CITATION: Omotayo v. Da Costa, 2018 ONSC 2187
COURT FILE NO.: CV-13-490035
DATE: 20180329

2018 ONSC 2187 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jacqueline Omotayo, Plaintiff

AND:

Jose Da Costa and Metro Toronto Condominium Corporation 1292, Defendants

BEFORE: Nishikawa J.

COUNSEL: D. Visschedyk, for the Defendant
Metro Toronto Condominium Corporation

R. Kesarwani, for the Defendant
Jose Da Costa

No one appearing for the Plaintiff

HEARD: March 7, 2018

ENDORSEMENT

Factual Background

[1] The defendant, Metro Toronto Condominium Corporation 1292 ("MTCC 1292") brings a motion for summary judgment dismissing the claim of the plaintiff, Jacqueline Omotayo, for failing to protect her from an assault by the other defendant, Jose Da Costa, at a MTCC 1292 Board meeting.

[2] The plaintiff did not oppose the motion for summary judgment, and at the hearing, counsel for MTCC 1292 advised that Ms. Omotayo had executed a release dismissing her claim against MTCC 1292 in this proceeding. Despite the plaintiff's release of MTCC 1292, the other defendant, Jose Da Costa, opposes the motion for summary judgment

because he has a crossclaim against MTCC 1292 for contribution and indemnity. Mr. Da Costa has alleged no independent claim against MTCC 1292. Both defendants agree, however, that the plaintiff's dismissal of her claim against MTCC 1292 does not obviate the need to consider the motion for summary judgment on its merits.

[3] The following facts are not in dispute. MTCC 1292 is a condominium corporation under the *Condominium Act, 1998*, S.O. 1998, c. 19, and is the occupier of 54, 56, 58, 60 and 62 Sidney Belsey Crescent, Toronto. The claim arises from an assault that took place on October 4, 2011 at a meeting of the MTCC 1292 Board. The meeting was held in a meeting room in the lower level parking garage of the building at 54 Sidney Belsey Crescent. At the meeting, the plaintiff and Mr. Da Costa began to argue. At some point, Mr. Da Costa struck Ms. Omotayo on the head with a chair. The police were called, and Mr. Da Costa was charged with three offences. He received a conditional discharge for the charge of assault with a weapon, and the other two charges were withdrawn. Mr. Da Costa admits that he struck the plaintiff.

[4] Shortly before the incident, on September 29, 2011, Ms. Omotayo had been removed from her position as Chair. On October 2, 2011, Mr. Da Costa sent a letter advising that he wished to resign from his position as President. The October 4, 2011 meeting was an emergency meeting called by another Board member to determine how the Board would function. Although the meeting was intended to be a meeting of the Board, Ms. Omotayo and other residents of the condominium heard of the meeting and were present in the meeting room. Mr. Da Costa joined the meeting while it was in progress.

[5] According to the evidence of Dianne Clarke, Secretary of the Board, in the year preceding the assault, the Board met approximately 30-40 times. Meetings of the Board had become contentious and heated, but there were no incidents of physical attacks or threats of physical violence until the incident on October 4, 2011.

Issues

[6] The issue to be determined on this motion for summary judgment is whether there is a genuine issue requiring a trial in respect of whether MTCC 1292 breached its duty of care to the plaintiff.

Analysis

Principles Applicable to Summary Judgment Motions

2018 ONSC 2187 (CanLII)

[7] In order to succeed on its motion for summary judgment, MTCC 1292 must demonstrate that there is no genuine issue requiring a trial: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 20.04(2).

[8] In *Mayers v. Khan*, 2017 ONSC 200, at para. 18, Glustein J. summarized the following principles applicable to summary judgment articulated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87:

(i) Summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It is no longer merely a means to weed out unmeritorious claims but rather a "legitimate alternative means for adjudicating and resolving legal disputes" (*Hryniak*, at paras. 5 and 36);

(ii) An issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial (*Hryniak*, at paras. 4 and 49);

(iii) On a motion for summary judgment, the judge must first determine whether there is a genuine issue requiring a trial based only on the evidence before him or her, without using the fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (*Hryniak*, at para. 66); and

(iv) The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Hryniak*, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (*Hryniak*, at para. 57).

