CITATION: Salman v. Desai et al., 2015 ONSC 878
COURT FILE NO.: CV-11-15980
DATE: 2015/02/ 06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Tony Salman	M. Pathak for the plaintiff
Plaintiff	
- and -	
Shilaben Desai and Hitendra Desai (also known as Hitendrabhai Desai) carrying on business as The Innkeeper Motel	N. Tahir for the defendants
Defendants	
	HEARD: December 1, 2014 at Windsor

Mitchell J.:

Overview

[1] Pursuant to Rule 20 of the *Rules of Civil Procedure,* the defendants seek summary judgment dismissing the plaintiff's claim for damages arising from a slip and fall on the defendants' property.

[2] A preliminary issue arose with respect to the admissibility of the responding affidavit of Leza Yaldo. Defendants' counsel argued that Ms. Yaldo's affidavit was served on November 26, 2014 long after service of the motion record on June 27, 2014.

[3] Plaintiff's counsel was unable to provide a satisfactory reason for the delay in serving responding material, including the affidavit of Ms. Yaldo.

[4] Should I decide to admit the evidence of Ms. Yaldo on the motion, defendants' counsel asks that the defendants be permitted to call *viva voce* evidence in response.

[5] I did consider the evidence of Ms. Yaldo on the motion; however, for the reasons which follow, I grant the defendants' summary judgment therefore making the issue of the admissibility of Ms. Yaldo's evidence moot and the calling of reply evidence unnecessary.

Background

[6] The defendants are the owners of 2098 Division Road in Windsor, Ontario (the "property"). They operate a motel business on the property under the name "The Innkeeper Motel".

[7] On December 1, 2009 sometime between the hours of 11 am and 12 noon, the plaintiff, Tony Salman, rented a room at the Innkeeper Motel with his companion, Ms. Yaldo.

[8] Mr. Salman paid a flat rate of $50 for the room. Mr. Salman and Ms. Yaldo were regular patrons of the motel frequenting the motel 1-2 times per week.

[9] Mr. Salman and Ms. Yaldo were in their room for approximately one-half hour when they decided to leave the motel room to purchase some snacks at a nearby gas station located across the street.

[10] While attempting to get into his motor vehicle, which was parked in the parking lot of the Innkeeper Motel, the plaintiff claims he slipped on a patch of black ice measuring 1 foot by 1 foot and suffered permanent and serious injuries to his back.

[11] By statement of claim issued February 17, 2011, the plaintiff seeks general and special damages from the defendants totaling $500,000 on account of those injuries. The plaintiff claims the defendants are liable, as owners of the property, for a breach of the duty of care imposed on them under the *Occupiers' Liability Act.*[1]

[12] The defendants defended this claim, examinations for discovery have taken place, a pre-trial was conducted on July 3, 2014 and the matter is scheduled to proceed to trial before a jury in November 2016. The parties estimate the trial will last six weeks.

Position of the Defendants/Moving Parties

[13] Mr. Tahir submits there is no genuine issue requiring a trial for its resolution. He asks that I make any one of three findings which will be sufficient to support granting the defendants' motion for summary judgment. The findings requested are as follows:

(i) Mr. Salman did not fall on the property.

(ii) If Mr. Salman did fall on the property, he did not fall on a patch of ice; rather, he lost his balance getting into his motor vehicle

[1] R.S.O. 1990, c. O.2

(iii) If Mr. Salman did fall on the property and he fell because of the presence of ice, the defendants did not breach the standard of care of an occupier in the circumstances.

[14] In large part, Mr. Tahir's submissions centred around the third issue because it does not require the court to assess credibility in order to make findings of fact; however, defendants' counsel did review the evidence relevant to a consideration of the first two issues at the outset of his submissions.

[15] The defendants submit that the evidence of the plaintiff is not credible and therefore not capable of establishing beyond a reasonable doubt that the plaintiff fell on the property.

[16] The defendants submit that the plaintiff's evidence is replete with inconsistencies which undermine his credibility as follows:

(a) The plaintiff's statement of claim originally pleaded the incident occurred on December 2, 2009 and was subsequently amended to plead the incident occurred on December 1, 2009;

(b) The evidence of Ms. Yaldo differs from the evidence of Mr. Salman with respect to the events which immediately followed the incident. Ms. Yaldo deposed that she returned to the room to leave the key and then called the chiropractor using Mr. Salman's cell phone. Mr. Salman says Ms. Yaldo never left his side and no call was placed to the chiropractor rather they drove directly to the chiropractor from the motel.

(c) On December 14, 2009 the plaintiff reported to the attending physician in the emergency department of Windsor Regional Hospital that he "fell off truck 2 wks ago" and twisted his back.

(d) On December 17, 2009 the plaintiff reported to the attending physician in the emergency room of Windsor Regional Hospital that his injuries were caused from twisting the wrong way 18 days prior getting out of a truck.

