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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

FIRMAN SALES & SERVICE LTD. and DENNIS FIRMAN and LENORE CHARTRAND carrying on business under the firm name and style of HEAVEN SCENT FLOWERS & GIFTS,	)	Counsel:
	)	ROSS A. MCFADYEN for the plaintiffs
plaintiffs,	)	
- and -	)	
ERWIN BUECKERT and ISAAK BUECKERT and HAROLD REIMER and the said ERWIN BUECKERT and ISAAK BUECKERT and HAROLD REIMER carrying on business under the firm name and style of PRO-TAC ROOFING & RENOVATIONS 2007 and JOHN DOE and WINNIPEG BUILDING & DECORATING LTD.,	)	MICHAEL G. FINLAYSON for the defendant Winnipeg Building & Decorating Ltd.
	)	JUDGMENT DELIVERED NOVEMBER 9, 2016
defendants.	)	

LANCHBERY, J.

INTRODUCTION

[1] A fire erupted in the plaintiffs' building that housed two businesses. The plaintiffs filed an insurance claim. The insurer approved the replacement of the fire damaged roof. Within six months, the plaintiffs' building would be unusable. What transpired in the intervening months is the subject matter of this trial.

[2] The plaintiffs allege that the defendant Winnipeg Building & Decorating Ltd. is liable in negligence for the damage suffered.

[3] Prior to trial, the plaintiffs discontinued this action against all defendants, other than Winnipeg Building & Decorating Ltd. and John Doe. The plaintiffs proceeded with their action against Winnipeg Building & Decorating Ltd., and abandoned their action against John Doe at the commencement of the trial.

[4] After reviewing the testimony, as well as the exhibits filed, it became clear that there are few, if any, factual matters in dispute.

FACTS

[5] On April 1, 2008, a fire occurred in the roof structure of a building owned by Dennis Firman. Firman Sales & Service Ltd. ("Firman Sales") and Heaven Scent Flowers & Gifts ("Heaven Scent") operated separate businesses in this building. Dennis Firman is the owner of Firman Sales. Lenore Chartrand operates Heaven Scent. The building is located in Gimli, Manitoba. The roof had suffered previous damage by fire. The insurance adjuster's investigation approved the plaintiffs' claim related to the April 1, 2008 fire and authorized the installation of a new roof.

[6] The first design for the new roof presented to the plaintiffs was rejected. Eventually a roof structure was designed to the plaintiffs' satisfaction. Work was to commence in early September 2008 as Gimli is a tourist town and reconstruction outside the summer months was preferable.

[7] When the construction of the new roof commenced in mid-September, it was discovered that at least three of the exterior walls had suffered rot. This made placement of the new roof on those walls questionable.

[8] The plaintiffs were advised of this fact, and it was suggested to them that the walls would have to be reconstructed in order to support the new roof.

[9] After the condition of the walls was made known to the parties, the defendant continued to remove the old roof structure. This resulted in the interior of the building being exposed to the elements.

[10] The defendant did not make any attempt to cover the exposed area.

POSITION OF THE PARTIES

[11] The plaintiffs allege that the defendant Winnipeg Building & Decorating Ltd. is liable for the damage suffered by them in negligence as it removed the roof without providing the plaintiffs with an opportunity to determine their next steps.

[12] The plaintiffs' opening statement and argument promoted a succinct position that due to the actions of the defendant, the building was doomed.

[13] I find that the plaintiffs' experiences following the fire were poor to say the very least. The frustration felt by Mr. Firman and Ms Chartrand was clearly evident during their testimony. The frustration extended to the plaintiffs' insurance agent, the insurer, the two adjusters assigned by the insurer, and the firm hired to protect the building from further damage. Communication with the plaintiffs by those involved in the claim, including the defendant, could fairly be

described as delayed or non-existent at times. Considering that two businesses operated out of this building and provided Mr. Firman and Ms Chartrand with their sole sources of income, their frustration is easy to understand. However, that frustration in and of itself does not prove their claim.

[14] The defendant denies that it was negligent. Further, as this claim has been pleaded only in tort it should fail as this is properly a contract claim.

