CITATION: Paul Porchak v. Pizza Pizza Limited, 2016 ONSC 4551
COURT FILE NO.: 547-13
DATE: 2016/07/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Paul Porchak	)	Yervant Boghossian, for the plaintiff
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Pizza Pizza Limited	)	
	)	
	)	Robert A. Betts, for the defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** June 15, 2016
	)	
	)	

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RADY J.:

Introduction

[1] The defendant moves for summary judgment dismissing the plaintiff's claim. The plaintiff has sued the defendant for damages arising from a trip and fall outside the defendant's leased premises in a strip mall at 395 Wellington Road in London. The plaintiff, a 20 year employee of a nearby grocery store, tripped over a bicycle rack placed outside the pizza restaurant. He suffered a fracture of the radial head.

The Evidence

[2] The defendant has filed an affidavit from James Stutts, the district sales manager with the defendant as well as one from Michael Washington, an insurance adjuster retained by the defendant following the accident.

[3] The plaintiff has filed an affidavit of his own.

[4] There are, as well, several photographs of the front of the pizzeria. Transcripts of the examinations for discovery of the parties have been filed.

The Facts

[5] The essential facts in this dispute are not in dispute. The plaintiff, who worked at a Metro store located in the same plaza as the pizzeria, passed by it on his way to Quiznos to buy his lunch. He was a regular customer there although he would occasionally go to Pizza Pizza as well.

[6] Mr. Stutts deposed that the store owned a bike rack that was placed outside against the front where it remained year round. It was not bolted down or otherwise affixed to the ground. He never received any complaints from the landlord or anyone else about its presence nor was he aware of any other fall involving the rack.

[7] I have a photograph taken by the plaintiff which was disclosed in his affidavit of documents. There are also several photographs taken by Mr. Washington on February 19, 2013. They show the rack was placed perpendicular to the outside wall of the restaurant up against the store wall. The bottom of the wall was red and white tile. The rack sat on the walkway. There is no evidence about how wide the walkway was. However, the photographs clearly show that the bike rack does not obstruct the entire walkway. There is room for pedestrians to walk

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around it without leaving the walkway. It is also visible against the red and white tile of the outside wall, although it is arguably somewhat similar in colour to the walkway.

[8] The accident took place between 12:15 p.m. and 12:20 p.m. on January 10, 2013. It was a cold day. There is no allegation that the walkway was slippery or had not been cleared or maintained.

[9] After purchasing and eating his lunch, the plaintiff was returning to the Metro store. He walked by the pizzeria carrying a plastic cup of water in his right hand and a cigarette in his left.

[10] The plaintiff gave a statement to Mr. Washington on May 16, 2013. He said:

> The incident occurred on Jan. 10, 2013 at around 12:20 pm….I had lunch at Quiznos also located in the plaza and I was walking back to Metro when the incident occurred. I was walking on the sidewalk and had a glass of water in my right hand. Without warning my foot went into the bike rack and became lodged. I fell forward and I used my right hand to shield my face as I hit the ground… There was no one around when I fell. I had to use my left hand to get my left foot out of the bike rack… At the time of my fall, it was cold and it was not snowing or blowing. The sidewalks were not icy… I go for lunch in the plaza a couple of times a week maybe less. In my experience the bike rack in front of Pizza Pizza is moved sporadically. At the time of my fall on Jan. 10, 2013 I was not looking down, it was just a normal day and I was just walking, with people going by and cars going by. I was not in a rush to get back to work.

[11] At his examination for discovery on April 16, 2014, he testified that he did not see the bike rack before falling. He said that his left foot became trapped between the racks causing him to fall down.

[12] He testified as follows:

> 302. Q: I guess it's fair to say then if you're visiting the Quizno once or twice a week during the winters, you've walked by that pizza store… the Pizza Pizza store many times?

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A: Quite a few, yes.

303. Q: Prior to January 10th, 2013, had you ever seen that bike rack that was out front of the store previously?

A: I may have; not that I would pay any attention to it.

356 Q: Okay. Tell me what happens. You finish eating at the Quizno, you leave, and what happens?

A: I'm walking back to work. I know there were some people on the sidewalk, vehicles going by. The next thing I know I'm on the ground. From there I can trace what happened backwards.

357 Q: As you were walking down the sidewalk where are you looking? Are you looking dead straight; are you looking up in the sky; are you looking..?

A: Ahead.

358 Q: Are you looking down at the ground to make sure that it's clear?

A: I…okay, I would be generally looking around; that's what I was doing, ahead, to the side, in front of me.

