

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: XIANG BIN MA (IN TRUST FOR A CORPORATION TO BE FORMED) et al,
plaintiffs

AND:

1835942 ONTARIO INC. et al, defendants

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: James Wortzman and Catherine Allen for the plaintiffs

Kris Borg-Olivier for the defendants 1835942 Ontario Inc. and Mohammed
Eslami Zadeh, aka Mohammed Eslamezadeh aka as Mohammed Eslami

Maurice Neirinck for the defendant Andy Bakhtiari

HEARD: November 22, 2023

ENDORSEMENT

[1] The plaintiffs commenced this action on August 29, 2018, seeking, among other things, specific performance of an agreement of purchase and sale entered into on October 3, 2017 (the “APS”) for the purchase of the property municipally known as 10481 Yonge Street, Richmond Hill (the “Property”) owned by the defendant 1835942 Ontario Inc.

[2] On August 30, 2018, the plaintiffs brought an *ex parte* motion and obtained an order granting leave to obtain and register a certificate of pending litigation (the “CPL”) against title to the Property. The CPL was issued and registered on title to the Property on the same day.

[3] The defendants brought a motion to discharge the CPL which was heard by me on October 11, 2023 (the “Discharge Motion”).¹ My Reasons for Decision dismissing the Discharge Motion were released on November 20, 2023.²

¹ The action was discontinued against the defendants Max Realty Solutions Inc. and Shahim Mirkhan on June 20, 2022. References in this Endorsement to “the defendants” refer only to the defendants 1835942 Ontario Inc., Mohammed Eslami Zadeh also known as Mohammed Eslamizadeh also known as Mohammed Eslami, and Andy Bakhtiari.

² *Ma et al. v 1835942 Ontario Inc. et al.*, 2023 ONSC 6530

[4] The plaintiffs bring this motion seeking an order pursuant to Rule 32.01 permitting the plaintiffs' consultant to attend at the Property for the purpose of completing a Phase Two Environmental Site Assessment of the Property.

[5] For the reasons that follow, the plaintiffs' motion is granted.

A. BACKGROUND AND LITIGATION HISTORY

[6] My Reasons for Decision in the Discharge Motion outline much of the relevant background and litigation history. Additional relevant aspects of the background and litigation history are provided in this Endorsement. For clarity, I repeat here that the APS includes the following condition (the "Environmental Condition"):

"This offer is conditional for a period of (45) Forty Five Days from the date of acceptance of this offer, upon the Buyer being satisfied at his own expense and in his sole and unfettered discretion with the following:

1) All matters of zoning, viability, soil test, develop-ability...

Failing which this Offer becomes null and void and the deposit money shall be returned to the Buyer in full without interest or deduction. This condition is included for the benefit of the Buyer and may be waived at his sole option by notice in writing to the Seller or his agent."

B. ISSUES

[7] The issue on this motion is whether the requested inspection should be ordered pursuant to Rule 32.01.

C. LAW AND ANALYSIS

(i) *Applicable legal principles*

[8] Rule 32.01(1) and (2) provide as follows:

32.01 (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.

(2) For the purpose of the inspection, the court may,

(a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;

(b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and

(c) permit the taking of samples, the making of observations or the conducting of tests or experiments.

[9] Relief under rule 32.01 is discretionary.³ In determining whether to order an inspection under Rule 32.01, the court will consider the following:

- (a) Whether the proposed inspection appears to be necessary for the proper determination of an issue in a proceeding.
- (b) Whether the party in possession of the property will be prejudiced by the inspection, such as through the impairment of the integrity of the property to be inspected.
- (c) The balance of the prejudice (if any) against the benefit to be derived from the inspection.⁴

[10] For the purposes of determining whether to make an inspection order, necessary means “useful” or “probative of an issue”. To establish necessity, the onus is on the moving party to demonstrate that “there is a reasonable possibility the proposed test will reveal something useful for the trier of fact (that is, something which will assist the trier of fact in determining an issue in the proceeding)”.⁵

[11] Rule 32 should be construed liberally to permit inspections.⁶ However, because an inspection order is discretionary, the court is not required to authorize the inspection even if necessity is established.⁷ The basis for refusing an inspection order has been explained as follows:

An inspection of property which will advance the interests of justice by aiding in the determination of an issue on the merits... should only be refused if there is evidence of some countervailing prejudice that would be occasioned by the order or if the request constitutes an abuse of the inspection rights available under Rule 32.01.⁸

