SUPREME COURT OF NOVA SCOTIA
Citation: *Brothers v Alexander*, 2023 NSSC 320

Date: 20230919
Docket: No. 471262
Registry: Halifax

Between:

Tenaha Brothers

Plaintiff

v.

Mark Alexander, Halifax Regional Municipality, and Cutting Edge Construction Limited

Defendants

Judge:	The Honourable Justice Diane Rowe
Heard:	March 2, 2023, in Halifax, Nova Scotia
Oral Decision:	September 19, 2023
Counsel:	Jeff Mitchell, for the Plaintiff Ashley Dooley, for the Defendant, Mark Alexander Colin Piercey for the Defendants, Halifax Regional Municipality and Cutting Edge Construction Ltd.

By the Court, orally:

Overview

[1] This is a motion for summary judgment on the evidence by the defendant Mr. Mark Alexander. Mr. Alexander is seeking an Order dismissing Ms. Teneha Brothers' action against him. The co-defendants, Halifax Regional Municipality, and Cutting Edge Construction, take no position on the motion.

[2] On January 7, 2017, Ms. Brothers slipped on ice and fell onto a sidewalk. The sidewalk was abutting Mr. Alexander's home in Dartmouth. All parties acknowledge that the sidewalk is owned by the Halifax Regional Municipality ("HRM"). From 2011 to 2018, HRM had retained Cutting Edge Construction to clear the sidewalk of snow and ice.

Issue

[3] Should the motion for summary judgment be granted and the action against Mr. Alexander be dismissed?

Law

[4] Justice Fichaud in *Shannex Inc. v Dora Construction Ltd*., 2016 NSCA 89 at paragraphs 32 to 42 of the decision sets out an analytical framework for the Court to follow upon a motion for summary judgment on evidence in an action, pursuant to *Nova Scotia Civil Procedure Rule* 13.04. *Shannex, supra* indicates that five questions arise for the Court to determine, in sequence, when considering a motion for summary judgment. They are:

> [34] I interpret the amended *Rule* 13.04 to pose five sequential questions:
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> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [*Rules* 13.04(1), (2) and (4)]
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> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under *Rules* 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
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> The analysis of this question follows *Burton's* first step.
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> A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
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> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [*Rules* 13.04(4) and (5)]
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> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended *Rule* 13.04(6)(b) allows the judge to balance these factors.
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> • **Second Question**: If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: *Rules* 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

> • **Third Question**: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: *Rule* 13.04(3). Governing that discretion is the principle in *Burton's* second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended *Rule* 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

> • **Fourth Question**: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under *Rules* 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under *Rule* 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under *Rule* 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under *Rule* 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] "**Discretion**": The judge's "discretion" under the amended *Rule* 13.04(6)(a) governs the option whether or not to determine the full merits – i.e. the Fourth

> Question. I disagree with Mr. Upham's factum that *Rule* 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The *Civil Procedure Rules* do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.
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> [36] **"Best foot forward"**: Under the amended Rule, as with the former *Rule*, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": *Rules* 13.04(4) and (5); *Burton*, para. 87.
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> [37] **Conversion to an application**: Lastly, the judge and counsel "**must**" bear in mind *Rule* 13.08(1)(b):
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> > 13.08(1) A judge who dismisses a motion for summary judgment on the evidence **must**, as soon as is practical after the dismissal, schedule a hearing to do either of the following:
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> (a) give directions for the conduct of the action, if it is not converted to an application;
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> (b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in *Rule* 5 - Application.
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> [emphasis added]

[5] In *Risley v. MacDonald* 2022 NSCA 76, the Court of Appeal considered the meaning of the first question, and specifically the term "genuine" in the context of what constitutes a "genuine issue of material fact". In doing so, Justice Farrar noted at paragraphs 55 to 56 that:

> [55] Although the appellants take no issue with the motions judge's identification of the appropriate law on a summary judgment motion, they take issue with its application. They say that Justice Warner erred in isolating the word "genuine", which led him down a path to consider the kind of evidence which was not genuine, as opposed to considering whether there was a genuine issue of material fact for trial. They state it this way in their factum:

> 66. […] The isolation of the word "genuine" led Justice Warner to dictionaries (Decision, para. 37) and then to case law which dealt with "the kind of evidence that was not genuine" (Decision, para. 40). This was an error. **The proper assessment was whether the "genuine" issue which was the "genuine issue of material fact" was an issue tied to the pleadings.** Assessing the evidence is a different matter.
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> [Emphasis added.]

