COURT OF APPEAL FOR ONTARIO

CITATION: Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP, 2024 ONCA 925
DATE: 20241219
DOCKET: COA-23-CV-0602

Simmons, Gillese and Coroza JJ.A.

BETWEEN

Arcamm Electrical Services Ltd.

Plaintiff/Moving Party
(Respondent)

and

Avison Young Real Estate Management Services LP and 4342 Queen St. Niagara Holdings Inc.*

Defendants/Responding Parties
(Appellant*)

Jeffrey Kaufman and Bradley Adams, for the appellant

Michael Mazzuca and Broghan Masters, for the respondent

Heard: October 9, 2024

On appeal from the judgment of Justice Elizabeth C. Sheard of the Superior Court of Justice, dated February 17, 2023, with reasons reported at 2023 ONSC 1151.

Gillese J.A.:

I. OVERVIEW

[1] 4342 Queen St. Niagara Holdings Inc. ("**Queen**") owns a commercial property at 4342 Queen Street in Niagara Falls, Ontario (the "**Property**"). When

the Property suffered a power outage (the "**Incident**"), Arcamm Electrical Services Ltd. ("**Arcamm**") was hired to repair the Property's main electrical power system. Arcamm acted quickly and restored power to the Property.

[2] Queen paid only Arcamm's initial invoices for the services that it provided.

[3] Arcamm sued for, among other things, its unpaid invoices. It then brought a summary judgment motion for payment of its claim (the "**Motion**").

[4] Queen opposed the Motion on two grounds. It submitted that: (1) Arcamm had caused, or contributed to, some of the contract damages for which it is claiming (the "**Contributory Fault Defence**") which raised genuine issues for trial; and (2) granting the Motion would risk inconsistent and contradictory findings in another action arising from the Incident involving the same parties and others. I pause to note that contributory negligence and contributory fault are related concepts, a matter to which I return below. To keep the tort and contract concepts analytically separate, the apportionment of damages in a tort claim is termed "contributory negligence" whereas apportionment in contract is termed "contributory fault".

[5] The motion judge rejected both submissions. By judgment dated February 17, 2023, she granted the Motion and ordered, among other things, that Queen pay Arcamm almost $1 million for its unpaid invoices (the "**Judgment**").

[6] Queen appeals.

[7] I would allow the appeal. As I explain below, in my view, the motion judge erred in granting summary judgment.

II. BACKGROUND

The Parties

[8] Queen is the registered owner of the Property, which houses federal government tenants who require power 24 hours a day, seven days a week.

[9] Arcamm is an experienced electrical contractor in the residential and commercial sector operating principally in southern Ontario.

[10] Avison Young Real Estate Management Services LP ("**Avison**") is a commercial property manager. Avison managed the Property for Queen pursuant to a services agreement between it and Queen.

The Electrical Outage and Provision of Services

[11] On June 8, 2021, a sudden electrical failure involving the Property's high voltage electrical system caused a complete power outage. Avison hired Arcamm to restore power to the Property on an emergency basis. Arcamm's initial services required it to: de-energize and remove two transformers (the "**Original Transformers**"); connect the Property to temporary generators so that power was maintained; and replace the damaged electrical switch gear. Arcamm removed the Original Transformers and was allegedly responsible for storing them in the electrical room of the Property.

[12] When the Original Transformers were tested in early September 2021, they failed to meet the requisite standard for re-energization. Consequently, the Property remained off the power grid and continued running on the temporary generators until replacement transformers could be supplied and installed.

[13] On October 30, 2021, Arcamm supplied and installed replacement transformers.

[14] On November 1, 2021, the Electrical Safety Authority confirmed that it had conducted a final inspection of Arcamm's work and that the work was completed in compliance with applicable regulatory requirements. This enabled the Property to be reconnected to the power grid and have power permanently restored. Arcamm then removed the two temporary generators that had been providing the Property with power. Arcamm moved the Original Transformers to a facility and began paying for their storage fees.

