Claim No: 324038

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Murray v. Sunnyside Mall, 2010 NSSM 27

BETWEEN:

GERALD WILLIAM MURRAY

Claimant

- and -

SUNNYSIDE MALL

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on March 23, 2010

Decision rendered on March 24, 2010

APPEARANCES

For the Claimant self-represented

For the Defendant David Seviour, General Manager

BY THE COURT:

[1] The Claimant parked his car in the parking lot at Sunnyside Mall in Bedford on the morning of January 26, 2010, while he spent some time in the Nubody's. When he came out and returned to his car, he noticed an overturned shopping cart close by and detected a small dent in the rear quarter panel of the car near the taillight. He sues in this claim for the cost of repairing the vehicle, in the amount of $343.94. He also claims costs and for some of the time spent dealing with this claim.

[2] Sunnyside Mall owns the shopping centre, and leases out the stores to tenants, one of which is the grocery store, Pete's Frootique. Pete's owns a fleet of plastic and metal grocery carts for its patrons, who often use them to transport groceries to their vehicles. There are cart corrals provided to leave one's cart, but it is well understood that some customers cannot be bothered and may leave their carts anywhere. Pete's staff go out into the lot and collect carts regularly.

[3] Sunnyside takes the position that it is not responsible for what may happen when one of its tenant's carts is accidentally bumped into a vehicle by a customer, or where it otherwise makes contact with a vehicle such as by being blown in the wind.

[4] The liability of an owner of property to an invited person, such as the Claimant, is governed by the provisions of the *Occupiers Liability Act*, which largely codifies what was the common law for over a century, with minor tweaks and clarifications. The Act provides (in part):

Duties of occupier

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises..

Willing assumption of risk

5 (1) The duty of care created by subsection 4(1) does not apply in respect of risks willingly assumed by the person who enters on the premises but, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act with reckless disregard of the presence of the person or property of that person.

[5] In basic terms, the occupier (or owner) must take reasonable care in all of the circumstances to ensure that people and their property are safe. Occupiers are not guarantors of safety.

[6] The onus of proof in a claim such as this is on the Claimant who must satisfy the court that the owner failed to take reasonable care, given all of the circumstances.

[7] In the case of a shopping centre owner, as pertains to the possible collisions between vehicles and shopping carts, I believe that it is a reasonable performance of that duty if it takes steps to delegate to its tenant the task of controlling shopping carts, and makes available corrals or other areas for carts to be collected. I find nothing unreasonable in the actions of the Defendant in this case.

[8] I also believe that anyone entering a shopping centre parking lot is aware of the possibility and knowingly (if reluctantly) assumes the risk of minor damage from carts or from other vehicles. Any other finding would essentially throw a wrench into the workings of shopping centres or stand-alone stores that use carts, and force them to control access and/or post prominent signs advising customers that the risk of damage is being assumed by the customer in cases where the owner has no real control. The Defendant is entirely correct that if it were responsible for every nick and dent that occurs in its parking lot, it would soon be bankrupt.

[9] Against that background, there is no liability to the Claimant here. Moreover, on all of the facts the most probable explanation for what happened to the Claimant's vehicle is that someone carelessly drove the cart into it. The

negligence, if any, would have been on that careless customer. The Defendant would not be liable for negligent conduct by a patron unless there were some reasonable way for the owner to control the handling of carts. I do not believe that this would be feasible in the real world.

[10] I do not accept the argument of the Claimant that the Defendant should not be allowing carts onto the upper parking level, because it is windier up there. First of all, there is no evidence that the damage here was caused by the wind. This is pure conjecture. Secondly, I do not think that there would be any reason to prohibit carts anywhere in the lot, as that would be quite impractical.

[11] In the final analysis, it does not matter that the Claimant never got to see the surveillance footage, which the Defendant claims showed nothing unusual. It also does not matter that the Defendant's witness may have been mistaken as to whether the Claimant's vehicle was pointed in toward the building, or was backed in, as the Claimant insists it was.

[12] In the result, the claim is without factual or legal substance and should be dismissed.

Eric K. Slone, Adjudicator