



**SUPERIOR COURT OF JUSTICE**  
**COUR SUPÉRIEURE DE JUSTICE**

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## **FAX COVER SHEET**

**Date:** January 19, 2010

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**FROM:** Joanne Mercuri, Judicial Secretary to The Honourable Madam Justice Eva Frank

**TOTAL PAGES (INCLUDING COVER PAGE):** 7

**MESSAGE:** Attached is Justice Frank's Endorsement  
Langille v. The City of Toronto – Court File No. 06-CV-306882PD1

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**CITATION:** Langille v. Toronto (City), 2010 ONSC 443  
**COURT FILE NO.:** 06-CV-306882PD1  
**DATE:** 20100119

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Michael Langille (Plaintiff) and The City of Toronto (Defendant)

**BEFORE:** Justice Eva Frank

**COUNSEL:** *Daniel J. Holland*, for the Plaintiff

*Jessica Bettencourt*, for the Defendant

**HEARD:** January 11, 2010

**ENDORSEMENT**

[1] The defendant, The City of Toronto, seeks summary judgment dismissing the action of the plaintiff Michael Langille as result of his failure to comply with the notice requirements of s. 44(10) of the *Municipal Act*, , S.O. 2001, c. 25.

[2] The statement of claim alleges that Mr. Langille slipped and fell on ice on a sidewalk in the City of Toronto on March 1, 2004 and injured his upper body as a result.

[3] The plaintiff has demonstrated little diligence in the prosecution of the action. The original claim was dismissed as abandoned. In 2006, acting on his own behalf, the plaintiff served what he titled an 'amended' statement of claim and then dealt directly with the City. In 2008, the plaintiff retained counsel now acting for him.

[4] Although the claim drafted by the plaintiff himself demand \$2,000,000, it is now proceeding under the Simplified Rules and is limited to \$50,000. Each statement of claim alleges the fall to have occurred in different locations, though in the same general area.

***Summary judgment***

[5] This motion is governed by the recently amended r. 20 of the *Rules of Civil Procedure*. Although in their factums filed on this motion, both parties relied on case law decided under the rule in effect prior to January 1, 2010, they acknowledge that it is the new rule that applies.

[6] As a result, the test for the granting of summary judgment is whether or not there is a genuine issue requiring a trial with respect to the application of s. 44(10). In determining whether there is a genuine issue requiring a trial, I may weigh the evidence, evaluate credibility of the deponents, and draw any reasonable inference from the evidence. (r. 20.02(2.1)).

***Was the required notice provided?***

[7] S. 44(10) requires written notice of a claim to be served or sent by registered mail to the clerk of the municipality within ten days after the injury. Absent this notice, no action can proceed unless a judge finds that: "...there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence." (s. 44(12)).

[8] The plaintiff met with a paralegal, David Kirshin, on March 8, 2004. Mr. Kirshen's letterhead states that his office is affiliated with the law office of Barry Kirshin. The paralegal's evidence is that he drafted a letter dated March 8, 2004 addressed to the Toronto City Clerk's Office stating that he had been retained to act on behalf of the plaintiff and that the plaintiff had slipped and fallen "on the sidewalk near the alleyway between Grange Ave. and Sullivan St. West due to extreme icy conditions on the side walk."

[9] The paralegal has no knowledge as to what happened to the letter. The file itself is not available. His evidence is based exclusively on what he describes as 'office protocol' at the time. On the basis of that protocol, the letter would have been faxed, or at the least mailed by regular mail.

[10] The City maintains that it did not receive the notice letter. It did, however, come to light in August of 2007. This was as a result of a review by counsel for the City of documents given to her by the plaintiff in support of his claim. The letter was amongst those documents.

[11] The lawyer with whom the paralegal was affiliated issued a statement of claim on behalf of the plaintiff on May 27, 2004. The City's adjuster wrote to the lawyer who issued the claim, advising him that the notice of the claim was inadequate as it failed to include the date on which the accident was alleged to have happened and was imprecise in the location given for the accident. The lawyer responded with the date of the accident. In doing so, he did not refer to any notice letter having been sent though he confirmed that the plaintiff 'visited' their offices on March 8, 2004.

