

CANADA / JUDGMENT

Moinzadeh v. Loblaws Inc.

2021 BCSC 793

COURT

Supreme Court of British Columbia

DECIDED

29 April 2021

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2021 BCSC 793 Moinzadeh v. Loblaws Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moinzadeh v. Loblaws Inc.,

2021 BCSC 793

Date: 20210429

Docket: S1510132

Registry: Vancouver

Between:

Hamid Moinzadeh

Plaintiff

And

Loblaws Inc., I-Corp Security Services Ltd. and

Arnold Bogdan

Defendants

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for Plaintiff:

Self-Represented

Counsel for Defendants:

R. Nigel Beckmann

Place and Date of Trial:

Vancouver, B.C.

April 12-16, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 29, 2021

I. introduction and overview

- [1] On October 10, 2013, just before 9 PM closing time, Mr. Moinzadeh stole some cheese from the Extra Foods store at Park Royal Mall in West Vancouver. Mr. Arnold Bogdan was a security guard in the store working as a "loss prevention officer" and he observed the incident, followed Mr. Moinzadeh out of the store onto the sidewalk at the mall, and apprehended him for theft.
- [2] Mr. Moinzadeh claims that the security guard used excessive force in effecting the arrest which caused injury to his right shoulder. He sues the security guard, Mr. Bogdan, his employer, I-Corp. Security Services LTD., as well as the storeowner for damages for personal injury.
- [3] For the reasons that follow, I find that Mr. Bogdan was justified in arresting Mr. Moinzadeh for theft, that he did not use excessive force in making the arrest, and consequently Mr. Moinzadeh's action for damages must be dismissed with costs.

II. underlying principles governing a "citizen's arrest"

- [4] Theft of property valued at \$5,000 or less is an indictable offence under section 334(b) of the Criminal Code of Canada.
- [5] Anyone who sees another person committing an indictable offence is permitted to make what is colloquially called a "citizen's arrest" of that person and is authorized to use as much force as is necessary for that purpose. This is an ancient right, indeed obligation, at common law but one which is also codified in sections 494 and 25 of the Criminal Code as follows:

Arrest without warrant by any person

494 (1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

..

Delivery to peace officer

- (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

For greater certainty

- (4) For greater certainty, a person who is authorized to make an arrest under this section is a person who is authorized by law to do so for the purposes of section 25.

Protection of persons acting under authority

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,

..

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

- [6] The concept of a "citizen's arrest" is discussed in detail by the Supreme Court of Canada in *R. v. Asante-Mensah*, 2003 SCC 38. Among other things, that case explains:

- Arrest implies confrontation which in turn creates a potential for the use of force;
- Arrest is a continuing act; it starts with taking a person into custody and it continues until the person is delivered to the police;
- Arrest occurs when (1) the individual is restrained by force or (2) upon words of arrest being pronounced, the individual simply submits to the process and accompanies the person detaining him;
- The person making the arrest has the right to use such force as is reasonable and necessary in the circumstances; however,
- Individuals who are wrongly arrested or against whom unreasonable and unnecessary force is used will have the right to pursue prosecutions for assault and/or claims for civil damages.

- [7] Another commonly cited case addressing a citizen's right of arrest is *R. v. Lerke*, 1980 ABCA 15 which points out that;

- the search powers of a private citizen making a valid arrest are the same as those of a police officer making the arrest;
- a search may be conducted of the person arrested for safety reasons, e.g. protection against later attack through the use of a concealed weapon; and,
- a search may also be conducted to obtain and preserve evidence related to the offence for which the arrest is being made.

- [8] A frequently cited example of civil liability arising from the use of excessive force in a citizen's arrest made by a private security guard is *Chopra v. T. Eaton Co. Ltd.*, 1999 ABQB 201. There the Court discussed how liability might be imposed for the torts of battery ("assault" in the vernacular), false arrest, and false imprisonment. In that case, the security guard in a department store was found liable for using "grossly excessive force" and for detaining the customer in handcuffs for an unreasonably long period of time (approximately four hours). The Court awarded damages totalling some \$38,000 for physical injury, humiliation, compensation for expenses incurred, and as a punitive measure.
- [9] In the present case, Mr. Moinzadeh was representing himself at trial but his legal claim was drafted by a lawyer on his behalf. The legal basis for the claim is said to be "the common law of negligence and/or breach of statutory duty" and does not expressly allege the torts of assault/battery, false arrest or false imprisonment. However, paragraph 5 of Part 1 of the pleading does allege the following facts:

On or about October 10, 2018, the plaintiff was shopping at the Park Royal Loblaw's during regular business hours when he was approached and verbally and physically assaulted by [Mr. Bogdan]. [Mr. Bogdan] violently twisted the plaintiff's right arm to his back and falsely accused him of and detained him for theft.

