COURT OF APPEAL FOR ONTARIO

CITATION: Miaskowski v. Persaud, 2015 ONCA 758
DATE: 20151109
DOCKET: C60285 and C60308

Cronk, Pepall and Lauwers JJ.A.

BETWEEN

DOCKET: C60285

Phil Miaskowski, Owen Miaskowski, Eric Miaskowski
and Zachary Bell, minors by their
litigation guardian, Phil Miaskowski

Plaintiffs/Appellants

and

Dustaff Persaud and Terrence Catney

Defendants/Respondents

AND BETWEEN

DOCKET: C60308

Phil Miaskowski, Owen Miaskowski, Eric Miaskowski
and Zachary Bell, minors by their
litigation guardian, Phil Miaskowski

Plaintiffs/Appellants

and

Dustaff Persaud and Terrence Catney

Defendants/Respondents

B. Robin Moodie and Bronwyn M. Martin, for the appellants

Jonathan Kulathungam, for the respondent Terrence Catney

David Zarek, for the respondent Dustaff Persaud

Heard: October 13, 2015

On appeal from the orders of Justice Paul M. Perell of the Superior Court of Justice, dated March 12, 2015, with reasons reported at 2015 ONSC 1654.

Cronk J.A.:

[1] This litigation arose from a 'slip and fall' accident that occurred in early 2007. On motions by the respondents in the Superior Court of Justice, the motions judge granted summary judgments and dismissed the appellants' action as against both respondents. In separate appeals heard together by this court, the appellants appeal from the motions judge's orders. These reasons address both appeals.

I. Background in Brief

[2] On February 28, 2007, the appellant, Phil Miaskowski, slipped and fell on ice and snow on the driveway of a single-family residential property located at 70 Jingle Crescent in Brampton (the "Property").

[3] The accident occurred while Mr. Miaskowski was going to work. At the time, he was employed at the Property by Alliance Youth Services Inc.

("Alliance") as a caregiver for a young boy. Steven Catney ("Mr. Catney Jr."), a friend of Mr. Miaskowski and the son of the respondent, Terrence Catney ("Mr. Catney Sr."), owned and operated Alliance, which carried on business at the Property.

[4] The Property was owned by the respondent, Dustaff Persaud, who resided in the State of New York. On February 2, 2007, shortly before the accident, Mr. Persaud, as landlord, had entered into a written residential lease with Mr. Catney Sr., as tenant, in respect of the Property (the "Lease"). Schedule "A" to the Lease provides in part:

> *The Tenant* shall keep the lawns in good condition and shall not injure or remove the shade trees, shrubbery, hedges or any other tree or plant which may be in, upon or about the premises, *and shall keep the sidewalks in front and at the sides of the premises free of snow and ice*. [Emphasis added.]

[5] The Lease contains no express provision assigning responsibility for the removal of snow and ice from the driveway, or for general winter maintenance, at the Property.

[6] Mr. Miaskowski retained counsel in respect of the accident in April 2007.

[7] On January 24, 2008, Mr. Miaskowski commenced an action against Mr. Persaud, seeking damages for personal injuries allegedly sustained by him in the accident. He did not sue Alliance or Mr. Catney Jr. Mr. Miaskowski claimed that Mr. Persaud had breached his duty of care as an occupier or owner of the

Property under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "*OLA*") and, further, that he had breached a common law duty of care owed to Mr. Miaskowski by failing to take any steps to ensure that the Property was safe from ice and snow conditions.

[8] On September 23, 2009, Mr. Persaud's lawyer wrote Mr. Miaskowski's lawyer, informing him that Mr. Catney Sr. was a tenant of the Property and suggesting that Mr. Catney Sr. be added as a co-defendant in the action.

[9] Approximately five and one-half months passed. On March 9, 2010, about three years after the accident, Mr. Miaskowski delivered an amended statement of claim in which he added Mr. Catney Sr. as a co-defendant. Even then, Mr. Miaskowski did not seek to sue Alliance or Mr. Catney Jr.

