CITATION: 136349 Ontario Inc. v. Bates, 2011 ONSC 1596
COURT FILE NO.: CV-06-0663
DATE: 20110314

ONTARIO

SUPERIOR COURT OF JUSTICE

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BETWEEN:	)	
1369349 ONTARIO INC.	)	R. Chown and D. Thompson, Counsel for the Plaintiff
Plaintiff	)	
– and –	)	
YANCH HEATING AND AIR CONDITIONING (BARRIE) LIMITED and ANDREW BATES cob as LIVE WIRE ELECTRICAL	)	J.D. Dooley and A.S. Khan, Counsel for the Defendants
Respondents	)	
	)	**HEARD:** November 16, 17, 18, 19, 22, 23, 24, 25, 30, and December 22, 2010

REASONS FOR DECISION

McISAAC J.:

OVERVIEW

[1] The insurer of the Plaintiff ("136") seeks compensation from the defendant, Andrew Bates c.o.b. as Live Wire Electrical ("Live Wire"), for a fire loss that occurred at its commercial premises in the City of Barrie on June 28, 2004. The defendant, Yanch Heating and Air Conditioning (Barrie) Limited, ("Yanch"), has already been dismissed from the action on consent of all parties. Although disputing liability, Live Wire agrees that 136 suffered a loss of $113,860.94 as a result of the fire.

BACKGROUND

[2] A commercial tenant of 135 required air conditioning for her store. The plaintiff hired Live Wire to make the "inside" electrical connection for the AC unit which had already

been installed on behalf of Yanch by another subcontractor who made the "outside" connection from the unit to a "disconnect" located on the rear outside wall of these premises. Although no one testified to the exact date of these two installations, I glean from the documentary evidence that this work was completed by Live Wire on or about June 15th, that is, approximately two weeks before the fire. The task of Live Wire was relatively straightforward: it involved the installation of approximately 25 metres of aluminum-clad electrical cable from the main electrical panel located in the front of the store to the "disconnect" located on the outside rear wall. To reach the outside, this cable had to penetrate a large wafer of plywood and insulation that had been installed in a rear window opening years before. Andrew Bates used a sheet metal clad "cut-out" in this wafer which had been originally made by the other subcontractors when they installed the AC unit and needed to connect refrigerant lines from this AC unit to a condenser located next to the furnace which itself was located in a small utility room.

[3] It is agreed that this utility room is the "area of origin" of the fire. On the other hand, it is hotly contested as to the "point of origin" of this fire. This case is a classic "battle of experts". The two who testified for 136 suggest the fire originated at the penetration where Live Wire had passed its electrical cable; the expert who testified for Live Wire testified that the fire was triggered by an undetermined event which took place in the ceiling of the utility room. The cable could cause a fire if the vinyl insulation covering the interior conductors somehow became damaged by a "pinching" or similar dynamic whereby one conductor came in direct contact with another, thereby triggering an electrical short which could ignite proximate flammable material

[4] Assuming that I decide that the fire originated at the window penetration, the plaintiff asks me to find that it must have taken place as the result of some negligence on the part of Andrew Bates during his installation of the electric cable. This theory cannot be affirmatively proved or disproved due to the destruction of this fire but the plaintiff suggests that it is the only reasonable inference to be drawn from the totality of the evidence.

EVIDENCE

[5] As I have already indicated, much of this case involved a battle of experts. The views of the two opposing original experts retained by the parties were so conflicting as to the point of origin of this fire that it was agreed to retained a "joint expert" in an attempt to resolve the impasse. This case became a veritable forensic "clash of titans". All three of them are eminently qualified and have a wealth of experience in fire investigations. Although their conclusions were hotly contested, none of them were challenged in relation to their competence to give expert testimony.

[6] Vincent Rochon was originally retained by the plaintiff's insurer and, as such, attended the fire scene shortly after it took place. In the result, he had the benefit of firsthand observation as opposed to the two other experts who were, for the most part, dependant on his observations and photographic record. He suggested that the fire originated at the penetration of the electrical cable in the roughed-in window opening. This was based on his fire pattern/consumption analysis along with the arc-pattern analysis of the cable and

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various other electrical lines located in the vicinity of the utility room. He also mused that the electrical cable had been damaged as a result of being cut through as a result of vibrational movement against the roughly-made aperture that had been snipped in the metal sheet that had been affixed to the outside plywood sheet of wood at the time of the "outside" connection. This, in turn, could have led to the arcing event between two conductors that produced this fire. He later speculated that the cable could have been compromised when it was bent and affixed to the inside plywood sheet by Mr. Bates resulting in some form of injury and/or stress to the lining of the conductors; see p. 226 of Exhibit "1A".