359 Q: You said the next thing you're on the ground. What happened to cause you to fall to the ground?

A: I had stepped between … my food had went right between the bicycle rungs in the bicycle rack, which trapped my left foot; and my momentum going forward shot me straight forward. My foot was still trapped in the bicycle rack leaving me no place to go but straight down.

360 Q: I take it you didn't see the bicycle rack?

A: I believe… obviously I did not.

361 Q: Sometimes I have to ask obvious questions though.

A: Sure. It wasn't… it's not a very big bicycle rack.

362 Q: I've seen it. If you're walking, looking around, on the ground, to the left and to the right; any explanation for why you didn't see the bicycle rack as you were walking back to the Metro?

A: Because of the size of the bicycle rack, and I was looking forward past it.

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363 Q: But I would assume what you told me was that as you were walking you were generally looking ahead and looking to the left and to the right; so when you were… I don't know, 10, 15 feet back from the bike rack you're looking ahead and to the left and the right; wouldn't it have been visible at that point?

A: Possibly it was. I'm not usually looking where I'm going to put my next step 20 feet down the plaza.

364 Q: Okay. Well when you were two steps away from it, and you are looking down at the ground to look where you're putting your feet..?

A: I wasn't looking at the ground; I was looking forward.

365 Q: So at what point then do you check to make sure it's safe to put a foot down on the ground, to check that the path is clear? You don't do it when you're 15, 20 feet behind; you don't do it when you're one or two feet behind it, so when do you check your pathway to make sure it's clear?

A: As you have said, I've walked up and down that sidewalk many times. You walk looking forward. It's windy, cold. It doesn't… here's the part that I don't understand: this bike rack is not always in the same place.

366 Q: I'm going to ask my question again: You said you don't look ahead when you're 15 to 20 feet back as to where you're going; you don't check it when you're one or two stps back from where you're going; so when do you check to make sure that the path is clear when you're walking?

A: I believed the path to be clear, and I was walking down look forward; I believed it to be clear.

368 Q: Well do you have any explanation for why you didn't see that bike rack, where it was that day then as you were walking down the sidewalk?

A: Because it was cold, it was windy, it was winter time. You would not expect a bicycle rack to be there. I don't have a definite explanation.

369 Q: There was nothing blocking your view of it? It wasn't covered by a tarp or anything like that?

A: No.

372 Q: I'll be more specific. Prior to January 10th, 2013, had you seen that bike rack in different positions?

A: Yes.

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> 373 Q: Was it four or five different positions prior to…?
>
> A: No.
>
> 374 Q: Okay. How many different positions had you seen it in prior to January 10th, 2013?
>
> A: I'd seen it in a couple of different positions… two.

[13] In his affidavit, Mr. Porchak deposed as follows:

> 15. The details of my trip and fall is [sic] that as I was walking from Quiznos to Metro when I stepped between the bicycle rungs in the bicycle rack, which trapped my left foot whereby my momentum going forward shot me straight forward. My foot was still trapped in the bicycle rack leaving me no place to go but straight down. My right hand hit at the same time as both of my knees hit the ground causing my left knee to be bruised and bleeding. I believed the path to be clear and I did not see the bicycle rack because of the size of the rack, and I was looking forward past it. As well, the weather that day was cold and windy.

The Statement of Claim

[14] In his claim, the plaintiff alleges as follows:

> 15. At all material times, the plaintiff, Paul Porchak, was conducting himself in a careful and prudent manner. The plaintiff pleads that the unsafe sidewalk conditions in front of the Pizza Pizza store was caused solely as a result of the negligence and/or gross negligence of the defendant and/or its servants, agents, or employees, for whose negligence and breach of duty the defendant is at law responsible, the particulars of which include, but are not limited to, the following:
>
> (a) it caused or permitted the sidewalk in front of the Pizza Pizza store to be, or to become, or to remain unsafe, thereby causing to exist or permitting to exist and hidden or unusual danger to individuals using the sidewalk in front of the store;
>
> (b) it knew or ought to have known that serious injury could result from the dangerous conditions on the sidewalk within its jurisdiction by leaving the bicycle stand in front of the store during winter;
>
> (c) it failed to implement a regular and adequate system for inspection of the sidewalks within its jurisdiction in front of its store;

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> (d) it owed a duty of care and had a responsibility for the safety of individuals using the sidewalk in front of its store, and it failed to take proper or any steps to protect their safety.

