IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATIONWIDE MUTUAL INSURANCE COMPANY, and A&M HOMES, LLC,	)	
Plaintiffs,	)	C.A. No. 2001-08-343
vs.	)	
KESTER CROSSE and CANDACE CROSSE, Defendants.	)	

Submitted February 8, 2007
Decided June 1, 2007

Christopher L. Sipe, Esquire, Attorney for Plaintiffs
George E. Evans, Esquire, Attorney for Defendants

DECISION AFTER TRIAL

In this action the Court is asked to determine whether the Defendant violated a City of Wilmington ordinance, whether the violation should be deemed negligence *per* se, and whether such negligence was the proximate cause of Plaintiffs' damages. For the following reasons, the Court finds for the Defendants.

FACTS

The following facts were established at trial by a preponderance of the evidence:

In March, 2001, Plaintiff A&M Homes, LLC ("A&M") owned a residential property at 1000 Clifford Brown Walk, in downtown Wilmington. The property was insured by Plaintiff Nationwide Mutual Insurance Company ("Nationwide"). John Burris was a principal of A&M. The adjoining residential property, 1002 Clifford Brown Walk, was owned by Defendants Kester and Candace Crosse ("Crosse"). The two properties shared a party wall, with no firewall. The Crosse property was vacant at the time. On March 8, 2001 a fire erupted within the second floor bedroom of the Crosse property. In addition to damaging the Crosse property, the fire also caused significant smoke and fire damage to the A&M property, necessitating repairs and loss of rents until the repairs were completed. The parties stipulated that Plaintiffs suffered damages in the amount of $9,844.70.

Mr. Burris testified that when he first purchased the Clifford Brown Walk property about eight months prior to this incident, he noticed that the Crosse property was vacant, and had broken windows and debris in the back yard. Mr. Burris visited his property, and had an opportunity to observe the Crosse property, four or five times before the fire. He testified he never saw anyone at the Crosse property on any of the visits to his property, and believed it was vacant. He did not see the doors or windows boarded up before the fire. The windows and doors of the Crosse property were not boarded up after the fire, as evidenced by the testimony of the witnesses and photographic exhibits.

Stephen Grelock ("Grelock"), a private investigator retained by Plaintiffs, testified that he visited the property approximately seven months after the fire. The photographs he took of the Crosse property at that time show windows that

are not boarded up. Mr. Grelock has considerable experience with the boarding up of vacant properties, and is familiar with HUD guidelines for boarding up vacant properties, although there was no evidence that the Crosse property was subject to HUD guidelines. He testified that HUD recommends boarding up houses on the exterior with 5/8th inch plywood extending 2" past the windows using lag bolts and screws, and 2x4s. Boarding up from the inside is not recommended as would-be intruders can easily kick in these boards. Grelock stated it would be customary for firemen to remove any boarding on windows to assist with putting out a fire. However, he saw no evidence that boarding had been done previously on the Crosse property and was removed. Grelock, however, did not enter the property on his post-fire visit.

Defendant Kester Crosse testified that the property had been vacant for approximately six to eight months prior to the fire because of a leak in the roof. At the time of the fire, Defendants had not begun any renovations. He stated he was aware the Wilmington City Code requires vacant homes be boarded. The home did not contain any burglar alarms, sprinklers or fire extinguishers. Although Defendants previously had insurance on the property, at the time of the fire it had lapsed and they were responsible to pay for all repairs. The property has since been used as a rental again.

Mr. Crosse was asked to review the photographs taken by Grelock after the fire that displayed no evidence of exterior boarding on the property. He testified that second floor windows are customarily not boarded up because the safety concern is with the first floor windows as they are more easily accessible. He clarified his deposition testimony in which he stated he did not board up the

windows at the house. He asserted that he meant that he, personally, did not install the boards, but that he paid his friend, Frederick Martin ("Martin"), to do so. Martin often did work for him. Defendant testified there had been break-ins in the past and he once found a pit bull dog chained in the house. The house had not been boarded up at that time. The defense introduced a January 17, 2001 receipt from Martin in the amount of $150. Although the receipt did not indicate what it was for, Defendant testified it was for Martin to buy supplies and board up the windows from the interior and secure the doors. Defendant did not offer or mention this receipt when previously deposed in this matter. Defendant indicated that he had not located the receipt until after that time. He also asserted that when he became aware of problems at the property in January 2001, he wanted the house boarded up from the inside because he did not want people to see from the street that it was empty. Defendant believed he was doing the right thing by boarding the house from the inside. Although Defendant testified in his deposition that there were no boards covering the windows, he said at trial that he later went through files and located the receipt which he recalled being for the purchase of the boarding supplies. After the fire, he testified, the windows were boarded again from the inside using Plexiglas.