³ *Ontario District School Board 19 v. 553518 Ontario Ltd.*, 2000 ONSC 3443 (“*Ontario District School Board 19*”) at para 11

⁴ *Ontario District School Board 19* at para 16

⁵ *Ontario District School Board 19* at para 16

⁶ *Morier v. Michelin North America*, 2010 ONSC 615 (“*Morier*”) at para 24

⁷ *Ontario District School Board 19* at para 16

⁸ *Morier* at para 21

(ii) *Is the proposed inspection necessary?*

[12] The plaintiffs submit that the proposed inspection will be probative to matters in issue in this litigation. Specifically, they argue that the testing will establish whether the Property is contaminated, which they submit is relevant to: (1) whether the defendants misrepresented the environmental status of the Property; and (2) the remedies they seek, including specific performance with an abatement and, alternatively, return of the \$5 million deposit they paid under the APS. The plaintiffs assert that the results of the inspection will also be relevant to assessing certain credibility issues, and that the results will be relevant and useful at the mandatory mediation of the action.

[13] The defendants' position is that the plaintiffs do not satisfy the test under Rule 32.01. They submit that the plaintiffs voluntarily waived the Environmental Condition and any related rights under that condition. The defendants argue that the plaintiffs are seeking an inspection to indirectly rewrite the APS and obtain contractual terms that have been waived, and to obtain rights that never existed under the APS. They submit that this is an abuse of the inspection rights available under Rule 32.01.

[14] With respect to the argument that the plaintiffs are seeking an inspection to indirectly rewrite the contractual terms of the APS, the defendants assert that prior to the waiver of the Environmental Condition the plaintiffs could have retained experts to conduct any tests they deemed necessary to assure themselves about the environmental status of the Property. They also argue that if the court determines that the plaintiffs waived the Environmental Condition then it must follow that the plaintiffs can have no right to an abatement or additional testing because any such rights can only arise under the Environmental Condition. In oral argument, the defendants asserted that the APS does not contain a guarantee or any express representations/warranties with respect to the environmental status of the Property. They also argue that the right of inspection under section 13 of the standard terms in the APS is inapplicable. In summary, the defendants assert that the plaintiffs are trying to obtain protections and rights that are not provided in the APS.

[15] On this motion, I must determine whether the requested inspection would be necessary for the trier of fact, not whether the plaintiffs have a contractual right to such an inspection. The plaintiffs seek the right to inspect pursuant to the *Rules of Civil Procedure*, not pursuant to a contractual right under the APS. The plaintiffs make certain claims and seek certain relief in their statement of claim. They are seeking an inspection to obtain information that they submit will be necessary – that is, useful or probative – with respect to the claims they make and the relief they seek. An inspection order need not be based solely on claims relating to the breach of a guarantee or a specific representation/warranty in the APS, nor a contractual right of inspection under the APS. Nevertheless, the inspection must be necessary to the trier of fact. Therefore, there must be a reasonable possibility the proposed inspection will reveal something useful for the trier of fact in determining the plaintiffs' claims or the relief they seek.⁹

⁹ *Ontario District School Board 19* at para 16

[16] Here, the information sought regarding the environmental status of the Property will be useful for several reasons. First, the plaintiffs' evidence is that prior to waiving the Environmental Condition they were told that there were no environmental issues on the Property. Specifically, the plaintiffs allege that at a meeting on October 11, 2017, the defendant, Mr. Eslami Zadeh, advised the plaintiff, Mr. Ma, that "he had spent \$9,000,000.00 to purchase and \$7,000,000.00 to clean the Property", that "Phase I and Phase II environmental Reports were prepared at that time and that there was 'absolutely no environmental issues'" and that "while the Phase I and II reports had expired, an update was performed by EXP in December of 2014, which confirmed the Property was clean". The plaintiffs allege that these statements were not true and were part of the defendants' representations that induced the plaintiffs to waive the Environmental Condition.