[9] On a motion for summary judgment, the court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras 26-27, aff'd 2014 ONCA 878, leave to appeal to SCC refused, [2015] S.C.C.A. No. 97.

2018 ONSC 2187 (CanLII)

[10] At the outset, the parties raised certain issues regarding the evidence filed on the motion. For clarity, I have not considered any portions of the discovery transcript of Mr. Da Costa that were referenced in his affidavit or factum, as he is not entitled to rely upon his own discovery evidence: *Rules of Civil Procedure*, R. 39.04(2). Regarding the transcript of the examination for discovery of Dianne Clarke, the representative of MTCC 1292, I have only considered the excerpts that were included in Mr. Da Costa's motion record, since Mr. Kesarwani did not provide a copy of the transcript to Mr. Visschedyk or advise him that he would be relying on it. Also, the affidavit of Lauren Hill, an associate at Mr. Visschedyk's firm, contains details about the incident and gives an opinion as to the foreseeability of the assault and the evidence of potential liability. I have not considered any of those portions of the affidavit and rely on the affidavit only in respect of procedural steps in the litigation and the attached documents, which are not in dispute.

MTCC 1292's Position

[11] MTCC 1292 acknowledges that at common law and under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, it owes a duty to residents and visitors to the building to ensure that the premises are safe and maintained in a reasonable manner.

[12] MTCC 1292's position is that this duty relates to matters such as the physical condition of the premises and foreseeable risks, but does not include preventing an assault by a third party in the circumstances of this case. MTCC 1292 argues that it was not reasonably foreseeable that a meeting participant would assault another participant during the course of a Board meeting.

[13] In support of its position, MTCC 1292 relies on the following evidence:

- the Board met 30-40 times in the previous year, and there were no previous incidents of physical violence or threats of physical violence at those meetings;
- at no time before the incident did the plaintiff claim that she felt threatened;
- no one else ever expressed a concern about their personal safety at a Board meeting or that behaviour of the participants had become potentially dangerous or violent; and
- there was never any request to arrange for security for a Board meeting.

2018 ONSC 2187 (CanLII)

[14] MTCC 1292 also relies upon the cross-examination evidence of Mr. Da Costa, who admitted that he had never threatened the plaintiff, and that there was no basis for anyone to think that he would assault her. He further testified that when he went to the meeting, he had no intent to harm the plaintiff. According to his own evidence, he could not explain how the assault happened, but only that he "lost it." In addition, Mr. Da Costa admitted on cross-examination that while he was the President of the Board, he had never arranged for security at any Board meeting.

Mr. Da Costa's Position

[15] Mr. Da Costa argues that MTCC 1292 is under a duty to have rules of conduct for meetings, policies relating to abusive language, threats and intimidating behaviour, and a duty to hire and supervise competent professionals to oversee its business.

[16] At the hearing, Mr. Kesarwani stated that he was relying upon s. 37(1) of the *Condominium Act*, but had not made this argument in his factum and did not bring a copy of the provision to the hearing. Subsection 37(1) refers to the standard of care of directors and officers of condominium corporations in exercising their powers and discharging the duties of their office, and states that they shall act honestly and in good faith and "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

[17] In opposing the summary judgment motion, Mr. Da Costa argues that further evidence is necessary on a number of issues, including whether MTCC 1292 was functioning in accordance with "industry standards" and the *Condominium Act*; to determine whether MTCC failed to meet its duty of care; and to assess the credibility of MTCC 1292's representative witness, Ms. Clarke.

[18] Mr. Da Costa points to evidence that Board meetings had become heated in the past, and relies on the discovery evidence of Ms. Clarke, in which she stated that people were in each other's faces. Ms. Clarke also testified that the plaintiff pointed her finger and raised her voice at her and behaved like a "bull on steroids." Ms. Clarke admitted in her examination for discovery that she had previously called the police after being threatened by the plaintiff. According to Ms. Clarke, however, she called the police after the plaintiff repeatedly left letters at her unit, because she was not comfortable about the plaintiff attending her unit.

