

CITATION: Hamid v. Lebanon Furniture Company Ltd., 2017 ONSC 4670
COURT FILE NO.: 5691/12
DATE: 2017-06-13
TRANSCRIBED DATE: 2017-08-01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WISAM HAMID by his Estate Trustee NAJLA KHDAYAR and NAJLA KHDAYAR and BEN HAMID and BALSAM HAMID and INAS HAMID and NIRAS HAMID and ANSIL HAMID, Plaintiffs

AND:

LEBANON FURNITURE COMPANY LTD. and JASHAMY INC. operating as HINLIM CANADA and FARIS WATBAN and RICHVIEW CONSTRUCTION COMPANY LIMITED and MICHELLE GRELLA and ANGELS OF FLIGHT CANADA INC. and SKYSERVICE BUSINESS AVIATION INC. and KALRA HOSPITAL SRCNC PVT. LTD., Defendants

AND:

PRICEWATERHOUSECOOPERS INC., trustees of the Estate of GROUP CDP INC. and INTACT INSURANCE COMPANY, Third Third Parties

BEFORE: Miller J.

COUNSEL: Maurice Benzaquen and Dimple Verma, Counsel for the Plaintiff

James Prior, Counsel for Lebanon Furniture Company Ltd., Jashamy Inc. operating as Hinlim Canada and Faris Watban

Christopher Cheung, Counsel for Richview Construction Company Limited and Michelle Grella

HEARD: June 13, 2017

ENDORSEMENT

[1] The Defendants Richview and Grella filed a summary judgment motion May 16, 2016 to be heard August 16, 2016. Examinations for discovery in this action had been completed July 22, 2015 and undertakings completed as at the end of 2015. The parties to the summary judgment motion agreed on a timetable which required cross-examinations on the motion, to be

completed by July 15, 2016. This was done. August 9, 2016 the Plaintiff's factum on the motion was served by email. A report of Scott Walters dated July 19, 2016 was attached to that factum. The moving party defendants objected to the report being relied on by the Plaintiffs on the summary judgment motion. The motion was adjourned to October 5, 2016 and for the Plaintiff to serve and file a motion seeking leave to rely on Mr. Walter's report (and accompanying affidavit) on the motion for summary judgement. The two motions were then adjourned to today's date.

[2] Rule 39.02(20) govern this motion. Per *First Capital Realty Inc. Centrecorp Management Services*, [2009] O.J. No. 4492 (Div. Ct.) in order to obtain the leave contemplated in rule 39.02(2) the proposed evidence must be shown to be relevant; it must be in response to an issue raised on cross-examination; its admission must not result in non-compensable prejudice and there must be a reasonable or adequate explanation for the failure to put forward the evidence before the completion of cross-examinations.

[3] The Defendants Lebanon, Jashamy and Watbam support the motion brought by the Plaintiffs. While their position on the action is that there was no negligence on the part of any of the Defendants, they point out that the Walters' report was the first evidence of any deficiency in the loading dock from which it is alleged Mr. Hamid fell. They submit it is clearly relevant and if it is not considered on the summary judgment motion, the Defendants Richview and Grella might succeed, not on the merits, but on the technicality – that being a strict application of Rule 39.02(2). That result they submit would be prejudicial to the Plaintiffs and to the other Defendants. Finally, they submit that any delay resulting from the personal circumstances of Plaintiffs' counsel cannot be attributed to the Plaintiffs nor should those circumstances stand in the way of their action being decided on its merits.

[4] The Defendants Richview and Grella bring the summary judgment motion on this basis: that the evidence does not show them to be "occupiers" as per the *Occupational Liability Act* and, alternatively there is no evidence, even if they are found to be occupiers, upon which any liability could be found.

[5] Richview and Grella are the owners of the premises where Mr. Hamid was injured, allegedly, by falling from a loading dock. The premise was, at the time, rented. The condition of the loading dock was the subject of a Ministry of Labour investigation following the incident involving Mr. Hamid October 12, 2010.

[6] Counsel for the Plaintiffs first requested copies of the ML investigative photographs on July 7, 2016. These were provided to Mr. Walters who attended the site July 14, 2016 then produced a report July 19, 2016 in which he opines that there were structural deficiencies in the loading dock and the absence of any safety chain, both of which may have contributed to Mr. Hamid's fall.

[7] The moving party Defendants reference *Shah v. LG Chen* 2015 ONSC 776 at paragraph 23: indicating leave should be granted sparingly; there is a high threshold; the rule should not be used as a mechanism for correcting deficiencies in the motion materials and the rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.

[8] In respect of the test for admission of the proposed evidence, counsel points out that Mr. Walters did not review the cross-examinations of Mr. Grella or the undertaking. It is his position as well that this does not support the Plaintiffs position that the proposed evidence is responsive to an issue raised on cross-examination. Further the engineer report relies on an examination six years after the incident giving rise to the action. The condition of the loading dock in July 2016 cannot be said to be its condition at the time of the incident.

[9] They submit no compelling reason has been put forth for failing to retain an expert soon after the incident.

[10] In respect of non-compensable prejudice, the moving party Defendants reference the Ontario Court of Appeal decision in *Allcock, Laight and Westwood Ltd. v. Patten*, [1996] O.J. No. 1069 regarding the splitting of a case at trial. They submit this principle is applicable to a Rule 39.02 motion.

[11] The timing of the production of the Walters report, in addition to the manner in which it was produced is troubling here. I am mindful of the high threshold to be met and the deleterious effects of permitting evidence to be introduced so late in the process or the expeditious movement of cases, and their various steps through the process. While there are strong arguments made with respect to the strength of the proposed evidence, I accept that it is relevant. It is responsive to issues raised in cross-examination particularly the absence of any other cause for Mr. Hamid's fall. I accept that certain personal issues prevented Ms. Verma from acting as efficiently as would have been preferable and I am persuaded that those circumstances should not be visited on the Plaintiffs themselves who did nothing themselves to create the delay. Finally I am persuaded that the moving party Defendants would not suffer any non-compensable prejudice if this evidence is permitted to form part of the summary judgment motion record.

[12] The moving party Defendants wish, in light of this decision, to cross-examine Mr. Walters and perhaps to take other steps before proceeding with their summary judgment motion.

[13] Summary judgment motion adjourned to December 18, 2017 at 10:00 for four hours. The parties may file new motion materials and to respond without seeking further leave, pursuant to Rule 39.02.

[14] I received submissions on costs. The Plaintiffs submit that the issue of costs thrown away should be determined by the judge hearing the summary judgment motion together with the costs of this motion.

[15] The moving party Defendants seek their costs of the summary judgment motion thrown away. Costs of the August 16, 2016 were reserved to today.

[16] The Plaintiffs made an offer August 15, 2016 to agree to adjourn the summary judgment motion to permit the moving parties to cross-examine Mr. Walters.

[17] I find that the moving parties are entitled to their costs thrown away to August 15, 2016. The Plaintiffs were successful on today's motion and are entitled to costs of today. I have

taken into account as well that leading up to today's motion the moving parties indicated they wished to cross-examine Ms. Verma then cancelled the night before.

[18] Taking into account the costs thrown away on the summary judgment motion and the costs of today's motion I conclude that on a set off basis, the Plaintiffs should and are ordered to pay costs to the moving party Defendants fixed at \$5,000 inclusive of tax and disbursements within 60 days.

Miller J.

Date: June 13, 2017

Transcribed Date: August 1, 2017