

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
SALI ELBAUM) *Spencer F. Toole*, for the Plaintiff
)
Plaintiff)
)
- and -)
)
YORK CONDOMINIUM CORPORATION) *Dena Oberman*, for the Defendant, York
NO. 67, NATHALIA GAUTO and) Condominium Corporation No. 67
MIQUEIAS de OLIVEIRA SILVA)
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Defendants)
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)
)
) **HEARD:** February 18, 2014
)

2014 ONSC 1182 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiff, Sali Elbaum, is a unit owner of the Defendant, York Condominium Corporation No. 67. In 2012, while she was walking on the common elements of the condominium, she was seriously injured when an unleashed dog, owned by the Defendants Nathalia Gauto and Miqueias de Oliveira Silva, other residents of the condominium, allegedly attacked her causing her to fall.

[2] Ms. Elbaum has sued the dog's owners pursuant to the *Dog Owners' Liability Act*, R.S.O. 1990, c. D.16, and she sues the Condominium Corporation for common law negligence or pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2.

[3] The Condominium Corporation brings a motion pursuant to Rule 21 for an order dismissing Ms. Elbaum's action.

B. FACTUAL BACKGROUND

[4] York Condominium Corporation No. 67 is a non-profit corporation under the *Condominium Act*, R.S.O. 1970, c. 77 located at 130 Neptune Dr. in Toronto, Ontario.

[5] Ms. Elbaum is a unit owner at the Condominium Corporation.

[6] On September 23, 2012, Ms. Elbaum, who was then 89 years old, was walking on the common elements of the Condominium Corporation when she was attacked by the dog (a puppy) owned by the Defendants Gauto and de Oliveira Silva, who were also unit owners at the condominium. The dog was unleashed and left to run free.

[7] Under the *Condominium Act*, the Condominium Corporation is an occupier of its common elements.

[8] Ms. Elbaum alleges that the Condominium Corporation was negligent because: (a) it failed to take reasonable or any steps to ensure that persons are reasonably safe while on the common elements; (b) it failed to take reasonable or any steps to ensure that dogs are kept on a leash; (c) it failed to take reasonable or any steps to ensure that unit owners control their pets at all times while on the common elements; (d) it failed to create and or adequately enforce rules that would require that dogs are always kept on a leash; (e) it failed to create and or adequately enforce rules that would require unit owners to control their pets at all times when on the common elements; and (f) it failed to monitor, supervise, and maintain the premises in such a manner to keep aware of dogs on the common elements that may pose a danger to persons on the common elements.

[9] At the time of the accident, the Condominium Corporation had posted signs that dogs are to be leashed under its by-law 31356. The Condominium Corporation's rules provide that no pet shall be kept on any part of the common elements.

[10] Ms. Elbaum alleges that she suffered serious injuries as a result of the dog attack. She sues the dog's owners pursuant to the *Dog Owners' Liability Act*, and she sues the Condominium Corporation for common law negligence or pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2.

[11] The Condominium Corporation argues that the *Dog Owners' Liability Act* applies exclusively in the circumstances of this case and that it is plain and obvious that it is not liable under that *Act* and, therefore, Ms. Elbaum's action should be dismissed. Alternatively, the Condominium Corporation submits that it is plain and obvious that it cannot be liable at common law or under the *Occupiers' Liability Act*.

C. DISCUSSION AND ANALYSIS

[12] The Condominium Corporation's motion is brought pursuant to rule 21.01 (1)(a), which states:

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or ...

[13] Under rule 21.01 (2), no evidence is admissible on a motion under rule 21.01 (1)(a) except with leave of a judge or on consent of the parties. In the case at bar, the parties consented to the admission of evidence.

[14] The admission of evidence does not change a motion under rule 21.01 (1)(a) into a summary judgment motion under Rule 20. To succeed in having the plaintiff's action dismissed under rule 21.01 (1)(a), the defendant must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed in the claim: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.); *Clement v. McGuinty*, [2001] O.J. No. 1400 (C.A.).

[15] The Condominium's argument turns on the interpretation of the liability provisions of the *Dog Owners' Liability Act* which are found in sections 1, 2, 3 and 5.1 of the *Act*, which state:

Definitions

1. (1) In this Act,

“owner”, when used in relation to a dog, includes a person who possesses or harbours the dog and, where the owner is a minor, the person responsible for the custody of the minor;

Civil Liability

Liability of owner

2. (1) The owner of a dog is liable for damages resulting from a bite or attack by the dog on another person or domestic animal.

Where more than one owner

(2) Where there is more than one owner of a dog, they are jointly and severally liable under this section.

