Case Name:

Mark v. Bhangari

RE: Ken Mark, Plaintiff, and
Saliman Bhangari and Somdat Bhangari, Defendants

[2010] O.J. No. 3014

2010 ONSC 4011

Court File No. 06-CV-322383PD2

Ontario Superior Court of Justice

D.A. Wilson J.

Heard: July 6, 2010.
Judgment: July 15, 2010.

(24 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- No triable issue -- To dismiss action -- Motion by defendants for summary judgment dismissing plaintiff's action allowed -- Plaintiff rode bicycle onto grassy strip in front of defendants' property -- Plaintiff struck metal stump and fell, injuring wrist -- Plaintiff commenced action under Occupier's Liability Act, alleging negligent condition of premises -- Grassy area belonged to City and it was well-established law that defendants were not liable since they did not have control over it or permit condition on their land to flow onto it -- That defendants mowed grassy strip and previously thought they owned it of no consequence, since they did not actually have control.

Tort law -- Occupier's liability -- Definitions -- Occupier -- Common law -- Motion by defendants for summary judgment dismissing plaintiff's action allowed -- Plaintiff rode bicycle onto grassy strip in front of defendants' property -- Plaintiff struck metal stump and fell, injuring wrist -- Plaintiff commenced action under Occupier's Liability Act, alleging negligent condition of premises -- Grassy area belonged to City and it was well-established law that defendants were not liable since they did not have control over it or permit condition on their land to flow onto it -- That defendants mowed grassy strip and previously thought they owned it of no consequence, since they did not actually have control.

Statutes, Regulations and Rules Cited:

Occupier's Liability Act,

Rules of Civil Procedure, Rule 20

Counsel:

Alexander M. Voudouris, for the Plaintiff.

Martin P. Forget, for the Defendants.

ENDORSEMENT

1 D.A. WILSON J.:-- The Defendants bring this motion for Summary Judgment pursuant to Rule 20 of the *Rules of Civil Procedure* and its recent amendments. The Plaintiff opposes the motion, arguing there is a genuine issue that requires a trial and further, the case raises a novel point of law.

Background

2 This action arises out of a bicycle accident that occurred on November 18, 2000 near the corner of Dundas Street East and Kent Road in the City of Toronto. The Plaintiff Ken Mark ("Mark") was riding his bicycle on the sidewalk immediately north of the property owned by the Defendants Bhangari ("Bhangari"). Mark alleges that there was a pedestrian on the sidewalk so he moved onto the strip of grass that runs between the sidewalk and the defendant's house. While on the grass, it is alleged Mark struck a metal stump in the lawn which caused him to fall off his bike thereby sustaining an injury to his left wrist.

3 A Statement of Claim was issued November 16, 2006 against the Bhangari defendants claiming "damages arising from the negligent condition of the premises located at 90 Kent Road ...". The claim is asserted pursuant to the *Occupiers' Liability Act*. Paragraph 4 reads:

> Each of the Defendants had responsibility for and control over the condition of the premises. Each of the said defendants were occupiers within the meaning of the *Occupiers' Liability Act*, R.S.O. 1990.

4 It is alleged in the Statement of Claim that the defendants knew of the existence of the metal stump in the ground and failed to remove it. Paragraph 7 of the Statement of Claim reads:

> The plaintiff states and the fact is that even in the event that neither of the defendants were the owners of the precise location of the pole, each of the defendants were in physical possession of the premises, and treated and cared for the previously referenced grassy area, as if they were the owners thereof.

5 The Statement of Defence denies the defendants were occupiers or that they were responsible for the area where the plaintiff alleges he fell.

6 At his examination for discovery in this action held in May of 2008, Bhangari testified that he thought he owned the grassy area next to the sidewalk and he cut the grass in the area where the Plaintiff fell. He considered the grassy area as part of his property, just as he did the house. At ques-

tion 651, Bhangari was asked this question: "Okay. As far as you were concerned, you did have control over and responsibility for the grassy area that we've been talking about?" and he responded in the affirmative.

7 Following the examination for discovery, a survey of the area done in 2009 was obtained and it confirmed that the metal stump was clearly on property owned by the City of Toronto. (Exhibit F to the affidavit of Stephen R. Kennedy sworn February 22, 2010 filed in support of this motion). This fact was not disputed by counsel for the Plaintiff.