(e) On December 23, 2009 the plaintiff reports to Dr. Sharmisa, the attending physician at Hotel-Dieu Grace Hospital, that his back was injured 9 years ago and most recently 9 days ago when he climbed into a truck at which point he felt pain in lumbar area.

(f) On January 13, 2010 the plaintiff reports to his family doctor that he fell off a truck on December 1, 2009.

[17] On 5 separate occasions, the plaintiff failed to report to attending medical professionals that his back injuries were caused by slipping and falling on a patch of ice located on the property. Furthermore, the plaintiff has inconsistently identified the date of the incident.

[18] The defendants point to the evidence of the plaintiff which is inconsistent with a fall on the property as follows:

(a) The plaintiff had no difficulty getting out of the car and traversing the parking lot to go to the motel room.

(b) The plaintiff did not observe any ice prior to the incident.

(c) Following the incident, the plaintiff did not notify the defendants, did not call an ambulance and did not seek treatment at a hospital.

(d) The first time the plaintiff attended at a hospital complaining of acute lower back pain was two weeks following the alleged incident.

(e) The plaintiff returned to the Innkeeper Motel and rented a room following the incident without advising the defendants or either of them of the incident on December 1, 2009.

(f) Despite lying on the ground for approximately 20 minutes in plain view of the motel office, no one recalls seeing the plaintiff lying on the ground.

(g) There were no eyewitnesses.

[19] Mr. Tahir submits the plaintiff is not credible and the court, using its enhanced fact-finding powers, is at liberty to find that the fall did not occur on the property.

[20] Mr. Tahir further submits that the expert evidence before the court allows the court to find that no ice was present on the property on December 1, 2009 and thus any fall on the property was caused solely by the plaintiff.

[21] Defendants' counsel then turned to the third issue, namely, whether the defendants met the standard of care.

[22] The defendants do not dispute that as owners of the property they are "occupiers" and that the property constitutes "premises" as those terms are defined in s. 1 of the Act. Accordingly, the defendants are subject to the duty of care imposed by s. 3 of the Act.

[23] The defendants submit that even if the court accepts all of the plaintiff's evidence, there has been no breach of the standard of care. The defendants argue that the inspection and maintenance program in place was a reasonable one and ensured the reasonable safety of Mr. Salman in all of the circumstances.

Position of the Plaintiff/Responding Party

[24] Ms. Pathak submits there is sufficient evidence before me to support a finding that the defendants' liability pursuant to s. 3(1) of the *Occupiers' Liability Act* is a genuine issue requiring a trial for its resolution.

Analysis

[25] Rule 20.04(2)(a) of the *Rules of Civil Procedure* requires the court to grant summary judgment where there is no genuine issue with respect to a claim or defence.

[26] With respect to the Court's powers on a motion for summary judgment, rules 20.04(2.1) and 20.04(2.2.) provide as follows:

> (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:
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> 1. Weighing the evidence.
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> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.
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> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[27] These enhanced powers came into effect in 2010. The Supreme Court of Canada's decision in *Hyrniak v. Mauldin*[2] is the leading case on how these enhanced powers under rule 20 are to be utilized.

[28] Karakatsanis J. writing for the court made the following comments regarding the role of rule 20 as part of a necessary culture shift. She writes[3]:

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
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> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible –

[2] *Hyrniak v. Mauldin*, 2014 SCC 7.
[3] *Ibid* at paras. 27 and 28.

proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] The enhanced powers permit the motions judge to use the summary motion rules as a legitimate alternative means for adjudicating and resolving legal disputes. No longer are the summary judgment rules a highly restrictive tool to weed out only those claims and defences which are clearly unmeritorious.[4]

[30] It is presumed that the judge will use these powers *unless* it is in the interest of justice for them to be exercised only at a trial. Whether or not a trial is required in the interests of justice will be driven by the underlying objective of the rule which is to promote access to justice by ensuring the process is proportional to the dispute.

[31] *Hyrniak* does not alter the well-developed principle that the parties are presumed to have placed before the court all of the evidence relevant to the issues that would be available at trial.[5] The Court may presume that no further and better evidence is available and the record is complete.[6]

[32] *Hyrniak* developed the following approach as summarized by Corbett J. in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (Ont. S.C.J.) at para. 33:

(1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial:

(2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;

(3) if the court cannot grant judgment on the motion, the court should:

(a) decide those issues that can be decided in accordance with the principles described in (2), above;

(b) identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;

(c) in the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.

[33] I will now apply that approach to the case at hand.

