IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Lawton's Drug Stores Ltd. v. Halifax (Regional Municipality), 2007 NSSC 3

Date: 20070103
Docket: SH-237808)
Registry: Halifax

Between:

Lawton's Drug Stores Ltd.

Plaintiff

v.

Halifax Regional Municipality
Titan Construction Services (1988) Ltd.
Boylan's Plumbing & Heating Ltd.

Defendants

and

Landmark Development Corporation Limited, a body corporate,
and United Equities Limited, a body corporate

Third Parties

and

Lawton's Drug Stores Limited, a body corporate

Fourth Party

DECISION

Judge:	The Honourable Justice Gordon A. Tidman
Heard:	November 15, 2006, January 3, 2007 in Halifax, Nova Scotia
Written Decision:	January 18, 2007 *(Oral decision rendered January 3, 2007)*
Counsel:	Thomas E. Hart & Christopher E. Wilson, for the Plaintiff/Fourth Party, Lawton's Drug Stores Ltd. Murray J. Ritch, Q.C. & A. Jean McKenna, for the Defendant, Boylan's Plumbing & Heating Ltd. Angela Jones-Rieksts, for the Defendant, Halifax Regional Municipality Michael J. Wood & Cheryl Canning, for the Defendant, Titan Construction Services (1988) Ltd. Sandra O. Arab Clarke, for the Third Party, Landmark Development Corporation Lt. John P. Merrick, Q.C. & William L. Mahody, for the Third Party, United Equities Limited

Tidman, J.:

[1] This is an application for summary judgment under the provisions of **Civil Procedure Rule 13** and **13.02 (b)**, by the plaintiff against the defendant, Boylan's Plumbing & Heating Ltd. on the sole issue of liability.

[2] The main action is also against the Halifax Regional Municipality, Titan Construction (1988) Ltd. and Landmark Development Corporation Ltd. United Equities Limited have been joined as a third party.

[3] The issue before the court was heard on November 15, 2006. Mr. Tom Hart represented the plaintiff and Ms. Jean McKenna represented Boylan's. All other parties were represented by counsel at the hearing, but took part only by way of watching briefs.

[4] Mr. Hart on behalf of the plaintiff submits that on the facts that are not in dispute the defendant Boylan's because of its obvious negligence is liable for the damages suffered by the plaintiff.

[5] The circumstances briefly are that in 1996 Mr. William Boylan of the defendant plumbing company was hired to connect plumbing appliances to the sanitary sewer line on the second floor of a multi-storey office building known as the Professional Building at the corner of Robie Street and Coburg Road in Halifax. Mr. Boylan connected the appliances drainage lines, including the toilet and water faucets, in the premises to the storm sewer line instead of the sanitary sewer line. As a result of heavy precipitation on December 25, 2002, the storm sewer backed up into the building and flooded the floor of the second storey premises. From there water leaked down to the first floor and into the plaintiff's, Lawton's Drug Store, causing extensive damage. Lawton's now sues for the cost of rectifying the damage. The other parties to the action are contractors, designers and owners of the building and the Halifax Regional Municipality.

The Law

[6] **Civil Procedure Rule 13.01** provides:

> ... After the close of pleadings, any party may apply to the court for judgment on the ground that:

> ...
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; ...

[7] **Civil Procedure Rule 13.02** provides:

> ... On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,
>
> ...
>
> (b) grant judgment for any party on the claim or any part thereof; ...

[8] The parties do not disagree on the applicable law.

[9] The Nova Scotia Court of Appeal in **United Gulf Developments Ltd. v. Iskandar** (2004), 222 N.S.R. (2d) 137 at para. 9 set out the following test for summary judgment:

> ... I concur with the Chambers judge that the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in *Guarantee Co. Of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the **applicant has shown that there is no genuine** [or arguable (*my addition)]* **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. 265, 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). [Emphasis added]

[10] In **Eikelenboom v. Holstein Assn. Of Canada** (2004), 226 N.S.R. (2d) 235 (C.A.), the Court of Appeal held that where material facts are not in dispute and the law is clear, then an application for summary judgment must succeed regardless of how complex is the analysis to reach a conclusion.

Issue -Is the Applicant entitled to summary judgment on the issue of liability?

Applicant's Position

[11] Mr. Hart, on behalf of the applicant submits that the material facts are undisputed. That is, Mr. Boylan admits that he "mistakenly" connected the plumbing appliances in the premises to the storm drain rather than the sanitary drain. Mr. Hart submits further that it was thus inevitable that any sort of partial blockage coupled with a severe rain event would cause a backup and hence the

defendant, Boylan's, is liable for the flood and resulting water damage suffered by the applicant.

