CITATION: Bay-Yorkville Developments Ltd. v. Ferguson-Neudorf Glass Inc., 2023 ONSC 1955
COURT FILE NOS.: CV-20-651198; CV-14-518564
MOTION HEARD: 20221207
REASONS RELEASED: 20230327

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

BAY-YORKVILLE DEVELOPMENTS LTD.

Plaintiff

- and-

FERGUSON-NEUDORF GLASS INC.

Defendant

BEFORE: ASSOCIATE JUSTICE McGRAW

COUNSEL: M. Lerner and A. Grossman for Bay-Yorkville Developments Ltd., Menkes Developments Inc. and Menkes Construction Limited
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D. Young for Hidi Rae Consulting Engineers Inc.

M. Bretgoltz for Toronto Standard Condominium Corporation No. 2282

E. Eski for IBI Group and architectsAlliance

C. Breukelman for KJA Consultants Inc.

J.Roberts for BVDA Façade Engineering

S. Barbier for WSP Group

T. Rahman for Thyssenkrupp Elevator (Canada) Limited

REASONS RELEASED: March 27, 2023

Reasons for Endorsement

I. Introduction

[1] This is a motion by the Plaintiff Bay-Yorkville Developments Ltd. ("BYDL") to consolidate this action (Bay-Yorkville Developments Ltd. v. Ferguson-Neudorf Glass Inc. ("FNG")(Court File No. CV-20-651198) (the "FNG Action") with the main action in these proceedings, Toronto Standard Condominium Corporation No. 2282 ("2822") v. Bay-Yorkville Developments Ltd. (Court File No. CV-14-518564)(the "Main Action", together with the FNG Action, the "Actions"). The Actions arise from the development of a mixed-use high-rise residential project in Toronto's Yorkville area known as the Four Seasons Residences (the "Project"). FNG opposes the motion and seeks to schedule a summary judgment motion.

II. Background

[2] I have been case managing these proceedings pursuant my order dated October 25, 2019. 2822, the Plaintiff in the Main Action, is the condominium corporation established for the Project. The current Defendants are BYDL, Menkes Developments Inc. ("MDI") and Menkes Construction Limited ("MCL")(collectively, the "Menkes Defendants"). BYDL is the Project developer and the declarant of 2822. MCL was the construction manager.

[3] 2822 commenced the Main Action on December 19, 2014 claiming damages of $4,000,000 for breach of contract and warranty; negligence; negligent design, construction and misrepresentation; and/or breach of statutory duty related to alleged deficiencies in the design and construction of the Project. These include stack effect (whistling noises caused by air movement through the building); condensation and icing on the windows installed within the curtain wall; water infiltration through the curtain wall into the building interior causing balcony tile and other damage; spontaneous glass breakage to windows in the curtain wall; "clicking" noises in units; and elevator reliability issues. 2282 has amended its Statement of Claim numerous times to, among other things, allege additional deficiencies, dismiss claims and replace MDL and add MDI.

[4] BYDL contracted FNG to provide materials, installation and design for the curtain wall system and balcony doors. FNG also procured and supplied the glass panes installed throughout the Project. After initial incidents of glass breakage, BYDL and FNG entered into an indemnity agreement dated April 2, 20214 (the "Indemnity Agreement") pursuant to which FNG agreed to repair any broken glass and indemnify BYDL for any subsequent breakage. FNG also investigated and repaired water infiltration issues in 2018 and 2019. BYDL alleges that there has been glass breakage as recently as September 2021.

[5] On July 25, 2017, the Menkes Defendants commenced a Third Party Claim in the Main Action (Court File No. CV-14-518564-00A2) against the architectsAlliance and IBI Group (the "Architects"), WSP Group and BVDA Façade Engineering ("BVDA") seeking contribution and indemnity for 2822's claims (the "Main Action TPC"). In October 2019, 2282 discontinued its direct claims against Stephenson Engineering, Hidi Rae Consulting Engineers Inc. ("Hidi"), KJA Consultants Inc. ("KJA"), Thyssenkrupp Elevator (Canada) Limited ("TKE"), the Technical Standards and Safety Authority and the City of Toronto (the "City"). On November 21, 2019, the Menkes Defendants commenced a Third Party Claim to convert their crossclaims against Hidi,

KJA and TKE to third party claims for contribution and indemnity (Court File No. CV-14-518564-00A3). Another Third Party Claim by the City against the Architects and WSP Group has been resolved.