2018 ONSC 2187 (CanLII)

Did MTCC 1292 Breach its Duty of Care?

[19] In order to determine whether there is a genuine issue requiring a trial as to whether MTCC 1292 breached its duty of care, it is necessary to consider whether the duty owed by MTCC 1292 included preventing an assault by a Board meeting participant on another participant.

[20] In *Coleiro v. Premier Fitness Clubs*, 2010 ONSC 4350, Lauwers J. (as he then was) granted summary judgment dismissing a claim against a fitness club arising from the assault of one patron by another. Lauwers J. found that the fitness club owed no duty of care, whether based on negligence law or the *Occupiers' Liability Act*, because the possibility of assault by one patron on another was not reasonably foreseeable. Lauwers J. further found that the risk was not one that could be considered a "customary or obvious risk," but that the assault was the independent act of a third party that could have happened anywhere. No causal link between the alleged negligence and the injury was found.

[21] Based on *Coleiro* and the facts in evidence on this motion, I find that the duty owed by MTCC 1292 did not include preventing an assault at a Board meeting. As occupier, MTCC 1292 owed the plaintiff a duty to prevent injury from reasonably foreseeable risks such as tripping hazards or other potentially dangerous physical conditions. The duty of care did not extend to preventing intentional assault by a third party at a Board meeting. The possibility of an assault by one Board member on another, or between meeting participants, was too remote a risk to be reasonably foreseeable. While the Board meetings had become contentious, the behaviour relied upon by Mr. Da Costa is not within the range of conduct that MTCC 1292 should have reasonably foreseen.

[22] In opposing the motion, Mr. Da Costa is in effect arguing that while the assault was unexpected from his perspective, MTCC 1292 should nonetheless have foreseen and protected against the risk of such conduct at a Board meeting. MTCC 1292 points out that even when Mr. Da Costa was the President of the Board, at no time did he arrange for security.

[23] Moreover, the bulk of the evidence of intimidating conduct relates to the plaintiff's behaviour at meetings of the Board. Even if MTCC 1292 had a duty to provide security at Board meetings, that duty might not have continued once the plaintiff was removed from the Board.

2018 ONSC 2187 (CanLII)

[24] Mr. Da Costa's argument about Ms. Clarke calling the police regarding Ms. Omotayo relates to a different risk than that which is relied upon by the plaintiff. Ms. Clarke contacted the police because she was concerned about the plaintiff attending at her unit and dropping of letters. This is unrelated to the question of the safety of Board meetings and whether MTCC 1292 should have provided security at those meetings.

[25] While Mr. Da Costa argues that issues of credibility would preclude summary judgment, there are no credibility issues that would impact the finding that MTCC 1292 did not breach its duty of care. The evidence of Mr. Da Costa and Ms. Clarke is consistent and establishes that prior to the incident: (i) no incident of physical violence had ever occurred at a Board meeting, (ii) no threats of physical violence had been made at a Board meeting, and (iii) no Board member or resident had ever raised a safety concern to MTCC 1292 about the conduct of Board meetings. In addition, Ms. Omotayo, who was a Board member until shortly before the incident, was examined for discovery. If evidence of previous incidents or safety concerns did exist, it would be in the record.

[26] Although Mr. Da Costa argues that Ms. Clarke's discovery evidence contradicts her affidavit, he has not identified any such inconsistencies. The incident in which Ms. Clarke called the police was explained. In any event, he chose not to cross-examine Ms. Clarke to probe any potential contradictions.

[27] Mr. Da Costa also relies upon certain discrepancies in the record as raising credibility issues, such as whether he was still a member of the Board, notwithstanding his resignation, and whether he was invited to the meeting by Ms. Clarke or attended at his own initiative. This seems to suggest that Mr. Da Costa's presence at the meeting should have been foreseeable, and that the risk of the assault was thus reasonably foreseeable. This is inconsistent with Mr. Da Costa's own evidence. As noted above, there was no reason to believe that Mr. Da Costa posed a threat and the issues identified are not relevant to the duty of care analysis.

