FILED SEP 27 2010

NO. 247/09

SUPERIOR COURT OF JUSTICE
OAKVILLE SMALL CLAIMS COURT
c/o BURLINGTON SMALL CLAIMS COURT

Brian W. King Q.C.
Deputy Judge

Heard 16 September 2010

B E T W E E N:

ARNALDO

Plaintiffs

-and-

H.C.C. #74

Defendant

JUDGMENT

The Plaintiff claims that the condominium garage door fell off its track and landed on top of his car just as it was being driven into the underground garage causing $15,320.49 in damage. The Condo Board denied liability.

The Alberta case of *Fisher* v. *Marquis Condo Corp.* has very similar facts. Car entering the underground parking of the condo.

The issue in that case was whether the sensors which tell the door to rise were working properly. There had been no previous problem and afterwards seemed to work properly, so what occurred on the day in question.

The Court referred to the Alta *Occupiers' Liability Act.* Similar in all respects to Ontario's Act. The Court pointed out while the occupier of the condo must take reasonable care in all circumstances, it does not mean it is an insurer of all risks. The standard is not perfection but reasonableness. The defendant is required to inspect, maintain and make needed repairs as called for and respond to any unresolved safety issues. The Alta Court goes on to point out that the law does not presume negligence and consequent liability for damage. There is no presumption that because an accident occurs on the occupier's premises that that therefore the occupier was negligent. The only distinction in the Alberta case was that the sensors were shown to be working perfectly after the accident whereas in this case the whole framework which carried the door's rollers had to be replaced with a double track for added strength. The suggestion being it had been there far too long; that a single track was never strong enough for the weight of the door. The new replacement after the accident was a stronger double track. There had been prior failures with respect to the door rolling but more towards failing to close than as in this case closing precipitously.

The history of the door shows that about once a year repairs were called for. In 2005 a worn roller assembly was replaced. In January 2006 a broken roller had to be replaced. In November 2006 there was an emergency call to replace hinges, rollers and drive motor. In May 2007 there was an emergency service to replace the control panel. In August 2007 to replace parts when the door jammed. In June 2009 the accident happened.

Mr. Osland testified he was the repair and service person. He had a contract to be on call if there was any problem with the doors. He inspected the site after the accident and found that the safety equipment operated as it should and springs and cables were undamaged. He removed the broken door.

The Plaintiff's theory is that the system was old and ought to have been replaced before the accident. The history of repairs and the installation of a stronger system immediately following the accident both indicate that. The Plaintiff claims damages to the car of $10,000.00. He produced an estimate of $15,320.49 but he did not proceed on the estimate but purchased the parts on the open market and had the garage do the labour. He had a labour invoice for $4,796.23 but no invoices for the parts. One can only surmise that he purchased the parts for cash at a discount. At the time of filing his claim the jurisdiction of the Small Claims Court was $10,000.00 and he requests the Court to assume that to be a reasonable figure in light of the estimate for a complete job.

The defence argues that the *Occupiers' Liability Act* replaces the common law. The Plaintiff has to establish negligence. They maintain they had a regular system of inspection. That is not quite correct. Just because the doors were repaired virtually annually due to malfunction and the repair company is on call does not amount to a system of inspection, although in fact the doors were looked at on the occasion of each repair.

Secondly, for the defendant to be negligent there must be some element of foreseeability. The defendant states there was none because the door had not fallen before and no one could have reason to anticipate it.

Thirdly, the defendant states that the only way the accident could have occurred was if the driver of the car had waited too long to approach resulting in the door starting down before the car was inside. That the driver either didn't notice the door coming down or did so but tried to beat it and ended up smashing through a descending door.

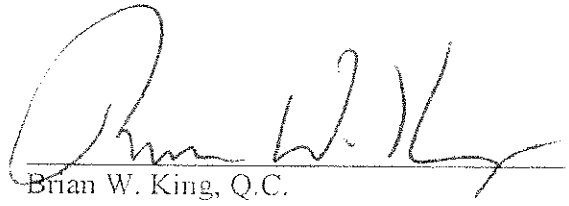
There are of course no witnesses to the defendant's theory. But it is necessary to come back to the question of the driver. Dennis Allcock, an experienced taxi driver and a friend of the Plaintiff, was driving at time of impact. The Plaintiff, also a taxi driver, had just driven home in his taxi to turn it over to whomever was to be driving the next shift. While he was engaged in that exchange he asked Mr. Allcock, who was also there because he also was at the end of his shift in another cab, to take the corvette from its above ground spot to the underground. He had performed this favour on previous occasions. His evidence was that he inserted the key at the top of the ramp to activate the door and as he drove in, the door simply failed and crashed down on the car.

The fact that Mr. Allcock was driving the car is interesting because neither he nor the Plaintiff owned the car. It was in the plaintiff's mother's name. Possibly for insurance purposes but that means the Plaintiff neither owned nor was driving the car. The defendant maintains that he has no standing at all to bring this action. I have to agree with the defendant, although I query whether this matter ought to have been raised at Settlement Conference or even pleaded and not left to summation after trial.

Notwithstanding the issue of non-standing, I find that however the accident occurred, the plaintiff has not established foreseeability required under the *Occupiers' Liability Act* and therefore must fail in this action. If he had been successful, I would have assessed damages at $9,500.00 on the basis that parts and labour are each usually fifty percent of the final invoice.

Cost awards were discussed at the end depending on the decided outcome. Plaintiff was represented by counsel and defendant by student-at-law. Both roughly agreed on an acceptable range of costs. I award the defendant $750.00 for student-at-law counsel fee and $40.00 for filing defence.

Date of issue:



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