

COURT OF APPEAL FOR ONTARIO

CITATION: Brown v. Hudson's Bay Company, 2012 ONCA 631

DATE: 20120924

DOCKET: C55054

Winkler C.J.O., LaForme J.A. and Cunningham A.C.J.S.C.J. (*ad hoc*)

BETWEEN

Collington Brown

Appellant

and

The Hudson's Bay Company (HBC), Linda Mercadante, Jane Doe a.k.a. Laura, Bramalea City Centre, Canstar Security Services Inc., Michael Magnaye, Ryan Harnest, Amanda Elizabeth Balne, Shaun McGrath, and Raphael Waugh

Respondents

Collington Brown, in person

Paulette Pommells, for the respondents

Heard and released orally: September 14, 2012

On appeal from the judgment of Justice Leonard Ricchetti of the Superior Court of Justice, dated January 12, 2012.

ENDORSEMENT

[1] The appellant submits that the motion judge made three errors. First, he argues that the motion judge made palpable and overriding errors in his findings of fact. We disagree.

[2] The motion judge clearly explained that even if he found all the relevant facts in favour of the appellant's position the claims were without merit because the requisite elements of the torts alleged could not be made up. In reaching this conclusion he made the following critical findings:

- (1) The respondent, Hudson's Bay Company is a lessee from the store and its employees requested the attendance of the security personnel to ensure the appellant left the store;
- (2) The respondents did not cause the appellant's detention, rather he caused it himself by failing to leave when asked by all security staff to do so; and
- (3) The respondents did not threaten or touch the appellant.

[3] The appellant's customer service dispute with the respondents is not relevant to proving his claims against them. What the record clearly establishes, and as the motion judge found, is that based upon the appellant's own examination for discovery the respondents never touched the appellant and had backed away from the confrontation. This is fatal to the appellant's court claims against the respondents. This ground of appeal is without merit.

[4] Second, the appellant submits that the motion judge failed to recognize that the respondents had a positive duty under s. 3(1) from the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, namely to take such care as is reasonable to keep premises reasonably safe for all persons entering the premises.

[5] We reject this ground of appeal. The appellant did not raise this cause of action in the statement of claim and it was not considered by the motion judge. Even if it had been properly raised on the motion, the *Occupier's Liability Act* would not assist the appellant. As is clear from the record and in the findings of the motion judge the appellant created the danger to his person by refusing to leave the store, not the respondents.

[6] Third, the appellant argues that the motion judge erred in failing to apply "the full appreciation test" for granting summary judgment as established in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764.

[7] This ground of appeal is also dismissed. Although the motion judge used the language, "no genuine issue requiring trial", he actually correctly applied the proper test. After referencing *Combined Air*, the motion judge disposed of the matter because it fell into the second category of *Combined Air*. That is, summary judgment was granted because the claims of the appellant were without merit.

[8] Once again the motion judge found that even if all the facts favoured the appellant, the claim he sought was simply without merit, indeed, and as previously referenced the motion judge found that based on the appellant's own examination for discovery none of the respondents touched the appellant and they evacuated from the confrontation.

[9] Accordingly, the appeal is dismissed.

[10] The respondents' costs will be fixed at \$3,500 inclusive of disbursements and HST.

“Warren Winkler C.J.O.”

“H.S. LaForme J.A.”

“J.D. Cunningham A.C.J. S.C.J.”