

Case Name:

CEJ Poultry Inc. v. Calderone

Between

**CEJ Poultry Inc., Plaintiff, and
Frances Calderone, Debbie Calderone-Woodward and Deena
Calderone-Woodward, a minor, by her litigation
guardian, Defendants**

[2009] O.J. No. 5968

Court File No. 32047/04SR

Ontario Superior Court of Justice
Whitby, Ontario

D.W.E. Salmers J.

Heard: November 18, 2008.

Judgment: January 9, 2009.

(50 paras.)

Counsel:

M. Forget, for the Plaintiff.

R. Banik, for Deena Calderone-Woodward.

RULING ON MOTION

D.W.E. SALMERS J.:--

Introduction and Nature of the Motion

1 The plaintiff commenced this simplified rules action against several defendants. In the action, the plaintiff claimed damages sustained as a result of a fire in a house owned by the plaintiff. Other than Deena Calderone-Woodward, all of the other defendants have now been let out of this action. The plaintiff brought this motion under Rule 76.07 seeking judgment against Deena for damages allegedly sustained by the plaintiff as a result of the fire. The plaintiff claimed that its damages were sustained due to Deena's negligence.

The Law on Rule 76.07 Motions

2 Rule 76.07 deals with summary judgment motions for simplified rules actions. The procedural and documentary requirements are set out in Rule 76.07(1)48), inclusive.

3 Rule 76.07(9) sets out the test for granting summary judgment. That subsection states:

The presiding judge shall grant judgment on the motion unless,

- (a) he or she is unable to decide the issues in the action without cross-examination; or
- (b) it would be otherwise unjust to decide the issues on the motion.

4 Rule 20 governs summary judgment motions for non-simplified rules actions. The test in Rule 20 is whether there is a genuine issue for trial. However, the wording of Rule 76.07 is that the judge shall grant judgment unless the judge requires cross-examination or it would be unjust. Further, for summary judgment motions under Rule 76.07, the Divisional Court has stated that "the motions judge should make determinations of fact, including determinations of credibility, unless unable to do so without cross-examination."¹] Thus, even if there is a genuine issue for trial, in a Rule 76.07 motion the motions judge must determine whether that issue can be justly decided without cross-examinations at trial. If that issue can be justly decided without cross-examinations at trial, then summary judgment will be granted despite the existence of a genuine issue for trial. The Divisional Court has upheld the correctness of lower court judges who have stated that there is a lower threshold for summary judgment motions under Rule 76.07 than for those under Rule 20.²]

5 In all summary judgment motions, under either Rule 20 or Rule 76.07, the onus is on the moving party. However, the responding party cannot merely deny the moving party's allegations, but must set out in affidavits specific facts to prove the responding party's case and defence.³] As stated by the Court of Appeal, "The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial."⁴]

6 A major purpose of simplified rules actions is to ensure access to justice by streamlining steps, thereby decreasing the time and cost required to have an action judicially determined. Rule 76.07 was enacted in accordance with this purpose. However, if a party chooses to bring a Rule 76.07 motion and is unsuccessful, the action will proceed to trial. There are costs consequences so as to deter frivolous motions.

Analysis

Liability

Necessity for Cross-examination

7 There are many facts which are undisputed. I will now set out some of the undisputed facts.

8 Around 4:20 p.m. in the afternoon of October 25, 2002, 16 year-old Deena Calderone-Woodward went to her boyfriend's residence. That residence was a house rented by an adult, but lived in by various young people, including Deena's boyfriend. The house was owned by the plaintiff. When Deena entered the house, no other people were in the house and Deena immediately noticed that there was considerable "grayish black" smoke in the air. The smoke hurt her lungs. She noticed a smoking pot on the kitchen stove. There were no other pots on the stove. To address the

problem, Deena turned the control knob for the stove element on which the pot sat. Unfortunately, her actions did not eliminate the problem caused by the smoking pot.

9 Deena then went upstairs where it was her intention to have a nap. There were no fire extinguishers or operating smoke detectors in the house and the house's windows were nailed shut.

10 After lying down, Deena smelled smoke. She went down the stairs, opened the door at the bottom of the stairs, and saw flames right in front of her. She thought that the whole house was on fire. In order to leave the house and save herself, Deena ran upstairs, smashed a window, and jumped to safety from that second floor window. Thankfully, there were no other people in the house. Eventually, the fire department arrived and the fire was extinguished.

