
CANADA / JUDGMENT

Nijjar v. Raymond

2015 BCSC 1087

COURT

Supreme Court of British Columbia

DECIDED

13 January 2015

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2015 BCSC 1087 Nijjar v. Raymond

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nijjar v. Raymond,

2015 BCSC 1087

Date: 20150113

Docket: S133528

Registry: Vancouver

Between:

Gurmel Nijjar and Hirdaypal Nijjar

Plaintiffs

And

Patrick Raymond and Shami Raymond

also known as Shamsher Raymond

Defendants

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

J.D. Meadows

Counsel for the Defendants:

D.L. Romanick

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 13, 2015

Place and Date of Judgment:

Vancouver, B.C.

January 13, 2015

- [1] THE COURT: The plaintiffs are the owners of a four-unit residential property in Abbotsford. The defendants were tenants of Unit 2. In the early morning on February 9, 2011, there was a fire at the property. It originated on the exterior of the balcony of Unit 2.
- [2] This action is a subrogated action commenced by the insurer (Wawanesa) of the plaintiffs. (I am going to refer to Wawanesa and the plaintiffs interchangeably.) The notice of civil claim was filed on May 10, 2013.
- [3] The defendants seek to have the action dismissed on a summary trial, on the basis that the notice of civil claim was filed after the expiry of the limitation period and the action is therefore statute-barred. The defendants say that the limitation period began to run on February 14, 2011, when Wawanesa was advised that preliminary results showed that the fire started in a planter on the balcony of Unit 2 and was likely the result of the disposal of smoking materials. The defendants say, at the very latest, the limitation period began to run not later than the end of March 2011, when electrical components (a potential source of the fire) were examined. The defendants say that, at that point, Wawanesa had within its means of knowledge (if only it had followed up with its investigator) facts indicating cigarettes as the probable cause of the fire, and that Wawanesa failed to exercise due diligence in waiting another two months for the investigator's report.
- [4] The plaintiffs say that they are entitled to the benefit of the postponement provisions in the former Limitation Act, R.S.B.C. 1996, c. 226, because for a period after the fire, Wawanesa and its investigator (Terry Zweng) were investigating two possible causes of the fire: one was electrical failure of one of the components of a light on the exterior wall of Unit 2; the other was combustion of smouldering cigarettes in a planter on the balcony. Wawanesa says that, in the light of case law discussing proof of liability in fire actions, this investigation was not only reasonable, but necessary before any conclusion could be reached on whether there would be a reasonable prospect of success in a claim against the defendants.

- [5] The plaintiffs say that the limitation period was postponed until May 26, 2011, when Wawanesa received the investigator's report (that is, Mr. Zweng's report) identifying a discarded cigarette placed in one of the wooden planters on the balcony of Unit 2 as the probable cause of the fire. The plaintiffs say that the limitation period was postponed until at least May 15, 2011, the date of Mr. Zweng's report. In either event, the plaintiffs say this action was therefore filed within time.
- [6] The basic facts concerning the events on the early morning hours on February 9, 2011, and subsequently, are not seriously in dispute, and I am going to summarize the facts based on the evidence that has been presented.
- [7] As I have already mentioned, fire broke out in the early morning hours on February 9, 2011. The fire was at Unit 2, the defendants' unit, and the fire caused property damage to the property.
- [8] The plaintiffs were insured with Wawanesa, and the defendants also had their own insurance, with a company called Intact Insurance Company.
- [9] On February 9, the day of the fire, Wawanesa retained the services of Mr. James Orr to act as the adjuster for the fire loss, and Mr. Orr in turn retained Mr. Zweng of Fire Pro Investigations to attend the property and investigate the cause and the origin of the fire.
- [10] On February 14, 2011, Mr. Orr provided his first adjuster's report to the claims examiner, Ms. Burgemaster, and under the heading "Cause and Origin of the Loss" in Mr. Orr's report, Mr. Orr stated that, "The insured does not know the cause of the fire." There is also some discussion in Mr. Orr's report concerning a discussion with the Fire Department, and Mr. Orr says in his report:

The preliminary assessment of the fire department is that the fire started in a planter on the balcony of unit #2. The fire department suspects that the careless disposal of smoking materials was responsible for this fire.

