

CANADA / JUDGMENT

Ferrier v. Johnscross Properties (B.C.) Ltd.

2010 BCSC 492

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 492 Ferrier v. Johnscross Properties (B.C.) Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ferrier v. Johnscross Properties (B.C.) Ltd., 2010 BCSC 492 Date: 20100412 Docket: S77291 Registry: Kelowna Between: Mary Ferrier Plaintiff And Johnscross Properties (B.C.) Ltd., James Palanio, 62-431 Realty Ltd., doing business as Re/Max Penticton Realty, Jeff Queen and 611032 B.C. Ltd. doing business as Re/Max Front Street Realty, Ploutos Enterprises Ltd. and Joe Doe doing business as Penticton Tile & Marble Defendants And Johnscross Properties (B.C.) Ltd., James Palanio, 62-431 Realty Ltd., doing business as Re/Max Penticton Realty, Jeff Queen and 611032 B.C. Ltd. doing business as Re/Max Front Street Realty, and John Doe doing business as Penticton Tile & Marble Third Parties Before: The Honourable Madam Justice Dillon Reasons for Judgment Counsel for the Plaintiff: S.T. Pihl Counsel for the Defendant, Johnscross Properties (B.C.) Ltd.: J. Forsythe Place and Date of Trial/Hearing: Kelowna, B.C. April 8, 2010 Place and Date of Judgment: Kelowna, B.C. April 12, 2010

Introduction

- [1] The defendant, Johnscross Properties (B.C.) Ltd. ("Johnscross" or the "defendant"), has applied for judgment against the plaintiff pursuant to Rule 18A. Prior to hearing the application, counsel for the plaintiff advised that the action was to be dismissed by consent against the defendants, Jeff Queen, 611032 B.C. Ltd., Ploutos Enterprises Ltd., and John Doe doing business as Penticton Tile & Marble. A consent dismissal order is in circulation and will be entered in due course. The remaining defendants, James Palanio and 62-431 Realty Ltd., have not joined in this application.
- [2] The plaintiff says that this matter is unsuitable for disposition under Rule 18A because there is a conflict in the evidence on a fundamental matter going to the heart of the plaintiff's claim. The defendant denies that there is such conflict or, if there is, that it is on a relatively minor matter that is not essential to the plaintiff's case and on which the defendant is prepared to concede, if necessary.

Facts

- [3] The plaintiff, Mary Ferrier, claims damages for injuries that she sustained in a slip and fall on Saturday, February 24, 2007, at a condominium property located at 277 Yorkton Avenue in Penticton, British Columbia (the "premises") which is owned by the defendant. The plaintiff arrived at the premises in the early afternoon with her husband, Ron Ferrier, and the defendant, James Palanio, her realtor ("realtor") to view a condominium unit that was for sale. According to John Lansley, president of the defendant, and not denied, the premises were still under construction, although 99 percent completed at the time of the accident with only carpeting and tiling remaining to be done. However, none of the condominium units was occupied yet and workmen were on site.
- [4] The plaintiff swore that she understood from her realtor that he had arranged for the visit for that day with the main listing agent. However, this inadmissible hearsay evidence is not supported either by an affidavit from her realtor or by the main listing agent. Mr. Lansley said that permission was required to enter the premises, even by owners of condominium units, by contacting the site foreman located in the site office in a trailer on the grounds. Mr. Lansley also said that the premises were closed on that day as it was a weekend, and nobody was allowed on the premises on the weekends. Visitors were allowed on weekdays with permission and provided that they were accompanied by someone on behalf of the defendant. No permission had been given by the defendant to the plaintiff or to her agent to attend for a view of condominium units on that day.
- [5] Mr. Lansley also swore that there was a sign on the front door of the premises advising that no access was allowed without an appointment and accompanied by certain personnel from the defendant. He provided a photo of the sign that said: "Attention No Access to non-working personnel without prior appointment and accompaniment..." The plaintiff and her husband both swore that there was no sign on the front door when they walked up to the front door on February 24, 2007. However, one of the workers grouting tiles on the premises that day, Cindy Paul, recalled seeing a sign on the front door to the effect that only trades' people were allowed in the building. Based upon her experience on construction sites generally and on that site in particular, Ms. Paul swore that the building was not open to the public.
- [6] Mr. Lansley said that the building was locked on that day. Ms. Paul confirmed that a key was required to enter the building. The plaintiff approached the front door and cannot comment on whether it was locked as workers laying tiles in the front foyer made a gesture that clearly indicated that she was not to enter there. The plaintiff said that she had the impression that the gesture meant that she was to try another door. Her husband understood the gesture to mean that they could not enter the lobby but thought that it indicated that they could go around the side of the building. The plaintiff, her husband, and her realtor went along the side and back of the building, trying several doors. All were locked. The group then went into the garage where several workers were working. Nobody had directed them to enter there. However, according to the plaintiff, none of the workers told her that she was not

