CITATION: Corchis v. Essex Condominium Corporation No. 28, 2010 ONCA 787
DATE: 20101122
DOCKET: C50032

COURT OF APPEAL FOR ONTARIO

Moldaver, Simmons and Gillese JJ.A.

BETWEEN

Loretta Corchis

Plaintiff

and

Essex Condominium Corporation No. 28

Defendant (Respondent)

and

London Caulking and Installations Limited and Constantine Bach

Third Parties (Appellant)

Avril A. Farlam, for the appellant

William S. Chalmers for the respondent

Heard: October 21, 2010

On appeal from the judgment of Justice Joseph G. Quinn of the Superior Court of Justice dated May 20, 2010.

By The Court:

[1] London Caulking and Installations Limited appeals from the January 2009 judgment of Quinn J. in the third party action requiring London Caulking to pay $916,452 to Essex Condominium Corporation No. 28 on account of damages and pre-judgment interest.

[2] The plaintiff in the main action is Loretta Corchis. Ms. Corchis owned a unit on the top floor of the east tower of a condominium complex registered in the name of Essex. She claimed that she and her husband were unable to use her condominium unit during the five year period between June 1994 and June 1999 because of continuous water leaks. She sought damages against Essex for breach of contract and for negligence for failing to keep the roof of the condominium complex in a proper state of repair.

[3] The main action was commenced in 1995 and tried before Quinn J. in 2005. Ms. Corchis obtained judgment against Essex for $719,058.30 on account of damages and pre-judgment interest.

[4] In the main action, the trial judge concluded that Essex acted unreasonably in hiring London Caulking to repair the roof of the condominium complex in October 1994 in the face of expert reports indicating more extensive repairs or replacement of the roof were necessary. The trial judge also found that Essex acted unreasonably between 1995 and 1998 in continuing to take advice from and enter into contracts with London Caulking during 1995 and in failing to take alternate action when the London Caulking's roof repairs did not resolve the water leaks.

[5] In 1998, Essex issued a third party claim seeking contribution and indemnity from London Caulking for any amounts Essex was required to pay Ms. Corchis. London Caulking did not defend the main action. The third party action was tried before Quinn J. in 2009. The trial judge held London Caulking largely responsible for the amounts Essex was required to pay Ms. Corchis based on negligent misstatement, negligence and breach of contract.

[6] The main issues on appeal are whether the trial judge erred in his findings of liability and damages in the third party action.

[7] Although we accept that it was open to the trial judge to find London Caulking liable for breach of contract, we conclude that the trial judge erred in his award of damages against London Caulking.

Background

i) The Water Leaks and the Roof Repairs

[8] Ms. Corchis began experiencing water leaks in her condominium unit in June 1994. In response to her complaint about these leaks, Essex obtained expert reports from an architect and an engineer recommending extensive repairs to the roof of the east tower or replacement of the roof of the east tower at a cost of about $130,000. After these reports were obtained, a majority of the Essex Roofing Committee recommended that the Board proceed with replacing the roof. However, William Docherty, the original developer of the condominium complex, and Constantine Bach, a unit owner and retired

engineer, did not agree with this recommendation and suggested that minor repairs would be sufficient.

[9] In mid-September 1994, representatives of London Caulking examined the roof and expressed a verbal opinion that the roof was in good condition and that London Caulking could stop all leaks. A representative of Essex wrote to London Caulking on September 16, 1994. In that correspondence Essex's representative advised that time was of the essence in relation to the roof, asked for a detailed proposed and inquired how long it would take to stop all leaks.

[10] In a letter dated September 19, 1994, London Caulking responded that it had "been involved with inverted rubberized asphalt roofing for over 20 years" and asserted that its "experience indicates that failures are usually isolated conditions caused by details, moving seams, or inflicted damages." London Caulking stated that work on the east tower roof would take about two weeks and could be completed for less than $20,000.

[11] At a meeting held on October 15, 1994, Essex decided to repair the roof rather than replace it.

[12] On October 17, 1994, Essex requested that London Caulking prepare a bid for conducting repairs to the roofs of the east and west towers and a recreational centre of the condominium complex in accordance with specifications prepared by Mr. Bach. London Caulking submitted a proposal "to complete necessary leak repairs and preventative

procedures to the roofs of the three buildings" at a cost of about $47,000. The proposal required Essex to provide the location of all leaks and stated, "[o]ur labour and materials are guaranteed for two years in the areas of work completed." Essex issued a purchase order for that work on October 21, 1994.

