

CITATION: Greaney v. Nitech Polysystems Inc. et al. 2019 ONSC 7500
COURT FILE NO.: CV-08-362432
DATE: 2019-12-27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MICHELE GREANEY, Plaintiff

AND:

NITECH POLYSYSTEMS INC., 1343081 ONTARIO LTD., MERI-CAN MACHINERY LTD., GN GEAR & MACHINE MANUFACTURING LTD., 1072510 ONTARIO INC., CANTAR POLYAIR LTD., and ACETRONIC INDUSTRIAL CONTROL, Defendants

BEFORE: Sossin J.

COUNSEL: Melissa Miller, Counsel for the Plaintiff

Linda Matthews and Saro Setrakian, for the Defendant

HEARD: October 8, 2019

REASONS FOR JUDGMENT

OVERVIEW

[1] The plaintiff, Michele Greaney (“Greaney”), is suing the defendants, Nitech Polysystems Inc. (“Nitech”), 1343081 Ontario Inc., Meri-Can Machinery Ltd., GN Gear & Machine Manufacturing Ltd. (“GN Gear”), 1072510 Ontario Inc., Cantar Polyair Ltd. (“Cantar”), and Acetronic Industrial Control (“Acetronic”) (collectively, the “defendants”), for a serious workplace injury sustained she sustained in 2003, in a manufacturing plant operated by Cantar in New Jersey. An action in New Jersey relating to this accident was dismissed for want of jurisdiction.

[2] The background facts of this action are not in dispute.

[3] Greaney’s accident involved her arm being caught in a turret winder, from which she suffered serious injuries.

[4] The turret winder in question was a copy of a machine owned by Cantar, known as the “Alpha Marathon” machine, which they commissioned Nitech, and its principal, Frank Sangiuliano (“Sangiuliano”) to procure.

[5] Nitech subcontracted the building of the turret winder for Cantar to GN Gear.

[6] Acetronic was subcontracted by GN Gear to build and installed the control panel and switches for the turret winder.

[7] Greaney's statement of claim was issued on September 12, 2008, in Toronto, and amended August 27, 2014, and alleges the defendants are responsible for negligence in the design and manufacture of the turret winder, and a failure to warn of the risks involved in the operation of the turret winder.

[8] GN Gear delivered its statement of defence and cross-claim on November 13, 2009.

[9] Cantar delivered its statement of defence and crossclaim on September 9, 2010.

[10] Nitech delivered its statement of defence and crossclaim on January 4, 2011.

[11] Acetronic delivered its statement of defence and crossclaim on January 25, 2011.

[12] GN Gear brings this motion for summary judgment under Rule 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the "*Rules of Civil Procedure*"), on the basis that there is no evidence of a manufacturing defect with the turret winder, and GN Gear had no role in the design or safety of the turret winder.

[13] GN Gear seeks to have the plaintiff's claim against it dismissed, as well as the cross-claims against it by other defendants.

ANALYSIS

[14] The test on a summary judgment motion under Rule 20.04 of the *Rules of Civil Procedure* is not in dispute. GN Gear must establish that there is no genuine issue requiring a trial with respect to its defence.

[15] In the roadmap provided in *Hryniak v. Mauldin*, 2014 SCC 7, Karakatsanis J. states (at paras. 66-67):

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[67] Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute

resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

[16] Greaney argues that this is a partial summary judgment motion, in that if GN Gear is successful, she will continue to have a claim against the other defendants.

[17] In *Butera v. Chown, Chairns LLP* 2017 ONCA 783, the Ontario Court of Appeal has elaborated on why partial summary judgment should be considered a “rare procedure” (at para. 34), emphasizing that the delay in resolving the main action, the additional expense to which this may lead and the risk of inconsistent findings, among other concerns.

[18] GN Gear states that this case is appropriate for summary judgment because it was involved only in one aspect of the turret winder – its manufacture – and therefore only one theory of liability could implicate GN Gear, which is a manufacturing defect.

[19] GN Gear characterizes this motion as a full rather than partial summary judgment from its perspective, as it would resolve all issues respecting GN Gear if successful, and remove both a defendant and a complete cause of action (for defects relating to the manufacture of the turret winder, if successful).

[20] In this context, it is necessary to consider the different grounds of liability alleged in order to determine if GN Gear fits within the characterization of partial summary judgment in *Hryniak v. Mauldin*, 2014 SCC 7, where the “resolution of an important claim against a key party could significantly advance access to justice and be the most proportionate, timely and cost effective approach.” (at para. 60).

