

CITATION: World Financial Solutions Inc. v. 2573138 Ontario Ltd., 2024 ONSC 1748
COURT FILE NO.: CV-18-00594161-00A1
DATE: 20240325

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WORLD FINANCIAL SOLUTIONS INC., Plaintiff

AND:

2573138 ONTARIO LTD. and MARGUERITE ALFRED, Defendants

AND:

ELISE BLOUIN also known as ELIZABETH BLOUIN also known as SUSAN ELIZABETH BLOUIN, SIETA & PIKES DEVELOPMENT LIMITED, 2868395 ONTARIO LIMITED, 2664358 ONTARIO LIMITED, MUKESH BHARDWAJ, DAVID LORNE REANO, 2870058 ONTARIO LTD., BIP MANAGEMENT CORPORATION, OLYMPIA TRUST COMPANY, GARY GRIECO, ANN GRIECO, ARYE LANKAR, FGC INC., 2839724 ONTARIO INC., THEODORUS VAN DER GULIK, DTAM INVESTMENTS GROUP INC., PRINCE AUJLA MEDICINE PROFESSIONAL CORPORATION, LUCIA VAN DER GULIK, FIRST FINANCIAL CONSULTING SERVICES (FFCS) LTD., 2790461 ONTARIO INC. c.o.b. PRIVATE LENDERS INC. operating as BOUTIQUE LENDING and BHARDWAJ LAW PROFESSIONAL CORPORATION, Third Parties

BEFORE: VERMETTE J.

COUNSEL: *Granville N. Cadogan*, for the Defendants

Marc Kestenberg and Kevin Schoenfeldt, for the Third Parties Mukesh Bhardwaj and Bhardwaj Law Professional Corporation

HEARD: December 19, 2023

ENDORSEMENT

[1] The Third Parties Mukesh Bhardwaj and Bhardwaj Law Professional Corporation (“**Bhardwaj Parties**”) move for an order striking the Third Party Claim commenced as against them by the Defendants. The motion is brought under Rule 21.01(1)(a) with respect to the question of whether the Defendants’ claim is statute-barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (“*Limitations Act*”), and under Rule 21.01(1)(b) with respect to the balance of the motion.

[2] The Third Party Claim discloses no reasonable cause of action as against the Bhardwaj Parties. Further, some of the claims are clearly statute-barred or barred by the doctrine of absolute privilege. Leave to amend is granted with respect to one aspect of the claim only.

A. THE PARTIES AND THE ACTION

[3] The Defendant 2573138 Ontario Ltd. (“**257**”) is an Ontario corporation. At the relevant time, 257 was the registered owner of properties located in Harcourt, Ontario (“**Subject Properties**”). 257 is the borrower under a mortgage registered on July 4, 2017 against the Subject Properties (“**Mortgage**”).

[4] The Defendant Marguerite Alfred is an individual residing in Ontario. She is a director and officer of 257. She is a guarantor under the Mortgage and two collateral mortgages registered against two properties located in Toronto (“**Collateral Mortgages**”).

[5] The Plaintiff, World Financial Solutions Inc., is an Ontario corporation. It is the lender under the Mortgage and the Collateral Mortgages.

[6] The Third Party Mukesh Bhardwaj is a lawyer who is licensed to practice law in Ontario. He practices law under the firm name Bhardwaj Law Professional Corporation. Mr. Bhardwaj acted for the Plaintiff in relation to the registration of the Mortgage on the Subject Properties on July 4, 2017 and the transfer of some or all of the Subject Properties to the Defendant 2868395 Ontario Limited (“**286**”) on October 28, 2021 (“**October 28, 2021 Transfer**”).