> [56] With respect, contrary to the appellants' position, determining whether a genuine issue of material fact exists is based on both the pleadings and the evidence, not simply "an issue tied to the pleadings". *Rule* 13.04(4) provides:
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> > On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

[6] *Risley, supra* highlights that when the Court is considering whether there is a genuine issue of material fact between the parties, it does so by considering all the evidence before the Court from any source.

Analysis

[7] The parties' evidence establish that Mr. Alexander and Ms. Brothers volunteered to assist with a bottle drive in support of a youth hockey team. Mr. Alexander was then the Assistant Coach for the team. Ms. Brothers, as a parent, along with some other volunteers met at Mr. Alexander's home to begin the bottle drive at about 9 a.m. The night before it had snowed, and temperatures were below freezing.

[8] Mr. Alexander brought his truck from his driveway at the back of his house, on Silvers Road, to Hawthorne Street, which is adjacent to the front of his home. Bags of bottles and cans were then loaded into the flatbed of Mr. Alexander's truck.

[9] Ms. Brothers picked up a bag, to load it into Alexander's truck. When she did so, she slipped on the municipal sidewalk (Ms. Brothers' Affidavit filed February 7, 2023).

[10] The Court notes that the Statement of Claim issued December 12, 2017, pleads against Mr. Alexander, as one of the named Defendants, in negligence "singularly or collectively" and includes the following: that Mr. Alexander invited Ms. Brothers to an area where he knew or ought to have known there was a Hazardous Condition (specifically ice on the sidewalk); failed to take such care as, in all the circumstances of the case, were reasonable to see that the Plaintiff was reasonably safe while using the sidewalk; failed to inspect the sidewalk properly, or at all, for a Hazardous Condition; failed to see and guard against the Hazardous Condition of the sidewalk; failed to rectify the Hazardous Condition of the sidewalk by salting or shoveling; and such other negligence's or breach of duty as may appear." These same pleadings are made as against the other named

defendants, identically. Procedurally, it appears that the pleadings have closed, with outstanding issues leading to trial still unresolved.

[11] At the hearing, Mr. Alexander made a motion to strike portions of the affidavit filed by Ms. Teneha Brothers, on the grounds of their relevance to the motion for summary judgment. Ms. Brothers conceded that motion, but opposed the applicants' request to strike Ms. Shaelyn Masters' Affidavit (signed February 7, 2023) concerning the applicability and timing of a HRM municipal bylaw concerning building permits. Further, Ms. Brothers' counsel sought to tender affidavit evidence concerning their own measurements of the Alexander property, with a fence, in support of an argument that as Mr. Alexander was in breach of a HRM municipal bylaw concerning some renovations, that he had created or contributed to the alleged hazardous condition. I will note that this claim of potentially tortious conduct is not expressed with any particularity in the pleadings.

[12] Mr. Alexander responded that he had not objected to the affidavits that had been filed in support of the respondent before the hearing as all of this was novel. In essence, Mr. Alexander submitted that the affidavits filed by Ms. Brothers' counsel were put before the Court to support a speculative claim against him. In argument, Mr. Alexander maintained that Ms. Brothers is asking the Court to jump

to find there is a standard of care when there is no evidence that there is a duty of care.

[13] Specifically, Mr. Alexander submits that the issue on the motion is whether Mr. Alexander owed a duty of care to Ms. Brothers in respect to HRM's sidewalk, and that there is no genuine issue of material fact, or mixed fact and law, to be determined by a Court as against Mr. Alexander.

[14] Mr. Alexander directs the Court to section 2 of the *Occupiers' Liability Act*, SN 1996, c. 27, which defines an occupier at common law, and includes one who is in physical possession, and one who has responsibility for, with control over, the condition of the premises, the activities conducted on the premises or the persons allowed to enter. Further, section 3 of the *Occupiers' Liability Act* provides that the *Act* applies in place of the common law rules for the purposes of determining the duty of care.

