

CITATION: MacLeod v. Accell Roofing Inc., 2024 ONSC 611
COURT FILE NO.: CV-81-2509
DATE: 2024/01/29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Stephanie MacLeod, Plaintiff

AND:

Accell Roofing Inc., Defendant

BEFORE: Tranquilli J.

COUNSEL: Graham MacLeod, for the Plaintiff

Thomas Madison, for the Defendant

HEARD: December 13, 2023

ENDORSEMENT

- [1] This action concerns property damage allegedly caused by the defendant during the supply and installation of a new roof on the plaintiff's residence in November 2018. The plaintiff claims the defendant's workmanship caused rainwater to infiltrate and damage the interior of her home.
- [2] The defendant brings a motion on undertakings and refusals arising from the plaintiff's examination for discovery. The plaintiff brings a cross-motion on a refusal arising from the defendant's examination for discovery.
- [3] The plaintiff claims general damages of \$150,000 for negligence, breach of contract, fraudulent and/or negligent misrepresentation, and breach of the *Consumer Protection Act*, special damages of \$50,000, and aggravated and punitive damages of \$100,000. She alleges she has suffered property damage, out-of-pocket expenses, loss of enjoyment of property, diminution of property value, and delay in the sale of the home.
- [4] The plaintiff has since particularized her damages as the costs of a loss investigation report, home improvement hours, the cost of home improvement materials, the cost of a complete roof replacement, loss of enjoyment, loss of sales opportunity, property taxes and mortgage costs because of the delay in the sale, breach of the *Consumer Protection Act*, and her loss of enjoyment for total damages of \$117,958.85 plus interest. She was indemnified by her home insurer for some of her losses, the particulars of which are unknown. She advises she claims only for the losses arising from the interior damage.

- [5] The defendant, Accell Roofing, denies liability. Accell registered a lien on the plaintiff's residence and commenced a separate action against the plaintiff under the *Construction Act* for payment under the contract (CV-19-94). The lien was vacated in 2021. The actions are to be tried together and proceeded through examinations for discovery in tandem. Counsel for Accell Roofing in the construction lien matter did not participate in this motion.
- [6] This should be a straightforward claim regarding a contractual dispute.
- [7] However, these matters have an unfortunate history of personal acrimony, recrimination, and procedural delay that have required numerous court appearances, including this special appointment. The court's impression is that personal communications and positions have interfered with the orderly completion of the most elementary of procedural steps, such as examinations for discovery. These motions are the most recent example of how the parties have allowed procedural issues to overwhelm and hinder the progress of the matter.
- [8] The plaintiff complains that the defendant did not send correspondence outlining the outstanding undertakings and refusals before the defendant proceeded with this motion. The defendant contends this was unnecessary as these procedural steps were already made the subject of a timetable endorsed by Justice Grace. While the *Rules of Civil Procedure*, RRO 1990, Reg 194 do not specifically require that the parties confirm undertakings and refusals by correspondence before bringing a motion, I agree this is the standard practice of the bar. While the timetable seeks to address the orderly and timely progress of the action, it does not otherwise serve as a substitute for following up upon the substance of any undertakings or refusals in issue. Correspondence may have obviated the need for a motion, particularly with respect to undertakings.
- [9] The plaintiff also alleges that the defendant committed a fraud upon the court when it filed the motion confirmation without, in fact, attempting to confer with counsel. The defendant submitted that the service of the motion was the confirmation of the motion. This does not make sense and is contradicted by the *Rules*. Service of the motion is not a substitute for conferring with counsel and confirming the motion. Rule 37.10.1 requires that a party who makes a motion on notice to another party "shall confer or attempt to confer with the other party" the motion not later than five days before the hearing date. That said, characterization of the defendant's conduct as a fraud is an overstatement.
- [10] Finally, the plaintiff complains that the defendant did not correctly complete the refusals and undertaking chart as required by Rule 37.10(10). The court agrees the chart fails to set out issue to which each undertaking or refusal relates. This would have been helpful to the court in determining the motion in a timely and efficient manner. To that end, the court notes the plaintiff neither confirmed her cross-motion nor filed a factum or compendium.
- [11] I note these deficiencies would give the court jurisdiction to refuse hearing the motions; however, I determined it would be more productive to address this motion and encourage

the parties to advance the actions without further delay. While these procedural skirmishes ask for the court's comment and may be relevant to costs, they do not serve to address the substantive issues on the motions, to which I now turn.