[34] Whether or not the plaintiff fell on the property and whether or an ice patch located on the property caused the plaintiff's fall are triable issues. Do these issues require a trial for their

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[4] *Ibid* at para. 36.
[5] See *Nguyen v. SSQ Life Insurance Co.*, 2014 CarswellOnt 15513 (Ont. S.C.J.) at para 32.
[6] See

determination? To resolve these issues I must assess and determine credibility since there is contradictory evidence relevant to these issues in the record before me.

[35] I have serious misgivings with respect to the credibility of the plaintiff given the numerous inconsistencies in his evidence and the lack of corroborating evidence; however, I am able to summarily dispose of this action without assessing Mr. Salman's credibility.

[36] I am able to decide this motion focusing only on the third issue. To decide whether or not the defendants met the standard of care of occupiers of the property does not require me to use my enhanced powers. I do not need to make findings of credibility. On the record before me I am able to resolve this issue without the time and expense of a six-week trial.

[37] For purposes of determining whether the defendants, as occupiers, met the standard of care, I assume the one foot square patch of ice was present in the parking lot of the property on December 1, 2009 and that this patch of ice caused the plaintiff to fall and sustain the injuries of which he now complains.

[38] Section 3 of the *Occupiers' Liability Act* (the "Act") states as follows:

> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[39] Section 3(1) does not contemplate a standard of perfection. It does not envision strict liability.[7] Articulated another way, the duty under s. 3(1) of the Act is not absolute. Occupiers are not insurers.[8]

[40] Mr. Desai deposed that the parking lot is approximately 3861 square feet. The presence of a small[9] patch of ice, in and of itself, does not amount to a breach by a defendant of the duty set out in the Act.

[41] The statutory standard of care for occupiers is one of reasonableness. It requires neither perfection nor unrealistic or impractical precautions against known risks.[10]

[42] The positive or affirmative duty that is imposed upon the defendant does not extend to the removal of every possible danger. It does not require a defendant to maintain a constant surveillance or lookout for potential danger. A defendant meets its duty to take reasonable care if it takes measures that are *reasonable in the circumstances*.[11](emphasis added)

[43] What were the circumstances with which the defendants were faced on December 1, 2009? The defendants' expert, Dr. Michael P. Morassutti, opined that the parking lot surface on

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[7] See *Lortie v. Hastings (Quinte West Daycare)*
[8] *Waldick et al. v. Malcolm et al.* (1989), 70 O.R. (2d) 1717 (C.A.) at para 19.
[9] Relative to the overall size of the area in question.
[10] *Miltenberg v. Metro Inc.*, 2012 ONSC (1063) (CanLII) at para. 21.
[11] *Lortie v. Hastings (Quinte West Daycare)*, 2008 CanLII 54319 (ONSC) at para. 50.

the property was not conducive to ice formation on December 1, 2009 as air temperatures were well above the freezing level from November 30 through December 2, 2009.[12]

[44] Dr. Morassutti further opined that there would have been no snow which could have melted and frozen into ice because there was no snow on the ground from November 30 through December 2, 2009[13]

[45] Dr. Morassutti noted that weather forecasts issued by Environment Canada captured temperature and precipitation conditions for the Windsor area on December 1 and 2, 2009. Nothing in those forecasts suggested subzero temperature conditions for either of these days. Furthermore, no weather warnings or watches were issued for Windsor advising of impending weather conditions which might lead to surface ice formation. In the opinion of Mr. Morassutti given these weather conditions and forecasts, a reasonable person would not have anticipated an inclement weather event on December 1 or 2, 2009 and, further, no extra caution or care would have been expected in terms of snow/ice maintenance.

[46] The property is located in Southwestern Ontario. Snow and ice are regular and frequent visitors to the area during the winter months. In order to meet the standard of care imposed by the Act, the defendant is required to have in place an inspection and maintenance program to ensure the safety of persons on the property during the winter months.

[47] Mr. Desai deposed to his practice for the inspection and maintenance of the property as follows:

(a) He inspected the property, including the parking lot, each day by walking around the parking lot and premises of the Innkeeper Motel.

(b) He maintained a constant supply of salt to use on the premises and parking lot when ice and snow were detected during his daily inspection.

(c) He purchased salt from Home Depot located across the street from the Innkeeper Motel.

(d) He retained the services of an individual by the name of Bill Donison to provide ice and snow removal and salting services on the property including the parking lot on an "on call" and "as needed" basis.

(e) Mr. Donison would shovel around any parked vehicles located in the parking lot and spread salt around the vehicles in the parking lot.

(f) Mr. Donison was paid $40 cash per visit for his plowing and salting services..

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[12] Tab 4, Motion Record of the Defendants, Affidavit of Dr. Michael P. Morassutti sworn June 16, 2014 at para. 8(a).

[13] Dr. Morassutti noted that there was a brief snow shower during the early morning of December 1, 2009; however it only prod8uced a trace amount, if any, snow.

