

Indexed as:
Ottenbrite v. State Farm Fire and Casualty Co.

Between
Joseph Ottenbrite, plaintiff, and
State Farm Fire and Casualty Company, defendant

[2001] O.J. No. 3623

Court File No. 91063/98

Ontario Superior Court of Justice

Stong J.

Heard: April 9-12, 17-20, May 4, 18 and June 18-21, 2001.

Judgment: September 4, 2001.

(25 paras.)

Insurance -- Multi-peril property insurance -- Household or homeowner's policies -- Evidence and proof -- Payment of insurance proceeds -- Actions, defences -- Criminal act by insured to bring about loss or damage.

Action by Ottenbrite against his insurer, State Farm, for the replacement cost of his home and its contents, which were lost in a fire. Ottenbrite had been convicted of arson concerning the fire, but still denied the offence and the conviction was under appeal. State Farm's evidence was that Ottenbrite was in financial difficulty at the time of the fire, that just a month before the fire he had insured the property for \$395,000 when it was worth about \$200,000, and that his business and investment plans had been frustrated before the fire. Noticing price tags in photographs of certain items that Ottenbrite claimed he lost in the fire, an adjuster for State Farm testified that she had traced the items to stores where Ottenbrite had photographed them.

HELD: Action dismissed. State Farm proved on a balance of probability that Ottenbrite had the motive and opportunity to burn his house down, and that he padded his claims. Proof of his conviction for arson and lack of evidence in rebuttal were sufficient to dismiss the claim.

Counsel:

Joseph Ottenbrite, on his own behalf.
David Zarek, for the defendant.

1 STONG J.:-- On April 11, 1997, Joseph Ottenbrite's residence at Lot 16, Concession 2, Belmont-Methuen Township, County of Peterborough was completely demolished by fire.

2 By policy number 60-CS-5189-1 issued March 1, 1997, State Farm Fire and Casualty Company insured the residential property against various perils including fire.

3 As a result of the fire Mr. Ottenbrite claims losses sustained under the policy coverage as follows:

Building	\$286,000.00
Contents	\$110,979.00
Less Deductible	(\$1,000.00)
Subtotal	\$395,979.00

4 In addition, Mr. Ottenbrite claims for expenses incurred under the Defendant's alternative living expense coverage as a result of the loss of his residence by fire.

5 The Defendant admits that Mr. Ottenbrite's residence was lost as a result of fire, and that he sustained damage to the building and contents and that he also incurred additional living expenses as a result of the loss.

6 The Defendant argues that the fire was an incendiary fire which was set by Mr. Ottenbrite himself at a time when he was the sole occupant of the residence, and that Mr. Ottenbrite had a motive to set fire to his residence since he was in poor financial condition at the time of the fire.

7 The Defendant further denies that Mr. Ottenbrite is entitled to payment for the loss under the provisions of the Policy of Insurance pleading that the policy was voided because the loss resulted from an intentional and, in this case, criminal act committed by Mr. Ottenbrite.

8 The trial of this matter had to be interrupted to permit Mr. Ottenbrite to attend before the Superior Court of Justice in Peterborough to be sentenced on his convictions by a jury of his peers for charges arising out of the destruction of his home by fire. He was convicted specifically of causing damage by fire to his dwelling house with intent to defraud State Farm Insurance and further he was convicted of intentionally or recklessly causing damage to his home by fire which seriously threatened the safety of his neighbour and his neighbour's family and property.

9 Proof of a criminal conviction is prima facie evidence of Mr. Ottenbrite's guilt, but that prima facie evidence is subject to rebuttal by evidence which could not have been led at the criminal trial, for example, or by evidence which would establish fraud in the conviction itself. In this case, Mr. Ottenbrite tendered no evidence to show that he was wrongly convicted, other than his denial that he did it. No new or fresh evidence was led that was not available at the criminal trial and a simple denial that he committed arson is in my view not sufficient to answer the prima facie evidence. See *Demeter v. British Pacific Life Insurance Company (OCA)* (1984), 13 D.L.R. (4th) p. 318.

10 I am instructed by Mr. Ottenbrite that his conviction and sentence are under appeal. In the event the appeal of conviction is successful, I agree with the submission of Mr. Zarek on behalf of the Defendant that I consider the evidence without regard for the fact of those convictions and determine whether or not a defence has been established on a balance of probabilities. Having said that, I am nevertheless of the view that the proof of the conviction in this case and the lack of evidence in rebuttal to it is sufficient to dismiss the claim.

