SUPREME COURT OF NOVA SCOTIA
Citation: Drummond v. Grafton-Connor Property Inc., 2013 NSSC 370

Date: 20131126
Docket: Hfx No. 343024
Registry: Halifax

Between:

Ian Ronald Drummond

Plaintiff

v.

Grafton-Connor Property Incorporated, a body corporate
of Halifax Regional Municipality, the Province of Nova Scotia,
c.o.b. under the name of Cheers Burger Emporium & Lounge;
Jonathan Lawrence Briggs and Brent Kisil

Defendants

Judge: The Honourable Justice Michael J. Wood

Heard: December 19, 2012 and August 23, 2013, in Halifax, Nova Scotia

Written Decision: November 26, 2013

Counsel: Wayne A. Bacchus, for the plaintiff
David A. Graves, for the defendants

By the Court:

[1] In the early morning of January 21, 2010, Mr. Ian Ronald Drummond was a patron at Cheers, an establishment located on Grafton Street, in Halifax, which was owned and operated by Grafton-Connor Property Incorporated ("Grafton-Connor"). Just before 2:30 a.m., Mr. Drummond was forcibly ejected from the premises and struck his head on the sidewalk. He suffered serious injuries and has no recollection of the events of that evening.

[2] On January 27, 2011, Mr. Drummond commenced these proceedings against Grafton-Connor and three individuals. One of those individuals, Jonathan Lawrence Briggs, was convicted of a criminal assault as a result of the incident. Mr. Briggs is now deceased and did not defend the proceedings.

[3] The remaining individual defendants, Mr. John Smith (a pseudonym) and Mr. Brent Kisil, were working at Cheers as bouncers on January 21. By subsequent amendment of the statement of claim, John Smith was removed as a defendant. Counsel for Grafton-Connor, as well as Mr. Kisil, have brought a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04. They are requesting that all of the plaintiff's claims against them be dismissed.

THE PLAINTIFF'S ALLEGATIONS

[4] According to the third amended statement of claim, which was issued in November, 2012, Mr. Drummond says that his injuries were caused by the actions of Messrs. Kisil and Briggs in shoving him out of the Cheers premises. He also alleged negligence on the part of Mr. Kisil and Grafton-Connor.

[5] The allegations against Mr. Kisil include failing to take proper care for Mr. Drummond's safety while in his custody, releasing him into the custody of Mr. Briggs, not providing a reasonable opportunity for Mr. Drummond to leave of his own volition and using unreasonable or excessive force.

[6] The allegations against Grafton-Connor include failure to provide appropriate safety training for its employees, failing to have training and policies relating to removal of patrons from the premises and permitting Mr. Briggs to act

as a *defacto* employee on January 21, 2010. Mr. Drummond alleges that Grafton-Connor is vicariously liable for the actions of Mr. Briggs and its employees.

[7] Mr. Drummond alleges that his injuries were contributed to by the negligence of another employee, Mr. Michael Mattatall, but provides no particulars of that allegation and is not claiming against him in his personal capacity.

EVIDENCE ON THE SUMMARY JUDGMENT MOTION

[8] In support of their motion for summary judgment, the defendants filed affidavits from Gary Muise and Brent Kisil. Mr. Muise is vice-president of operations of Grafton-Connor. He deposed that Mr. Briggs was never an employee of Grafton-Connor. He said that the company provides training for employees, including Messrs. Kisil and Mattatall, and provided a one page outline of what was included in that training. He confirmed that Messrs. Kisil and Mattatall both completed the training prior to January, 2010.

[9] Attached as an exhibit to Mr. Muise's affidavit was a CD containing surveillance video from various cameras in and around the Cheers' premises, which show the events giving rise to the litigation.

[10] In Mr. Kisil's affidavit, he confirmed the training which he received. He described his discussions with Mr. Drummond on January 21, 2010. He said that Mr. Drummond was being escorted from the bar by Mr. Mattatall when he asked Mr. Kisil if he could remain. Mr. Kisil took custody of Mr. Drummond from Mr. Mattatall and, at the inner exit door, he encountered Mr. Briggs who grabbed Mr. Drummond.