[10] Mr. Miaskowski was examined for discovery in mid-February 2011. He admitted on his discovery that, at the time of the accident, he knew: Alliance occupied the Property but did not own it; Alliance was owned by his friend Mr. Catney Jr.; and the Property was rented.

[11] On December 18, 2013, Mr. Persaud commenced third party proceedings against Mr. Catney Jr. and Alliance, seeking contribution and indemnity from them for any damages for which he might be held responsible in the main action, on the basis that they were liable as occupiers of the Property for breach of duties of care owed under the *OLA*.

[12] In due course, Mr. Persaud and Mr. Catney Sr. both moved for summary judgment in the main action, as did Mr. Catney Jr. and Alliance in the third party proceedings commenced by Mr. Persaud. The motions were heard together on March 5, 2015. For differing reasons, the motions judge granted all three motions. He dismissed the action as against both respondents, as well as the third party claim. His latter ruling is not at issue on this appeal.

II. The Catney Appeal

[13] In his statement of defence, Mr. Catney Sr. acknowledged that he was an occupier of the Property, within the meaning of the *OLA*, at the time of the accident. However, he pleaded that Mr. Miaskowski's claim as against him was statute-barred due to the expiry of the applicable two-year limitation period under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. (the "*Limitations Act*"). He advanced the same argument in support of his summary judgment motion.

[14] The motions judge agreed. He held that, on February 28, 2007 – the date of the accident – Mr. Miaskowski knew that the Property was rented and that he had a "certain claim" against the tenant of the Property. In these circumstances, by operation of s. 5(2) of the *Limitations Act*, he was presumed to have known that he had a claim against the tenant of the Property within the meaning of s. 5(1)(a) of the statute on the day his injury had occurred, unless he led evidence

rebutting this statutory presumption of the date on which he had discovered his claim.

[15] The motions judge went on to hold that Mr. Miaskowski had failed to rebut the presumption that he had learned of his claim on February 28, 2007. Mr. Miaskowski led no evidence establishing that he or his lawyer were reasonably diligent in attempting to identify the proper defendants to his claim, or to explain why they were unable to do so on a timely basis. The effect of this finding was that the limitation period began to run on February 28, 2007 and expired on February 28, 2009, well before the commencement of the action against Mr. Catney Sr. on March 9, 2010.

[16] In these circumstances, the motions judge concluded that there was no genuine issue requiring a trial concerning the question whether Mr. Miaskowski's action as against Mr. Catney Sr. was statute-barred. He, therefore, granted summary judgment in favour of Mr. Catney Sr. and dismissed the action as against him.

[17] The appellants challenge this ruling on three bases. They argue that the motions judge erred: i) by concluding that this was an appropriate case for summary judgment; ii) by failing to properly apply the doctrine of discoverability; and iii) by finding that, if Alliance and Mr. Catney Jr. had been named originally as defendants in the main action, Mr. Miaskowski and his counsel would have

discovered promptly that Mr. Catney Sr. should have been named as a defendant in the action.

[18] I would reject these arguments.

[19] First, in my view, the motions judge did not err in concluding that this was an appropriate case for summary judgment in respect of the claim advanced against Mr. Catney Sr.

[20] The motions judge considered the governing principles regarding summary judgment motions set out by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Having addressed these principles, he concluded that he was positioned to fairly and justly adjudicate the limitation period dispute without the need for employing his expanded powers under r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and that a summary judgment would afford a timely and proportionate procedure for resolution of the action against Mr. Catney Sr. I agree.

[21] At the time of the summary judgment motion, the facts relating to the limitation period dispute were known and essentially uncontroversial. Contrary to the appellants' submission, no serious credibility issues regarding the limitation period issue arose on the record. As acknowledged by the appellants at the appeal hearing, the matters said by them to raise material credibility issues

pertain to questions of law or matters peripheral to the controlling issue, namely, when the applicable two-year limitation period began to run.

[22] Section 5(2) of the *Limitations Act* provides:

> A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[23] Sections 5(1)(a) and (b) of the *Limitations Act* read:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[24] Section 5(2) creates a presumption that a claimant acquired knowledge of his or her claim on the date the act or omission on which the claim is based took place. In this case, by reason of s. 5(2), in the absence of evidence to the

contrary, Mr. Miaskowski was presumed to have discovered the material facts on which his claim against Mr. Catney Sr. was based on the day that the accident took place: *Placzek v. Green*, 2009 ONCA 83, 307 D.L.R. (4th) 441, at para. 23.