[17] As noted in my Reasons for Decision on the Discharge Motion, there are significant disputes with respect to the waiver of the Environmental Condition, including what was done and said by each of the parties.¹⁰ The implications of the waiver on the parties' respective rights under the APS will have to be determined at trial. The circumstances surrounding the waiver of the Environmental Condition are one aspect of the plaintiffs' claims that the defendants breached the APS. There are disputes about the defendants' alleged statements regarding the environmental status of the Property. Therefore, even if the APS did not include a guarantee or any representations/warranties about the environmental status of the Property, there are allegations that the statements were false and induced the plaintiffs to waive the Environmental Condition. Therefore, relevant issues at trial include whether Mr. Eslami Zadeh made the alleged statements and whether they were true. In order to determine whether these statements were true, evidence about the environmental status of the Property will be necessary.

[18] Information about whether the Property is contaminated will also be relevant to certain remedies sought by the plaintiffs. For example, the plaintiffs seek an order for Specific Performance "with a variation to extend the closing date in the said Agreement and whatever other variation or amendments this Honourable Court may deem just".¹¹ Although the defendants acknowledge in their factum that the plaintiffs are seeking specific performance and an abatement of the purchase price, they assert that "there is no basis in law" for such a remedy. I do not agree. The trier of fact in this case will have to determine whether specific performance should be ordered and, if so, whether the purchaser is entitled to an abatement in purchase price for any deficiency in the quality of the Property. Information about the environmental status of the Property will be necessary to determine whether specific performance with an abatement is appropriate and, if so, how to quantify the abatement.

¹⁰ Disputed issues include the circumstances regarding the waiver of the Environmental Condition, such as: (1) whether the waiver was given in circumstances where the defendants had breached the APS by failing to produce certain environmental reports regarding the Property; and (2) whether the defendants had made misrepresentations to the plaintiffs about the environmental status of the Property that induced the plaintiffs to waive the Environmental Condition.

¹¹ Statement of claim, paragraph 1(a)

[19] Further, as alternative relief, the plaintiffs seek an order requiring the return of the deposit and payment of their out of pocket expenses “in the event that the Property is contaminated”.¹² Therefore, if the plaintiffs’ claim is successful but the court is not prepared to make an order for specific performance, or specific performance with an abatement, the court will have to determine if it is appropriate to order a return of the deposit. Information about the environmental status of the Property will be necessary and useful in making that determination.

[20] The plaintiffs assert two additional grounds for the inspection motion that I do not accept. First, the plaintiffs argue that the inspection would be useful for purposes of assessing the defendants’ credibility with respect to their position about the environmental status of the Property. I do not agree. Credibility is based on what the defendants knew about the environmental status of the Property at the relevant time. Therefore, even if the results of the proposed testing show that the Property is contaminated, that would not mean that the defendants should not be believed about what they told the plaintiffs at the relevant time about the available environmental reports. As well, it would not demonstrate that the defendants had no basis for the statements they allegedly made at the time that the Property did not have any environmental issues. An attack on the defendants’ credibility would have to be based on the reports and information that were available at the time, and not a new report.

[21] The plaintiffs also argue that the inspection should be ordered because it will provide information that will increase the chances of resolution at the mandatory mediation of the action. In the circumstances, I do not accept that purported usefulness at mediation is a stand-alone basis to order an inspection. If the plaintiffs are unable to demonstrate that information from the sought-after inspection will be useful to the trier of fact, it would not be appropriate to order an inspection to obtain information solely because one of the parties is of the view that it should be available for the purposes of mediation.

(iii) *Prejudice*

[22] With respect to the issue of prejudice, the plaintiffs submit that the defendants have not alleged any prejudice that could arise from the proposed inspection and, therefore, no balancing is required in respect of the exercise of the court’s discretion. The defendants acknowledge that there is no evidence that an inspection of the Property is prejudicial *per se*.

[23] In the result, as there is no evidence of prejudice, it is not necessary to assess the balance of the benefits derived from the inspection against the resulting prejudice. Nevertheless, it is appropriate to assess certain potential impacts of an inspection order, as well as the scope/terms of the inspection. I consider those issues below.

¹² Statement of claim, paragraph 1(h)

(iv) *Should the court decline to order an inspection due to the delay in bringing this motion?*

[24] The defendants submit that even if the Court determines that an inspection is “necessary”, the granting of an inspection order is not automatic or mandatory, and the court retains discretion under Rule 32.01 to decline to order an inspection. They submit that a moving party’s delay in bringing a motion for an inspection order is a relevant factor the court must consider in determining whether to exercise its discretion under Rule 32.01.¹³ They argue that because of the plaintiffs’ delay in bringing the Inspection Motion in this case, the court should decline to make an inspection order.