[7] Michael Learmonth was retained by the defendant. Despite using the same accepted professional protocol as used by Mr. Vachon, the Guide for Fire and Explosion Investigations as issued by the National Fire Protection Association, he came to the contrary conclusion that the fire did not originate at the window penetration but in the ceiling of the utility room near a duplex receptacle. He relied on burn pattern analysis as suggesting the fire began much higher in the utility room than posited by Mr. Rochon. He also concluded that the "arcing" that occurred in the section of cable that traversed the roughed-in window opening was "victim" arcing caused by the downward progression of the active fire from the ceiling area.

[8] As I understand it, the third expert, Mazen Habash, was retained late in the game almost on an *amicus* basis, in an attempt to resolve the impasse that had developed between the two originally retained experts. Although not agreeing with all of the conclusions posited by Mr. Rochon in relation to this fire, he did eventually concur with him as to the point of origin of the fire being where Live Wire's cable penetrated the window opening. He appears to have based this view on metallographic examination of this section of the cable which I understand is a sophisticated form of arc analysis and did not suggest that they were the "victims' of this fire but the cause of it.

[9] Andrew Bates testified on his own behalf. He confirmed the installation of this electrical cable as a function of hooking-up the AC unit to the electrical panel. He categorically denied any carelessness in this task which was routine and uncomplicated. In particular, there was absolutely nothing the he did that could have damaged the cable in any manner that would cause it to "short circuit" and trigger this fire. In particular, he vehemently rebuffed the suggestions that he damaged this cable by tugging too forcefully when he "fished" it across the ceiling of the utility room or made his yoke with it as it passed through the inside of the window penetration and travelled up to the ceiling. He swore that if he had this job to do over, he would do it in exactly the same manner he did in June, 2004. He did not have to "reconstruct" the events of June 28, 2008 as he was called in to the fire scene to reactivate power for the upstairs tenants and recalled his installation two weeks beforehand.

ISSUES

[10] As I see it, the issues that require determination are the following:

i. What was the point of origin of this fire?

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ii. If I decide that issue in favour of the plaintiff, was the installation of the electrical cable by Live Wire done negligently so as to cause this fire: and, alternatively,

iii. Did Live Wire breach any form of warranty by installing a defectively manufactured piece of electrical cable that caused this fire, absent the negligence of Live Wire?

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ANALYSIS

Point of Origin of the Fire

[11] How do I resolve this debate among the well-qualified experts that testified before me? It is really no different a task than the assessment of any other witness. I am driven to the conclusion that this fire started in the penetration through the roughed-in window opening for the following reasons:

a. The opinions of Mr. Rochon and Mr. Habash on this issue are self-supporting as opposed to the opinion of Mr. Learmonth which stands on its own;

b. These two opinion, in my view, "stack up" with the photographic evidence which suggests a much greater degree of burn damage to the window area than in the ceiling;

c. The reports and testimony of Mr. Learmonth contain a great deal of "hectoring" of the investigation and opinion of Mr. Rochon which suggests to me that he is more interested in protecting his professional "turf" than assisting the court in its search for the truth;

d. The Learmonth theory of the fire originating in the ceiling does not, in my view, satisfactorily explain the absence of arcing failure in the upper section of the electrical cable which would have made impossible an arcing event in the lower window enclosure;

e. Finally, Mr. Learmonth did not have the benefit of a personal attendance at the fire scene and was dependant on third party information.

[12] For these reasons, I find that the plaintiff has established, on a balance of probabilities, that this fire originated at the window penetration of the electrical cable which was installed some two weeks before June 28, 2004 by the defendant.

Alleged Negligence on the Part of Live Wire

[13] The only source of ignition at this point of penetration was the electrical cable installed by the defendant some two weeks before the fire. Although Mr. Habash considered the possibility of a manufacturer's defect involving this cable, he rejected it as a likely explanation for this failure. I have no reason to disagree with this view. As well, he posited a theory that, in the case of severe abuse, the aluminum armour of the cable could

be separated thus exposing the protective covers of the electrical conductors to interference and allowing them to contact, thereby triggering an arcing event and, eventually, a fire.

[14] In those circumstances, and in the absence of any explanation of the exercise of due care by the defendant, it would be possible to draw an inference of negligence: see *Kirk v. McLaughlin Coal Supplies Ltd.* [1968] 1 O.R. 311 (C.A.). Has the defendant rebutted that inference? In my view, despite some deficiencies in the evidence of Mr. Bates that I will address shortly, I am satisfied that he has.