Manufacturing Liability

[21] GN Gear takes the position that the only allegation in the claim relating to its discrete role in the turret winder process is that of manufacturing defect. In order to establish liability on this basis, a plaintiff must prove that there was negligence in the manufacturing process, resulting in a product that was deficient; *Nadeau v. Nexacor Realty Management Inc.*, [2002] O.J. 2095 (C.A.).

[22] GN Gear relies on the affidavit evidence of its representative (Mr. Hunjan), Nitech’s representative (Mr. Sanguiliano) and Cantar’s representative (Mr. Corrigan).

[23] GN submits that all these key parties support the view that the turret winder was manufactured by GN Gear to the specifications of Nitech, and was accepted by Cantar following testing to ensure it worked according to the specifications given.

[24] GN Gear argues that there is no genuine issue for trial as to any defect in the manufacture of the turret winder.

[25] Greaney’s position is that the evidence shows GN Gear did not take steps to ensure its manufacturing process met safety standards in the U.S. or Canada.

[26] Greaney characterizes the report of the plaintiff's expert (Mr. Sarrett) as concluding that the design and manufacture of the turret winders was defective.

[27] Mr. Sarrett's affidavit evidence does not distinguish between the design and manufacture of the turret winders. He states that (at para. 19):

It is my opinion within a degree of engineering certainty that the design and manufacture of the turret winder involved in this incident was defective, creating a hazard for operators and others about the machine in that:

- (a) Ingoing "nip points" are not guarded or otherwise protected;
- (b) It is not equipped with suitable emergency stop measures either at or convenient to the area of hazard;
- (c) Specific warnings and instructions describing the hazards and the means to avoid them are not provided at the hazardous work station. (Emphasis added.)

[28] Mr. Sarrett states that those responsible for the design and manufacture should have known about these hazards and used adequate means to eliminate or ameliorate these hazards.

[29] On cross-examination, Mr. Sarrett stated that the manufacturer "always has, in my mind, responsibility to install safety guards."

Design Liability

[30] GN Gear submits that it had no role in the design of the turret winder.

[31] Further, GN Gear argues that where the role of manufacture and design are distinct, the manufacturer cannot be held liable for deficiencies in the design, and may appropriately have a claim dismissed against it on summary judgment; *Thwaites v. MacDonnell Fuels Ltd.*, 2010 ONSC 5529, at paras. 50-55.

[32] By contrast, Greaney frames the liability among the defendants in this case as an "intricate web fraught with credibility issues among each of the witnesses involved."

[33] Greaney submits that in a context of reverse engineering the manufacture of the turret winder, all the defendants plays roles in design decisions to varying degrees.

The Duty to Warn

[34] GN Gear also submits that it had no duty to warn, as the danger in the use of turret winders was apparent in its function. This is akin to the reference by the Ontario Court of Appeal that there is no duty to warn "that a knife or axe will cut, a match will take fire, dynamite will explode or a hammer may mash a finger." *Deshane v. Deere & Co.*, 1993 CanLII 8678 (ON CA), at para. 55.

[35] Greaney's position is that all the defendants were under a duty to ensure safety precautions were in place given the evident risk of the turret winder.

Applicability of New Jersey Law

[36] The accident took place in New Jersey and Greaney submits that there is a genuine issue for trial as to whether New Jersey product liability law applies to this litigation on the basis of *lex loci delicti*; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at p.1050.

[37] Greaney further submits that if the law of New Jersey applies to manufacturer's liability, then strict liability may apply for the manufacture of defectively designed machine or a machine which fails to meet safety standards.

[38] GN Gear rejects this characterization of New Jersey law, and submits that to the extent it applies, strict liability operates on Cantar as Greaney's employer and the operator of the turret winder.

[39] Beyond this, GN Gear argues that as there is no expert evidence on New Jersey law, it is not possible to speculate on its difference, if any, with Ontario law.

Is there a Genuine Issue for Trial?

[40] Parties are obliged to put their best foot forward in any motion for summary judgment.

[41] The question of whether there is a genuine issue for trial in this case comes down to the question of GN Gear's role. Did GN Gear play no role other than manufacturing a turret winder to the specifications of Cantar based on the Alpha Marathon machine? Did GN Gear discharge all of its duties under the applicable law?

[42] The difficulty for GN Gear is that addressing this question involves issues of credibility and uncertainty.

[43] There were no specific, pre-determined design drawings for the turret winder which GN Gear was commissioned to follow. Rather, this project involved "reverse engineering" and copying the Alpha Marathon machine, which in turn required collaboration between Hunjan (and others at GN Gear) and Mr. Sanguiliano at Nitech, who was providing design specifications.

[44] Mr. Sanguiliano's evidence is that he was in touch with GN Gear weekly during the manufacturing process to design issues and for quality control. He was also in touch with Mr. Corrigan at Cantar on a weekly basis throughout this process.