[7] The Statement of Claim was issued on March 16, 2018. The Plaintiff’s claim is on the covenant to pay under the Mortgage made between 257 as mortgagor, Ms. Alfred as guarantor, and the Plaintiff as mortgagee. The main relief sought by the Plaintiff against the Defendants is the following:

- a. Payment by the Defendants of the sum of \$2,178,899.98, as on March 16, 2018, due pursuant to the loan covenants under the Mortgage and Collateral Mortgages, to pay together with interest thereon at the rate of 14% per annum.
- b. Possession and sale of: (1) the principally secured mortgaged property in Harcourt, Ontario; and (2) the two collaterally secured mortgaged properties in Toronto, Ontario.

[8] The Third Party Elise Blouin prepared and delivered a Statement of Defence dated April 16, 2018 on behalf of the Defendants. However, that Statement of Defence was struck without prejudice on August 20, 2019. The Defendants have not subsequently delivered a Statement of Defence.

B. THIRD PARTY CLAIM

[9] The Third Party Claim was issued on January 31, 2023, almost five years after the action was commenced. By Order dated October 6, 2023, leave to amend the Third Party Claim to add

Bhardwaj Law Professional Corporation as a Third Party was granted. No changes to the body of the Third Party Claim were made.

[10] In the Third Party Claim, the Defendants seek, among other things: (1) damages in the amount of \$26 million from all the Third Parties, jointly and severally, “for negligence, negligent misrepresentation, conspiracy, loss of opportunity to operate the resort and trespass”; (2) damages in the amount of \$4,209,262.99 for the profits lost from the operation of the resort; and (3) punitive damages in the amount of \$100,000.00 as against Mr. Bhardwaj.

[11] The Third Party Claim contains the following paragraph:

The Defendants repeats [sic] and relies [sic] upon the Statement of Defence and Counterclaim. All capitalized terms, phrases and references that are otherwise defined have the same meaning as attributed in the Statement of Defence and Counterclaim of the Defendants.

[12] Despite this paragraph, no Statement of Defence and Counterclaim has been filed.

[13] The claims against the Bhardwaj Parties are outlined in paragraphs 16-25 of the Third Party Claim. The following is a summary of the allegations made against the Bhardwaj Parties in relation to the Mortgage:

- a. Mr. Bhardwaj “exclusively prepared and registered” the Mortgage on July 4, 2017.
- b. On or about June 30, 2017, Mr. Bhardwaj directed 257’s solicitor, Mr. Jordan Sobel, to undertake not to release or otherwise deal with the loan deposited into Mr. Sobel’s trust account on June 30, 2017 without Mr. Bhardwaj’s approval. Mr. Bhardwaj instructed Mr. Sobel not to release the funds until further notice from Mr. Bhardwaj. The Defendants state that Mr. Bhardwaj, through his client, the Plaintiff, “was solely responsible for the transfer of the funds to [Mr.] Sobel and/or controlled when the funds were transferred to [Mr.] Sobel and when [Mr.] Sobel could use the funds.”
- c. The Defendants state that Mr. Bhardwaj owed the Defendants “a duty of care to ensure that the information in the charge instrument was accurate, not misrepresented in any manner and reflected the agreement between the parties.” The Defendants also state that Mr. Bhardwaj “was negligent and or willfully blind in failing to ensure that the information on the Charge Instrument was accurate and reflected the agreement”. Five examples of allegedly inaccurate information are listed. They are as follows:
 - i. “Entered the date of advance as May 31, 2017 on the Charge Instrument when the funds were not advanced until July 4th, 2017;”
 - ii. “Entered the first payment date on the charge instrument as June 1st, 2017 instead of August 1st, 2017;”