Mr. Martin is self-employed and performed maintenance work on Defendants' properties. He testified he put plywood over the windows inside of the Clifford Brown Walk property prior to the fire. Martin confirmed that the receipt introduced into evidence was for screws, plywood, and 2x4s used to secure the windows. One of the 2x4s was used to secure the back door from the

interior. He did not secure the front door, as this had a working lock, nor the second floor windows. He did not board up the property after the fire.

Mr. Randall Burton ("Burton") also testified for the defense. He is self-employed in the construction industry and is a consultant. He used to board properties with the Wilmington Housing Authority and testified there are different ways utilized to secure properties. He was aware that according to the Wilmington City Code, vacant houses must be boarded. It is preferable to board the homes from the outside but it can be done from the inside. According to Burton, boards that are inside a house can be more easily kicked in but boards on the outside of a house clearly indicate to others that the property is vacant, thus perhaps inviting problems. He was not aware of whether Defendants' property had been boarded either before or after the fire.

The Wilmington Fire Department's investigative report was admitted into evidence at trial. The report found "no evidence to support an intentionally set fire." It concluded that the "ignition source could not be determined and all investigative leads have been exhausted."

DISCUSSION

Plaintiffs claim that Defendants violated the provisions of the Wilmington City Code (the "Code") by failing to board up their vacant property, and that their failure is thus negligence *per se*. In determining whether violation of an ordinance or statue amounts to negligence *per* se, the Court applies a four-part test: First, was the statute or ordinance at issue enacted for the safety of others? Second, is there a causal connection between the statutory violation and the

injury caused, and is the plaintiff a member of the class the statute seeks to protect? Third, does the statute or ordinance provide a standard of conduct designed to avoid the harm the plaintiff suffered? Lastly, did the defendant violate the statute or ordinance by failing to abide by the requisite standard of conduct?[1]

Plaintiffs allege Defendants violated Chapter 4, Buildings and Building Regulations § 4-119.7 of the Code, which requires owners of vacant buildings to board and secure any openings in vacant buildings. Plaintiffs claim this provision was enacted to prevent uninvited persons from entering vacant structures and causing havoc such as a fire. The section of the Code in question does not set forth its specific purpose; however, the overall purpose of the Chapter is "to provide minimum standards to safeguard life, limb, health, property and the public welfare insofar as they are affected by the…use and occupancy, location and maintenance of all buildings and structures and their appurtenances and service equipment in the city."[2] The Court finds this section of the City Code plainly states the City's intent in enacting the provision to protect the safety and property of others.

If the preponderance of the evidence determined that Defendant violated this ordinance, and that a person who entered the building as a result started the fire that damaged the adjoining property, there would be a causal connection between the violation and the harm suffered. Further, Plaintiffs, as owner of an adjoining building, are within the broad class of persons meant to be protected by the ordinance.

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[1] *NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, *3 (Del. Super.) (citing *Sammons v. Ridgeway*, 293 A. 2d 547, 549 (Del. 1972)).
[2] Wilmington City Code at § 4-1.

Section 4-119.7 states that "[I]t shall be unlawful for any owner, agent, or person in control of any building or structure which is vacant, open or otherwise unsafe to fail to secure and board up the open areas of any such building." The Code does thereby provide some standard of conduct aimed at preventing unauthorized entry into vacant, open buildings. It does not, however, specify whether the boards are to be placed over the open areas from the outside or the inside. Likewise, it only requires "open areas" to be boarded. There was testimony at trial that boarding a building from the outside is considered more secure, but the evidence does not establish that the Code requires boarding from the outside, or that inside boarding is wholly inadequate. Inasmuch as the Code does not set forth more detailed requirements, the Court finds that boarding the exterior or interior of open areas sufficiently satisfies this section's requirements. Inasmuch as the clear intent of the requirement is to prevent unauthorized entry into vacant buildings, the Court also find that boarding of the lower floor open areas satisfies the requirement of the Code when the second floor open areas are otherwise inaccessible.