- [10] Counsel for the defendants acknowledges that, while Mr. Moinzadeh's claim is not properly pleaded as an action in negligence, the alleged facts, if proved, are sufficient to sustain a cause of action for assault.

III. resolving credibility disputes and making findings of fact

- [11] For the first time since the arrest occurred in October 10 2013, the plaintiff admitted at the opening of this trial that he had in fact stolen the cheese from the Extra Foods store and he tacitly conceded that Mr. Bogdan was entitled to effect a "citizen's arrest" for the indictable offence of theft. Mr. Moinzadeh maintains, however, that the amount of force used by Mr. Bogdan to arrest and subsequently detain him was grossly excessive and should result in liability notwithstanding the theft. In particular, he maintains that Mr. Bogdan violently and unnecessarily twisted his right arm behind his back while marching him back to the store thereby resulting in the shoulder injury which he alleges to have sustained.
- [12] Mr. Bogdan admits that he seized Mr. Moinzadeh's arm while making the arrest and that he continued to hold that arm while escorting Mr. Moinzadeh back into the store, but he strenuously denies twisting the arm or forcing it behind Mr. Moinzadeh's back. In essence, Mr. Bogdan says Mr. Moinzadeh is simply not telling the truth about the nature and extent of force used during the arrest.

- [13] A human being's perception and memory of events is fallible. Memories are fragmentary, suggestible, and malleable. They often contain amnesic gaps, information out of order, guesses, and incorrect details. They are subject to decay, interference, distortion, and constructive error. Witnesses in a trial usually do their best to provide accurate evidence about a sequence of events or the content of conversations, but there is a great deal of room for error and reconstruction, and conflicting testimony is commonplace.
- [14] The primary role of a trial judge is to make findings of fact, i.e. to determine what happened in any given case, and to apply the law to those facts in order to generate the appropriate legal result. Findings of fact are based on admissible evidence presented to the court. As in this case, that evidence can include testimony under oath from witnesses respecting their actions and observations, as well as documents or other material marked as exhibits. The role of the trial judge is to appropriately weigh all of this evidence and to determine which alleged facts have been proved in accordance with the applicable standard of proof - in civil cases, on a balance of probabilities.
- [15] The assessment of a witness's oral testimony necessarily entails an assessment of credibility. The role of the court is not usually reduced to simply choosing between two or more versions of events, and it is not an all-or-nothing process. In determining facts, i.e. making findings as to what actually occurred in any given case, the court is free to reject some aspects of a witness's evidence while accepting others and, indeed, to assign different weight to different parts of the witness's evidence.
- [16] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:
- consistency of the witness's account of events;
 - consistency with other admissible evidence from witnesses, documents, or other physical objects;
 - whether the evidence is reliably corroborated or contradicted by other evidence;
 - the witness's ability to reliably recall and communicate details;
 - the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation, or exaggeration; and
 - the inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.

[17] Sometimes, however, witnesses deliberately lie and intend to deceive. When that occurs, it may be impossible to accurately separate truth from falsehood and the court may simply find the witness's testimony wholly unreliable. The more frequently the witness lies, the more likely that will be the case. If as a consequence a truth is not accepted as a fact by the court, the witness has only himself or herself to blame.

[18] In this particular case, Mr. Moinzadeh has lied repeatedly and has displayed persistent dishonesty. First, of course, as he now admits, he did actually steal the cheese. On two separate occasions, he lied to the police about doing so and falsely accused Mr. Bogdan of "planting" the evidence. In his later pleadings, he continued to falsely claim that Mr. Bogdan wrongfully accused him of theft. In his examination for discovery in this action, he lied under oath by denying he had taken the cheese from the store. In such circumstances, absent reliable corroboration, there is little reason for the Court to believe Mr. Moinzadeh is now telling the truth about the degree of force employed during his arrest.

