2015 ONSC 8135
Ontario Superior Court of Justice

TD Meloche Monnex v. 2234101 Ontario Inc.

2015 CarswellOnt 20474, 2015 ONSC 8135, 262 A.C.W.S. (3d) 1091

TD Meloche Monnex and Security National General Insurance Company and TD General Insurance Company o/a Trademark TD Insurance, Plaintiff and 2234101 Ontario Inc. o/a York Regional Collision Centre Ltd., Defendant

Graeme Mew J.

Heard: December 18, 2015
Judgment: December 18, 2015
Docket: Toronto CV-15-522838

Counsel: C. Korte, A. Gatensby, for Plaintiff

Headnote

Civil practice and procedure --- Default proceedings — Judgment following default — By motion for judgment — Evidence
Motor vehicle was involved in accident and towed to premises of defendant — Vehicle was insured by plaintiffs — Plaintiffs paid amount of $39,322.62 for repairs to vehicle — Owner wished to sell vehicle and became concerned about repairs competed on vehicle — Plaintiffs investigated and found irregularities between repairs purportedly conducted by defendant and those that were actually completed — Plaintiffs purchased vehicle from owners for $50,733.65 — Forensic engineering report stated that it would cost amount of $50,000 to put vehicle back to factory specifications — Plaintiffs commenced action for amount of $115,443.45 for all costs associated with vehicle, including payment for repairs and amounts paid to owner — Defendant failed to filed statement of defence and was noted in default — Plaintiffs brought motion for default judgment — Motion granted — Court was satisfied plaintiffs had suffered damages of $115,443.45 — Amounts were recoverable as damages foreseeably resulting from defendant's breach of duty — There was deception by defendant implicit in repair or non-repair of vehicle — Airbag was removed and replaced with rags, and there were other serious structural weaknesses that were left as result of defendant's actions — Defendant's conduct justified award of punitive damages in amount of $60,000.
Remedies --- Damages — Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Breach of contract
Punitive damages.

***Graeme Mew J.*:**

1 This is a motion for default judgment brought by the plaintiffs. The record indicates that a statement of claim was issued on 25 May 2015. The defendant was served with the statement of claim on the 26 May. The defendant failed to serve a statement of defence or notice of intent to defend and was noted in default on June 18, 2015. There is an indication that at one stage the defendant was represented by a lawyer, however no lawyer ever formally went on the record and counsel today filed with me a copy of correspondence from that lawyer, Inga B. Andriessen, of Andriessen & Associates, dated the 21 August 2015, confirming that her firm no longer represents the defendant. What that correspondence does, of course, confirm, is that the defendant is well aware of this action. Although not required, absent an order of the court to the contrary to do so, the plaintiffs did serve, or at least attempt to serve, the defendants with the motion materials relating to today's attendance. They did so both by ordinary mail and also by attempted personal service as is evidenced by affidavits that have been filed from David Heggie and Angela Anteed dated the 15th and 16th of December, respectively.

2 I am entirely satisfied that all reasonable attempts have been made to bring today's motion to the attention of the defendant and I therefore have no hesitation in dealing with this matter on its merits today.

3 The basic rule, of course, if that when a party is in default, the allegations of fact contained in the statement of claim are deemed to have been established. That does not, of course, relieve the party seeking default judgment of the responsibility of satisfying the court that its claim is tenable in law.

4 The subject matter of this case is, ultimately, a 2010 Mercedes Benz ML350 Bluetec automobile, which at all material times was owned by Frederique Amar and insured by the plaintiffs. Over a number of months the plaintiffs in their capacity as Ms. Amar's insurer, either paid to the defendant or incurred expense because of the defendant, said to total $115,443.45.

5 The record indicates that on 19 April 2012, the vehicle was involved in an accident. As a result it was towed to the York Regional Collision Centre, that is the business operation operated by the defendant, so that the damage to the vehicle and the need for repairs could be assessed.

6 The defendant was paid $910.78 for towing the vehicle. The defendant then presented a repair estimate dated 24 April 2012 in the amount of $28,047.52. Through the months of May, June and July, 2012, the plaintiff was advised by individuals working at the defendant's body shop that they continued to find more damage to the vehicle, which would take additional time and of course, expense to repair. Each time the completion date for the repair of the vehicle was extended. So too, was the cost incurred by the plaintiffs in providing their insured, Ms. Amar, with a replacement rental vehicle. In total $5,056.48 was paid in respect of the provision of a rental vehicle for Ms. Amar.

