

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
AMIR YOUSSEF a disabled person by his	)	
litigation guardian the OFFICE OF THE	)	D. W. Romaine, for the Plaintiff
PUBLIC GUARDIAN TRUSTEE	)	(Respondent)
	)	
Plaintiff (Respondent)	)	
	)	
<b>– and –</b>	)	
	)	
MARGARET MISSELBROOK, 693316	)	
ONTARIO LIMITED o/a TORONTO	)	T. Macmillan and E. Vereshchak, for the
REDI-MIX LIMITED, REGIONAL	)	Respondents (Moving Party)
MUNICIPALITY OF DURHAM and	)	
MARK BURNFIELD	)	
	)	
Defendants (Moving Party)	)	
	)	
	)	<b>HEARD:</b> August 2, 2018

**MULLIGAN J.**

[1] The remaining defendant in this action 693316 Ontario Limited (“Redi-Mix”) brings a summary judgment motion seeking a dismissal of the claim of Amir Youssef (“Youssef”) the plaintiff in this action. Youssef seeks the dismissal of this motion together with a judgment in his favour against Redi-Mix for liability, with the issue of damages reserved to trial.

**OVERVIEW**

- [2] The following overview of facts will provide context for the discussion that followings. The facts emerge from the extensive record filed before the court including affidavits and transcripts of examination for discovery and cross-examinations on affidavits filed.
  
- [3] Amir Youssef was riding his motorcycle on Winchester Road in Durham Region on September 6, 2009 at approximately 3:00 a.m. His motorcycle struck a donkey on the road. He lost control and suffered serious injuries. He has no recollection of what happened. A passerby John Marett observed the tail-end of the accident. He saw four

donkeys on the paved portion of the road and found Mr. Youssef lying in the middle of the roadway. He observed that Mr. Youssef appeared to be unconscious. In addition to the four donkeys he saw a donkey lying in the middle of the road which he thought had been killed in the accident. He attempted to take Mr. Youssef for treatment but returned to the accident scene and waited for police to arrive. As a regular passerby on Winchester Road, he had seen the donkeys in the adjacent field in the past, but never on the roadway.

- [4] Mr. Youssef has very little recollection of the accident. He was found to be incompetent by the order of Speyer J. His litigation guardian is the Office of the Public Guardian and Trustee. On April 18, 2012 he was examined for discovery by the defendant Redi-Mix. The following questions and answers indicate the extent of his knowledge:

Q: So let's go to September 6, 2009. What time did the accident take place?

A: It was about 3 in the morning.

Q: Do you remember the accident itself?

A: No I don't.

...

Q: Do you remember any of the drive back toward Ajax?

A: I just remember that I was on Highway 7 (Winchester Road).

Q: Do you remember being anywhere outside of Whitby or does your memory stop sometime before that?

A: I remember just a few details but what I don't remember is everything what happened after the accident.

Q: You don't remember the impact itself?

A: No.

### **THE REDI-MIX PROPERTY**

- [5] At the time of the accident Redi-Mix owned a rural residential property of about 100 acres. It was rented to Mark Burnfield. Redi-Mix brought a third party action against Mark Burnfield. It was not defended and Burnfield has been noted in default. Youssef amended his Statement of Claim adding Mark Burnfield as a defendant. The amended claim was not defended and Mr. Burnfield has been noted in default.

- [6] In its third party action Redi-Mix pled,

This defendant [Redi-Mix] states that, if there was an animal on the roadway, then that animal was under the care and control of co-defendant (Burnfield).

34. This defendant pleads and relies upon the allegations of negligence as against the co-defendants as set out in its Statement of Defence.

- [7] In its Amended Statement of Claim Youssef broadened his claim to add Burnfield, setting out at para. 9:

The defendant Mark Burnfield (Burnfield) is a resident of the Province of Ontario and was at material times a tenant and/or lessee on the premises. At all material times, Burnfield owned and/or was the last possessor of donkeys and/or of livestock on the premises.

- [8] Among the allegations of negligence against Redi-Mix and Burnfield, Youssef claimed in part:

12(e) they failed to confine the livestock/donkey to the premises;

(h) they permitted the livestock/donkey to escape from the premises when they knew or ought to have known that the livestock/donkey could escape and pose a danger to the general public;

(k) they failed to have the exterior fencing of the premises in proper working order;

(o) they failed to take any reasonable precautions to ensure that secure fencing surrounded the premises;

(p) they failed to take any or reasonable steps to inspect, secure, maintain and/or repair the exterior fencing, when they knew or ought to have known that this would present a danger and would cause a foreseeable risk of injury to members of the general public, including the plaintiff; and

(u) they failed to implement a reasonable system of inspection and/or repair to the premises.