[15] Based on invoices that Arcamm provided to Queen, Queen paid Arcamm approximately $700,000 for its initial services. Queen had submitted proofs of loss to its insurer, Aviva Insurance Company of Canada ("**Aviva**"), and Aviva had provided Queen with the funds to pay those invoices. However, Aviva ceased providing payment to Queen when it received reports calling into question liability for (1) the Incident and (2) the damages associated with the allegedly improper storage of the de-energized Original Transformers which caused them to be

irreparably damaged. Queen then refused to pay Arcamm's invoices for items including: the supply and installation of the replacement transformers; connecting the replacement transformers to the power grid; and the supply of emergency generators and fuel in the months after it was found that the Original Transformers could not be re-energized.

The Action

[16] On January 17, 2022, Arcamm sued Avison and Queen for its unpaid invoices and claimed for ongoing costs associated with its work at the Property, including monthly fees for storage of the Original Transformers (the "**Arcamm Action**"). Arcamm secured its claim by registering a construction lien against title to the Property.

[17] In its statement of defence to the Arcamm Action, Queen alleged that Arcamm failed to properly and promptly investigate the presence of water and moisture which caused the Incident and, thereafter, failed to protect the de-energized Original Transformers in the electrical room "during times when environmental conditions included high humidity levels and possible dust contamination". Queen relies on these allegations for its Contributory Fault Defence.

The Related Actions

[18] In addition to the Arcamm Action, the Incident and Arcamm's services to the Property as a consequence of the Incident led to two other actions being commenced (the "**Related Actions**").

[19] First, on June 29, 2022, Queen sued Aviva for a declaration that, under its insurance policy with Aviva, it is entitled to payment from Aviva for all amounts for which it may be found liable as a result of the damage to the electrical equipment on the Property arising from the Incident (the "**Queen Action**").

[20] Second, on July 29, 2022, Aviva issued a statement of claim (in Queen's name) against Arcamm and others for $2.5 million, asserting that one or more of the named defendants caused the original power outage and the damage to the Original Transformers while they were de-energized (the "**Subrogated Claim**"). The essence of Aviva's claim against Arcamm is that Arcamm (1) failed to take measures to preserve and maintain the Original Transformers when the electrical repairs and remediation were being performed at the Property, and (2) failed to ensure that the Original Transformers were not exposed to humidity, and/or moisture, or other environmental conditions while de-energized.

The Summary Judgment Motion

[21] In June 2022, Arcamm brought the Motion for summary judgment on all issues raised in the Arcamm Action, pursuant to Rule 20 of the *Rules of Civil*

Procedure, R.R.O. 1990, Reg. 194.[1] Avison brought a summary judgment motion as against Queen. Both motions were returnable on January 12, 2023. Ultimately, however, the hearing of the two summary judgment motions proceeded separately.

[22] Queen responded to the Motion, arguing that it should not be required to pay Arcamm's invoices until its Contributory Fault Defence had been decided and liability for the damages suffered as a result of the allegedly negligent storage of the Original Transformers had been determined and apportioned. In sum, Queen submitted the Motion should be dismissed because: (1) there were genuine issues for trial, and (2) granting the Motion would risk inconsistent and contradictory findings in the Subrogated Claim. Queen argued alternatively that the Motion should be stayed until a motion could be brought under r. 6.01 of the *Rules* to consolidate the Arcamm Action with the Subrogated Claim.

[23] The record before the court on the Motion was voluminous. Arcamm, Queen, and Avison filed affidavits with numerous exhibits, transcripts from the cross-examination of the affiants, answers to undertakings, and factums. The record included copies of the pleadings in the Related Actions. It also included five inspection reports, bearing dates between June 24, 2021, and May 11, 2022,

[1] Arcamm also sought judgment pursuant to s. 50(2) of the *Construction Act*, R.S.O. 1990, c. C.30, the "prompt payment" provision. Because the motion judge found the prompt payment provisions did not apply, nothing more is said about this matter.

which opine on, among other things, the cause for the Incident and for the damage to the de-energized Original Transformers (the "**Reports**").

III. THE DECISION UNDER APPEAL

[24] In her reasons (the "**Reasons**"), the motion judge made a number of determinations that are not challenged on this appeal. I summarize below only those parts of her Reasons relating to the issues raised on appeal, namely, whether there is a genuine issue for trial and whether granting the Motion would risk the possibility of inconsistent and contradictory findings in the Related Actions.