[12] The evidence of the paralegal fails to cast doubt on the reliability of the City's evidence that the letter was not received by it, either by way of fax or regular mail. A trial is not required to determine whether the required notice was provided. I am satisfied on the evidence that the letter was not sent. In the circumstances I need not consider the significance of the failure to comply with the requirement that the letter, if sent by mail, be registered.

[13] I find that the required notice was not provided.

***Does s. 44(12) entitle the plaintiff to proceed with the action***

[14] S. 44(2) requires that the plaintiff establish both that there is a reasonable excuse for the insufficiency of the notice and that the defendant was not prejudiced in its defence by the late notice in order to be relieved of the notice requirement.

*(i) prejudice*

[15] Where notice has not been provided within ten days, the municipality is presumed to have been prejudiced. That presumption can be overcome by evidence establishing the absence of prejudice. (see *Fremeau v. Toronto (City)*, [2009] O.J. No. 2391, at para. 30).

[16] The City first received notice of the accident over twelve weeks after the accident is alleged to have happened. This was by way of the statement of claim which identified the location of the accident as "a public alleyway between Grange Avenue and Sullivan Street west of Huron St. in the City of Toronto." That is not the location at which the plaintiff now claims to have fallen.

[17] No investigation was done until 2006, following the plaintiff's service of the 'amended statement of claim' in which he identified the location of the accident as Huron St. at Sullivan St.

[18] The plaintiff argues that the fact that the City's investigation was delayed by the late notice is irrelevant in this case and therefore the City has suffered no prejudice. In support of this, the plaintiff submits, first, that the City has all of the records it maintains in the normal course consisting of weather records, the field investigators Patrol Diary Log notes and Service Request Reports which record service requests and complaints. Second, the plaintiff submits that the fact that the City did not do any investigation on receipt of the first statement of claim suggests that it would not have investigated the accident promptly even if the required notice had been given. I do not accept either of these submissions.

[19] The well established principles as to the obligations of both sides on motions for summary judgment, with the necessary adjustments for the recent change in the summary judgment rules, apply to the determination of whether a trial is required to determine whether the City has suffered prejudice. The moving party has the burden of showing that the claim does not raise a genuine issue requiring trial and the responding party has an evidentiary burden to put forward some evidence in support of its position – it "must lead trump or risk losing". (*Meditrust Healthcare Inc. v. Shoppers Drug Mart*, (2002), 61 O.R. (3d) 786 (C.A.))

[20] The new rules clarify the obligations of the responding party:

20.02(2) In response to affidavit material or other evidence in support of a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in

affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[21] The plaintiff has put no evidence before the court that demonstrates that there is a genuine issue with respect to the existence of prejudice to the City that requires a trial.

[22] Absence of prejudice might be established by, for example, evidence that the City had taken steps to investigate the accident in spite of not having received notice from the plaintiff, or by timely photographs of the scene having been taken by the plaintiff or by his having obtained the name of witness to the accident. But, there is no such evidence in this case.

[23] That leaves the question of whether the City's evidence is sufficient to make trial unnecessary.

[24] The City relies on the evidence of its Field Investigator, the independent adjuster appointed to investigate the claim and a lawyer at the firm defending the action on behalf of the City who had carriage of the file who has assisted with the file. They all attest to prejudice having been suffered as a result of the late notice.

[25] The Field Investigator's evidence is that he has no independent recollection of the conditions in the area on the day the accident is alleged to have happened and believes that had he had notice within 10 days of the date of the alleged accident, he would have had a clear memory of whether he himself had been in the area at the relevant time and whether there were any problems, issues or concerns with respect to it.

[26] He goes on to say that had notice been given as required, he would have questioned City employees to see what information they had regarding the conditions in the area and would have taken photographs of the area. The opportunity to do so was lost with the passage of time. Further, the existing records provide no direct assistance in that they include no reference of any kind to the area where the fall is alleged to have happened.

