COURT OF APPEAL FOR ONTARIO

CITATION: Galota v. Festival Hall Developments Limited, 2016 ONCA 585
DATE: 20160721
DOCKET: C61253

2016 ONCA 585 (CanLII)

Laskin, Gillese and Roberts JJ.A.

BETWEEN

Maria Galota

Plaintiff (Respondent)

and

Festival Hall Developments Limited, Walter Rosati and Louis Yam Man Chu

Defendants (Appellant)

Jay Skukowski and Alex Reyes, for the appellant

William G. Scott and Barbara Opalinski, for the respondent

Heard: May 17, 2016

On appeal from the judgment of Justice David L. Corbett of the Superior Court of Justice, dated October 6, 2015, with reasons reported at 2015 ONSC 6177.

Laskin J.A.:

A. Overview

[1] On this appeal we must answer a single question: did the motion judge err by finding that the claim of the respondent Maria Galota against the appellant Festival Hall was not discoverable until three and a half years after the accident in which she was injured?

[2] On May 13, 2006, Ms. Galota broke her right arm when she fell off an elevated dance floor at Republik Nightclub. The nightclub was located in a building in downtown Toronto. Republik was a tenant in the building; Festival Hall was the landlord and owner.

[3] Ms. Galota retained a lawyer immediately after her accident and, in December 2007, sued Republik for damages for negligence. She claimed that she was injured by the unsafe condition of the dance floor. She alleged that the raised dance floor was not equipped with appropriate barriers or handrails, was not properly lit, and did not have appropriate traction. She did not initially sue Festival Hall.

[4] The claim against Republik was an insured claim and Republik's insurer, Leeds Insurance Company Ltd., appointed an adjuster. The adjuster investigated the claim and was in contact with Ms. Galota's lawyer. Republik defended the action and in May 2008, two years after the accident, delivered a statement of defence. Neither the adjuster nor Republik in its defence alleged that Festival Hall or any other party was responsible for Ms. Galota's injuries.

[5] On November 11, 2009, a representative of Republik was examined for discovery. Ms. Galota's lawyer then learned for the first time that before opening, Republik had extensively renovated the nightclub, including the dance floor from

2016 ONCA 585 (CanLII)

which Ms. Galota fell, and that Festival Hall may have had some involvement in the renovations.

[6] Unfortunately for Ms. Galota, Republik Nightclub closed in March 2009. Then, in March 2011, Ms. Galota's lawyer learned that Republik's insurer Leeds became insolvent. On November 10, 2011, a day less than two years from the examination for discovery of Republik and five and a half years after her accident, Ms. Galota sued Festival Hall for negligence as an "occupier" of the nightclub.

[7] Festival Hall moved for summary judgment to dismiss the action on the ground that it was started more than two years after Ms. Galota's claim was discoverable, and so was barred by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The motion judge had to decide when Ms. Galota ought to have known Festival Hall had any potential liability for the unsafe condition of the dance floor. Ms. Galota contended the date was the day Republik's representative was examined for discovery. Therefore, the two year limitation period ran from that date and her claim was not out of time. Festival Hall contended that if Ms. Galota's claim was not discoverable on the day of the accident, it was certainly discoverable well before the day Republik was examined for discovery had Ms. Galota investigated Festival Hall's potential liability with reasonable diligence. As she did not do so, her action was out of time.

2016 ONCA 585 (CanLII)

[8] The motion judge sided with Ms. Galota. He made the following important finding at para. 23 of his reasons:

> I conclude that the plaintiff was not put on notice of, and did not show a want of diligence in investigating the potential involvement of, the landlord in the design and construction of the elevated dance floor.

2016 ONCA 585 (CanLII)

[9] On appeal, Festival Hall makes two submissions. Its main submission is that the motion judge erred by finding Ms. Galota "did not show a want of diligence" because she took no steps at all to investigate a claim against Festival Hall until at least three and a half years after her accident. Ms. Galota's position is that the motion judge's finding is a finding of fact, reasonably supported by the evidence, and thus entitled to deference on appeal.

[10] Festival Hall's secondary submission is that the motion judge erred by using his expanded powers on a motion for summary judgment to call for expert evidence on the standard of care of a solicitor prosecuting an occupier's liability claim. Ms. Galota's position is that Festival Hall did not object to the motion judge's order for expert evidence.

