CITATION: Miaskowski v. Persaud, 2015 ONSC 1654
COURT FILE NO.: 08-CV-347755 PD1
DATE: 20150312

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
PHIL MIASKOWSKI, Minor by his Litigation Guardian, OWEN MIASKOWSKI, Minor by his Litigation Guardian, ERIC MIASKOWSKI, minor by his Litigation Guardian and ZACHARY BELL, Minor by his Litigation Guardian Plaintiffs	*B. Robin Moodie* and *Bronwyn Martin* for the Plaintiffs
– and –	
DUSTAFF PERSAUD and TERRENCE CATNEY Defendants	*Shanti Barclay* and *Zeitoon Vaezzadeh* for the Defendant Dustaff Persaud *Jonathan Kulathungam* and *John Paul Ventrella* for the Defendant Terrence Catney
– and –	
STEVEN CATNEY, 1440415 ONTARIO INC. C.O.B. ALLIANCE YOUTH SERVICES INC., BETHS SUEPAL and 889961 ONTARIO INC. C.O.B. RE/MAX REALTY SPECIALISTS INC. Third Parties	*Jonathan Kulathungam* and *John Paul Ventrella* for the Third Parties Steven Catney and 1440415 Ontario Inc., c.o.b. as Alliance Youth Services Inc.
	HEARD: March 5, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] On February 28, 2007, the Plaintiff Phil Miaskowski slipped and fell on ice and snow at his place of employment. He broke his ankle at 70 Jingle Crescent, a residential property in Brampton, Ontario, which was his place of work for the Third Party, 1440415 Ontario Inc., which carries on business as Alliance Youth Services Inc.

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[2] After his fall, Mr. Miaskowski sued Dustaff Persaud, who was the owner of 70 Jingle Crescent, and about three years after the accident, he joined Terrence Catney ("Terrence"), whom he learned was the tenant of the property, as a co-defendant.

[3] Mr. Persaud crossclaimed against Terrence and about six years after the accident Mr. Persaud also commenced third party proceedings for contribution and indemnity from Steven Catney ("Steven"), who is Terrence's son and the owner of Alliance Youth Services Inc.

[4] In his third party claim, Mr. Persaud also sued Beths Suepal, who is a real estate agent, and 889961 Ontario Inc., which carries on business as Re/Max Realty Specialists Inc. ("Re/Max"). These third parties had been retained in 2007 to find the tenant of 70 Jingle Crescent and they placed Terrence as the tenant.

[5] Submitting that the claim is statute-barred under the *Limitations Act*, S.O. 2002, c. 24, Sched. B, Terrence brings a summary judgment motion to have Mr. Miaskowski's claim dismissed.

[6] Submitting that he was neither an occupier nor negligent, Mr. Persaud brings a summary judgment motion to have Mr. Miaskowski's claim dismissed.

[7] Submitting that the third-party claim is statute-barred under the *Limitations Act*, Steven and Alliance Youth Services bring a summary judgment motion to have Mr. Persaud's third party claim dismissed.

[8] Mr. Persaud brings a cross-motion for a declaration that his third party claim is not statute-barred.

[9] For the reasons that follow, I grant Mr. Persaud's and Terrence's respective summary judgment motions in the main action. Thus, I dismiss Mr. Miaskowski's action.

[10] This outcome makes the third parties' summary judgment motion moot because there is no remaining claims for contribution and indemnity.

[11] However, because of the possibility of appeals and because a determination of the third partys' motion is relevant to the matter of costs, I grant the third party's summary judgment motion. In my opinion, the third party claim is statute-barred, and the discoverability principle does not apply for claims for contribution and indemnity.

[12] Thus, the third party proceeding should also be dismissed for all third parties including Ms. Suepal and Re/Max.

B. FACTUAL AND PROCEDURAL BACKGROUND

[13] The factual and procedural background is as follows.

[14] In January 2007, Mr. Miaskowski began work with Alliance Youth Services, whose premises consisted of a residential home at 70 Jingle Crescent in Brampton, Ontario. Alliance Youth Services was providing care for a 14-year old Crown Ward who resided at the property. Mr. Miaskowski was a caregiver for the youth.

[15] Alliance Youth Services is owned by Steven, the son of Terrence. Mr. Miaskowski knew Steven, who was his friend, but not Terrence. Mr. Miaskowski was not aware of how Terrence was involved with Alliance Youth Services' occupancy of 70 Jingle Crescent.

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[16] Mr. Miaskowski was, however, aware that Alliance Youth Services was a tenant and not the owner of 70 Jingle Crescent.

[17] 70 Jingle Crescent is a semi-detached single-family home with a one-car garage and a driveway adjacent to the driveway of the companion semi-detached home.

[18] Mr. Persaud, who resides in the United States, is the owner of 70 Jingle Crescent, and as an absent landlord, he retained Ms. Suepal and Re/Max to find a tenant. Ms. Suepal found Terrence, who in the application for lease misrepresented himself as an employee of Alliance Youth Services.

[19] The lease, a Residential Rental Lease Agreement, was signed by Terrence, who in his Statement of Defence admits to being an occupier of the property.

[20] Ms. Suepal told Mr. Persaud that Terrence owned Alliance Youth Services and would be living at the premises with a disabled child. Terrence's name and contact information were on the rental application.

[21] As a fact, however, Terrence was not an occupant of the premises. The premises were rather occupied by his son Steven and his corporation, Alliance Youth Services. In the third party proceedings, they too have admitted to being occupiers.

[22] The rent cheques provided to Mr. Persaud and cashed by him were paid by Alliance Youth Services.

[23] At his Examination for Discovery, Terrence testified that he had not signed the Lease Agreement. He said that he had given his son Steven permission to sign the Lease Agreement in Terrence's name because his credit history was better than Steven's. Terrence thus permitted Steven to sign the rental agreement on his behalf.

[24] The lease stipulates that the tenant is responsible for clearing snow and ice at the premises. Schedule "A" to the lease states:

> The Tenant shall keep the lawns in good condition and shall not injure or remove the shade trees, shrubbery, hedges or any other tree or plant which may be on, upon or about the premises, and shall keep the sidewalks in front and at the sides of the premises free of snow and ice.

[25] Steven says that it was his employees' responsibility to clear snow and ice and that they had done so. Mr. Miaskowski denied any such responsibility.

[26] At the time of entering into the lease of 70 Jingle Crescent and throughout the winter of 2007, Mr. Persaud was living in New York.

[27] On February 28, 2007, Mr. Miaskowski arrived for his 3:30 p.m. shift. He says that the driveway was covered with ice and snow and that while walking on the driveway, he slipped and fell. He broke his ankle and was taken to the hospital. He never returned to work at 70 Jingle Crescent.