[11] Mr. Kisil says that Mr. Drummond was not physically resisting being removed from the bar and that he released his hand from Mr. Drummond's shoulder, following which Mr. Briggs threw Mr. Drummond onto the sidewalk causing his injuries. He said that this occurred suddenly, without warning to him, and that he had no opportunity to intervene.

[12] Mr. Kisil was cross-examined and described the protocol in place at Cheers for removal of patrons. They were to be asked to leave and if they did not

respond, they would be advised to leave and if there was still no co-operation, they would be told that they were being removed. Mr. Kisil assumes that Mr. Drummond had been given the warnings called for by this protocol by Mr. Mattatall.

[13] Mr. Kisil said that he knew Mr. Briggs from having seen him work as a bouncer at another establishment. As he was moving Mr. Drummond through the inner door of the premises, Mr. Kisil said that patrons entering the bar got in his way and he lost control of Mr. Drummond. He felt that Mr. Drummond and Mr. Briggs knew each other. He did not release Mr. Drummond to Mr. Briggs. Mr. Briggs pulled him from his grasp suddenly.

[14] Mr. Kisil described Mr. Drummond as passively resisting and arguing that he should be allowed to remain in Cheers. Within a few seconds of his initial contact, Mr. Kisil had grabbed Mr. Drummond and began moving him towards the door.

[15] Mr. Kisil testified that he wanted to maintain control as Mr. Drummond was leaving the bar so he would not fall and hurt himself. He denies pushing him out the door.

[16] In response to the summary judgment motion, Mr. Drummond filed his own affidavit indicating that he had no specific recollection of the events of January 21, 2010, and identifying himself on the security video. He also filed an expert report from Greg Sypher, who is a civil engineer, with experience in accident reconstruction. Mr. Sypher reviewed the video evidence, Mr. Drummond's jacket which he wore on January 21 and the other witness evidence filed on the summary judgment motion. He expressed the opinion that Mr. Kisil applied force to Mr. Drummond, which contributed to his ejection from Cheers and resulting injuries.

ADMISSIBILITY OF THE SYPHER REPORT

[17] The defendants argued that the Sypher report should not be admitted as an expert report at the hearing of the summary judgment motion. Their submission was that the report did not meet two of the four requirements for admissibility set out in the decision of the Supreme Court of Canada in *R. v. Mohan,* [1994] 2

S.C.R. 9. In particular, they say that the report is not necessary and that Mr. Sypher is not properly qualified to give the opinions set out in the report.

[18] The issue of necessity involves a consideration as to whether the opinion provides information which is likely to be outside the expertise and knowledge of the trier of fact. To be admissible, the opinion must be needed in order to enable the trier to appreciate the matters in issue due to their technical nature.

[19] The submission of the defendants is that Mr. Sypher's opinion about what the video evidence shows is a conclusion which any lay person could reach viewing that recording. In other words, it is not necessary to have Mr. Sypher's opinion in order to draw the proper conclusions from the video evidence.

[20] Mr. Sypher's report goes beyond simply looking at the video and coming to conclusions. He calculates the frame rate as being 1.87 frames per second, which means that there is .53 seconds between each successive image in the video. He analyzes particular images from the point of view of Mr. Kisil's body geometry and reproduces image frames on which he has marked the angle between Mr. Kisil's upper arm and forearm, and shows how that angle changes in successive frames. He relates this arm movement to the extent of the wrinkles in Mr. Drummond's jacket where Mr. Kisil's hand is located.

[21] Mr. Sypher interprets the movements of Mr. Kisil's upper body in relation to the rotation of Mr. Drummond's body during the ejection process.

[22] Using landmarks seen in the video footage, as well as a visit to the site, Mr. Sypher estimates the distant travelled by Mr. Drummond before he hit the sidewalk. Based upon Mr. Drummond's mass, Mr. Sypher calculates the force required to eject Mr. Drummond and compares that with the force required for other tasks, such as opening an exterior door. Based upon his calculations and a frame by frame examination of the video recording, Mr. Sypher concludes that Mr. Drummond was already in motion and pivoting as a result of force applied by Mr. Kisil when Mr. Briggs pushed him onto the sidewalk.