11 Without considering the conviction, I will review the evidence to determine whether the defence has been established on a balance of probabilities.

12 The Defendant pleads the contractual provision of the insurance policy which states that if Mr. Ottenbrite who is "insured under this policy causes ... a loss covered under this policy for the purpose of obtaining insurance benefits this policy is void and will not pay ... for this loss".

13 Mr. Ottenbrite provided the Defendant with a sworn Statement and Proof of Loss dated July 3, 1997 in respect of his claims for the building and contents. He further submitted by sworn Statement and Proof of Loss dated January 21, 1998 a claim for his additional living expenses to December 13, 1997 in the amount of \$25,401.50.

14 The Defendant argues that both of these Proofs of Loss are fraudulent and therefore Mr. Ottenbrite's pursuing claims are vitiated. The Defendant relies on the provisions of the Policy of Insurance which require a claimant to provide a proof of loss verified by statutory declaration listing a complete inventory of the damaged property, detailing the costs and actual cash value, stating how the loss occurred and that it did not occur through any willful act of the insured. The Defendant also relies on the provision of the policy which states that any fraud or willfully false statements in the particulars provided in the statutory declaration of proof of loss also vitiates the claim of the person making the declaration.

15 Mr. Ottenbrite testified that on the day of the fire he had been applying Varathane, a urethane based product, to the floors, walls and cupboards on the main floor of his residence and particularly in the living room where the fireplace was located. He testified that he had put a log on the fire be-

fore retiring upstairs to his bedroom, and he had left the door of the fireplace open to provide sufficient draft to cause the damp log in the fireplace to burn. He said he was awakened sometime later by the sound of the fire alarm and when he got up to open his bedroom door he was met with a cloud of dense smoke and heat. He immediately retreated back into his bedroom where he fashioned an escape rope out of curtains and bed sheets with which he lowered himself out of the bedroom window to the ground below. He didn't know how the fire started, but he surmised that either a log rolled out of the fireplace onto the freshly varathaned floor setting it on fire, or the fumes from the Varathane eked into the opened door of the fireplace igniting and setting the house on fire. He was the only one at home at the time and he denied setting the fire or using an accelerant such as gasoline or varsol. Mr. Ottenbrite further testified that the fire did not begin in the basement of his home. He said that in the initial stages of the fire after he had been able to exit the house, as he looked back at it, there were no flames visible through the basement windows, whereas, there were flames clearly visible on the main floor area of the home.

16 The evidence which this court accepts as establishing that the fire was an incendiary fire comes first from the report and testimony of the Fire Marshal, Mr. Eric Blough. He investigated the scene and concluded that the "main beam was badly burnt on the bottom and there were in fact still sub floor and flooring on the top of the beam, indicating to me that the fire has originated in the basement of the home". The testimony of the fire fighters who responded to the fire was that it was not surprising that Mr. Ottenbrite could not see flames through the basement windows because the smoke was so thick that it obliterated a view of the flames. The Fire Marshal's evidence was that the fire had been intentionally set. He had taken samples from various locations in the debris in the basement which he submitted to the Center of Forensic Science. They were analyzed by Ms. Terri Lang at the Center who confirmed that a gasoline component was found in 5 of the 16 samples submitted. I note as well that there is no evidence which rebuts the evidence of the Fire Marshal and the analyst from the Center of Forensic Science.

17 Mr. Ottenbrite challenged the findings of the Fire Marshal with respect the finding of gas suggesting in cross-examination that someone could have poured the gasoline on the debris after the fact. However, I accept the evidence called verifying the security of the scene from the time the fire was extinguished until the investigation had been completed and that no one had access to the scene to be able to tamper with it. Mr. Ottenbrite also questioned whether the fire fighters in fighting the fire could have carried the gasoline in on their boots or gear. That suggestion was discounted by the direct evidence adduced through the fire fighters who attended the scene and fought the blaze, particularly that of Chief Matthews and Captain Bower.