Defendant Accell's Motion

Undertakings

- [12] Accell advised the undertakings are now largely satisfied, with the exception that it requires the declaration page in addition to the production plaintiff's insurance policy that was produced. The defendant notes this is the first time it was made aware that more was required to satisfy the undertaking.
- [13] Nevertheless, the plaintiff shall request and provide the declaration page to the defendant. The court should not have even been troubled to hear about this.

Refusals 1-4 – To ask Graham MacLeod if he tried to lift the bolt of material that fell of the roof, if he picked it up before Accell Roofing removed it and to ask him the weight of the bolt and to advise how long Grant MacLeod habitually stayed at the plaintiff's home when he visited her.

- [14] The plaintiff alleges that Accell Roofing employees or agents left a bolt of roofing material on the roof of her residence in the midst of removing the old roof and installing the new roofing. She pleads that on the afternoon of November 4, 2018, the bolt fell and violently struck another portion of the roof causing visible cracks to appear in the interior room below the area of impact. In the early morning hours of November 5, 2018, the plaintiff discovered rainwater coming into the interior rooms of her home. The plaintiff immediately contacted her insurer for assistance. She pleads she permitted Accell Roofing's crew to return to her residence to collect the defendant's tools and equipment.
- [15] At paragraph 11 of her statement of claim, she stated that during Accell's attendance: "*....a member of the Defendant's Crew was threatening, abusive, confrontational, and used profane language toward the Plaintiff's son.*"
- [16] Graham MacLeod is the plaintiff's son. He also acts as plaintiff's counsel in these actions. In addition to his reportedly unpleasant interaction with the defendant as set out in the statement of claim, Mr. MacLeod was staying overnight in the plaintiff's home at the time of the rain damage.
- [17] The plaintiff has now answered the first three refusals: Graham MacLeod has no recollection of lifting the bolt of material or its weight, and therefore whether he lifted it before it was removed by Accell.
- [18] The plaintiff maintains her refusal in respect of how often Mr. MacLeod stayed over at his mother's home. The plaintiff submits this question is irrelevant and baseless. Her son

argues the defendant is unduly occupied with the familial relationship between the plaintiff and counsel and that this is an irrelevant distraction from the matters in issue in this proceeding. He submits there is no compelling evidence that he is, in fact, a witness. Moreover, he submits the plaintiff has provided sufficient particulars of her damages on which she could be examined and for which the defendant was clearly ill-prepared to address at the examination for discovery. There is no other evidence that would be of value to demonstrating the extent of the plaintiff's damages claim.

[19] I do not accept plaintiff counsel's argument that these questions are a tactic to make him a witness. He is a witness by virtue of his involvement in the incident that underlies this action.

[20] He was present at the time the damage ostensibly occurred, when he was staying overnight at his mother's home. He is witness to his mother's claims as to the unfolding damage and her loss of enjoyment of the property as claimed in the pleading. Moreover, he is the principal witness to the alleged unsavoury interaction with a representative of the defendant that is expressly described in the statement of claim. This question and related follow up questions are relevant to the issues of the circumstances of the damage, its remediation, and his mother's loss of enjoyment of use of the property.

Refusal 5 – To advise who performed the restoration work to fix the interior rain damage.

[21] Ms. MacLeod advises this is not a refusal. She has answered she cannot remember who undertook the restoration work to fix the interior rain damage.

[22] The defendant notes it has no information as to what any insurance funds for the loss were applied to or who performed the work.