[25] The motion judge observed that the issues raised in the Subrogated Claim are "what caused the [Original Transformers] to fail and who, if anyone, was at fault for that". She said that a determination of those issues "will require a full evidentiary record put forth by all the named parties, many of whom are not party to Arcamm's claim here, which is essentially a debt collection claim". She added that the Subrogated Claim would "undoubtedly" require expert evidence to determine both liability and damages": Reasons, at para. 34.

[26] The motion judge said that the "central issue" to be decided on the Motion was whether Arcamm was entitled to payment of its invoices. She found that, based on the evidence before her, Arcamm's claim could be decided on the Motion and there was no genuine issue for trial: Reasons, at para. 56.

[27] As between Queen and Arcamm, the motion judge found that Queen should bear the cost of restoring power to the Property because: Queen had enjoyed the benefit of Arcamm's services and materials, thereby allowing Queen to carry on its business and meet its obligations to its tenants; and, it was at Queen's request and direction that Arcamm supplied Queen with the temporary generators and the fuel to run them, and provided and connected replacement transformers. In her view, Queen should "assume those costs while Queen is engaged in a dispute with its own insurer over what expenses are covered by insurance": Reasons, at para. 66.

[28] The motion judge rejected Queen's submission that it should not be obliged to pay Arcamm's invoices until liability for the damages associated with the Original Transformers was determined in the Subrogated Claim. She said that a determination of Queen's claim against Arcamm ought to be made in the Subrogated Claim and "not used as it is here as a defence to payment of invoices rendered by Arcamm for services and materials": Reasons, at para. 69.

[29] The motion judge stated that ordering Queen to pay Arcamm's invoices has "no bearing" on whether Arcamm has any liability to Queen for damages to the Original Transformers because she made no determination of that matter: Reasons, at paras. 70 and 103.

IV. ISSUES ON APPEAL

[30] Queen submits that the motion judge erred:

1. by not allowing Arcamm's alleged contributory fault to be raised as a defence and by not making proper determinations in that regard;
2. in failing to find there is a genuine issue for trial;
3. in finding there was no risk of inconsistent findings with the Subrogated Claim or other grounds that warrant procedural relief under r. 6.01 of the *Rules*;
4. in stating "the evidence put forth by Queen falls short of establishing liability on the part of Arcamm" when no determination of that issue was made; and
5. in misapprehending and mischaracterizing the Arcamm Action as an insurance dispute, and made an overriding and palpable error in so doing.

ISSUES 1 and 2 The Contributory Fault Defence raises a genuine issue for trial

1. Introduction

[31] Queen's first two issues challenge the motion judge's finding that there was no genuine issue requiring a trial. Consequently, I will address the two issues together.

[32] The legal framework governing summary judgment motions is set out in *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Such motions must be

granted when there is no genuine issue requiring a trial: at para. 47. There is no genuine issue requiring a trial when the motion judge can reach a "fair and just determination on the merits of the motion for summary judgment"; this will be the case when the motion judge is able to make the necessary findings of fact and apply the law to the facts, and the motion process is "a proportionate, more expeditious and less expensive means to achieve a just result": at para. 49.

[33] On the pleadings and evidence before the motion judge, Queen raised a genuine issue, namely, whether the damages Arcamm claimed in its Action were caused, or contributed to, by Arcamm's conduct. The motion judge erred both by failing to address the issue of contributory fault and by failing to determine whether that issue could be fairly and justly decided without a trial.

2. Contributory Fault is a genuine issue

[34] Queen raises a Contributory Fault Defence at paras. 15 and 17 of its statement of defence in the Arcamm Action. At para. 15(c), Queen alleges that Arcamm acted "negligently, carelessly and unskillfully" by failing to perform its work "in a good and workmanlike manner, resulting in delays and damages". At para. 15(d), Queen alleges that Arcamm (1) failed to investigate, in a prompt and timely manner, the presence of water and moisture which caused the Incident; and (2) stored the Original Transformers, while they were de-energized, in environmental conditions that "included high humidity levels and possible dust

contamination". Accordingly, at para. 17 of its statement of defence, Queen denies that it owes Arcamm the amounts claimed in the Arcamm Action. While the words "contributory fault" are not used in Queen's statement of defence, in my view, it is clear that Queen is alleging that Arcamm's conduct caused, or contributed to, the contract damages which Arcamm is claiming in its Action and, accordingly, is seeking an apportionment of those damages.