[25] The plaintiffs submit that there has been no delay, as they have been requesting an inspection since 2018. They also submit that their decision to wait until after discovery to bring this motion was reasonable.

[26] While I accept that delay is a factor that can be considered, I find that the plaintiff’s delay in bringing this motion was not unreasonable and is not a sufficient basis to decline to exercise my discretion to order an inspection under Rule 32.01. In that regard, I note that in *Tre Memovia*, the delay was six years from the commencement of the litigation. As well, the delay in *Tre Memovia* was an additional reason for declining to order an inspection, as Master Short also found that “there is good reason to conclude that the proposed intrusive investigations would not be sufficiently useful or probative”, and that ordering the inspection would be prejudicial to one of the defendants.¹⁴

(v) *Conclusion with respect to inspection order*

[27] For the reasons outlined above, I find that the requested inspection is necessary in that it will provide useful and probative information for the trier of fact. I also find that there is no prejudice that would potentially outweigh the benefits of an inspection order, and that there is no basis to decline to exercise my jurisdiction to make an inspection order based on delay.

(vi) *Impact of inspection order on mediation / setting the action down for trial*

[28] At the hearing of the motion, the defendants raised certain concerns about the potential impact of an inspection order. Specifically, the defendants note that the action cannot be set down for trial because the mandatory mediation has not yet occurred, and they submit that an inspection will further delay the mediation and the parties’ ability to set the action down for trial. Therefore, the defendants seek an order dispensing with the parties’ requirement to complete mediation before setting the action down for trial. The plaintiffs submit that they too are interested in having the

¹³ *Tre Memovia Developments Ltd. v. 1491316 Ontario Inc.*, 2019 ONSC 4 (“*Tre Memovia*”) at paras 83-86; aff’d 2020 ONSC 1568; leave to appeal denied 2021 ONSC 2938 (Div. Ct.)

¹⁴ *Tre Memovia* at paras 74, 78 and 80-81

action set down for trial as soon as possible but they are opposed to an order dispensing with the parties' mediation obligations.

[29] Unfortunately, the impacts of an inspection order on mediation and the ability to set the action down for trial were not discussed amongst counsel prior to the hearing of the Inspection Motion and were first raised by the defendants at the hearing of the motion. In my view, the most appropriate means of mitigating any unnecessary delay is to include a timetable in the inspection order that provides deadlines for: (1) timely commencement and completion of the inspection; (2) scheduling and completion of the mandatory mediation; and (3) setting the action down for trial following mediation. The parties should meet and confer to try to reach an agreement on a timetable for these steps. If they are unable to do so, they may request a case conference before me to settle any disputed timetabling issues.

(vii) *Scope and terms of inspection order*

[30] While the defendants acknowledge that there is no evidence that an inspection of the Property is prejudicial *per se*, they submit that in the event an inspection is ordered, the proposed scope of the inspection is overly broad. Specifically, the defendants take issue with the proposed number of boreholes, monitoring wells, and test pits in the proposed inspection plan. The plaintiffs submit that the defendants have been aware of the scope of the proposed inspection since at least May 2022 when the plaintiffs' motion record was served. The plaintiffs submit that the defendants have filed no expert or other evidence as to why the scope of the proposed inspection is overly broad or unnecessary. In my view, absent such evidence, the inspection should proceed in accordance with the Proposal for a Phase Two Environmental Site Assessment as provided in the January 28, 2022 letter from Soil Engineers Ltd. to Malin Direct Corp., Exhibit "CC" to the affidavit of Peter Ma sworn May 17, 2022.

[31] The defendants also submit that, regardless of the scope of the inspection, the inspection order should include certain terms with respect to: restoration of the Property after the testing (including decommissioning of monitoring wells); clearance of underground services; and the defendants' access to the Phase Two Environmental Site Assessment. Although the Inspection Motion had been pending for many months, the proposed terms to be included in an inspection were raised for the first time by the defendants' counsel at the hearing of the motion. The plaintiffs' counsel made brief reply submissions on the proposed terms, indicating simply that, at first blush, they do not appear objectionable *per se*.

[32] Given the uncertainty at the hearing of the motion of the parties' respective positions with respect to the proposed terms, the parties are directed to meet and confer in order to attempt to reach an agreement, or narrow the issues, regarding the proposed terms for the inspection. In the event that the parties are unable to agree on the terms, counsel may request a case conference before me for direction on a process for determining any terms that remain in dispute.