[27] The Field Investigator did not become aware of the claim until March 2006, immediately after the City's receipt of the 'amended' statement of claim. However, in my view, it is a reasonable inference to be drawn from the evidence that his memory even three months after the alleged accident would have been significantly reduced from what it would have been within days of the accident as would that of other City employees.

[28] In submitting that the City's failure to investigate the alleged accident on receipt of the statement of claim precludes the court from granting summary judgment, the plaintiff relies on the decision in *Myshraill v. Toronto (City)*, [2001] O.J. No. 481. *Myshraill* also is a case in which the City sought summary judgment based on the plaintiff's failure to comply with the notice requirement in a claim alleging a slip and fall on ice. The notice letter in issue in that case was received within the required time, but contained no information as to where the accident happened. The Court of Appeal,

overturning the motion judge who had granted summary judgment dismissing the action for failure to comply with the notice provision, held that whether the notice was sufficient raised a genuine issue for trial.

[29] *Myshrall* is distinguishable as it was decided under the previous notice provisions of the *Municipal Act*, which contained no exception to the application of the limitation period in the circumstances of that claim. The issues identified by the Court of Appeal in interpreting the limitation section do not apply in this case. Additionally, the issue in *Myshrall* was the adequacy of notice. But, in this case the issue is whether prejudice was suffered as a result of late notice.

[30] In my view, a trial is not required for the determination of the question of whether the City has been prejudiced in its defence by the late notice.

[31] It is the evidence of the claims representative for the City that either the Field investigator or an adjuster would go to the site of any accident as soon as possible after receiving notice of a claim and that 'greater urgency' would be given to a claim such as this as it involved snow and ice.

[32] It is the evidence of counsel for the City that her client lost the opportunity to interview witnesses, including residents in the area, while their memories were fresh and intact. Based on plaintiff's evidence, there was a witness. But, any reasonable prospect of identifying that witness would have diminished with the passage of time.

[33] Based on the evidence of the claims adjuster and the Field Investigator, I conclude that had timely notice been given, the opportunity to fully investigate would have been taken by them. The question is not how much prejudice the City has suffered but whether it has suffered prejudice. In my view these lost opportunities together with the diminished recall of those involved amount to prejudice.

[34] Accordingly, I find that the requirement of s. 44(12) that the City not be prejudiced in its defence by the late notice has not been met.

*(ii) reasonable excuse*

[35] As I have found that the failure to give the required notice did prejudice the City, it is not necessary for me to consider whether the plaintiff has a reasonable excuse for the failure. However, if it were necessary for me to determine that issue, I would find that the circumstances in this case do not amount to a "reasonable excuse" for the purposes of s. 44(12).

[36] This subsection was enacted to import into the limitation period the discoverability principle. (*Blair v. Barrie (City)*, [2006] O.J. No. 4997, at para. 7) The Court of Appeal explained the discoverability principle as a principle "designed to avoid the injustice of precluding an action or claim before the plaintiff is in a position to commence proceedings." (*Zapfe v. Barnes*, [2003] O.J. No. 2856, para. 22) That principle has no application to this case.

[37] While the plaintiff may bear no responsibility for the late notice, that does not bring him within the exception to the application of s. 44(10). If the plaintiff has remedies, they lie elsewhere.

**Conclusion**

[38] A trial is not required to determine whether the plaintiff's action must be dismissed for failure to comply with the notice requirement of the *Municipal Act*. On the evidence before me, I find that the plaintiff's action is barred.

[39] The City is entitled to summary judgment dismissing the action.

[40] Counsel have agreed to the amount of costs to be awarded to the successful party. On the basis of that agreement, the defendant is entitled to costs of this motion in the all-inclusive amount of \$7,361.07.

[41] If the defendant is so advised, it may make submission to me in writing with respect to costs of the action. The submissions are to be received within 10 days. The plaintiff will have 10 days to respond in writing.

  
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Frank J.

Date: January 19, 2010