2012 ONSC 782
Ontario Superior Court of Justice

Soomre (Litigation Guardian of) v. P.A. Ramey Enterprises Ltd.

2012 CarswellOnt 1242, 2012 ONSC 782, [2012] O.J. No. 411, 16 R.P.R. (5th) 164, 212 A.C.W.S. (3d) 694

Annalise Marie Soomre and Alyssa Dianne Soomre, minors by the Litigation Guardian, Annett Soomre, and the said Annette Soomre personally, Plaintiffs and P.A. Ramey Enterprises Ltd., Port Perry Sobeys and Sobeys Capital Inc. and/or Sobeys Capital Incorporated, Defendants

J.E. Ferguson J.

Heard: January 17, 2012
Judgment: February 1, 2012 *
Docket: Oshawa 61255/09

Counsel: Melissa McCormick, for Plaintiffs
Kendall Cumming, for Defendants, Port Perry Sobeys, Sobeys Capital Inc., Sobeys Capital Incorporated
W. Joanne Horton, for Defendant, P.A. Ramey Enterprises Ltd.

Subject: Civil Practice and Procedure; Torts; Property

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff, pregnant with twins, was walking in parking lot of defendant store when she tripped and fell due to pothole — Plaintiff commenced action, alleging twins might have suffered developmental problems as result of premature birth — Leasing agreement between store and co-defendant landlord identified party responsible for care and maintenance of parking lot — Landlord admitted responsibility for maintaining parking lot — Store brought motion for summary judgment dismissing claim as against it — Motion dismissed — Genuine issue existed for trial — Store was occupier pursuant to Occupiers' Liability Act — Leasing agreement dealt with parking lot, but details were not specified and were silent with respect to timing of inspections and specific requirements to ensure that landlord was competent to carry out repair and maintenance of parking lot — Store was present at location of trip and fall each day — There remained responsibility on each party to ensure that property was being maintained in proper manner — Court cannot allow occupier to avoid its responsibilities under Act by not paying attention to maintenance practices of co-occupier — To qualify for defence under s. 6(1) of Act, store should have done more to satisfy itself that landlord was acting in proper and competent manner — Mere assignment of responsibility to maintain parking lot was not enough to discharge occupier of its responsibility to patrons.

Torts --- Negligence — Occupiers' liability — Duties and obligations — General principles

Plaintiff, pregnant with twins, was walking in parking lot of defendant store when she tripped and fell due to pothole — Plaintiff commenced action, alleging twins might have suffered developmental problems as result of premature birth — Leasing agreement between store and co-defendant landlord identified party responsible for care and maintenance of parking lot — Landlord admitted responsibility for maintaining parking lot — Store brought motion for summary judgment dismissing claim as against it — Motion dismissed — Genuine issue existed for trial — Store was occupier pursuant to Occupiers' Liability Act — Leasing agreement dealt with parking lot, but details were not specified and were silent with respect to timing of inspections and specific requirements to ensure that landlord was competent to carry out repair and maintenance of parking lot — Store was present at location of trip and fall each day — There remained responsibility on each party to ensure that property was being maintained in proper manner — Court cannot allow occupier to avoid its responsibilities under Act by not paying attention to maintenance practices of co-occupier — To qualify for defence under s. 6(1) of Act, store should have done more to satisfy

itself that landlord was acting in proper and competent manner — Mere assignment of responsibility to maintain parking lot was not enough to discharge occupier of its responsibility to patrons.

MOTION by defendant store for summary judgment dismissing plaintiff's slip and fall claim as against it.

***J.E. Ferguson J.*:**

Nature of the Motion

1 The defendant, Port Perry Sobeys and Sobeys Capital Inc. and/or Sobeys Capital Incorporated ("the defendant") brings this motion for summary judgment dismissing the claim as against it on the basis that there is no genuine issue requiring a trial.

The Facts

2 This action arises as a result of a trip and fall incident in the parking lot outside the Port Perry Sobeys ("Sobeys") on or about May 29, 2007 ("the incident").

3 The plaintiff, Annette Soomre ("Soomre"), was walking in the parking lot when she tripped and fell to the ground due to a pothole. At the time of the incident, she was pregnant with twins who were delivered prematurely. It is alleged in the claim that the twins may have suffered developmental problems as a result of premature birth.

4 There is a leasing agreement between the defendant and P.A. Ramey Enterprises Ltd. ("the co-defendant") wherein the party responsible for the care and maintenance of the parking lot is identified.