ANALYSIS

[15] The questions to be resolved in this claim are:

a) is this a claim that should have been pleaded in contract as opposed to tort;

b) what is the duty of care owed to the plaintiffs by the defendant;

c) was that duty of care breached; and

d) if the duty of care was breached, what are the damages that flow from the breach of the duty of care.

WHETHER THE CLAIM SHOULD BE FRAMED IN CONTRACT OR TORT

[16] The defendant argued that this claim was framed in negligence, and it should properly have been pleaded in contract. I agree with the position of the plaintiffs that when a contractor is engaged, it is implied that the work will be done in a good and workmanlike manner. Subsequent to repair, the owner of a building does not expect that the building will be left in a poorer state than it was prior to the commencement of the work.

[17] The case law is clear that a contractor performing work on a client's property may be concurrently liable in both tort and contract. (See *Knock v. Dumontier et al.,* 2006 MBCA 99, (2006), 208 Man.R. (2d) 121 ("*Knock*"))

[18] There is also a question as to whether the plaintiffs entered into a contract with the defendant. The plaintiffs testified that each of them believed that they were obligated to have the defendant perform the services in question based upon what the insurance adjusters had advised them. I accept their evidence that from the very beginning, the plaintiffs expressed doubts about the ability of the defendant to perform the work for the quoted price. I received conflicting evidence on this point, but what I can say is that there was never a written contract entered into between the plaintiffs and the defendant.

[19] In applying *Knock*, I will consider the plaintiffs' claim as properly pleaded only in tort.

DUTY OF CARE

[20] The plaintiffs allege that the defendant was negligent for:

a) its failure to adequately inspect and assess the condition of the exterior walls prior to the commencement of the project, and

b) the failure to suspend the project (and in particular, leave the existing roof in place) after the discovery of the rotting exterior walls so that the situation could be properly assessed and a plan could be put in place by them to rectify the issue.

[21] I find the defendant owed the plaintiffs a duty to exercise such reasonable care and skill in the performance of its work so that no damage to the building would result from its actions or inactions. (See *Knock*)

STANDARD OF CARE

[22] The standard of care applicable to a defendant is that of an ordinary, reasonable, cautious and prudent person. (Gerald H.L. Fridman, *The Law of Torts in Canada,* 3rd ed. (Toronto: Thomson Reuters Canada Limited, 2010 at 363-364)

[23] The building owned by Mr. Firman was built in the 1960s and was functional until April 1, 2008.

[24] The northeast wall only began to display visible signs of bowing outward ("deflection") during the summer of 2008. Prior to commencing the agreed work, the defendant attempted to shore up the area of deflection by placing a support post under the roof structure.

[25] The plaintiffs' submission is that prior to performing any work, the defendant should have inspected and assessed the condition of the walls. The failure to inspect was alleged to be a breach of the duty of care.

[26] This is a case with unusual fact circumstances that are compounded by the fact the plaintiffs did not advance any expert evidence to establish the standard of care that the defendant should have exercised. The plaintiffs relied upon exceptions to the expert evidence rule in support of its case. The standard of care applicable in this case will turn on this issue.

[27] The plaintiffs relied upon two exceptions to the expert evidence rule in determining the standard of care that the defendant should have exercised. These are firstly, where non-technical matters or those of which an ordinary, person may be expected to have knowledge, or secondly, where the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard. (*Krawchuk v. Scherbak et al.*, 2011 ONCA 352, (2011), 106 O.R. (3d) 598 ("*Krawchuk*"))

[28] I find that in this case, expert evidence was required to establish the standard of care that should have been exercised by the defendant. It is not clear to me that the defendant should have inspected the condition of the exterior walls prior to commencing the work. The defendant was hired to remove the old roof, and replace it with a new roof.

[29] The plaintiffs submitted that the building was so old that an ordinary, reasonable, cautious and prudent person would have been concerned as to whether the existing walls could support a new roof.

