1998 CarswellOnt 3711
Ontario Court of Justice (General Division)

Estey v. Sannio Construction Co.

1998 CarswellOnt 3711, [1998] O.J. No. 2984, 70 O.T.C. 293, 81 A.C.W.S. (3d) 395

Melanie Estey and Danny Estey, Plaintiffs and Sannio Construction Company Limited, Joe Moscato also known as Joe Luponte and Shirley Behen, Defendants

Cavarzan J.

Judgment: July 9, 1998
Heard: July 8, 1998
Docket: Hamilton 7500/94

Counsel: *Michael Kelly*, on behalf of the Plaintiffs/Responding Parties.
Mary A. Teal, on behalf of the Defendant/Moving Party Sannio Construction Company Limited.

Subject: Property; Civil Practice and Procedure

Headnote

Practice --- Summary judgment — Determination of question of law

Defendant landlord moved for summary dismissal of claim by individual injured in slip and fall accident on residential property leased by landlord — Only genuine issue was question of law as to whether landlord responsible for clearing ice and snow on rented premises absent agreement with tenant to that effect — Question of law determined in favour of landlord and claim dismissed.

Landlord and tenant --- Residential tenancies — Repairs and fitness — Tenant's obligation

Defendant landlord moved for summary dismissal of claim by plaintiff injured in slip and fall accident on residential property leased by landlord — Only genuine issue was question of law as to whether landlord responsible for clearing ice and snow on rented premises absent agreement with tenant to that effect — Landlord's responsiblity to repair under s. 94(1) of Landlord and Tenant Act did not include snow and ice removal which was tenant's responsibility absent agreement to contrary — Pursuant to s. 8 of Occupier's Liability Act, landlord owes duty of care equivalent to occupier of premises only with respect to carrying out responsibilities of repair and maintenance according to terms of tenancy — Interaction of s. 8 of Occupier's Liability Act and s. 94(1) of Landlord and Tenant Act did not in itself impose liability on landlord for accidents caused by build up of snow or ice on leased property — Question of law determined in favour of landlord and claim dismissed — Landlord and Tenant Act, R.S.O. 1990, c. L.7, s. 94(1) — Occupiers' Liability Act, R.S.O. 1990, c. O.2, s. 8.

MOTION by defendant landlord for summary dismissal of plaintiff's damages claim for injuries sustained in slip and fall on premises leased by landlord.

***Cavarzan J.*:**

1 In this motion an order is sought for summary dismissal of the claim against the defendant Sannio Construction Company Limited (Sannio).

2 The plaintiff Melanie Estey claims damages for injuries received when she slipped and fell on the driveway portion of the residential premises rented by the individual defendants from the property owner Sannio. Sannio acquired a one-acre parcel of land in 1986 as a place on which to store its heavy construction equipment. It erected a fence dividing the property in half so that the single family dwelling located on one-half of the property could be rented to generate rental income.

3 Behen and Moscato were the latest in a series of tenants when they took possession of the dwelling in 1992. Ms. Behen still resides in the dwelling. Ms. Estey's slip and fall occurred on February 26, 1997.

The Evidence on the Motion

4 The moving party Sannio has filed the affidavit of Paul Ciccone an officer and shareholder of Sannio. He deposed, and is not disputed, that Behen and Moscato became tenants pursuant an oral agreement making them month-to-month tenants at a monthly rental of $500 plus utilities charges. No other lease terms were discussed. The tenants were responsible for clearing snow and ice on their half of the property. Ms. Behen confirms this in her sworn testimony given on her examination for discovery. On one occasion only in the first year of their tenancy and "*as a favour to the tenant*", Sannio cleared the snow from their half of the property.

5 Transcripts of the examinations for discovery of Melanie Estey, Shirley Behen, and Paul Ciccone were filed on the motion.

6 The only affidavit filed on behalf of the responding parties was one given by their solicitor. It does not purport to contain statements of the deponent's information and belief as required by rules 39.01(4) and 20.02. It simply repeats at least one allegation made in the statement of claim and cites testimony given at the examinations for discovery. In my view this affidavit is inadmissible and will not be considered as evidence on this motion.