[23] Unless the plaintiff amends or corrects her answer, the court observes this could raise a challenge in proving her damages. Her specified damages summary specifies a sum claimed for expenditure on "home improvement materials". Surely, in proving the performance of the repair expenses claimed from the defendant, she would have and have knowledge of and/or have access to records of any third party who undertook those repairs.

[24] This question is relevant to establishing the plaintiff's damages. But in any event, this refusal has been answered. Unless this answer is corrected, per Rule 31.07(2), the plaintiff will not be able to introduce information as to who performed the restoration work without leave of the court.

Refusal 6 – To advise if there was a cash settlement for the interior repair through the homeowner's policy and to provide those particulars.

[25] Accell Roofing submits this query relates to the plaintiff's claims for lost hours and materials regarding restoration. The defendant says this information is necessary to assess the extent to which the loss was covered through the plaintiff's homeowner's policy, for what purposes the funds were paid, and to avoid double recovery.

- [26] The plaintiff submits she is prevented from providing those particulars by terms of a confidential settlement with her insurer. To compel her to provide this information would force her to violate law and constitutes an abuse of process. In any event, she submits the settlement is irrelevant as she is claiming for the hours lost in respect of restoration efforts. I find the plaintiff's position on this refusal curious in contrast to her position on her answer that she could not recall who performed the restoration work.
- [27] The court accepts the defendant's position that this information is relevant to assessing and testing the plaintiff's claim for damages. The defendant is entitled to test her claim for damages and to ensure there is no double-recovery.
- [28] The plaintiff did not provide the court with the terms of any settlement with her insurer under seal in respect of this loss for review. If it is correct that the terms of the settlement are subject to a confidentiality agreement, then the plaintiff is directed to provide this order to the insurer and request production, along with her authorization for the settlement to be disclosed. If the insurer refuses to authorize disclosure, the defendant will be required to bring a 30.10 motion if it still seeks that information.

Refusal 7 – To advise what the home equity line of credit was used for.

- [29] The defendant submits this question is relevant to the plaintiff's claim for losses arising from her claim that the damage delayed the sale of her home and caused her to carry mortgage expenses pending the sale of the subject home and her purchase of another residence.
- [30] The plaintiff responds that this information is irrelevant to her claims for damages. She answered on examination for discovery that the line of credit was not used to finance any interior repairs arising from the claimed property damage. She otherwise does not explain the particulars of the HELOC.
- [31] This question should be answered. The defendant is entitled to test the evidence and to ensure any claims for damages are related to the property loss in question. It is not an onerous question.

Refusal 8 – To advise where the plaintiff is currently living and whether she has any loans for which her current property is collateral that she is paying monthly or bi-monthly.

- [32] The plaintiff sold the subject property and has twice moved to her current home to which she reportedly holds title. The defendant submits this question is relevant to testing the plaintiff's claims for losses arising from the delay in selling her home and the related carrying costs through her mortgage. They should be permitted to inquire as to the particulars of her current financing and whether there are any expenses to offset against her claims for expenses arising from her additional time spent living in the subject property under a mortgage and HELOC.

[33] The defendant submits the specific question did not seek the plaintiff's current address and that the question did not result in a refusal. The plaintiff advised she did not have mortgage or HELOC on her current residence and defence counsel accepted that answer.

[34] The plaintiff shall answer this question. Irrespective of any lack of precision in counsel's question, the plaintiff's current address is properly a subject of discovery. The defendant is entitled to this basic information in order to make further inquiries as it may see fit.

Refusal 9 – To advise if there while there was still damage to the home the plaintiff had any guests over or whether she spoke to anyone who saw the damage.

[35] The defendant submits this question is relevant to identifying any witnesses to the loss and their knowledge, information, and belief of those circumstances and the plaintiff's claim for loss of enjoyment.

[36] The plaintiff responds that this information is unnecessary and disproportionate to the matters in issue. She has already provided comprehensive loss materials by way of photographs and repair estimates and the defendant had an opportunity to examine her on those materials.