[6] On May 12, 2022, the Menkes Defendants commenced a Third Party Claim against the Architects and BVDA for contribution and indemnity with respect to the balcony tiles (the "Balcony Tiles TPC"). Pleadings have not closed and BVDA and the Architects advised during the case conference and the motion that they intend to add FNG as a Fourth Party to this proceeding. To date, they have not done so. 2282's position is that the Balcony Tiles TPC is not a new claim but falls within the previously pleaded water infiltration issues.

[7] Over 60,000 documents were produced in the Main Action between January 2019-July 2020. Examinations for discovery were conducted over 13 days in November-December 2020 and February 2021. The remaining steps in the Main Action before it can be set down for trial include further productions; answers to outstanding undertakings; further examinations of 2282 on its amended pleading, remedial efforts and new deficiencies (including the balcony tiles); potential undertakings and refusals motions; pleadings, document production and examinations for discovery in the Balcony Tile TPC; and additional examinations as required.

[8] BYDL commenced the FNG Action by Notice of Action issued on November 12, 2020. In the FNG Action, BYDL claims contribution and indemnity from FNG for certain of the alleged deficiencies claimed by 2822 in the Main Action including glass breakage, condensation/icing and water infiltration. BYDL specifically pleads that the FNG Action should be tried together with the Main Action and states that the FNG Action was commenced as a separate proceeding for expedience.

[9] At a case conference on May 3, 2022 to establish a revised timetable for the Main Action, the parties first raised consolidation. FNG advised that it intended to bring a summary judgment motion on the basis that the FNG Action is barred by operation of the *Limitations Act 2002* (Ontario) (the "Summary Judgment Motion"). The parties attended at Civil Practice Court ("CPC") before Black J. on May 25, 2022 to speak to FNG's request to schedule the Summary Judgment Motion. Black J. declined to schedule the Summary Judgment Motion given that the parties were discussing terms of consolidation and that mediation (in which FNG participated) was scheduled for July 2022. Counsel attended CPC again on September 6, 2022. In denying FNG's request to schedule the Summary Judgment Motion, Myers J. directed as follows in his Endorsement dated September 6, 2022:

> "What I cannot tell however, is whether the issues are sufficiently articulated and ripe for the motion to be brought now. I understand that McGraw AJ is conducting case management to deal with scheduling and consolidation of this action with the prior action next week. There are scheduling issues caused by the late addition of Ms. Book's client to a claim that is far along the preparation tracks already. McGraw AJ will have better insight than me into whether, after consolidation, a motion for summary judgment by Ms. Book's client may become a motion for partial summary judgment in the context of a consolidated case with no risk of duplication of evidence or inconsistent verdicts as precluded by the Court of Appeal (See: Mason v. Perras Mongenais, 2018 ONCA 978

(CanLII) at paras. 40 and 41). I need to consider this due to Justice Brown's admonition against even scheduling motions for partial summary judgment without assurances – as discussed in Malik v. Attia, 2020 ONCA 787 (CanLII) at paras. 61 to 63. The claims for liability could be so enmeshed in the prior action, there could be a benefit to deferring the proposed motion until after Ms. Book's client is sufficiently up-to-speed on discovery to better focus on the issue of whether there is a discrete issue of the kind needed to allow for partial summary judgment for example.

If AJ McGraw agrees that the motion may be brought now then the parties are to agree on a schedule with a hearing date next May and re-attend CPC so a judge can set the date and endorse the schedule. There may be any number of other process and scheduling issues to be discussed. I do not wish to say or do anything to limit this discretion of McGraw AJ. The motion can be scheduled as soon as he is content that the time is appropriate (if ever)."