7 Mr. Kelly urged me, of course, to consider the sworn testimony given at the examinations for discovery. He cited the February 9, 1998 decision of the Ontario Court of Appeal in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 17 C.P.C. (4th) 219 (Ont. C.A.) and, in particular, the following passage from the reasons delivered by Borins J. (ad hoc) on behalf of the Court at paragraph 32:

> An issue of fact must relate to a material fact. As Morden A.C.J.O. pointed out in Ungerman, supra, at p. 550: "[i]f a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a 'genuine issue for trial'." In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court' s role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

8 In my view no issue of credibility is raised in this case. The moving party has demonstrated clearly that no genuine issue exists, material to the claim or defence, which necessitates a trial to resolve.

9 I am cognizant of the caution uttered at paragraph 35 of the reasons in *Aguonie* that:

> ... it must be clear to the motions judge, where the motion is brought by the defendant ... that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

10 Although I am properly precluded from making findings of fact, I am obliged to review the evidence placed before me on this motion. The moving party has placed clear evidence before me from the examination for discovery of Shirley Behen which demonstrates that she, as the tenant, assumed responsibility for snow and ice removal on the property and did not look to the landlord Sannio to carry out this responsibility:

> 228. Q. Okay. Did Paul [Ciccone] or any of his employees ever do any snow removal on your property?
>
> A. No.
>
> 229. Q. Never?

A. Well, I think maybe once.

230. Q. Did Paul or his people ever salt or sand your property?

A. No. I did.

231. Q. And that one time when he removed the snow, was that by a backhoe, or how did he do that?

A. Yeah, one of those truck things.

232. Q. And when was that? Do you remember when it was?

A. Maybe the first year I moved in there.

234. Q. In that year, that winter of '94 — remember this incident occurred February 26th, '94 —

A. Right.

235. Q. — did he ever do any snow removal at that time?

A. No.

270. Q. Do you know if he ever came to check on you, check the place while you were away or anything to that effect?

A. No, because I never went away.

271. Q. All right. Did he ever cut the grass for you?

A. No. I just told you that.

272. Q. Did Joe ever shovel the snow?

A. No. I enjoy shovelling snow.

273. Q. So in all the times you were with Joe there, he never shovelled the snow. Did he ever sand or salt?

A. No, I did. Not sand, but I used the big bags, what do you call those bags of salt?

. . . . .

376. Q. Okay. And how often would you shovel the snow on a regular basis?

A. Well, I mean I'd wait till the snow stopped and then I'd go out and shovel and then I'd put salt all the way down, but where there was asphalt, I always made sure I tried to get it right off, because like there is other people that's walking up there to bring me my flyers or whatever, so you have to keep, like I did keep it clean. Nobody ever fell there except for her.

377. Q. Okay. So how often would you shovel the snow? As often as you could, or did you have a regular routine, or did it depend on the snow fall?

A. Yeah, it depended on the snow fall. Like if it snowed that day, I let it finish snowing and then I'd go out and shovel it.

378. Q. And your porch and the steps, did you do them more than shovelling the snow?

A. Oh, yeah. No. No.

379. Q. Or you did them altogether?

A. Altogether.

380. Q. Did you ever shovel your sidewalk?

A. I don't have a sidewalk.

381. Q. There is no sidewalk on the front?

A. No.

382. Q. Okay. On the dirt portion?

A. Right.

383. Q. I take it you couldn't shovel that because it was on dirt and not on the asphalt?

A. Well, I shovelled that, I shovelled till I got enough off, I'd push it against the fence or push it against this side. I make it wide enough for my car to get in and for me to walk up and down — and I've never fell there, even if there was ice there, I never fell, because I was wearing the proper shoes for winter time.

384. Q. Okay. On the date of this incident, do you recall if there was any ice on your driveway? Was there some icy spots?

A. Probably. But not where her car was.

11 In *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) Morden A.C.J.O., speaking for the Court, stated the following at pages 551 and 552 about the wording of rule 20.04 (2):

> *It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists*. (emphasis in original text)

Is the Only Genuine Issue a Question of Law?