### **THE REDI-MIX PREMISES**

- [9] Redi-Mix purchased a 100 acre rural residential property bordering Winchester Road in September, 2006. Dominic Suppa the chief financial officer for Redi-Mix swore an

Affidavit as to the purchase and the subsequent lease to the defendant Mark Burnfield. Although Redi-Mix did not keep any livestock on the premises, it was aware that the tenant intended to do so. The lease was entered into October 1, 2006. The property was known municipally as 975 Winchester Road and the lease set out that the landlord “leases to the tenant the residential premises and farmland.” The lease continued on a month-to-month basis until Mr. Burnfield and his domestic animals vacated the property in July, 2011 in connection with the expropriation of the property by the Ministry of Transportation for the expansion of Highway 407. As to fencing Dominic Suppa, chief financial officer of Redi-Mix, deposed at para. 4:

I attended at the premises prior to concluding the purchase. At the time of purchase, I believe that the property had in place adequate and appropriate gates and fencing for its use as a residence and farm.

### **FENCING**

- [10] It is not disputed the Redi-Mix property was fenced along the northerly limit of its 100 acre parcel of land that paralleled Winchester Road, in addition to fencing on the east-west limits as well. What is in dispute is the condition of the fencing and gates and the obligations of Redi-Mix to inspect, maintain and repair, if necessary, gates and fences.
- [11] The evidence of Redi-Mix emerged from three sources: Carmen Kulesza, the company’s controller who was examined for discovery, Dominic Suppa, the chief financial officer who filed an Affidavit in support of this summary judgment motion and was cross-examined and the Affidavit of Giuseppe Lamanna, one of the Redi-Mix partners. In addition two Affidavits were sworn by Steve Diminie, the O.P.P. Sargent who attended at the scene and investigated this accident.

### **CARMEN KULESZA**

- [12] Carmen Kulesza, the Redi-Mix controller, was examined for discovery in April, 2012. At discovery Ms. Kulesza indicated that Redi-Mix did not build the fence, the fencing existed at the time the property was purchased. She had no knowledge about when the fence was constructed. As to fencing inspection the following questions and answers emerged:

Q: Did any agent of the company attend the premises at any time prior to this accident, to inspect the fence?

A: Not that I know of.

Q: Was there any policy or procedure in place at the time of the accident, to ensure the premises was safe and its cattle and everything that was on the property, was safe from neighbours and residents? Any polices or procedures in place?

A: No.

**DOMINIC SUPPA**

[13] As noted Mr. Suppa swore an Affidavit in connection with this motion, as the chief financial officer for Redi-Mix. With respect to fencing he stated in his Affidavit at para. 29, “It was my understanding based on my prior observations and the lack of any notice or stated concerns to the contrary, that the gates, gate locks, and fencing were all functioning properly on or about September 6, 2009.” However, Mr. Suppa’s statement about prior observation was considerably weakened in cross-examination. The following questions and answers illustrate the point:

Q: You’ve never inspected the fence along Winchester?

A: No.

Q: You’ve never inspected the fence that runs perpendicular to Winchester to the east of the property?

A: No.

Q: And further, on that first visit you were not inspecting the fence along the road or the one that runs perpendicular to it?

A: No.

Q: On that second visit I take it you were not doing a fence inspection?

A: No. Looked at the pond to see how big this pond was.

Q: Did you walk down along the –

A: I’ve never reached Winchester walking.

Q: ...you don’t put in your Affidavit that that’s Mr. Lamanna’s information?

A: All the information that I got about the fencing and the gates would come from Mr. Lamanna.

**GIUSEPPE LAMANNA**

[14] Mr. Lamanna provided an Affidavit for the purpose of this motion. He is a partner in the Redi-Mix company. He was cross-examined on his Affidavit. Mr. Lamanna indicated that he was experienced in farming and inspecting properties. He recalled walking the

entire property prior to the purchase. He observed no defects in the fencing and considered the fencing and gates adequate for use as a residence and a farm. He was never notified of any problems by his tenant.

