one time owned and operated both Boehmers Home Services ("Boehmers Home") and Boehmers Fuel. From in or about 1996, the plaintiff retained Boehmers Home to undertake the repair and maintenance of her furnace and related equipment. She also retained Boehmers Fuel to supply heating oil to her residence.

4 In August of 2000, St. Lawrence Cement sold Boehmers Home to Lennox, at which time all of Boehmers Home's records and documentation, as well as the employ of its workers and technicians, were transferred to Lennox. Following August 2000, Lennox continued to provide repair and maintenance services for the furnace and related equipment at the plaintiff's residence up to and including the time of the discovery of the heating oil spill.

5 St. Lawrence Cement sold Boehmers Fuel to Boucher & Jones Inc. ("Boucher & Jones") on June 7, 2002 at which time all of Boehmers Fuel workers and technicians became employed by Boucher & Jones. Boucher & Jones continued to supply fuel to the plaintiff's residence up to and including the time of the discovery of the oil spill.

6 The oil tank was located above ground in the garage of the plaintiff's residence. As a result of revised government regulations, on December 19 and 20, 2001, at the request of Boehmers Fuel (then still owned by St. Lawrence Cement), Lennox (operating Boehmers Home) repositioned the

oil tank and, in doing so, replaced six of the eight feet of above grade copper line connecting the oil tank to the furnace.

7 The repositioning of the oil tank also entailed moving the fill spout from the interior to the exterior of the garage. Consequently, after December 20, 2001, Boehmers Fuel technicians did not have access to the garage and could not inspect the tank or its connecting lines.

8 In the winter of 2002, the plaintiff's daughter-in-law noticed the furnace was generating insufficient heat She complained to Lennox who sent a technician to bleed the oil lines. The problem persisted, forcing Lennox to attend on three occasions in January of 2003. At the last attendance on January 28, 2003, the problem was noted to be freezing of the above grade copper line connecting the oil tank to the furnace. The Lennox technician, Ian Clark ("Clark"), thawed the lines to allow the proper flow of oil and changed the oil filter.

9 Clark provided a statement with respect to his attendance on January 28, 2003. The substance of the statement was that he checked all of the oil line at the time because he suspected the line was frozen. He found no sign of a leak or damage to the line and everything appeared fine.

10 Lennox repeated Clark's evidence that there was no leak or signs of a spill as of January 28, 2003. In paragraph 13 of its Statement of Defence, which states:

> The Lennox representative determined that the problem was a frozen oil line and a plugged filter. Lennox remedied the problem and at that time checked all of the oil lines and found no signs of any leakage.

11 In addition, Lennox produced Gregory Scarlett ("Scarlett") as its representative on examination for discovery. He testified that the Lennox technician was required to inspect the entire line in January 2003 and ensure that it was replaced if he believed corrosion affected the line's structural integrity. The line was not replaced at that time.

12 Between January 28, 2003 and April 17, 2003, the plaintiff did not report any problems with the supply of heating oil or any indications of a possible oil leak. She was in the premises the week prior to the discovery of the leak. At her examination for discovery, she testified that she did not notice any smell of oil or witness any evidence of an oil spill such as staining.

13 A neighbour of the plaintiff discovered the oil spill on April 17, 2003. She smelled a strong odour in her basement and noticed oil seeping through the floor. The Technical Standards and Safety Authority ("TSSA") inspected the oil spill later that day, but did not find that any regulations had been breached.

14 Lennox dispatched Greg Mercer ("Mercer"), a service technician, to the plaintiff's residence. Mercer located a pin-hole leak in the oil line inside the garage, cut out the affected portion and repaired the line. The leak was in the line adjacent to the oil tank and above ground. The portion of the line containing the leak which Mercer removed (the "line sample") was approximately eight inches long and was left for the representative of TSSA to inspect. The line sample later came into possession of the experts retained by the insurers for the plaintiff. It has since been misplaced and cannot be located.

15 A dispatch memo was produced by Lennox in relation to Mercer's attendance at the plaintiff's home in response to notice of the oil spill. The memo stated that "Greg found pin-hole in oil line cut

out and repaired line -- Someone had spread kitty litter like substance on floor to clean up oil that had been leaking for approx 2 months Greg thought".