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The Parties' Positions

[15] The defendant submits that the plaintiff failed to keep a proper lookout. It says that the bike rack was there to be seen; he knew that it was there; there was nothing blocking his view; he knew that the rack was moved on occasion; and he had never encountered any difficulty passing by it before or indeed that day on his way to Quiznos.

[16] The plaintiff says he did not expect the bike rack would be there and that he did not see it because of its size and colour. He says that he was keeping a proper lookout at the time.

[17] He also relies on the lease agreement between Pizza Pizza and its landlord. The lease provides as follows:

> 17. The sidewalks, entrances, stairways and corridors of the building as well as the parking lot and common areas shall not be obstructed by a Lessee or used for any purpose other than ingress and egress to and from the Leased Premises…

[18] He submits that Pizza Pizza was in breach of the lease because the bike rack constituted an impermissible obstruction.

[19] During oral argument, Mr. Boghossian suggested that the pizzeria failed to warn of the presence of the rack. It should be noted that the claim does not allege a duty to warn or a failure to do so.

The Law Respecting Summary Judgment

[20] On a motion for summary judgment, Rule 20.04 provides that a court shall grant summary judgment if:

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

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[21] Pursuant to the 2010 Rules amendments, motions judges have been provided with expanded powers to adjudicate a motion for summary judgment under Rule 20.04(2.1).

[22] In determining whether there is a genuine issue requiring a trial, the court must consider the evidence submitted by the parties. If the court concludes that there is a genuine issue, the following powers may be exercised, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[23] The leading decision in Canada on the interpretation of the summary judgment rules is *Hryniak v. Mauldin*, [2014] S.C.J. No. 7. The Supreme Court of Canada offered the following guidance:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make necessary findings of fact, (2) allows the judge to apply the law to the facts and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[24] A helpful discussion of the new test is found in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, [2014] O.J. No. 851 at paragraphs 26, 33 and 34. Justice Corbett stated:

> 26…The length and complexity of the statement of claim is of little significant on a motion for summary judgment. The plaintiffs must show that there is evidence to support their allegations. A party may not rest on allegations in its pleadings on a motion for summary judgment. The party must "put its best foot forward" or "lead trump or risk losing".
>
> 33. As I read *Hryniak*, the court on a motion for summary judgment should undertake the following analysis:
>
> 1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
>
> 2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
>
> 3) If the court cannot grant judgment on the motion, the court should:
>
>   a. Decide those issues that can be decided in accordance with the principles described in 2), above;
>
>   b. Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issue;
>
>   c. In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
>
> 34. The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a "full appreciation" of a case necessary to grant judgment. Obviously greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.

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[25] Justice Corbett's comments were adopted by Justice Perell in *Landrie v. Congregation of the Most Holy Redeemer*, [2014] O.J. No. 3132:

> [47] ....*Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will respectively present at trial. The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing.

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[26] I pause here to note that in his factum, plaintiff's counsel devoted considerable time discussing fundamental principles of negligence – duty of care and standard. I expect that is because the plaintiff has not pleaded the *Occupiers' Liability Act* but instead has grounded his claim in ordinary principles of negligence.

[27] I will not deal with the submissions on duty of care because I did not understand the defendant to seriously contend that no duty of care was owed although I do note that it has denied being an occupier. The essence of its position is that there is no evidence that the defendant breached the standard of care and the plaintiff is entirely at fault.

Analysis

[28] I have concluded that this is an appropriate case on which to grant summary judgment. There is no genuine issue requiring a trial. There are several reasons for my conclusion.

[29] As already noted, the plaintiff has not pleaded the *Occupiers' Liability Act*. It is also the case that he has not pleaded a duty to warn. It is no answer to say that the pleading might be amended in future. For the purposes of this motion, I am entitled to consider that the record is complete and it is all that would be before a trial judge if the matter were to proceed.

[30] A leading decision respecting the basis on which to find negligence is *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201. It summarizes the law as follows:

> 28. Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

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[31] An elaboration of this concept is found in A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015):

> 5.6 Conduct is negligent if it creates an unreasonable risk of harm. This does not mean that all risky conduct attracts liability, for virtually everything that anybody does creates some hazard to somebody. If every act involving danger to someone entailed liability, many worthwhile activities of our society might be too costly to conduct. The law of negligence seeks to prevent only those acts that produce an unreasonable risk of harm. In measuring whether the hazard is an unreasonable one, the court balances the danger created by the defendant's conduct, on one hand, and the utility of that conduct, on the other hand. If the hazard outweighs the social value of the activity, liability is imposed; if it does not, the defendant is exonerated.
>
> 5.7 The two sides of this equation may be broken down further. In assessing the risk, the courts look at two components: (1) the chance or likelihood that the harm will culminate, and (2) the gravity or severity of the potential harm that will ensue if the accident transpires. The other side of the equation also comprises two elements: (1) the purpose or object of the act in question, and (2) the cost or burden to the actor to eliminate the hazard.