11 The issues in this motion include ultimate determination of Deena's liability, the plaintiff's contributory negligence, and assessment of damages. Responding parties are to put in the record all of their evidence on issues that must be determined in a Rule 76.07 summary judgment motion. Further, in this case, Deena was examined for discovery. A transcript of that examination was filed.

12 As her defence, it is Deena's position that she is not liable for the plaintiff's damages because:

- a) she did not cause damage to the plaintiff's property;
- b) she did not owe a duty to the plaintiff;
- c) if she owed a duty, by her actions she properly discharged that duty;
- d) the plaintiff was contributorily negligent;
- e) the plaintiff has not proven its damages; and
- f) the plaintiff's damages are too remote.

13 I will first deal with subparagraph a), which is causation. Deena admitted that she noticed a smoking pot on the stove and believed that she addressed the problem by turning off the element under the pot. The moving party's materials include evidence that the fire in the house was caused by a fire that started in that pot. That evidence included a fire inspection report with photographs, taken after the fire, of the premises and the alleged cause of the fire. Deena's counsel submitted that a trial was required so that report's writer could be cross-examined as to his expertise and findings. For the reasons that follow, I do not believe that such cross-examination is necessary to assist me in deciding the issue of causation.

14 Deena's position is that she is not liable because she did not originally put the pot on the stove and turn on the element. However, she has not claimed over against other persons and did not seek an adjournment to allow her to do so. Also, more than one person can be negligent. Further, Deena has no cross claim or counterclaim and did not seek leave to make a cross claim or counterclaim. Lastly, in her materials filed on the motion, Deena did not provide any evidence or submissions that the fire had any cause other than the pot that was left on the stove. In fact, she deposed that the fire may have spread from the stove to a mattress that was adjacent to the stove,⁵] thereby supporting the evidence contained in the fire inspection report. In these circumstances, I find that there was sufficient evidence in the record for me to decide, without further cross-examination, if the plaintiff had proven that Deena caused the fire.

15 I will now deal with subparagraph b), which is whether Deena owed a duty of care to the plaintiff. Although Deena did not directly pay any money to the plaintiff, she was utilizing (albeit temporarily) the premises of the plaintiff. The issue of whether she owed a duty is a legal issue to be

determined on those facts. No further cross-examination is necessary for me to decide if the plaintiff has proven that Deena owed a duty to the plaintiff.

16 I will now deal with subparagraph c), which deals with whether any duty owed was discharged by Deena. In her examination for discovery and her responding materials, Deena outlined all the steps that she took to discharge any duty that was owed to the plaintiff. I find that there was sufficient evidence in the record for me to decide, without further cross-examination, if Deena discharged any duty owed to the plaintiff.

17 With respect to subparagraph d), which deals with contributory negligence, Deena has stated that the plaintiff was negligent because the house did not contain fire extinguishers or operating smoke detectors. The plaintiff had the opportunity to put before me all facts and evidence disputing Deena's contributory negligence claim. I find that there was sufficient evidence in the record for me to decide, without further cross-examination, if Deena has proven that there was contributory negligence on the part of the plaintiff.

18 Subparagraph e) deals with the plaintiff's damages. In its materials, the plaintiff provided evidence as to its damages. In her materials and submissions, Deena stated why she disputed those damages. Based on the nature of the damages claimed and Deena's disputes, I find that there was sufficient evidence in the record for me to decide, without further cross-examination, if the plaintiff has proven its damages.

19 Lastly, subparagraph 1) deals with the remoteness of the damages. Remoteness is related to causation and I have already found that cross-examination at trial is not required on the issue of causation. Further, in her materials, Deena was obliged to state why she felt that the claimed damages were too remote. The plaintiff also had the opportunity to put forward evidence and submissions on the issue of remoteness. Remoteness is a mixed question of fact and law. I find that there was sufficient evidence in the record for me to decide, without further cross-examination, the issue of remoteness.

20 Considering those reasons, the factors set out above, and all of the evidence before me and circumstances of this case, and based on:

- the undisputed evidence;
- the fact that neither party has any further evidence that would be heard at trial;
- the available transcript; and
- the contents of the record before me;

I am satisfied that there was sufficient evidence before me and that viva wee cross-examination at a trial is not required for me to decide all issues necessary to ultimately determine Deena's liability, the plaintiff's contributory negligence, and damages.