[23] The determination of the frame speed of the video and the force calculations carried out by Mr. Sypher are not matters that a judge or a jury would have knowledge of. The video itself is choppy because of the frame speed, which

makes interpretation of movement difficult for a lay observer. Mr. Sypher's frame by frame analysis and knowledge of body mechanics provides additional information which could be useful. He points out things which might not readily be apparent to an observer, such as hand positions on doors and locations of centres of gravity.

[24] I am satisfied that Mr. Sypher's analysis goes beyond what a lay person could bring to a viewing of the incidents shown on the video. It is not simply a question of determining what is seen on the video, it is a matter of providing assistance to the Court in determining what inferences can be drawn from that information.

[25] The defendants also challenge Mr. Sypher's qualifications to provide the opinions expressed in his report. As a general rule, the qualification threshold required for admissibility is relatively low. As long as the proposed expert possesses special knowledge and experience going beyond that of the trier of fact, their opinion should be admitted. Deficiencies in expertise go to the weight which should be given to the opinion (see p. 198, *The Law of Evidence* (6th ed.), Paciocco; Irwin Law Inc. 2011).

[26] Mr. Sypher is a civil engineer, who has conducted investigations into motor vehicle collisions, including accident reconstruction of car-pedestrian collisions. He has testified as an expert witness in civil engineering. He has also conducted computer based three dimensional modelling in order to determine the movement of occupants in a motor vehicle as a result of a collision. Mr. Sypher has provided interpretation of video evidence

[27] I am satisfied that Mr. Sypher has the necessary expertise to carry out the analysis of the physical interaction between Messrs. Kisil, Drummond and Briggs as depicted in the video evidence. The weight to be given to that evidence need not be determined on this summary judgment motion.

[28] I conclude that Mr. Sypher's opinion is admissible for purposes of the defendants' summary judgment motion.

THE LAW OF SUMMARY JUDGMENT

[29] Motions for summary judgment have become commonplace in Nova Scotia. They have been the subject of multiple decisions from the Nova Scotia Court of Appeal over the last few years. Recently that Court sat as a panel of five in *Burton Canada Company v. Coady*, 2013 NSCA 95. In that decision, Justice Jamie W. S. Saunders, writing for the majority, took the opportunity to review the rationale behind summary judgment motions and outlined the proper analytical framework to be applied. He described the underlying purpose of summary judgment motions as follows:

> [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.

[30] The test for summary judgment which is usually cited comes from the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. According to that decision, the preliminary issue for determination is whether the applicant for summary judgment has shown that "there is no genuine issue of material fact requiring trial". Once that step is met the respondent must show that their claim or defence has a real chance of success. (Para. 27)

[31] In Nova Scotia, Rule 13.04 sets out the requirements for a motion for summary judgment on evidence. As noted by Justice Saunders in the *Burton* decision, the language of Rule 13.04(1) varies somewhat from the formulation of the test articulated in the *Guarantee Company* decision. That Rule provides as follows:

> **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.

[32] After noting that the language of this Rule differs from the traditional description of the test for summary judgment, Justice Saunders reiterates that the

established legal principles related to summary judgment continue to apply in Nova Scotia. Those principles were emphasized in the following passage from the *Burton Canada* decision:

> [38] This was Burton's motion for summary judgment. Burton had the burden of satisfying Justice Warner that there were no genuine issues of material fact requiring a trial. That is stage 1 in the analysis. During this stage there was no burden upon Mr. Coady to do anything. Burton had the onus of satisfying the Chambers judge that summary judgment was a proper question for consideration. In order to do that Burton bore the evidentiary burden of showing that there was no genuine issue of material fact which would necessitate a trial. It failed to do so.
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> [39] Once Justice Warner concluded that Burden had failed to meet its burden, his finding ought to have ended the analysis. He did not have to enter into an inquiry, tangentially or otherwise, into the merits of Mr. Coady's claim or his chances of success. That is stage 2 in the analysis and only arises if the moving party has met the first stage which is to satisfy the court that there are no genuine issues of inquiry.
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> [40] It would only be if Burton had met its initial burden, that the responding party (here Mr. Coady) would be required to show he had a real chance of success with his claim (**AMCI, supra**). This would then engage the second stage of the inquiry.