[48] No evidence was before me that Mr. Desai or Mr. Donison, plowed and/or salted the parking lot on December 1. 2009. I have assumed therefore for purposes of this motion that neither of them salted the parking lot on December 1, 2009 prior to the incident.

[49] Based on the evidence of Dr. Morassutti, it was reasonable for them not to have salted the parking lot on December 1, 2009 since the forecast did not call for any snow or ice the day prior to or the day following December 1, 2009.

[50] Plaintiff's counsel urges me to find that the evidence of the defendants with respect to Mr. Desai's practices for maintaining the property and ensuring it was reasonably clear of snow and ice, is insufficient to establish the defendants have met the standard of care and thus a trial is required to determine that issue.

[51] She points to the lack of independent supporting documentation in the form of a log confirming the evidence given by Mr. Desai in both his affidavit filed in support of this motion and at examination for discovery.[14]

[52] She asked me to infer from the absence of such a log that Mr. Desai is not telling the truth and that Mr. Desai's evidence is not credible. Ms. Pathak did concede that if it was established the inspection and maintenance program deposed to by Mr. Desai was in fact in place, it was sufficient to meet the standard of care.

[53] Curiously, the plaintiff chose not to cross-examine Mr. Desai with respect to his snow clearing and salting practices. As was noted earlier in these reasons, it is presumed that all evidence which would be available at trial is before me on this motion. The defendants' evidence is not tested. The defendants' evidence is undisputed. There is no other evidence which would cause me to question the veracity of the defendants' evidence.

[54] Turning now to the expert evidence. The plaintiff relies on the affidavit evidence of Mr. DeBiase to challenge the reliability of Dr. Morassutti's evidence.

[55] In my view, Mr. DeBiase goes beyond the bounds of proper affidavit evidence when he challenges the assumptions relied upon by Dr. Morassutti. He challenges the opinions of Dr. Morassutti on the basis he did not consider the actual temperature of the ground or the unique geographical features of the motel property. Mr. Debiase also challenges the report because he says Dr. Morassutti failed to mention or analyze weather conditions in the days leading up to December 1, 2009 and how this might impact the formation of ice on the motel parking lot.[15]

[56] Mr. DeBiase is the plaintiff's lawyer. Mr. DeBiase is not an expert witness. His affidavit evidence with respect to matters opined on by Dr. Morassutti is inadmissible. Mr. DeBiase is not qualified to give evidence as to the effect of weather conditions on ice formation on the property on December 1, 2009.

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[14] The transcript from the examination for discovery of Mr. Desai was not before me on the motion.

[15] Tab 2, Responding Party's Motion Record, Affidavit of Michael DeBiase sworn November 24, 2014 at para. 24.

[57] If the plaintiff sought to challenge the qualifications and opinions of Dr. Morassutti, the plaintiff should have cross-examined Dr. Morassutti. Without a responding expert's report and without evidence of Dr. Morassutti from cross-examination, we are left with the findings and opinions of Dr. Morassutti contained in his report. That evidence is unchallenged and uncontradicted. Based on my review of the curriculum vitae of Dr. Morassutti I am satisfied he is qualified to give evidence in respect to the matters contained in his report.[16]

[58] The responding party on a motion for summary judgment must "play trump" or risk losing and must demonstrate that its case has a real chance of success at trial. In responding to this motion, a self-serving affidavit containing bald allegations or denials will not create a triable issue and "the Court must be scrupulous in assessing the *bona fides* of so called credibility disputes and ensure that any such dispute constitutes a genuine issue for trial.[17]

[59] At trial, the plaintiff has the burden of proving on a balance of probabilities that the defendants breached the standard of care. On the record before me, there is no evidence of a breach of standard of care by the defendants. Accordingly there is no genuine issue requiring a trial of that issue.

Order and Costs

[60] Summary judgment is granted. This action is dismissed with costs of the action payable by the plaintiff to the defendants in an amount to be agreed and, absent agreement, as assessed.

[61] The defendants are entitled to their costs of this motion. They seek costs on a partial indemnity basis in the amount of $6,921.98 which amount is less than the amount the plaintiff was seeking had he been successful on the motion. Therefore, I find the amount sought by the defendants to be fair and reasonable.

[62] The plaintiff shall pay to the defendants their costs of this motion in the amount of $6,921.98 inclusive of disbursements and HST.

Justice A.K. Mitchell

Released: February 6, 2015

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[16] Dr. Morassutti is an "Accredited Consulting Meteorologist" and a Member of the Canadian Society of Forensic Science. Dr. Morassutti signed an Acknowledgement of Expert's Duty as required by subrule 53.03(1) and (2) of the *Rules of Civil Procedure.*

[17] *Khabouth v. Nuko Investments Ltd.,* 2013 ONSC 2159, aff'd *Khabouth v. Nuko Investments Ltd,* 2013 ONCA 671 at para 37.