[37] Rule 31.06(2) entitles a party to obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of the occurrences in issue. I do not see that compiling the names of acquaintances who may have visited the property is unduly onerous given the damages sought by the plaintiff. This question shall be answered.

Refusal 10 – To provide time estimates for how many hours the plaintiff spent in her house in a given day.

[38] The defendant submits that the plaintiff's evidence as to the time she spent in the areas of the house that were damaged by the rainwater is relevant to her general damages claim for loss of enjoyment. Only certain areas of her residence were water-damaged, such as closets and certain rooms in the upper level of the home. The defendant should be permitted to test the extent to which she truly experienced a loss of enjoyment of these areas of the home while they were damaged and under repair.

[39] The plaintiff submits this type of detail is unnecessary, excessive, and disproportionate.

[40] This refusal is proper. While this line of questioning as to the plaintiff's regular use of various areas in her home has relevance, the request for the number of hours spent in each area is unrealistic and disproportionate to the claim. It would be relevant to obtain an understanding of the various rooms in the home, occupants, and the areas that had regular or daily use, but asking for what amounts to a timesheet or docket is impractical. Again, as the plaintiff has foreclosed this line of evidence, she would need leave of the court to lead evidence at trial as to any testimony on how the duration of the damage and repairs affected her daily use and enjoyment of the property.

Plaintiff MacLeod's Motion

- [41] The plaintiff moves on one refusal by Accell Roofing. The defendant refuses to produce its corporate tax returns for the years 2017 to 2019 inclusive.
- [42] The plaintiff asserts the defendant opened the door to relevance on this request through defence counsel's remonstrations on the plaintiff's first day of examination in 2022 that there was a \$300,000 claim "hanging over this business." The plaintiff argues the defendants' financial arrangements are pivotal to understanding whether Accell Roofing allocated the appropriate resources to the contract and in addressing whether any subcontractors are uncovered by the defendant insurance policy that is defending this claim.
- [43] The defendant submits these productions are irrelevant. Its insurer is responding to the claim. Counsel's comments about the lawsuit do not put the defendant's solvency into question. There is no allegation that the defendant's financial situation led to the circumstances of the claim.
- [44] The court agrees the plaintiff has not established this question is relevant to the matters in issue. This is not a judgment debtor examination. There is no evidence that there are undefended claims relating to any subcontractors involved in the contract.

Disposition

- [45] The plaintiff's motion on the refusal is dismissed.
- [46] The defendant's motion on undertakings and refusals is granted as follows, with reference to the chart of undertakings and refusals:
- a. Undertaking 4 - the plaintiff shall request and provide the declaration page of her homeowner's policy pertaining to the loss in issue within 30 days of this order;
 - b. The plaintiff shall answer refusals #4, 7, 8 and 9;
 - c. The plaintiff shall answer refusal #6 through a request to her homeowner policyholder for consent to release the particulars of the property loss settlement in issue. If the insurer refuses disclosure, the plaintiff shall provide the requesting and responding correspondence to the defendant for the purposes of a 30.10 motion, to be brought by the defendant in its own discretion.
 - d. The defendant's motion in respect of refusal #10 is dismissed.
 - e. The plaintiff's motion in respect of defendant's refusal #1 at questions 76-80 of the defendants' examination for discovery is dismissed.
- [47] The plaintiff shall attend for further examination for discovery on a date to be agreed to by the parties, at her own cost, to provide answers to the aforesaid refusals made at her

examination for discovery which have been ordered to be answered and to answer any questions which may arise from answers.

[48] The parties shall each bear their own costs of their motions for the following reasons. Neither attended the motion prepared with a cost outline as anticipated by Rule 57.01(6). Each party failed to adhere to rules that are designed to facilitate an orderly, courteous, and efficient hearing of the motion, for the reasons I reviewed earlier in this endorsement.

[49] I trust this decision will assist the parties in moving this matter forward.

Tranquilli J.

Date: January 29, 2024