[25] Further, this court held in *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 42:

> A plaintiff is required to act with due diligence in determining if he has a claim. A limitation period will not be tolled while a plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a) [of the *Limitations Act*]. While some action must be taken, the nature and extent of the required action will depend on all of the circumstances of the case.

[26] And it is here that the appellants' challenge to the motions judge's ruling regarding the action against Mr. Catney Sr. founders. The appellants led no evidence in response to Mr. Catney Sr.'s summary judgment motion outlining any efforts undertaken by them or on their behalf to determine the identity of the tenant at the Property. Yet Mr. Miaskowski, by his own admission on discovery, knew on the date of the accident that the Property was rented. Similarly, the appellants failed to adduce any evidence explaining why Alliance, Mr. Miaskowski's employer, was not sued although Mr. Miaskowski knew it occupied, but did not own, the Property.

[27] A party opposing a summary judgment motion is obliged to put his or her 'best foot' forward in response to the motion. Further, under s. 5(2) of the *Limitations Act*, the appellants bore the onus of leading evidence to displace the

statutory presumption of the date on which they discovered their claim against Mr. Catney Sr. They failed to do so. Consequently, they failed to satisfy their obligation to establish why, with the exercise of reasonable diligence, they could not have discovered the identity of the actual tenant of the Property prior to the expiry of the applicable limitation period.

[28] In these circumstances, I agree with the motions judge's conclusion, at para. 77, that the appellants did not meet "the relatively low threshold of showing that [they] could not, through reasonable diligence, have discovered [their] claim on the day the act or omission on which the claim is based took place", as contemplated under s. 5(2) of the *Limitations Act*.

[29] I appreciate that the appellants argue that the motions judge erred by finding, at paras. 75 and 78, that if normal inquiries had been made by Mr. Miaskowski or his lawyers, and if Mr. Catney Jr. and Alliance had been sued at the outset, "in relatively short order, [Mr. Miaskowski] would have discovered all of the parties, including [Mr. Catney Sr.] should have been defendants to the action". The appellants submit, in effect, that the motions judge either ignored or discounted evidence that Mr. Catney Jr. had falsified the Lease by entering into it in his father's name and by signing his father's name to the Lease.

[30] In my view, nothing turns on this issue for the purpose of this appeal. Regardless of the arrangements agreed upon by Mr. Catney Sr. and his son

concerning the contents and execution of the Lease, the appellants led no evidence that these arrangements misled or prevented them from discovering the identity of the tenant of the Property. Simply put, there was no evidence before the motions judge regarding *any* efforts by the appellants or their counsel to ascertain the identity of the tenant prior to the expiry of the limitation period.

[31] Moreover, even after Mr. Persaud's lawyer informed the appellants' counsel, in September 2009, that Mr. Catney Sr. should be added as a party defendant to the main action, the appellants did not join him in the proceeding for almost five and one–half months. This, too, belies any suggestion of reasonable diligence by the appellants in attempting to identify the tenant of the Property.

[32] For these reasons, I would dismiss the appeal from the motions judge's order granting summary judgment in favour of Mr. Catney Sr. and dismissing the action as against him.

III. The Persaud Appeal

[33] I reach a different conclusion, however, regarding the appellants' appeal from the summary judgment granted to Mr. Persaud.

[34] As I have said, Mr. Miaskowski claims that Mr. Persaud, either as an occupier or as the owner of the Property, breached his duties under the *OLA* and at common law to take reasonable care to ensure that the Property was reasonably safe for use and clear of ice and snow.

[35] As framed, these claims engage the interplay between the provisions of the *OLA* and the statutory duties imposed on landlords and tenants under the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (the "*RTA*").

[36] With respect to the *OLA*, the appellants' claims against Mr. Persaud implicate ss. 1, 3, 6, 8 and 9 of the *OLA*, among other provisions of that statute. Section 1 defines the term "occupier". Section 3(1) provides:

> 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.