[28] In April 2007, two months after the accident, Mr. Miaskowski retained Andrew Suboch as his lawyer to pursue a slip and fall claim. At the time of the retainer, Mr. Miaskowski knew that: (a) his employer was Alliance Youth Services; (b) he was at work at the time of the accident; (c) Alliance Youth Services was not the owner but a renter of the premises. At the time of the retainer, Mr. Miaskowski did not know who the owner of 70 Jingle Crescent was.

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[29] On January 24, 2008, about one year after the accident, after making inquiries to determine who was the registered owner of 70 Jingle Crescent, Mr. Miaskowski commenced an action just against Mr. Persaud.

[30] There is no explanation why Mr. Miaskowski did not join his employer as a party defendant.

[31] The Statement of Claim was served on Mr. Persaud on September 3, 2008.

[32] About a year passed and on September 23, 2009, Mr. Persaud's lawyer wrote Mr. Miaskowski's lawyer and advised that Terrence was the tenant of the premises, which was Mr. Persaud's understanding based on the signed lease. Mr. Persaud's lawyer suggested that Terrence be added as a co-defendant.

[33] Another six months passed and on March 9, 2010, about three years after the accident, Mr. Miaskowski issued an Amended Statement of Claim adding Terrence as a defendant.

[34] It may be noted that the joinder of Terrence is over three years after the slip and fall but within six months of the letter identifying Terrence as the tenant. It may be emphasized here that Terrence does not dispute being the tenant and an occupier, but he says that the claim against him is statute-barred.

[35] On October 10, 2010, Mr. Persaud served his Statement of Defence and Crossclaim against Terrence.

[36] On February 18, 2011, Mr. Persaud's lawyer examined Mr. Miaskowski for discovery.

[37] During the discovery, Mr. Miaskowski disclosed that he worked at 70 Jingle Crescent for Alliance Youth Services, which was owned by his friend Steven. It was disclosed that Mr. Miaskowski knew that the property was a rented property and the property was not owned by Alliance Youth Services, but he did not know the identity of the owner at the time of the accident.

[38] Pausing here, it is important to note that as of February 18, 2011, as a result of the examination of Mr. Miaskowski, Mr. Persaud knew all he needed to know to bring a third party proceeding against Alliance Youth Services for contribution and indemnity. To foreshadow the discussion below, it was, however, already too late to commence a third party proceeding for contribution and indemnity.

[39] On October 12, 2012, Terrence served his Statement of Defence and Crossclaim.

[40] On April 17, 2013, Terrence was examined for discovery. He testified that he did not recognize the handwriting on the lease and that he was not an actual occupant of the premises, which were being used for his son's corporation. He said that he authorized his son to sign the lease on his behalf so that the premises could be used by Alliance Youth Services.

[41] Pausing here, Mr. Persaud submits that up until Terrence's examination for discovery there had been a fraudulent concealment of the identity of the true tenant of the premises. As I will explain later, however, it is not necessary to decide the point, because even if there was a fraudulent concealment, Mr. Persaud's third party claim came too late.

[42] Eight months later, on December 18, 2013, approaching six years after the accident, Mr. Persaud commenced a third party claim against Steven and Alliance Youth Services seeking contribution and indemnity on the basis that they were the occupiers.

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[43] Mr. Persaud also sued Ms. Suepal and Re/Max as third parties for contribution and indemnity.

[44] It may be noted that the issuance of the third party claim was five years and three months after Mr. Persaud was served with the Statement of Claim. It was two years and 10 months after Mr. Miaskowski's examination for discovery.

[45] In August 2014, Steven and Alliance Youth Services delivered their defence to the third party claim.

[46] Subsequently, the parties brought the several summary judgment motions that are now before the court.

C. THE POSITION OF THE PARTIES AND OVERVIEW

[47] Mr. Persaud, Terrence, Steven, and Alliance Youth Services take the position that this case is suitable for a summary judgment. Mr. Miaskowski takes the position that there are genuine issues requiring a trial.

[48] For the reasons expressed below, I am satisfied that this case is suitable for a summary judgment and nothing would be gained by a trial.

[49] In his summary judgment motion, Terrence admits that he is an occupier, but in his summary judgment motion, relying on ss. 4 and 5 of the *Limitations Act, 2002*, he submits that the claim is statute-barred. For the reasons set out below, I agree with Terrence, and I grant his summary judgment motion.

[50] In their summary judgment motion, Steven and Alliance Youth Services also rely on a limitation period defence. They, however, rely on s. 18, a different section of the *Limitations Act, 2002* that gives special treatment for claims for contribution and indemnity.

[51] For the reasons set out below, I agree with the third parties that the third party claim is statute-barred because the claim for contribution and indemnity was not brought within two years of the service of the Statement of Claim in the main action. I conclude that the discoverability principle does not apply to a third party claim for contribution and indemnity.

[52] Moreover, for the reasons set out below, even if the discoverability principle and the principle of fraudulent concealment, which are relied on by Mr. Persaud, applied to claims for contribution and indemnity, the third party claim in the immediate case would still be statute-barred.

[53] In his summary judgment motion, Mr. Persaud denies liability on the grounds that there are no genuine issues requiring a trial that: (a) he was not an occupier; and (b) if an occupier, his negligence was not proven.

[54] For the reasons set out below, I agree with Mr. Persaud that he is not liable, and I grant his summary judgment motion.

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D. THE TEST FOR SUMMARY JUDGMENT

[55] As a matter of procedure, rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

[56] With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04(2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[57] In *Hryniak v. Mauldin*, 2014 SCC No. 7, the Supreme Court of Canada held that on a motion for summary judgment, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers enacted when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[58] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[59] *Hryniak v. Mauldin* encourages the use of a summary judgment motion to resolve cases in an expeditious manner provided that the motion can achieve a fair and just adjudication. Speaking for the Supreme Court of Canada, Justice Karakatsanis opened her judgment by stating:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. … Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[60] At paragraph 22 of her judgment in the companion case of *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, Justice Karakatsanis summarized the approach to determining when a summary judgment may or may not be granted; she stated:

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> 22. Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

[61] Justice Corbett provided a useful summary of the *Hryniak v. Mauldin* approach in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, where he stated at paras. 33 and 34:

> 33. As I read *Hryniak*, the court on a motion for summary judgment should undertake the following analysis:
>
> > (1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
> >
> > (2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
> >
> > (3) If the court cannot grant judgment on the motion, the court should:
> >
> > > (a) Decide those issues that can be decided in accordance with the principles described in (2), above;
> > >
> > > (b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
> > >
> > > (c) In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
>
> 34. The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a "full appreciation" of a case necessary to grant judgment. Obviously greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.

[62] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will respectively present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R (3d) 481 (Ont. C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11. The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 255 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

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[63] In the case at bar, as I will expand upon below, without the need of exercising the forensic powers provided by rule 20.04(2.1), I am satisfied that there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure for the main action and the third party proceeding in the case at bar.

