

CITATION: Cecile v. Retrofoam of Canada Incorporated, 2011 ONCA 199
DATE: 20110314
DOCKET: C52716

COURT OF APPEAL FOR ONTARIO

MacPherson, Rouleau and Epstein JJ.A.

BETWEEN

Robert Cecile, Michelle Cecile, Gerald Patrick Doyle, Stanley Lawton,
Stanislao Calandra, Bruce Andrew MacLellan, Jeffrey Michael Simpson,
Simone Marisa Cupid, Cindy Ruth Armstrong, Jaime Batista and Susan Huntley

Plaintiffs (Respondents)

and

Retrofoam of Canada Incorporated, Retrofoam Holdings Inc., Retrofoam Windsor Inc., Retrofoam of Southern Ontario Inc., Retrofoam of Eastern Ontario Ltd., Polymaster Inc., Enerliv Inc., Paul John Weigel, Northern Retrofoam Inc., Enwise Power Solutions Inc., Enwise Building Science Inc., Gary Zavaros, 756882 Ontario Ltd. C.O.B. as Lambton Insulation Ltd., The Attorney General of Canada, National Research Council of Canada, Attie Enterprises Ltd., I-Gen Energy Inc. and Foam Comfort Inc.

Defendants (Respondent)

and

Federated Insurance Company of Canada

Non-party (Appellant)

Donald Dacquisto, for the appellant Federated Insurance Company of Canada

David Zuber, for the respondent Foam Comfort Inc.

William V. Sasso, for the plaintiff-respondents

Heard & released orally: March 4, 2011

On appeal from the order of Justice Terrence L.J. Patterson of the Superior Court of Justice dated September 1, 2010.

ENDORSEMENT

[1] This is an appeal from the order of Justice Patterson of the Superior Court of Justice dated September 1, 2010, requiring the Federated Insurance Company of Canada to defend Foam Comfort Inc. in a class action and to file a statement of defence within 30 days.

[2] Neither the plaintiffs nor Foam Comfort requested that Federated Insurance be involved in the litigation. Indeed, at the hearing of the motion from which this order arose, Foam Comfort sought leave to represent itself. Federated Insurance was not a party to the motion.

[3] Since that order, the class action against Foam Comfort has been dismissed pursuant to the agreement of the parties and the court has approved the dismissal by order dated January 6, 2011.

[4] Foam Comfort has therefore abandoned its cross-appeal seeking leave to represent itself. Federated Insurance nonetheless wishes to proceed with its appeal from the September 1, 2010, order against it.

[5] In response to the respondents' preliminary issue of mootness, Federated Insurance argues that the appeal is not moot and that there remains a live controversy that

may affect the rights of the parties in the future because the dismissal of the claim against Foam Comfort was subject to the following terms and conditions:

- 1) Foam Comfort would consent to a dismissal without costs;
- 2) If the plaintiff Batista is not made whole in the class proceeding, he may in his discretion bring an action against Foam Comfort; and
- 3) Foam Comfort will not raise a *Limitations Act, 2002* defence.

[6] It is Federated Insurance's position, therefore, that there remains a tangible and concrete dispute between the parties as the dispute can be revived if the plaintiff, Mr. Batista, decides to pursue a separate claim against Foam Comfort in the future. Should that happen, the order of Patterson J. dated September 1, 2010, will remain in effect requiring Federated Insurance to defend Foam Comfort. Therefore, a decision by this court will serve a purpose in determining whether Federated Insurance has a duty to defend Foam Comfort, should the issue arise in the future.

[7] We disagree. As a result of the dismissal, with prejudice, of the present action against Foam Comfort, the order of Patterson J. is no longer of any relevance. If a new claim is later issued against Foam Comfort, the issue of whether Federated Insurance will be required to defend on behalf of Foam Comfort will need to be decided in the context of that later action. As conceded by counsel for the respondents, the order of Patterson J. will have no relevance whatsoever to that determination. In our view, therefore, the appeal is moot.

[8] As a result we dismiss the appeal. In the circumstances, we make no order as to costs.

“J.C. MacPherson J.A.”
“Paul Rouleau J.A.”
“Gloria Epstein J.A.”