12 The plaintiffs have pleaded and rely upon the provisions of the *Occupiers' Liability Act*, R.S.O. 1990, Chapter 0.2. In particular, they assert that the defendant Sannio comes within the meaning of "*occupier*" in section 1 of that *Act*. In argument before me the provisions of section 8 of that *Act* were also invoked, in combination with the provisions of section 94 of the *Landlord and Tenant Act*, R.S.O. 1990, Chapter L.7. This position was fully argued before me with reference to the applicable case law.

13 I am satisfied that the only genuine issue is a question of law. Rule 20.04(4) speaks to the disposition of motions for summary judgment in such cases:

> (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly...

14 This is not a case like *Aguonie*, supra, which involved the discoverability rule. At paragraph 29 of his reasons for the Court, Borins J. (ad hoc) explains why that was not an appropriate case for summary judgment:

> The starting point for the application of the discoverability rule and s. 2 (8) is the same. It is the time when the appellants' cause of action arose. This will define the starting date of the limitation period. It is a question of fact when the cause of action arose and when the limitation period commenced. The application of the discoverability rule is premised on the finding of these facts: when the appellants learned they had a cause of action against the respondents; or, when, through the exercise of reasonable diligence, they ought to have learned they had a cause of action against the respondents. These facts constitute genuine issues for trail and, in resolving them, the motions judge assumed the role of trial judge.

15 In this case the action has already proceeded to the examination for discovery stage. I make no findings of fact in reviewing the evidence before me and noting that there is no genuine issue for trial. Mr. Kelly submitted that a trial is needed in order to develop adequately the evidence concerning the true relationship between this landlord and these tenants. This is akin to saying that more and better evidence will be adduced at trial.

16 The moving party has placed its best foot forward. What have the responding parties done? This motion was returnable in the first instance on April 16, 1998. It was adjourned on consent on that date and placed on the trial list commencing July 6, 1998. It was reached on July 8, 1998. In the intervening three months no affidavit from persons having personal knowledge of the contested facts was offered by the responding parties. Instead, an affidavit sworn by their solicitor on July 2, 1998 was filed. The examinations for discovery had been conducted on December 17, 1997 (Shirley Behen) and on March 21, 1996 (Melanie Estey and Paul Ciccone). Mr. Kelly was not able to point to any evidence contradicting that of Shirley Behen that the tenants had assumed responsibility for removal of snow and ice from the residential property which they occupied.

17 Although the moving party has the ultimate burden of demonstrating that there is no genuine issue for trial, the responding parties have an evidential burden. The responding parties have not discharged that burden in this case.

The Question of Law

18 The following are the relevant statutory provisions:

> **Occupiers' Liability Act**
>
> 1. In this Act,
>
> "occupier" includes,
>
> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to en enter the premises, despite the fact that there is more than one occupier of the said premises; ("occupant")
>
> "premises" means lands and structures, or either of them...
>
> 8.
>
> (1) 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.
>
> (3) For the purposes of this section, obligations imposed by any enactment by virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.
>
> (4) This section applies to all tenancies whether created before or after the commencement of this Act.

Landlord and Tenant Act

94.

(1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and despite the fact that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

(2) The tenant is responsible for ordinary cleanliness of the rented premises, except to the extent that the tenancy agreement requires the landlord to clean them.

19 The responding parties submit that conditions of ice and snow are considered matters of "repair" under s. 94 (1) of the *Landlord and Tenant Act*. They rely upon the authority of *Peck v. Victoria Harbour (Village)* (1995), 27 M.P.L.R. (2d) 75 (Ont. Div. Ct.), a decision of the Divisional Court which reviewed the cases dealing with the duty of municipal corporations under s. 284 (1) of the *Municipal Act* to keep bridges and highways in repair. There it was noted that, in certain situations, the failure to sand a road after a heavy snowfall could constitute non-repair. Mr. Kelly was not able to point to any cases in which the proposition had been applied to oblige landlords in residential tenancy situations to clear snow and ice from residential premises or to apply sand and salt, in the absence of any agreement imposing that duty on the landlord.

20 I agree with Ms. Teal's observation that the courts have given an expansive interpretation to the word "*repair*" in s. 284(1) of the *Municipal Act*, in part at least, because of the exemption in s. 10(2) of the *Occupiers' Liability Act*:

10(2) This Act does not apply to the Crown or to any municipal corporation, where the Crown or the municipal corporation is an occupier of a public highway or a public road.