- [11] In the "Causation" section of his report, Mr. Orr stated that he confirmed with Mr. Zweng that he had spoken with Mr. Raymond (one of the defendants). Mr. Raymond admitted that he was a smoker, and a package of cigarettes was found on the kitchen table of Unit 2. Mr. Orr's report referred to the preliminary results of Mr. Zweng's investigation, including that Fire Pro believed that the fire originated in the planter and also that the origin of the fire was confirmed by the tenant of Unit 1, who was the first person to witness the flames. Mr. Orr stated in his report that he had not yet requested a written report from Fire Pro.

- [12] Mr. Zweng in his affidavit describes what he did in his capacity as investigator. He confirms that he was retained by Mr. Orr on February the 9th, and that he attended the property on that date to investigate the cause and origin of the fire. He says that he interviewed the defendant Mr. Raymond as part of the investigation and at that time, according to Mr. Zweng, Mr. Raymond told him that he was a smoker, but that he only smoked outside at ground level and not on the balcony.
- [13] Mr. Zweng says (para. 5 of his affidavit) that he formed a preliminary opinion that the fire could possibly have been caused by either: (1) an electrical failure of one of the electrical components and associated wiring near the origin of the fire; or (2) by the combustion of smouldering cigarettes in the planter. So, in short, in the area of origin, Mr. Zweng had identified two potential causes.
- [14] As part of the Fire Pro investigation, Mr. Zweng removed the electrical components for off-site investigation by the electrical examiner at Fire Pro, a Mr. Steve Baker. Mr. Zweng says (para. 6 of his affidavit) that the electrical components were placed in secure storage and examined by Mr. Baker on or around March 13, 2011. The examination of the electrical components was necessary in order to determine whether the fire was caused by an electrical failure or if an electrical failure could be ruled out as a cause of the fire. Mr. Zweng deposes to that in paragraph 8 of his affidavit.
- [15] Mr. Zweng completed his report on May 15, 2011, and a copy of his report is attached as Exhibit "A" to his affidavit. Mr. Zweng could not recall exactly when he was instructed to prepare a written report, and Mr. Zweng says in his affidavit that the delay between his investigation on February 9, 2011, and his report of May 15 was somewhat unusual, as it was his general practice to complete reports within one month of his investigations. He stated that he believed the delay was likely due to the delayed electrical investigation and a busy workload that he had at the time.
- [16] Mr. Zweng concluded in his report that, based on the scene examination, witness statements and the off-site examination of the electrical components, it was Mr. Zweng's opinion that the cause of the fire was accidental. He stated the area of origin was at the base of the wall between the sliding glass door and angled corner. The wooden planters where the cigarette butts were found were at this location. He stated that it was probable that a discarded burning cigarette was placed in one of the wooden planters containing organic soil and/or peat, and a smouldering fire initiated. He stated that the fire transitioned to flaming combustion and travelled outward and upward from the planter. He stated further that the electrical components in the area of origin were examined and eliminated.
- [17] Wawanesa received Mr. Zweng's report on May 26, 2011.
- [18] The key issue on the application in this case is: when should Wawanesa, exercising due diligence and acting reasonably, have identified the cigarette material as the probable cause of the fire. At that point, the limitation period begins to run.