Positions of the Parties

8 The moving Defendants argue that in order for the Plaintiff to be successful in this action, he must establish that Bhangari was the *occupier* of the grassy area where the Plaintiff fell. The evidence is uncontroverted that the metal stump which caused Mark to lose control of his bicycle and fall was on property owned by the City of Toronto, and the City was not sued. As an adjacent property owner, Bhangari can only be held liable for incidents occurring on municipal property in two circumstances: if he had control over the property at the time in question; or if he allowed a condition on his property to flow onto the municipal property, thereby creating a danger. The Plaintiff cannot establish the facts of this case fall under either exception and therefore, there is no genuine issue of liability that requires a trial.

9 The Plaintiff argues that Bhangari made an admission at his discovery that he was an occupier and the Court may find that he was in these circumstances. He clearly thought he owned the grassy area and he exerted control over it and the case law makes it clear that this is a significant factor that the court must take into consideration.

10 Furthermore, the facts of this case fall into the "special circumstances" that the Courts have found where liability will be imposed on adjacent property owners. None of the cases relied on by counsel contain a similar fact situation, they all deal with falls that occur on municipally owned sidewalks. This raises a novel question of law which cannot and should not be decided on a summary judgment motion.

Analysis

11 The recent amendments to Rule 20 of the *Rules of Civil Procedure* have increased the powers of judges hearing summary judgment motions. Judges may now weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. It is, however, important to remember that the test for Summary Judgment -- whether there is a genuine issue of material fact that requires a trial for its resolution -- is the same as set out by the Court in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.). The task of the motions judge is still to determine if there is a genuine issue that requires a trial.

12 Furthermore, as noted by Karakatsanis, J (as she then was) in *Hino Motors Canada v. Kell,* 2010 ONSC 1329 (CanLII):

> The new Rule does not change the burden in a summary judgment motion. The moving party bears the evidentiary burden of showing that there is no genuine issue requiring a trial. The moving party must prove this and cannot rely on mere allegations or the pleadings. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleading but must set out

> in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial." In other words, consistent with existing jurisprudence, each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. The court is entitled to assume that the record contains all the evidence which the parties would present if there were a trial.

13 With respect to the argument advanced by counsel for the Plaintiff that the Court must find Bhangari an occupier under the *Act* because he admitted at his discovery that he was an occupier of the grassy area, I reject this submission. The determination of whether or not an individual or another entity is an occupier within the meaning of the legislation is one that is undertaken by the Court taking into account all of the relevant factors in the circumstances. If Mr. Voudouris' argument were to be accepted, the determination would not require any analysis by the Court, simply a statement by a party in an affidavit or at an examination for discovery.

14 The case law in Ontario is clear that adjacent property owners will not be held liable for accidents which occur on municipal property unless they fall under one of the two exceptions that have been identified by the courts: if the owner had *control* over the property at the time of the incident (the "Bogoroch" exception, [1991] O.J. No. 1032); or if the owner of the property permitted a condition on his or her property to flow onto the land owned by the municipality and in so doing, created a *danger* (the "Brazzoni" exception, [1992] O.J. No. 254): *Bongiardina v. York Regional Municipality,* [2000] O.J. No. 2751 (C.A.).

15 There are numerous cases in which the court undertakes an analysis to decide if a particular case falls under one of the exceptions. The solicitor for the Plaintiff argues that this case is similar to the *Bogoroch* exception as there was no delineation which would be obvious to the public between the Defendants' property and that belonging to the City. The grassy area where the Plaintiff fell looked as if it belonged to the Defendants and certainly, Bhangari had complete and exclusive use of that area and treated it as an extension of his home. I do not accept this proposition.

16 In imposing liability in *Bogoroch, supra*, the Court considered the fact that the store had secured a permit from the City which conferred upon it the right to use part of the sidewalk as an extension of its store. Because the store was in control of the sidewalk where the pedestrian fell, the Court found that the store was an occupier of that part of the sidewalk and could be found liable under the *Occupier's Liability Act* although the place where the Plaintiff fell was owned by the City.

17 In the record before me, there is no evidence that Bhangari was controlling the grassy area where Mark fell. The fact that he mowed the grass because he was of the mistaken belief that the grassy area was his property is of no consequence, in my opinion. He was not free to deal with that area as he wished.