E. THE CLAIM AGAINST TERRENCE

[64] Under s. 4 of the *Limitations Act, 2002,* the basic limitation period is two years from the day the claim was discovered.

[65] Section 5 of the *Act* defines discovery as follows:

> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[66] In bringing a summary judgment motion, a defendant advancing a limitation period defence will rely on the statutory presumption in s. 5(2) of the *Limitations Act, 2002* that unless the contrary is proven, the claimant is presumed to have known the elements for his or her claim on the day the events of the claim occurred. A plaintiff will attempt to rebut the statutory presumption by tendering evidence that he or she both subjectively and objectively did not discover the claim until sometime after the day the events of the claim occurred.

[67] In order to rebut the presumption of having discovered his or her claim, the claimant must meet both a subjective and an objective standard test of non-discovery. Section 5(1) of the *Act* defines discovery by relation to "the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)."

[68] In *Lawless v. Anderson,* 2011 ONCA 102, the Ontario Court of Appeal stated at paragraphs 22-23:

> 22. The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. ….

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> 23. Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation period begins to run: see *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.) and *McSween v. Louis* (2000), 132 O.A.C. 304 (C.A.).

[69] When a limitation period defence is raised, the onus is on the plaintiff to show that its claim is not statute-barred and that it behaved as a reasonable person in the same or similar circumstances using reasonable diligence in discovering the facts relating to the limitation issue: *Durham (Regional Municipality) v. Oshawa (City)*, 2012 ONSC 5803 at paras. 35-41; *Bolton Oak Inc. v. McColl-Frontenac Inc.*, 2011 ONSC 6657 at paras. 12-14; *Bhaduria v. Persaud* (1985), 40 O.R. (3d) 140 (Gen. Div.). The standard of due diligence is that of a reasonably prudent person in pursuing the facts: *Castronova v. Sunnybrook & Women's College Health Sciences Centre*, [2008] O.J. No. 160 (S.C.J.), affd 2008 ONCA 655; *White v. Mannen*, 2011 ONSC 1058 at para. 29.

[70] The limitation period runs from when the prospective plaintiff has or ought to have had, knowledge of a potential claim and the question is whether the prospective plaintiff knows enough facts to base a cause of action against the defendant, and, if so, then the claim has been discovered and the limitation period begins to run: *Lawless v. Anderson*, *supra* at para. 23; *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.); *McSween v. Louis*, [2000] O.J. No. 2076 (C.A.); *Gaudet v. Levy* (1984), 47 O.R. (2d) 577 at p. 582 (H.C.J.).

[71] In *Longo v. MacLaren Art Centre*, 2014 ONCA 526, the Court of Appeal held that the plaintiff had rebutted the statutory presumption of having discovered the claim against the defendants for damaging a work of art. The Court stated at para. 42:

> A plaintiff is required to act with due diligence in determining if he has a claim. A limitation period will not be tolled while a plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a). While some action must be taken, the nature and extent of the required action will depend on all of the circumstances of the case ….

[72] That the onus is on the plaintiff accords with the presumption in s. 5(2) of the *Act* that a person with a claim shall be presumed to have discovered the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[73] Applying the above principles to the case at bar, the evidence establishes that there is no genuine issue requiring a trial that Mr. Miaskowski both subjectively and objectively knew that he had a claim against the occupier-tenant of 70 Jingle Crescent. Terrence has admitted to being that occupier and tenant, but Mr. Miaskowski knew that his employer Alliance Youth Services occupied and rented 70 Jingle Crescent.

[74] On February 28, 2007, Mr. Miaskowski knew that he had fallen and broken his ankle and he knew or ought to have known that he had a potential claim against the owner-landlord and also a certain claim against the tenant-occupier of 70 Jingle Crescent. In these circumstances, there is no reasonable basis to invoke the discoverability rule. See *Safai (Litigation guardian of) v. Bruce N. Huntley Contracting Ltd.*, 2010 ONCA 545 at para. 19.

[75] I do not need expert evidence to conclude that when Mr. Miaskowski instructed his lawyer, the lawyer would or should in the normal course have made inquiries about the identities of the proper and necessary parties. Typically and prudently, a plaintiff will join all the potential defendants and discontinue discrete claims later once it is established that the joined defendant

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should or can be let out of the action. In a slip and fall case it is just common sense to inquire who are the occupiers of premises known to be rented. In the case at bar, had normal instructions been given and normal inquiries been made, it would have been immediately ascertainable (if it was not already known) that all of Terrence, Steven, and Alliance Youth Services ought to have been joined from the outset.

[76] The presumption under the *Limitations Act* is that Mr. Miaskowski knew whom to sue and there is no genuine issue requiring a trial that he cannot meet the onus of rebutting the statutory presumption. There is no evidence to show that Mr. Miaskowski or his lawyer were reasonably diligent and there is no evidence to explain why Mr. Miaskowski was unable to determine and identify who the potential defendants to his slip and fall claim were.

[77] This is a case where a plaintiff has failed to meet the relatively low threshold of showing that he or she could not, through reasonable diligence, have discovered his or her claim on the day the act or omission on which the claim is based took place. See: *Higgens v. Barrie*, 2011 ONSC 2233; *White v. Mannen*, 2011 ONSC 1058; *Safai v. Bruce N. Huntley Contracting Ltd., supra*.

[78] Mr. Miaskowski and his lawyer did not need to wait until they received a letter from Mr. Persaud's lawyer that there were more defendants who were proper parties to be joined as co-defendants. There is no explanation as to why Mr. Miaskowski did not immediately sue Steven and Alliance Youth Services. Had he done so, then in relatively short order, he would have discovered all of the parties, including Terrence, should have been defendants to the action. This is not a case like some where an unknown person played a role and this was not disclosed until examinations for discovery.

[79] In the circumstances of this case, I find that there is no genuine issue requiring a trial that the action is statute-barred against Terrence.

F. THE CLAIM AGAINST STEVEN AND ALLIANCE YOUTH SERVICES

[80] Whether the third party claim brought by Mr. Persaud is statute-barred depends upon the operation of s. 18 of the *Limitations Act 2002*, which provides special treatment for claims for contribution and indemnity. Section 18 of the *Act* states:

> 18(1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.
>
> *Application*
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

[81] Pursuant to s. 18 of the *Limitations Act*, a claim for contribution and indemnity is deemed to be discovered on the date upon which the "first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought," and with this deeming provision, the limitation period expires two years after the date on which the claim is served.

