

CANADA / JUDGMENT

Estabrooks v. Gauvin 2000 Construction Ltd.

2013 BCSC 628

COURT

Supreme Court of British Columbia

DECIDED

11 April 2013

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2013 BCSC 628 Estabrooks v. Gauvin 2000 Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Estabrooks v. Gauvin 2000 Construction Ltd.,

2013 BCSC 628

Date: 20130411

Docket: S110627

Registry: Vancouver

Between:

Iris D. Estabrooks

Plaintiff

And

Gauvin 2000 Construction Ltd., Gauvin Construction Ltd., 1140 Holdings Ltd., John Doe, doing business as Austin Denture Clinic, and the said Austin Denture Clinic, Elena Molchanova, doing business as Bloom European Floral Design, and the said Bloom European Floral Design, John Doe, doing business as Roger B. Kok & Company, and the said Roger B. Kok & Company, Vivian Oh, doing business as Queen's Acupuncture Clinic, and the said Queens Acupuncture Clinic, Monica Hay, doing business as Quilted Treasures, and the said Quilted Treasures, John Doe, doing business as James L. Robinson, and the said James L. Robinson, Searun Fly & Tackle Ltd., and Y.L. Forest Trading Ltd.

Defendants

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Plaintiff:

M. Kozlowski

Counsel for the Defendant (Applicant) Monica Hay, doing business as Quilted Treasures:

S.L. Kovacs

D. Field (Articled Student)

Counsel for the Defendants Gauvin 2000 Construction Ltd., Gauvin Construction Ltd., and 1140 Holdings Ltd.:

H. Bromley

Place and Date of Hearing:

Vancouver, B.C.

April 26 and November 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

April 11, 2013

I. introduction

- [1] This is an application by the defendant Monica Hay ("Hay"), doing business as Quilted Treasures, for an order dismissing this action as against her and Quilted Treasures under Rule 9-7 of the Supreme Court Civil Rules.
- [2] The defendants Gauvin 2000 Construction Ltd., Gauvin Construction Ltd. and 1140 Holdings Ltd. (collectively, "Gauvin" or the "defendants") say that this matter is not suitable for a summary trial under Rule 9-7.
- [3] The plaintiff, Ms. Estabrooks, takes no position in this application.

II. Background

- [4] The affidavit evidence discloses that on February 3, 2009, the plaintiff arrived at a strip mall in Coquitlam, B.C., with the intention of going to Quilted Treasures, a retail tenant operated by Hay. When she arrived, the two parking spaces reserved for Quilted Treasures and directly in front of it, were occupied. She parked her vehicle in a parking space two spaces west of the Quilted Treasures spaces and in front of a cement planter abutting another retail space. In order to go to the entrance of Quilted Treasures, she then walked through the

parking lot. There was an alternate path to the entrance on a sidewalk with covered stairs. She slipped and fell on some ice or snow in the parking lot and suffered injuries as a result.

- [5] Hay leases the retail space used by Quilted Treasures from 1140 Holdings Ltd., the owner of the mall.
- [6] No one saw the plaintiff slip and fall. In her affidavit, Hay swears that after the plaintiff fell, she went out of her premises and saw the plaintiff "sitting in the parking lot, injured, on or near a snow pile by a planter in front of the parking stall located adjacent to a neighbouring retail space occupied, at that time, by an acupuncturist."
- [7] Hay also states that, about the time that the plaintiff fell, the parking lot was clear of snow, with the exception of snow piled up in the parking space in front of the acupuncturist. She believed that the snow had been piled there by a snow removal company hired by the defendants.
- [8] In her examination for discovery, the plaintiff said that before she fell, she had made it around the edge of the snow pile and was between the snow pile and a car when she fell. She said that she could not see the yellow line between the snow pile and the car but could not remember if that was because it was covered by slush or snow or because of the car.
- [9] The evidence before the court regarding the location of the plaintiff's fall suggests that she fell between the snow pile and one of the parking spaces reserved for Quilted Treasures, which was occupied by a car. However, it is unclear whether she slipped on ice and snow that had accumulated along the edge of that parking space, where the plaintiff said the yellow line was not visible. If the line was covered by the vehicle, then she probably slipped outside that space. If it was covered by snow or ice and the car was parked well inside the line, then she may have slipped inside the space although that is unlikely. The evidence before the court does not lend itself to a finding as to whether the plaintiff fell within or outside a parking space reserved for Quilted Treasures.
- [10] Under the lease between Gauvin and Hay, Hay is obligated to keep all walks, passages, yards and alleys adjacent to her premises clean and free from any rubbish, ice or snow. There is no provision in the lease that expressly refers to the cleaning of parking spaces in front of the retail spaces.
- [11] In her examination for discovery the plaintiff recalled that Hay was apologetic to her and said that the mild weather that day had made her forget that ice would have formed during the night, so she had not used the salt given to her by the strip mall owner.