[33] It is clear that there are two distinct analytic steps which a trial judge must take in considering a motion for summary judgment. The first is whether the applicant has established no genuine issues of material fact requiring trial. Sometimes this is expressed as a requirement that there be "no material disputed facts". Alternatively, courts have said that a summary judgment motion can only be decided based upon "undisputed facts".

[34] In my view, the use of language such as "facts in dispute" or "undisputed facts" may be confusing. It suggests that the initial inquiry is limited to a consideration of whether the parties have presented competing evidence. Such an evidentiary contest may well lead a judge to conclude that an applicant for summary judgment has not met the burden imposed in the first stage of the analysis; however, that is not the only situation which might lead to that outcome. It was clearly reinforced by Justice Saunders in *Burton Canada* that the responding party has no burden to do anything, including filing evidence, and so

the initial assessment of whether there is a genuine issue of material fact requiring trial must still take place, even if the respondent offers no evidence.

[35] Courts have never said that the failure of the responding party to call evidence is always fatal to their position on a summary judgment motion and so even without an evidentiary dispute a court might conclude that a trial is required on a particular issue.

[36] An example which illustrates how an undisputed piece of evidence might still raise issues requiring trial is the equipment rental agreement and waiver of claims document which was signed by the plaintiff Coady in the *Burton Canada* case. Mr. Coady was injured in a snowboarding accident at a ski hill and one of the issues in the litigation was the standard of care which should be imposed on the equipment provider in light of the fact that Mr. Coady was sixteen years old. Justice Saunders' analysis of the issue in the context of the summary judgment motion is found in the following passage:

> [62] In Mr. Coady's case, the degree, if any, to which Mr. Coady's youth may affect Burton's standard of care likely will be pivotal. The definition of the standard of care involves issues of fact, including the drawing of inferences from the evidence: see **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120, which discussed the topic at length.
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> [63] The evidence on this summary judgment record has meagre pickings from Burton. But one item we have is Burton's "SNOWBOARD EQUIPMENT DEMO/RENTAL, AGREEMENT NOT TO SUE, WAIVER OF CLAIMS AND ASSUMPTION OF RISK AGREEMENT". This document says (1) "snowboarding involves certain inherent risks, dangers and hazards which can result in serious personal injury or death." (2) "THE RISKS INHERENT IN THE SPORT OF SNOWBOARDING CAN BE GREATLY REDUCED BY TAKING LESSONS, RIDING WITHIN MY ABILITIES AND USING COMMON SENSE AT ALL TIMES" and (3) "I HEREBY FREELY AGREE TO ASSUME AND ACCEPT ANY AND ALL KNOWN AND UNKNOWN RISKS OF INJURY WHILE USING THIS EQUIPMENT." [capitalization on the form] There is a line for signature of the Equipment User, beside which there is another line over the words "Signature of Parent or Guardian if user Under the Age of 18". Mr. Coady signed without reading it. But there was no signature by his parent or guardian, and apparently no insistence by Burton that his parent or guardian sign before Burton gave the snowboard to Mr. Coady.

> [64] Mr. Coady suggests that, for the definition of Burton's standard of care to a minor, Burton's form supports the inference that Burton has adopted a standard - i.e., that the parent is to lay eyes on the warning, which gives the parent an opportunity to talk sense into the child before the child uses the snowboard. As to causation, Mr. Coady's parents were at home in Enfield, over an hour's drive away. So, if Burton had insisted on a parent's signature, likely Mr. Coady would not have obtained the snowboard that day, meaning the accident and injury would not have occurred.
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> [65] Burton, on the other hand, says that the form requires the parent's signature solely because otherwise the waiver would be legally invalid, and the form carries no inference as to the standard of care.
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> [66] Which of these competing views is preferable involves the drawing of inferences from the evidence - i.e., from the form itself and from the testimony of witnesses who may speak to the circumstances surrounding the form, its creation and use. This is a classic "genuine issue for trial" under Rule 13.04.

