Case Name:

Amhil Enterprises Inc. v. Seawright Electric Ltd.

Between
Amhil Enterprises Inc. and Wentworth Technologies Company Limited, Plaintiffs, and Seawright Electric Limited, Siemens Canada Limited/limitee

[2010] O.J. No. 5170

Court File No. CV-09-392090

Ontario Superior Court of Justice

Master R. Brott

November 29, 2010.

(14 paras.)

Counsel:

R. **Betts** for the defendant, Siemens, Moving Party.

M. Saitua for the plaintiffs, Responding Parties.

ENDORSEMENT

1 **MASTER R. BROTT**:-- This is a Motion to strike paragraphs 5, 6, and 7 of the Statement of Claim. Prior to the hearing the parties had reached an agreement to strike paragraph 6 of the Statement of Claim.

2 This action relates to an alleged bus duct failure which occurred on December 31/07 at the plaintiff's factory. Siemens is alleged to be the manufacturer of the bus duct and Seawright, the installer. The bus duct which failed had previously failed on June 13, 2000 and had been repaired and/or replaced by one or both of the defendants after the 2000 incident. Litigation between the parties to this proceeding arose following the 2000 incident and the action settled at Mediation in or about August 2007.

3 Both paragraphs 5 and 7 refer to the explosion caused on June 13, 2000 when the bus duct caught fire.

4 Rule 25.06(1) of the Rules of Civil Procedure states that "every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts as proved". Rule 25.11 permits the court to strike out all or part of a pleading on the ground that the pleading may prejudice or delay the fair trial of the action; is scandalous, frivolous or vexatious or is an abuse of process of the court.

5 In short the moving party asserts that paragraphs 5 and 7 as they relate to the 2000 incident do not contain any material facts. The responding parties submit that the previous incident is a material fact. At paragraph 10(h) of the Statement of Claim the plaintiff pleads that the defendants as liable as they "knew or ought to have known that the bus duct was defective"

6 In Bennett v Robert Simon Construction (1977), 17 O.R. (2d) 190 the plaintiffs sought damages for a second and third flood allegedly caused by the defendants and in the Statement of Claim, the plaintiffs referred to the first flood which was subject to a settlement. The defendants move to strike the reference to the first flood on the grounds that it was not a material fact. The court agreed and struck the offending paragraph. The plaintiff in the within action sought to distinguish the Bennett case on the basis that it did not refer to any repairs having been effected following the first flood or any negligence on the part of the defendants in their handling of the first incident.

7 I find the case to be to be directly on point to the issue before me. In this case, the defendant Siemens has not denied that the repairs may well be relevant and may be pleaded - the only issue the defendant objects to is the clear mention of the earlier incident.

8 In my view the language used in describing the 2000 incident puts both of the defendants into a very negative light. The pleadings are there to concisely tell a story. The story of the 2007 bus duct explosion can well be told without specific mention of the 2000 incident. The fact that the pleading at 10(h) of the Claim speaks of knowledge that the defendants had or should have had certainly leaves open the door for the previous incident to be fully explored at discovery. Similarly the fact that Seawright pleads that it removed itself from the scene and left all maintenance to the defendant Siemens after 2000 can also be told without the necessity of imputing significant negativity on Siemens vis-à-vis the 2000 incident. On this basis alone, the paragraphs are hereby struck with leave to the plaintiff to re-do paragraph 7 in respect of repairs effected by the defendant(s).

9 Even if it was found that the paragraphs (5 & 7) do contain material facts, I find that they do contain reference to similar fact evidence and when I weight the probative value against the prejudicial effect to one party, I find that there is little probative value. The prior negligence of a party is not proof of its subsequent negligence. The prejudice to the defendant Siemens outweighs that probative value. Counsel for Seawright asserts "huge probative value" insofar as the history of the particular duct is concerned. With that I concur - but mention of the 2000 explosion is unnecessary.

10 Again - order to go striking paragraphs 5 and 7 with leave to the plaintiff to amend paragraph 7 without reference to the previous 2000 incident.

11 On costs, there is divided success to some extent. The defendant Siemens was successful on the motion to strike. The plaintiff met with some (albeit minimal) success as it is permitted to amend a paragraph. Seawright, in my view, although it provided the court with additional clarity on the issue but it, was unsuccessful in its position to leave the pleading untouched. Costs outlines have been reviewed.

12 Costs are payable by the plaintiff to the defendant Siemens forthwith fixed in the amount of $3250.00.

13 Counsel was seeking costs from the previous attendance as well (even though not included in his costs outline). On those costs, I note simply that when the lists are over crowded, counsel is given a choice to sit all day in the hopes of getting reached or not. Of course it is open to counsel to register their complaints so that lists are more manageable thereby limiting the likelihood of wasting days in court.No costs are ordered for the previous attendance.

14 Last, I want to commend all counsel on their extremely able submissions, even despite the underestimation of the timing.

MASTER R. BROTT

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