[32] In my view, the plaintiff has provided no evidence of an objectively unreasonable risk of harm. It must be firmly borne in mind that the standard is not one of perfection. The standard is not that of the extraordinarily conscientious person or the exceptionally skilled. The standard requires reasonable and ordinary prudence.

The mere fact that there was a fall does not mean, *ipso facto*, that there was negligence.

[33] There is no evidence that the bike rack posed a hidden or unusual danger on the sidewalk. The rack was in plain view, the plaintiff knew it was there and he had passed by it frequently in the past. It was not camouflaged in any way. Indeed, he passed by it earlier on his way to buy his lunch. There is no suggestion that it had been moved in the meantime.

[34] There is no question that the plaintiff sustained an injury but the "chance or likelihood that the harm will culminate" to reiterate from *Canadian Tort Law* is low. This is a reasonable conclusion given that there has been no prior accidents involving the bike rack of which the defendant was aware. There is nothing objectionable about having a bike rack in place. It is helpful to those who wish to use a bicycle as a means of transport. It is also fair to observe that the use of a bicycle in winter is not uncommon. There is nothing inherently dangerous in leaving a bike rack outside year round.

[35] There is no evidence that Pizza Pizza had an obligation to inspect but if it did, there is no evidence that it failed to do so. Moreover, there is no evidence of a causal link between a failure to inspect and the plaintiff's injury. There is no evidence that the rack was in a state of disrepair that caused or contributed to the injury. If there were a duty to inspect, what would it have revealed? The presence of the bike rack in its customary position outside the pizzeria against the wall.

[36] Assuming that the defendant owed a duty of care to the plaintiff to take steps to protect him from injury, there is no evidence of a breach. There is no evidence of an industry practice or standard, let alone that there was a breach thereof.

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[37] Finally, the plaintiff's reliance on the lease agreement between the defendant and its landlord is misplaced. First, it is not clear to me that a stranger to the contract can rely on its terms. But leaving that aside, there is no evidence of a breach of the lease.

[38] As the photographs demonstrate, the presence of the bike rack did not obstruct the walkway. There was more than ample space for a pedestrian to walk around the rack without leaving the sidewalk. It is also noteworthy that the defendant had no complaints from its landlord or anyone else.

[39] The only reasonable conclusion is that the plaintiff was not taking care and simply did not see the rack before he fell, although it was in plain view. That he was injured is unfortunate indeed. But as already noted, the fact of injury does not inexorably lead to the conclusion that there was negligent conduct.

[40] The facts of this case bear a resemblance to a number of maritime and one western trial decisions outlined in the defendant's factum. I will not repeat their facts but the theme that runs through the decisions is that there is no duty to warn of something that is plainly visible and that the plaintiff knew existed. A plaintiff must maintain a proper lookout for his own safety.

[41] The recent decision in *Trimmeliti v. Blue Mountain Resorts Limited,* 2015 ONSC 2301 is also pertinent. It involved injuries sustained while the plaintiff was skiing at the defendant resort. He collided with a fluorescent orange mesh ribbon used to close a run and fractured his clavicle. He commenced an action. The defendant brought a motion for summary judgment. Justice Dunphy was obliged to deal with a waiver of liability issue that is not present here. However, he also considered whether the plaintiff was responsible for his injuries. The motion judge concluded that he was because of his failure to keep a proper lookout for something that was plainly there to be seen. He said "[n]othing in the plaintiff's

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evidence explains the failure of the plaintiff to have noticed the ribbon at all". The plaintiff in this case is in precisely the same position.

[42] He submits that the decision is distinguishable because the tape was brightly coloured. I do not agree. As already noted, while the rack is somewhat dark in colour, it is not in any way camouflaged either against the red and white tile, against which it abutted, or the grey sidewalk below.

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Disposition

[43] For these reasons, the motion is granted and the claim dismissed. If the parties cannot agree, I will receive brief written submissions on costs, first from the defendant by August 10, 2016 and the plaintiff by August 24, 2016.

"Justice H. A. Rady"

Justice H. A. Rady

Released: July 14, 2016

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BETWEEN:

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- and -

Pizza Pizza Limited

Defendant

REASONS FOR JUDGMENT

RADY J.

Released: July 14, 2016

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