[11] On Festival Hall's main submission, I agree with Ms. Galota's position. On its secondary submission, the expert evidence called was not material. The motion judge did not rely on it, beyond considering the possible investigative steps recommended by Festival Hall's expert. Nor did either party in this court.

[12] The motion judge did not err by finding that Ms. Galota's claim against Festival Hall was not discoverable until November 11, 2009. I would dismiss the appeal.

2016 ONCA 585 (CanLII)

B. The Issues

(1) Did the motion judge err by finding that Ms. Galota "did not show a want of diligence"?

(a) *The Limitations Act, 2002*

[13] In most Ontario cases, including this one, an action must be started within two years "of the day on which the claim was discovered." If it is not, the claim is barred by the statute: *Limitations Act, 2002*, s. 4.

[14] Sections 5(1) and (2) set out the statutory scheme for determining when a claim is discovered:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[15] Three points about these provisions are relevant to the submissions on appeal:

- Section 5(1)(b) codifies the common law rule of discoverability. If s. 5(1)(b) applies, the two year limitation period will run from a date later than the date the plaintiff was injured.
- Under s. 5(1)(b), a plaintiff "first ought to have known" of the claim when the plaintiff has enough evidence or information to support an allegation of negligence, including facts about an act or omission that may give rise to a cause of action against a possible tortfeasor: *Zapfe v. Barns* (2003), 66 O.R. (3d) 397 (C.A.), at paras. 32-33; *Burtch v. Barnes Estate* (2006), 80 O.R. (3d) 365, at para. 24. The plaintiff cannot delay the start of the limitation period until he or she knows with certainty that a defendant's act or omission caused the injury or damage: *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 44.

2016 ONCA 585 (CanLII)

- The rebuttable presumption in s. 5(2) means that a plaintiff has the onus of showing that the rule of discoverability in s. 5(1)(b) applies: *Fennell v. Deol*, 2016 ONCA 249, at para. 26.

2016 ONCA 585 (CanLII)

(b) The motion judge's reasons

[16] The motion judge found that Ms. Galota knew the matters specified in s. 5(1)(a)(i),(ii) and (iv) on the date of the accident or shortly after it occurred. She knew then that she was injured, that the design and construction of the elevated dance floor may have caused or contributed to her injury, and that an action for damages was an appropriate way to remedy her injury.

[17] Thus the motion judge found that Ms. Galota's claim against Festival Hall turned on s. 5(1)(a)(iii) and s. 5(1)(b): when Ms. Galota first ought to have known that an act or omission by Festival Hall caused her injury. He correctly framed the issue he had to decide at para. 16 of his reasons:

> So the limitations issue turns on factor iii): when did the plaintiff know, or when should she have known, that the hazardous condition of the elevated dance floor was a result of an act or omission by Festival Hall?

[18] The motion judge resolved this issue at para. 23 of his reasons. He held that Ms. Galota did not know about Festival Hall's involvement with the design and construction of the dance floor until her lawyer examined a representative of Republik for discovery on November 11, 2009.

> I accept that the plaintiff did not know the terms of the lease or of any involvement by the landlord with the design and construction of the elevated dance floor before the examination for discovery of Republik in 2009.

2016 ONCA 585 (CanLII)

[19] The motion judge then considered s. 5(1)(b). He found that Ms. Galota first ought to have known Festival Hall's act or omission caused or contributed to her injury on the date of the examination for discovery. Her claim against Festival Hall was therefore discoverable on November 11, 2009. Thus, the motion judge found Ms. Galota had rebutted the presumption in s. 5(2) of the Act.

> I conclude that the plaintiff was not put on notice of, and did not show a want of diligence in investigating the potential involvement of, the landlord in the design and construction of the elevated dance floor. Thus I find that the plaintiff has defeated the presumption established in s. 5(2) in respect to factor iii), and thus that the limitations period as against Festival Hall began to run upon discovery of the tenant in 2009. It follows that the claims against Festival Hall, commenced less than two years later in 2011, are not out of time. The motion for judgment is dismissed and it is ordered, on a final basis, that the plaintiff's claims against the defendant Festival Hall are not precluded by the *Limitations Act*.