[37] As this indicates, Justice Saunders concluded that the document itself could not be considered in isolation. It was necessary to consider its context in order to determine how it might assist the trier of fact in determining the content of the applicable standard of care. It was not necessary for Mr. Coady to show that there was an evidentiary disagreement between the parties relating to this document in order for the Court to conclude that there was a genuine issue of material fact requiring trial.

[38] Once the moving party has met the initial burden of showing that there are no genuine issues of material fact requiring trial, the responding party must show that their claim (or defence) has a real chance of success. They must establish this on evidence and if they are unable to do so Rule 13.04(1) requires the judge to grant summary judgment.

APPLICATION OF THE LAW TO THE DEFENDANTS' SUMMARY JUDGMENT MOTION

[39] The evidence relied upon by the defendants in establishing that there is no genuine issue of material fact requiring trial is the affidavit of Mr. Kisil and the video surveillance evidence. From those two sources, their pre-hearing brief says that the following material facts arise:

25. The material facts of this matter are as follows:

- In January, 2010, Kisil and Mattatall were employed as doormen by Grafton-Connor. Both had received Level l and Level 2 training from Ravensberg College;

- Drummond was a patron of the Bar on January 21, 2010. At approximately 2:00 a.m. Drummond was asked by staff to leave the Bar due to his apparent state of intoxication;

- Matatall escorted Drummond nearly to the inner front door of the Bar before transferring Drummond to Kisil. Kisil then escorted Drummond toward the inner front door, where they were approached by Briggs;

- Briggs grabbed Drummond's arm and brought him into the foyer between the inner and outer front door of the Bar. When Briggs grabbed Drummond's arm, Kisil informed him not to interfere, but he lost contact with Drummond at that time due to patrons entering the Bar;

- Kisil caught up to Briggs and Drummond in the foyer between the inner and outer front door, where Briggs and Drummond were talking. Kisil noted Drummond was asking to stay in the bar;

- Kisil re-established contact by placing his right hand on Drummond's left shoulder.

- Kisil noted that Briggs appeared to be a friend of Drummond, and the tones exchanged between the pair were not threatening;

- Kisil removed his hand from Drummond after reaching the outer front door. Suddenly, and without warning, Briggs threw Drummond out of the outer front door onto the sidewalk outside the Bar;

- Briggs was not a Grafton-Connor employee at the time of the Assault, and had never worked in any capacity for Grafton-Connor;

- Drummond sustained injuries as a result of Briggs' actions.

[40] Based upon these facts, the defendants make the following submission with respect to the first stage of the summary judgment analysis:

> 27. We are not aware of any relevant evidence other than the Kisil Affidavit and Video as to the sequence of events that culminated in Briggs throwing Drummond from the Bar. It is our understanding that the Plaintiff has complete amnesia regarding the events of January 21, 2010. As noted earlier in this submission, Briggs is deceased and accordingly cannot give evidence.
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> 28. As noted earlier in this submission, a material dispute of fact can only arise on evidence. In the absence of any evidence giving rise to a material dispute of fact, the summary judgment test should proceed to the next step.

[41] I disagree with the manner in which the defendants have framed the legal test to be met on the first stage of the analysis. It is not enough for me to conclude that there is no material dispute of fact, I must also be satisfied that there is no genuine issue of material fact requiring trial. In this case, Mr. Drummond has no recollection of the events at Cheers on January 21, 2010 and, therefore, does not "dispute" anything that Mr. Kisil says in his affidavit. However, that is not the end of the analysis.

[42] It is interesting to note that both the plaintiff and defendants say that the video recording supports their position. At the crucial moment when Mr. Drummond is thrown from the premises by Mr. Briggs, it is clear from the video that Mr. Kisil has his hand on Mr. Drummond's shoulder. Counsel for Mr. Drummond argues that the video shows force being applied by Mr. Kisil as a result of the indentation in the fabric of Mr. Drummond's jacket. He also says that as Mr. Drummond was ejected, Mr. Kisil's arm straightened in a pushing motion.

[43] Counsel for the defendants looks at the same video evidence and argues that it clearly shows that Mr. Kisil did not apply any force to Mr. Drummond, and that his hand was on his shoulder and "guiding him outside".