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[82] I pause to emphasize that in the context of the discovery of a claim that s. 18 uses the word "deemed," which as a declarative legal concept is a firmer or more certain assertion of the discovery of a claim than the rebuttable presumption of discovery contemplated by s. 5 of the *Limitations Act, 2002*. Moreover, the deeming provision in s. 18 does not contain the moderating language "unless the contrary is proved" that is found in s. 5(2) of the *Act*. I will return to this point below.

[83] Much of the case law about s. 18 of the *Limitations Act, 2002* has focused on the issue of what counts as a crossclaim or a third party claim for contribution and indemnity so as to be subject to the special treatment provided by s. 18 of the *Act*. See: *Canaccord Capital Corporation v. Roscoe,* 2013 ONCA 378; *Oil Republic Insurance Co. of Canada v. Aviva Canada Inc.*, 2014 ONSC 2425.

[84] In *Canaccord Capital Corp. v. Roscoe, supra,* Justice Sharpe reviewed the legislative history of s. 18 and stated at paras. 20 and 24:

> 20. The second change is in the specific wording of s. 18, which contains two features that are consistent with and, in my view, driven by that general overall purpose. Significantly,, s. 18 departs from the model established in 1948 in the *Negligence Act*. The provision in the *Negligence Act* applied only to claims for contribution and indemnity as between tortfeasors. It allowed such claims to be brought within one year of settlement or judgment in the underlying action, despite the expiry of any limitation period governing the claim of the injured party against the other tortfeasor. In contrast, s. 18 applies not only to claims as between tortfeasors but also to claims for contribution and indemnity by one "wrongdoer" against another, "whether the right to contribution and indemnity arises in respect of a tort or otherwise." Moreover, s. 18 significantly shortens the limitation period governing contribution and indemnity claims to two years from the date the first alleged wrongdoer was served with the underlying claim, thereby encouraging resolution of all claims arising from the wrong at the same time.
>
> 24. In my view, the departure from the 1948 model to embrace "wrongdoers", not just tortfeasors, and to cover claims that arise "in respect of a tort or otherwise" rep-resented a conscious decision to expand the scope of the provision beyond the tort context to include claims like the one at issue in this case. This is consistent with the often-repeated goal of creating a clear, cohesive scheme for addressing limitation issues. As mentioned, the purpose of the Act is to balance the plaintiff's right to sue with the defendant's need for certainty and finality. Carving out exceptions to the general rule in s. 18 for certain types of claims in contribution and indemnity would undercut that purpose. It would expose defendants from whom contribution and indemnity is sought to unpredictable limitation periods, undermining the defendant's ability to defend the claim.

[85] At paragraph 28 of his judgment, Justice Sharpe described the special features of s. 18 of the *Limitations Act, 2002*. He stated:

> Section 18 creates a specific rule for determining when a claim for contribution and indemnity is discovered. Section 18 provides that a claim for contribution and indemnity is discovered on the day the first alleged wrongdoer is served with the claim in respect of which contribution and indemnity is sought. In other words, once the party seeking indemnity is served with the injured party's statement of claim, the claim is discovered and the two-year limitation period starts to run. Section 18(2) makes clear that this special rule for claims for contribution and indemnity "applies whether the right to contribution and indemnity arises in respect of a tort or otherwise" (emphasis added). The legal theory grounding the contribution and indemnity claim is not relevant for deciding whether s. 18 is triggered; the provision applies when there is a claim for contribution and indemnity, no matter what legal theory underlies the claim.

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[86] In *Canaccord Capital Corp. v. Roscoe, supra,* Justice Sharpe does not directly consider whether the discoverability principle applies to s. 18 of the *Act*, but the tenor or spirit of his remarks is that s. 18 imposes an absolute limitation period that is not affected by the discoverability principle.

[87] Years earlier, in *Placzek v. Green*, [2009] O.J. No. 326 (C.A.), Justice Simmons for the Court of Appeal also did not directly consider whether the discoverability principle applies to s. 18 of the *Limitations Act, 2002*. In *Placzek*, she described the operation of s. 18 as involving a deeming provision; however, she also spoke of s. 18 involving a presumption, which, in turn, suggests that there might be a role for the discoverability principle. Justice Simmons stated at paragraph 24 of her judgment:

> Section 18(1) is a deeming provision relating to contribution and indemnity claims. It deems the day the injured party's statement of claim is served on the contribution and indemnity claimant to be the day on which the acts or omissions on which the claim for contribution and indemnity is based took place. When read in combination with s. 4 and s. 15, s. 18 establishes the date of service of the injured party's statement of claim as the presumed commencement date for the basic two-year limitation period and the actual commencement date for the ultimate 15-year limitation period with respect to contribution and indemnity claims:

[88] In *Waterloo Region District School Board v. CRD Construction Ltd.*, 2010 ONCA 838, the plaintiff sued an engineering firm and others. The claim against the engineering firm was statute-barred and the issue addressed by the Court of Appeal was whether the co-defendant's claim for contribution and indemnity were also statute-barred. The Court of Appeal held that claims for contribution and indemnity were governed by s. 18 and, therefore, governed by a limitation period that began to run when the defendant was served. In reaching this decision, Justice Feldman described the operation of s. 18 at paras. 23-25, 29 as follows:

> 23. Section 5(2) sets the date when a claim is presumed to be discovered, and s. 15 provides the ultimate limitation period under the Act. Section 4 provides the basic two-year limitation period for all claims unless otherwise provided in the Act.
>
> 24. Reading the relevant sections together, a claim for contribution and indemnity, whether in tort or otherwise, now has a two-year limitation period that is presumed to run from the date when the person who seeks contribution and indemnity is served with the plaintiff's claim that gives rise to its claim over. This is the only limitation period in the Act that applies to claims for contribution and indemnity. …
>
> 25. There is nothing in the new Act itself, or in the working papers and recommendations that accompanied the drafting of the new Act, to suggest that there was any intention to change the effect of s. 8 of the *Negligence Act*, other than as specifically done with a new limitation period of two years and a new commencement date based on the overriding conceptual basis of the new Act: the discoverability of a claim.
>
> ….
>
> [29] The effect of the new provision is that the period for bringing the claim for contribution and indemnity now coincides much more closely with the basic limitation for bringing all actions, and procedurally, it is contemplated that all claims arising out of the incident that caused the injury will be tried and disposed of together. Therefore, to the extent that a claim for contribution and indemnity may be brought beyond the limitation period that applied to the plaintiff's potential claim against a particular tortfeasor, the extension is minimized by the operation of s. 18 and any negative consequences to the tortfeasor by being

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[89] In *Waterloo Region District School Board v. CRD Construction Ltd.*, the operation of the discoverability principle was not in issue, but Justice Feldman's description of s. 18 does not foreclose the discoverability principle being operative, but once again the point is not directly addressed.

[90] In *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, 2010 ONSC 4114, the discoverability point was addressed directly by Justice D.A. Wilson. *Lilydale* appears to be the first time the point was addressed directly.