- iii. “entered the amount of the advance as \$2,039,000.00 when the amount actually advanced was \$1,725,000.00;”
 - iv. “Entered the monthly payment as \$22,152.08; rather than \$20,125.00, as a result of his negligence in entering the incorrect amount of the Mortgage advance;”
 - v. “Registered a charge instrument in the amount of \$2,039,000.00 on the property rather than \$1,725,000.00”.
- d. The Defendants allege that Mr. Bhardwaj knew, ought to have known or was willfully blind to the fact that the information entered on the Mortgage was inaccurate and did not conform to the agreement between 257 and the Plaintiff.
 - e. Mr. Bhardwaj, despite knowing that it included information that was inaccurate, registered the Mortgage on July 4, 2017 containing the inaccurate dates and amounts. The Defendants state that as a result of Mr. Bhardwaj’s negligence, the Defendants suffered damages, including: (i) the Defendants became liable to pay excess monthly interest payments; (ii) a Notice of Sale was issued against the Defendants where there was no default under the Mortgage; and (iii) a default renewal fee, in relation to which the Defendants allege that Mr. Bhardwaj “ignored the fact that no payments were due until the cottages were built and sold.”
 - f. Mr. Bhardwaj was notified of the error on the charge instrument on or about July 5, 2017. Despite being notified of the error, he refused to correct the date on the charge instrument from May 31, 2017 to July 4, 2017.

[14] The following is a summary of the allegations made against the Bhardwaj Parties in relation to the October 28, 2021 Transfer and the enforcement proceedings that were commenced following the alleged default under the Mortgage:

- a. At all material times, Mr. Bhardwaj knew, ought to have known or was willfully blind to the fact that the Notice of Sale dated January 25, 2018 was inaccurate.
- b. Despite being notified of the error in the charge instrument, Mr. Bhardwaj continued enforcement proceedings based on an incorrect interest adjustment date of May 31, 2017, and transferred the property to 286 to the detriment of 257.
- c. Mr. Bhardwaj exclusively prepared and registered the October 28, 2021 Transfer.
- d. Mr. Bhardwaj “was negligent and negligently represented the following at the time he made the following law statements and transferred the property to 286: (i) the sale proceedings and transfer complied with the Charge, the Mortgages Act, and if applicable the Bankruptcy and Insolvency Act (Canada); (ii) [the] charge was in default at the time notice of sale was given and continues to be in default and the money has been advanced under the charge”.

- e. The Defendants state the following:

The law statements made by [Mr. Bhardwaj] were false. The sale proceedings had defects. [Mr. Bhardwaj] knew that the interest adjustment date on which the Notice of Sale was issued was incorrect. No funds were advanced by the Plaintiff to 257 on May 31st, 2017 and all the funds were not advanced under the Charge Instrument. Furthermore, [Mr. Bhardwaj] knew[,] ought to have known or was willfully blind to the fact that except for the first six months of payments of interest, no further payments were due under the Charge because he had negotiated an agreement between the parties where 257 and the Plaintiff were partners in the development of the property.

- f. The Defendants state that Mr. Bhardwaj “knew, ought to have known or was willfully blind to the fact that a Motion to determine the validity of the Plaintiff’s Notice of Sale was scheduled and served on him prior to the registration of the transfer to 286.” The motion was scheduled for May 17, 2022. The Defendants further state that Mr. Bhardwaj “knew, ought to have known or was willfully blind to the fact that his actions were wrongful in that he knew that the statements in the transfer were false compliance with the Mortgages Act and [the Plaintiff’s] right to commence enforcement proceedings.” The Defendants also allege that Mr. Bhardwaj “knew, ought to have known or was willfully blind to the fact that [the Plaintiff’s] power of sale proceedings was [sic] suspended and that [there] was no default on the loan”.
- g. The Defendants plead that as a result of the transfer of the property to 286, they suffered the following damages: (i) loss of income from the operation of the resort valued at \$4.6 million; (ii) loss of income from the built-out value of the property in the amount of approximately \$26,850,000.00.
- h. In relation to these damages, the Defendants state the following:

The Defendants state that [Mr. Bhardwaj] is liable to pay the amounts set out above to the Defendants for his negligence. The Defendants further states [sic] that they are entitled to punitive damages against [Mr. Bhardwaj], as [Mr. Bhardwaj] refused to correct inaccurate interest adjustment date and continued mortgages enforcement proceedings against the defendants when he knew, ought to have known or was willfully blind to the fact that alleged default resulted from his negligence, the Notice of Sale was inaccurate and there was a motion scheduled to determine the validity of the information he entered on the Charge instrument registered on July 4th, 2017.