5 The co-defendant was examined for discovery on September 13, 2010 and admitted its responsibility to maintain the parking lot. Further, the representative of the co-defendant acknowledged that he had a system of inspection in place regarding the repair and maintenance of the property and that he would have carried out this procedure in April, 2007, several weeks before this incident.

6 The co-defendant takes no position with respect to this motion.

The Law

7 The parties are in agreement as to the law which now governs summary judgment motions.

8 On December 5, 2011, the Court of Appeal released the reasons on five Appeals concerning the amendments made to the *Rule 20 Summary Judgment Rules*. The seminal case is *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.).

9 The Court of Appeal identified three types of cases that are amenable to summary judgment:

(i) Where the parties agree that it is appropriate to determine an action by way of Motion for Summary Judgment;

(ii) Where the Claims or Defences are shown to be without merit;

(iii) Where the Trial process is not required in the interest of Justice.

10 The Court of Appeal further confirmed that a judge hearing a motion for summary judgment may weigh evidence, evaluate the credibility of the deponent, and draw any reasonable inferences from the evidence to determine whether or not there is a genuine issue requiring a trial with respect to a claim or defence.

11 In determining whether or not there is a genuine issue for trial, the motions judge must ask the following question: Can the full appreciation of the evidence and issues that is required to make the positive findings be achieved by way of summary judgment or can this full appreciation only be achieved by way of trial?

12 A motions judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case.

13 The requirement that each side put their best forward with respect to evidence for a summary judgment motion has not been changed under the new amendments.

14 The purpose of the new summary judgment rules is to eliminate unnecessary trials, not to eliminate all trials.

Position of the Parties

15 The defendant submits that this is not a case that requires a full trial to appreciate the evidence and issues in this action. Soomre's position is that this is a case that will require a trial to fully appreciate the evidence and issues.

16 Initially, the defendant was taking the position that it was not an occupier pursuant to the *Occupiers' Liability Act*, R.S.O. 1990 ("O.L.A."). However, it did not proceed with that position at the hearing of the motion. I find for the purpose of the motion, that it is an occupier pursuant to the O.L.A.

17 The following sections of the O.L.A. are applicable:

> 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 reasonable safe while on the premises.
>
> (3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty. R.S.O. 1990, c. O.2, s. 3.
>
> 6.(1) Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

18 There is a leasing agreement between the landlord co-defendant, and the defendant wherein the party responsible for the care and maintenance of the parking lot is identified. The following sections of the Leasing Agreement, dated May 28, 2007, are relevant:

> C. The Tenant exercised its second (2nd) option to renew the Lease for five (5) years from March 9, 2007 to March 8, 2012 (the "2nd Renewal Term") by letter dated September 7, 2006.
>
> **Section 10.01 Maintenance, Repairs, and Replacements by Landlord**
>
> The Landlord, throughout the Term, at its sole cost and expense shall promptly:
>
> (h) keep the Parking Facilities properly drained, paved, lighted and striped, in accordance with good repair and maintenance practice, including repair and replacement when required.
>
> Any repairs or replacements which are required to be carried out by the Landlord in accordance with this Section 10.01 shall be performed as expeditiously and prudently as possible, and so as to cause as little disturbance or interference as possible to the free flow of pedestrian and vehicular traffic, the parking of vehicles, and the business of the Tenant in the Leased Premises. If by reason of any such work, the Landlord shall excavate or otherwise disturb the pavement or other improvements of the Leased Premises or the Parking Facilities, or if such pavement or other improvements shall become undermined, weakened, or damaged as a result of such work, the Landlord shall give the Tenant as much notice as possible

of its intention to do such work and shall settle with the Tenant the best time at which to begin such work, which shall whenever possible, be at times when the Leased Premises are not open for business.

All maintenance, repairs and replacements in respect of the Leased Premises to be performed by the Landlord pursuant to this Lease shall be effected with equivalent materials and workmanship used in, and at least equal to, the original standards of construction for the Leased Premises subject to the then prevailing standards and By-Laws. Except in the case of an emergency, the Landlord shall give to the Tenant as much written notice as possible of its intention to do any such work which might result in interference with access to or visibility of the Leased Premises or with the accessibility of parking in relation to the Leased Premises and shall obtain the prior written consent of the Tenant thereto. Except in the case of an emergency, no major repair or replacement in respect of the Leased Premises shall be done by the Landlord during the period from October 15 in any year to January 15 of the following year except upon receipt of the prior written consent of the Tenant.