[44] The expert witness, Mr. Sypher, goes through a more complex analysis, but essentially comes to the same conclusion as was argued by counsel for Mr. Drummond. He opines that Mr. Kisil applied force to Mr. Drummond which contributed to the ejection process that lead to his injuries.

[45] The summary judgment motion took place over two days. The initial hearing was on December 19, 2012, at which time Mr. Kisil was cross-examined. The matter was then adjourned to permit the plaintiff to obtain an expert opinion, which resulted in the Sypher report which was filed on April 15, 2013. The summary judgment motion resumed on August 23, 2013, at which time Mr. Sypher was cross-examined and arguments were made with respect to the admissibility of his report. At that time, the defendants presented an alternative argument to the effect that even if the video demonstrated force being applied by Mr. Kisil, he was permitted to do so. This was because Mr. Drummond's permission to remain in the Cheers' premises had been revoked and Mr. Kisil was therefore entitled to use reasonable force to remove him.

[46] I have reviewed the video evidence carefully and based upon that evidence alone, I am not able to come to any firm conclusion with respect to the extent to which Mr. Kisil was applying force to Mr. Drummond when he had his hand on his shoulder at the entrance to Cheers on January 21, 2010. The frame speed of the recording is such that there is slightly more than a half second between each image that is captured. The means that the people in the video move in a disjointed fashion. Portions of their movements are not captured at all. This is particularly important where the culminating events occur over the space of less than ten seconds. In order to determine what inferences could be drawn from the video surveillance recording, other evidence is necessary. It could be the testimony of people in the video, such as Mr. Kisil, bar patrons or other Cheers' staff. It could also be expert evidence from a witness, such as Mr. Sypher, who has sufficient experience to explain what is shown on the recording or provide technical information which might assist in its interpretation.

[47] In some ways, the video evidence is similar to the equipment rental agreement and waiver considered in the *Burton Canada* case. The evidence is not disputed in the sense that it exists and shows the events in question. However, what inferences should be drawn from it will depend upon a broader consideration of the circumstances.

[48] The defendants argue that the combination of Mr. Kisil's affidavit and the video evidence is sufficient to establish that there is no genuine issue of material fact requiring trial because they say there is no other witness testimony available.

I disagree for two reasons. Firstly, there are a number of other people shown on the video, some of whom are identified employees of Cheers, and others unidentified patrons. These individuals may well have information which would assist the Court in interpreting the events shown on the video. For example, at the time of Mr. Drummond's ejection, there were several women standing beside Mr. Kisil. Who they are and whether they can be located is not known to me, but their evidence could be very significant in determining what happened.

[49] The second reason that I am not prepared to accept the defendants' submission concerning the sufficiency of Mr. Kisil's evidence is that his credibility and reliability will require assessment in order to determine how much weight it should be given. This can only take place in the context of a trial and should not be done on a summary judgment motion. A few examples will illustrate why I have come to this conclusion.

[50] In his affidavit, Mr. Kisil says that when he first encountered the plaintiff, he asked if he could stay in the bar and Mr. Kisil informed him that another employee had already told him that he had to leave. In his cross-examination, he indicated that this was an assumption on his part and he did not know whether Mr. Drummond had been given a prior warning. In order to have authority to remove Mr. Drummond, his permission to be at Cheers must have been revoked. Mr. Kisil did not withdraw this permission and assumes that other staff did. This does not prove justification for removal of Mr. Drummond.

[51] In his affidavit, Mr. Kisil said that he released his hand from the plaintiff's shoulder and that suddenly Mr. Briggs threw him onto the sidewalk. This leaves the impression that there was no physical contact with Mr. Drummond at that point in time. In his cross-examination, Mr. Kisil said that he put his hand on Mr. Drummond's shoulder to maintain control as he went through the door. He also said that he was trying to maintain that control as he was leaving so that he would not fall and hit his head. Mr. Kisil's *viva voce* testimony describes the situation where his hand was guiding Mr. Drummond through the doorway which is consistent with the plaintiff's theory and Mr. Sypher's opinion that some force was being applied.