[13] London Caulking initially completed its work on November 18, 1994. Ms. Corchis reported further leaking on November 27, 1994. London Caulking completed additional repairs on February 9, 1995. Despite these repairs, Ms. Corchis's condominium unit continued to leak.

[14] On March 1, 1995, London Caulking delivered a two-year guarantee to Essex in which it agreed "to correct and repair ... any deficiency in their work ... as a result of improper workmanship or incorrect materials for a period of two years from the date of substantial completion". Although not referred to in London Caulking's original proposal, the Guarantee stated there were no "representations, warranties or conditions express or implied" other than as set out the Guarantee, and required that Essex give written notice of any deficiencies within 20 days of discovery of the deficiency.

[15] On March 23, 1995, Essex faxed a letter to London Caulking advising that Ms. Corchis's unit continued to experience leaks after repairs were completed on February 9, 1995 and that although the leaks had subsequently "been stopped ... freezing weather made it impossible to ascertain whether the repairs were successful."

[16] In August 1995, Essex entered into further contracts with London Caulking to perform additional work to the exterior walls of the complex considered necessary to assist in stopping the leaks.

[17] Finally, in April 1998, Essex retained another engineering firm to investigate the roof. The engineering firm concluded that the repairs completed by London Caulking, which mainly involved replacement of the weatherproofing membrane in selected areas, would not have been 100% effective in addressing the previously reported leaks because there were other areas where water could penetrate if those areas were not repaired. Ms. Corchis's condominium unit stopped leaking after a new roof was installed in accordance with the engineering firm's recommendation.

ii) The Main Action

[18] As we have said, London Caulking did not defend the main action, and accordingly, although apparently present throughout, did not participate in the trial of the main action.

[19] At the conclusion of the trial of the main action, counsel for Ms. Corchis and for Essex filed an Agreed Statement of Fact. Although the trial judge said, in his reasons, that he did not regard the Agreed Statement of Fact as binding on the court, he observed that most of the evidence led at trial was not in dispute and supported the facts agreed upon. Accordingly, the trial judge made 81 findings of fact mirroring the Agreed Statement of

Fact submitted by counsel. However, the trial judge noted that the issue in the case "was not what had occurred, but what interpretation should be placed on what had occurred."

[20] In the analysis section of his reasons relating to the main action, the trial judge concluded that Essex did not act reasonably in 1994 when it rejected the advice of the engineer and the architect it had retained and instead relied on the advice of London Caulking, William Docherty and Constantine Bach concerning the steps that should be taken to fix the roof of the east tower. The experts recommended extensive repairs or a new roof at a cost of $130,000. London Caulking, Mr. Docherty and Mr. Bach "reported that the [east] roof was in excellent condition and required only minor repairs at a cost of $20,000."

[21] In addition, the trial judge concluded that Essex failed to act reasonably in 1995, 1996, 1997 and 1998. In 1995, Essex failed to act reasonably by continuing to accept advice from London Caulking. In 1996, 1997 and 1998, Essex failed to act reasonably by doing nothing to resolve the ongoing roof leaks until April 1998, when it retained an engineering firm to investigate the roof. The engineering firm concluded that the life expectancy of the roof had expired. The roof leaks stopped after a new roof was installed in accordance with the engineering firm's recommendation.

[22] Based on his findings that Essex failed to act reasonably, the trial judge awarded damages to Ms. Corchis. In accordance with an agreement between Ms. Corchis and Essex, the trial judge ordered Essex to pay Ms. Corchis $719,058.30 on account of

damages and pre-judgment interest plus $299,221.00 on account of costs for a total of $1,018,279.30.

iii) The October 2005 Motions

[23] In October 2005, Essex moved for an order that the trial judge's findings of fact and the quantum of damages in the main action were binding on London Caulking and "for directions as to those factual issues that arise between [Essex] and [London Caulking] that have been determined by operation of the Orders and determinations made in the main action."