16 In an effort to determine the cause of the spill, each of the plaintiff's subrogating property insurer, Boucher & Jones, and St., Lawrence Cement retained engineers. Each consultant prepared a report.

17 If a party intends to rely on the substance of an expert's report on a summary judgment motion, the evidence must be put before the court in a manner that will permit cross-examination of the maker of the report. This can be done in one of two ways. The expert can place the substance of his/her opinion in an affidavit sworn by him/her. Alternatively, the expert can swear an affidavit to which his/her report is attached as an exhibit and swear to the truth of the contents of the report. Dutton v. Hospitality Equity Corp. (1994), 26 C.P.C. (3d) 209 (Ont. Ct. Gen. Div.) and Deslauriers v. Bowen; [1994] O.J. No. 2198 (Ont. Ct. Gen. Div.).

18 While counsel on both sides made reference to the reports prepared by experts involved in this case, none of the reports were properly introduced into evidence on the motion. Accordingly, I am unable to consider the opinions expressed in those reports.

19 The plaintiff's subrogating property insurer retained the firm of D.L. Services Limited to remediate the damage caused by the oil spill. The principal of that firm, Doug Leblanc ("Leblanc"), prepared a report in which he expressed the opinion that the duration of the leak could have been "possibly greater than 5 years".

20 Recently, counsel for Lennox examined Leblanc under oath under Rule 39.03 of the rules of Civil Procedure. Leblanc testified that soil conditions suggested oil leaking from the plaintiff's residence would have taken four to five years, or longer, to reach the neighbour's basement. A written report expressing that opinion was not delivered before he testified.

21 Them was no evidence that Lennox or the plaintiff asked Leblanc for a report or an affidavit that expressed such an opinion prior to undertaking the examination. Counsel for Lennox invited counsel for St. Lawrence Cement to participate in the examination. Counsel for St. Lawrence Cement declined to do so for legitimate tactical reasons. The opinion expressed in Leblanc's report was speculative at best and not damaging to the defence of St. Lawrence Cement.

22 During argument on this motion, issues developed between counsel for St. Lawrence Cement and counsel for Lennox as to whether Leblanc was an expert, whether his evidence was admissible, and whether his evidence had been placed before the court in a proper manner. I conclude it is not necessary for me to resolve those issues.

23 St. Lawrence Cement moved for summary judgment seeking a dismissal of the claim and crossclaims against it. The plaintiff consented to the dismissal of her claim. Boucher & Jones consented to the dismissal of its crossclaim against St. Lawrence Cement. Lennox is the only party opposing the motion.

24 The crossclaim advanced by Lennox against St. Lawrence Cement is based on negligence. In order to succeed in that claim, Lennox must prove on balance (i) what the standard of care was for St. Lawrence Cement to meet before it sold Boehmers Home to Lennox in August 2000, (ii) that St. Lawrence Cement breached that standard of care, and (iii) that the breach of the duty of care caused the loss claimed.

25 Under Rule 20 of the Rules of Civil Procedure, a party may move with supporting material for summary judgment when there is no genuine issue for trial with respect to a claim.

26 A genuine issue for trial cannot be spurious. It must relate to a material fact whose existence or non-existence will affect the outcome. For the moving party to succeed on a motion for summary judgment, it must be clear that a trial is unnecessary. The court's function is not to resolve an issue of fact, but to determine whether a genuine issue of fact exists. Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.).

27 In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact. Aguonie v. Galion Solid Waste Materials Inc. (1998), 38 O.R. (3d) 161 (C.A).

28 Counsel for Lennox argued that the trial judge, when asked to make a determination of the cause and duration of the leak in question, will be forced to assess and weigh competing expert opinions in this regard. Credibility issues relating to the experts' opinions will also undoubtedly be a factor, particularly in light of the present situation where a key piece of evidence, i.e. the line sample, has gone missing.

29 Counsel for Lennox also argued that a genuine issue for trial existed with respect to the negligence claim against St. Lawrence Cement due to St. Lawrence Cement's involvement in servicing the furnace system until the year 2000, the request to reposition the tank in the fall of 2001, and the filling of the oil tank for many years until the spring of 2002. Lennox took the position that a trial was required to determine the cause of the oil leak, its duration, and the potential existence of other sources of oil contamination.

