Case Name:
Persad v. State Farm Fire

Between
Persad, and
State Farm Fire

[1998] O.J. No. 6583

Ontario Court of Justice (General Division)

L.K. Ferrier J.

March 26, 1998.

(24 paras.)

Insurance law -- Actions -- By insured against insurer -- Defences -- Action by Persad against State Farm for payment on his fire insurance policy dismissed.

Insurance law -- Fire insurance -- On the evidence presented by State Farm, it was apparent that Persad had the opportunity to set the fire and he had several motives related to economic gain therefore State Farm had established on a balance of probabilities that Persad set the fire.

Action by Persad against State Farm for payment on his fire insurance policy -- On March 6, 1993, there was a fire at Persad's home and the contents were damaged -- Persad's claim related solely to the contents of the home and not damages to the premises -- Persad claimed slightly under twenty-two thousand dollars -- State Farm raised the defence of arson on the part of Persad -- Persad conceded the fire was deliberately set part way through the trial, but he denied that he was the person who set it -- Persad was convicted of arson in connection with the fire and his appeal from the conviction was pending -- HELD: Action dismissed -- Generally, proof of conviction was prima facie evidence of Persad's guilt -- However, as his conviction was under appeal the fact of his conviction should not determine the action -- Therefore it was left to State Farm to prove the allegations on a balance of probabilities -- On the evidence presented by State Farm, it was apparent that Persad had the opportunity to set the fire -- It was also apparent that he had several possible motives related to economic gain -- On that basis, State Farm established on a balance of probabilities that Persad set the fire.

Counsel:

Kris Persad for himself

David Zarek for the defendant

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1 **L.K. FERRIER J.**:-- In this action the plaintiff's claims against the defendant's insurance company for payment on his fire insurance policy.

2 On March 6, 1993, there was a fire at the plaintiff's home at 187 Campbell Avenue, Toronto. The contents were damaged in the fire. The claim of the plaintiff relates solely to the contents and not damages to the premises and his claim is in the amount of a sum slightly under twenty-two thousand dollars.

3 The defence is arson and the defendant takes the position that the plaintiff set the fire. The defendant also claims that the claim itself in its amount is fraudulent.

4 Part way through the trial the plaintiff conceded that the fire was deliberately set, but he denies that he was the person who set the fire. The plaintiff was convicted of arson in connection with the same fire at the same premises on the same date. he has appealed that conviction and the appeal is pending.

5 I agree with the submission of Defence Counsel that the Demeter decision - to which I will refer further - establishes the proposition that proof of conviction is prima facie evidence of the plaintiff's guilt. The prima facie evidence is, of course, subject to rebuttal by evidence which would establish fraud in the conviction itself.

6 It is my view that a simple denial that he committed arson is not a sufficient answer to the prima facie evidence. In this case the plaintiff 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 I refer to the case of Demeter v. British Pacific Life Insurance Company, a decision of Justice Osler, in [1983] O.J. No. 3148, (1983), 43 O.R. (2d) 33, and Demeter v. British Pacific Life Insurance Company, the Court of Appeal decision at [1984] O.J. No. 3363, (1984), 48 O.R. (2d) 266.

7 Confirming the law is the decision of the Court of Appeal for Ontario in the decision of re: Del Core v. Ontario College of Pharmacists, reported at (1985), 51 O.R. (2d) 1.

8 As indicated, the above-mentioned criminal conviction is under appeal and that appeal may be successful. Accordingly, it is my view that I should consider the evidence without regard to the fact of that conviction and, indeed, ignoring that conviction to determine whether or not the 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 a sufficient basis for dismissing the claim. However, there is a second basis for dismissing the claim, and that is, that is my view that the defence has been established on a balance of probabilities, without considering the conviction. In this context I review the evidence.

9 The plaintiff admits being at the scene at the time of the fire, but says he arrived to find the fire already burning. It is accordingly necessary to consider his credibility, and I note the following points.

10 It was only part way through this trial, after the Fire Marshall had testified, that the plaintiff finally admitted that the fire had been set. And secondly, he lied to Mr. Dipirsco, an insurance investigator, concerning the state of currency of his mortgage payments. In this regard he told Mr. Dipirsco that he was up-to-date on his mortgage when it was the fact that he was some five or six months in arrears. He also lied to Dipirsco about the amount of the monthly mortgage payments.

11 In reference to his income, at trial he said he filed tax returns including the years 1991, 1992, 1993, and yet in the witness box reversed himself and acknowledged that he had not filed returns for those years. Indeed, he had executed a document containing admitted facts, to the effect that he had not filed tax returns for those years.