Respondents' Position

[12] Ms. McKenna for the respondent concedes that Mr. Boylan admitted the "mistaken" connection but now argues that the admission was based on what Mr. Boylan was told as to what had occurred and he has since acquired additional information that places his so-called admission in doubt and that there are other circumstances exonerating him from liability.

The Evidence

[13] Mr. Hart filed the affidavit of Archie Frost, a professional engineer. Mr. Frost in his affidavit states, "I was informed by the adjuster acting for the Plaintiff ... that the water closet in the said (dental) suite was the source of a water backup which resulted in (the) flooding."

[14] Ms. McKenna filed an affidavit of Mr. Boylan in which he explains when and why he made the connection to the storm drain, if indeed, he did so, which he does not now admit. That is, he admits what he did, but cannot say for certain if the connection was to the storm drain since both the storm and sanitary sewer lines looked to be identical.

[15] Mr. Boylan explains in his affidavit what he did in making the connection which I summarize as follows. The suite in which Mr. Boylan made the connection was previously occupied. When that tenant vacated, the suite was dismantled and all fixtures, including the plumbing fixtures, were removed and the connection to the main drainage line was capped.

[16] The storm drain collects water from the roof. That drain line ordinarily would descend to ground or basement level and empty into the municipal sewer main. It would apparently be unnecessary to run connectors to the intervening floors, since the purpose of the storm drain was to drain precipitation from the roof directly to ground level. The sanitary sewer line runs up and down parallel to the storm line. The lines are identical in appearance. However,ordinarily on each floor

a 45˚ angle “take off” is installed from the main sanitary sewer line to allow connections from the premises on each floor.

[17] When Mr. Boylan made the connection he connected to the 45˚ angle “take off” which had been capped when the previous tenant vacated and which was the only “take off” leading to the suite from the sewer line. He says it appears that the previous tenant’s plumbing appliances had been connected to the same drainage line for the duration of the previous tenancy. He says that the only way to be certain of the correct connection would be to actually trace the storm sewer line from the roof to the basement or ground level. Ms. McKenna submits that this would be impractical because it would entail disturbing many tenants in the multi-floor building when it logically appeared that the correct connection had been made.

[18] Mr. Boylan noted that when the proper connection was made, the connection to the sanitary sewer was via a clean-out plate not ordinarily used for connection purposes, but apparently used in that instance since no 45˚ take-off was installed for connection purposes.

[19] Mr. Boylan in his affidavit also questioned the applicant's conclusion as to how the backup of water causing the Lawton's damages occurred. Mr. Boylan states that the Municipality joined the sanitary and storm lines together outside of the building. He states that it is possible that a back up from the municipal sewer line would ultimately back up into both the storm and sanitary lines within the building, regardless of the internal connection. Mr. Boylan was not cross-examined on his affidavit.

Conclusion

[20] In applying the applicable tests as previously set out, I am not satisfied that the applicant gets past the threshold test as to whether there is no arguable issue of material fact requiring trial.

[21] Although it is admitted that the respondent actually made the connection, it is not clear that the alleged erroneous connection was the cause of the flooding. Neither it is agreed or clear that the connection was erroneous.

[22] The respondent has raised at least three issues which, in the court's view, can only be resolved by evidence at trial.

[23] Firstly, there is an issue as to whether the connection by Mr. Boylan was incorrect. There was only one take-off available to Mr. Boylan by which to make the connection. Since it is possible that the sanitary and storm sewer lines join prior to emptying into the municipal main, it may be that with that design it made no difference whether the connection at the 2nd storey level was to the sanitary or to the storm line.

[24] Secondly, even if the connection was incorrect, was it reasonable under the circumstances for Mr. Boylan to make the connection he did. The circumstances being that there was only one take-off for connection purposes and that ordinarily there are no take-offs from the storm drain between the roof and the ground level. It also appears that the previous tenant may have made the same connection.

[25] Thus, there is a standard of care issue that can only be resolved with further evidence.

[26] Thirdly, there is an issue as to whether the backup could have occurred regardless of the connection by Mr. Boylan. It is not clear that the connection in dispute caused the backup and a determination of this issue will require further evidence.

[27] Therefore, the application is dismissed. Costs between the applicant and respondent shall be costs in the cause, and I set the amount of costs at $1,000.00 plus reasonable disbursements.

J.