SUPREME COURT OF NOVA SCOTIA

Citation: *Basker v. Inverness County (Municipality)*, 2013 NSSC 345

Date: 20131028
Docket: PtH No. 369939
Registry: Halifax

Between:

Blaze Anthony Basker

Plaintiff

v.

Municipality of the County of Inverness

Defendant

Ceilidh Trail C.B. Club, a Society pursuant to the Societies Act, 1989, Chapter 435, and Inverness Development Association, a Society pursuant to the *Societies Act*, 1989, Chapter 435, and the Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Third Parties

Judge: The Honourable Justice Kevin Coady

Heard: October 18, 2013, in Halifax, Nova Scotia

Date of Decision: October 28, 2013

Counsel: Jamie MacGillivray, for the Plaintiff
Ian Dunbar, for the Defendant
Lisa Richards, for the Third Party, Inverness Development Association
Christa Brothers, for the Third Party, Ceilidh Trail C.B. Club
Richard Arab, for the Third Party, Attorney General of Nova Scotia

By the Court:

[1] On December 4, 2010 at approximately 4:30 p.m. Mr. Basker partially fell through a manhole located in a small park along Central Avenue in Inverness. He suffered injury as a result of the fall. It appears as if the manhole cover had been disturbed by persons unknown at a time unknown.

[2] Mr. Basker filed a Notice of Action against the Municipality of the County of Inverness seeking damages. He described the Defendant as "the owner of a park situated on Central Avenue, Inverness, Nova Scotia." The Defendant municipality filed a Notice of Defence which contained the following paragraph:

> 6. The Defendant says that if the Plaintiff fell, as alleged in the Statement of Claim, on lands owned by the Defendant, the said lands had been leased to the Ceilidh Trail C.B. Club pursuant to a lease dated April 1, 1995, which lease was in effect on December 4, 2010. Pursuant to the terms of the lease, the Ceilidh Trail C.B. Club assumed responsibility for maintenance of the lands where the Plaintiff fell. In addition, the Defendant entered into an agreement with the Inverness Development Association in 2005 ("IDA Agreement"). Pursuant to the terms of the IDA Agreement, the IDA assumed all responsibility for maintenance and repair of all accessory structures in the area of the new sidewalk, which included the manhole cover where the Plaintiff allegedly fell on December 4, 2010. The Defendant denies it was the occupier under the *Occupiers' Liability Act* of Nova Scotia.

The Defendant municipality then third partied the Ceilidh Trail C.B. Club (Ceilidh), the Inverness Development Association (IDA), and the Attorney General of Nova Scotia (AGNS).

[3] The three third parties filed defences and cross claimed against each other. Ceilidh now brings a motion for summary judgment. They seek dismissal of the municipalities' third party claim and the cross claims brought by the IDA and the AGNS. IDA also brings a motion for summary judgment seeking dismissal as against the municipality and the cross claims. The AGNS did not file anything on these motions but participated in these applications. The Plaintiff neither filed nor participated.

[4] It is not disputed that the park is composed of three lots. One is owned by Ceilidh and the other two lots are leased to Ceilidh by the owner municipality. The manhole in question is located on a lot owned by the municipality.

[5] Ceilidh is comprised of a small group of local citizens whose purpose is to foster volunteerism in the community and to financially contribute to community organizations. On April 1, 1995 they entered into an agreement with the municipality wherein they agreed to lease lands for the nominal sum of one dollar. Those lands were to become the Ceilidh Trail C.B. Club Park. It was their intention to maintain the park area for the community's enjoyment. The 1995 lease directs that Ceilidh "keep the demised premises in good repair." An April 10, 1995 letter from the municipality to Ceilidh states:

> It is the understanding that all maintenance and snow removal of these lands and any adjacent sidewalks will be the responsibility of the Ceilidh Trail C.B. Club.