[15] At the end of the Third Party Claim, there is also a general allegation that the Third Parties “jointly combined to effect the conveyance of the property to defeat the determination of the validity of the Notice of Sale before the Courts.”

C. GENERAL PRINCIPLES APPLICABLE ON A MOTION TO STRIKE

[16] On a Rule 21.01(1)(b) motion, a pleading will only be struck out if, assuming the facts pleaded to be true, it is plain and obvious that it discloses no reasonable cause of action – that is, where the pleading has no reasonable prospect of success: *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618 at para. 18.

[17] The Court of Appeal set out the principles applicable to a motion to strike in *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 39 (“*McCreight*”):

- In the interests of efficiency and correct results, there is a need to weed out hopeless claims – this housekeeping dimension underlies Rule 21.
- If the cause of action pleaded has been recognized, all of its essential elements must be pleaded.
- If the cause of action has not been recognized, this is not necessarily fatal. One must ask whether there is a reasonable prospect that the claim will succeed.
- The claim should not be struck merely because it is novel.
- Unless manifestly incapable of being proven, the facts pleaded are accepted as being true for the purposes of the motion.
- The pleading forms the basis of the motion; possible future facts that have not been pleaded may not supplement the pleading.
- No evidence is admissible on such a motion.
- The pleading must be read generously in favour of the plaintiff, with allowances for drafting deficiencies.
- A motion to strike should not be confused with a summary judgment motion which has a different test, a different purpose, and different rules relating to evidence.

[18] Each defendant named in a statement of claim must be able to determine, upon review of the pleading, what it is alleged to have done that caused harm to the plaintiff, and when it was done: *Burns v. RBC Life Insurance Company*, 2020 ONCA 347 at para. 16. Vague allegations that make it impossible for an opposing party to reply should be struck: see *Aristocrat Restaurants Ltd. (c.o.b. Tony’s East) v. Ontario*, [2003] O.J. No. 5331 at para. 19 (S.C.J.).

[19] Although the court must accept as true the material facts as pleaded, this obligation does not extend to bald conclusory statements of fact, unsupported by material facts: *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683 at para. 31. Similarly, while a party may raise a point of law in a pleading, conclusions of law may be pleaded only if the material facts supporting them are pleaded: see Rule 25.06(2) of the *Rules of Civil Procedure*.

[20] Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars. However, knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. See Rule 25.06(8).

[21] While no evidence is permitted on a motion to strike under Rule 21.01(1)(b), the court may consider documents referred to in the claim. For a document to be properly considered as being incorporated by reference into the pleading, it is not enough that it has been referenced in the statement of claim. It must “form an integral part of the plaintiff’s claim” or of the “factual matrix of the statement of claim”: see *McCreight* at para. 32 and *Allan Etherington v. National Hockey League*, 2020 ONSC 5789 at para. 127.

[22] While a pleading may be struck, leave to amend should be denied only in the clearest of cases. The fact that the allegations are bald is not, in itself, a basis for refusing leave. Leave to amend should only be refused where it is clear that the deficiencies in the pleading cannot be cured by an appropriate amendment and the plaintiff cannot allege further material facts that the plaintiff knows to be true to support the allegations. The fact that amendments may have previously been made is a relevant consideration. See *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385 at para. 22 (Ont. C.A.), *Tran v. University of Western Ontario*, 2015 ONCA 295 at para. 27, *South Holly Holdings Limited v. The Toronto-Dominion Bank*, 2007 ONCA 456 at para. 6 and *Horfil Holding Corp. v. Queens Walk Inc.*, 2019 ONSC 1381 at paras. 33-34.

