Case Name:

Watson v. Steed and Evans Ltd.

RE: Watson et al., and
Steed and Evans Limited et al.

[2007] O.J. No. 2607

68 C.L.R. (3d) 253

2007 CarswellOnt 6765

Court File No. 3487OB/00

68
Ontario Superior Court of Justice
London, Ontario

T.A. Heeney J.

Heard: June 11, 2007.
Judgment: June 11, 2007.

(12 paras.)

Counsel:

H. Perlis, for the moving party, the fourth party John Emery Geotechnical Engineering Limited ("Jegel").

M. Forget, for the responding party, the third party Dufferin Construction Company ("Dufferin").

P. Emerson, for the responding party, the fourth party Delcan Corporation ("Delcan").

ENDORSEMENT

1 T.A. HEENEY J.:-- This action arises out of a motor vehicle that occurred on Highway 402 on May 16, 2000. The plaintiff Julio Watson was driving eastbound in the passing lane of the highway

when she allegedly encountered a pool of water on the road surface. The car began hydroplaning, she lost control, and a serious accident resulted.

2 The plaintiff sued the Ministry of Transportation, who then brought a third party claim against Dufferin, who was contracted in 1997 to rebuild the highway. Dufferin then brought fourth party claims against the other members of the consortium involved in this design/build project.

3 The only expert evidence on liability in the court record is a report by Curt Beckemeyer, a professional engineer, dated September 22, 2006. He concludes that if water ponded in this 100 m. stretch of road, it was because the highway at this site was essentially flat. The design called for a 2% slope from the middle of the 2-lane eastbound roadway outward toward both edges. This would permit rainwater to drain away naturally. However, due to inadequate grade control, the asphalt on the inside edge of the roadway was too thick and the asphalt at the centre was too thin, resulting in little or no slope.

4 Jegel brings this motion for summary judgment, asking that the fourth party claim against it brought by Dufferin, as well as the cross-claims by the other fourth parties, be dismissed. Mr. Perlis argues on behalf of Jegel that no triable issue is raised on the record before the court. He points to statements in the discovery evidence of Dufferin to indicate that Jegel had nothing to do with either laying the asphalt layer, nor with inspecting the grade of the lanes as they were constructed.

5 However, in Schedule 9 of the written contract covering this project, Dufferin delegates to Jegel responsibility for the development and implementation of the quality assurance and quality control system for the project. According to the contract, the objective of this system is to ensure that the design and contractor participants have satisfactory control over the quality of the work and materials being provided. Jegel is designated as the Quality Control/Quality Assurance Manager, and is responsible for the day-to-day administration of the QA/QC team, and for review, acceptance and reporting of the quality assurance inspection and testing. It is also obligated to monitor the quality control results for all aspects of the work.

6 Mr. Perlis argues that, despite what the contract says, Jegel had nothing to do with inspecting the grade of the asphalt as it was laid. The contractor who laid the asphalt, Towland (London) 1970 Limited, did its own inspection, and Delcan did additional testing and inspection to ensure that the asphalt was being laid according to specifications. Dufferin was aware of all of this, and allegedly acquiesced. On that basis, he asks that all claims against Jegel be dismissed.

7 The role of the judge hearing a motion for summary judgment is set out in Aguonie v. Galion Solid Waste Material Inc. (1998), 156 D.L.R. (4th) 222 (Ont. C.A.), quoted by Borins J.A. in Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at para. 19:

> 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.

8 Here, the contract on its face clearly makes Jegel responsible for designing and administrating a quality control system, and for reviewing and monitoring the results of all inspection and testing. On the evidence, it would be open to the court to conclude that the quality control system failed, in

that a section of highway was constructed that did not meet the design specifications. This raises a triable issue as to whether Jegel was in breach of its contractual obligations.

9 Mr. Perlis argues that the manner in which the contract was interpreted and carried out left Jegel with no responsibility whatsoever for assuring that the grade levels met specifications. In making that submission, he is asking that I interpret the contract in a manner favourable to his client, and contrary to the express words of the contract.

10 In Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 52 0.R. (3d) 97 (C.A.), the court held that a contract must be interpreted in the context of properly admissible evidence, and that this process cannot be fully carried out until findings of fact have been made on the evidence.

11 Since it is not my function as a motions judge hearing a motion for summary judgment to make findings of fact, it follows that it is not my function to interpret the contract as suggested by Mr. Perlis, or in any manner whatsoever. A triable issue is raised with respect to the interpretation of the contract, which will define the scope of Jegel's duties and responsibilities under the contract. This is followed by another triable issue as to whether Jegel was in breach of those contractual duties and responsibilities.

12 The motion is, therefore, dismissed. If the parties cannot agree on costs, I will accept brief written submissions within 30 days.

T.A. HEENEY J.

cp/s/qlbxr/qljjn/qlbrl/qlhcs