There was conflicting testimony at trial as to whether the 1002 Clifford Brown Walk property was properly secured as required by the Code. The then-principal of Defendant A&M testified he didn't see any boarding on the four or five visits to his adjoining property in the eight months before the fire. However, it appears from the evidence that, if the windows were boarded from the inside it would not be necessarily visible to a viewer from the outside of the building. The balance of Plaintiffs' evidence on this issue regards the lack of boarding on the property *after* the fire, which, in the Court's view, is of limited relevance,

especially in light of testimony that firefighters commonly remove the boarding in fighting the fire. Finally, although Defendant Kester Crosse stated in deposition that he had not boarded up the building prior to the fire, in trial he testified that he subsequently recalled he had engaged Mr. Martin to board up the building in January, 2001, and produced an undesignated receipt for the materials for that job. Mr. Martin testified that he did, indeed board up the building, from the inside, securing the downstairs windows and door (one door was secured by lock). If the Court found that the Crosse property was indeed boarded at the time of the fire in the manner described by Mr. Crosse and Mr. Martin, it would find Defendants had not violated the City ordinance, and that they were not negligent. However, the Court need not resolve the quality of evidence and credibility issues presented by the above conflicting evidence, unless the proximate cause of Plaintiffs' damage has been proven by a preponderance of the evidence.

"[A] proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[3] If there is a subsequent, intervening cause, which breaks the causal chain, the intervening cause must have been neither anticipated nor reasonably foreseeable by the first tortfeasor.[4]

The only ***evidence*** offered at trial as to the cause of the fire was the Investigative Report of the Wilmington Fire Department dated August 2, 2001, which concluded there was "no evidence to support an intentionally set fire," and that an "ignition source could not be determined." It further found the cause of the fire to be "undetermined." Throughout the trial, the Plaintiffs consistently

[3] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).
[4] *Id.*

assumed that an unknown person or persons entered the Crosse property and started the fire, but failed to offer any evidence establishing this as the cause of the fire. However, it does appear, in reviewing prior motion pleadings, deposition testimony and interrogatory responses, *none of which were introduced into evidence or otherwise referenced at trial,* that Defendants also occasionally ***assumed*** this same cause of the fire.[5]

The occasional, but inconsistent assumption and stated belief by the Defendants in the pretrial process that a "derelict" or "vagrant" started the fire inside the property raises the issue of whether such stated assumptions may be deemed a legal admission of causation by the Defendants, sufficient to replace Plaintiffs' total failure to support its burden to produce evidence of causation of the fire.

Although the Plaintiffs at trial offered no discovery responses as Defendants' admissions of the cause of the fire, Delaware courts have recognized and occasionally applied the concept of judicial admissions. "[J]udicial admissions… are not a means of evidence but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore are a limitation on the issues."[6] Judicial admissions which are binding on the

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[5] *Defendants' Answers to Interrogatories*: "12. Defendants have no direct knowledge of the cause of the incident other than our ***belief*** that it was caused by derelicts who unlawfully occupied the premises and caused the fire." (Emphasis added.) "16. The persons who caused the fire were trespassing and engaged in reckless burning." *Deposition of Kester Crosse, at 19*: "Q: Okay. Had you had prior problems with – this is your term from one of your letters – derelicts entering the property to get warm? A: I didn't have problems from them doing it. I had a problem when they caused the fire." *Plaintiff's Motion for Summary Judgment*: "2. The aforesaid fire occurred after vagrants were improperly permitted to enter the aforesaid long-vacant, unsecured, and not-boarded-up house through what is believed to have been an unsecured and not-boarded-up window. The aforesaid fire started by the aforesaid vagrants caused $9,844.70 in damage to an adjacent residential structure owned by Plaintiff . . .." *Defendants' Response*: "2. Denied. The second sentence is admitted."

[6] *Krauss v. State Farm Mutual Automobile Ins. Co,*. 2004 WL 2830889 *4 (Del.Super.)(citing IV Wigmore, *Evidence* § 1064 (Chadbourn Rev.1972)).

tendering party are limited to factual matters in issue and not to statements of legal theories or conceptions.[7]

Judicial admissions are usually admissions contained within a complaint or answer; however, the Court of Chancery has held that admissions included in a response to a Civil Rule 12(c) motion were judicial admissions.[8] Therefore, this Court may consider whether Defendants' various pretrial statements made in pleadings and discovery amount to a judicial admission of causation.