- [15] In cross-examination he spoke about several visits to the property. His first visit was because he was thinking about building a golf course. As he stated about that visit:

Q: So you wouldn't have really been making observations of gates and locks on the first visit right?

A: The first visit no.

- [16] On the second visit he also did not inspect fences. The third visit was for the purpose of effecting minor repair on the fence on the west side of the property. He could not recall the date of the third visit, as he answered:

Q: When did that happen? When did you make that visit?

A: I think it was just after we bought, a year, two years later. I don't remember exactly the date.

On that visit with a labourer he repaired a section of the fence that had been damaged by a fallen tree branch.

- [17] The fourth visit was to inspect the fence.

Q: How long were there?

A: Five minutes.

Q: When did you make this last inspection of the fences?

A: I don't remember.

Q: Did you communicate this to Dominic (CEO) or to Carmen (controller) that was the purpose that were going to make this special trip?

A: No.

- [18] The following questions and answers emerged as to Redi-Mix's responsibility for gates and fences:

Q: The condition of gates and fences were the obligation of your company, isn't that right?

A: Yes. The condition, yes.

Q: Well one way [to look at locks on gates] is by inspecting and from what I understand, the only inspections that were even made specifically for the fence was after the accident.

A: I went and inspect the gate and fence, I don't remember if it was before or after. This is, I can't recall.

Q: Did you have anybody assigned to do periodic inspections of the property to see that the gates were being properly locked, did you? Your company didn't appoint someone as part of their job to go and inspect the property to make sure it was suitable?

A: No we don't have nobody.

Q: You don't have a single note though to tell us when you went.

A: No I don't.

### **THE ACCIDENT INVESTIGATION**

[19] The investigation of this accident was conducted by Steve Diminie, at that time a Sergeant with the Ontario Provincial Police. Mr. Diminie swore two Affidavits with respect to the accident. He was not cross-examined. He attended the accident scene around 3:15 a.m. assisting a police officer at the scene. He learned that Mr. Youssef believed he had struck a donkey. Mr. Diminie stated in his first Affidavit at paras. 12 to 14:

12. Near the adjacent property I located five donkeys or mules outside of a secured and fenced field. None of the donkeys had noticeable injuries.

13. I recall prying open the fence or gate that led to the field. When I did so, the donkeys then walked into the property.

14. I walked the length of the property along the side that bordered the highway. There were no gates along this side of the property. I observed no gaps in the fencing. No charges were laid as a result of this investigation.

[20] In his second Affidavit Mr. Diminie deposed:

5. ...when I learned that mules were out I then walked easterly along the fence line looking for mules. When I got to the northeast corner of the property I spotted the mules.

6. Marker B [on the photograph exhibit] depicts where I located five mules in a cluster, standing near the intersection of a fence and several trees. The trees were abutted up against the fence line. The fence line ran past the trees continuing south. Right at the trees, there was a metal gate portion of the fence. There was no lock on the gate. I was able to pry the gate apart so the mules could get back onto the property. I pulled the fencing toward me, creating a gap and the mules walked in on their own. In my opinion the gate would not have been used on a daily basis. I formed that opinion by the effort it took to open the gate.

[21] Although Office Diminie was looking for mules and not comprehensively inspecting the gates or fences, his observation was that the fencing along the roadway appeared to be intact, as did the section of fencing running south along the east side of the property up to the gate.

### **FINDINGS OF FACT**

[22] Based on the comprehensive record before me I am able to make the following findings of fact.

[23] The donkeys escaped from the Redi-Mix property. Redi-Mix rented the land to Mr. Burnfield for farm purposes including raising domestic animals. A passerby, Mr. Marett, had seen donkeys on the Redi-Mix farm when he regularly drove past the property. On the night in question he saw donkeys on or near the roadway including one lying down on the road, which he thought had been killed. When Steve Diminie arrived on the scene he found five mules clustered near the fence line along the east limit. With his own effort he was able to pry the gate apart and the mules walked in on their own. There was no lock on the gate. With the force of a human Mr. Diminie was able to pry the unlocked gate open. I am satisfied on the balance of probabilities that the force of a mule or mules pried the gate apart allowing their exit from the property to Winchester Road where they were observed at the time of the accident. I am further satisfied that Mr. Youssef struck on of these donkeys.