Section 10.02 Landlord's Right of Inspection of Leased Premises

The Landlord shall have the right to inspect the Leased Premises under the supervision of the Tenant, at all times during the Tenant's normal business hours. The Landlord may make such repairs, alterations, improvements or additions to the Leased Premises as the Landlord is required to carry out in accordance with this Lease at such times as the Tenant shall approve. In the event that any emergency which is likely to materially and adversely affect the Leased Premises requires immediate entry when the Leased Premises are not open for business, the Landlord shall use all reasonable efforts to notify the Tenant and to obtain the aforementioned supervision, failing which, such entry may be made at any time without supervision but at the Landlord's sole risk. In any event, the Landlord shall notify the Tenant of any such entry without supervision as soon as possible thereafter. All damage caused by any entry is to be repaired at the expense of the Landlord forthwith.

Section 11.01 Compliance with By-Laws by Landlord

(c) The Landlord further covenants and agrees to observe and comply with all provisions of law, including without limitation, all By-Laws, requirements of all governmental authorities, including federal, provincial and municipal legislative enactments and other resolutions now or hereafter in force and which pertain to or affect the Leased Premises.

19 It is the defendant's position that the leasing agreement explicitly sets out which party was to be held responsible for the care and maintenance of the parking lot. Specifically, it states that the landlord ("co-defendant") was responsible to "keep the parking facilities properly drained, paved, lighted and striped in accordance with good repair and maintenance practice, including repair and replacement when required." As a result, it is their position that the duty was discharged by the defendant by deferring the repair and maintenance of the parking lot upon a reasonable, competent and skilled individual, the co-defendant who actually owned the property.

20 Soomre's position is that the defendant continues to owe a duty under the O.L.A. and that the defence, under section 6(1), is not applicable and does not exempt the moving party from its obligations under 3(1) of the O.L.A.

21 In *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 (S.C.C.), the Supreme Court of Canada notes that when applying the statutory duty on occupiers to take reasonable care in the circumstances to make the premises safe "that duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be specific to each situation."

22 I agree with the position as set out by Soomre in paragraph 22 of her factum:

In the case at bar, the moving defendant is relying solely on the provisions in the leasing agreement and that the co-defendant admitted its responsibility in maintaining and inspecting the property. However, that is not enough to discharge their responsibilities as an occupier. To ensure the premises, particularly the parking lot, are maintained, and to fulfill their duty of care to patrons, the defendants should have implemented a protocol to ensure that there was a schedule for inspection. To qualify for the defence under s. 6(1) of the *Occupiers' Liability Act*, the moving defendant should have

done more to satisfy itself that the co-defendant was acting in a proper and competent matter. A mere assignment of a responsibility to maintain the parking lot is not enough to discharge an occupier of its responsibility to patrons.

23 In *Canada (Attorney General) v. Ranger*, 2011 ONSC 3196 (Ont. S.C.J.), Power J. accepted the proposition that "occupiers can successfully defend a claim under the Act by demonstrating that they had in place a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risks to those lawfully on the property and that an occupier's conduct in this regard is to be judged not by the result of his or her efforts...but by the efforts themselves."

24 There is a leasing agreement dealing with the parking lot. However, the details are not specified and are silent with respect to such things as the timing of inspections and specific requirements to ensure that the co-defendant was competent to carry out the repair and maintenance of the parking lot.

25 In *Manning v. 3980 Investments Ltd.* [2003 CarswellOnt 2427 (Ont. S.C.J.)], 2003 CanLII 2906, the court ultimately found the defendants liable for several reasons, one of which was for failing to have an up-to-date inspection system. Belleghem J. noted that "there was simply an inadequate system of instruction, and supervision, of the temporary superintendant, by those over him, leading in due course to the landlord. There was no system in place to ensure salting or sanding. There was no system in place to ensure when and by whom it was being carried out. There was no system in place for follow up, particularly when conditions became treacherous."

26 The moving party was present at the location of the trip and fall each day. There remains a responsibility on each party to ensure that the property was being maintained in a proper manner. The court cannot allow an occupier to avoid its responsibilities under the O.L.A. by not paying attention to the maintenance practices of a co-occupier. To qualify for the defence under s. 6(1) of the O.L.A., the defendant should have done more to satisfy itself that the co-defendant was acting in a proper and competent manner. A mere assignment of a responsibility to maintain the parking lot is not enough to discharge an occupier of its responsibility to patrons.

27 There is a genuine issue requiring a trial. Summary judgment is therefore not granted to the defendant.

28 I indicated to counsel that if they could not agree on the disposition of costs, that they could provide brief written submissions within 30 days of the receipt of this decision. These should be sent to my assistant in Oshawa.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on February 8, 2012 has been incorporated herein.