[15] Firstly, I consider the strength of the inference of negligence that the plaintiff asked me to draw against Live Wire. I believe that inference, at best, is only a modest one for the following reasons. Despite the fact the cable was only installed in a protected environment some two weeks before the fire event on June 28, 2004, the suggestion that the electrician, in effect, maliciously or carelessly sabotaged his own installation by some form of violence inflicted on this cable defies common sense. By the time counsel arrived at final submissions, Mr. Rochon's theory that some form of vibrational incursion took place through the protective armour of this cable had virtually evaporated. In my view, this speculation was put to its final rest as a result of the metallographic examination undertaken by Mr. Habash which confirmed that there had been no contact between any of the conductors in this cable and the jagged edge of the perforation that had been made to accommodate the refrigerant line and, subsequently, this electrical cable. If one assumes that Mr. Bates did, in fact, damage the cable during the course of the installation, the cost associated with this length was only $50.00. Again, it boggles reason to suggest that he would not replace the damaged or self-sabotaged length and either absorb the additional cost or add it to the account of 136.

[16] Turning to the evidence of Mr. Bates, I agree that there are circumstances of this installation that suggest it was not flawless. He agrees that there were outstanding third partly Code violations that he reported to neither the owner or the authorities and that he himself had activated electrical power to this installation without having the appropriate approval. He also agrees that when he made the connection at the panel, he used a "marrette" or twist-on to extend one of the conductors from this cable and that this did not conform to Code. Insofar as it is suggested that Mr. Bates intentionally proceeded with this installation without obtaining the appropriate permit, I accept his explanation that this was a reasonable "miscommunication" between himself and the people who had installed the AC unit for Yanch and made the "outside" electrical connection. As well, I accept his evidence that he caulked the hole in the perforation after he had passed the cable through it. Although the tenant of the premises testified that there was a hole in the "plate" and one could see to the outside, she did not specify how long the hole was present as she did not go into the utility room "that often". She could have thus made this observation before Live Wire attended to do the "inside" connection.

[17] In the final result, although I have some suspicions about the quality of this installation and as to the overall creditability of the defendant, these concerns do not rise to a sufficient level to cause me to not accept his denial of professional negligence in this

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case. I am satisfied that the appropriate standard of care was met and, accordingly, that the inference to the contrary has been rebutted.

Breach of Warranty

[18] The plaintiff suggests that, assuming there was no negligence on the part of Live Wire, Mr. Bates is still caught by the warranty implied by s.15 of the *Sales of Goods Act*, R.S.O. 1990, Chapter 5.1 (the "Act") in relation to quality or fitness of the electrical cable which failed and caused this fire. Alternatively, the plaintiff argues that Live Wire breached the warranty of fitness imposed at common law: see *G.H. Myers and Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46.

[19] As to the statutory claim, I agree with the defendant that this was not an agreement for the sale of goods, that is, of the electrical cable and ancillary hardware. It was an agreement for the provision of a service, that is, the "hook-up" of the AC unit, and the cable was clearly incidental thereto: see *Fairbanks Soap Co. v. Sheppard*, [1951] O.R. 860 (C.A.). See as well *Robinwood Management Corp. v. King Koating Solutions Inc.* (1995), 23 B.L.R. (2d) 35 (O.C.J. – Gen. Div.). Accordingly, the *Act* does not apply to this situation.

[20] Turning to the issue of the common law warranty, Mr. Habash was the only witness who spoke to the possibility/probability of a manufacturer's defect. He testified that he had never seen such a phenomenon and found it unlikely to have occurred in this case. However, it remained a possible explanation for this fire in the sense that it could not be affirmatively excluded due to the destruction produced. In the final analysis, I harbour bald suspicions that this cable may have been manufactured in a defective manner for which latent defect the defendant would be vicariously liable regardless of any negligence on his part. However, these suspicions are nothing more than the similar suspicions I have that the defendant damaged this cable during this installation. Suspicions are not the building blocks of proof.

[21] Accordingly, the plaintiff, having failed to establish on a balance of probabilities that this cable was defective when installed by Live Wire, the claim under this basis must also fail.

CONCLUSION

[22] For all of these reasons, the plaintiff's claim is dismissed. Damages are assessed in the amount of $113,860.94. I am prepared to consider written submissions as to costs, those of the defendant to be filed within 30 days of the release of these reasons, and those of the plaintiff, 30 days thereafter.

McISAAC J.

Released: March 14, 2011

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