(c) Analysis

[20] Festival Hall accepts that the motion judge correctly stated the test for determining when Ms. Galota's claim against Festival Hall was discoverable under s. 5(1)(b). It challenges his application of the test. Its simple submission is that the motion judge erred by finding Ms. Galota showed "no want of diligence"

because she did nothing to investigate a claim against Festival Hall for at least three and half years after she was injured.

[21] Festival Hall points out that in several cases this court has held that a plaintiff relying on s. 5(1)(b) has a positive duty to exercise reasonable diligence in investigating a claim of negligence against a defendant. That duty cannot be met, Festival Hall contends, when a plaintiff takes no steps at all. Had Ms. Galota acted with reasonable diligence she would have discovered her claim against Festival Hall well before November 2009. See, for example: *Zapfe; Soper v. Southcott*, [1998] O.J. No. 2799 (C.A.); and *Pepper v. Zellers Inc. (c.o.b. Zellers Pharmacy)*, [2006] O.J. No. 5042 (C.A.).

[22] The motion judge accepted that as Ms. Galota was relying on s. 5(1)(b), she was obliged to "investigate on a reasonable basis" a claim against Festival Hall. He said at para. 17 of his reasons:

> I agree with the plaintiff that it would be inappropriate to name landlords as defendants in every case of an occupier's liability claim against a tenant. On the other hand, to satisfy the third branch of the test under s. 5(1)(a), for the purposes of s. 5(1)(b) of the *Limitations Act*, the plaintiff must investigate on a reasonable basis with a view to determining the proper defendants to the claim. In this case, this would mean identifying the condition of the elevated dance floor as a basis for alleged liability and the persons apparently responsible for it. This requires a plaintiff to make reasonable investigation of her claim. It does not, however, require a pre-discovery discovery of an adverse party.

2016 ONCA 585 (CanLII)

[23] But the important point, implicit in this paragraph and expressly made by my colleague van Rensburg J.A. in *Fennell,* is that a plaintiff's failure to take reasonable steps to investigate a claim is not a stand-alone or independent ground to find a claim out of time. Instead, the reasonable steps a plaintiff ought to take is a relevant consideration in deciding when a claim is discoverable under s. 5(1)(b). Justice van Rensburg made this point at paras. 18 and 24 of her reasons in *Fennell*:

> [18] While due diligence is a factor that informs the analysis of when a claim ought to have reasonably been discovered, lack of due diligence is not a separate and independent reason for dismissing a plaintiff's claim as statute-barred.
>
> ...
>
> [24] Due diligence is part of the evaluation of s. 5(1)(b). In deciding when a person in the plaintiff's circumstances and with his abilities ought reasonably to have discovered the elements of the claim, it is relevant to consider what reasonable steps the plaintiff ought to have taken. Again, whether a party acts with due diligence is a relevant consideration, but it is not a separate basis for determining whether a limitation period has expired.

[24] In substance, the motion judge found that there were no steps Ms. Galota reasonably ought to have taken that would have enabled her to discover her claim against Festival Hall before her lawyer examined a representative of Republik in November 2009. Some may view the motion judge's finding to be questionable. But all these cases are very fact-specific. And the motion judge's

2016 ONCA 585 (CanLII)

finding is a finding of fact, which in my opinion is well supported by the record, and therefore to which we should defer: *Burtch*, at para. 22; *Longo*, at para. 38.

[25] Together the following four considerations support the motion judge's finding:

- Ms. Galota sued the party occupying the premises and her claim was an insured claim.
- No one alleged any other party was potentially liable.
- Festival Hall's potential liability as owner and landlord was not obvious.
- The steps suggested by Festival Hall's expert would not have alerted Ms. Galota to a claim.

(1) Ms. Galota sued the party occupying the premises and her claim was an insured claim

[26] First, Ms. Galota sued the tenant, the party in physical possession of and carrying on business at the premises where she fell and was injured. Republik was unquestionably an "occupier" under the *Occupiers' Liability Act*. Moreover, Ms. Galota's claim was an insured claim. Republik's insurer responded to the claim and appointed an adjuster to investigate it. Ms. Galota and her lawyer had every reason to believe the insurer would settle her claim or pay any judgment she obtained after a trial. In this case, the need to pursue another party would

2016 ONCA 585 (CanLII)

hardly have seemed reasonable. Neither Ms. Galota nor her lawyer could be expected to foresee the rare occurrence of an insurance company becoming insolvent.