[30] The evidence is clear that this concern was raised by Mr. Firman and Ms Chartrand during the summer of 2008. However, there is nothing before me that would indicate an ordinary, reasonable, cautious and prudent contractor, hired to replace the roof of an older building, which had fire damage only in the roof area, would obtain an assessment and/or inspection prior to replacement. It is not clear, that since two fires had occurred in the roof, whether an ordinary,

reasonable, cautious and prudent contractor would obtain an assessment and/or inspection of the walls prior to commencement of the work. It is also unclear whether the deflection of one of the walls some months after the fire would require an assessment and/or inspection.

[31] The plaintiffs' position that these are non-technical matters that do not require expert evidence, cannot be sustained. Whether the standard of care has been breached is outside my knowledge base. Technical information is required to determine the standard of care that the defendant should have exercised.

[32] The second exception, being that the actions were so egregious that an ordinary person would know the impugned actions of the defendant violated the standard of care, must also be considered. I find the evidence before me fails to establish that the impugned actions of the defendant were so egregious that expert evidence would not be required to demonstrate that there was a breach of the standard of care.

[33] The plaintiffs' position is that expert evidence is not required, but in the agreed book of documents there is evidence of Mr. Robert O'Toole. Mr. O'Toole is an engineer whose services were engaged by the defendant. He testified that twenty-five to thirty percent of his practice is related to fire assessments.

[34] Mr. O'Toole's letter of November 21, 2012 (Exhibit 2, Tab 52) states:

> The exterior wood framed stud walls provide the primary load bearing structural elements to support the gravity loads from the roof structure as well they provide the lateral resisting support for the building as a whole. The exterior walls are in essence 'shear walls' that resist wind loads as well they provide lateral stability for the individual load bearing elements (i.e. studs, posts etc.).
>
> The exterior wood wall framing was found to be in extremely poor condition: large sections of the exterior 'sheathing' which was made up of diagonally installed ¾" ship lap was badly deteriorated or missing altogether in sections leaving the exterior building paper and stucco exposed from the interior.
>
> The deteriorated state of the exterior wall framing had compromised the lateral resistance capacity of the exterior walls to act as shear walls as well had rendered the exterior walls unable to support the new wood roof structure.
>
> It was noted during our inspection that supplementary solid timber posts had been install[ed] at the ends of the original wood roof trusses. The posts are independent of the main structure and bear on the main floor slab and are not supported on a proper foundation. We suspect that the posts may have been installed to provide additional support to the roof trusses likely in response to sagging and downward displacement of the trusses as the original wall framing that initially supported the trusses at these locations was badly deteriorated. As they were not laterally supported nor were they supported on a proper foundation they would be considered temporary shoring of the roof.
>
> Based on our observations of the prevailing condition of the wood framing progressive collapse of the structure was imminent. Wood shore posts installed below the original trusses would suggest that structure had been compromised prior to the fire.

[35] Mr. O'Toole's letter concluded with the following:

> It is not realistic for the occupants to have expected to continue to have operated the businesses from the building for any significant length of time without making it structurally sound.

[36] The expert opinion of Mr. O'Toole was not contradicted by the plaintiffs. I accept Mr. O'Toole's opinion as to the condition of the building after the April 1, 2008 fire. I note under cross-examination that he agreed that it would be difficult to place a precise date of the imminent collapse of the building, but his opinion on the condition of the walls and the dangers associated with this were not contradicted.

[37] Mr. O'Toole testified that if he had inspected the walls in the days following the April 1, 2008 fire and observed the amount of rot in the walls, he would have condemned the building. He expressed concern that the exterior sheeting was rotten and wood studs were missing from the exterior walls. This compromised the structure to the point that an unexpected catastrophic collapse could occur without warning.

[38] To find that expert evidence was not required in support of the plaintiffs' case, I would have to find that Mr. O'Toole's evidence is irrelevant. I am not prepared to do so. The position of the plaintiffs is that notwithstanding the two exceptions, there are cases where the courts have found negligence on the part of a contractor without having regard to expert evidence as to the standard of care to be applied to the contractor. (*Pulczer v. Cirton Plumbing & Drains Ltd.*, 2011 ONSC 973, (2011), 3 C.L.R. (4th) 81 ("*Pulczer*")) This is not one of those cases.