allowed on the premises. The plaintiff did not establish that the workers were employees of the defendants or exactly who they were. Her realtor found an open man door from the garage into the building. The realtor entered, followed by the plaintiff and her husband.

- [7] The plaintiff entered the lobby of the building and was informed that the elevator was not working. Her realtor then led the plaintiff and her husband up the stairs. On the first landing that they approached, Cindy Paul was preparing to grout the tiles on the landing. The tiles had been laid the week before and were completely dry and fixed. Ms. Paul swore that before she started her grouting, she ensured that the stairwell was clean by sweeping it very well 15 to 20 minutes before she started grouting. This was done specifically to ensure that no dirt or debris got into the grout.
- [8] Ms. Paul stated that, between 1:00 and 1:30 p.m., she observed a lady enter the stairwell, followed by two men. This was the first time that Ms. Paul had seen non-workers in the building and she was surprised to see them. She was kneeling on the back wall working on the tiles furthest from the stairs. From this vantage point, I conclude that she had full and close view of the floor of the landing and near stairs. She said that the plaintiff told her that she would make sure that she did not step on the tiles. Ms. Paul said that she responded by saying that it was okay because the tile was glued down and she was only grouting. Ms. Paul observed the plaintiff to carefully step around the tile and approach the stairs. On the first or second step, the plaintiff's feet came out from under her and she fell backwards onto her bottom. Ms. Paul swore that there was nothing on the stairs for the plaintiff to slip on, that there was no water or debris on the stairs. The plaintiff cried out that she had broken her leg and informed Ms. Paul that she had osteoporosis.
- [9] The plaintiff stated in her affidavit that she attempted to step around the tile on the landing with her right foot. As she put her right foot down, her foot slipped out from under her and she fell to the ground on the landing. She said that she had already put her foot on the landing when she slipped. She did not look to see what she had slipped on. She denied that Ms. Paul had told her that it was all right to step on the tiles. On discovery, the plaintiff said that her left foot was still on the stairs before the landing, that her right foot slipped on the bare floor on the landing, and that she fell sideways and landed on her bottom on the landing. At another point, she said that she pivoted, fell backwards and landed on her rear. As she pivoted, she heard a snap coming from her right ankle and then she fell backwards. When asked whether she was sure that she had slipped, the plaintiff responded: "Something made me slip" and she agreed that it could have been the break to her ankle that caused her to fall.
- [10] The plaintiff's husband recalled that the woman worker told them not to step on the tiles. He said that his wife was stepping around the tiles when she slipped and fell. He disagreed with Ms. Paul's description of the area as clear of debris. Mr. Ferrier stated that following the fall, he noticed "a thin covering of debris on the ground" that he believed to be sawdust. Almost three years after the accident, he said that he looked at the soles of the shoes that the plaintiff was wearing on that day, which they still had and which Mr. Ferrier said that the

plaintiff had not worn. He stated that he observed a coating of grey dust or grit on the sole of the shoe. He said: "I speculated that this was debris from the grout mixture, but I have no direct knowledge of that. I am however certain that there was debris on the ground in the location where my wife slipped..." He also said that he was concerned for his wife's injury and did not pay attention to the nature of the debris on the floor that he thought that his wife slipped on.