[91] In this case, Justice Wilson held that s. 18 applied to bar a third party claim and that s. 18 applied without being subject to the discoverability principle. She also held that if the discoverability principle applied, the third party claim was statute-barred. The *Lilydale* decision was applied in *Boutz v. DTE Industries Ltd.*, 2013 ONSC 7085 and *Boutz* was applied in *Welch v. Peel Standard Condominium Corp. No. 755*, 2013 ONSC 7611.

[92] Similarly, in *Scotia Mortgage Corp. v. Chmielewski*, 2013 ONSC 856, Justice Ramsay held that the presumption in s. 18 of the *Limitations Act, 2002* is conclusive, but on the facts of that case even if it was rebuttable, the plaintiff's evidence did not rebut the presumption.

[93] In none of the cases where the question of whether s. 18 is subject to the discoverability principle is addressed (directly or indirectly) is there any detailed analysis of the language of the statute.

[94] Performing that analysis, in my opinion, by using the language of a deeming provision without any reference to the deeming of discovery of the claim being rebuttable, the legislature intended to impose an absolute two-year limitation period with respect to claims for contribution and indemnity.

[95] Such an interpretation is consistent with the policy purposes of the *Act* and provides some certainty and efficiency in the application of the law about limitation periods. As Justice Sharpe noted in *Canaccord Capital Corp. v. Roscoe, supra*, s. 18 significantly shortens the limitation period governing contribution and indemnity claims to two years from the date the first alleged wrongdoer was served with the underlying claim, thereby encouraging resolution of all claims arising from the wrong at the same time.

[96] This interpretation of s. 18 also seems fair because it would be a rare case that a defendant would not know the parties against whom to claim contribution and indemnity. Moreover, two years is ample time to exercise due diligence to determine whom should be sued after being served with the plaintiff's Statement of Claim.

[97] I conclude that the discoverability principle does not apply to s. 18 of the *Limitations Act, 2002*. I would, therefore, follow *Lilydale Cooperative Ltd. v. Meyn Canada Inc., supra*; *Boutz v. DTE Industries Ltd., supra*; *Welch v. Peel Standard Condominium Corp. No. 755, supra* and *Scotia Mortgage Corp. v. Chmielewski, supra*.

[98] Mr. Persaud, argues, however, that the discoverability principle applies to claims for contribution and indemnity and in the case at bar, he did not discover the claim because of the fraudulent concealment perpetrated by Steven and Alliance Youth Services who were hiding their occupier status behind Terrence's tenancy of 70 Jingle Crescent.

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[99] As a matter of both fact and law, however, this argument fails. It fails as a matter of law because for the above reasons, I have concluded that s. 18 imposes an absolute two-year limitation period not affected by the discoverability principle.

[100] The argument fails as a factual matter because even if the discoverability principle and the fraudulent concealment principle applied, the third party claim was still too late in the case at bar. See: *Scotia Mortgage Corp. v. Chmielewski, supra; Lopez v. A & P Food Stores,* [2009] O.J. No. 2472 (S.C.J.); *Baptista v. Koziol,* 2012 ONSC 322 (Master); *Boutz v. DTE Industries Ltd., supra.*

[101] As a factual matter, as noted above, it was five years and three months after service of the Statement of Claim that Mr. Persaud commenced third party proceedings for contribution and indemnity against Steven, Alliance Youth Services, Ms. Suepal and Re/Max. The third party claim was issued two years and 10 months after Mr. Miaskowski's examination for discovery when Mr. Persaud learned all he needed to know to bring a claim against Steven and Alliance Youth Services. He would have known about the claims against Ms. Suepal and Re/Max from the time of service of the Statement of Claim in the main action.

[102] I conclude that Mr. Persaud's third party proceedings are statute-barred.

G. THE CLAIM AGAINST MR. PERSAUD

[103] I also, conclude, in any event, that Mr. Persaud has no need to advance a claim for contribution and indemnity.

[104] Mr. Miaskowski's claim against Mr. Persaud is two branched. The first branch is that Mr. Persaud was an occupier who breached his duty of care under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. The second branch is that Mr. Persaud breached his common law duty of care in failing to take any steps to ensure that the property was safe from dangerous ice and snow conditions.

[105] On his summary judgment motion, Mr. Persaud's argument is that there is no genuine issue for trial that he has no liability. Mr. Persaud's argument is complex because of the intricacies of how the *Occupiers' Liability Act* addresses the liability of landlords. It is a particularly complex argument when residential premises are leased.

[106] However, in my opinion, the competing arguments are capable of being resolved on this motion for summary judgment, and in this section of my Reasons for Decision, I shall describe the law about a landlord's and a tenant's liability under the *Occupiers' Liability Act* and apply that law to the circumstances of the case at bar to reach the conclusion that Mr. Persaud is not liable.

[107] For present purposes, the relevant portions of the *Occupiers' Liability Act* are set out in Schedule "A" to these Reasons.

[108] The *Occupiers' Liability Act* replaces the common law of occupier's liability. The marginal note for s. 2 of the *Act* is "Common law duty of care superseded." The *Occupiers' Liability Act* was intended to supersede the common law rules of negligence that imposed liability upon landlords and tenants of property and differentiated between, for instance, invitees and trespassers: *Musselman v. 875667 Ontario Inc. (Cities Bistro),* 2010 ONSC 3177 at para. 171, aff'd 2012 ONCA 41.

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[109] Section 9 of the *Act* preserves higher legal obligations that may be imposed on innkeepers, common carriers, bailees, and others, and, for present purposes, s. 9 is relevant because the *Residential Tenancies Act*, *2006*, S.O. 2006, imposes some duties on landlords that are non-delegable. More precisely, subject to s. 6 of the *Occupiers' Liability Act*, these higher duties imposed by the *Residential Tenancies Act* are non-delegable. Section 6, however, allows a landlord to meet his duty of care by responsibly using independent contractors to keep the property safe. Section 6 of the *Act* states:

> **6**. (1)Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

[110] The first major issue in this case is whether Mr. Persaud is an occupier. Section 1 of the *Occupiers' Liability Act* provides an inclusive definition of who is an occupier with the attendant duty of care imposed by the *Act*.

[111] In *Wheat v. E. Lacon & Co. Ltd.* [1966], 1 All E.R. 582 (H.L.) at p. 593, Lord Denning described the word "occupier" as "a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises." The *Act* defines occupier to include: (a) a person who is in physical possession of premises, or (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter premises.

[112] The *Act* in s. 1 provides that there may be more than one occupier of the same premises.

[113] Typically, a tenant will qualify as an occupier of his or her leased premises. And there is case law that establishes that where a tenant controls or has responsibility over adjoining property (i.e., property not leased to the tenant), the tenant may also be an occupier of that property. See: *Slumski v. Mutual Life*, [1994] O.J. No. 301 (Div. Ct.); *Pammett v. McBride Corp*., 2013 ONSC 2382.