30 As I understand the argument advanced by counsel for Lennox, summary judgment dismissing his client's crossclaim against St. Lawrence Cement would constitute findings that (a) the leak discovered by Mercer on April 17, 2003 was the sole cause of contamination at the property, (b) the leak arose a relatively short time before its discovery, and (c) potential causes associated with the leak were not reasonably apparent in 2001 or earlier.

31 I do not agree. In a negligence action, as with any other case of action, the party responding to a motion for summary judgment must adduce evidence to support the requirements of the cause of action alleged, failing which the motion for summary judgment must be granted. Kreutner et al. v. Waterloo Oxford Co-operative Inc. et al. [2000] O.J. No. 3031 (C.A.).

32 On a motion for summary judgment, the responding party cannot sit back and rely on the allegations contained in the pleadings; it "must lead trump or risk losing". J061590 Ontario Ltd. v. Ontario Jockey Club et al., [1995] O.J. No. 132 (C.A.), at para. 35. When hearing a motion for summary judgment, the motion judge must assume that, if the case were to go to trial, the responding party would not be presenting any further evidence. In other words, he/she must consider the record complete. Royal Bank of Canada v. Feldman [1995] O.J. No. 1598 (Gen. Div.).

33 I conclude that the motion by St. Lawrence Cement for summary judgment dismissing the crossclaim advanced by Lennox against it must succeed for the reasons that follow.

34 First St. Lawrence Cement had not serviced the furnace and its accessories since August 2000, Lennox took over that work at that time and continued servicing the plaintiff's residence until the

date of the oil spill. As well, St. Lawrence Cement last delivered heating oil to the plaintiff's residence in the spring of 2002. Boucher & Jones took over that service as of June 7, 2002.

35 In December 2001, Lennox repositioned the oil tank in the garage and replaced six of the eight feet of above grade copper line connecting the oil tank to the furnace. It is reasonable to infer that, if there had been any evidence of an oil leak at that time, the service technicians performing the work for Lennox would have made a note of it. No such note or record was produced.

36 In paragraph 13 of its statement of defence and crossclaim, in reference to its employee Clark's service call at the plaintiff's residence on January 28, 2003, Lennox pleaded that Clark "determined that the problem was a frozen oil line and a plugged filter. Lennox remedied the problem and at that time checked all of the oil lines and found no signs of any leakage". In paragraph 26 of its crossclaim, Lennox adopted "the allegations and admissions contained in its statement of defence".

37 That is a formal admission. Formal admissions, including statements made in a pleading, are made for the purpose of dispensing with proof at trial and are therefore conclusive with regard to the matters admitted, Vancouver Art Metal Works Ltd. v. Canada [2001] F.C.J. No. 483, As to these matters, other evidence is precluded as being irrelevant but, if such evidence is adduced, the court is bound to act on the admission even if the evidence contradicts it John Sopinka, Sidney N. Lederman & Alan W. Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto, Butterworths, 1999) at 1051.

38 The formal admission in Lennox's statement of defence and crossclaim is supported by the statement given by the technician Clark and by Lennox's representative Scarlett who testified at his examination for discovery that Clark was required to inspect the entire oil line in January 2003 and ensure that it was replaced if be believed corrosion affected the line's structural integrity. The line was not replaced at that time.

39 In addition, the plaintiff testified on her examination for discovery that she was at the property one week prior to the discovery of the oil spill. She did not notice any smell of oil or witness any evidence of an oil spill such as staining at that time.

40 The evidence is clear that Lennox inspected the line in January 2003. Its technician found no leaks or damage to the line. Lennox is precluded from leading any evidence that is inconsistent with its formal admission that as of January 28, 2003, there was no evidence of an oil leak and no indication the oil line was defective.

41 It is for that reason that it is not necessary for me to rule on the issues arising from the evidence of Doug Leblanc. Apart from whether he is an expect entitled to give opinion evidence and whether his evidence was properly presented to the court, or is admissible, his evidence is irrelevant in view of the formal admission Lennox made in its statement of defence and crossclaim.