THE "BUT FOR" TEST

[39] In a negligence claim, my task is to consider what is commonly referred to as the "but for" test. This test has been described by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 ("*Clements*"), as follows:

> 46 The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
>
> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss 'but for' the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred 'but for' the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or 'but for' cause of her injury, because each can point to one another as the possible 'but for' cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[40] This "but for" analysis relates to the two negligence claims advanced by the plaintiffs:

a) its failure to adequately inspect and assess the condition of the exterior walls prior to the commencement of the project, and

b) the failure to suspend the project (and in particular, leave the existing roof in place) after the discovery of the rotting exterior

walls so that the situation could be properly assessed and a plan effected to rectify the issue.

FAILURE TO INSPECT

[41] Prior to the defendant's involvement, the building's roof required removal and replacement due to the cumulative effect of two fires, the most recent being on April 1, 2008. By mid-September 2008, the plaintiffs and the defendant were aware that three exterior walls needed to be rebuilt. The evidence at trial was insufficient for me to conclude whether the fourth wall, being the south wall, needed to be rebuilt. This wall was not examined by the defendant, or by anyone else.

[42] If I were to accept that an assessment and inspection should have been performed by the defendant prior to commencing work, would the plaintiffs' awareness of the condition of the three walls have changed their approach to the loss? In the months following the April 1, 2008 fire, there were discussions between the plaintiffs and the insurer about replacing the building. The insurer would have contributed to these costs to extent of the policy limits. After careful consideration, the plaintiffs rejected this approach in late August 2008. (email communication between adjuster and representative of the defendant - Exhibit 2, Tab 25)

[43] I find that the plaintiffs, by their testimony, established that they lacked the ability to finance new construction or an ability to inject cash into the construction over and above the policy limits of the insurance coverage. It is

true that the plaintiffs' knowledge of the problem would have occurred sooner if an inspection had occurred, but in light of the plaintiffs' financial difficulties, I find that the plaintiffs would not have been in a superior position if they had known about the rot in the three walls at an earlier time. The plaintiffs have not satisfied me on a balance of probabilities, that if this information had been made available at an earlier date, the outcome would be different.

[44] In reading Mr. O'Toole's report, I am left with the question, what was the plaintiffs' knowledge of the condition of the building prior to April 1, 2008? Mr. O'Toole referenced there had been downward displacement of the roof trusses such that lateral supports had been placed under the roof trusses prior to the fire. It was also noted that these supports were insufficient as they were not supported on a proper foundation.

[45] Mr. Firman worked in this building every day. The only logical conclusion is that he was aware of the placement of the lateral supports. However, there was no trial evidence as why the work was done, by whom or when. Mr. O'Toole's position on the placement of the lateral supports was not challenged in cross-examination.

[46] I am left to wonder if this was the reason Mr. Firman was always questioning the defendant's repair estimate as he knew there were far more problems with the building than just a damaged roof.

[47] Applying the "but for" test in a generous and liberal manner, the plaintiffs have failed to satisfy me that the failure to inspect the condition of the walls at an earlier date caused the loss.

REINSTATEMENT

[48] In order to find "but for" the actions of the defendant, the plaintiffs were denied the opportunity to reinstate the building I must consider whether reinstatement was possible.

[49] The first question is whether the plaintiffs were denied the opportunity to construct new walls once the rot was discovered "but for" the actions of the defendant.

[50] Although the south wall was never examined for rot and it is impossible to know if it contained rot, for the purposes herein, I will accept that it did not require repair of any kind. Once rot had been discovered in three of the exterior walls, what remained was a building that needed its roof replaced and three structurally unsound walls that required replacement or repair before this could be considered a "building".

[51] The plaintiffs' evidence is that they never approached anyone about the construction of three new walls. The plaintiffs failed to take any steps to develop a plan to rebuild the building from discovering the rotten walls in mid-September 2008 until the start of this trial.