[10] Pursuant to Myers J's directions, the parties appeared before me at another case conference on September 13, 2022. FNG sought to bring the Summary Judgment Motion without the requirement for it to participate in any further steps in the Actions including discoveries while the Summary Judgment Motion is pending. The Menkes Defendants submitted that the issues related to FNG are central to the Main Action and that permitting FNG to bring the Summary Judgment Motion and not participate would unduly delay these proceedings. The parties continued to discuss a resolution and another telephone case conference was scheduled for September 28, 2022. Significant discussions were held with respect to potential interim resolutions which would permit discoveries to move forward and the Summary Judgment Motion to be scheduled. However, after reviewing and discussing options with counsel, this consolidation motion remained opposed.

[11] The motion was originally scheduled for October 26, 2022 however it was removed from the list and subsequently rescheduled for December 7, 2022 at a telephone case conference on November 7, 2022. On December 5, 2022, FNG served a Motion Record of approximately 400 pages in support of the Summary Judgment Motion.

III. The Law and Analysis

[12] The issue on this motion is whether the FNG Action should be consolidated with the Main Action. If this relief is granted, then the court must consider whether FNG should be required to participate in discoveries before the Summary Judgment Motion is scheduled. Central to this dispute is FNG's request to have its Summary Judgment Motion scheduled and heard as soon as possible without participating in discoveries even if consolidation is ordered.

[13] Rule 6.01 states:

(1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

[14] Section 138 of the *Courts of Justice Act* (Ontario) states that "as far as possible, multiplicity of proceedings shall be avoided".

[15] The proper approach and relevant considerations were set out by Master Dash (as he then was) in *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 ONSC 3306:

> 17 In my view the proper approach on a motion for consolidation or trial together is to first ascertain whether the moving party has satisfied one or more of the three "gateway" criteria set out in rule 6.01(1)(a), (b) or (c) and then consider all relevant factors as well as section 138 of the *Courts of Justice Act* which directs the court to avoid a multiplicity of proceedings whenever possible, in order to exercise the court's discretion and make such order as is just. I will attempt to set out a list of factors courts have considered on motions for trial together as well as some of the "bifurcation factors" modified appropriately to reflect that this is a motion to try actions together, not sever issues within an action. I point out that the list that follows are considerations for ordering trial together of various actions, which is the relief sought on this motion, and not full consolidation of various actions, for which some different factors may apply.
>
> 18 A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances, include:
>
> (a)the extent to which the issues in each action are interwoven;
> (b)whether the same damages are sought in both actions, in whole or in part;
> (c)whether damages overlap and whether a global assessment of damages is required;
> (d)whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;
> (e)whether the parties the same;
> (f)whether the lawyers are the same;

(g)whether there is a risk of inconsistent findings or judgment if the actions are not joined;
(h)whether the issues in one action are relatively straight forward compared to the complexity of the other actions;
(i)whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;
(j)the litigation status of each action;
(k)whether there is a jury notice in one or more but not all of the actions;
(l)whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;
(m)the timing of the motion and the possibility of delay;
(n)whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;
(o)any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;
(p)whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;
(q)whether the motion is brought on consent or over the objection of one or more parties."

[16] For the reasons that follow, I conclude that the Actions should be consolidated.

[17] In my view, BYDL has met the "gateway" criteria. Consistent with the fact that the FNG Action is a claim by BYDL for contribution and indemnity for certain claims against it in the Main Action, the relief claimed in the Actions arises out of the same transaction or occurrence or series of transactions or occurrence, namely, damages related to alleged deficiencies at the same building, the Project (Rule 6.01(1)(b)). I am also satisfied that the Actions have questions of law and fact in common including the causes of the glass breakage, water infiltration and condensation icing and who, if anyone, is liable for any damages and the amount (Rule 6.01(1)(a)). The factors listed in *1014864 Ontario Ltd.* are also relevant to a consideration of whether there is any other reason an order ought to be made under Rule 6.01(1)(c)(*1014864 Ontario Ltd.*at para. 28). Based on my review of the factors below, I conclude that other reasons exist to order consolidation under Rule 6.01(1)(c) and that an order of consolidation is just in the circumstances. I have not been referred to any authority which addresses one party's summary judgment motion as a factor on a consolidation motion.

