COURT OF APPEAL FOR ONTARIO

CITATION: Musselman v. 875667 Ontario Inc. (Cities Bistro), 2012 ONCA 41

DATE: 20120124
DOCKET: C52502

Doherty, LaForme and Hoy JJ.A.

BETWEEN

Gloria Musselman, V. Gerald Musselman, Karey Musselman, Carolyn Musselman, Mark Musselman, Leanna Wigboldus by her Litigation Guardian Carolyn Musselman and Lucas Musselman by his Litigation Guardian Mark Musselman

Plaintiffs (Appellants)

and

875667 Ontario Inc. carrying on business as Cities Bistro, BDO Dunwoody Limited, Trustee in Bankruptcy, the Corporation of the City of Toronto, Ida Dominelli, Minas Tzortzis, Stella Tzortzis and Fred Dominelli

Defendants (Respondents)

Jerome R. Morse and John J. Adair, for the plaintiffs (appellants)

Louis A. Frapporti and P. Kennedy, for the defendants (respondents), Dominelli

Heard: January 18, 2012

On appeal from the judgment of Justice R.D. Reilly of the Superior Court of Justice, dated June 1, 2010.

ENDORSEMENT

[1] The appellant slipped and fell on the stairs leading from the restrooms to the main floor of the restaurant. She suffered catastrophic injuries. As analyzed by the trial judge, the outcome of this case turned largely on whether the respondent (owner/landlord) was an occupier of the rented premises within the definition of "occupier" in the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "*Act*").

[2] The trial judge dealt at length with the applicable law and the relevant evidence (paras. 171-188). As we apprehend the submissions, the challenge on appeal is not to the trial judge's legal interpretation of "occupier", but to his treatment of the relevant evidence.

[3] Counsel for the appellant submits that the trial judge misapprehended three parts of the evidence. Two of the misapprehensions relate to the substance of the evidence of the tenant, Brian Heasman. The appellant submits that properly understood, Mr. Heasman's evidence established that the respondent had the necessary responsibility for and control over the premises to make him an "occupier" under the *Act*.

[4] Counsel for the appellant also submits that the trial judge misapprehended the terms of the operative lease and, in particular, the meaning of clause 6 in that lease. Counsel contends, that properly understood, that term placed inspection and repair responsibilities on the respondent thereby giving the respondent

sufficient control and responsibility over the premise to make him an “occupier” under the *Act*.

[5] We can address the two alleged misapprehensions of Mr. Heasman’s evidence together. At para. 183 of his reasons, the trial judge indicated that there was “no evidence that he [the respondent] ever used the basement washrooms or descended the stairs”. At para. 186, the trial judge found that Mr. Heasman testified that the respondent was “responsible for the exterior walls and roof of the building and Mr. Heasman was responsible for everything inside the premises”.

[6] We have examined the extracts from Mr. Heasman’s evidence relied on by counsel in support of these submissions. We have also considered the other parts of Mr. Heasman’s evidence put forward by counsel for the respondent. In our assessment, the trial judge’s interpretation of Mr. Heasman’s evidence was reasonably available on the entirety of his evidence. At its highest, the appellant’s submissions demonstrate that certain of the extracts are capable of bearing a different interpretation. That is not enough to find a misapprehension of the evidence warranting appellate interference.

[7] The trial judge’s findings with respect to para. 6 of the lease appear at paras. 182 and 186 of his reasons. At para. 182, he said:

> Pursuant to paragraph 6 of the lease, Mr. Heasman had complete responsibility for repair and maintenance of the premises.

[8] We think the trial judge correctly interpreted para. 6 of the lease. He engaged in a careful and detailed analysis of many provisions of the lease, beginning with para. 4, which declared the lease to be "a completely carefree net lease for the landlord". Having regard to the entirety of the lease, we think the trial judge was correct in finding that para. 6 put complete responsibility on the tenant for repair and maintenance. We accept counsel for the respondent's submission that the exclusion of "wear and tear" from the tenant's responsibility to maintain and repair does not place any obligation on the landlord to repair or inspect the property.

[9] We would add that the trial judge's finding that the respondent was not an "occupier" was based on his assessment of the entirety of the circumstances. While the lease figured prominently in that analysis, the lease alone, much less one clause from the lease, was not determinative. The conduct of the parties over the many years in which they were in a landlord/tenant relationship was also a significant consideration in determining whether the respondent was an occupier. On the trial judge's view of that conduct, it did not support the contention that the respondent had the necessary responsibility for or control of the premise to fall within the meaning of "occupier" under the *Act*.

[10] We see no basis upon which to interfere with the trial judge's finding of fact that the respondent was not an occupier. He could not, therefore, be liable under s. 3 of the *Act* for the appellant's most unfortunate injuries.

[11] We add two further observations. As we understood counsel for the appellant, the appellant does not rely on s. 8 of the *Occupiers' Liability Act*. In any event, as found by the trial judge (para. 187), we do not think s. 8 has any application. However, if it does, then the exemption under s. 8(2) should operate to protect this respondent from any liability under s. 8.

[12] Finally, counsel in his factum argued that the respondent could be liable in negligence apart from any liability in negligence as an occupier. Counsel did not make any oral argument in support of this submission and we see no basis on this record for a finding of negligence against the respondent if, as found by the trial judge, the respondent was not an "occupier" within the meaning of the *Act*.

[13] The appeal is dismissed. As agreed to by the parties, the respondent is entitled to costs of the appeal in the amount of $25,000, inclusive of disbursements and relevant taxes.

"Doherty J.A."
"H.S. LaForme J.A."
"Alexandra Hoy J.A."