

CITATION: Horn v. Latondress, 2024 ONSC 1089
COURT FILE NO.: CV-18-600
DATE: 2024/02/21

SUPERIOR COURT OF JUSTICE-ONTARIO

RE: KEITH HORN, Plaintiff

-and-

BRIAN LATONDRESS, LONDON & MIDDLESEX HOUSING CORPORATION and JOHN DOE INC., Defendants

BEFORE: Gibson J.

COUNSEL: Daniel Fife and Rachel Andrews, Counsel for the Plaintiff (Responding Party)

Patrick Brennan, Counsel for the Defendant LMHC (Moving Party)

HEARD: October 30, 2023

ENDORSEMENT

Overview

[1] This action arises out of an altercation between the plaintiff Keith Horn (“Horn”) and the co-defendant Brian Latondress (“Latondress”) that occurred on May 23, 2016, at the London & Middlesex Housing Corporation (“LMHC”) housing complex located at 85 Walnut Street in London, Ontario (“85 Walnut”).

[2] LMHC is the owner, property manager and landlord of 85 Walnut. The plaintiff Horn has been a tenant at 85 Walnut since July 2010. Latondress is also a tenant, and at the time of the incident, was employed by LMHC as the property’s Resident Contact, which the plaintiff says was akin to a building superintendent.

[3] LMHC aims to provide safe, secure and affordable community housing for low-to-moderate-income individuals and families, including rent-g geared-to-income properties such as 85 Walnut.

[4] Latondress was employed by LMHC as a Resident Contact for the building. He received rent-free accommodation, including free utilities and credit for phone calls, in addition to an hourly wage for performing work outside his general duties.

[5] On May 23, 2016, Horn, his dog Lucy, and two friends, Bev and Ricky (now deceased) were returning to 85 Walnut, where Horn was a resident at the time, via the front entrance. At the same time, Latondress, who was a resident and Resident Contact for the building, was sitting on a bench with his dog Cruiser, as well as his friend Jean Morris (now deceased), at or near the front entrance of 85 Walnut. There was a history of animosity between Horn and Latondress arising from incidents between their dogs. Horn and Latondress had previously had confrontations regarding the muzzling of Horn's dog as instructed by animal control, and his use of a retractable leash which exceeded the length prescribed in local by-laws.

[6] As Horn passed Latondress, words were exchanged between them as their dogs barked. There is disagreement between the two as to what was said, with each accusing the other of aggressive behaviour. Horn walked past Latondress and to the building. At or near the front entrance of the building, Horn turned and walked back towards Latondress.

[7] At this point in the evidence, there are two divergent versions of events provided by Horn and Latondress leading up to and resulting in the plaintiff's injury. Latondress says that following the exchange of words at the bench, he continued conversing with Jean for a few minutes before getting up to enter 85 Walnut by the main entrance. Latondress says that Horn was standing at or near the entrance to 85 Walnut, waiting for him along with Ricky. Horn punched Latondress, Ricky punched Latondress, and then Latondress pushed the plaintiff in the chest, resulting in Horn falling and being injured.

[8] Horn says that as he turned to go back to Latondress to address something that was allegedly said by Latondress, Latondress was waiting for Horn at or near a dividing fence at the front entrance of 85 Walnut. Horn says that Latondress said something to the effect of "I have been waiting a long time to do this" before placing hands on the plaintiff's chest, pushing him aggressively, sending him flying and resulting in his fall and consequent injuries, including a fractured right femur.

[9] The police attended and a police report was prepared. No assault charges were laid against Horn.

[10] The plaintiff Horn has alleged that Latondress, as an employee of LMHC, among other things excessively and recklessly applied force to Horn and irrationally and wrongly determined that he needed to defend himself from Horn. As to the Defendant LMHC, the plaintiff alleges that it is liable for the alleged assault and battery pursuant to the *Occupiers Liability Act*, the *Residential Tenancies Act*, and/or vicarious liability as the employer of Latondress.