18 I also accept the uncontroverted evidence of Mr. Michael Rochon, a professional engineer, who was qualified to give his expert opinion on the cause and origin of the fire. He testified that from the indication of burn patterns on the material of the structure left after the fire, especially the main beam in the basement, the fire began in the basement not on the main floor where the fireplace was located. He also took samples from the floor covering in the basement which had been broadloomed in part and submitted them for analysis. Ms. Barbara Kovensky performed a forensic analysis of the samples and found them to contain a varsol and a varsol-like substance. Mr. Rochon's samples were taken from different locations in the basement than those of the Fire Marshal and he testified that it appeared that two accelerates were used. Mr. Rochon also found an empty gasoline container in the garage, which contained traces of varsol.

19 Mr. Rochon also discounted Mr. Ottenbrite's theory that the Varathane on the main floor may have self-combusted and caused the fire. He testified that urethane products are petroleum based and will not self heat and thus will not rise in temperature to such a degree that spontaneous combustion results.

20 I also accept the evidence adduced at trial upon which the Defendant relies to prove that Mr. Ottenbrite had a tangible motive for setting his house on fire. Mr. Ottenbrite was in financial difficulties. He had been sued and was subject to a judgment obtained by Ms. Eleanor Gray who had joined with him originally and contributed financially in the purchase of the property. However, she backed out of the deal and ended up having to sue him for the return of her contribution when she found out that he had not had her name put on the deed. Mr. Ottenbrite also had hoped to turn his residence into a bed and breakfast as a source of income for himself, but his neighbour, McLaren, had let it be known that he would oppose such an application to the municipality. In addition, Mr. Ottenbrite had obtained an insurance policy from the Defendant on March 1, 1997, just over one month before the fire, which would cover an actual replacement cost of the residence in the amount of \$286,000.00. Then on March 3, 1997 he contacted Mr. Gary Warner, a real estate agent, to list his property for sale. He instructed Warner that he would like to list the property for \$250,000.00 but would agree to list it for \$239,000.00 for a quick sale. Warner, a knowledgeable agent who had a good sense of the value of properties in the area, advised him that he was willing to list the property for only \$199,000.00, the amount he deemed it to be worth in the area. Nor was Mr. Ottenbrite shy in talking about his planned retirement plan, a \$400,000.00 interest in a proposed subdivision in Nova Scotia. In cross-examination he admitted that he had no title to the property, that in fact his son had title, and that 6 months before the fire the son had told him that he was not in line for any benefit from the subdivision development. One wonders if it is just coincidence that Mr. Ottenbrite is claiming \$395,000.00 from the Defendant by way of loss when faced with the apparently failed plan for retirement which was based on his anticipated \$400,000.00 interest in land in the Maritimes. In any event, I am satisfied that the residence was in fact over insured and there was room for substantial gain by the insured in the event of a total loss. After provision for the mortgages, and his own expenditures after purchase, the recovery on the total loss would have afforded him a handsome gain and so the only inference that can reasonably be drawn is that a tangible motive existed for Mr. Ottenbrite to realize a large gain on his investment.

21 I am satisfied that on a balance of probabilities the Defendant has proven that the fire was an incendiary fire, and that Mr. Ottenbrite had opportunity and tangible motive to burn the house down.

22 Nor do I find Mr. Ottenbrite's claim for loss of contents reliable. He submitted to Ms. Jennifer Reid, the State Farm property claims adjuster, a list of the contents, which he claimed were lost in the fire. He supported his claim with pictures which he told her he took prior to the fire because he had heard a program on the radio which advised the listeners to take pictures of their belongings so that it would be easier to prove their loss when necessary. Ms. Reid noticed price tags on some of the items in the pictures. She commenced her own investigation and was able to find not only the store in which the furniture was located, but also the furniture itself in some instances and the very lay out and location depicted in the pictures. In cross-examination, Mr. Ottenbrite made a feeble attempt to explain that he really took the pictures after the fire to indicate the type of furniture he had had in his home. If that were the case, why the long explanation to Ms. Reid that he had heard the radio program and had followed the advice given. Mr. Ottenbrite's evidence in cross-examination is totally unreliable.

23 I am satisfied that the Defendant has proven on a balance of probabilities that Mr. Ottenbrite padded his claim for the loss of contents. He knowingly misrepresented and fraudulently claimed for items which were not there. This willfully false statement in and of itself vitiates the entire claim.

24 For the reasons set out above, Mr. Ottenbrite's claim is dismissed in its entirety.

25 The parties are invited to address the issue of costs in writing if they wish, or set a date through the trial co-ordinator for an appearance before the court to address the issue of costs.

STONG J.

cp/s/qlsar