D. EVIDENCE FILED BY THE DEFENDANTS

[23] The Defendants have filed an affidavit of Ms. Alfred in support of their position on this motion. Ms. Alfred attaches to her affidavit numerous documents that are not specifically referred to in the Third Party Claim, including requisition letters, e-mails, letters, draft documents, corporate profile reports, and a bankruptcy search report.

[24] The only documents attached to Ms. Alfred’s affidavit that are incorporated by reference into the Third Party Claim are:

- a. Charge Instrument No. HA49301 dated July 4, 2017;
- b. Transfer Instrument Number HA74986 dated October 28, 2021;
- c. Agreements of Purchase and Sale between the Plaintiff and 286 or 2664358 Ontario Ltd.;

- d. Notice of Motion dated February 10, 2021;¹ and
- e. Statement of Defence dated April 16, 2018.

[25] The other documents attached to Ms. Alfred's affidavit were included as evidence to support and prove some of the facts pleaded in the Third Party Claim, which is impermissible on a motion under Rule 21.01(1)(b): see *McCreight* at para. 32.

[26] The part of the motion based on the alleged expiry of the limitation period is brought pursuant to Rule 21.01(1)(a). For motions under Rule 21.01(1)(a), no evidence is admissible except with leave of a judge or on consent of the parties: see Rule 21.01(2)(a). The Defendants have not sought leave and no leave has been granted. While the Bhardwaj Parties' consent was not sought in advance, they consent to some of the documents attached to Ms. Alfred's affidavit being admitted in evidence for the purpose of the part of the motion under Rule 21.01(1)(a), including e-mails dated July 5, 2017 between Mr. Bhardwaj and Mr. Sobel and Notices of Motion dated June 20, 2019 and September 11, 2019. The complete list of the documents to which the Bhardwaj Parties consent – most but not all of which are incorporated by reference in the Third Party Claim – is set out in paragraph 24 of their Factum. Based on Rule 21.01(2)(a), I find that these documents, including the e-mails dated July 5, 2017 between Mr. Bhardwaj and Mr. Sobel and the two Notices of Motion, are admissible for the purpose of the part of the motion that was brought under Rule 21.01(1)(a).

E. POSITIONS OF THE PARTIES

1. Position of the Bhardwaj Parties

[27] The Bhardwaj Parties' position is that the Defendants' claims with respect to the Mortgage should be struck as against them without leave to amend for failing to disclose a reasonable cause of action and for being statute-barred. It is also their position that the Defendants' claims with respect to the enforcement proceedings should be struck as against them without leave to amend for failing to disclose a reasonable cause of action, for being statute-barred and because they are prohibited by the doctrine of absolute privilege.

[28] The Bhardwaj Parties submit that it is well-established law that counsel owes no duty of care to the party opposite in litigation and in commercial transactions.

[29] The Bhardwaj Parties state that the circumstances in which a lawyer will be found to owe a duty of care to a third party are very narrow. They point out that the Defendants had their own

¹ Ms. Alfred attaches two other Notices of Motion to her affidavit which are dated June 20, 2019 and September 11, 2019. While the Third Party Claim does not specifically mention the date of the motion that it refers to, the allegations regarding the motion correspond to the contents of the Notice of Motion dated February 10, 2021.

lawyer with respect to the Mortgage and the Defendants have not pleaded that they were relying on the Bhardwaj Parties. The Bhardwaj Parties argue that even if there were any errors in any of the Mortgage documents, the Defendants had their own counsel who was in a position to identify those errors. According to the Bhardwaj Parties, if the Defendants have any claim with respect to the Mortgage, it would be against their own counsel or the Plaintiff, but not against them as they only owed a duty to their client, the Plaintiff.