- [11] The plaintiff suffered a broken ankle in the fall. Suitability for Determination under Rule 18A
- [12] The plaintiff argued that this matter was not suitable for determination under Rule 18A because of a conflict in the evidence on a fundamental matter going to the heart of the basis for liability. There were three conflicts in the evidence: first, whether the sign was posted at the front door; second, whether access was allowed to the premises; and third, the condition of the floor where the plaintiff fell. The defendant said that any conflicts in the evidence were not material and that it was not necessary for the court to determine whether there was a sign on the front door in order to determine liability. Further, the defendant states that the plaintiff's husband's opinion about debris on the floor based upon his observations of the plaintiff's shoes long after the event is speculation and that the issue can be resolved on the evidence.
- [13] Certainly, a judge may not give judgment under Rule 18A unless she can find the facts necessary to decide issues of fact based on materials before the court and it is just in the circumstances to render judgment. In consideration of the justice of the situation, the court should consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of proceeding to a conventional trial in relation to the amount involved, the course of proceedings, and other matters (*Inspiration Management Inc. v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202 (C.A.) (*Inspiration Management*); *Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184; *Dahl v. Royal Bank* (2005), 46 B.C.L.R. (4th) 342 (S.C.), affirmed 2006 BCCA 369).
- [14] It is not the case that a court may not determine a matter under Rule 18A if there are conflicts in the evidence (*MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, 33 B.C.L.R. (4th) 44; *Uppal v. Rawlins*, 2009 BCSC 127 at para. 21 (Uppal); *Friscioni v. Forzani Group Ltd.*, 2004 BCSC 787 at paras. 12 and 22 (Friscioni)). However, if serious concerns about credibility arise, it may not be possible to find the facts necessary to determine the matter (Uppal at para. 26) or it may be unjust to do so (Friscioni at paras. 12 and 22). It may be possible to resolve conflicts in the evidence without making findings of credibility (Friscioni at para. 22). Or, credibility may be determined based upon other admissible evidence (*Inspiration Management* at pp. 215-216; *Singh v. Lally*, 2005 BCSC 1600 at para. 23 (Singh)). The matter may be unsuitable for disposition under this Rule where such other evidence is not available, or there is a head-on conflict in the evidence going to the foundation of the case and that conflict is not resolvable without making findings of credibility (Friscioni at para. 22; *Singh* at para. 24).

- [15] The court should give judgment under Rule 18A wherever it can and should be courageous to resolve an action without a conventional trial if circumstances make it just to do so (*Mariotto v. Waterman* (1996), 32 B.C.L.R. (3d) 125 (C.A.)).
- [16] This is a straightforward matter involving a slip and fall with relatively moderate injury sustained. The trial is scheduled for eight days, an expensive undertaking given the modest damages anticipated. All parties have been discovered, and although the plaintiff mentioned cross-examination of Mr. Lansley on his affidavit as a possibility, the plaintiff did not request to cross-examine him or Ms. Paul. While there is a conflict in the evidence about the sign on the front door, I do not consider this to go to the foundation of the case. Neither do I consider the evidence about access to be in conflict. It was clear that the building was locked and that it was under construction with workers around doing tiling. There is no admissible evidence that the plaintiff had obtained permission to attend there on that day, and regardless of whether the sign was on the front door or not, it is not contested that the defendant had a policy of not inviting visitors without permission and without being accompanied by one of the defendant's personnel. Workers were in the garage, and it is not contested that a door was open to the main building from there. While the plaintiff asks that I draw the inference that the open door provided access to uninvited guests, so doing does not raise a conflict on the evidence as to whether the plaintiff was supposed to be there in all of the circumstances.
- [17] Finally, as to the condition of the floor where the plaintiff fell, the plaintiff alleges in paragraph 6 of the Amended Statement of Claim that "...in attempting to walk across the landing, the Plaintiff slipped and fell on sawdust, flooring material or some other substance left on the floor of the Premises in an unsafe manner". The plaintiff suggested that there was a conflict going to credibility between Ms. Paul and Mr. Ferrier on the issue of debris left on the floor. However, Mr. Ferrier said that he did not pay close attention to the thin debris that he thought was on the floor where his wife slipped but "at first...believed it to be sawdust". Years later, he speculated that it was debris from the grout mixture based upon the bottom of the plaintiff's shoes. It should be noted that the plaintiff had already walked around the building, through the garage, through the lobby where tiling was going on, and up the first flight of stairs. To suggest that anything on the soles of the plaintiff's shoes two years after the event came from the exact spot where she fell, and further that it was debris from the grout mixture, is weak and does not seriously challenge the credibility of Ms. Paul, who explained how and why she had cleaned the floor to prevent debris from getting into the grout. Hers is direct evidence. Further, the plaintiff did not know what caused her to slip but said that she slipped on the floor of the landing where, according to pictures, there would not have been grouting as the tiles did not extend over all of the landing. Finally, the real issue is not whether there was debris on the floor, but whether it was left there in an unsafe manner.

