Ewanchek v. Eglinton Square, 2015 ONSC 2281

Ewanchek v. *Eglinton Square Shopping Centre Holdings et al.*

Court File No.: CV-12-445683

Motion Heard: January 9/15

In attendance: N. Dewey, for the proposed defendant

N. Shapiro, for the plaintiffs

By the Court:

[1] The proposed defendant, Paragon Protection Ltd. ("Paragon"), is a security services contractor that provided security services at the Eglinton Square Shopping Centre (the "mall") when, on July 3/10, the plaintiff Maria Ewanchek slipped and fell at the entranceway of a store in the mall. That store was Stitches. Paragon's security desk was located directly in front of Stitches and, on the date of Ms. Ewanchek's fall, the security desk was manned.

[2] The plaintiffs retained counsel within a few weeks of Ms. Ewanchek's fall. A little more than one month to the day of the fall, plaintiffs' counsel gave notice to the owners of the mall and, a few months later, gave notice to Stitches of the plaintiffs' potential claim.

[3] Between August 2010 and August 2011, counsel for the plaintiffs communicated with the insurance adjusters for both the mall and Stitches. The evidence before me is that, at no time prior to the issuance of the statement of claim, was there any inquiry made on behalf of the plaintiffs as to the identity of the mall's security services provider or as to anyone, other than the defendants, who might be added as parties defendant, even though the plaintiff knew that the defendants (through their insurers) were conducting investigations of Ms. Ewanchek's fall. No questions were asked. No documents were requested. The inquiries made were only as to the status of the insurers' investigations. Then too, there is nothing before me to suggest that the plaintiffs conducted their own investigations or requested documents or information that might tend to shed a light on who, other than the owners of the mall and Stitches, might have caused or contributed to Ms. Ewanchek's alleged injuries.

[4] On February 3/12, a statement of claim herein was issued naming as defendants only the mall owners and Stitches. While the evidence adduced on the part of the plaintiffs is that the plaintiffs did not know of the proposed defendant's involvement, the claims made in paragraph 10 of the statement of claim seem to suggest otherwise. Reference is made to the defendants' servants, employees or agents who, *inter alia*, failed to take care to see that Ms. Ewanchek would be safe, failed to give Ms. Ewanchek adequate or effective warning of the danger that befell her, failed to inspect, permitted the spilled liquid on which Ms. Ewanchek allegedly slipped to remain unguarded, and failed to warn Ms. Ewanchek. No inquiries were made, though they could have been, as to the identity of those servants, employees or agents. Further, a "person/inspector/guard Doe" claim might have been, but was not, asserted.

[5] In response to the plaintiffs' claim, the mall owners alleged on May 15/12 (before the putative limitation period elapsed) that Stitches had "...abdicated its responsibility by relying on others to patrol for slipping hazards..." (para. 23 of the mall owners' statement of defence and crossclaim). The plaintiffs could have and, arguably should have, inquired as to who those "others" were—this before July 10/12. This is particularly so given that reliance on the *Occupiers' Liability* Act was pled, with s. 6 addressing issues of liability where an independent contractor has been retained. No questions were asked of anyone before 2013 as to whether the mall owners retained an independent contractor to patrol for slipping hazards, *inter alia*.

[6] Stitches made specific reference at paragraph 8 of its statement of defence and crossclaim to the fact that the mall's "security personnel who were either employees and/or retained by the co-defendant [mall]" were given notice of the spill. Stitches alleged that "the security officers and/or the [mall] were primarily responsible for the clean-up of the spill [and that it was] not aware that the security officers took any reasonable steps to address the situation, once advised". Stitches' pleading was served only one week after the putative limitation period had elapsed.

[7] There is nothing before me to suggest that any inquiries were made by or on behalf of the plaintiffs, in May, June or July/12, to identity the mall's security services provider and/or the nature of its relations with the mall owners, though its potential liability was adverted to by the mall owners and stated specifically by Stitches, in the defendants' respective pleadings.

[8] On August 7/12, a letter was sent by counsel for the owners of the mall addressing the contents of a security video that he had reviewed—Ms. Ewanchek's fall having been captured on film. He referenced the fact that a security guard, identified as being with Paragon, was alerted to a spill and placed a yellow sign near the site of Ms. Ewanchek's fall (being the site of the spill). The identity of the proposed defendant and its involvement with the spill/Ms. Ewanchek's fall was thus made explicit (even if the full extent of its potential involvement was not yet known).

[9] By November 9/12, plaintiffs' counsel had reviewed the closed-circuit TV footage of the incident which made clear that Ms. Ewanchek had direct interaction with Paragon security on the day of the incident. This is confirmed by letter dated November 9/12, sent by counsel for the plaintiffs (Exhibit "F' to the affidavit of Bahram Dehghan, sworn August 18/14).

[10] Thereafter, and by May 21/13, the defendants had served their affidavits of documents and productions that included, *inter alia*, an incident report prepared by Paragon (identifying it as the mall's security contractor) and the security services contract between the mall and Paragon (see: Exhibit "E" to the affidavit of Joel McCoy, sworn December 18/14).