The Issue of Unjustness

21 The fire in question occurred on October 25, 2002 - over six years ago. The amount of damages claimed is relatively small. As stated above, there was sufficient evidence before me to enable me to decide the issues in this action, as claimed in this motion, without further cross-examination. Both parties would incur not insignificant further legal costs if the matter were to proceed to trial. One purpose of a simplified rules action is to have the dispute adjudicated fairly and justly but, at

the same time, in a timely and cost-efficient manner having regard to the circumstances of the dispute.

22 For those reasons, and also considering all of circumstances of this case and the reasons set out above regarding the need for cross-examinations, I am satisfied that it would not be unjust to decide the issues on the motion.

Negligence

Causation

23 Deena's position was that another person left the pot on the operating element and thereby caused the fire. Also, Deena was only a temporary guest at the premises. Accordingly, Deena argued remoteness and submitted that she is not liable for any damages caused by the fire.

24 More than one person can be responsible for a party's losses. As stated by the Supreme Court of Canada:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.⁶]

25 More recently, the Supreme Court of Canada clarified:

... the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred.⁷]

26 Based on all the evidence before me, I find that the fire was caused by the pot that was left on the stove. I am satisfied that no further cross-examination or trial is necessary to determine the cause of the fire.

27 By her own evidence, Deena did not remove the pot from the stove after she saw that the pot was smoking when she initially entered the house. After believing that she had turned off the element, she did not remove the pot from the element or stove. Further, she did not remain in the kitchen until the pot stopped smoking or cooled down so that she was sure that there was no risk of fire created by the pot on the stove. Nobody else was in the house between the time that she left the kitchen (believing that she had turned off the element) and her return to the kitchen from upstairs after smelling smoke. Additionally, as stated above, Deena deposed that the fire may have spread from the stove to a mattress that was adjacent to the stove. On these facts and all of the evidence before me, I find that but for Deena's conduct, which failed to ensure that the smoking pot created no risk of fire, the fire would not have occurred. Accordingly, notwithstanding that another person may have initially left the pot on the stove element, Deena's conduct was part of the cause of the fire and the resultant damage.

Duty of Care

28 Deena admitted that she was utilizing (albeit temporarily) the premises of the plaintiff. She did so with either the express or implied permission of her boyfriend who, although not a tenant, was a resident of the premises. Accordingly, I find that Deena was lawfully in the house.

29 From her use of the plaintiff's property, Deena was deriving a benefit. It was reasonably foreseeable that, if Deena was careless while using the plaintiff's property, the plaintiff's property would likely be damaged. It is not reasonable that, at no cost or potential liability, a person can use and derive benefit from another's property and, if careless, expose that property to risk of likely damage. In these circumstances, I find that the relationship between the plaintiff and Deena was of sufficient proximity that each party owed a duty of care to the other. Accordingly, on Deena's part, I find that there was a duty of care owed by Deena (as a person who, at no cost, was using and deriving a benefit from the plaintiff's property) to the plaintiff (as owner of those premises). I am further satisfied that Deena's duty of care included (1) an obligation not to damage the premises and (2) an obligation to take reasonable steps to ensure that damage did not occur to the premises while she used them.

Breach of the Standard of Care

30 When dealing with causation, I found that but for Deena's conduct, which failed to ensure that the smoking pot created no risk of fire, the fire would not have occurred. The only step that Deena took was to turn the control knob for the stove element to what she believed was the "off" position. She was admittedly unfamiliar with the operation of the stove. She did not remain in the kitchen to ensure that she had used the correct control knob for the burner on which the pot was sitting. She did not remain in the kitchen to ensure that the element actually turned off. She did not remove the pot from the element or the stove. She did not remain in the kitchen to ensure that a fire did not emanate from the smoking pot. She did none of these things. Instead, she went upstairs to take a nap. On her own evidence, the house was "a run-down old farm house which did not have a lock on the front door and which was badly in need of repairs."⁸] Deena was also aware that there were no smoke detectors or fire extinguishers in the house and that the windows were nailed shut.