[6] The IDA is a non-profit society set up to advance community interests. In 2003 it began a program aimed at upgrading the main street for the town's 2004 centennial celebrations. The IDA secured funding from various sources for the upgrading of the sidewalks in the vicinity of the park and for park improvements such as lighting and benches. In 2005 the IDA entered into an agreement with the municipality. The following recitals preface the responsibilities set forth in that agreement:

> WHEREAS the IDA, in collaboration with the Municipality, is going to supervise, and bring about, the construction of a new sidewalk, along with lighting, public seating, garbage containers, and flower boxes/gardens in the community of Inverness.
>
> AND WHEREAS, the parties wish to set out their respective responsibilities for the future care and maintenance of the said sidewalk and accessory structures.

[7] This agreement called for the following breakdown of responsibilities:

> 1. The Municipality will assume all responsibility:
>
> a. For the maintenance, repair and snow clearing of the sidewalk;
>
> b. For payment to Nova Scotia Power consumption for 40 lights in the new sidewalk;
>
> c. For liability insurance in respect of the new sidewalk only, and not any accessory structures;

2. The *IDA* will assume all responsibility for:

    d. The maintenance and repair of all accessory structures in the area of the new sidewalk, including the lighting infrastructure, the rest areas, the seating units, the garbage containers, the flower beds/boxes, and any other accessories other than the sidewalk itself;

    e. The above will include all necessary cleanup of the rest and seating areas and removal of garbage from the garbage containers;

    f. The provision of liability insurance with respect to all the abovementioned accessory structures;

    g. The provision of loss or damage insurance on the above-mentioned accessory structures if the *IDA* wishes to be covered for such;

[8] The position of the municipality with respect to the third party claims is that although they were the owner of most of the park, it delegated any duty it had as occupier to inspect and maintain the park to Ceilidh and the IDA. The municipality submits that Ceilidh was responsible for inspection and maintenance of the park and the IDA was responsible for inspection and maintenance of accessory structures including lighting. It further submits that if the occupier should have noted a disturbed manhole cover, the obligation to remedy such was the responsibility of Ceilidh and the IDA.

[9] The Municipalities position on the catch basin is well stated at paragraph 6 of their brief:

> 6 The Municipality does not take the position that the Club and the IDA were required to maintain or clean the Catch Basin itself. Maintenance of the Catch Basin remained the responsibility of the Province as owner of the structure, which is located within its Right of Way and is part of the storm drainage system of the public highway. However, the Plaintiff's claim against the Municipality does not rest on maintenance of the Catch Basin, but rather on the maintenance and inspection of the surrounding Park. It is our position that the Club and IDA were required to inspect the Park for any dangerous conditions, including for example an open catch basin cover, and remedy or report any such conditions. If the Plaintiff proves deficient inspection or maintenance led to his injury, the third party claims are likely to succeed.

[10] Ceilidh argues that at no time during lease discussions was it suggested they would be responsible for the upkeep of the municipal services within the park boundaries. The IDA argues there is no evidence they had any involvement with the catch basin. The IDA further states there is no evidence to suggest the catch basin was considered an "accessory structure" as referenced in the 2005 agreement with the municipality.

[11] The Applicant's motions for summary judgment are brought pursuant to *Civil Procedure Rule* 13.04 which states:

> 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.

The test applicable to a motion for summary judgment is well established. In *Guarantee Co. of North America v. Gordon Capital Corp*, [1999] 3 S.C.R. 423, the Supreme Court of Canada outlined the appropriate test at paragraph 27:

> 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. … Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." …

Courts have consistently stated that if a material dispute of fact is established a motion for summary judgment must be immediately dismissed.

[12] Recently the Nova Scotia Court of Appeal issued a decision in *Burton Canada Company v. Coady*, 2013 NSCA 95. Justice Saunders canvassed "a series

of well-established legal principles" respecting summary judgment applications. That list appears at paragraph 87:

1. Summary judgment engages a two-stage analysis.

2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or

> defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.
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> 9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.
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> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
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> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
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> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[13] Justice Saunders provided guidance at paragraph 22 of the above referenced decision:

> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

Notwithstanding the clarity of such appellate direction, this Court continues to see these applications come forward based on complex legal arguments.