[114] Landlords are not so habitually occupiers, and their status as an occupier will depend on whether they are caught by the definition of "occupier" found in s. 1 of the *Act* or whether they are caught by the provisions of s. 8 of the *Act*, discussed below.

[115] Sometimes, both the landlord and the tenant of a property may be occupiers because of shared responsibilities to maintain and repair the premises and to keep the premises safe.

[116] Depending on the factual circumstances, landlords have been held to be occupiers under the *Act*. See: *Allison v. Rank City Wall Canada Ltd*. (1984), 45 O.R. (2d) 141 (H.C.J.)*; Johnston v. Standard Life Assurance Co.* (1990), 73 O.R. (2d) 495 (H.C.J.); *Finchurst Plaza Inc. v. Chun*, [1996] O.J. No. 5027 (Gen. Div.); *Manning v. 3980 Investments Ltd*., [2003] O.J. No. 1937 (S.C.J.); *Dogan v. Pakulski*, [2007] O.J. No. 1903 (S.C.J.); *Kehoe v. Ameli*, [2008] O.J. No. 2103 (S.C.J.), varied on other issues 2010 ONCA 301.

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[117] Sometimes, the landlord will not qualify as an occupier because he or she will not be in possession of the premises, and he or she will have no responsibility for the control of the premises. This is typically the case when the landlord leases a property under a lease that imposes the repair and maintenance obligations on the tenant.

[118] In other words, mere ownership of a property does not make the owner an occupier, and the terms of the lease and the landlord's and tenant's behaviour may rebut any responsibility for or control over the premises. See: *Barnett-Black v. Silad Investments Inc.*, [1990] O.J. No. 2008 (Gen. Div.); *Perricelli v. Musca*, [2002] O.J. No. 3768 (S.C.J.); *Borzecki v. Elay Gate Signs*, [2006] O.J. No. 652 (S.C.J.); *Blount v. H. Corp. Coiffures Ltd. (c.o.b. L'Attitudes International Image Centres)*, [2008] O.J. No. 3690 (S.C.J.); *Musselman v. 875667 Ontario Inc. (Cities Bistro)*, 2010 ONSC 3177, aff'd 2012 ONCA 41.

[119] In my opinion, there is no genuine issue requiring a trial that Mr. Persaud is not an occupier pursuant to s. 1 of the *Occupiers' Liability Act*. Just addressing the definition of "occupier" in s. 1 of the *Act*, based on the evidentiary record, there is no genuine issue for trial that Mr. Persaud was not an occupier. He was not a person in physical possession of 70 Jingle Crescent. He was not responsible for and he did not have control over the condition of 70 Jingle Crescent. He did not have control over the activities there carried on or control over persons allowed to enter 70 Jingle Crescent.

[120] The issue then becomes did Mr. Persaud have obligations under s. 8 of the *Occupiers' Liability Act*. Pursuant to subsections (1) and (2) of s. 8, a landlord will have an occupier's liability if two pre-conditions are satisfied; namely: (1) under the tenancy, the landlord is responsible for the maintenance or repair of the premises; and (2) the landlord's default is such as to be actionable at the suit of the tenant. As I shall demonstrate below, neither precondition is satisfied in the case at bar.

[121] Section 8 of the *Occupiers' Liability Act* specifically addresses the liability of landlords. Under s. 8(1), if the landlord is responsible for the repair and maintenance of the premises, then the landlord owes the duty of care established by the *Act* to all entrants, and property brought onto the premises by entrants, in respect of dangers arising from the landlord's failure to carry out that responsibility. Under s. 8(3), obligations imposed by any enactment (viz., for example, the *Residential Tenancies Act*) by virtue of a tenancy shall be treated as imposed by the tenancy.

[122] However, pursuant to s. 8(2) a landlord will not be deemed to have defaulted in the duty toward an entrant, unless the landlord's default is such as to be actionable at the suit of the tenant.

[123] *Estey v. Sannio Construction Co.*, [1998] O.J. No. 2984 (Gen. Div.) is an example of the operation of s. 1 and s. 8 of the *Act*. In this case, the plaintiff alleged that the landlord of residential premises was liable as an occupier.

[124] In *Estey v. Sannio Construction Co.*, the plaintiff Melanie Estey slipped on ice and snow on a residential property rented to Messrs. Behen and Moscato and owned by Sannio Construction Co. The tenancy was pursuant to an oral month-to-month lease under which the tenants were responsible for clearing snow and ice on the property.

[125] In *Estey v. Sannio Construction Co.* the then *Landlord and Tenant Act*, R.S.O. 1990, c. L.7 imposed repair obligations on both the landlord and the tenant of residential property. Section 94, which is identical to ss. 20 and 33 of the current *Residential Tenancies Act*, stated:

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> 94. (1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and despite the fact that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into. [now s. 20 of the *Residential Tenancies Act*.]
>
> (2) The tenant is responsible for ordinary cleanliness of the rented premises, except to the extent that the tenancy agreement requires the landlord to clean them. [Now s. 33 of the *Residential Tenancies Act*.]

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[126] Relying on ss. 1 and 8 of the *Occupiers' Liability Act*, combined with s. 94 of the *Landlord and Tenant Act*, Ms. Estey argued that Sannio Construction Co. was liable as an occupier. Justice Cavarzan disagreed, and on a summary judgment motion brought by Sannio Construction, he dismissed Ms. Estey's slip and fall claim against Sannio Construction. In Justice Cavarzan's view, the removal of snow was not a repair obligation imposed on the landlord under s. 94(1) of the *Landlord and Tenant Act*, but rather was an activity within the meaning of s. 94(2), which made the tenant responsible for the "ordinary cleanliness of the rented premises, except to the extent that the tenancy agreement requires the landlord to clean them". Justice Cavarzan stated at para. 27:

> 27. In my view, the law does not make a landlord an "occupier" of the premises by virtue of the combined operation of s. 94 of *the Landlord and Tenant Act* and s. 8 of the *Occupiers' Liability Act* in the circumstances here. It is not the landlord's responsibility to clear snow and ice on rented residential premises where there is no agreement which requires the landlord to do so. This is particularly the case where the uncontradicted evidence of the tenant is that she always cleared the snow and ice, and never regarded this to be a responsibility of the landlord.

[127] In *Estey v. Sannio Construction Co.*, the owner was not an occupier under s. 1 of the *Occupiers' Liability Act* because the indicia of control and responsibility were not present because the tenants had contractually agreed to assume those responsibilities.