III. Analysis

- [12] One of the leading cases on the application of former Rule 18A (now Rule 9-7) is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (3d) 202 (B.C.C.A.).

[13] At para. 52 of *Inspiration Management Ltd., McEachern C.J.B.C.* (as he then was), referring to earlier cases where it was suggested that a chambers judge should only proceed with a summary trial and reach a judgment if he is sure that a full trial would not produce a different result, stated:

In my view it will be rare for a judge in chambers to be satisfied to such an extent. Anything might happen at a trial and one can never say that the result will always or inevitably be the same. If the chambers judge can find the facts, then he must give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so.

[14] At para. 74, *Lambert J.A.* states:

So judgment should not be given under subrule 18A(3) without asking these two questions: Has any party been denied an opportunity to produce relevant testimony: Is there a conflict in the evidence, which the judge can not readily resolve, on a point of fact which could affect the result? If the answer is "Yes" to either question then the case is probably not ready for judgment. And the steps that must be taken to answer those questions "No" will indicate whether the best course is to manage the case to judgment under subrules 18A(5) and (3) or to send the case to the trial list.

[15] In my view this matter is not suitable for adjudication under Rule 9-7 because there is insufficient evidence to determine where the plaintiff fell. Even if the location of the plaintiff's fall could be determined, the evidence is unclear as to who had responsibility to maintain that area free from ice or snow. A determination of that issue will involve a consideration of the terms of the lease as to the meaning of the walks and passages "adjacent" to the premises and the previous practice of Hay in keeping the area around her premises clear of ice or snow.

[16] It is also not clear whether Hay is an "occupier" under the *Occupiers Liability Act*. Consideration will have to be given to the significance of the two parking spaces being reserved for Quilted Treasures. While Hay asks the Court to infer that she did not have sufficient control or responsibility of those spaces to result in her being an occupier, the evidence of the defendants regarding the significance of the reservation, as well as Hay's past practice with regard to those spaces, appear to be relevant. While she denies assuming responsibility for ensuring those spaces were kept free from ice, she appears to have acknowledged to the plaintiff that she had forgotten to apply salt to an area that may have included the place where the plaintiff fell. This aspect of the case might be clarified by an examination for discovery of Hay, which has not yet occurred.

[17] Hay relies on the decision in *Gardner v. Unimet Investments Ltd.*, 19 B.C.L.R. 196 (C.A.) where a store owner successfully brought a summary trial motion under Rule 18A for the dismissal of the plaintiff's claim against it, leaving the plaintiff to proceed against the landlord. In my view that case is distinguishable because it did not involve a consideration of the significance of reserved parking spaces. For example, Ms. Hay may have been entitled to have a vehicle ticketed or towed from one of the spaces reserved for Quilted Treasures, thus giving her a measure of control over those spaces. There was also no dispute in that

case over where the fall occurred. I also note that in the Gardner case the original summary trial was adjourned to permit examinations for discovery to be completed, so that all the evidence was before the summary trial judge, whereas here Hay has not been examined for discovery.

[18] I am also concerned that to decide the question of Hay's liability without the full factual matrix before me may result in the release of one defendant from an action when, after all of the evidence is before the court, it is determined that some apportionment of liability should be made.

[19] Accordingly, the application of the defendant Monica Hay, doing business as Quilted Treasures, and Quilted Treasures, is dismissed with costs in the cause.

"Bowden J."

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