7 The vehicle was finally repaired and released to Ms. Amar on the 17th of July, 2012. The plaintiffs had paid $28,047.52 in accordance with the initial repair estimate and an additional $11,275.010 in accordance with a second repair estimate, for total damages for repairs of $39,322.62.

8 On the 30th of August, 2013 the plaintiffs received a call from Ms. Amar. She indicated that she had obtained a CarFax report that showed approximately $45,000.00 of repairs had been performed on the vehicle. She indicated that it had been her understanding that only $28,000.00 in repairs had in fact been performed. This apparently became material to Ms. Amar because she was either in the process of, or at least thinking about trading her vehicle in.

9 There were then further communications involving Ms. Amar, a friend of Ms. Amar and the Mercedes Benz dealership that Ms. Amar had been in contact with, and that resulted in a meeting that took place on the 1 October 2013 between representatives of the Mercedes Benz dealership and an investigator from the plaintiffs' special investigations unit.

10 As a result of that meeting, the plaintiffs became aware of certain irregularities between the repairs purportedly conducted by the defendant and those that were actually completed. Ultimately, the plaintiff decided to commission a forensic engineering report to determine the extent of those irregularities.

11 On the 14 January, 2014, the plaintiffs' investigator met with Shaddy Attalla of Forensic Engineering Inc. to perform an initial inspection of the vehicle. Mr. Attalla noted many irregularities with the purported repairs and produced a report dated 14 February 2014. A copy of that report was filed in evidence. Based on the extent of the irregularities identified by Mr. Attalla, the plaintiffs made the decision to obtain actual cash value appraisals of the vehicle at the time of the accident, and then purchased the vehicle from their insured based on those appraisals so that a full tear-down of the vehicle could take place, thereby enabling the plaintiffs to fully document the extent of the irregularities with the defendant's work.

12 It cost the plaintiffs $226.00 to get a total loss replacement report and as a result of the actual cash value of appraisals provided in that report, the plaintiffs purchased the vehicle from Ms. Amar for $50,733.65.

13 As I have already indicated, the forensic engineering report identified many irregularities. The tear-down and further appraisal was then undertaken by Marc Priestley of Action Appraisal & Consultants Inc., which resulted in a detailed report dated 6 April 2014, in which the principal findings of Mr. Priestley included the following comments related to the vehicle:

(a) the seat was assembled with the air bag unplugged;

(b) rags were used in place of the airbag edge;

(c) foam was used in place of the airbag module;

(d) masking tape was used to repair the airbag housing;

(e) the passenger seat airbag was deployed but not replaced;

(f) the floor was buckled and badly beaten up from hammering, such that it was not properly aligned to meet with manufacturer's specifications or crash-worthiness;

(g) An HSLA metal cut on the inside of the splice point of the A-Pillar reinforcement, one of the main structural components of the vehicle, caused the component to be severely weakened such that it would split upon impact;

(h) the factory spot welds on the seatbelt anchor were drilled out and not re-welded properly, compromising the main seatbelt mounting point; and

(i) the R.T. inner rocker reinforcement was buckled, weakening the vehicle structure.

14 In his report, Mr. Priestley concluded as follows (page 14 of his report):

In conclusion, as a result of the inadequate state of repairs this vehicle is not fit to be on the road in its current condition. The crash-worthiness of this vehicle in the structural integrity has been jeopardized by the inconsistency of the welding and the inconsistency of the repairs to the vehicle. The crash-worthiness of the vehicle has been jeopardized to a point where the passenger in the front seat could sustain life-threatening injuries if a major impact does occur. The outer right rocker panel, which is a major structural component of the vehicle will collapse, compromising the area of the passenger compartment dramatically.

15 On page 15 Mr. Priestley says this:

By the amount of the repairs that were done to this, done to the vehicle, I do not believe that there was any I-CAR structural repairs done. This means that inside the rocker panels there is no joining of the panels internally with the support panel and this would give the vehicle, this would give the vehicle integrity during a loss.

16 Mr. Priestly also expresses the opinion that it would cost at least another $50,000.00 to put the vehicle back to factory specifications because one would have to literally restart or redo the entire car.