### **ANALYSIS**

[24] Rule 20.04 of the *Rules of Civil Procedure* provide that:

- (2) the court shall grant summary judgment if,
  - (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
    - (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence



submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[25] Both parties made reference to the Supreme Court of Canada's seminal decision on summary judgment motions, *Hryniak v. Mauldin*, 2014 S.C.C. 7. Speaking for the Court, Karakatsanis J. provided the following guidance:

49. There will be no genuine issue requiring a trial where the judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is the proportionate, more expeditious and less expensive means to achieve a just result.

57. On a summary judgment motion the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly.

### **THE ISSUES**

[26] Both the parties agree that this motion raises the following issues as set out in the Factum of the moving party at para. 38:

- (a) The ordinary rules of negligence apply to the analysis of whether a duty of care was owed by Redi-Mix to the user of the highway;
  - (i) No statutory duty under the *Occupier's Liability Act*;
  - (ii) Not a case of strict liability;
  - (iii) Not a case of nuisance;
- (b) The plaintiff has not proved that Redi-Mix as a landlord, was negligent.

[27] Youssef as the responding party agrees that these are the issues to be determined on this motion but submits that the motion ought to be dismissed when these issues are considered. Further, Youssef submits that a summary judgment finding for the plaintiff, on liability, ought to be granted despite the absence of a cross-motion for such relief.

[28] The Ontario Court of Appeal made such a determination in *Singh v. Trump*, 2016 ONCA 747. As Rouleau J.A. stated for the Court at para. 147:

The motions judge correctly noted that on a motion for summary judgment the judge may grant judgment in favour of the responding party, even in the absence of a cross-motion for such relief. [citations omitted]

[29] It is beyond dispute that each party must put their “best foot forward” on a motion for summary judgment. As Benotto J.A. stated for the Ontario Court of Appeal in *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292 at para. 54:

The evidentiary obligation on a summary judgment motion is well established. Each side must “put its best foot forward”. The motion judge is entitled to assume that the evidentiary record is complete and there will be nothing further if the issue would go to trial. [citations omitted]

[30] I agree with the moving party defendant that it did not breach any statutory duty under the *Occupier’s Liability Act* and that this is not a case of strict liability. However I disagree that the plaintiff has not proved that Redi-Mix as landlord was negligent. I say for the following reasons.

**OCCUPIER’S LIABILITY ACT**

[31] Section 3 of the *Occupier’s Liability Act*, R.S.O 1990 c.O.2 deals with an occupier’s duty of care to persons entering the premises to ensure their safety while on the premises. This accident occurred on Winchester Road, a public highway. Redi-Mix had no control of the adjacent public highway and nothing in the general use of the property by Redi-Mix or its tenant extended to the public highway.

**STRICT LIABILITY**

[32] Both parties made reference to the Supreme Court of Canada’s decision *Fleming v. Atkinson*, 1959 S.C.R. 513. In the rejecting a strict liability approach the court’s approach was summarized in the headnote:

It was therefore open to this court to apply the ordinary rules of negligence to the case of straying animals and the case of *Searle* offered no obstacle.

**THE DOCTRINE OF NUISANCE**

[33] It is the defendant's position that the doctrine of nuisance does not apply because the keeping of livestock is not an inherently dangerous condition.

[34] As the plaintiff sets out at para. 124 of its Factum:

(9) The public's use and enjoyment of the highway was unreasonably interfered with by the mules escaping from the numbered company's premises and ending up on the highway.

[35] In my view the escape of the donkeys from the farm property rented by Mr. Burnfield, the tenant, became a public nuisance when the donkeys strayed onto Winchester Road. The issue then becomes whether or not Redi-Mix as landlord was negligent in maintaining and inspecting fences on its residential farm property.

**RESIDENTIAL TENANCIES ACT**

[36] It is not disputed that the agreement between Redi-Mix as landlord and Burnfield as tenant was governed by the provisions of the *Residential Tenancies Act*. Section 20(1) provides:

A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

[37] A landlord's obligation with respect to fences is specifically addressed in section 8 of O.Reg. 517/06 which provides:

Retaining walls, gardens and fences in exterior areas shall be maintained in a structurally sound condition and free from hazard.

[38] Redi-Mix as the moving party submits that it has no duty to monitor the activities of its tenant and that it met its obligations with respect to the fencing as set out in the Affidavits filed on its behalf. Redi-Mix acknowledges that ordinary rules of negligence apply to determine the issue of liability of an owner of animals, but such a rule ought not to be applied to the non-owner of a domestic animal. As the moving party states in its Factum at para. 47:

The circumstance in which a landlord who does not have care and control over the daily activities of a premises, is liable to third parties not on the premises are very narrow.

