CITATION: Metro Ontario Inc. v. Cloverdale Mall Inc., 2015 ONSC 4579
DIVISIONAL COURT FILE NO.: 201/15
DATE: 20150716

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: METRO ONTARIO INC., Moving Party

AND:

CLOVERDALE MALL INC., Responding Party

BEFORE: Harvison Young J.

COUNSEL: *Andrew Sanfilippo and Brett A. Stephenson*, for the Moving Party

Michael Blinick and Paul Jonah, for the Responding Party

HEARD at Toronto: in writing

ENDORSEMENT

(Leave to Appeal to the Divisional Court)

Introduction

[1] The moving party defendant Metro Ontario Inc, seeks leave to appeal to the Divisional Court from the Order of Akhtar, J. dated April 15, 2015 dismissing its summary judgment motion. The plaintiff allegedly slipped and fell on ice in the "common areas" as set out in the lease. Metro brought a motion for summary judgment to order the respondent defendant Cloverdale to indemnify it for the cost of litigating the resultant personal injury claim pursuant to an indemnity provision in the lease agreement between Metro as tenant and Cloverdale as landlord.

[2] The motions judge interpreted the terms of the lease agreement between the parties and specifically the indemnity provision contained within it. Having interpreted these provisions, he concluded that pursuant to those terms, Cloverdale was not required to indemnify and\or hold Metro harmless.

The Test for Granting Leave to Appeal

[3] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and that the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and in each case, both aspects of the two-part test must be met before leave may be granted.

[4] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is in the opinion of the judge hearing the motion "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.*,(1992), 7 O.R. (3d) 542 (Div.Ct.).

[5] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong; that aspect of the test is satisfied if the judge granting leave is satisfied that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J. per Then J.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen Div., per Farley J.). In addition, the moving party must demonstrate matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and the administration of justice: *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J. per Catzman J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div.Ct.).

Ruling

[6] The application is dismissed. The applicant has not satisfied the test under either branch of Rule 62.02(4).

[7] First, with respect to Rule 62.02(4)(a), I do not agree that the applicant has pointed to any conflicting decisions. The central issue in the case at bar before the motions judge was whether the contractual provisions contained an indemnity provision that was applicable in the circumstances. The motions judge found that the provisions of this lease, and the indemnification provision in particular, did not provide for the indemnification of Metro in the circumstances. This is very different from the case of *Stewart Title Guarantee Co. v. Zeppieri* [2009] O.J. No. 322 (Ont.S.C.) relied on by the applicant where the court did find that that contract provided for the indemnification in issue. Zeppieri and the line of cases that followed it were based on different contractual provisions from the ones in issue in the present case. There is thus no conflicting issue of principle.

[8] Second, I am not satisfied that the correctness of the motions judge's decision is "open to very serious debate". The motions judge considered the terms of the lease and the particular provisions in dispute. He found that because section 12.02 obliges the tenant to place insurance on the "Common Areas", the proviso in section 12.06 was triggered such that the landlord was

exempted from its duty to indemnify. I do not agree with the moving party's submission which is, in effect, that the Pleadings Rule must be applied without regard to the contractual provisions in issue. That position is not supported by the case law cited, which looks first to the contractual provisions and their proper interpretation: see *Freedman v. Toronto (City)*, 2009 CarswellOnt 6938 (Ont.Div.Ct.). In short, this case contained a particular contractual provision that distinguished it from the *Zeppieri* line of cases in which there was no comparable provision setting out an exemption to the duty to indemnify. The does not give rise to reason to doubt the correctness of the decision. In addition, while the moving party takes issue with the motions judge's interpretation of the exemption provisions, it has not identified any error in approach or principle that gives rise to a reason to doubt the correctness of the decision.

[9] Finally, this case concerns one provision in one contract. Unlike the *Zeppieri* line of cases, this is not a single provision whose application is repeatedly arising in the cases before the court. I am unable to find that the moving party has demonstrated "matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and the administration of justice".

[10] For these reasons, the motion for leave to appeal is dismissed.

Costs

[11] I have reviewed the written costs submissions of the parties. The respondent shall pay costs of this motion to the respondent Cloverdale in the amount of $6500 including HST and disbursements.

Harvison Young J.

Harvison Young J.

Date: July 16, 2015