Identification of hazard not required to defeat summary judgment in accident claims

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In the event of a summary judgment motion relating to accident claims caused by a presumed hazard, it is important that defendants carefully review the facts to see whether the plaintiff has any direct evidence of a hazard present. Proper identification of the hazard is less crucial than direct evidence of the existence of a hazard, which can include "feeling" the hazard. If the plaintiff has evidence of the hazard, regardless of the identification, the occupier may not be successful on a summary judgment motion.

Background

In *Adler v. Promenade General Partner Inc.*, 2021 ONSC 5393 (Adler), the plaintiff was walking near the food court in Promenade Mall when she slipped and fell, suffering significant injuries to her face, skull and kneecap. She alleged that the cause of her injury was an unidentified sticky substance on the floor, which caused her to slip and fall. She commenced a claim under the *Occupier's Liability Act* against the owner of the mall, the property manager and the cleaning contractor at the mall. The defendants moved for summary judgment dismissing the action.

Decision

Relying on two cases, *Hamilton v. Ontario Corporation #2000533 o/a Toronto Community Housing Corporation*, 2017 ONSC 5467 (Hamilton v. TCHC) and *Nandlal v. Toronto Transit Commission*, 2014 ONSC 4760 (Nandlal), the defendants argued that in the absence of objective evidence of any hazardous substance on the floor, it was merely speculation by the plaintiff. This means that no breach of the standard of care could be made out in this case.

The defendants also advanced an alternative argument that if there was evidence of a hazard, there had been a reasonable system of maintenance and inspection in place, and therefore, there was no genuine issue for trial. Finally, the defendants argued that if there was a genuine issue for trial, this case was appropriate for the court to exercise its fact-finding powers to dismiss the plaintiff's claim.

In response, the plaintiff denied that her case was grounded in speculation. She clearly recalled that her foot stuck to a sticky substance. She also argued that her inability to identify the substance is not an impediment to her claim for two reasons:

1. There was circumstantial evidence that supported that the sticky substance was food or drink given that she was near the food court; and
2. She was not required to identify what the substance was, only that there was a hazard on the floor and the defendants breached their duty of care.

The court distinguished *Hamilton v. TCHC and Nandlal*, stating that in those cases the plaintiffs had not adduced any admissible evidence of a hazard. In both cases, the plaintiff's evidence was "only her own speculative rationalization about what must have happened." By contrast, in Adler, the plaintiff was not attempting to reconstruct what happened through speculation, but offered direct evidence of a sticky substance on the floor that impacted her stride and caused her to fall, even though she was unable to identify the substance. The court stated, "Ms. Adler may not be able to pinpoint the substance that was on the floor, but she is able to pinpoint the hazard." The court further found that the defendants had not provided sufficient evidence regarding the system of maintenance and whether it was reasonable. Therefore, there was a genuine issue for trial and the court dismissed the motion.

Takeaways

Before proceeding with summary judgment, defendants should carefully review the facts of their case to see whether the plaintiff has any direct evidence of a hazard, even if the actual hazard itself cannot be identified. In defending against summary judgment, it is important to note that plaintiffs do not need to see and/or be able to identify the exact substance causing their fall or injury to be successful. Evidence that something was there that caused the fall may be sufficient. Where the plaintiff has evidence of "feeling" the hazard, or any other direct evidence that there was a hazard, the occupier may not be successful on a summary judgment motion.

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