IV. evidence, aNALysis and findings of fact in this case

[19] The basic facts of this case are largely uncontroversial and I make the following findings:

- i. At approximately 8:45 PM on October 10, 2013, Mr. Moinzadeh entered the Extra Foods store at Park Royal Mall in West Vancouver to purchase some groceries.
- ii. He was observed by Mr. Bogdan, a licensed security guard employed by I-Corp. Security Services Ltd. working inside the store as a "loss prevention officer".
- iii. Mr. Bogdan had completed his training as a security guard at the Justice Institute of British Columbia in 1997 and had received further training on I-Corp's "policies and procedures" when he first joined I-Corp. in 1998. Over the years, Mr. Bogdan has made approximately 1,000 arrests for shoplifting and other offences.
- iv. Mr. Bogdan observed Mr. Moinzadeh placing various grocery items into a store basket, but he also saw Mr. Moinzadeh picking up a package of cheese and putting it into the left pocket of his jacket. While Mr. Moinzadeh paid for the grocery items in his basket before exiting the store, he did not pay for the cheese he was concealing in his left jacket pocket.
- v. Mr. Bogdan followed Mr. Moinzadeh as he exited the store and the mall, and approached him on the sidewalk outside. He hailed Mr. Moinzadeh and identified himself as store security.
- vi. Mr. Moinzadeh turned around to face Mr. Bogdan. Mr. Bogdan told Mr. Moinzadeh he had some cheese that he had not paid for in his pocket and told him he was being arrested for theft.
- vii. Mr. Moinzadeh denied having any cheese and turned his right jacket pocket inside out to show that he had no cheese.

viii. Mr. Bogdan told Mr. Moinzadeh that the cheese was in his other pocket, whereupon Mr. Moinzadeh started turning away to his left. Mr. Bogdan thought Mr. Moinzadeh was evading arrest so he grasped Mr. Moinzadeh's right arm to detain him and also reached into Mr. Moinzadeh's left jacket pocket to retrieve the stolen cheese.

ix. Mr. Moinzadeh became verbally belligerent, uttered profanities and attempted to pull away, however, Mr. Bogdan kept his grip on Mr. Moinzadeh's right arm and physically escorted him back into the store, down an aisle and into an office in the rear.

x. Mr. Moinzadeh pulled out his cell phone and called 911. Constable Sardari of the West Vancouver Police Department attended the store a few minutes later and met up with Mr. Bogdan and Mr. Moinzadeh in the rear office.

xi. Constable Sardari had been informed by 911 that the male on the phone (Mr. Moinzadeh) had been taken into custody by the store's loss prevention officer and was complaining about injury to his arm. In the rear office, Mr. Moinzadeh was standing up against a countertop and angrily complained that he had been wrongfully arrested and that an item had been planted on his person by the security guard. He stated that he had paid for everything he had taken from the store.

xii. Constable Sardari formally arrested Mr. Moinzadeh for theft, read him his Charter rights, placed him in handcuffs and then escorted him outside to his police car where, in due course, Mr. Moinzadeh was released after being issued an appearance notice for court in North Vancouver.

xiii. Later that evening, Mr. Bogdan prepared a written report detailing his observations and his interaction with Mr. Moinzadeh. He subsequently delivered a copy of that report to the West Vancouver Police Department for their file.

xiv. Mr. Moinzadeh attended at the West Vancouver Police Department on November 18, 2013, to lay a complaint of assault against Mr. Bogdan. He was interviewed by Constable Griffin who took notes in his notebook. The interview was also recorded and a transcript was marked as an Exhibit at trial. Mr. Moinzadeh again denied that he had stolen any cheese and again accused Mr. Bogdan of planting the cheese on him. He stated that Mr. Bogdan had grabbed his right arm in a very rough manner, twisted it to the back and then pushed his arm up behind his back while escorting him into the store causing pain which was still present at the time of the interview.

xv. Mr. Bogdan was asked by the West Vancouver Police Department to attend an interview that occurred on December 13, 2013. Constable Sardari conducted that interview and it was also recorded on video. Both the transcript and the video were marked as an Exhibit in the trial. Mr. Bogdan stated that he placed his left hand on Mr. Moinzadeh's arm when the latter started to pull away from him but he denied using any form of "joint manipulation" during the arrest.

xvi. Constable Sardari prepared the "general occurrence" report regarding this incident detailing the investigation for the purposes of instructing Crown Counsel. He noted that a search of the "PRIME" database indicated a history of shoplifting and uttering threats on the part of Mr.