[24] In response, London Caulking moved for an order that the findings of fact made and the quantum of damages fixed in the main action would not be binding on it and for an order perpetually staying or dismissing the third party action because of a secret agreement reached between Ms. Corchis and Essex concerning liability. As part of its argument, London Caulking relied on *Merrett v. Lyons*, [1958] O.J. No. 316 (C.A.), claiming that that case stands for the proposition that an agreement as to damages between and plaintiff and a defendant is not binding on a third party.

[25] The motions were heard on April 24, 2006; Quinn J. released his reasons on May 2, 2006. The motion judge dismissed London Caulking's motion. He concluded that issues relating to the evidence adduced after the secret agreement concerning liability had been reached could be addressed at the trial of the third party action. Further, he found that evidence had been led to support Ms. Corchis's damage claim during the trial of the

main action and that the measure of damages in the third party action was the same as the measure of damages in the main action "i.e. what damage did plaintiff sustain from water leakage." The motion judge concluded, "the judgment for damages in the main action is binding in the third party action subject to arguments with regard to liability."

[26] London Caulking's motion for leave to appeal the May 2, 2006 decision to the Divisional Court was dismissed on January 19, 2007.

iv) The Third Party Action

[27] The third party action was heard over seven days in November and December 2008 and the trial judge released his reasons on January 20, 2009.

[28] In his reasons, the trial judge noted that, in addition to the Agreed Statement of Fact and the agreement concerning damages, Ms. Corchis and Essex entered into an agreement near the end of the trial concerning liability that they did not disclose to the court. The trial judge said the witnesses called after the agreement was entered into "had no effect on the court's finding of liability". Rather, the finding of liability was based on the fact that Essex "obtained [two professional reports recommending roof replacement] and then ignored the reports in favour of pseudo roof experts who advocated a cheaper roof repair solution."

[29] Further, the trial judge once again noted that London Caulking failed to defend the main action and that it was therefore bound by relevant orders or determinations made in the main action. He repeated his 81 findings of fact made in the main action "as they

[were] binding where relevant in the Third Party proceeding and … chronicle[d] the facts in dispute."

[30] Concerning liability, the trial judge found London Caulking liable for negligent misstatement, negligence and breach of contract. London Caulking's negligent misstatement consisted of representing that it could offer a permanent solution to the roof leaks without determining what was causing the leaks. Its negligence consisted of carrying out spot repairs over identified leaks without determining what portions of the roof membrane were bonded and whether water could flow along the deck. London Caulking breached its contract with Essex by failing to fulfill its commitment "to complete the necessary leak repairs and preventative procedures."

[31] Further, the trial judge rejected London Caulking's argument that Essex's claim was barred by London Caulking's two-year Guarantee since the work was completed in 1995 and the third party claim was not issued until June 26, 1998. The trial judge said, "[t]here were continual complaints from [Ms. Corchis] about roof leaks and these complaints were known by London". He found that London was on site from 1994 to 1997 or 1998 and that "throughout, [it] attributed the leaks to causes other than their repairs."

[32] The trial judge's reasons relating to damages consisted of a single paragraph. He noted the total damages agreed upon in the main action including costs ($1,018,279.30) and observed that they were based on a period of loss of Ms. Corchis from June 1994 to

June 1999. As London Caulking "was not involved with the roof repairs until after October 15, 1994", the trial judge reduced Essex's entitlement to contribution and indemnity "by one-tenth or six months."

Discussion

[33] In our view, the trial judge's finding of liability based on negligent misstatement cannot stand.

[34] To make out a cause of action for negligent misstatement, among other requirements, a claimant must show that it relied, in a reasonable manner, on the negligent misrepresentation of the defendant: see *Queen v. Cognos Inc.* [1993] 1 S.C.R. 87, at p. 110.

[35] In this case, the trial judge's findings in the main action preclude a finding of reasonable reliance. In his reasons for judgment in the main action, the trial judge made an explicit finding that Essex did not act reasonably in 1994 when it "rejected the advice of its two professional experts and accepted the advice of London Caulking" and others. In addition, the trial judge said,

> Whatever standard is imposed, this issue should have been within the Board members' abilities ... The difficulty was that the Board members were so influenced by costs that they neglected to ask questions. The Board members had before them two detailed written reports by an architect and an engineer. The Board rejected the detailed opinions contained in the two reports by acknowledged experts and accepted an oral opinion from dubious experts that the roof was in excellent condition and required only minor repairs.

