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Case Comment on Jung v Cloverdale Mall Inc., et al.

The Ontario Superior Court of Justice recently released the decision *Jung v Cloverdale Mall Inc.*[1] where McCague Borlack, successfully opposed a summary judgment motion and was awarded costs in the amount of $17,000.

Factual Background

The summary judgment motion arose from a dispute as to the interpretation of an indemnification provision between the leasee, Metro Ontario Inc. ("Metro") and the owner/operator of 250 The East Mall, Toronto, Ontario (the "Property"), Cloverdale Mall Inc. ("Cloverdale"). Metro's occupancy was governed by a lease agreement (the "Lease"), which divided responsibility for maintenance of the Property between the parties.

Metro asked the Court to grant summary judgment on the basis that the indemnity provision in the Lease required Cloverdale to indemnify it for the cost of litigation stemming from a slip and fall that occurred at the Cloverdale Mall.

All areas outside the Metro store were Cloverdale's sole responsibility. Cloverdale was responsible for removing snow and ice from the common areas of the Property. In that respect, Cloverdale contracted with a snow removal company, Pro-Turf Landscaping ("Pro-Turf"), to remove snow and ice as necessary during the 2008/09 winter season from the entrances, exits, walkways and parking areas.

On December 20, 2008, the Plaintiff, Mr. Jung, slipped and fell on ice when walking along the pathway leading to the south main entrance to the Property. Mr. Jung brought an action against Metro, Cloverdale and Pro-Turf. Metro was joined as a co-defendant to the proceedings even though clearing the common areas of snow and ice was the exclusive responsibility of Cloverdale and Pro-Turf.

Cloverdale and Pro-Turf entered into a Pierringer Agreement with the Plaintiff prior to this motion for summary judgment. Pursuant to that settlement agreement, both Cloverdale and Pro-Turf withdrew from the litigation, leaving Metro as the sole Defendant in the Plaintiff's action.

Throughout June, July and August 2014, Metro requested that Cloverdale pay for its defence pursuant to an indemnification provision contained in the Lease. Cloverdale took the position that they had no obligation to indemnify.

[1] 2015 ONSC 2386

The Terms of the Lease

The Lease outlined the duties and roles of Cloverdale and the signatory tenant. Three sections were of particular significance to the case. Section 12.01, which governed Cloverdale's duties with respect to insuring the Property read as follows:

> **Section 12.01 - Landlord's Insurance**
>
> The Landlord shall through the Term provide and keep in force or cause to be provided and kept in force:
>
> (a) comprehensive general liability insurance with respect to the Landlords operation of the Shopping Centre for bodily injury or death and damage to property of others…

Section 12.02, which outlined Metro's corresponding obligations in the insurance context provided:

> **Section 12.02 Tenant's Insurance**
>
> (a) comprehensive general liability insurance for bodily injury or death and damage to the property of others with respect to all business conducted in, at, upon all from the Leased Premises and the use and occupancy thereof *and the use of the "Common Areas" and Facilities*, including the activities, operations and work conducted or performed by the Tenant, by any other person on behalf of the Tenant, by those for whom the Tenant is in law responsible and by any other person on the Leased Premises, such policy or policies shall be written with inclusive limits of not less than $3,000,000.00 for any one accident or occurrence or such higher limits as the landlord shall reasonably require from time to time...[emphasis added.]

Finally, Section 12.06, an indemnification provision, outlined the circumstances in which the costs of litigation against a tenant would be reimbursed by the landlord:

> **Section 12.06 - Indemnification of Tenant**
>
> Except as provided in Section 12.03, the Landlord shall indemnify the Tenant and save it harmless from and against any and all claims, actions, damages, liabilities, losses, costs and expenses, including legal expenses, whatsoever including, without limitation, those in respect of loss of life, personal injury or damage to property, arising from any occurrence caused by the negligence of the Landlord or any person for whom the Landlord is responsible at law *and not covered by the insurance required to be placed and maintained by the Tenant* pursuant to this lease *or otherwise maintained by the Tenant*. [emphasis added.]

Positions of the Parties

Both parties to the summary judgment motion agreed that the central issue in the case was the interpretations of Sections 12.01, 12.02 and 12.06. Counsel for Metro, asserted that these sections, which included the phrase "save it harmless", required Cloverdale to pay Metro's incurred and ongoing litigation costs. Counsel argued that the requirement for insurance on "Common Areas" arose only when Metro used the "Common Areas" for a particular purpose, for example by setting up a promotional stall.

Michael Blinick, counsel for Cloverdale submitted that Section 12.06 did not impose an obligation on Cloverdale to indemnify Metro, as the requisite conditions in the indemnity provision had not been met. Specifically, because Section 12.02 obliged Metro to place insurance on the "Common Areas" (where the Plaintiff's claim arose), the proviso in Section 12.06 was triggered exempting Cloverdale from its duty to indemnify.

Section 12.06 Did Not Require Cloverdale to Indemnify Metro

Justice Akhtar concluded that Cloverdale was not liable to indemnify Metro as Metro was unable to prove that it was entitled to the relief set out in the indemnity provision.

The "Common Areas"

Justice Akhtar concluded that Section 12.02 indicated that it was mandatory for Metro to keep in force insurance on all business conducted in the property and "the use and occupancy thereof and the use of the Common Areas." The learned Justice disagreed with Counsel for Metro's argument that only particular usage of the common areas would require insurance. Instead, Justice Akhtar concluded that the phrase "use of the Common Areas" captured a broader array of activity than Metro suggested, and included the day-to-day activities that must take place within these areas, such as returning shopping carts and entering the store. Metro was required to place insurance on the common areas pursuant to Section 12.02 of the Lease and this requirement was reflected by the fact that Metro had indeed taken out such insurance. Section 12.06 applied, and Cloverdale was therefore, not under any duty to indemnify Metro.

Insurance "otherwise maintained by the Tenant"

Justice Akhtar also concluded that the words "or otherwise maintained by the Tenant" specifically envisaged the situation where covering insurance taken out by Metro was already in place. The learned Justice pointed to the evidence of Metro's Risk Manager during cross-examination, where it was revealed that Metro had put insurance in place for the period encompassing the Plaintiff's claim. The insurance company, according to same, had confirmed that there were no issues of coverage.

Conclusion

Justice Akhtar concluded that Cloverdale was not required to indemnify Metro and its motion for summary judgment was dismissed. While this decision is in the process of being appealed, the

decision represents a tool for parties when interpreting indemnification clauses when alleged negligence occurs in "common areas" of a leased commercial property. While indemnification provisions are seldom clear and unambiguous, Justice Akhtar concluded that Cloverdale can rely on Section 12.06 of the Lease to not be found liable to indemnify Metro. The above case may aid counsel when arguing that a Landlord does not have to indemnify its tenant for alleged negligence in "Common Areas".

As Justice Akhtar stated, "use of the Common Areas" captures a broader array of activity, including the day-to-day activities that must take place within these areas. Counsel can utilize this interpretation to deny a tenant's request for indemnification when alleged negligence occurs in a "Common Area" and its Lease Agreement has a similar provision to Section 12.06 of the subject Lease.

To read the full case decision download the pdf.