[52] In his affidavit, Mr. Kisil said that he lost physical control of Mr. Drummond after he was grabbed by Mr. Briggs as a result of other patrons

entering the bar, and that he subsequently regained physical contact in the foyer. It is clear from reviewing the video evidence that there were no patrons entering the bar at the time when control of the plaintiff transferred from Mr. Kisil to Mr. Briggs. It appears that Mr. Kisil's evidence is contradicted by the video.

[53] The video evidence shows that Mr. Drummond was grabbed by Mr. Kisil and moved towards the door of the premises. The defendants argue that he was entitled to do so because Mr. Drummond's permission to remain in the premises had been revoked and he was therefore a trespasser. They rely upon the decision of Ilsley, C.J. in *Cottreau v. Rodgerson and Saulnier*, [1965] NSJ No. 20 where it states:

> The plaintiff became a trespasser on the premises occupied by Saulnier as soon as he was told by Rodgerson to leave and persisted in remaining on the premises.
>
> *Salmond on Torts*, 13th ed., p. 166 says:
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> Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff's land or vehicle is as much a trespass as to enter originally without right. Thus any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises.
>
> Indeed, counsel for the plaintiff felt free to state in his argument at the conclusion of the evidence that at the time the plaintiff was ejected by Rodgerson he was a trespasser.

[54] As this passage indicates, a person whose licence to be on property is revoked must be given a reasonable time to leave before force can be applied. In this case, Mr. Kisil's evidence does not establish if Mr. Drummond was told to leave by another employee. Mr. Kisil assumed that this had taken place. Mr. Kisil's interaction with Mr. Drummond lasted less than thirty seconds from beginning to end. Mr. Kisil places his arms on Mr. Drummond within a few seconds of the initial contact. There were apparently discussions between Mr. Kisil and Mr. Drummond, and Mr. Mattatall was present for some of them. Whether Mr. Kisil's conduct was reasonable and the force applied not excessive, will depend upon all of the circumstances. Mr. Kisil's brief affidavit and the video

evidence does not provide sufficient context for me to make this assessment of reasonableness on a summary judgment motion.

SUMMARY AND CONCLUSION

[55] The defendants have the initial evidentiary burden on a summary judgment motion to satisfy me that there is no genuine issue of material fact requiring trial. This is not limited to situations where there is an evidentiary dispute between the parties. In this case, the most important piece of evidence relied upon by everyone is the video surveillance recording. The footage in that exhibit has no sound and a relatively low frame rate. This means that the movement of people shown is disjointed. The result is that some of their movement is not captured and one has to infer what takes place during the half second between frames. This is crucial in a situation such as this, where the actual ejection of Mr. Drummond takes place over a few seconds.

[56] Whether a trier of fact should infer that the video recording shows Mr. Kisil applying no force, as argued by the defendants, or sufficient force to contribute to the injuries, as argued by the plaintiff, cannot be determined by a stand alone examination of the exhibit. More information about the events, including the *viva voce* testimony of people depicted will be required. It may also be helpful to have expert evidence. In my view, this is a classic situation where the factual determination of what transpired at the time of Mr. Drummond's ejection requires the full examination of a trial and cannot be resolved on a summary judgment motion.

[57] Even the defendants' alternative submission that any force applied by Mr. Kisil was reasonable necessitates a consideration of the surrounding circumstances. This would include what was said between Messrs. Kisil and Drummond and the extent to which Mr. Drummond may have been resisting his removal. Although Mr. Kisil said in his cross-examination and affidavit that Mr. Drummond was not physically resisting him, the video shows that he grabbed him and moved him towards the door. He described Mr. Drummond as passively resisting his removal and requesting the opportunity to remain. The evidence of the other patrons and staff who were present during these discussions will assist the Court in determining the surrounding circumstances in order to determine the context for Mr. Kisil's actions.

[58] I am satisfied that the defendants have not met the threshold burden of showing that there is no genuine issue of material fact requiring trial and I, therefore, dismiss their motion for summary judgment.

[59] As required by CPR 13.07, I would ask the parties to contact me and arrange for a motion for directions unless all of them wish to waive this requirement.

[60] I will receive written submissions from the parties on the issue of costs within thirty days of the date of this decision.

Wood, J.