- [19] The plaintiffs submit that it was not until May 26, 2011 that Wawanesa reasonably knew the facts and had reasonably taken the appropriate advice (that is, the advice from their investigator, Mr. Zweng) on those facts so as to be able to conclude that it had an action against the defendants with a reasonable prospect of success. The plaintiffs say that Wawanesa acted reasonably in obtaining expert advice on the question of causation.
- [20] The plaintiffs say that Wawanesa did not know the cause of the fire as of February 14, 2011, when it received Mr. Orr's first report. They say while there was speculation that the fire was caused by Mr. Raymond's careless disposal of cigarettes in the planter, there was a possible alternate cause of an electrical fire that needed to be ruled out by an expert. The plaintiffs say that it was not until Wawanesa received Mr. Zweng's report that the possibility of an electrical fire was eliminated as a cause, leaving the careless disposal of smoking materials as the only probable cause.
- [21] The plaintiffs say that the Fire Prevention (Metropolis) Act, 1774 stipulates that "no action, suit or process" can be "maintained or prosecuted against any person" at whose property a fire began if the fire was accidentally started. The plaintiffs say that s. 86 of the Fire Prevention (Metropolis) Act provides a statutory defence which requires proof of negligence in setting a fire or permitting it to spread before there can be liability, and the onus is on the plaintiff to establish, on a balance of probabilities, that the fire was not an accident and that it began because of a defendant's negligence.
- [22] The plaintiffs cite a number of cases, including *Wong v. Misleng*, 2007 BCSC 1835, *Steer v. Hore*, [1990] B.C.J. No. 519 (S.C.) and *Franks v. Sanderson* (1986), 35 C.C.L.T. 307 (B.C.S.C.), *aff'd* (1988), 44 C.C.L.T. 208 (B.C.C.A.), all of which indicate that there must be evidence clearly indicating a defendant's negligence was the cause of a fire to the exclusion of other potential causes, otherwise the plaintiff's action is very likely to be dismissed.
- [23] The plaintiffs say that the case law is clear that, in cases without direct evidence of the cause of the fire, the courts will not draw an inference of negligence (e.g., that careless disposal of smoking materials caused the fire) unless other potential causes have been eliminated. The plaintiffs say that Wawanesa was aware of this legal context (and they rely on statements in the affidavit of Ms. Burgemaster to that effect) and did not consider that it had a cause of action with a reasonable prospect of success against the defendants until it could rule out alternative causes of the fire other than careless smoking.
- [24] Wawanesa did not consider that other causes were adequately ruled out until it had received Mr. Zweng's report, which ruled out a possible electrical cause and concluded that the only probable cause was a carelessly discarded cigarette.
- [25] The plaintiffs say that it was reasonable for Wawanesa to seek out expert advice on the facts to determine the cause and origin of the fire. They say that determining the probable cause of a fire is a difficult task requiring the expertise of an experienced and trained investigator whose professional practice is dedicated to determining the cause and origin of fires, especially when multiple possible causes of fire are contemplated. The plaintiffs say that

therefore they, and Wawanesa in particular, acted with due diligence when they retained the investigator, Mr. Zweng.

- [26] In the plaintiffs' submission, it was not obvious until they received Mr. Zweng's report that they would have a reasonable prospect of success in an action against the defendants. They say that there are some circumstances where an expert opinion regarding causation is needed to provide the plaintiff with the requisite means of knowledge for purposes of the provisions of the Limitation Act, and that this is clearly one of those cases.
- [27] The plaintiffs say that it was not enough to suspect careless smoking was the cause of the fire. In order to know that they had a reasonable prospect of success in the action, they needed to know that the defendants' negligence was the probable cause of the fire to the exclusion of all other possible causes, and the only way to obtain this information was through seeking expert advice. The plaintiffs cite the Court of Appeal's decision in *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58 (C.A.), where the court broadened the means of knowledge test. The court held, at paragraph 38 of *Levitt*, that facts falling within the plaintiff's means of knowledge are, "[f]irstly, those actually known, and secondly, those which would become known if he took such steps as would have been reasonable for him to take in his circumstances." The plaintiffs say that, on this view of the law, the question is when the plaintiff ought reasonably to have known of the facts and ought reasonably to have taken the appropriate advice on those facts so as to be able to conclude that an action would have a reasonable prospect of success.
- [28] The plaintiffs say that it was not until May 26, 2011, when Wawanesa received Mr. Zweng's report, that they knew of the facts and took the appropriate advice on those facts from Mr. Zweng. It was that which enabled them to conclude that an action against the defendants would have a reasonable prospect of success. In the plaintiffs' submission, that timing was reasonable.
- [29] The defendants say that the necessary facts and advice could reasonably have been learned if only Wawanesa had picked up the phone or contacted Mr. Zweng, and that Wawanesa could have done this and learned the substance of Mr. Zweng's advice and conclusions by the end of March at the latest, since the examination of the electrical components, according to Mr. Zweng, was done by Mr. Baker around the middle of March. The defendants say that by the end of March, once the electrical components had been examined, Wawanesa should have taken steps to confirm with their expert the probable cause of the fire, and that if Wawanesa had done so, it would have known that it had a cause of action against the defendants with a reasonable prospect of success.
- [30] The defendants say that Wawanesa's failure to do so is a failure to exercise due diligence as described in the authorities, and a failure to act reasonably. Therefore, in the defendants' submission, Wawanesa is not entitled to the benefit of a postponement under the Limitation Act.

