

CITATION: Danyliw v. 578693 Ontario Limited, 2007 ONCA 447
DATE: 20070618
DOCKET: C45432

COURT OF APPEAL FOR ONTARIO

WEILER, BLAIR and ROULEAU J.J.A.

BETWEEN:

FRANCIS DANYLIW

(Plaintiff/Respondent)

and

578693 ONTARIO LIMITED, C & R CONTRACTORS LIMITED
and TURNPIKE MASONRY LIMITED

(Defendants/Appellant)

James M. Regan for the appellant

Ian H. Gold and Nadine Nasr for the respondent

Heard and Released Orally: June 14, 2007

On appeal from the judgment of Justice Blenus Wright of Superior Court of Justice dated April 25, 2006.

ENDORSEMENT

[1] The appellant appeals the trial judge's finding that Turnpike's construction of a fireplace caused a fire in the respondent's home.

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[2] The overarching issue on this appeal is whether the trial judge erred in his application of the burden of proof and in his appreciation of the evidence.

[3] The burden is on the plaintiff to establish the origin of the fire and causation. The trial judge held that the preponderance of evidence supported the plaintiff's theory of the point of origin of the fire. In so doing the appellant submits that the trial judge only dealt with one alternative cause of the fire put forward by the appellant and failed to consider whether the fire was of no known origin. The appellant provided a number of possibilities in support of its position that the cause of the fire was undetermined. Related to this argument the appellant submits that the trial judge misapprehended the evidence.

[4] We disagree. The trial judge's reasons must be read as a whole. The trial judge accepted the evidence presented by the respondent that the cause of the fire was the faulty construction of the chimney. In so doing, the trial judge implicitly rejected the appellant's position that the cause of the fire could not be determined. In addition, the trial judge specifically rejected the appellant's position that the most likely origin of the fire was an electrical failure above the shower in the attic possibly due to squirrels chewing the insulation off the electrical wires. The trial judge was not obliged to deal with other more speculative possible causes put forward by the appellant.

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[5] We are not satisfied that the trial judge made any palpable and overriding error in his findings of fact. Specifically we are not satisfied that he misapprehended the evidence as to the origin and cause of the fire. The trial judge's finding was that the fire started where the trimmer joist was charred and that was in close enough proximity to the flue to have been ignited as a result of a chimney fire in the fireplace leading to pyrolysis. Although admittedly there is conflicting evidence as to the location of the flue and the proximity to the point of ignition, it is apparent that the trial judge accepted the evidence of the respondent's expert, Rochon, as to the proximity of the flu to the charred trimmer joist and as to pyrolysis as the cause of ignition. It is not for us to retry the case and reconcile all of the evidence. Suffice it to say that the finding the trial judge made was open to him and in the absence of palpable and overriding error being shown, which has not been done, we cannot interfere with it.

[6] Accordingly the appeal is dismissed. Costs of the appeal are to the respondent and are fixed in the amount of \$20,000 all inclusive.

Ken M. White
Pat Blain JA

Paul Rochon JA