[28] The other issues raised by Mr. Da Costa, including s. 37(1) of the *Condominium Act*, do not alter the analysis. Subsection 37(1) relates to the standard of care that directors and officers owe to the condominium corporation. Mr. Da Costa has provided no cases to support the application of this provision to the circumstances of this case.

[29] To the extent that Mr. Da Costa argues that further evidence of "industry standards" is required, if such evidence were relevant to the standard of care analysis, it should have been adduced in the motion. As noted above, the court is entitled to expect that the

2018 ONSC 2187 (CanLII)

record contains all the evidence that the parties would present at trial and that the parties have put their best foot forward.

[30] Based on the case law and evidence before me, I find that there is no genuine issue requiring a trial on the issue of whether MTCC 1292 breached its duty of care to the plaintiff.

It would be unduly onerous to find that a condominium corporation has a duty to provide security at every Board meeting to prevent a potential assault. Even given the contentious environment at the Board in this case, it would not be reasonable to require the condominium corporation to provide security. It is reasonable to expect individuals who participate on the boards of condominium corporations to adhere to a standard of conduct that includes, at a minimum, refraining from assaulting another participant.

[31] In the event that MTCC 1292 did breach a duty of care to the plaintiff, I find that the injury to Ms. Omotayo was not caused by MTCC 1292's breach. As was the case in *Coleiro,* the assault was an independent act of a third party. On Mr. Da Costa's own evidence, the assault was a random and unexpected act. The attendance at the October 4, 2011 meeting of Mr. Da Costa and Ms. Omotayo, who had both resigned from the Board, the argument between them, and the assault with a chair, were all unforeseen acts, and there is no casual link between any breach of duty by MTCC 1292 and the assault: *Coleiro,* at paras. 21-22.

[32] Given the narrow issue before the court in this case, I find that a summary judgment motion affords a process that allows the court to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial. I have not found it necessary to resort to the additional fact-finding powers of the court to determine the issues on this motion.

[33] The motion of the defendant, MTCC 1292, for summary judgment dismissing the plaintiff's claim against it is granted. The action will proceed only on the plaintiff's claim against Mr. Da Costa.

[34] This court is alert to the Court of Appeal's caution against ordering partial summary judgment due to the risk of inconsistent findings, and because such motions can lengthen proceedings without disposing of the action on the merits: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783. In this case, the allegations against Mr. Da Costa are separate and distinct from the allegations against MTCC 1292. While specific causes of action are not

2018 ONSC 2187 (CanLII)

pleaded in the Statement of Claim, the allegations against Mr. Da Costa relate to his use of force against the plaintiff in a reckless, dangerous or careless manner without regard to the plaintiff's well-being. In respect of MTCC 1292, the allegations relate to its failure to ensure the plaintiff's safety and to employ security measures at meetings. Mr. Da Costa's potential liability for assaulting the plaintiff can be determined independently, without raising the risk of re-litigation or inconsistent findings.

Costs

[35] Counsel for MTCC 1292 submitted a bill of costs for the motion of $6631.00 on a partial indemnity basis, including disbursements and HST. Counsel for Mr. Da Costa's bill of costs was significantly higher.

[36] Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) Rule 57.01(1) of the *Rules of Civil Procedure* sets out the factors to be considered by the court when determining the issue of costs.

[37] I have considered these factors, as well as the principle of proportionality in R. 1.01(1.1) of the *Rules of Civil Procedure*, while keeping in mind that the court should seek to balance the indemnity principle with the fundamental objective of access to justice. I fix costs at $6500.00, inclusive of disbursements and HST, payable by Mr. Da Costa to MTCC 1292 within 30 days of the date of this order.

Nishikawa J.

Date: March 29, 2018

2018 ONSC 2187 (CanLII)