31 As stated above, Deena owed a duty of care to the plaintiff. Deena was aware of the condition of the house. By her admitted action of attempting to turn off the stove element, I find that she realized the risk of fire that was created by the smoking pot. Any reasonable person is aware of the gravity of harm that could result from a house fire. Any reasonable person would have realized that, in the house in question and in almost any house, it was reasonably foreseeable that a smoking pot could cause a fire; that it was reasonably foreseeable that the fire might spread beyond the stove to the house; and that it was reasonably foreseeable that significant damages, injury, and possibly death could occur. Considering all of the facts of this case, a reasonable and prudent person in Deena's position would have taken all the necessary steps to ensure that the smoking pot could not possibly continue to be at risk of causing a fire. When initially confronted with the smoking pot, Deena merely turned a stove element control knob to what she believed was the "off" position. She did nothing else. I find that by her conduct, Deena did not act as a reasonable and prudent person would have done in the circumstances. Accordingly, she breached the duty and standard of care owed to the plaintiff. I have already found above that her conduct, which constituted the breach, was a cause of the fire. Therefore, subject to any contributory negligence, Deena is responsible for the damages sustained by the plaintiff as a result of the fire.

Contributory Negligence

32 During argument, both counsel acknowledged that all evidence relevant to contributory evidence was before me. Accordingly, both counsel acknowledged, that the issues of contributory negligence could be determined on this motion.

33 The plaintiff was renting out a run-down house. It was reasonably foreseeable that the tenants of that house and their lawfully invited guests could suffer property damage, personal injury, and even death if the premises were unsafe. Accordingly, the plaintiff, as the owner of the house, owed a duty of care to its occupants and their lawfully invited guests.

34 There were no smoke detectors in the house, even though smoke detectors are mandatory by law. A reasonable person renting the premises would ensure that the premises contained smoke detectors. By its failure to install smoke detectors, in this run-down house which had no locks on the front door, the plaintiff created a situation that was unsafe for the tenants to whom the plaintiff was renting the property. By that conduct alone, the plaintiff breached the duty and standard of care owed to its tenants and their lawful invitees.

35 In this case, the plaintiff's breach is compounded. A reasonable person would also have reasonably foreseen that in a run-down house, without front door locks, smoke detectors, or fire extinguishers, it was essential that there be emergency exits from the second floor of the house where there were bedrooms for tenants. In this case, the windows on the second floor were all nailed shut, effectively almost trapping people on the second floor without a means to exit in emergencies. No reasonable person would have rented this house without ensuring that its second floor windows, the only means of emergency exit from the second floor, could be opened. By renting the house in that condition, the plaintiff further breached the standard of care owed to the tenants and their lawful invitees, including Deena.

36 However, on the facts of this case, I find that only the lack of smoke detectors contributed to the damages sustained as a result of the fire.

37 If the house had contained operating smoke detectors, I find that Deena would not have dealt with the smoking pot only by turning an element control knob to the "off" position. When smoke is detected, most smoke detectors emit an extremely loud, screeching, wailing noise that is very difficult to tolerate and virtually impossible to sleep through. If the plaintiff's house had such a smoke detector, I am satisfied that Deena would not have gone upstairs until the smoke detector had stopped wailing. Since the house's windows were nailed shut, it would have taken considerable time for the smoke to clear sufficiently for the wailing to stop. Further, while the existing smoke was clearing, Deena would have had to ensure that no further smoke was coming from the pot in order to stop the smoke detector from continuing to wail. This would have effectively ensured that there was no longer any continuing risk of fire as a result of the smoking pot.

38 For those reasons, I find that the lack of a smoke detector was a significant contributing factor of the fire and that but for the lack of a smoke detector, the fire would probably not have occurred. Accordingly, the fire damage resulted in part from the lack of a smoke detector on the premises. By not ensuring that a smoke detector was on the premises, the plaintiff breached a duty of care owed to persons lawfully at the house. For these reasons, there was contributory negligence on the part of the plaintiff that, in part, caused its damages.

39 In assessing the degrees of responsibility, I find that the lack of a smoke detector was as much a cause of the fire damage as was Deena's conduct. Therefore, I find the amount of the plaintiffs contributory negligence to be 50%. Deena is therefore responsible for 50% of the damages proven by the plaintiff.