[39] Redi-Mix as the moving party relies on the decision of the Divisional Court in *Durling v. Sunrise Propane Energy Group Inc.*, 2014 ONSC 1041 (Div. Ct.). As the court stated at para. 10:

The landlord will rarely owe a duty to care to third parties for the negligence of a tenant but the circumstance of this case are out of the ordinary. It is alleged that this landlord knew or ought to have known that inherently dangerous, unsafe and illegal conduct of the tenant over an extended period of time amounted to foreseeability of a catastrophic harm that eventually occurred.

[40] It should be noted that the parties in *Durling* entered into a commercial lease and the provisions of the *Residential Tenancies Act* had no applicability.

[41] The moving party also made reference to the decision of Sheard J. in *Sorbam Investments Ltd. v. Litwak*, 2017 ONCA 706. The court adopted *Durling* and stated at para. 60:

Based on the evidence, this does not appear to be to one of those rare cases in which a landlord owes a duty of care to third parties; the facts cannot be said to be “out of the ordinary”.

[42] That case also dealt with a commercial tenancy agreement between a landlord and tenant. The *Residential Tenancies Act* had no application.

### **STANDARD OF CARE**

[43] As *Fleming v. Atkinson*, supra, makes clear the Supreme Court of Canada found that ordinary negligence rules applied to the liability of an owner whose cow wandered off the property and was struck by the plaintiff’s vehicle. It is clear that the donkeys were out of the property and on the roadway at the time of the accident. When the officer attended at the fence/gate the donkeys had assembled there and with his own effort he was able to pry open the unlocked gate allowing the donkeys to return to the field.

### **Was Redi-Mix as landlord responsible for the negligence of its tenant Burnfield?**

[44] I am satisfied that the tenant Mark Burnfield was negligent in allowing the mules to wander from the property onto Winchester Road by means of his failure to secure the gate or fence along the side of the property. By the time the investigating officer arrived the donkeys had congregated near this fence and the officer, with simple human force, was able to pry open the gate or fence and the donkeys returned to the field. Mr. Burnfield has not disputed the claims against him and has been noted in default with respect to the plaintiff’s claim and the defendant’s third party claim.

[45] I am also satisfied that the defendant Redi-Mix was negligent with respect to its duties and obligations as a residential landlord of rural property. The following points assist me in drawing that conclusion:

- Redi-Mix purchased this residential rural property with existing fences.
- Redi-Mix leased this property to Mr. Burnfield in 2006 with the knowledge that he had domestic animals there.

- The accident happened approximately three years after the lease was entered into but Redi-Mix had no policy or procedure in place to inspect or repair the fences knowing it was their obligation to do so. The controller Carmen Kulesza had no knowledge of any inspection of fences. Dominic Suppa, the chief financial officer, indicated he had never inspected the fence. His only knowledge about fencing came from information provided to him by Mr. Lamanna. Mr. Lamanna made several visits to the property over the years. One such visit was to repair a certain area of fence. The other visits were unrelated to fencing. Mr. Lamanna was unsure whether his last inspection was before or after the accident.
- The *Residential Tenancies Act* sets out that landlords are responsible for providing and maintaining a residential complex in a good state of repair.
- The Regulation under the *Residential Tenancies Act* further sets out that fences and exterior areas shall be maintained in a structurally sound condition and free from hazard.

[46] I am satisfied that the record before me provides the court with sufficient information to make a determination with respect to the landlord's negligence without the necessity of a trial. I therefore grant judgment in favour of the plaintiff Amir Youssef against the defendant 693316 Ontario Limited o/a Toronto Redi-Mix Limited on the issue of liability. The issue of damages remains a triable issue.

### **COSTS**

[47] The parties are encouraged to reach an agreement as to costs. In the event that no agreement is arrived at I will receive costs submissions from the plaintiff Amir Youssef not exceeding five pages together with a bill of costs within twenty days of the release of this Endorsement. Thereafter the defendant 693316 Ontario Limited o/a Toronto Redi-Mix Limited will have ten days to provide reply submissions not exceeding five pages. Submissions may be sent in care of my judicial assistant at the Barrie Courthouse.

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MULLIGAN J.

**Released:** October 26, 2018