In this analysis, it is important to note that at trial Plaintiffs did not offer or otherwise attempt to admit Defendants' alleged pretrial admissions. When, at the close of evidence, the Court questioned the Plaintiffs on the lack of evidence offered on causation of the fire, Plaintiffs merely responded that both parties assumed throughout the litigation that unknown persons entered the building and started the fire. However, as previously noted, the Wilmington Fire Department's Investigative Report *offered in evidence by the Plaintiffs* could not determine the cause of the fire. In the Court's view, this offered report, at a minimum, should have made Plaintiffs aware that, to meet their burden of proof, they would have to produce ***something*** by way of evidence of causation.[9] Even if the Court, as the trier of fact, may consider the statements made by Defendants outside the trial as judicial admissions, it still must make a threshold inquiry into whether the statements in question are of sufficient quality and consistency to be considered as evidence.[10]

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[7] *Blinder, Robinson & Co. Inc. v. Bruton*, 552 A.2d 466, 474 (Del. 1989).
[8] *Lillis, et. al. v. AT&T Corp*., 896 A.2d. 871 (Del.Ch. 2005).
[9] Plaintiffs also did not plead or argue *res ipsa loquitor* as to this issue.
[10] *See, e.g. Ervin v. Vesnaver*, 2000 WL 1211201 (Del. Super.), in which then-Judge Quillen held that a judicial admission in an answer could be binding, but that it would not be equitable in that case to adhere to the rule.

In their interrogatory answers, the Defendants stated they had "no direct knowledge" of the cause of the fire, but that it was their "belief" it was caused by persons unlawfully entering the premises.[11] In his deposition, Mr. Crosse stated that he had a problem with "derelicts" on the property "when they caused the fire."[12] Paragraph 2 of Plaintiffs' motion for summary judgment set forth two separate sentences: That "vagrants were improperly permitted to enter" the Crosse premises, and that the "fire started by the . . . vagrants caused $9,844.70 in damage . . .." In their response to the motion, Defendants denied the first statement, but admitted the second sentence. Finally, in their portion of the Pretrial Conference Worksheet, in the section titled "Nature of the Case," Defendants stated that "[v]agrants entered the building and caused a fire." However, in the portion of the Worksheet in which the parties are to list stipulations and admissions of fact, none are listed.

The purpose of the pretrial conference is to familiarize the litigants with the issues in the case, reduce surprises at trial, and facilitate the overall litigation process.[13] Court of Common Pleas Civil Rule 16(e) provides that once entered as an order of the Court, a pretrial stipulation "shall control the subsequent course of the action unless modified by a subsequent order."

However, the Court cannot find that the Defendants' unilateral statement of the nature of the case amounted to a "stipulation" under Rule 16(e). Likewise, the various other statements by the Defendants referring to the cause of the fire are both inconsistent and conclusory. They clearly were based upon assumption and belief, and not upon any personal knowledge or evidence within the

[11] See footnote 5.
[12] See footnote 5.
[13] *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1222 (Del. 1989).

possession of either party. For all of the foregoing reasons, the Court holds that Defendants' various statements made in pretrial filings and discovery are not judicial admissions. Without a judicial admission, the Plaintiffs' case as presented at trial fails on the element of causation. Therefore, the Court need not make a finding on whether or not Defendants boarded up their vacant property.

CONCLUSION

The Plaintiffs have failed to meet their burden of going forward with the evidence, let alone their burden of proof, as to the causation of the fire. Even if the Court were to find that Defendants were negligent *per se* in failing to board up their vacant building in accordance with Wilmington ordinances, there is no evidence that anyone entered the building as a result of such failure by Defendants and then started the fire that ultimately caused damage to Plaintiffs. The Defendants' assumption and belief, stated in pretrial proceedings and pleadings, that unknown persons entered the building and started the fire are inconsistent, speculative and not based upon any apparent personal knowledge or investigative evidence possessed by anyone. The Court therefore finds the quality of such speculative statements insufficient to be considered a judicial admission. Judgment is entered against the Plaintiffs, and in favor of the Defendants. Costs are assessed against Plaintiffs.

IT IS SO ORDERED, this ____ day of June, 2007.

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Kenneth S. Clark, Jr.
Judge