[15] Mr. Alexander relies upon the decision in *Bowden v Withrow's Pharmacy Halifax (1999) Ltd*., 2008 NSSC 252, and the Court's interpretation of the interplay of the statute and the common law, for authority that there is no duty of care for an abutting landowner to a public sidewalk in Nova Scotia, with particular emphasis that this motion for summary judgment is analogous in its facts to that decision.

Bowden, supra involved a slip and fall by a passerby on a HRM sidewalk, with a claim made against the abutting landowner by the plaintiff, and ensuing cross claims between the abutting commercial landowner and the city. The Court found that it was not possible on the facts that the abutting landowner was an occupier at common law. As was noted by Justice Beveridge at para 43:

> [43] The plaintiff's claim against WPL is based on an assertion of liability in negligence and under the *Occupiers' Liability Act*. In my opinion, the law could not be clearer that, **absent special circumstances**, the owner or occupier of premises abutting a sidewalk owes no duty of care to pedestrians either at common law or pursuant to statute. [emphasis added]

[16] After engaging in a review of jurisprudence in Nova Scotia, and other provinces, in similar factual circumstances, as provided by both counsel during the motion it is apparent that the jurisprudence does not go so far to say that there will never be liability for an abutting landowner to a municipally owned and maintained sidewalk. There can be circumstances in which a finding of liability is warranted on the facts and application of the common law principles of tort.

[17] As Justice Beveridge also noted at paras 51 and 52 of *Bowden, supra*:

> [51] In *Bongiardina*, MacPherson J.A. noted there were two exceptions to the general principle that the law does not recognize a duty on a property owner. First, an owner may be deemed in law to be an occupier if it assumes control of that property. This was the conclusion in *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (Gen. Div.) where the court held that a store owner who used the adjacent sidewalk to display its wares on a continuing basis was an occupier of the sidewalk and thus subject to the duties imposed by the *Occupiers' Liability Act*. Similarly,

> Dambrot J. in *Moody v. Toronto (City)* (1996), 1996 CanLII 8229 (ON SC), 31 O.R. (3rd) 53 dismissed a motion for summary judgment on the basis that the owners of the Skydome in Toronto might be an occupier of the sidewalks adjacent to the stadium because of the special circumstances surrounding those walkways, particularly the almost exclusive use of the walkway by Skydome patrons.
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> [52] The second exception is that an owner owes a duty to ensure that conditions or activities on his or her property do not leave the property and cause injury to others. This was illustrated in *Brazzoni v. Timmons (City)*, [1992] O.J. No. 254 where the court held that the bank was liable allowing water from melting snow on its roof to accumulate, run across the sidewalk and create a dangerous situation that it knew or ought to have known could cause injury to pedestrians using the sidewalk.

[18] The parties do not dispute the location and circumstances of Ms. Brothers' slip and fall onto the sidewalk, or that HRM is the occupier of the sidewalk, as per statute. An assessment of credibility on these elements is not necessary then, Mr. Alexander submits.

[19] In response, Ms. Brothers pleads that there are related genuine issues of material fact, or of mixed fact and law, that require trial. Mr. Alexander invited her, with others, to that specific portion of the sidewalk where he chose to locate his truck for loading, with the bags of deposit containers deposited there. She points out that Mr. Alexander, on discovery, alluded to his knowledge that there was water flowing from his property and accumulating on "our sidewalk". In his discovery he stated that he made an observation to her, and possibly others, concerning the area being slippery and that he warned people concerning the space.

In that sense, it would appear that there is an issue of mixed fact and law as to whether Alexander had assumed control of the space for the bottle drive activity to a degree that would come within the exceptions noted in *Bowden, supra*. (Also *Shane v. 3194854 Nova Scotia Ltd*., 2013 NSCA 84).