21 In two further cases relied upon by the responding parties courts held that there was liability on the part of the landlord. The first is *Brewer v. Kayes* , [1973] 2 O.R. 284 (Ont. Dist. Ct.) a decision of the District Court. There, fuel oil seeped into a well on neighbouring property from property which was in the possession of a residential tenant. The landlord was held liable in nuisance on the theory that an owner-landlord upon whom rests the duty to repair under s. 96 (later s. 94) of the *Landlord and Tenant Act* may be deemed in sufficient control of the demised premises to be fixed with liability if he knowingly or with means of knowledge allows a nuisance to continue unabated. Such liability exists even though the landlord neither created the nuisance nor received any benefit from it. Gratton, D.C.J. stated in the penultimate paragraph of his reasons that the "*defect having been observed from the outset of the tenancy, it seems reasonable to conclude that the defect was caused by the landlords when they altered the [heating] system prior to the tenant assuming possession*.".

22 The second case is *Blake v. Kensche* a decision of the Supreme Court of British Columbia reported in (1990), 3 C.C.L.T. (2d) 189 (B.C. S.C.). There a landlord was held responsible for injuries received by the tenants' infant son who had fallen into an old abandoned well on the premises when the earth around the well opening suddenly collapsed. That was a case, however, in which the landlord exercised a certain degree of control over the activities on the premises in that the tenant required his permission to do repairs. Moreover, the landlord had been told on two occasions that something should be done about the old well. The landlord refused to deal with this potentially dangerous condition on the basis that he could not afford the expense of doing the necessary repairs. On those facts the court held that the landlord was liable as an "*occupier*" under the provisions of s. 6(1) of the B.C. *Occupiers Liability Act* which is similar in wording to s. 8(1) of the Ontario *Act*.

23 In my view these cases do not support the proposition contended for by the responding parties namely, that because of s. 94(1) of the *Landlord and Tenant Act* and in the absence of any specific agreement by the tenants to assume responsibility for maintenance and repair, the tenancy is one to which s. 8 of the *Occupiers' Liability Act* would be applicable to render the landlord an "*occupier*" who owes a duty to those who visit the premises.

24 In the first place, removal of snow and ice from residential premises does not come within the meaning of the term "*repair*" in s. 94. Such activity falls logically within the meaning and intent of s. 94(2) which makes the tenant responsible for the "*ordinary cleanliness of the rented premises, except to the extent that the tenancy agreement requires the landlord to clean them*".

25 The *Landlord and Tenant Act* contains definitions for "*residential premises*" but does not define the term "*premises*" used in section 94. "*Premises*" in the estates and property context means, according to *Black's Law Dictionary (6th Edition)*:

> Land with its appurtenances and structures thereon.
>
> . . . . .
>
> A dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant.

In brief, the ordinary meaning of "*premises*" in this context accords with the definition in the *Occupiers' Liability Act* i.e., "*lands and structure, or either of them*".

26 A landlord's duty to repair under s.94 of the *Landlord and Tenant Act* has made him an "*occupier*" under the *Occupiers' Liability Act* only in cases of nuisance such as the *Brewer*case where he knew of a dangerous condition and did nothing, or the *Blake* case where the landlord exercised a certain degree of control over the activities on the premises, would permit repairs by the tenant only with the landlord's permission, and the landlord knew of a dangerous condition and refused to take steps to correct it.

27 In my view, the law does not make a landlord an "*occupier*" of the premises by virtue of the combined operation of s. 94 of the *Landlord and Tenant Act* and s. 8 of the *Occupiers' Liability Act* in the circumstances here. It is not the landlord's responsibility to clear snow and ice on rented residential premises where there is no agreement which requires the landlord to do so. This is particularly the case where the uncontradicted evidence of the tenant is that she always cleared the snow and ice, and never regarded this to be a responsibility of the landlord.

Conclusion

28 The question of law is resolved in favour of the moving party. There will be summary judgment, therefore, for the defendant Sannio dismissing the plaintiffs' claim against it.

29 If the parties are unable to agree on the matter of costs, counsel may arrange to speak to me.

Motion granted and claim dismissed.