[18] Turning to these factors, as the FNG Action is a claim for contribution and indemnity by BYDL for claims advanced against it in the Main Action, the issues with respect to glass breakage, water infiltration and condensation icing in the Main Action are linked and interwoven and similar in complexity with those in the FNG Action. There is also overlap in damages and evidence including documents, witnesses and expert evidence such that BYDL will require evidence from FNG to defend the Main Action. Given the overlap in issues there is a risk of inconsistent findings including with respect to breach of warranty and causation if the Actions were to proceed separately. While this risk would not exist if FNG is successful in the Summary Judgment Motion

on the limitations issue, this is not the case if the FNG Action must proceed to trial. The fact that there are other issues in the Main Action unrelated to FNG and the FNG Action does not change my conclusions. In addition, BYDL and their lawyers are the same in the Actions and there are no jury notices.

[19] FNG submits due to the late commencement of the FNG Action, the Main Action has advanced to a stage where it would be impractical to consolidate it with the FNG Action in which no steps have been taken. There is some merit to this submission, however, I am satisfied that given the forthcoming discoveries in the Main Action and the need for FNG to participate in the Main Action by providing documents and witness evidence in any event, the parties, with the court's assistance if necessary, can manage this process effectively. This would also streamline the proceedings and result in efficiencies and costs savings resulting from one set of examinations and documentary discovery.

[20] I also conclude that the balance of convenience favours consolidation. If consolidation is not ordered, FNG will proceed with the Summary Judgment Motion and not participate in the Main Action. While some steps could be taken in the Main Action, FNG's non-participation would inevitably lead to material delay to the detriment of the many parties to the Main Action (*Soilmec North America Inc.* v. *D'Elia,* 2011 ONSC 5214 at para. 14; *Rabba* v. *Rabba,* 2019 ONSC 5205 at paras. 25-33). Further, having the FNG Action proceed separately would not eliminate the need for substantially the same issues to be determined in the Main Action requiring FNG's participation in any event after the Summary Judgment Motion is disposed of. This runs the risk that if the Summary Judgment Motion is unsuccessful in the Main Action will fall even further behind. Having the Actions proceed together so that the documents and transcripts produced during discoveries can support both the Main Action and the Summary Judgment is the most efficient, practical and just result in the circumstances.

[21] I reject FNG's argument that consolidation would lead to more costly litigation. Substantially all of FNG's submissions about the benefits of proceeding separately are predicated on FNG succeeding on the Summary Judgment Motion, including FNG's assertions that it would be more cost effective and get the FNG Action in and out of the court system quicker. FNG's arguments ignore the economies of scale of having the record for the Main Action developed at the same time as the Summary Judgment Motion while underestimating the delay which would result if FNG is unsuccessful on the Summary Judgment Motion and the FNG Action must proceed to trial. FNG's assertion that even if the Summary Judgment Motion is unsuccessful it may still save time and money by eliminating the need to pursue these defences at trial is speculative at best.

[22] I also do not accept FNG's submissions that consolidation would cause it to incur non-compensable prejudice. FNG has not referred me to any authority in support of its assertion that consolidation would result in actual prejudice because it might make it more difficult for FNG to schedule and win the Summary Judgment Motion. Similarly, FNG has not cited any authority for the proposition that non-compensable prejudice would result because if FNG is successful in the consolidated proceedings it would only ever be able to recover a portion of its costs. Non-compensable prejudice does not include recovering partial or substantial indemnity costs instead of full indemnity costs.

[23] Based on the relevant factors, I conclude that consolidation is just in the circumstances and furthers the objective of avoiding a multiplicity of proceedings. It is also consistent with Rule 1.04(1) which requires a liberal interpretation of the Rules to secure the just, most expeditious and least expensive determination on the merits and is proportionate to the issues in the litigation and the amount claimed.

[24] Having concluded that the Actions should be consolidated, I turn to the timing of the Summary Judgment Motion. There is no opposition to this court's jurisdiction to provide orders and directions with respect to the timing of the Summary Judgment Motion pursuant to Rules 6.01(2) and 50.13(5) and Myers J.'s directions. For the reasons below, I conclude that the Summary Judgment Motion should be heard after discoveries have been completed.