[36] Even assuming that Essex could show it had a "special relationship" with London Caulking (another essential element of a cause of action for negligent misstatement), the trial judge's findings in the main action preclude a finding of reasonable reliance.

[37] Nonetheless, we are satisfied that it was open to the trial judge to find London Caulking liable to Essex for breach of contract. The negotiations that preceded London Caulking's October 19, 1994 letter to Essex provide background context for interpreting the language of London's proposal. Particularly in the light of that context, it was open to the trial judge to conclude that the proposal "to complete the necessary leak repairs and preventative procedures" amounted to a promise to provide a "permanent solution to the roof leaks and not repairs to selected roof locations."

[38] The trial judge found that Ms. Corchis's unit leaked from 1994 until 1998, when a new roof was installed. Based on the evidence of the engineer hired by Essex in 1998, he also found that the work carried out by London Caulking was not sufficient to resolve the leaking problem. In our view, on the basis of these findings, it was open to the trial judge to find, as he did, that London Caulking breached its contract with Essex because it failed to take necessary preventative measures to stop the leaks.

[39] Further, we agree with the trial judge's conclusion that London Caulking could not rely on the terms of its Guarantee to exclude its liability in the circumstances. The original terms of the agreement between the parties did not specify any terms apart from a two-year warranty. Moreover, Essex provided London Caulking with written notice of

ongoing leaks in March 1995 and London Caulking was well aware of the ongoing problem with leaks. In all the circumstances, London Caulking is not entitled to rely on the terms of the warranty to absolve itself from liability.

[40] That said, we conclude that the trial judge erred in assessing damages because he failed to turn his mind to the issue of causation. Particularly in the light of the trial judge's strong findings in the main action concerning the negligence of Essex, it was necessary that the trial judge address the issue of causation before holding London Caulking liable to Essex for the damages suffered by Ms. Corchis.

[41] The trial judge's core findings against Essex were that, in the face of two expert reports Essex had obtained, Essex was negligent in hiring London Caulking in the first place and then in continuing to take advice from London Caulking and in failing to take alternate steps more quickly when the solutions offered by London Caulking did not work.

[42] The leaking problem started and Essex obtained the two expert reports the trial judge found Essex should have relied on before London Caulking was ever on the scene. Ms. Corchis did not have a contract with London Caulking; nor did she sue London Caulking. London Caulking's liability to Essex for damages suffered by Ms. Corchis therefore turns on the extent to which London Caulking's wrongful conduct caused Essex to incur liability to Ms. Corchis.

[43] As is demonstrated by the chronology set out above, this matter has had a long and tortured history. In these circumstances, rather than ordering a new trial to address the issue of causation, we consider it appropriate that we exercise our power under s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 to make an appropriate award of damages.

[44] In our view, given the trial judge's findings of fact, it is reasonable to conclude that London Caulking's conduct in negotiating and performing its contract caused some part of Essex's delay in taking proper steps to fix the roof on the east tower. While we conclude that Essex must bear primary responsible for this delay because of its own negligence, we consider it reasonable to fix London Caulking with responsibility for about three months out of the total 60 months of delay, resulting in an award of $50,913.97 on account of damages. Having regard to the fact that London Caulking was paid a total of $58,920.86 including tax for its work under the contract for roof repairs this amount seems to us to be eminently reasonable.

[45] In the circumstances, we consider it unnecessary to determine whether this was a proper case for findings of concurrent liability for breach of contract and negligence. We see no realistic possibility that we would have arrived at a different result had we analyzed the issue based on a finding of negligence.

[46] Accordingly, the trial judge's award of damages is set aside, and an award of $50,913.97 is substituted.

[47] Having regard to the limited success of Essex against London Caulking, we set aside the trial judge's order requiring London Caulking to indemnify Essex for the costs it was required to pay the successful third party, Constantine Bach. Further, we set aside the trial judge's order requiring London Caulking to pay Essex costs of the main action and the third party proceeding in the amount of $173,476.00 and substitute an order requiring London Caulking to pay Essex trial costs totalling $12,500. Finally, we make no order as to the costs of this appeal.

Signed: "M. J. Moldaver J.A."

"Janet Simmons J.A."

"E.E. Gillese J.A."

RELEASED: "MJM" November 22, 2010