Extent of liability

(3) The liability of the owner does not depend upon knowledge of the propensity of the dog or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

Contribution by person at fault

(4) An owner who is liable to pay damages under this section is entitled to recover contribution and indemnity from any other person in proportion to the degree to which the other person's fault or negligence caused or contributed to the damages.

Application of Occupiers' Liability Act

3. (1) Where damage is caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under this Act and not under the *Occupiers' Liability Act*.

Protection of persons or property

(2) Where a person is on premises with the intention of committing, or in the commission of, a criminal act on the premises and incurs damage caused by being bitten or attacked by a dog, the owner is not liable under section 2 unless the keeping of the dog on the premises was unreasonable for the purpose of the protection of persons or property.

Precautions by Dog Owners

Owner to prevent dog from attacking

5.1 The owner of a dog shall exercise reasonable precautions to prevent it from,

- (a) biting or attacking a person or domestic animal; or
- (b) behaving in a manner that poses a menace to the safety of persons or domestic animals.

[16] The Condominium Corporation's argument is that: (a) damage was caused to Ms. Elbaum by being attacked by a dog on its premises (the common elements); (b) thus, the Condominium Corporation's liability is determined under the *Dog Owners' Liability Act*; but (c) it is not the owner or harbourer of the dog under the *Act*; and, therefore, (d) the Condominium Corporation is not liable under the *Dog Owner's Liability Act*; and (e) it is not liable under the *Occupiers' Liability Act*, which liability is precluded by the *Dog Owner's Liability Act*.

[17] There, however, is a logical fallacy in this argument, because it depends on the Condominium Corporation simultaneously being a dog owner and also not being a dog owner under the *Dog Owners' Liability Act*. A proposition and its negation, however, cannot be both true at the same time. The fallacy is conflating the ownership of the premises with the ownership of the dog, which is the ownership that actually matters under the *Dog Owners' Liability Act*. The Condominium Corporation's argument does not work.

[18] As I interpret the civil liability provisions of the *Dog Owners' Liability Act*, the court first determines whether the defendant is the owner or harbourer of the dog that bit or attacked a person or domestic owner. If the defendant is the owner or harbourer then there is strict liability; the *Act* negates the *scienter* defence; i.e., liability does not depend upon knowledge of the propensity of the dog or fault or negligence of the owner.

[19] As I interpret the civil liability provisions of the *Dog Owners' Liability Act*, if the defendant is the owner or harbourer of the dog and the plaintiff's damage was caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under the *Dog Owners' Liability Act* and not under the *Occupiers' Liability Act*.

[20] However, as I interpret the civil liability provisions of the *Dog Owners' Liability Act*, if the court determines that the defendant is not the owner or harbourer of the dog, then there is no strict liability, but there is also no preclusion of a common law negligence claim or a claim under the *Occupiers' Liability Act*.

[21] In *Graham (Litigation Guardian of) v. 640847 Ontario Ltd.*, [2005] O.J. No. 3685 (S.C.J.), a motel owner who permitted a dog on its premises was found not to be an owner under the *Dog Owners' Liability Act*, and it was unsuccessfully argued that the motel owner should be liable as an occupier. This argument failed because it was not established that the owner of the motel violated the duty of care imposed by the *Occupiers' Liability Act*. A similar argument also failed in *Hudyma v. Martin*, [1991] O.J. No. 1184 (Gen. Div.) against a landlord who knew that his tenant was keeping large dogs on the rented property.

[22] Put shortly, in the case at bar, it is not plain and obvious that the Condominium Corporation could not be found liable for a common law negligence claim or a claim under the *Occupiers' Liability Act*.

[23] In the case at bar, a trial or a summary judgment motion is required to determine whether: (a) the Condominium Corporation is a harbourer of the dog, which at this point is doubtful but not plainly and obviously not the case; or (b) not the owner of the dog but nevertheless liable for common law negligence or under the *Occupiers' Liability Act*, which liability at this point is not plainly and obviously not the case.

D. CONCLUSION

[24] For the above reasons, I dismiss the Condominium Corporation's motion.

[25] If the parties cannot agree about costs, they may make submissions in writing beginning with Ms. Elbaum's submissions within twenty days of the release of these Reasons for Decision followed by the Condominium Corporation's submissions within a further twenty days.

Perell, J.

Released: February 26, 2014

CITATION: Elbaum v. York Condominium Corporation No.67, 2014 ONSC 1182
COURT FILE NO.: 13-CV-478191
DATE: 20140226

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BETWEEN:

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Plaintiff

- and -

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