18 In the case of *Graham v. 7 Eleven Canada Inc.,* [2003] O.J. No. 544, Justice Sachs considered whether the owner of property next to a municipal sidewalk could be found an "occupier" under the *Act*. She noted that "absent special circumstances, the owner of land adjacent to a municipal sidewalk is not an occupier of the sidewalk for the purposes of the *Occupier's Liability Act*." In rejecting the argument that "special circumstances" existed which ought to impose liability on the property owner, Justice Sachs stated that "the fact that Monk Realty [the owner of the adjacent property] cleared the snow and ice from the sidewalk also does not render them liable at common law." I agree with this analysis and the fact that Bhangari mowed the grassy area where the Plaintiff fell is

not evidence to support the proposition that he "controlled" the grassy area, as envisaged in the *Bogoroch* exception. There is no evidence before me that Bhangari had "exclusive" control of the municipal road allowance for many years as submitted by the solicitor for the Plaintiff. Rather, the evidence is that he owned the house next to the grassy area and that he mowed the grass because he believed it was part of his property.

19 I agree with the submission of counsel for the moving parties that if on the facts of *Graham*, *supra*, where a store owner is not found to be an occupier of the municipal property located right outside its doors which his customers must use to enter and exit the store, then on the facts of the case at hand, Bhangari cannot be found to be an "occupier" of the grassy area owned by the Municipality which can be used by any member of the public who are not entering or exiting his house.

20 The issue of whether an adjoining owner of property could be found to be an occupier and thus subject to a finding of liability was canvassed more recently by Justice Glithero in *Coulson v. Hamilton (City),* [2008] O.J. No. 4977. In that case, the parties agreed that an adjoining owner of property may become an occupier if special circumstances are demonstrated. The Plaintiff alleged she slipped and fell on a sidewalk owned by the City. Justice Glithero, in rejecting the argument that the Defendant be found an occupier stated:

> The fact that the defendant inspected for and took steps to remedy snow and ice on the sidewalk is not enough to make it an occupier ... In my opinion, it has not been demonstrated that the defendant Effort is an occupier of the municipal sidewalk in question. Mere assumption of snow clearing from an adjoining municipal sidewalk is clearly not enough. There is no evidence here of that degree of control over the sidewalk so as to deem the defendant an occupier as was shown in *Bogoroch*. ...

21 In my view, the actions of the Defendant in the case before me falls far short of what would be necessary to enable a court to find that Bhangari was an occupier of the grassy area where the Plaintiff fell.

22 Counsel for the Plaintiff argues that there are no cases dealing with the same facts as the case before me as the other cases all deal with falls that occurred on municipally owned sidewalks. Thus, it is submitted, since it has not been decided, it constitutes a novel point of law. I do not agree. The law, in my view, has been settled in Ontario since at least 2000 and probably as early as 1994 [*Slumski v. Mutual Life Assurance Co. of Canada* [1994] O.J. No. 301 (Div.Ct.)] that the owner of property adjacent to a public sidewalk is not an "occupier" of the premises within the meaning of the *Occupier's Liability Act* and is not liable to others who use the area absent "special circumstances". There have been numerous cases which have considered what constitutes special circumstances. Each case must be scrutinized based on its facts. Simply because the case before me involves a fact situation that is arguably different than those that have been considered by the courts up to the present time does not mean that this case involves a novel point of law. The issue that the Court must decide is whether on the facts of a particular case a defendant has control, possession or responsibility over municipal property as articulated in *Bongiardina, supra*. The fact of whether the municipal property was a sidewalk, a grassy area, a road, a trail or any other place where a Plaintiff alleges he or she suffered injury is not determinative in the analysis. I note that many of the cases cited to me by counsel were decided on different fact situations, pursuant to a motion for Summary Judgment.

23 In this case, the Plaintiff has not demonstrated that there is a genuine issue that requires a trial. The area where the Plaintiff fell is not owned by the Defendants and there is no evidence to support the contention that Bhangari was an occupier within the exception contemplated by the *Bogoroch* case and other cases that have considered that issue. The Plaintiff cannot bring this case within one of the exceptions articulated in the case law. There is no triable issue concerning liability of the Defendants as adjoining property owners.

Conclusion

24 The Defendants' motion for Summary Judgment is granted and the action is dismissed. If counsel cannot agree on costs, I will accept brief written submissions within 7 days from the date of release of this Endorsement following which I will fix the costs.

D.A. WILSON J.

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