2016 ONCA 585 (CanLII)

(2) No one alleged any other party was potentially liable

[27] Second, the insurer's adjuster never suggested that Festival Hall or any other party was potentially liable for Ms. Galota's injury. Similarly, in its statement of defence, Republik did not allege Festival Hall bore any responsibility and Republik did not take third party proceedings against Festival Hall or anyone else. Indeed, before the examinations for discovery neither the adjuster nor Republik ever suggested there had been extensive renovations of the nightclub or that Festival Hall was involved in those renovations. I do not suggest either the insurer or Republik had any obligation to notify Ms. Galota about the potential liability of Festival Hall, but their failure to do so is a practical consideration supporting the motion judge's finding. As Lauwers J. (as he was then) said in *Madrid v. Ivanhoe*, 2010 ONSC 2235, 101 O.R. (3d) 553, at para. 17:

> If Ivanhoe's insurance adjuster had advised the plaintiff that liability was being denied because another party was liable, then the plaintiff's duty to make further inquiries would have been triggered. But, on the actual facts of this case, a naked denial of liability should not trigger a duty on the plaintiff to make further inquiries.

(3) Festival Hall's potential liability as owner and landlord was not obvious

[28] Third, Festival Hall was not an "occupier" of the premises it leased to Republik simply because it was the landlord and owner: *Musselman v. 875667 Ontario Inc. (c.o.b. Cities Bistro)*, 2010 ONSC 3177, 93 C.L.R. (3d) 58, aff'd 2012 ONCA 41, 8 C.L.R. (4th) 163. Thus, Ms. Galota cannot be faulted for not having joined Festival Hall in her initial claim. On the day of the accident, Ms. Galota could not have known that an act or omission of Festival Hall caused or contributed to her injuries.

[29] In oral argument, Festival Hall conceded that in an occupier's liability claim, a plaintiff is not always obliged to sue the landlord from the outset. Festival Hall argues, however, that Ms. Galota should have taken steps to investigate a possible claim against Festival Hall. But what steps? Festival Hall suggests two in particular: do a search of title to find out the owner of the building and obtain a copy of the lease.

[30] Ms. Galota's lawyer did not search the title until long after it issued a claim against Republik. Perhaps he should have done so earlier. But learning that Festival Hall owned the building would not have alerted him to a potential claim against Festival Hall. As I have just said, Festival Hall did not become an "occupier" simply because it was the landlord and owner.

2016 ONCA 585 (CanLII)

[31] The lease between Republik and Festival Hall is undoubtedly an important document for determining whether Festival Hall was potentially liable as an occupier for Ms. Galota's injuries. Under ss. 1(a) and (b) of the *Occupiers' Liability Act*, an occupier is either:

> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
>
> despite the fact that there is more than one occupier of the same premises; ("occupant")

[32] Festival Hall was not in physical possession of the premises it leased to Republik. Whether it had "responsibility for and control over the condition of the premises" depends on the terms of the lease.

[33] Or, Festival Hall may have owed a duty to Ms. Galota under s. 8(1) of the statute, which specifically addresses a landlord's obligation:

> 8. (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.

[34] Again, whether Festival Hall was responsible for the maintenance and repair of the leased premises depends on the terms of the lease. The lease,

2016 ONCA 585 (CanLII)

however, was not a public document. And Ms. Galota had no automatic ability to require Festival Hall to produce a copy of the lease before suing Festival Hall.

[35] Ms. Galota could have obtained a copy of the lease from Republik as part of documentary production. Presumably, she and her lawyer could have obtained the lease before the examination for discovery of Republik's representative. But in 2011, Republik's former lawyer said he would not be providing a copy of the lease or anything else from the file because Republik was no longer a client. Ms. Galota's lawyer followed up with Festival Hall about his request for the lease in October 2013. Festival Hall did not deliver a copy of the lease until March 2014.

[36] But even had Ms. Galota obtained the lease earlier, she could not reasonably have known she had a claim against Festival Hall until she married the terms of the lease to the facts that Republik extensively renovated the nightclub and dance floor before opening, that the renovations may not have complied with the *Building Code*, and that Festival Hall may have had some involvement in the renovations. These three facts, according to the sworn testimony of Ms. Galota's lawyer, which the motion judge was entitled to accept, she only learned on the discovery of Republik's representative.