[52] I find Mr. Firman and Ms Chartrand to be credible witnesses overall. However, I do not accept their evidence that they believed someone else should have been responsible for obtaining cost estimates to construct three new walls. Ms Chartrand and Mr. Firman acknowledged during their testimony that they were aware that the cost of constructing these walls was their responsibility. Why would anyone other than the plaintiffs be obtaining an estimate? The plaintiffs were aware that the walls were not part of the insurance claim, yet the plaintiffs failed to take any action to address the condition of the three walls.

[53] A preliminary estimate for the construction of new walls in the amount of $35,000 was communicated by the insurance adjuster to counsel for the plaintiffs on September 22, 2008. (Exhibit 2, Tab 32). Mr. Malkoske, the insurance adjuster handling the file at the time the roof had been removed, testified that he was aware that approximate costs were closer to $50,000. However, whether the estimated amount was $35,000 or $50,000, the plaintiffs failed to take any action to construct new walls. I find that the plaintiffs have failed to establish after applying the "but for" test in a generous and liberal manner that the actions of the defendant were responsible for the loss suffered.

[54] I now turn to whether or not the plaintiffs could have continued to operate their businesses in the existing building if the roof had not been removed by the defendant.

[55] The plaintiffs testified that prior to the fire they had engaged in retirement discussions and intended to retire in 2018. Therefore, if the defendant had

stopped its work prior to the removal of the existing roof structure, would the plaintiffs have been able to continue operating their businesses from this building for an additional 10 years?

[56] The evidence before me is that the plaintiffs were continually contacting the insurance adjuster after the April 1, 2008 fire as the temporary repairs performed by the firm engaged to protect the building had failed to eliminate moisture from penetrating the Heaven Scent portion of the building. At a minimum, the flooring was damaged, and the roof structure was sustaining new water damage.

[57] Winter was approaching and given the existing problems with the temporary repair, the status quo was not acceptable. There is also the evidence of Mr. O'Toole that the condition of the walls was such that he would have condemned the building. He opined there was a real danger of the building collapsing as the roof was no longer being properly supported. I accept there is disagreement whether the collapse was imminent.

[58] The evidence shows that two things needed to occur for the plaintiffs to reinstate the building. Firstly, a new roof was required, and secondly, evidence that the three walls could have been repaired as opposed to being replaced.

[59] The plaintiffs did not lead any evidence whether the three walls could have been repaired as opposed to being replaced.

[60] However, I find it troubling that temporary repairs were made to "shore up" the roof <u>prior</u> [emphasis added] to the April 1, 2008 fire as noted in

Mr. O'Toole's report. I did not receive any evidence as to who performed this work, on whose direction, or whether the work was sufficient.

[61] At a minimum, Mr. Firman must have been aware that shoring had been installed under the roof trusses prior to the April 1, 2008 fire. His evidence was that he attended his building at least six days per week. He rarely took time away from his business. The temporary shoring could only have been done with his knowledge. I am left to wonder what the state of the building's structure was prior to April 1, 2008 that made shoring necessary. I am also left to wonder if one of the reasons that Mr. Firman expressed concern about the amount of defendant's tender was that he knew that there was far more work to be done than simply replacing the roof.

[62] Once again, Mr. O'Toole's letter of November 21, 2012 (Exhibit 2, Tab 52) is critical to the evaluation of the plaintiffs' position. If the building could have been reinstated, the plaintiffs failed to demonstrate how this was even possible. Mr. O'Toole's letter is dated almost four years prior to trial; the plaintiffs did not introduce any contrary opinion from an expert, or even a building contractor. As a result, I find that the plaintiffs' position on reinstatement was pure speculation.

[63] What remained were walls that were open to the elements. The sheathing was rotten which left large gaps. Mr. O'Toole testified as to how the foundation, the bottom plates, the sheathing, and the outside stucco all work together to support a roof.

[64] Applying the "but for" test in a generous and liberal manner, the plaintiffs have not met their burden to establish that "but for" the actions of the defendant they suffered a loss. The plaintiffs in their opening statement said that because of the actions of the defendant the building was doomed. However, the building was doomed long before the defendant entered the property. There was a structurally unsound roof and unsound walls to the point that there was a risk that the entire structure would collapse. The walls and roof needed to be replaced. I find that this building, in its condition following the fires, did not have ten years of life remaining.