[128] It is not entirely clear why the owner in *Estey v. Sannio Construction Co.* was not an occupier under s. 8(1) because the premises were occupied or used by virtue of a tenancy under which the landlord was responsible for the maintenance or repair of the premises. The explanation for no liability would appear to be that the landlord was not in default because the default in this case in keeping the property free of ice and snow was the tenant's fault and thus the default was not actionable by the tenant and, in turn, pursuant to s. 8(2) not actionable by the plaintiff.

[129] The facts of *Estey v. Sannio Construction Co.* are comparable to the facts of the immediate case, and I would apply the principles from that case to conclude that Mr. Persaud has no liability under s. 1 or s. 8 of the *Occupier's Liability Act.*

[130] The Court of Appeal's decision in *Montgomery v. Van*, 2009 ONCA 808 is relevant to the analysis of Mr. Persaud's liability, if any in the case at bar.

[131] The facts of *Montgomery v. Van* case were that Ms. Van was the tenant of a basement apartment. She slipped on ice on the walkway leading to her basement apartment and suffered injury. In his defence, the landlord pleaded that under Ms. Van's lease, she was responsible for keeping their walkway and stairway clean, including snow removal.

[132] Reversing the motions court judge, the Court of Appeal held that this provision in the lease was void under the *Tenant Protection Act, 1997*, S.O. c. 24, which provided in ss. 2(1) and 16 that a provision in a tenancy agreement that was inconsistent with the *Act* or its regulations was void. [This *Act* was repealed on January 31, 2007 and replaced by the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17.]

[133] In particular, the Court held that the provision in Ms. Van's lease was inconsistent with s. 2(2) of Ont. Reg. 198/98, which provided that the landlord was responsible to maintain exterior common areas and to remove unsafe accumulations of ice and snow from exterior common areas.

[134] For present purposes, it is important to note that *Montgomery v. Van* turned on a precise responsibility to keep exterior common areas safe. It is significant also to note that Justice Juriansz, who delivered the judgment for the court, did not foreclose the operation of s. 6 of the *Occupiers' Liability Act*, where the landlord can meet its standard of care by responsibly employing an independent contractor, nor did he foreclose a landlord contracting the repair obligation onto the tenant. Justice Juriansz stated at paras. 9-10, 13-14 of his judgment:

> 9. I agree with the observation of the motion judge that the legislation only requires the landlord to "ensure" exterior common areas are free of unsafe accumulations of ice and snow. It does not prohibit a landlord from satisfying this statutory obligation by retaining others to provide the required services. Specifically, it does not prohibit a landlord from contracting with a tenant to perform snow removal tasks.
>
> 10. This, however, is not enough to conclude as the motion judge did, that the particular provision between the landlord and tenant in this case may be declared to be "not inconsistent" with the Act. That the Act does not prohibit a landlord from contracting with a tenant for snow removal services does not mean that every provision that addresses snow removal by a tenant is consistent with the Act. It remains necessary to consider the import of the provision in issue and determine if it creates a contractual obligation to which s. 16 of the Act does not apply.
>
> ….
>
> 13. In order to be effective, a clause that provides that a tenant will provide snow removal services must constitute a contractual obligation severable from the tenancy agreement. The reason such a clause must be able to stand alone as an enforceable contract is because s. 16 of the Act voids provisions of tenancy agreements that are inconsistent with the Act or Regulations. The Act and Regulations make clear that in the landlord and tenant relationship, the landlord is responsible for keeping the common walkways free of snow and ice. Therefore, it cannot be a term of the tenancy that the tenant complete snow removal tasks.
>
> 14. This does not mean that the landlord cannot contract with the tenant as a service provider to perform snow removal tasks. It does mean, however, that the clause under which the tenant agrees to provide such services, even if included in the same document as the tenancy agreement, must create a severable contractual obligation. The severable contractual obligation, while it cannot transfer the landlord's statutory responsibility to ensure maintenance standards are met, may support the landlord's claim over against the tenant in contract.

[135] As I read these passages from the judgment in *Montgomery v. Van*, a landlord can contract with his or her tenant to assume responsibility for snow removal provided that the contract is not inconsistent with statutory provisions. In this case, the statute in question, unlike the situation in *Estey v. Sannio Construction Co. supra*, imposed a precise responsibility to clear exterior common areas on the landlord, and this obligation could not be shifted onto to the tenant, unless the tenant was, in effect, an independent contractor with a severable contractual

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obligation from the lease. (Although Justice Juriansz does not mention it, this analysis is consistent with s. 6 of the *Occupiers' Liability Act*.)

[136] In the case at bar, no specific provision of the *Residential Tenancies Act* is inconsistent with the terms of the lease between Terrence and Mr. Persaud. This means there is no basis to nullify Schedule A of the lease in the case at bar that provided that the tenant shall keep the sidewalks in front and at the sides of the premises free of snow and ice and there is no basis to negate the other provisions of the lease that imposed repair obligations on the tenant.

[137] The last case to consider before turning to whether Mr. Persaud has any common law liability for Mr. Miaskowski's slip and fall is another decision of the Court of Appeal, *Taylor v. Allard*, 2010 ONCA 596.

[138] In *Taylor v. Allard*, Mr. Taylor attended a party at property owned by Robert Allen and rented to his mother Joyce and to one Bobby Allard. Mr. Allen did not live on the property, but he had built a fire pit ringed with partially submerged cinder block. The inebriated Mr. Taylor tripped over the cinder blocks, fell into the fire pit, and was badly burned.

[139] Reversing the trial judge, in a judgment written by Justice Goudge, the Court of Appeal held that Mr. Allen was an occupier and liable under the *Act*. The trial judge's prime error was that he ignored that Mr. Allen had admitted in his statement of defence that he was an occupier. As Justice Goudge noted at para. 17 of his judgment, the consequence of this admission was that Mr. Allen must be taken to have the duty of care that s. 3(1) of the *Occupiers' Liability Act* imposes on an occupier and in failing to find this, the trial judge erred.

[140] In *Taylor v. Allard*, Justice Goudge went on to find a second fundamental error by the trial judge. The error was that of ignoring s. 8 of the *Occupiers' Liability Act* and the landlord's statutory imposed responsibilities. At paras. 19-27 of his judgment, Justice Goudge stated:

> 19. Although the appellant's first argument is enough to dispose of the appeal, I propose also to deal with the appellant's second argument. The appellant says that in giving effect to the rental agreement that relieved the respondent of maintenance obligations as the basis for finding that the requirements of s. 8(1) and (2) of the OLA were not met, the trial judge erred in ignoring s. 94(1) and s. 80(1) of the Landlord and Tenant Act, R.S.O. 1990, c. L.7 (the LTA). Those sections impose a statutory duty on a residential landlord to maintain the premises, a duty that the landlord cannot escape by contract.
>
> 20. I agree with the appellant. Sections 94(1) and 80(1) of the LTA read as follows:
>
> > 94.(1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and despite the fact that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.
> >
> > 80.(1) This Part applies to tenancies of residential premises and tenancy agreements despite any other Act or Parts I, II or III of this Act and despite any agreement or waiver to the contrary except as specifically provided in this Part.
>
> 21. Section 94(1) imposes a statutory responsibility on the landlord of residential premises to maintain and repair the premises. Section 80(1) provides that this responsibility prevails, despite any agreement or waiver to the contrary. See *Phillips v. Dis-Management* (1995), 24 O.R. (3d) 435 per Sharpe J. (as he then was).