Damages Property Damage

40 From the photos and other evidence, there is no doubt that the house was damaged by the fire.

41 The plaintiff obtained an estimate of \$43,756.15 to repair the fire damage. That estimate was submitted to the plaintiffs insurer together with a proof of loss form. The insurer accepted the damages as submitted by the plaintiff. The insurer paid that amount (less \$1,000 deductible) to the plaintiff. The plaintiff accepted the insurer's cheque, but for business reasons, chose to tear down the house rather than to repair it.

42 The respondent argued that trial and cross-examination were required because the proposed repairs constituted significant betterment or unjust enrichment for which the respondent was not liable. I disagree.

43 Prior to the fire, the plaintiff's building was run-down. However, it seems unreasonable and there was no evidence to suggest that the fire repairs could have been affected with used materials so as to put the plaintiff in the same position as prior to the fire. Also, there was no evidence about the value of the building after the completion of the proposed repairs.

44 As stated above, in this motion, the respondent was obligated to put all evidence before the court that she would have adduced at trial. However, she merely submitted that the betterment was obvious without providing further details. On this evidence, a trier of fact would not be able to determine an adjustment for betterment.

45 There was evidence, in the form of an estimate, about the needed repairs and the cost of those repairs. The plaintiff's insurer accepted the proposed necessary repairs and cost of same as contained in the repair estimate. The respondent has not submitted any evidence on which a trier of fact could find and determine an amount for betterment or unjust enrichment. Considering these facts and all of the evidence before me, I am satisfied that cross-examination at trial is not required and that it is not unjust for me to determine the property damage suffered by the plaintiff as a result of the fire. Based on all of the evidence, I find that the fire caused \$43,756.15 property damage to the plaintiffs building.

46 Based on my findings on causation, negligence, and contributory negligence, the respondent is liable for 50% of the property damage. Accordingly, for its property damaged by the fire, \$21,878.07 of the plaintiff's property damages were attributable to the respondent.

Loss of Rental Income

47 The plaintiff also requested \$14,000 for loss of rental income. For the reasons that follow, I am not satisfied that it would be just to determine loss of rental income without further cross-examination at trial.

48 There was insufficient evidence to satisfy me how long it would have taken to effect repairs. There was no evidence as to how long, after the completion of repairs, it would have taken to attract a new tenant for the premises. There was insufficient evidence to satisfy me that it was a reasonable business decision for the plaintiff to demolish rather than repair the house. If that was a reasonable

decision, there was insufficient evidence to satisfy me that 14 months was a reasonable time to rebuild the house and attract a new tenant.

49 For those reasons alone, I am not satisfied that it would be just to determine loss of rental income without further cross-examination at trial.

50 Accordingly, in this motion, there will be no award for loss of rental income.

Summary

In summary:

- a) the defendant Deena Calderone-Woodward was negligent and her negligence caused fire damage to the plaintiff's property;
- b) the plaintiff was 50% contributorily negligent for the fire damage to its property;
- c) the plaintiff's total property fire damage was \$43,756.15, for which the defendant Deena Calderone-Woodward was 50% responsible, namely \$21,878.07, for which amount the plaintiff shall receive judgment and on which amount the plaintiff shall receive pre-judgment and post-judgment interest pursuant to the Courts of Justice Act;
- d) the plaintiff's claim for loss of rental income is reserved to the trial judge; and
- e) if the parties cannot agree on costs for this motion, they are to contact the Whitby trial co-ordinator to arrange an appearance before me to make costs submissions.

D.W.E. SALMERS J.

cp/s/qlcct/qlaxd/qlmxb

1 Newcourt Credit Group Inc. v. Hummel Pharmacy Ltd. (1998), 38 O.R. (3d) 82 (Div. Ct.) at para 11.

2 Newcourt Credit Group Inc. y Hummel Pharmacy Ltd. (1998), 38 O.R. (3d) 82 (Div. Ct.).

3 Ibid.

4 Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 at para. 17.

5 Affidavit of Deena Calderone-Woodward sworn July 7, 2008, at para 9.

6 Athey v. Leonati, [1996] S.C.J. No. 102 at para. 17.

7 Resudice Corp. V, Hanke, [2007] S.C.J. No. 7 at para. 21.

8 Affidavit of Deena Calderone-Woodward sworn July 7, 2008, at para 2.