42 Second, even if my finding that Leblanc's evidence is irrelevant and inadmissible is incorrect, I agree with the submission of counsel for St. Lawrence Cement that Leblanc's testimony that the leaking had occurred for four to five years is disingenuous in light of overwhelming evidence to the contrary including (i) the fact that, from August 2000, Lennox technicians regularly attended the promises and maintained the furnace without any indication of leakage or that the line was defective, (ii) the admission by Lennox that them were no signs whatsoever of any leak or indications of an oil spill just three months before the incident, and (iii) the technician Mercer's observation on

April 17, 2003 that he thought the oil had been leaking for approximately two months. In light of that evidence, I find that Lennox cannot rely on Leblanc's testimony in support of its argument that there is a genuine issue for trial.

43 Third, Lennox has failed to establish that there is a genuine issue for trial based on the negligence of St. Lawrence Cement. There is no evidence before me about the standard of care that St. Lawrence Cement owed to the plaintiff as of August 2000 when it sold Boehmers Home to Lennox or about the standard of care that it owed to the plaintiff in lime 2002 when it sold Boehmers Fuel to Boucher & Jones.

44 In particular, there is no evidence that a St. Lawrence Cement technician from either of those divisions should have detected the corroded pipe and recommend that it be changed. There is also no evidence that St. Lawrence Cement failed to have a reasonable system of maintenance and inspection in place to detect the defect. The lack of evidence in this regard is consistent with the admission Lennox has made in its statement of defence and crossclaim that there were no signs of an oil spill or leakage in the oil line as of January 28, 2003.

45 In addition, when Lennox repositioned the oil tank on December 20, 2001, the fill spout was transferred to the exterior of the garage. As of that date, technicians from Boehmers Fuel no longer had access to the garage and could not inspect the tank or Its connecting lines.

46 The crossclaim by Lennox against St. Lawrence Cement based on negligence is not factually supported. I find that there is no evidence that St. Lawrence Cement breached its duty or standard of care owed to the plaintiff or that there was any act or omission by its technicians that caused the oil spill.

47 Lennox has the onus to set out specific facts and coherent evidence organized to show that there is a genuine issue for trial. Pizza Pizza v. Gillespie (1990), 75 O.R. (2d) 225 (Ont. Ct. Gen. Div.). I find that the record before me does not disclose a genuine issue for trial. The motion to granted. Judgment will issue dismissing the crossclaim of Lennox against St. Lawrence Cement with costs to St. Lawrence Cement to be assessed.

48 Having succeeded on its motion, St. Lawrence Cement is entitled to its costs of the motion. An issue has developed as to whether it is entitled to costs on a substantial indemnity basis.

49 Or April 26, 2006, St. Lawrence Cement made an offer to the plaintiff, Lennox, and Boucher & Jones to settle the matter for a dismissal of the action against it on a without costs basis. The offer was open until one minute following the commencement of trial and was made pursuant to Rule 49 of the Rules of Civil Procedure.

50 Prior to the argument of the motion, the plaintiff and Boucher & Jones accepted the offer, I endorsed a consent order on the record dismissing the plaintiffs claim and the crossclaims of Boucher & Jones and St. Lawrence Cement against each other on a without costs basis.

51 Counsel for Lennox argued that St. Lawrence Cement is not entitled to costs on it substantial Indemnity basis because its offer to settle does nor comply with Rule 49.11(b) of the Rules of Civil Procedure. I agree that the offer does not mad the technical requirements of that Rule in that it was not an offer to settle the plaintiffs claim against all the defendants, nor was it an offer made by all the defendants.

52 In the context of the crossclaim made by Lennox against St. Lawrence Cement, Lennox is the plaintiff and St. Lawrence Cement is the defendant. As I read Rule 49.10, a defendant who serves

an offer to settle under Rule 49 that results in costs consequences to the plaintiff is nevertheless only entitled to partial indemnity costs.

53 As I understand the jurisprudence on this subject, as a general rule, where a plaintiff's claim is dismissed, the defendant is entitled to costs on a partial indemnity basis. In those circumstances, costs are awarded to the defendant on a substantial indemnity basis in only rate and exceptional cases. This is not one of those case.

54 St. Lawrence Cement is therefore entitled to its costs on the motion on a partial indemnity basis. I hereby fix those costs in the amount of $15,000.00 inclusive of disbursements and GST. The costs are payable forthwith by Lennox.

G.T.S. VALIN J.

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