[35] On the Motion, Queen relied on both the pleadings in the Subrogated Claim and the Reports to support its Contributory Fault Defence.

[36] The pleadings in the Subrogated Claim raise, among other issues, the same ones that Queen raises in its statement of defence, namely, whether Arcamm caused or contributed to the damage to the Original Transformers and the expenses that followed as a result. Those expenses include: the supply of emergency generators and fuel for an additional period because the Original Transformers could not be re-energized; the supply and installation of the replacement transformers; and the need to connect the replacement transformers to the power grid.

[37] The onsite inspection Reports also provide support for the Contributory Fault Defence. They note that the electrical room in which the Original Transformers were stored while de-energized was not climate controlled. At least one Report opines that the damage to the Original Transformers resulted not from the Incident

but, rather, from the environmental conditions (high humidity levels and possible dust contamination) in which they were stored while de-energized.

[38] The motion judge acknowledged that Queen raised the issue of Arcamm's liability, in whole or in part, "for the irreparable damage allegedly caused to the [Original Transformers] because they were stored in a humid environment while de-energized": Reasons, at para. 59. However, she said that issue was "properly determined" in the Subrogated Claim and Queen could not use it as a defence to the Arcamm Action because Queen "has admitted that it has no valid dispute" with Arcamm's invoices: Reasons, at para. 69. She reiterated that a decision on the Motion that Arcamm is entitled to payment of its invoices would have "no bearing at all on the determination of whether Arcamm has any liability to Queen for damage to the [Original Transformers]": Reasons, at para. 70. She then concluded there was no genuine issue for trial on whether Arcamm was entitled to payment for the services and materials it provided in respect of the Property: Reasons, at para. 71.

[39] Respectfully, I find these statements difficult to reconcile. The motion judge could not grant summary judgment unless she was confident she could find the necessary facts and apply the relevant legal principles so as to resolve the dispute fairly and justly: *Hryniak*, at para. 49. To do that, the motion judge had to address the Contributory Fault Defence, including the evidence adduced on that matter, to determine whether it raised a triable issue. She further had to consider whether

she could resolve the issue in a fair and just manner or whether a trial of the issue was necessary. She erred in law by failing to make these determinations.

[40] I conclude on this matter by addressing Arcamm's submission that Queen could raise the Contributory Fault Defence only by way of counterclaim as against Arcamm or by seeking set-off for any amounts due to Arcamm's alleged negligence and/or poor workmanship. I understand this submission to rest on the assumption that contributory fault cannot be raised as a defence to a claim in contract.

[41] I reject this submission and the assumption which underlies it. There has been a long-standing debate about whether the courts can apportion damages in a breach of contract case based on a consideration of the "contributory negligence" of the parties. While recognizing that the *Negligence Act*, R. S.O. 1990, c. N.1 does not apply to actions in contract, a number of first instance decisions in Ontario, beginning with *Tompkins Hardware Ltd. v. North Western Flying Services Ltd.* (1982), 139 D.L.R. (3d) 329, 22 C.C.L.T. 1 (Ont. H.C.J.), have applied the principle that damages in contract can be apportioned based on the degree of fault of the plaintiff and defendant. See, for example, *Ribic v. Weinstein* (1982), 140 D.L.R. (3d) 258 (Ont. H.C.), aff'd (1984), 47 O.R. (2d) 126 (C.A.); *Treaty Group Inc. v. Drake International Inc.* (2005), 36 C.C.L.T. (3d) 265, 15 B.L.R. (4th) 83 (Ont.