[37] Under s. 6 of the *OLA*, an occupier may avoid liability for damage caused by the negligence of an independent contractor employed by the occupier, in certain circumstances.

[38] Section 8 of the *OLA* sets out the obligations of a landlord in respect of rented premises where the landlord is responsible for the maintenance or repair of the premises. Section 8(1) reads:

> Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.

[39] Finally, s. 9 of the *OLA* provides that nothing in the statute relieves an occupier from "any higher liability or any duty to show a higher standard of care" arising from "any enactment or rule of law imposing special liability or s andards of care" on landlords, amongst others.

[40] Thus, by reason of s. 9 of the *OLA*, the duties imposed on landlords under the *RTA* and associated regulations are also in play, in addition to those provisions of the *OLA* that impose duties on occupiers or landlords of property. Section 20(1) of the *RTA* stipulates:

> 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.

[41] Further, s. 26(1) of O. Reg. 517/06, enacted under the *RTA* and entitled "Maintenance Standards" (the "Regulation"), states:

> *Exterior common areas shall be maintained in a condition suitable for their intended use and free of hazards and, for these purposes, the following shall be removed*:
>
> 1. Noxious weeds as defined in the regulations to the *Weed Control Act*.
> 2. Dead, decayed or damaged trees or parts of such trees that create an unsafe condition.
> 3. Rubbish or debris, including abandoned motor vehicles.
> 4. Structures that create an unsafe condition.

5. *Unsafe accumulations of ice and snow.*

[Emphasis added.]

[42] The motions judge concluded that Mr. Miaskowski's claims against Mr. Persaud, including those involving issues related to the application of the relevant provisions of the *OLA* and the *RTA*, were appropriate for and capable of resolution by means of summary judgment.

[43] In so concluding, the motions judge considered various pertinent statutory provisions and several decisions of this court regarding the *OLA* and a predecessor statute to the *RTA*. Having done so, he held that there was no genuine issue requiring a trial because: i) Mr. Persaud was not an "occupier" within the meaning of the *OLA* and was not liable under s. 8 of the *OLA*; ii) no specific provision of the *RTA* was inconsistent with the terms of the Lease; iii) no breach of Mr. Persaud's obligations as a landlord under s. 20 of the *RTA* had been demonstrated; and iv) since the *OLA* supersedes common law liability for occupiers, and Mr. Persaud was not an occupier, there was no basis for any finding of liability in negligence at common law against Mr. Persaud.

[44] The motions judge, therefore, granted summary judgment in favour of Mr. Persaud and dismissed the action as against him.

[45] With respect, it is my view that, on the record before him, the motions judge erred in granting Mr. Persaud's summary judgment motion. Even

assuming that the claims advanced against Mr. Persaud were appropriate for resolution by means of summary judgment, I do not agree that no genuine issue requiring a trial arises in respect of those claims. I say this for the following reasons.

[46] The appellants' action against Mr. Persaud requires consideration of the scope and effect of the tenant's obligations under the Lease, the landlord's and the tenant's obligations under the *RTA* and associated regulations, and the nature of Mr. Persaud's duties under the *OLA*, in respect of the Property. This, in turn, necessitates consideration of the interrelationship between the *RTA* and the *OLA*. In my opinion, the motions judge failed to address several key aspects of this amalgam of relevant considerations.

[47] First, the appellants argue that Mr. Persaud was bound by a continuing maintenance obligation in respect of the Property under s. 20(1) of the *RTA* and s. 26(1) of the Regulation. Section 26(1) of the Regulation imposes obligations on residential landlords to maintain "exterior common areas" and to remove unsafe accumulations of ice and snow, among other matters.

[48] The respondents submit that, as the Property was a single-family home, s. 26(1) of the Regulation does not apply as the driveway at the Property was not an "exterior common area".