[14] The municipality submits that the second step of the traditional test is modified in the case of third party claims for summary judgment. It refers to the case of *Selig v. Cook's Oil Company Ltd.,* 2005 NSCA 36. Roscoe J.A. stated at paragraphs 11 and 13:

> 11 With respect, the chambers judge erred in the application of the test by requiring that Cook's Oil meet both parts of the test. It is the applicant for summary judgment, in this case the third party, who must prove that there are no genuine issues of fact. Here, in effect, the chambers judge required that the defendant prove that the plaintiffs have a good case against it, when he required Cook's Oil to establish that migration of petroleum product is the source of the plaintiffs' contamination and to prove that there is either a new source or a causal connection to the third party's work in 1992.
>
> 13 On an application for a summary judgment of a third party claim, it should be assumed that the plaintiffs will prove their case. The defendant should not have to show that the plaintiffs have a good cause of action. The plaintiffs will have to prove at trial that their land is contaminated and that the source of the contamination is from the defendant's property. The plaintiffs have not yet stated when the contamination occurred, or how long it has been in existence, nor have they had to prove such things as how migration of hydrocarbons take place and how long a process is involved.

The result of this direction is that on an application for summary judgment by a third party, the initial focus should be whether the third party has established that there is no genuine issue of fact as alleged in the third party claim.

[15] The Plaintiff's action alleges negligence. The allegations of negligence appear in the statement of claim as follows:

> The particulars of the Defendant's failure to take reasonable care to protect the Plaintiff are that the Defendant:
>
> (a) Failed to have in place a reasonably adequate system for maintaining the Defendant's property;
>
> (b) Failed to have a reasonably adequate system in place for inspecting the Defendant's property;
>
> (c) If the inspection system was reasonably adequate, then the Defendant's employees failed to follow through with reasonable diligence;
>
> (d) Such other negligence as may appear.

The Plaintiff's claim against the municipality arises from the allegation that the park was improperly maintained or inspected. The municipality is essentially attempting to download those responsibilities to Ceilidh and the IDA through the two agreements. There is undisputed evidence that the manhole cover was improperly installed. There is no evidence that Ceilidh or the IDA had any involvement in the installation.

THE CEILIDH APPLICATION:

[16] The relationship between Ceilidh and the park is canvassed in the evidence. Since 1995 it has used the park to host a variety of town activities and festivals.

Club members regularly mowed the grass, removed garbage, planted flowers and generally cared for the visual aspects of the park. There is no evidence to suggest Ceilidh was involved in the installation, repair or maintenance of the storm drain system and specifically the subject manhole.

[17] Ceilidh bears the initial burden of establishing there are no facts in dispute. Caselaw states that a fact must be a material fact in order to be a disputed fact. The revised Rule 13.04(1) does not mention "material fact" and this omission was commented on by Justice Saunders in *Burton Canada Company v. Coady, supra*, at paragraph 31:

> The critical words "of material fact" have been dropped. I think this is unfortunate and may have led to some confusion in both the application of the test and the steps or stages that are triggered during that application.

Justice Saunders cited *242088 Nova Scotia Ltd. v. Hiltz,* 2011 NSCA 74 at paragraph 41:

> [27] The disputed fact under Stage 1 must be "material", ie. essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

I am satisfied that notwithstanding the wording of *Rule* 13.04(1) a dispute of fact must be material and not just peripheral.

[18] I find that there are disputed facts as to Ceilidh's duties arising from the 1995 agreement with the municipality. Ceilidh takes the position that because the

agreement is silent on ongoing obligations they have no duties beyond mowing the grass and removing garbage. This is disputed by the April 10, 2005 letter that speaks of "all maintenance." It is arguable that maintenance can include the duty to inspect for dangerous conditions and to report same to the body responsible for the manhole.

[19] Additionally Joe O'Connor's affidavit suggests that since 1995 Ceilidh has been required to maintain the park at all times.

[20] The law respecting occupiers' liability contributes to uncertainty surrounding park inspection and maintenance obligations. Ceilidh argues that it was not an occupier of the park despite the 1995 lease. The municipality argues that Ceilidh was an occupier due to its ongoing responsibility for and control over the park. Section 2(a) of the *Occupiers' Liability Act* states:

> **2.** Occupier means an occupier at common law and includes (a)(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises, and, for the purpose of this Act, there may be more than one occupier of the same premises.