[45] This commission was the first time GN Gear had undertaken the manufacture of a turret winder.

[46] Mr. Sanguiliano's affidavit evidence appears to support both sides of this motion. On the one hand, he confirms that Nitech was responsible for hiring GN Gear and providing it with the specifications on the Alpha Marathon machine which GN Gear was to reverse engineer. On the other hand, when discussing whether he would have retained a safety review firm if the turret winder was to remain in Canada, Mr. Sanguiliano suggested the design process was collaborative:

Q. What about GN Gear? What do you understand would have been GN Gear's responsibility in that with respect?

A. Well, I think it should have been my responsibility only because I'm the last person to sell [sic] it to them. GN Gear I guess I could have told them to have them in because they did build the machine, they designed the machine or redesigned the machine. (Emphasis added.)

[47] Subsequently, Mr. Sanguiliano gave evidence that the design for the turret winder did not come only from him, as stated in Mr. Hunjan's evidence on behalf of GN Gear:

Q. Just so I understand what your concern was or your disagreement with Mr. Hunjan's evidence, were you suggesting that he actually played a role in the design because he was involved in the copying or that neither of you played a role in the design at all? I'm trying to understand...

A. The design is a reverse design. It's a copy of the machine. It's a copy of the machine – nothing more, nothing less. We were asked to copy the machine. I passed that on to Gurmukh [Hunjan]. I asked him to copy the machine. He copied the machine. He took the – he took the specifications of the current machine, he took the additional specifications that we wanted changed, he put that together.

All the drawings are of GN Machine. When he was in here last year he stated that I supplied all the drawings. Now, that may make no difference today or tomorrow it make a difference, but if somebody is going to come into a deposition and say things that aren't true, then I'm going to be a little bit concerned.

[48] To the extent that liability may turn on the role, if any, GN had in contributing to the design of the turret winder, this may constitute a genuine issue for trial. On this evidence, it is not possible to determine watertight, distinct roles for design with one party, and manufacture with another.

[49] Further, Mr. Sarrett, the only expert to provide evidence, which remains uncontroverted, expressly links the defects in the turret winder to its "design and manufacture."

[50] While I conclude there is evidence to support GN Gear's position that it has no liability for the accident because of its limited role in manufacturing the turret winder to the specifications of others, there is also evidence to suggest that the design and manufacture process were interwoven given the reverse engineering process. The divergence between this evidence, in turn, depends on the credibility of key parties.

[51] In these circumstances, I am not persuaded that GN Gear has demonstrated that there are no genuine issues for trial.

[52] There is also a danger in this case of inconsistent findings in this case. If GN Gear were to be removed from this action at this stage, and the Court accepted Greaney's evidence at trial that the failure to meet safety standards (whether in Ontario or New Jersey) was at least partially a result of the GN Gear's involvement, this would give rise to exactly the dilemma highlighted by

Justice Pepall in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 at para. 33, with respect to partial summary judgment.

[53] This case may be distinguished from cases such as *Larizza v. Royal Bank of Canada*, 2018 ONCA 632, where one party could be hived off of litigation because the claim against it was “standalone and limited in nature” (at para. 40) without affecting the plaintiff’s case against the other defendants.

[54] Greaney’s allegations against GN Gear are not standalone nor are they limited in nature. Given the web of interactions and evidence between Cantar, Nitech, GN Gear and Acetronic, removing GN Gear from the litigation may present significant challenges for Greaney in pursuing its litigation with the other parties.

[55] For all of these reasons, I conclude this is not an appropriate case for summary judgment in favour of GN Gear against Greaney.

CONCLUSION

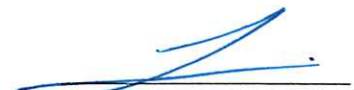
[56] For the reasons set out above, GN Gear’s motion for summary judgment and to have the action against it by Greaney dismissed, is denied.

[57] The motion to have the crossclaims against GN Gear dismissed is granted, as no other defendants opposed GN Gear’s motion.

[58] With respect to costs, I find a costs award in favour of Greaney of \$30,000 to be fair and reasonable in the circumstances. Therefore, GN Gear shall pay costs of \$30,000, all inclusive, to Greaney, within 30 days of this judgment.

[59] GN Gear sought costs against Greaney, had it been successful on this motion, but it is not clear whether GN Gear also is seeking costs against the other defendants in relation to the dismissal of the cross-claims, and if so, how such costs ought to be apportioned.

[60] Should GN Gear wish to pursue costs awards against the other defendants, it may make brief submissions (or no more than 2 pages), within 20 days of this judgment, with any reply submissions from other defendants (also limited to 2 pages) due within 10 days of receiving GN Gear’s submissions.



Sossin J.