[11] Rather than take steps to add Paragon as a party defendant or even to put Paragon on notice (when there could be no doubt but that Paragon was involved in the July 3/10 events), the plaintiff chose to proceed to discovery. Discoveries herein, in the absence of and (importantly) without notice to Paragon, took place in late May/13.

[12] It wasn't until October/13 (more than three years after Ms. Ewanchek's fall, more than one year after there was no doubt as to the fact that the plaintiffs had a potential claim against Paragon--if, indeed, there was any doubt before then, and five months after examinations for discovery herein) that the plaintiffs put Paragon on notice of a potential claim.

[13] Paragon submits both that any claims against it are statute-barred and that it has suffered actual prejudice. The security guard who had been working on the day of the incident ceased to be an employee before Paragon was notified that it might be added as a party defendant and "efforts to contact him have been unsuccessful". That doesn't mean that he won't be able to be located but, to date, he hasn't been. And, in any event, his power of recall and willingness to cooperate (now that he is no longer an employee) are not known. Then too, Paragon posits,

discoveries took place without its participation such that adding it, at this stage, will cause it to suffer procedural unfairness.

[14] Counsel for Paragon says that any claim against Paragon could have been discovered with the exercise of due diligence well within two years July 3/10. "[T]he identity and [allegedly] culpable acts of [Paragon were] known or knowable with reasonable diligence [within the limitation period or, at the very least, more than one year before this motion was brought]" (see: *Johnson* v. *Studley*, [2014] O.J. No. 1232, at para. 59). Of note, says Paragon's counsel, is the fact that when asked on cross-examination whether Ms. Ewanchek told counsel that "after she fell, a security guard came and attended to her immediately afterwards", plaintiffs' counsel refused to answer the question. An adverse inference ought to be taken, he argues and I agree, from the plaintiffs' failure to acknowledge or refute the involvement of a security guard on July 3/10—particularly given that Exhibit "A" of Bahram Dehgan's August 26/14 affidavit is a special occurrence report recording, among other things, the Paragon security officer's interview of Ms. Ewanchek and her son on July 3/10.

[15] In addition, they submit, the plaintiffs improperly and inexplicably delayed in seeking to add Paragon as a party defendant. When the defendants, in their pleadings, made specific reference to the mall's security contractor, the plaintiffs failed to follow up and/or to move to add the security contractor as a party. They proceeded to discoveries, without putting Paragon on notice. Just because the potential claims against Paragon were addressed and expanded upon during examinations for discovery, this does not mean that the plaintiffs could not have or should not have discovered that they had a potential claim against Paragon much earlier. Paragon says, and I agree, that a review of the pleadings and the evidence adduced on this motion make it clear that the plaintiffs could have obtained the information necessary to assert a claim against Paragon long before this motion was brought.

[16] While the plaintiffs posit that, prior to July 11/12, they "acted diligently and reasonably to ascertain the person in the care and control of the area where the fall was occasioned", there is no evidence before me of any efforts made by them in that regard. From the date of her fall, Ms. Ewanchek knew of the involvement of a security officer. There is nothing before me to suggest that any efforts were made to determine his identity or his role.

[17] But, even if I am wrong in coming to the view that the claims against Paragon could have been discovered within two years of Ms. Ewanchek's fall, the delay in seeking to add Paragon and the fresh steps taken in the absence of Paragon, since July 11/12 (when the plaintiffs, themselves, say the claims against Paragon were discoverable), are sufficient (when considered in context) to persuade me that Paragon ought not now to be added as a party defendant. R. 5.04(2) is not listed in the plaintiffs' notice of motion but is referenced in the plaintiffs' factum and was relied upon by plaintiffs' counsel in argument. Plaintiffs' counsel acknowledged that the motion was brought pursuant to both R. 26.01 and R. 5.04(2).

[18] "...[W]here it is sought to add parties under [R.] 5.04(2), the court has a discretion whether to allow the amendment, notwithstanding that the threshold test is satisfied; the discretion is to ensure procedural fairness and consideration has to be given to such matters as the state of the action...[including] whether examinations for discovery of all parties have already been held..." (see: *Mazzuca* v. *Silvercreek Pharmacy Ltd.*, 56 O.R. (3d) 768 (C.A.), at para. 25).

[19] In failing to move with alacrity in bringing this motion after July 11/12 and in choosing, with full knowledge of Paragon's involvement, to proceed to discovery without first putting Paragon on notice, and, then, in waiting five month after discoveries to put Paragon on notice, the plaintiffs have compromised Paragon's ability to defend such claims as might be asserted against it by the plaintiffs. While the plaintiffs say that they did not fully know the nature of the relationship between the mall owners and Paragon until late, there is no indication before me that they sought to determine the full nature and extent of that relationship at any time before late May/13 (when discoveries took place). In any event, they had sufficient knowledge of the acts and omissions of Paragon long before this motion was brought and, indeed, before their conduct of examinations for discovery.

[20] For all of these reasons, the plaintiffs' motion is dismissed.

April 8/15