Moinzadeh (another incident in 2012 which did not result in any charges being laid), and expressed the opinion that the charge of theft arising out of the October 10, 2013 incident at the Extra Foods store was justified. He also recommended that Mr. Moinzadeh be required to undergo mandatory anger management counselling as well as several hours of community service.

xvii. On December 3, 2013, Mr. Moinzadeh was charged with the offence of theft of property of a value less than \$5,000 contrary to section 334(b) of the Criminal Code. Following various Court appearances, the case was diverted to the alternative measures program pursuant to which Mr. Moinzadeh was required to undertake 10 hours of community service.

- [20] Mr. Comeault, the general manager of I-Corp. Security, testified about the company's policies and procedures respecting shoplifting offences. He stressed his company has a "no chase" policy and while reasonable force is permitted to effect an arrest, if there is violent resistance on the part of the shoplifter, the loss prevention officer is expected to let the suspect depart rather than putting himself at risk.
- [21] Mr. Comeault was the person who initially hired Mr. Bogdan and provided him training on the company's policies and procedures. He described Mr. Bogdan as an excellent employee with good communication skills. He was often specifically asked for by clients who were pleased with his performance. Mr. Bogdan had made a number of arrests leading to convictions for theft during his tenure with I-Corp. and, apart from the current case, there were no complaints from clients or allegations of injury from persons who had been arrested. He described the allegation of "planted evidence" as "preposterous". I accept Mr. Comeault's evidence regarding Mr. Bogdan's performance as an employee of I-Corp.
- [22] Mr. Bogdan was an excellent witness on his own behalf. His testimony was thoughtful and measured, without exaggeration. While there were some minor discrepancies between the versions of events provided in his initial written report, his subsequent recorded interview, and his testimony at trial, the Court is satisfied that Mr. Bogdan testified truthfully and honestly about the events of October 10, 2013 generally, and Mr. Moinzadeh's arrest in particular.
- [23] Mr. Bogdan expressly denied Mr. Moinzadeh's testimony that he had offered to let Mr. Moinzadeh go if he came back into the store and paid for the cheese, saying he would never allow any shoplifter to do that. While he acknowledged he seized Mr. Moinzadeh's upper right arm to make the arrest and continued holding that arm as he escorted him back into the store, he expressly denied twisting Mr. Moinzadeh's arm behind his back. I accept Mr. Bogdan's evidence on these points and I disbelieve Mr. Moinzadeh's evidence to the contrary.

[24] As noted above, Mr. Moinzadeh has been fundamentally dishonest in the versions of events he recounted to the two police officers and to which he testified at his examination for discovery. Where his evidence conflicts with that of Mr. Bogdan on the critical points in issue, namely the nature and extent of the force applied to him by Mr. Bogdan during the arrest and the escort back into the store, I prefer and accept the evidence of Mr. Bogdan.

[25] On the whole of the evidence I find as a fact that;

- Mr. Moinzadeh concealed the block of cheese in his left pocket and did not pay for that cheese before leaving the store;
- Mr. Bogdan observed Mr. Moinzadeh's conduct throughout and was lawfully authorized by law to arrest Mr. Moinzadeh for the indictable offence of theft, entitling Mr. Bogdan to use as much force as was necessary for that purpose;
- Mr. Moinzadeh resisted arrest firstly by attempted deception and thereafter by starting to turn away, thereby justifying Mr. Bogdan's seizure of Mr. Moinzadeh's right arm to effect the arrest;
- in the course of grasping and continuing to hold Mr. Moinzadeh's right arm, Mr. Bogdan did not twist that arm nor did he bend it behind and up Mr. Moinzadeh's back; and,
- the physical force applied by Mr. Bogdan was necessary to effect the arrest and was reasonable in the circumstances of the case.

[26] It follows from all of the above that any cause of action alleged by Mr. Moinzadeh for assault, battery, or wrongful arrest must fail and this action must be dismissed. In the circumstances, there can be no vicarious liability on the part of Mr. Bogdan's employer, I-Corp., and the action against that defendant is dismissed as well.

[27] Loblaw's Inc. is not properly named as a defendant in this action. The evidence at trial is that the "occupier" of the Extra Foods store at Park Royal Mall was a franchisee, a numbered company identified in Mr. Bogdan's written report to the police but which, I am advised by counsel, has since been dissolved. It follows that the action against Loblaw's Inc. must also be dismissed.

V. conclusion

[28] The action is dismissed. Should anything have occurred between the parties that might affect any award of costs in this case, the parties may make submissions in writing within 30 days of the date of this judgment. Otherwise, costs will follow the event and are awarded to the defendants to be assessed on scale B of Appendix B of the Supreme Court Civil Rules.

"Kent, J."

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