[31] The Limitation Act, s. 6 provides in relevant part:

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

...

(b) for damage to property;

...

(4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

(a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

(5) For the purpose of subsection (4),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) "facts" include

(i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

...

(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[32] In my opinion, Wawanesa acted with due diligence in pursuing advice. On February 9, 2011, Mr. Orr was appointed the adjuster and he was instructed to retain Mr. Zweng of Fire Pro to conduct a cause and origin examination. Mr. Zweng's affidavit evidence confirmed these facts. Mr. Zweng formed a preliminary opinion that the fire could have been caused by one of two potential causes: the electrical failure of one of the electrical components and associated wiring, or by the combustion of smouldering cigarettes in the planter. As Mr. Zweng described in his affidavit, he proceeded to take steps to have the electrical components examined. People (for example, people in the Fire Department and Mr. Orr) may have formed early and preliminary views about who and what was responsible for the

fire: namely, careless disposal of cigarette material by one of the defendants. However, based on the cases discussing the Fire Prevention (Metropolis) Act, 1774, cited by the plaintiffs in their submissions, it was, in my opinion, entirely reasonable for Wawanesa to pursue further investigations and obtain an opinion concerning the probable cause of the fire. This was what Mr. Zweng was doing and providing.

- [33] Mr. Zweng completed his report on May 15, 2011. He states his opinion concerning the cause of the fire.
- [34] Ms. Romanick, on behalf of the defendants, says that I should conclude that, despite the date of the report, that Wawanesa had, shortly after the examination of the electrical components, within its means of knowledge facts based on which a reasonable person would regard the facts as showing that a cause of action against the defendants would have a reasonable prospect of success.
- [35] I am not prepared to draw that conclusion. On the evidence, Mr. Zweng's report was not completed until May 15, 2011. I am not prepared to speculate that if Wawanesa had pressed Mr. Zweng for his opinions and conclusions prior to that date he would or could have provided them. Nor am I prepared to find that Wawanesa had an obligation in the circumstances to do so. Moreover, in my opinion, Wawanesa's conduct in waiting for Mr. Zweng's report was not unreasonable because, without the report, Wawanesa had insufficient facts based on which it could consider that an action against the defendants had a reasonable prospect of success.
- [36] In my opinion, Wawanesa acted reasonably in obtaining advice on the question of causation, and the report containing that advice was not in existence before May 15, 2011.
- [37] Accordingly, the plaintiffs are entitled to a postponement of the limitation period to May 15, 2011, and the action was filed within two years of that date.
- [38] It follows, therefore, that the defendants' application is dismissed.
- [39] Unless counsel wish to make submissions on costs, I would say that the application is dismissed with costs to the plaintiff in any event of the cause.
- [40] MS. ROMANICK: My Lady, with respect to costs, I would just note that this was an issue that needed to be addressed. Certainly it could have gone either way and it would be my submission that, because of that fact, that costs should be in the cause.
- [41] MR. MEADOWS: My Lady, I obviously don't agree with my friend's position and I think that this was an application that the defendants elected to bring, and in the result it's not part of the merits of the case, and in the result I think that it's fair to order costs in any event of the cause.
- [42] THE COURT: All right. I think the appropriate order with respect to costs is that the plaintiffs will have costs of this application in any event of the cause.

[43] Again, I am indebted to counsel for their very helpful submissions, and that concludes my ruling.

"Adair J."

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