CITATION: Carnovale v. Longo Brothers Fruit Markets Inc. 2017 ONSC 4131
COURT FILE NO.: CV-15-543195
DATE: 20170705

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ANTONIETTA CARNOVALE	)	*Kal Stoykov*, for the Plaintiff
Plaintiff	)	
– and –	)	
LONGO BROTHERS FRUIT MARKETS INC., 2226524 ONTARIO INC. and DONE RITE PLAZA MAINTENANCE AND SONS LTD.	)	*Jordan M. Black* for the Defendants
Defendants	)	
	)	**HEARD: June 30, 2017**

ENDORSEMENT

DIAMOND J.:

Overview

[1] On January 30, 2014, the plaintiff attended a Longo's grocery store located at 5283 Rutherford Road, Vaughan, Ontario. The defendant Longo's Brother Fruit Markets Inc. ("Longo's") owns and operates the grocery store. The defendant 2226524 Ontario Inc. ("222") is the owner of the property upon which the grocery store carries on business.

[2] After purchasing a coffee with her husband inside the grocery store, the plaintiff was walking back to her car through the parking lot. The car was parked directly adjacent to a traffic island, and as the plaintiff stepped onto that island with her right foot, she fell forward onto the traffic island and claims to have sustained serious and permanent injuries to, *inter alia*, her lips, mouth, teeth, arms, shoulders and wrists.

[3] The plaintiff commenced this action against Longo's and 222 for, *inter alia*, negligence and breach of the *Occupiers' Liability Act*, R.S.O. 1990 c.I-2. Longo's and 222 (hereinafter "the

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defendants") now move for summary judgment seeking an order dismissing this proceeding on the basis that there are no genuine issues requiring a trial.

[4] The defendants' motion was argued before me on June 30, 2017 and I took my decision under reserve.

The Fall

[5] The plaintiff's fall was captured on closed circuit security video. Both parties provided the court with a DVD copy of the video of the incident. The defendants further provided a copy of video footage of the plaintiff and her husband in the check-out line prior to leaving the grocery store.

[6] I have reviewed the video of the incident several times. In the video, both the plaintiff and her husband are seen walking from the grocery store towards the traffic island. As stated, their car is located on the other side of the traffic island, and right next to it. The plaintiff's husband is walking a few feet in front of the plaintiff. The plaintiff is carrying her coffee in her left hand, with her right hand slightly swinging by her side.

[7] The plaintiff's husband steps onto the traffic island with his right foot, clearing the curb from the pavement. Approximately 3-4 seconds later, the plaintiff appears to follow the same path as her husband and also clears the curb with her right foot. However, as she places her right foot down onto the traffic island, her right foot appears to slip, possibly in a forward motion, as she tumbles onto the traffic island.

Evidence Filed on this Motion

[8] In support of their requested relief, the defendants filed the affidavit of Frank Sangirardi ("Sangirardi", the store manager) along with the affidavits and expert opinions of Dr. Robert Parkinson ("Parkinson") and Kathleen Denbeigh ("Denbeigh"), a principal and an associate respectively in the forensic firm known as 30 Forensic Engineering.

[9] In his affidavit, Sangirardi explained his responsibility as store manager for overseeing all of the departments, including cleanliness and safety for all customers. Sangirardi notes that the location where the plaintiff's right foot landed on the traffic island was in a proper state of repair on the day of the incident, and that concrete curbs which delineate traffic islands are common place in most parking lots to separate the road/driveway from the parking spaces.

[10] Parkinson and Denbeigh opined that the plaintiff fell because she misplaced her foot on the curb of the traffic island, so that not enough of her foot was planted to support the weight transfer to her right leg. As the plaintiff approached the curb, she was able to step onto the curb of the traffic island with her right foot and began to transfer her weight, and as such she must have been aware of the curb and adapted to it.

[11] In response to the defendants' motion, the plaintiff did not swear an affidavit. As such, there is no direct evidence from the plaintiff on this motion.

[12] The plaintiff did file the affidavit of one her lawyers. That affidavit included an excerpt of seven questions from the plaintiff's examination for discovery sworn "on information and belief", although the source of that information and belief is not specified.

[13] The plaintiff further filed an affidavit and expert opinion of Jeff Archbold ("Archbold"), a forensic engineer at Walters Forensic Engineering Inc. Archbold was retained on April 4, 2017, mere days before the defendants' motion was served and filed.

[14] According to Archbold, the height of the curb of the traffic island was higher than what he surmises that the plaintiff expected as a pedestrian, and therefore she fell forward while her right foot was stopped due to "encountering an elevation difference greater than expected". On his cross-examination, Archbold stated that his evidence that the plaintiff's expectation of the height of the curb of the traffic island was based upon "her own previous experience with curbs" as opposed to being influenced by what she actually saw right then and there on January 30, 2014.

The Curb Height

[15] The experts have different opinions on whether the height of the curb of the traffic island was appropriate. All experts agree that the curb is approximately 20 centimeters high. Archbold testified that according to the Ontario Provincial Standard Drawing ("OPSD"), the normal curb height (which the plaintiff was allegedly accustomed to) is 15 centimeters. The OPSD guidelines are used when the Province of Ontario retains contractors to install curbs on provincial roads and property. The OPSD requirements do not apply to private property such as the Longo's grocery store. However, as Archbold acknowledged on cross-examination, the use of the OPSD by the Province of Ontario (or for that matter, a municipality) is not mandatory.

[16] According to Denbeigh, in preparing several prior forensic expert reports dealing with over a hundred trips/slips and falls, she has found curbs to range in height from 10 to 20 centimeters. In support of their conclusions, Denbeigh and Parkinson referenced and relied upon the allowable maximum 20 centimeter height of a stair riser set out in the *Ontario Building Code*. I note that while the curb would arguably be compliant with the *Ontario Building Code* had it been indoors, the curb was only "one stair" and not a series of stairs leading upward or downward.