S.C.), aff'd on other grounds, 2007 ONCA 450[2]; *K-Line Maintenance & Construction Ltd. v. Scepter Corp.*, 2009 CarswellOnt 7398, 91 C.L.R. (3d) 73 (Ont. S.C.), at para. 161; *Atos v. Sapient*, 2016 ONSC 6852, at para. 389; and *Parkhill Excavating Limited v. Robert E. Young Construction Limited*, 2017 ONSC 6903, at para. 212. Appellate courts elsewhere in Canada have similarly held that damages in contract cases can be apportioned based on fault. See, for example, *Coopers & Lybrand v. H.E. Kane Agencies Ltd.* (1985), 62 N.B.R. (2d) 1, (N.B. C.A.), at pp. 707-708; and *Doiron v. Caisse populaire d'Inkerman Ltée* (1985), 17 D.L.R. (4th) 660, 61 N.B.R. (2d) 123 (N.B. C.A.), at p. 273.

[42] In *Tompkins*, Saunders J. gave compelling reasons for holding that the courts should allow for the apportionment of contract damages. He said that negligence on the part of a plaintiff should have the same effect in reducing damages regardless of whether the claim is brought in tort or contract. In his view, the principle in tort cases that where a person is part author of their own injury, the person cannot call upon the other party to compensate them in full, applies equally in contract cases: at para. 34.

[43] In *Treaty Group*, Ducharme J. thoroughly canvassed the caselaw and academic writing on the subject and applied the reasoning in *Tompkins*. At para.

[2] At para. 4 of its decision, this court acknowledged that the trial judge reduced the damages by 50%, stating that the result should be the same whether recovery was in contract or tort. However, it decided the appeal based on contributory negligence and said nothing more about contributory fault.

70 of *Treaty Group*, Ducharme J. concluded that not only could he apportion damages in a contract action to recognize conduct on the part of the plaintiff that had increased their damages but, in appropriate cases, apportionment was "required by fairness, equity and justice". I agree.

[44] Finally, I note that in *Cosyns v. Smith* (1983), 146 D.L.R. (3d) 622, 25 C.C.L.T. 54 (Ont. C.A.) Lacourciere J.A., writing for this court, considered the contributory fault defence, describing it as "analogous to contributory negligence" but where the Court holds the basis of recovery against the defendants to be contract, not tort: at para. 1. He reviewed the reasoning of Saunders J. in *Tompkins*, but concluded that it was not necessary to pronounce on the "attractive conclusion" that Saunders J. had reached because the plaintiff's conduct did not amount to contributory negligence.

[45] I agree with the Ontario first instance courts that damages in contract cases can be apportioned based on fault. Accordingly, in my view, Queen was entitled to defend the Arcamm Action on the basis of contributory fault, and to seek to have the contractual damages Arcamm claimed reduced to recognize Arcamm's alleged conduct in increasing those damages.

3. A fair and just determination requires a trial

[46] There may be cases where, given the nature of the issues and the evidence required, the motion judge cannot make the necessary findings of fact or apply the

legal principles to reach a just and fair determination: *Hryniak*, at para. 51. This is such a case.

[47] Arcamm and Queen adduced competing and contradictory affidavit evidence about liability for the events that led to the contractual damages in dispute. Fact finding on that matter will require credibility and reliability determinations based on evidence from witnesses, non-parties, and experts. That type of fact finding could not be done on the record before the motion judge. Because the motion judge could not find the facts upon which to apply the relevant legal principles, the summary judgment process did not enable a fair and just determination of the dispute. Indeed, the motion judge herself recognized that a determination of who, and what, caused the Original Transformers to fail would require a "full evidentiary record" including expert evidence on both liability and damages: Reasons, at para. 34.

ISSUE 3 The risk of inconsistent findings

[48] There are two prongs to Queen's position on this ground of appeal. First, Queen submits it "would have been just for the motion judge to consider r. 6.01(1) and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43" and stay the Motion pending the determination of fault in the Subrogated Claim. Second, Queen submits that the motion judge erred in failing to recognize that granting the Motion would lead to a risk of inconsistent findings in the Subrogated Claim.