17 I am entirely satisfied that as a result of the defendant's breach of the duty of care that it owed not only to Ms. Amar, but also to the plaintiffs, the plaintiffs have suffered damages of $115,443.45 consisting of the $910.78 towing payment, the $39,322.62 for purported repairs, the $677.86 paid to the defendant for a rental vehicle and $4,378.62 paid to a third party rental company, as well of course, as the $226.00 paid for the total loss replacement report and the $50,733.65 paid to Ms. Amar, and then finally, the sum of $14,690.00 paid to Forensic Engineering Inc. for their services. All of those amounts in my view are recoverable as damages foreseeably resulting from the defendant's breach of duty.

18 I am also asked to consider an award of punitive damages. It is clear, based on the authorities that I have been referred to by counsel, that it is open to me to award punitive damages in the course of a default judgment, the leading case in that regard being, *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (Ont. C.A.), a decision of the Ontario Court of Appeal.

Further authority for that proposition being the decision in *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 (Ont. S.C.J. [Commercial List]), a decision of Mr. Justice D.M. Brown, formerly of this court, in a Commercial List matter.

19 In *Keays v. Honda Canada Inc.*, 2008 SCC 39 (S.C.C.), at paragraph 62, the different purposes of compensatory and punitive damages were described in these terms:

> Damages for conduct in the matter of dismissal are compensatory. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

20 The *Honda* case was of course, a wrongful dismissal matter. Later on in *Honda*, reference is made to another decision of the Supreme Court of Canada, *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), where, at page 1108, the Supreme Court indicated that conduct meriting punitive damage awards must be harsh, vindictive, reprehensible and malicious as well as extreme in its nature and such that by any reasonable standard deserving of full condemnation and punishment.

21 And then in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.), Mr. Justice Binnie writing for the Supreme Court at paragraph 74 said this:

> The governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which punitive damages are awarded, (retribution, deterrence and denunciation).

22 In this case the deception implicit in the repair or non-repair of the subject vehicle is bad enough. But what tips the facts of this case squarely into the precinct of punitive damages is the removal of the airbag and its replacement with rags, as well as the other serious structural weaknesses that were left as a result of the defendant's actions. I understand that Ms. Amar was a mother and that the subject vehicle was used for transporting her and her family, including her children and it does not require a vivid imagination to contemplate what the consequences could have been if that horribly compromised vehicle was involved in some other incident.

23 It is one thing to cheat on a repair job undertaken by a body shop using non-standard parts or overstating what has been done in order to extract payment to which the repairer is not entitled. It is quite another to put individuals' lives at risk. The defendant's conduct in this case was not only dishonest but it was morally reprehensible and deserving a denunciation in the strongest possible terms.

24 Having regard to the principles of proportionality, I have concluded that an appropriate award of punitive damages against the defendant would be $60,000.00.

25 Finally I turn to the issue of costs. I have been provided with a costs outline by counsel in which the fees and disbursements claimed on a full indemnity basis, that is 100 percent of the fees and disbursements actually incurred, amount to $13,966.80.

26 Recent decisions from this court and the Court of Appeal clearly indicate that there are three scales of costs typically recognized. Full indemnity costs roughly correspond with what used to be called solicitor and own client costs and represent the full amount paid by a client to its solicitors. Full indemnity costs still have to be reasonable. So even if the court concludes that full indemnity costs should be awarded, it has to be first satisfied that the amounts claimed are reasonable. Partial indemnity costs are just that, a scale of costs which are intended to partially indemnify a successful party for the legal fees that it has incurred. And substantial indemnity costs are provided for by the Rules as being 1.5 times partial indemnity costs.

27 The jurisprudence makes it clear that it is only in the most exceptional cases that an award of full indemnity costs will be merited.

28 I would venture to suggest that many of the qualities that attract an award of punitive damages would also be relevant considerations in determining whether full indemnity costs would be appropriate. In this case, I believe that they are, and I

am influenced in coming to that conclusion by the fact that the full indemnity costs claimed by the plaintiffs are eminently reasonable, having regard to the rates of compensation that lawyers with the experience of counsel who appear today can typically attract in the City of Toronto.

29 Consequently judgment will go in accordance with these reasons awarding: compensatory damages in the amount of $115,443.45, punitive damages in the amount of $60,000.00 and costs in the amount of $13,966.80 inclusive of HST and disbursements.

30 Of course there should also be interest in accordance with the *Courts of Justice Act*.

Motion granted.