[49] The motions judge held that no "specific provision" of the *RTA* was inconsistent with the terms of the Lease. However, based on his reasons, it is unclear that he considered whether the maintenance standards imposed by s. 26(1) of the Regulation applied in this case and whether the landlord's statutory duty under s. 20(1) of the *RTA* could be removed by the Lease, in particular, in light of this court's decisions in *Montgomery v. Van*, 2009 ONCA 808, 256 O.A.C. 202 and *Taylor v. Allen*, 2010 ONCA 596, 325 D.L.R. (4th) 761.

[50] By failing to address these matters, the motions judge erred in principle. Whether Mr. Persaud was freed of any obligations he might have under s. 20(1) of the *RTA* by reason of the Lease, and whether the maintenance standards set out in s. 26(1) of the Regulation apply in this case, are genuine issues requiring a trial.

[51] Second, the scope of the tenant's snow and ice removal obligation under Schedule "A" to the Lease and the landlord's obligations under s. 8 of the *OLA* are central issues in relation to the appellants' claims against Mr. Persaud. While the motions judge referred to the tenant's maintenance obligation under Schedule "A" to the Lease, he failed to address the pivotal language in the Schedule, which refers only to snow and ice on the sidewalks in front and at the sides of the Property, and not to hazards *on the driveway* where the accident occurred.

[52] The scope of the tenant's maintenance obligation under Schedule "A" to the Lease is critical to the issue of Mr. Persaud's potential liability under s. 8 of the *OLA*. As this court explained in *Taylor*, at para. 12:

> Second 8(1) imposes a duty of care on the landlord to any person coming on to the property where the premises are occupied under a tenancy in which the landlord is responsible for the maintenance or repair of the property. *This section applies whether or not the landlord is found to be an occupier.* Section 8(2) adds a second requirement, namely, that only if the landlord's default is such as to be actionable at the suit of the tenant will the landlord's default constitute a breach of the landlord's duty under s. 8(1). [Emphasis added.]

[53] Thus, the question whether the tenant was responsible under the Lease for removal of snow and ice hazards on the driveway of the Property, as opposed to the sidewalks, is integral to the issue of the landlord's potential liability under s. 8 of the *OLA* regardless of whether the landlord was an occupier of the Property. In these circumstances, the scope of the tenant's maintenance obligation under the Lease is a genuine issue requiring a trial.

[54] Third, the *RTA* imposes specific responsibilities on tenants of residential properties in some circumstances. Section 33 of the *RTA*, for example, provides that tenants are responsible for the ordinary cleanliness of their rental unit, except to the extent that the applicable tenancy agreement requires the landlord to clean it. It is arguable that, in this case, as in *Estey v. Sannio Construction Co.* (1998), 70 O.T.C. 293 (Ont. C.J. (Gen. Div.)), s. 33 of the *RTA* imposes an

obligation on the tenant to remove snow. That said, I note that, in *Estey*, this finding rested in part on evidence that the tenant had removed snow and ice from the rented property in the past and believed that it was the tenant's obligation to do so.

[55] In this case, neither the parties nor the motions judge addressed the potential application of those provisions of the *RTA* that deal with tenants' responsibilities in relation to residential properties in light of the terms of the Lease, the intentions of the parties and any evidence about who, in fact, removed snow from the driveway at the Property. In these circumstances, whether the tenant, rather than the landlord, had contractual or statutory responsibility for the removal of snow and ice *on the driveway* of the Property is a genuine issue requiring a trial.

[56] Accordingly, for the reasons given, I would allow the appeal from the motions judge's order granting summary judgment in favour of Mr. Persaud and dismissing the action as against him, set aside his order dated March 12, 2015 regarding Mr. Persaud, and reinstate the action as against him.

IV. Costs

[57] The respondent, Mr. Catney Sr., is entitled to the costs of the Catney appeal, while the appellants are entitled to the costs of the Persaud appeal. I would fix Mr. Catney's costs in the amount of $12,000, inclusive of

disbursements and all applicable taxes, as agreed by the parties. I would fix the appellants' costs of the Persaud appeal in the amount of $10,000, inclusive of disbursements and all applicable taxes, also as agreed by the parties.

Released: NOV - 9 2015

E.A.C.

E.A. Cronk J.A.

I agree. K.M. Pepall J.A.

I agree P. Lauwers J.A.