The evidence establishes that Ceilidh were responsible for aspects of all three factors. If the Plaintiff is able to prove that the manhole cover should have been discovered before the Plaintiff's fall, Ceilidh's maintenance and inspection duties

would come into play and could leave them liable to the municipality in part or in whole.

[21] The interpretation of the 1995 lease is very much a disputed fact. The two parties advance widely divergent views of its import. It will be necessary for a trial judge to explore the evidence leading up to the agreement to determine whether Ceilidh shares liability with the municipality. While Ceilidh's exposure may seem tenuous, I am precluded from weighing that evidence in this proceeding. Consequently Ceilidh's application for summary judgment is dismissed.

THE IDA APPLICATION:

[22] The IDA argues there is no evidence that it had any involvement with the manhole in question. With respect to the 2005 agreement it argues that there is no evidence to suggest that the man hole was considered an "accessory structure." The IDA's affiants state that their organization has never been involved with the "maintenance, inspection or repairs of the storm sewers or catch basins in Inverness." The August 13, 2013 affidavit of Tony MacDonald described IDA's role in the park as follows:

> It was never my understanding, nor was it ever suggested to me by anyone involved that IDA's responsibility for the "structures" described in the 2005 Agreement had anything to do with the storm sewers or catch basins. My

> understanding was that this agreement referred to lighting, garbage containers and flower boxes, all of which the IDA was actively involved with procuring and maintaining.

In fact the IDA stresses that until Mr. Basker's accident they had no knowledge of the manhole.

[23] I find that there are disputed material facts as to the IDA's duties arising from the 2005 agreement. The IDA takes the position that their agreement with the municipality is limited by the following language at paragraph 2(d):

> The maintenance and repair of all accessory structures in the area of the new sidewalk, including the lighting infrastructure, the rest areas, the seating units, the garbage containers, the flower beds/boxes, and any other accessories other than the sidewalk itself;

The municipality argues that this clause creates three significant responsibilities:

- The maintenance and repair of all accessory structures in the area of new sidewalk;
- Including the lighting infrastructure;
- And any other accessories other than the sidewalk itself.

[24] It must be remembered that the Plaintiff's action against the municipality states that "he fell into a manhole that did not have a cover on it, in the middle of a grassy, poorly lit area." The modified step one test articulated in *Selig v. Cook's*

Oil Company Ltd., supra, requires that I assume the Plaintiff will prove these claims.

[25] There is a dispute as to what the term "accessory structure" means in the subject agreement. The IDA say it does not include the manhole whereas the municipality claims it does. In the framework of the lawsuit the duty of care includes inspecting for dangerous conditions and taking steps to have them corrected by the appropriate party. The interpretation of what the parties meant by "accessory structures" is an issue of fact and will require a determination by a trial judge.

[26] There is also a factual dispute over the lighting in the park. Assuming the Plaintiff succeeds in proving his fall was due in part to poor lighting, the municipality will be entitled to contribution and indemnity from the IDA as the maintainer of the lighting system. In his rebuttal affidavit at paragraph 11, Rankin MacDonald states:

> As to paragraph 47 of the O'Connor affidavit, I state all dealings with respect to the technical specifications for lighting in the park were between CBCL and Joe O'Connor. After the installation of the lighting, all dealings with electrician Alex MacNeil relating to the lighting in the park were carried out by Joe O'Connor.

The municipality submits that the 2005 agreement brings the IDA directly into the 2005 town improvements and specifically requires them to maintain the lighting infrastructure. This is a factual dispute that is material.

[27] The third sentence of paragraph 2(d) seems to suggest that the 2005 agreement delegates to the IDA all maintenance responsibilities short of the sidewalk. The municipality and the IDA differ on its interpretation.

[28] The IDA has not satisfied me that there are no material facts in dispute and, as such, I dismiss their application for summary judgment.

Coady, J.