[11] LMHC denies all liability and asserts that it is not liable for the plaintiff's damages on the basis that Latondress's actions were an assault against Horn or were committed in self-defence from aggression by Horn.

[12] LMHC has brought the present summary judgment motion for an order dismissing the claim against it on the basis that there is no genuine issue requiring the trial of the claim against it.

[13] The plaintiff Horn opposes summary judgment, submitting that the liability of LMHC is a genuine issue requiring a trial. It submits that the potential liability of LMHC hinges on the issue of whether there is a sufficient nexus between the conduct of Latondress and his position as an employee of LMHC such that LMHC could be held liable at trial for having hired Latondress to the position of Resident Contact, and/or whether LMHC can be held vicariously liable for such conduct. It contends that this issue of whether such nexus exists cannot be determined by motion but requires the trier of fact to hear and consider the evidence at trial.

Positions of the Parties

Position of the moving party co-defendant LMHC

[14] LMHC submits that in the evidence provided, including at the examinations for discovery of the parties, two versions of the altercation have been provided by Horn and Latondress. In neither version, LMHC submits, is it causally connected to the subject incident and the plaintiff's injuries, and in neither does it face liability exposure. The defendants have not cross-claimed against each other.

[15] From the evidence of Latondress, Horn accosted Latondress before he and Ricky assaulted and battered Latondress, precipitating Latondress pushing Horn in self-defence, which resulted in Horn's injury and damages. If Latondress's evidence is accepted at trial, LMHC submits, Horn's injuries will be found to be the result of Latondress's application of sufficient force in self-defence to end the altercation, resulting in the plaintiff being the author of his own misfortune. If Latondress's evidence is accepted, there can be no finding of liability against LMHC for the plaintiff's injury.

[16] From the evidence of Horn, LMHC submits, the incident was instigated by Latondress, who, while lying in wait for the plaintiff, uttered a threat indicating premeditation and intention before assaulting and battering the plaintiff resulting in the plaintiff's injury and damages. The plaintiff's allegations based upon his evidence raise the intentional tort of battery against Latondress for the incident. But in this situation, LMHC submits, there can be no finding of liability against LMHC for the plaintiff's injury. Latondress was off duty at the material time and was not operating in any capacity as a Resident Contact at that time.

[17] For LMHC to be found vicariously liable for Latondress's battery of the plaintiff Horn, the facts would have to satisfy the *Salmond* test, which outlines two instances in which an employee's conduct falls within the course and scope of employment, either: acts authorized by the employer; or, unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes-although improper modes-of doing what has been authorized: *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 6, citing *Salmond and Heuston on the Law of Torts* (19th ed. 1987), at pp. 521-522.

[18] LMHC submits that, if it is accepted that Latondress was an employee or contractor at the material time, the plaintiff's evidence that Latondress committed a pre-meditated and intentional battery based upon personal animosity given the history between Horn, Latondress and their respective dogs, falls outside the scope of vicarious liability. In this circumstance, the battery, as recounted by the plaintiff, was an independent act of the co-defendant Latondress.

[19] LMHC submits that there is no evidence that situates Horn and Latondress in a materially or causally connected place of risk of the alleged battery by any conduct, instructions, or duties for a Resident Contact created by LMHC. There was no enhanced risk. LMHC submits that the plaintiff

has failed to adduce any evidence suggesting any deficiency, hazard, or other issue with respect to the physical property in and around the premises which contributed in any way to the alleged injuries and damages. It was a holiday. Latondress was off duty at the time of the subject incident. No criminal charges were laid as a result of this incident. It says that Latondress's status as a Resident Contact, either on or off duty, is immaterial given the two versions of the events of the subject incident provided by Horn and Latondress: either the plaintiff was a victim of an intentional battery by Latondress or he was injured when Latondress moved to defend himself from Horn's aggression. In neither instance, LMHC submits, is it responsible for the plaintiff's injury and resultant damages.