[49] I reject Queen's first submission. As Queen did not bring a r. 6.01 motion in the court below, the motion judge can scarcely be faulted for failing to consider that matter. However, I do accept Queen's second submission on this issue.

[50] The Subrogated Claim will require a determination of, among other things: what caused the Original Transformers to fail; whether Arcamm contributed to those failures, incurred costs as a result, and is seeking to recover such costs in its claim against Queen; and, if so, how damages are to be apportioned. Thus, on the record, there can be no dispute that the Arcamm Action and the Subrogated Claim have questions of law and fact in common arising from the Incident and the services that Arcamm provided as a result thereof. The pleadings in the two actions show that the facts, issues, and damages associated with Acamm's alleged contributory fault are inextricably intertwined. It is also clear that there will be significant overlap of evidence and witnesses to determine both liability and damages in the two actions.

[51] The motion judge said she was not deciding Arcamm's liability for the damaged Original Transformers, leaving that matter to be decided in the Subrogated Claim: Reasons, at paras. 34, 67, 70, and 103. However, the motion judge could not grant summary judgment unless she found Queen liable for the services for which Arcamm claimed in its invoices (the "**Finding**"). The risk of inconsistent findings in the Subrogated Claim with the Finding made on the Motion

is readily apparent. In the circumstances, the motion judge had to consider that risk when deciding the Motion: *Spiridakis v. Li*, 2021 ONCA 359, at para. 14.

[52] Recognition that inconsistent findings could be made in the Subrogated Claim meant the motion judge could not be confident that Arcamm was entitled to full payment of its claims. It also meant that the summary judgment process could not provide the motion judge with the evidence she needed for a fair and just adjudication of the dispute between Arcamm and Queen.

[53] For these reasons, as well as those given on Issues 1 and 2, the motion judge erred in granting the Motion.

ISSUES 4 and 5

[54] On Issue 4, Queen points to various statements in the Reasons which it says demonstrate that the motion judge did not consider the Contributory Fault Defence and the evidence relevant to it. Queens submits that, in so doing, the motion judge erred in law because she failed to consider relevant evidence and misapplied the legal principles that apply to summary judgment motions.

[55] On Issue 5, Queen submits that the motion judge erroneously characterized its defence to the Arcamm Action as an insurance dispute. It points to the statement, at para. 66 of the Reasons, in which the motion judge concluded that Queen should pay Arcamm's claim while it "is engaged in a dispute with its own insurers over what expenses are covered by insurance". Queen submits that this

statement demonstrates that the motion judge fundamentally misapprehended the evidence on the Motion, as well as its Contributory Fault Defence.

[56] The matters raised on Issues 4 and 5 are addressed above in my analysis of Issues 1 through 3. I will not repeat myself. It is sufficient to simply reiterate two points. First, in my view, the motion judge erred in law by deciding the Motion without addressing the Contributory Fault Defence and the evidence relevant to it. Second, in light of the conflicting evidence on the issue of contributory fault, there is a genuine issue for trial.

[57] I conclude by noting that, because the motion judge failed to properly consider the Contributory Fault Defence, nothing in the Reasons shall be taken as findings by the motion judge on that matter.

DISPOSITION

[58] For these reasons, I would:

i. allow the appeal;

ii. set aside the Judgment, except for para. 5 which dismissed the Arcamm Action and the Motion as against Avison, matters that were not the subject of this appeal;

iii. dismiss the Motion as against Queen; and,

iv. order Queen to bring a motion under r. 6.01, within 45 days of the date of the release of these reasons, to have the Arcamm Action tried

together with the Subrogated Claim or one after the other as the trial judge may determine.

[59] I would also order Arcamm to pay Queen costs of the Motion and this appeal, the latter of which I would fix at the agreed-on sum of $40,000, all inclusive. If Arcamm and Queen are unable to agree on costs of the Motion, they may make written submissions on the same to a maximum of three pages, to be filed with this court no later than January 15, 2025. The parties shall affix, to their submissions, their bills of costs and any attendant materials filed on the Motion.

Released: December 19, 2024 “J.S.”

“E.E. Gillese J.A.”
“I agree. Janet Simmons J.A.”
“I agree. Coroza J.A.”