

SUPREME COURT OF NOVA SCOTIA

Citation: Shane v. 3104854 Nova Scotia Ltd., 2010 NSSC 448

Date: 20101217

Docket: Hfx No. 315268

Registry: Halifax

Between:

Shirley Anne Shane

Plaintiff

v.

3104854 Nova Scotia Limited

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: November 4, 2010 (in Chambers), in Halifax, Nova Scotia

Written Decision: December 17, 2010

Counsel: Michael S. Dull, for the plaintiff
Connie F. Morrissey, for the defendant

Coughlan, J.: (Orally)

[1] 3104854 Nova Scotia Limited moves for an order of summary judgment dismissing Shirley Anne Shane's claim, pursuant to Civil Procedure Rules 13.01(1) and 13.04.

[2] Shirley Anne Shane was walking to work on the morning of January 7, 2008. Ms. Shane slipped and fell on the sidewalk on Hollis Street, Halifax, Nova Scotia. At the time of the fall, 3104854 Nova Scotia Limited was the owner of a parking lot situated at 1568 Hollis Street, adjacent to the place where Ms. Shane fell. Ms. Shane did not take specific note of what caused her to slip and fall. For the purposes of the summary judgment application, 3104854 Nova Scotia Limited admits there was ice present on the sidewalk where Ms. Shane slipped.

[3] Since approximately 2006, 3104854 Nova Scotia Limited has not exercised any control over the municipal sidewalk adjacent to its property and, in particular, did not restrict or control the use of the sidewalk, nor maintain the sidewalk, including the removal of snow, or ice, or spreading salt or sand. The Halifax Regional Municipality was maintaining the sidewalk.

[4] An affidavit of Jason Sulis deposed to October 8, 2010 was filed. He deposed on the morning of January 8, 2008, he saw Shirley Shane lying on the sidewalk on the western side of Hollis Street, adjacent to an outdoor gravel parking lot. The section of the sidewalk where she was lying was covered in ice and was slippery.

[5] Civil Procedure Rules 13.01(1) and 13.04 provide:

Scope of Rule 13

13.01 (1) This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.

....

Summary judgment on evidence

13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close.

[6] In this case, the defendant is bringing the application for summary judgment. The test when a defendant brings an action for summary judgment was set out by Iacobucci and Bastarache, JJ., in giving the Court's judgment in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at p. 434 as follows:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[7] Has 3104854 Nova Scotia Limited shown there is no genuine issue of material fact requiring trial?

[8] In *Bongiardina v. York (Regional Municipality)*, [2000] O.J. No. 2751, MacPherson, J.A., in giving the Ontario Court of Appeal's judgment, stated commencing at para. 19:

The question then becomes: is there a common law duty on the owner of the property to clear snow and ice from public sidewalks adjacent to the property? In my view, the answer to this question must be 'No'. Although the 'neighbour' principle from *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), has been expanded in recent years to cover a myriad of new relationships, it would stretch it too far if it was applied in the circumstances of this case. A homeowner has a duty to ensure that his or her own property is maintained in the circumstances of this case. A homeowner has a duty to ensure that his or her own property is maintained in a reasonable condition so that persons entering the property are not injured. If the homeowner complies with this duty, he or she should be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks. The snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality, not the adjacent property owner.

There are two exceptions to this general principle. First, a property owner may be deemed in law to be an occupier of adjacent public property if the owner assumes control of that property. ...

The second exception to the general principle that a property owner is responsible only for his or her property is that the duty of care on the owner extends to ensuring that conditions or activities on his or her property do not flow off the property and cause injury to persons nearby. An example of a case in this category would be *Brazzoni v. Timmins (City)* (February 7, 1992), Doc. CA 685/88 (Ont. C.A.), where the court held both the City of Timmins and the Toronto-Dominion Bank liable for injuries suffered by a person who fell on snow and ice on a public sidewalk near the bank. Referring to the bank's liability, the court said, at p. 2:

The trial judge found that water flowed from the respondent's property across the sidewalk at the time the plaintiff fell. By allowing the water from melting snow, on the roof of its building and from its parking lot, to accumulate on its property and to run across the sidewalk which was covered with snow and ice, the respondent, in our opinion, created a dangerous condition that it knew or ought to have known could cause

injury to pedestrians using the sidewalk. Regardless of whether liability is based on nuisance or negligence, the respondent, in our opinion, is liable.

[9] It is therefore possible for 3104854 Nova Scotia Limited to be responsible for Ms. Shane's fall if Ms. Shane can show 3104854 Nova Scotia Limited allowed water to accumulate on its property and run across the sidewalk, creating a dangerous condition.

[10] In his discovery evidence, Kevin Nelson, the controller and recognized agent of 3104854 Nova Scotia Limited, testified if the right conditions exist, snow can melt in the parking lot and flow out on the public sidewalk. If the parking lot at 1568 Hollis Street was icy, salt was spread on it. Salt was applied to the parking lot on January 7, 2008.

[11] Whether the ice on the sidewalk at the time Ms. Shane fell was caused from water 3104854 Nova Scotia Limited allowed to accumulate on its property and run across the sidewalk thereby creating a dangerous condition that it knew or ought to know could cause injury to pedestrians using the sidewalk, is a genuine issue of material fact requiring trial.

[12] The first part of the test not being satisfied, the motion is dismissed.

[13] Civil Procedure Rule 13.07 provides:

Conference or hearing after dismissal

13.07 (1) A judge who dismisses a motion for summary judgment on evidence brought in an action must, as soon as is practical after the dismissal, arrange to give directions, unless all parties waive this requirement.

(2) The judge may provide directions for the conduct of the proceeding, including directions that do any of the following:

- (a) restrict discovery in view of disclosure made through an affidavit or cross-examination on an affidavit;
- (b) narrow the issues to be tried by identifying facts not in dispute;

- (c) regulate disclosure or production of documents, electronic information, or other evidence;
- (d) permit evidence on the motion for summary judgment to stand as evidence at trial;
- (e) provide for a speedy trial;
- (f) provide for a hearing, rather than a trial, under Rule 6 - Choosing Between Action and Application.

[14] I will arrange a hearing to hear submissions from counsel as to directions concerning the conduct of the action.

[15] In the style of cause, the defendant is described as 3104854 N.S. Limited. The name of the defendant is 3104854 Nova Scotia Limited. I amend the description of the defendant, with consent of the parties, to 3104854 Nova Scotia Limited.

[16] If the parties are unable to agree, I will hear them on the issue of costs.

Coughlan, J.