Position of the responding party plaintiff Horn

[20] The plaintiff insists that the liability of LMHC remains a genuine issue requiring a trial. The focal point of analysis must be the nexus to Latondress's employment. It suggests two bases for potential liability of LMHC: direct negligence in hiring Latondress, knowing that he had a propensity for violent behaviour; or, vicarious liability as an employer.

[21] The plaintiff asserts that LMHC owed a contractual and statutory duty to ensure the premises would be safe and secure, and to hire and supervise its employees so that tenants were not put in harm's way, including by being physically injured by employees or other tenants.

[22] The plaintiff asserts that LMHC knew or ought to have known of Latondress's propensity for violent and threatening behaviour, and did not exercise due diligence in hiring him. No reference checks were completed. It therefore breached its duty of care.

[23] With regard to the potential second ground, the plaintiff does not suggest that LMHC authorized acts of violence, but that Latondress's unauthorized act was so connected to an authorized act as to constitute a mode of doing the authorized act, in instructing Horn to put his dog on a proper leash and to muzzle him. This could potentially provide a trial judge with evidence of sufficient proximity that could trigger vicarious liability, and fits into the enterprise risk ground of potential liability.

Issues

[24] The issue before me in this matter is whether summary judgment is appropriate in this case.

Law and Analysis

The test on a motion for summary judgment

[25] The test on a motion for summary judgment is well-established: Rule 20.04(2) states that the court shall grant summary judgment if it “is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.” There is no genuine issue requiring a trial if the evidence before the court allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts and is a proportionate, more expeditious and less expensive means to achieve a just result: *Calloway REIT (Westgate) Inc. v. Elita’s Perfect Touch Hair Studio*, 2019 ONSC 5755, at para. 41; *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49.

[26] The parties on the motion are expected to put their best foot forward when presenting their evidence. The court is entitled to presume all evidence that would be available at trial is in front of the court on the motion so that it is assured of a sufficient evidentiary record on which to make necessary findings of fact, and to apply the law.

[27] Further guidance on the application of these principles has recently been given by Brown J.A. for the Court in *Moffitt v. TD Canada Trust*, 2023 ONCA 349.

[28] Responding parties on a motion for summary judgment may not rest solely on the allegations or denials in their Statement of Defence. Rule 20.02 requires responding parties to set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Analysis

[29] The potential liability of LMHC hinges on the issue of whether there is a sufficient nexus between the conduct of Latondress and his position as an employee of LMHC.

[30] As a Resident Contact, Latondress was a representative of LMHC at 85 Walnut, and acted as a liaison for LMHC to be involved in all aspects of the operation and management of the property on a day-to-day level. He was essentially the “eyes and ears” of LMHC.

[31] Pursuant to the Guidelines for Resident Contacts, Latondress had minimum on-duty hours for when the LMHC main office was closed after hours and 24-hours on weekends and holidays. There was no formal set schedule; however, he was required and believed to be available 24/7. The subject incident occurred on May 23, 2016, the Victoria Day holiday.

[32] It is not in dispute that LMHC as the owner, property manager and landlord of 85 Walnut was an occupier pursuant to s.1 of the *Occupiers Liability Act*. Pursuant to s.3(1) of the *Act*, LMHC owed a duty of care to reasonably ensure that individuals on the premises would be reasonably safe, and to take reasonable steps to prevent foreseeable harm. It also owed a duty of care under s.20(1) of the *Residential Tenancies Act*.

[33] Pursuant to the *Salmond* test, employers will be vicariously liable for torts falling within the scope or course of employment if such acts were: (1) authorized by the employer, or (2) unauthorized acts by the employee so connected to the authorized acts that they may be regarded as modes, albeit improper modes, of doing an authorized act: *Bazley v. Curry*, *supra*, at paras. 6 and 10; *Dagenais v. Slavko*, 2021 ONSC 3415, at para. 55.