[37] As it turned out, the lease is a net lease, which means that Republik had the primary obligation to repair and maintain the leased premises. Whether

2016 ONCA 585 (CanLII)

Festival Hall had any obligation triggering its potential liability to Ms. Galota can only be decided at the trial of this action.

(4) The steps suggested by Festival Hall's expert would not have alerted Ms. Galota to a claim

[38] Fourth, although the discoverability standard under s. 5(1)(b) is an objective standard – when ought the plaintiff have known – and although Festival Hall's expert said a reasonably competent lawyer would have undertaken investigations Ms. Galota's lawyer did not undertake, the motion judge found, and was entitled to find, that these investigations would not have alerted Ms. Galota to a possible claim against Festival Hall.

[39] The motion judge used the expanded powers available to a motion judge hearing a motion for summary judgment and ordered each side to provide expert evidence on the standard of care of a reasonably competent solicitor in occupier's liability claims. The motion judge's order is a separate ground of appeal, which I will deal with shortly. James Regan gave expert opinion evidence for Ms. Galota and Richard Shekter gave expert opinion evidence for Festival Hall. Both are well-regarded and experienced advocates, with expertise in occupier's liability claims.

2016 ONCA 585 (CanLII)

[40] The motion judge did not mention Mr. Regan's opinion evidence. He did, however, address Mr. Shekter's opinion. Mr. Shekter said that a competent solicitor would have done five things, none of which Ms. Galota's lawyer did:

- either attend or arrange for someone to attend at the nightclub to examine the premises generally or the elevated dance floor in particular
- arrange for measurements or photographs of the scene in general or the dance floor in particular
- retain the services of an engineer, building inspector, or contractor to determine if there were any Building Code or by-law restrictions or infractions relevant to the incident
- request a copy of the lease
- request information concerning the person(s) responsible for constructing the elevated dance floor

[41] I have already dealt with the fourth item on Mr. Shekter's list, requesting a copy of the lease. On the fifth item, I agree with the motion judge that those inquiries could only have been made of potential adverse parties.

[42] The motion judge agreed, however, that a "wise" solicitor would have undertaken the first three items on the list to preserve evidence relevant to the

2016 ONCA 585 (CanLII)

claim. But he found that those investigations would not have disclosed the claim against Festival Hall. He wrote, at para. 20:

> Preserving evidence of the condition of the elevated dance floor would not, itself, lead to discovery of information about the involvement of Festival Hall. Only by inquiries of the tenant, or Festival Hall itself, could this information have come to light.

I see no basis to interfere with this finding. The motion judge made no palpable and overriding error.

[43] For the four considerations I have discussed, I would not give effect to Festival Hall's main submission on appeal.

(2) Did the motion judge err in ordering expert evidence on the standard of care of a reasonably competent solicitor in an occupier's liability case?

[44] Festival Hall submits that the motion judge erred in making this order because expert evidence is not needed to decide discoverability under s. 5(1)(b) of the *Limitations Act, 2002,* and because the relevant date is when the plaintiff, not her solicitor, first ought to have known of a claim.

[45] I agree expert evidence is not needed to decide when a claim is discoverable under s. 5(1)(b). Still, I find Festival Hall's submission to be odd. It did not object to the motion judge's order, the motion judge did not rely on Mr. Regan's opinion, and Festival Hall sought to buttress its position on appeal by relying on Mr. Shekter's opinion.

2016 ONCA 585 (CanLII)

[46] Nothing turns on the expert evidence. The motion judge did not rely on it for his decision, and nor do I. I would not give effect to Festival Hall's submission.

C. Conclusion

[47] The motion judge did not err by finding that Ms. Galota's claim against Festival Hall was not discoverable under s. 5(1)(b) of the *Limitations Act, 2002* until November 11, 2009, and that she had rebutted the presumption in s. 5(2). I would dismiss Festival Hall's appeal with costs in the agreed on amount of $10,000 inclusive of disbursements and applicable taxes.

Released: (E.E.G.) July 21, 2016

"John Laskin J.A."
"I agree E.E. Gillese J.A."
"I agree L.B. Roberts J.A."

2016 ONCA 585 (CanLII)