[20] Mr. Alexander indicates in reply that this portion of his discovery is not fully reproduced for the Court, and directs the Court to review another portion of his discovery evidence on this point demonstrating that he viewed the prior installation of a fence with drainage rock as not effecting any change in the flow of the drainage from the top of the hill onto the sidewalk. He submits that this work did not change the natural flow of water from the upland area of his property, and further submits that the prevailing weather conditions that day, which is typical for winter in Nova Scotia, were conducive to ice forming on a sidewalk, and so he owed no special or higher duty to either clear, salt or warn persons who went to his house for the drive that day.

[21] The Court finds that there is no issue of material fact concerning the circumstances of the fall simply. It was an icy snow covered surface. All parties agree on the specific location of the fall and weather conditions. Ms. Brothers argues on the motion that causation of the ice is also a genuine material fact in issue. But with respect, the Court does not have evidence before it sufficient to

ground a finding on that point of her submission, as the affidavits filed in support of this were from counsel, not experts and appear to come within the "speculation from the counsel table" requesting that the Court infer a material fact in issue.

[22] However, considered altogether, these submissions by both Alexander and Brothers, paired with discovery evidence of Mr. Alexander, indicate there is a genuine question of law mixed with fact between the parties, specifically related to determining whether Mr. Alexander was an occupier and if so, whether there was a duty of care upon Mr. Alexander in keeping with the exceptions alluded to in *Bowden, supra*, for determination by a Court, that would require an evaluation of the credibility of the witnesses on all of the circumstances in which the fall occurred.

[23] The answer to the first question in the *Shannex, supra* sequence then is "No. There is no genuine issue of mixed fact and law for determination in this matter".

[24] However, as to the second question, the Court is satisfied that there is an issue between the parties that requires a determination by a Court of a question of law mixed with a question of fact, whether there is a duty of care owed to Ms. Brothers by Mr. Alexander as an occupier, on the evidence and the law as put before the Court on this motion for summary judgment.

[25] As Fichaud, J. noted the next sequential task for the Court is to determine, as the answers to question 1 and 2 are respectively “No” and “Yes”, whether to exercise its discretion to grant or deny summary judgment. This is governed by determining whether the challenged pleadings have a real chance of success.

[26] The burden falls on Ms. Brothers to demonstrate that there is a real chance of success. The degree of what constitutes a “real chance” in the context of a motion for summary judgment was addressed in *Coady v Burton Canada Co* 2013 NSJ No 245 NSCA 95 at paragraphs 43 and 44 as that which is a possibility that is reasonable the sense that it is an arguable and realistic position that finds support in the record, rather than that of reasonable proof to a civil standard on a finding of liability.

[27] In this matter, based on the portions of Mr. Alexander’s discovery evidence, paired with the evidence accepted concerning the circumstances of the fall, there is a reasonable and arguable position finding support in the record to date for the Plaintiff to proceed with a claim against Mr. Alexander on the question of law, mixed with fact, to determine whether he was or was not an occupier in the sense of the *Bowden, supra* exceptions.

[28] The next question in the *Shannex, supra* decision sequence then is for the Court to determine whether to exercise its discretion to finally determine the issue of law. *Hryniuk v Mauldin*, 2014 SCC 7 gives guidance to a Court in exercising this discretion, with a direction that the principle of proportionality is to be considered. In other words, viewing the matter in light of *Hryniuk, supra* and with the affidavit evidence only before the Court on the motion, it would not be possible for the Court to make a determination on the issue of law, mixed with fact. Oral evidence may be required to determine the facts that will inform the findings of law concerning the tort claim and the issue of a duty in the circumstances. On this motion, then, I decline to make a determination on this issue of law as it may be more appropriately addressed at a trial, with the involvement of the other named parties.

[29] Finally, it is mandatory for a Justice making a dismissal of a motion for summary judgment to schedule a hearing for directions on the action as soon as is practical after the dismissal. I am directing counsel to contact Scheduling at the Halifax Law Courts to schedule a hearing for directions in Chambers forthwith.

Conclusion

[30] The motion is dismissed. In regard to the issue of costs, upon consideration of the issue and the contents of the motion before the Court, and in recognition that the motion did not result in a final determination of the proceeding, I will order costs of the motion will be in the cause, pursuant to *Civil Procedure Rule* 77.03(4)(a).

Diane Rowe, J.