[34] In *Bazley*, the Court assessed the strength of the connection between the tortfeasor's employment and the tort. Improper or not, the abuse of a position does not sever the connection with employment. Imposing liability requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing: *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, at para. 26. This has been described as the "enterprise risk test." The focus should be on whether the employer's enterprise and empowerment of the employee created or materially enhanced the risk that the tort would occur: *Blackwater v. Plint*, 2005 SCC 58, at para. 20.

[35] In the circumstances of the present case, Latondress had extensive and personal contact with the tenants and was essential to the day-to-day level business as a liaison for LMHC to be involved in the property's operation and management. It is still open to dispute as to whether Latondress was on duty at the time of the incident. It is at least arguable that he was. Monday, May 23, 2016 was a provincial holiday, Victoria Day. Resident Contacts were meant to provide 24-hour coverage on holidays.

[36] There must be a strong causal link between the powers, duties and responsibilities conferred on the employee by the employer and the wrongful act. The causal link arises if the act was an unauthorized act so connected to the authorized acts that it may be an improper mode of doing the authorized act. The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer. The degree of connection is broad, and imposing liability may be appropriate where there is a sufficient connection between the creation of risk by the employer and a wrong that accrues therefrom, even if unrelated to the employer's desires: *Dagenais v. Slavko*, 2021 ONSC 3415, at paras. 108 and 145.

[37] The material duties of a Resident Contact included, but were not limited to, reporting disturbances, maintaining general security, investigating tenant complaints, conducting regular building security patrols, reporting security situations and other occurrences to supervisory staff with written reports, reporting and assisting with maintenance issues, assisting EMS, and all other related duties as assigned.

[38] The incident arose from a confrontation regarding the plaintiff's dog. Latondress instructing Horn to properly muzzle and leash his dog caused Horn to become upset. It was part of Latondress's employment to deal with tenants and their pets. His act is attributable to how he chose to deal with the situation. There is at least some degree of connection between Latondress's authorized duties and his intentional act.

[39] In determining the sufficiency of the connection between the employer's creation or enhancement of risk and the wrongful act, the court may consider the subsidiary factors outlined in *Bazley* at para. 20: the opportunity that the enterprise afforded the employee to abuse his power; the extent of power conferred on the employee; and the vulnerability of potential victims to wrongful exercise of the employee's power.

[40] A risk may be created or enhanced by employing an individual with an inclination for aggressive behaviour and putting him in a position of management with an element of authority: *Moosa v. Hill Property Management Group Ltd.*, 2014 ONSC 3717, at paras. 69, 80 and 81.

[41] There is at least some indication of concerns in this regard regarding Latondress. No reference checks were completed by LMHC prior to his engagement.

[42] The blanket denial by LMHC that Latondress was on duty at the relevant time is not persuasive or substantiated by the evidence available on this motion.

[43] I conclude that, even applying the enhanced powers afforded by Rule 20.04(2.1) and (2.2), there remain genuine issues which necessitate a trial in this matter.

Conclusion

[44] Applying the applicable principles, I find that there remains a genuine issue for trial concerning the liability of LMHC arising from whether the co-defendant Latondress's battery on the plaintiff Horn is sufficiently connected to his assigned duties such that his intentional act can be regarded as a materialization of the risks created or enhanced by LMHC's business. A trial is required for a fair and just determination on the merits.

[45] Accordingly, LMHC's motion for summary judgment is dismissed.

Order

[46] The Court Orders that:

1. The co-defendant LMHC's motion for summary judgment is dismissed.

Costs

[47] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The plaintiff may have 14 days from the release of this decision to provide his submissions, with a copy to LMHC; LMHC a further 14 days to respond; and the plaintiff a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not

received any response or reply submissions within the specified timeframes after the plaintiff's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

M. Gibson, J.

Date: February 21, 2024