Summary Judgment

[17] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant a summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*,

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weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[18] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada held that on a motion for summary judgment the Court must first determine whether there is a genuine issue requiring a trial based only upon the record before the Court, without using the fact-finding powers set out in the 2010 amendments. The Court may only grant summary judgment if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure.

[19] The overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case.

[20] As held in *Sanzone v. Schechter* 2016 ONCA 566 (CanLII), only after the moving party discharges its evidentiary burden of proving that there is no genuine issue requiring a trial for resolution does the burden then shift to the responding party to prove that its claim has a real chance of success. The Court must address the threshold question of whether the moving party discharges its evidentiary obligation to put its best foot forward by adducing evidence on the merits.

[21] Nothing in *Hyrniak* or the subsequent jurisprudence displaces the onus upon a party responding to a motion for summary judgment to "lead trump or risk losing". The Court must assume that the parties have put their best foot forward and placed all relevant evidence in the record. If the Court determines that there is a genuine issue requiring a trial, the inquiry does not end there and the analysis proceeds to whether a Court can determine if the need for a trial may be avoided by use of its expanded fact-finding powers.

Decision

[22] In my view, the defendants have led sufficient evidence to establish that there is no genuine issue requiring a trial. In determining the issues in this proceeding, the Court must not only find that the curb presents a hazard itself, but also determine that the mechanics of the plaintiff's fall be causally related to the curb.

[23] A review of the video of the incident confirms that the plaintiff did not trip on the rise of the curb itself. It is not as if the plaintiff caught her right foot on the curb as she attempted to negotiate herself over it. Having successfully lifted her right foot over the curb, for some reason the plaintiff failed to plant her right foot properly on the traffic island. That, in and of itself, does not mean that the curb was a hazard. The curb was not obstructed from view in any way, and was certainly not so high that any reasonable person would encounter difficulty in clearing it. The plaintiff's husband did so with ease, and until she fell, the plaintiff's right foot cleared the curb as well.

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[24] Archbold's opinion, while arguably understandable, is rooted in a finding that since the height of the curb was different from what the plaintiff understood to be a "normal curb height", the plaintiff was confused and perhaps took a full or partial "air step" as her right foot went downward. The difficulty with Archbold's opinion is that there is absolutely no evidence filed on this motion from the plaintiff herself which could support Archbold's theory, or lay the factual foundation for Archbold's assumptions.

[25] Counsel for the plaintiff pointed to excerpts from the plaintiff's examination for discovery to support Archbold's position. It is trite to state that the provisions of Rule 39.04(2) precludes the plaintiff from using evidence from her own examination for discovery on this (or any other) motion absent the defendants' consent (which was not given). Similarly, the attempt by the plaintiff's lawyer to "cut and paste" excerpts from the plaintiff's examination for discovery also fails to comply with the provisions of Rule 39.01(4). In the circumstances of this case, a lawyer's affidavit is simply inadequate to discharge the plaintiff's onus to lead trump. The plaintiff's first-hand evidence, and expert opinion based on such first hand evidence, is the trump suit. In light of the plaintiff's decision not to file her own affidavit, I must hold the plaintiff to her choice. As held by Justice Myers in *Paramandham v. Holmes* et al 2015 ONSC 1904 (CanLII):

> "The alternative would indeed be a slippery slope in which counsel are encouraged to withhold their trump cards for trial … trial by ambush tactics are the antithesis of efficient, affordable, and proportionate procedures."

[26] Much has been said since the release of *Hyrniak* about the enhanced powers under Rule 20.04 and the ordering of a mini-trial. As stated in *Forstall v. Carroll* 2015 ONSC 2732 (CanLII), appeal dismissed 2016 ONSC 2385 (CanLII), those enhanced powers should not include permitting a party to buttress a deficient evidentiary record through the use of a mini-trial.

[27] In the absence of evidence from the plaintiff that she, as a pedestrian in the parking lot, was confused about the height of the curb based upon her own previous experience or expectation, Archbold's opinion has no factual foundation. Archbold's opinion would not be able to survive at trial in the absence of the plaintiff's testimony. It should be no different on this motion for summary judgment.

[28] In any event, I find that Archbold's reliance upon the OPSD has no application to the curb in the case before me. The OPSD can apply to municipal and provincial roads. The Longo's parking lot does not fall within either category. There is no objective evidence that the curb of the traffic island was cut at an improper height. Even if there was such evidence, I do not find that the curb of the traffic island was a hazard. While the *Ontario Building Code* has no direct application to the facts of this case, I agree with the defendants that if the Province had legislated that the rise of a stair at 20 centimeters is reasonable, that would apply from the first stair to the last stair. The curb of the traffic island, by analogy, is the "first stair" and the plaintiff had no difficulty in clearing the curb with her right foot. If 20 centimeters is too high for an

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individual to clear with either foot, then every stair built at 20 centimeters in the Province of Ontario could arguably be inherently hazardous. In my view, this is not a reasonable result.

[29] For all these reasons, the defendants' motion for summary judgment is granted and the plaintiff's action is dismissed.

Costs

[30] I would urge the parties to try and resolve the costs of these motions. If those efforts prove unsuccessful, then I may receive written costs submissions (totaling no more than four pages including a Costs Outline) in accordance with the following schedule:

a) the defendants' costs submissions to be served and filed within ten business days of the release of this endorsement; and

b) the plaintiff's costs submissions to be served and filed within ten business days of the receipt of the costs submissions from the defendants.

Diamond J.

Released: July 5, 2017

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Defendants

ENDORSEMENT

Diamond J.

Released: July 5, 2017