[65] During closing argument, the plaintiffs argued that the "crumbling" skull theory should not apply but that the "thin" skull theory was applicable. Whether reliance is made upon the crumbling skull or the thin skull, the plaintiffs have not satisfied the Court on the balance of probabilities that their claim should be successful.

DAMAGE ANALYSIS

[66] In the event that I had determined that the actions of the defendant were negligent causing damage to the plaintiffs, I would prefer the Alternative No. 2 calculation of Mr. Schinkel (business valuator for the defendant). (Exhibit 2, Tab 54) I note that this calculation closely represents the midpoint calculations between Simpson (business valuator for the plaintiffs) (Exhibit 2, Tab 53) and Schinkel Alternative No. 1 evaluations.

[67] In the calculation performed by each of the business valuators, references were made to the assumptions utilized by each. In Alternative No. 1, Mr. Schinkel used assumptions that were beneficial to the defendant. Mr. Simpson used assumptions that were beneficial to the plaintiffs. By choosing Alternative No. 2, the assumptions made by each expert would closely reflect any damages suffered by the plaintiffs as the uniqueness of the Gimli, Manitoba economic market cannot be equated to the Canadian economy as a whole, or similar to Brandon, Manitoba, which is the largest regional economic centre outside of the City of Winnipeg.

[68] It was also argued by the plaintiffs that as disability and mortality contingencies were made in 2013, I should consider the fact that both plaintiffs are still alive and not disabled, therefore, the Simpson argument should be favoured. I agree that mortality and disability is self-evident, however, the plaintiffs have not provided financial statements for years beyond the year ending April 30, 2013. The plaintiffs cannot pick and choose between what information should be updated from the calculations, and what should remain static. Therefore, I am not prepared to adjust the calculations for mortality and disability.

[69] I disagree with the defendant's suggestion that the $35,000 received by the plaintiffs from one of the original defendants should be deducted from this claim. Paragraph 30 of the agreed statement of facts (Exhibit 1) notes that this was for business interruption expenses. Although there is no explanation why

this amount was agreed to by the plaintiffs, the only logical conclusion is that this reflected the business interruption loss suffered by them for the period when repairs would have been performed as a result of the April 1, 2008 fire. This represented the possible trial exposure of that particular defendant.

[70] Although the plaintiffs did not have business interruption insurance, it does not mean that they would not be entitled to make a claim against the party that caused the downtime in the first place. The defendant, by the use of the midpoint calculation, is receiving the $35,000 credit for loss incurred during the downtime. They cannot receive this credit twice.

[71] The defendant argued that I should deduct from any award the $15,000 cost to construct a new mansard roof which was the reason for the second plan for reconstruction. I disagree with this position. A mansard roof was integral to the original design of the building. The estimate for the new mansard roof was within the limits of the plaintiffs' insurance policy. The mansard roof was necessary to restore the plaintiffs to the position they would have been in prior to the April 1, 2008 fire.

[72] The defendant also wishes to deduct $35,000 from the award for the cost of constructing the new walls. I reject this position. In the event that the plaintiffs had proved the defendant breached the duty of care and suffered damage, one must consider whether the plaintiffs could have reinstated the building to a usable condition without constructing new walls. Credit cannot be given for construction costs if the walls could have been repaired.

[73] If I had found the plaintiffs had proven their case, I would have found that the midpoint calculation between the Simpson and Schinkel Alternative No. 2 and accounting for loss incurred during repairs, and not providing credit for monies paid by third parties, and the costs for the walls and mansard roof, damages would be:

Firman Sales and Services Ltd.	$138,055
Heaven Scent	$ 92,281
TOTAL:	**$230,336**

CONCLUSION

[74] Therefore, the plaintiffs' claim is dismissed. As to the question of costs, if counsel cannot reach agreement, they may arrange to speak to me.

Lanchbery, J.