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Docket: CI 98-01-10282
Indexed as: Western Label Company Ltd. v. Kenwal Properties Ltd.
Cited as: 2000 MBQB 151
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

Western Label Company Ltd.,	)	
	)	For the plaintiff:
plaintiff,	)	R.D. McDonald
	)	
- and -	)	
	)	For the defendant:
	)	M.G. Finlayson
Kenwal Properties Ltd.,	)	
	)	
defendant.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	September 20, 2000

KRINDLE, J.

[1] The defendant moves to expunge, pursuant to ***Court of Queen's Bench Rule 25.11***, certain paragraphs in a Reply to a Statement of Defence, arguing that those paragraphs are scandalous, frivolous or vexatious. The party moving to expunge does so on the basis that the facts stated do not constitute material facts which are legally capable of responding to the issues raised in the Statement of Defence.

[2] Western Label leased space from the defendant, Kenwal Properties. In January of 1997, according to the Statement of Claim, water pipes froze

elsewhere in the building as a result of which water escaped into the area rented by Western Label, causing substantial damages to the property of Western Label. Western Label sues Kenwal in negligence and alternately in contract alleging breaches of the lease by Kenwal's failing to maintain the heating system, etc.

[3] By way of defence to the whole of the claim, Kenwal denies that it was negligent and pleads the terms of the lease itself. In that latter regard, Kenwal says that the lease between Western Label and Kenwal provides that Western Label would keep in force insurance on Western Label's leasehold improvements and contents and specifically that Western Label:

> Shall cause each of its policies to contain an undertaking by the insurers to notify (*Kenwal*) at least thirty days prior to cancellation or any other change material to (*Kenwal's*) interests. All policies will include (*Kenwal*) as an additional named insured with cross liability clauses, where appropriate.

[4] The defence of Kenwal is that the lease explicitly determined that Kenwal would benefit from Western Label's insurance, that Western Label accordingly undertook and promised that any rights of subrogation would be waived and that, in effect, Kenwal was an unnamed co-insured under Western Label's policy of insurance. Kenwal takes the position, therefore, that the lease itself bars the action by Western Label against Kenwal. In taking that position, Kenwal relies on the following trilogy of landlord and tenant cases from the Supreme Court of Canada:

> ***T. Eaton Co. Ltd. v. Smith et al*** (1977), 92 D.L.R. (3d) 425;
>
> ***Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*** (1975), 55 D.L.R. (3d) 676; and

Ross Southward Tire Ltd. et al. v. Pyrotech Products Ltd. et al. (1975), 57 D.L.R. (3d) 248.

It is not my function on this motion to rule on the position taken by Kenwal in its defence. Suffice it to say that the legal position taken by Kenwal is not a frivolous one.

[5] In response to the Statement of Defence of Kenwal, Western Label filed a Reply. The Reply pleads that Kenwal took no steps to require Western Label to have its insurer add Kenwal as a named insured under the policy and that Kenwal did not rely on the covenant to add it as a named insured under the policy. No challenge, at least in this motion, is taken to that portion of the Reply. The Reply additionally pleads the following:

> (b) at all material times (*Kenwal)* had purchased and maintained in force its own comprehensive general liability policy which policy was valid and in force at the time of the loss described in the Statement of Claim herein. Subject to compliance with the policy's terms and conditions by (*Kenwal), (Western Label)* says that the said policy will indemnify (*Kenwal)* for any liability that it may have to (*Western Label*) as a result of the within action;
>
> . . .
>
> (d) If (*Kenwal)* is found liable to indemnify *(Western Label), (Kenwal)* will suffer no loss as any such loss will be paid by way of indemnification by (*Kenwal's)* own comprehensive general liability insurer.

It is the two allegations contained in (b) and (d) in the Reply that Kenwal seeks to strike as being frivolous or vexatious in that they are irrelevant to the question of Kenwal's alleged negligence and are irrelevant to the issue as to the meaning and effect of the terms of the lease. Kenwal says they do not bear upon the issues either of breach of contract or negligence asserted by Western Label.

[6] Western Label argues that the issues raised in the Reply are relevant to the issue whether the provisions of the lease operate as a waiver of the right of subrogation or a bar to the claim. As I understand the position of Western Label, it is that Kenwal's having placed its own insurance is relevant to the issue of Kenwal's reliance on the provisions in the lease which required Western Label to provide for insurance. I have read the two decisions referred to by counsel for Western Label which, he says, import the notion of reliance into the applicable law in this matter:

> ***Bow Helicopters Ltd. v. Bell Helicopter Textron et al.*** (1982), 125 D.L.R. (3d) 386 (Alta. C.A.); and
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> ***Sheds Manor Holdings Ltd. v. Dale Mann Ltd.*** (1996), 25 C.L.R. (2d) 290 (Ont. C.J.).

It will be for the trial judge to determine whether or not reliance has been imported into the law. But even if it has, the fact that Kenwal placed its own insurance would, at best, be evidence which might arguably support the fact of non-reliance. Pleadings are to contain concise statements of material facts. They are not to contain statements of evidence by which those material facts are to be proved. If reliance is a material fact, the fact of Kenwal's own insurance would at best be a pleading of evidence.

[7] Accordingly, the motion to strike sub-paragraphs 2(b) and (d) of the Reply to the Statement of Defence is allowed. Kenwal is entitled to its costs of this motion.

J.