D. DISPOSITION AND COSTS

[33] For the reasons outlined above, I order as follows:

1. The defendants' motion for an inspection order pursuant to Rule 32.01 permitting the plaintiffs' consultant to attend at the Property for the purpose of completing a Phase Two Environmental Site Assessment is granted. The permitted inspection shall be in accordance with the Proposal for a Phase Two Environmental Site Assessment as provided in the January 28, 2022 letter from Soil Engineers Ltd. to Malin Direct Corp., Exhibit "CC" to the affidavit of Peter Ma sworn May 17, 2022.
2. The parties are directed to meet and confer within 10 days of the release of this endorsement (subject to mutual agreement otherwise with respect to the scheduling of the meeting):
 - (a) To discuss a timetable for: (1) timely commencement and completion of the inspection; (2) scheduling and completion of the mandatory mediation of the action; and (3) setting the action down for trial following mediation. If the parties are unable to agree on a timetable for these steps, they may request a case conference before me to settle any disputed timetabling issues.
 - (b) To discuss and attempt to reach an agreement, or narrow the issues, with respect to proposed terms regarding: restoration of the Property after the testing (including decommissioning of monitoring wells); clearance of underground services; and the defendants' access to the Phase Two Environmental Site Assessment. In the event that the parties are unable to agree on the terms, counsel may request a case conference before me for direction on a process for determining any terms that remain in dispute.

Costs

[34] At the conclusion of the hearing of the Inspection Motion, the parties made costs submissions with respect to the Discharge Motion,¹⁵ the Inspection Motion, and the refusals motion that was argued before me on February 8 and 9, 2023 (the "Refusals Motion").¹⁶

[35] With respect to costs, the plaintiffs submitted that, in the event of success on this Inspection Motion, they are seeking costs of the Discharge Motion and the Inspection Motion on a partial indemnity basis in the aggregate amount of \$88,524.23 inclusive of disbursements and taxes. They submit that the Discharge Motion was very important to the parties and that the quantum they are

¹⁵ As noted in my Reasons for Decision on the Discharge Motion, the parties agreed at the conclusion of the Discharge Motion that they would make their cost submissions with respect to the Discharge Motion following the completion of argument at this Inspection Motion.

¹⁶ In my decision on the Refusals Motion, I reserved costs of that motion to be determined following the Discharge Motion and Inspection Motion.

seeking is reasonable and in an amount that an unsuccessful party could reasonably expect to pay in respect of those motions. In that regard, the plaintiffs note that the defendants' costs outlines for the Discharge Motion and the Inspection Motion seek costs in the aggregate amount of approximately \$79,000 on a partial indemnity basis. The defendants did not take the position that the quantum claimed by the plaintiffs for the Discharge Motion and the Inspection Motion is unreasonable.

[36] I have considered the plaintiffs' success on the Discharge Motion and the Inspection Motion, the importance of the issues addressed on the motions, and the similarity in the aggregate costs claimed by the plaintiffs and defendants in their respective costs outlines. I also note that the defendants did not take issue with the quantum of the aggregate costs claimed by the plaintiffs. Considering the factors outlined in Rule 57.01, I find it fair and reasonable for the defendants to pay to the plaintiffs' costs of the Discharge Motion and Inspection Motion in the aggregate amount of \$88,524.23, inclusive of disbursements and taxes, within 30 days.

[37] The plaintiffs also seek their costs of the Refusals Motion. They submit that they were successful on that motion and that the evidence obtained was relevant and useful in the determination of the issues on the Discharge Motion. The plaintiffs submit that the defendants should be ordered to pay costs of the Refusals Motion fixed in the amount of \$6,597.00 on a partial indemnity basis, or alternatively that no costs should be payable with respect to the Refusals Motion. The defendants submit that the Refusals Motion was unnecessary, caused significant delay in the hearing of the Discharge Motion and Inspection Motion, and that very little of the evidence that resulted from the questions ordered to be answered was used on the Discharge Motion. The defendants submit that the plaintiffs should be ordered to pay costs of the Refusals Motion fixed in the amount of \$9,000.00 on a partial indemnity basis.

[38] Considering the factors outlined in Rule 57.01, I find that it is appropriate to order that no costs are payable with respect to the Refusals Motion.

DATE: February 2, 2024

R. Frank Associate J.