[25] The parties rely on *George Weston Limited* v. *Domtar,* 2012 ONSC 5001 in which D.M. Brown J. (as he then was) set out the factors to consider when scheduling a summary judgment motion:

> "[55] Accordingly, where a judge faces a request to schedule a lengthy summary judgment motion before the parties have embarked upon or completed discoveries, factors to take into account would include
>
> > (i)the nature and complexity of the issues raised in the action;
> > (ii)the extent of the record the parties are likely to develop if a summary judgment motion proceeds prior to the completion of productions and discoveries;
> > (iii)whether a record so built through a summary judgment motion will offer a less complete picture of the case than the responding party could present at trial and, if it would, in what respects; [page214]
> > (iv)would the responding party to the summary judgment motion enjoy the equivalent access to key documents as would exist through the documentary discovery process?
> > (v)would the responding party be able to examine the representative of the party which it would have selected for purposes of examination for discovery?
> > (vi)whether the most efficient means of developing a record capable of satisfying the full appreciation test given the nature and complexity of the issues in play is to proceed through the normal route of discovery; and
> > (vii)whether the most efficient means of satisfying the full appreciation test would be to develop a modified discovery plan, incorporating elements of traditional discovery and the preparation of a summary judgment record, with a view to proceeding to a non-conventional trial which would ensure the just, most expeditious and least expensive determination of the case on its merits."

[26] In my view, the application of these factors supports deferring scheduling of the Summary Judgment Motion until after discoveries. The issues on the Summary Judgment Motion are not as straightforward or discrete as FNG submits and would require substantial affidavit evidence and cross-examinations. Even narrowed to FNG's limitations defence, the material issues and evidence on the Summary Judgment Motion relate to the timing of FNG's warranty repair work; the nature

and scope of FNG's glass and curtain wall repair work; the design and planning for FNG's remediation work with respect to the water repair issues; the circumstances surrounding and reliance on the Indemnity Agreement; tracing the batches of glass installed at the Project and determining which ones were subject to heat soaking; and the design, selection, and specification of the balcony doors. All of this is in the context of complex construction litigation with many parties and claims. There is overlap in the evidence required to adjudicate these issues in both Actions and permitting the Summary Judgment motion to proceed now would eliminate many if not all of the benefits of consolidation described above. Most prominently, allowing the Summary Judgment Motion to proceed before discoveries would cause delay to the Main Action. Further, given the number and complexity of the overlapping issues and the necessity for the parties to put their best foot forward on the Summary Judgment Motion, the usual discovery process would result in the most complete record using the most efficient process.

[27] FNG's arguments again rely largely on the assumption that it will be successful on the Summary Judgment Motion. This includes FNG's assertions that it would be more cost effective, efficient and not result in inconsistent findings to have the Summary Judgment Motion proceed without discoveries. Even if FNG is successful on the Summary Judgment Motion, its evidence and participation will be required for the Main Action. If it is unsuccessful, the delay to the Main Action will be compounded. This reflects the inefficiencies of permitting the Summary Judgment Motion to proceed prior to discoveries.

[28] I reject FNG's characterization that deferring scheduling of the Summary Judgment Motion until after discoveries would amount to a stay of proceedings. Court orders and directions in a case managed proceeding which require certain steps to occur before others is not a stay. FNG's characterization ignores the fact that by participating in the discovery process in the Main Action, the record for the Summary Judgment Motion in the FNG Action will be developed concurrently. Further, consolidation does not necessarily mean that scheduling the Summary Judgment Motion should wait until all steps related to discovery have been completed. After the completion of examinations for discovery and undertakings and refusals are being addressed, there may be sufficient insight into timing to consider scheduling the Summary Judgment Motion. This can be appropriately addressed through the case management process.

IV. Disposition and Costs

[29] Order to go on the terms set out above. Counsel shall discuss and agree upon a timetable for the Actions and file a form of Order and Consent for my review and approval. If the parties cannot agree on a timetable, they may schedule a telephone case conference with me to speak to one.

[30] If the parties cannot agree on the costs of this motion, they may file written costs submissions not to exceed 3 pages (excluding Costs Outlines) on a timetable to be agreed upon by counsel.

Released: March 27, 2023

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Associate Justice McGraw