- [18] In my conclusion, this is a case where it is appropriate to determine the matter under Rule 18A. There are not really any head-on conflicts relating to important issues. Credibility is not seriously at issue, such that it is impossible to make the necessary findings of fact. The matter is not complex. Neither party seeks to adduce further evidence. The cost of proceeding to an 8-day trial is disproportionate to the amount involved.

Analysis

- [19] The duty established for an occupier of premises under s. 3 of the Occupier's Liability Act, R.S.B.C. 1996, c. 337, is to take reasonable care in all of the circumstances to see that a person on the premises is reasonably safe in using the premises. The plaintiff bears the onus of proving on a balance of probabilities that the occupier breached his duty of care (Mainardi v. Shannon, 2005 BCSC 644 at para. 21(Mainardi). Injury alone does not establish that some act or failure to act on the part of the occupier caused the plaintiff's injury (Mainardi). The test is one of reasonableness (Mainardi). The court cannot speculate when determining the cause of the plaintiff's fall and subsequent injury because it is for the plaintiff to prove the nexus between her fall and the defendant's failure to discharge his duty of care (Mainardi). The care required varies according to the nature and use of the premises (Mainardi).
- [20] In this case, the plaintiff testified upon discovery that she did not know what she slipped on. She did not see anything that could have caused her to fall. She did say that she heard a snap come from her ankle area before she fell and that she suffered from osteoporosis. Her husband said that there was thin debris on the ground where the plaintiff fell and speculated that this could be sawdust or dust from the grouting mixture. However, he did not say that this was the cause of her fall. This evidence does not establish causation on a balance of probabilities. The plaintiff does not know why she fell. There are two theories within the evidence: she may have broken her bone before she fell to the ground, or she may have slipped on the floor because of something on the floor. These differing theories of causation raise possibilities about the cause of her fall but do not go so far as to establish the cause of her fall on the balance of probabilities.
- [21] It is not possible in the face of Ms. Paul's evidence to infer that there must have been something on the floor that caused her to fall. Ms. Paul said that she had purposefully cleaned the area of any debris before she started to grout.
- [22] The plaintiff did not observe anything that could have caused her to fall. This court cannot presume that an act or omission on the part of the defendant caused the plaintiff to fall (Zantvoort v. Welyk, 2003 BCSC 995 at paras.18-19). In these circumstances, the plaintiff has not established that an act or omission on the part of the defendant caused her to fall. The action should be dismissed on that basis.

[23] Further, the plaintiff has not established that there was either grout dust or sawdust or other material on the ground that was not reasonably safe. Assuming for the moment that there was such material on the ground, it should not be forgotten that the building was clearly under construction especially as it related to the floors. Entry was restricted through the normal routes as workmen were busy on the floors. It was not expected that visitors would be around the building, and the plaintiff failed to prove that she had an appointment with the defendant. The plaintiff has not established that a thin dusting on the floors in this circumstance was not reasonably safe. The standard is not perfection (*Weiss v. Greater Vancouver* (1979), 11 B.C.L.R. 112 (C.A.)). The plaintiff has not established that the defendant breached his duty to make the premises reasonably safe for users, including the plaintiff, in these circumstances.

Conclusion

[24] The action is dismissed against Johnscross with costs to the defendant on Scale A. "J. Dillon, J." The Honourable Madam Justice Dillon

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