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> 22 Since this was a residential premises, this statutory duty applied to the respondent landlord and could not be removed by his rental agreement with the tenants. Nor could the rental agreement serve as a defence to the respondent in a suit brought by the tenants if the danger created by the cinder blocks had caused them harm.
>
> 23. The combined effect of ss. 94(1) and 80(1) of the LTA is therefore that, for the purposes of s. 8(1) of the OLA, these premises were occupied under a tenancy in which the landlord is responsible for the maintenance and repair of the premises. Equally, for the purposes of s. 8(2), the rental agreement could not prevent the landlord's default being actionable at the suit of the tenants. As a consequence, the respondent landlord had a duty of care under s. 8(1) of the OLA, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.
>
> 24. In other words, s. 8(1) imposes on the respondent the same duty of care to the appellant that the respondent would have under s. 3 of the OLA as an occupier for a danger arising from his failure to maintain the premises.
>
> 25. In summary, therefore, the respondent not only had a duty of care as occupier to the appellant under s. 3 of the OLA. He had a duty of care to the appellant under s. 8(1) of the OLA. The trial judge therefore erred in finding that the respondent owed no duty of care to the appellant.
>
> 26. In my view, the findings of fact by the trial judge also necessarily entail the conclusion that the respondent breached his duty of care to the appellant imposed by s. 8(1) of the OLA. Particularly given that he created the danger in the first place by installing the cinder blocks surrounding the fire pit, by permitting the danger to continue the respondent landlord failed in his statutory responsibility to maintain the premises. The danger that caused the appellant harm arose from this failure. The respondent therefore breached his duty of care to the appellant under s. 8(1) of the Act.
>
> 27. I conclude that the respondent landlord breached his duty of care to the appellant, both his duty under s. 3 of the OLA as an occupier and his duty under s. 8(1) of the OLA as a landlord with the responsibility to repair and maintain the premises. …

[141] Returning to the case at bar, like the situation in *Estey v. Sannio Construction Co., supra,* and unlike the situation in *Taylor v. Allard,* there was no breach of s. 94(1) of the *Landlord and Tenant Act* (now s. 20 of the *Residential Tenancies Act*) and, therefore, no liability under s. 1 or s. 8 of the *Occupiers' Liability Act*.

[142] Once again I conclude that Mr. Persaud has no liability under s. 1 or s. 8 of the *Occupiers' Liability Act*.

[143] This brings me to the final issue of whether Mr. Persaud is liable for common law negligence. Here, I can be brief.

[144] Recalling that the *Occupiers' Liability Act* supersedes common law liability for occupiers, there is no basis for a finding of a common law liability for negligence. The alleged breach of duty in the case at bar is the failure to attend to snow and ice removal. That is a possible incident of liability under the *Occupiers' Liability Act* if a landlord is an occupier. In the case at bar, there is no genuine issue requiring a trial that Mr. Persaud was not an occupier.

H. CONCLUSION

[145] For the above reasons, I grant the summary judgment motions of Mr. Persaud and Terrence, and I dismiss the main action.

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[146] I grant the summary judgment of Steven and Alliance Youth Services and I dismiss the third party action.

[147] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Persaud, Terrence Catney, Steven Catney and Alliance Youth Services within 20 days of the release of these Reasons for Decision.

[148] The third parties Ms. Suepal and Re/Max may also make costs submissions within 20 days.

[149] The costs submissions of Mr. Miaskowski in the main action and of Mr. Persaud in the third party proceedings shall be delivered within the following 20 days.

_____

Perell, J.

Released: March 12, 2015

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Schedule "A"

Occupiers' Liability Act, R.S.O. 1990, c. O.2

Definitions

1. In this Act,

"occupier" includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

despite the fact that there is more than one occupier of the same premises; (occupant)

Common law duty of care superseded

2. Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons. R.S.O. 1990, c. O.2, s. 2.

Occupier's duty

3.(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

….

Restriction of duty or liability

5.(1) The duty of an occupier under this Act, or the occupier's liability for breach thereof, shall not be restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises.

Extension of liability by contract

(2) A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person not a party to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than the occupier, employees of the occupier and persons acting under the occupier's direction and control.

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Reasonable steps to inform

(3) Where an occupier is free to restrict, modify or exclude the occupier's duty of care or the occupier's liability for breach thereof, the occupier shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed.

Liability where independent contractor

6. (1)Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

Idem

(2) Where there is more than one occupier of premises, any benefit accruing by reason of subsection (1) to the occupier who employed the independent contractor shall accrue to all occupiers of the premises.

Idem

(3) Nothing in this section affects any duty of the occupier that is non-delegable at common law or affects any provision in any other Act that provides that an occupier is liable for the negligence of an independent contractor.

….

Obligations of landlord as occupier

8.(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.

Idem

(2) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to a person unless the landlord's default is such as to be actionable at the suit of the person entitled to possession of the premises.

Definitions

(3) For the purposes of this section, obligations imposed by any enactment by virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Preservation of higher obligations

9. (1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on the occupier by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,

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(a) innkeepers, subject to the *Innkeepers Act*;

(b) common carriers;

(c) bailees.

Employer and employee relationships

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from an employer and employee relationship where it exists.

Application of Negligence Act

(3) The *Negligence Act* applies with respect to causes of action to which this Act applies.

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CITATION: Miaskowski v. Persaud, 2015 ONSC 1654
COURT FILE NO.: 08-CV-347755 PD1
DATE: 20150312

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PHIL MIASKOWSKI, Minor by his Litigation Guardian, OWEN MIASKOWSKI, Minor by his Litigation Guardian, ERIC MIASKOWSKI, minor by his Litigation Guardian and ZACHARY BELL, Minor by his Litigation Guardian

Plaintiffs

– and –

DUSTAFF PERSAUD and TERRENCE CATNEY

Defendants

– and –

STEVEN CATNEY**,** 1440415 ONTARIO INC. C.O.B. ALLIANCE YOUTH SERVICES INC.**,** BETHS SUEPAL and 889961 ONTARIO INC. C.O.B. RE/MAX REALTY SPECIALISTS INC.

Third Parties

REASONS FOR DECISION

PERELL J.

Released: March 12, 2015