12 At trial he testified that he was not in financial difficulty immediately prior to the fire and yet it was clearly established in evidence that he owed at least thirty thousand dollars on a judgment for child support and it was established in evidence that in December 1992 he had attempted to have the child support obligation reduced because he could not afford it or did not have the means to pay it and that application was unsuccessful. At around the same time the amount of child support had actually been increased to provide for the support of a second child. The amount of the child support obligation immediately prior to the fire was in the range of eight hundred dollars per month and his mortgage payments of fifteen hundred dollars per month on the premises of 187 Campbell made his financial position precarious. I also note that the reality tax arrears on the property had accumulated for two or three years arrears prior to the fire.

13 I also note that Mr. Persad swore two Proof Of Loss Statements, one showed the contents loss at thirty-four hundred dollars and the second one showed the content lost at almost twenty-two thousand dollars. Both these documents were sworn under oath.

14 Mr. Worden, an investigator for the insurance company attended at the premises and took photographs of 187 Campbell Avenue in March 1993, about a week after the fire. Mr. Wordon testified that the plaintiff was present. The plaintiff denies being there. I accept Mr. Worden's evidence. The investigator took photographs of all of the rooms in the building and photographs of the exterior, and the plaintiff denies not only that he was there, but he denies that these pictures, as shown in Exhibit 19, were pictures of the house in question, and I reject the plaintiff's evidence in that regard.

15 I also note the following uncontradicted evidence which I accept. The front door and the rear door of the premises were secured and locked when the police and fire officials arrived on the evening in question. The same is true of the interior door of the living room, which is the room in which the fire was set. The door to that room, while damaged, had a lock in the locked position and it showed no sign of forced entry. There was no sign of forced entry in the entirety of the building. The fire was set by gasoline being poured about the living room and ignited with a match or a lighter or, at least, an open flame. According to the Fire Marshall, it was a mild enough fire for someone to set and escape unhurt. No one except the plaintiff and his wife has keys to the living room. His wife was in Montreal at the time. The plaintiff testified that he had other keys but they had been stolen from his van, raising the suggestion that an unknown third party who had stolen the keys broke into the building that evening, using the keys. I do not accept that evidence concerning

the alleged theft of keys and I note that his wife did not corroborate that testimony in any respect, although she did corroborate the plaintiff's evidence that the van had been broken into.

16 I also note that in the long history of this matter this is the first occasion on which the suggestion of stolen keys has been raised.

17 Evidence of the witnesses at the scene, which I accept, described the plaintiff as calm and not in an agitated state. Mr. Persad left the area before the Fire Marshall arrived and I do not accept his evidence that the police told him to leave or that he could leave.

18 I accept the evidence of Lucy Gouveia without reservations. She is a neighbour, living at 189 Campbell Avenue, which is the other half of the two semi-detached dwellings, 187, 189 Campbell Avenue. On the evening in question she was on the watch for her husband because he was late coming home. She was looking out the window from time to time to see if he was coming home. At about 11:40 p.m. she saw the plaintiff walking up the street and he turned to walk up the front walk of 187 Campbell Avenue. Her husband arrived a few minutes before midnight and a few minutes later they heard a bang or a pop or an explosion in the words of Lucy Gouveia.

19 The Fire Marshall's evidence, which I accept was to the effect that there was not likely an explosion, but rather, a large "whoom". But she also testifies that people often describe this mistakenly as an explosion. In a matter of moments Mrs. Gouveia and her husband smelt smoke. She called 911 and they did what was necessary to remove themselves and other family members from their home at 189 Campbell. When she came out on the front porch she saw Mr. Persad and another man standing on the front walk in front of 187 Campbell Avenue. He was not agitated or upset and appeared calm and unconcerned. Thus, on the evidence which I accept on this matter it is apparent that Mr. Persad had the opportunity to set the fire. It is also apparent that he had several possible motives related to economic gain. I have no hesitation in finding on the balance of probabilities that the plaintiff set the fire. It being so the defence is established and the claim is dismissed.

20 The plaintiff counterclaims for a total of thirty-two thousand and sixty-seven dollars and seventy-four cents. That sum is made up of two elements. The first is the amount that it was required to pay to the mortgagee and that sum is thirty thousand seven hundred and thirty dollars and twenty-four cents, that is the mortgagee that held the mortgage on the premises.

21 In addition the defendant was required to expend for needed emergency repairs, the sum of one thousand three hundred and thirty seven dollars and fifty cents, totalling the figure above-mentioned.

22 In view of my findings the defendant is entitled to judgment in that sum together with prejudgment interest in accordance with the Courts of Justice Act and the defendant will have judgment accordingly.

23 There will be a prejudgment interest at the rate of four point two percent from January 1, 1994.

24 I agree with the submissions by counsel for the defence. This is a case for solicitor and client costs. So ordered.

qp/t/np/qlpmd/qlafr/qlhcs