[30] The Bhardwaj Parties submit that this case is one of the rare cases where a pleading should be struck based on the expiry of a limitation period. They state that on the face of the Third Party Claim, the Defendants have pleaded that the alleged errors with respect to the Mortgage were identified in July 2017 and that the Bhardwaj Parties were put on notice of those alleged errors in July 2017. The Bhardwaj Parties point out that the Third Party Claim was commenced on January 31, 2023, almost five and a half years after the Mortgage was registered and the Defendants' counsel put Mr. Bhardwaj on notice of a potential claim, and almost five years after the main action was commenced against the Defendants on the basis of the Mortgage.

[31] With respect to the enforcement proceedings and the October 28, 2021 Transfer, the Bhardwaj Parties state that they were acting for the Plaintiff, not the Defendants. Accordingly, they did not owe any duty to the Defendants. The Bhardwaj Parties also point out that the Defendants had their own counsel with respect to the enforcement proceedings. They argue that the Defendants were not relying on the Bhardwaj Parties, nor would it have been reasonable for them to do so. They submit that any errors or inaccuracies in the Notice of Sale or with respect to the enforcement proceedings and the October 28, 2021 Transfer should have been addressed by the Defendants and their counsel within the context of the enforcement proceedings. Therefore, the Defendants have no reasonable cause of action against the Bhardwaj Parties.

[32] The Bhardwaj Parties argue that the Defendants' claims with respect to the enforcement proceedings are prohibited by the doctrine of absolute privilege. They state that absolute privilege applies to any cause of action that arises out of what was said or done in a proceeding. They also state that the steps that they took were taken in the context of this litigation and were taken on behalf of their client, the Plaintiff. They submit that if, as the Defendants have pleaded, there were errors on the Mortgage, which led to improperly taken enforcement proceedings, those are issues properly raised as defences or counterclaims in the context of the main action.

[33] The Bhardwaj Parties' position is that the Defendants should not be granted leave to amend if the Third Party Claim is struck. They point out that the Defendants have already amended the Third Party Claim once to add Bhardwaj Law Professional Corporation as a party, and they chose not to make any substantive amendments at that time. The Bhardwaj Parties argue that, in any event, no amendments can change the fact that: (a) the Bhardwaj Parties were acting for the Plaintiff, opposite the Defendants with respect to both the Mortgage and the enforcement proceedings and, accordingly, they owed the Defendants no duty; (b) the Mortgage claim is statute-barred; and (c) the claim related to the enforcement proceedings is barred by absolute privilege. Accordingly, the deficiencies in the Third Party Claim cannot be cured by further amendments.

2. Position of the Defendants

[34] The Defendants' Factum is replete with submissions that are based on facts or allegations that have not been pleaded, including the allegations that: Mr. Bhardwaj had a personal interest in the transaction, a Document Registration Agreement was entered into between Mr. Bhardwaj and Mr. Sobel and it was analogous to an undertaking between lawyers, the Document Registration Agreement created a "relationship of reliance" between Mr. Bhardwaj and Mr. Sobel for the benefit of the Defendants, and Mr. Bhardwaj knew that 286 was a fraudulent person at the time of the October 28, 2021 Transfer.

[35] The Defendants argue that the solicitor-client relationship is not an umbrella under which the solicitor can engage in tortious and wrongful conduct and yet escape liability. They state that there is no such principle in our law and that none of the cases cited by the Bhardwaj Parties stand for such a proposition. The Defendants submit that a solicitor acting within or outside the scope of their retainer is not supposed to lie or breach statutes and the law on behalf of their client.

[36] The Defendants submit that there is no absolute bar to an action against a lawyer by an opposing party or third party whom the lawyer has injured while acting outside the scope of their retainer. They state that a lawyer can be liable to an opposing or third party where the lawyer commits an independent tortious act and causes foreseeable injury, and that it does not matter that the non-client was represented. The Defendants argue that there are two exceptions to the general principle that a solicitor only owes a duty to their client and not an adverse party:

- a. Where a lawyer gives an undertaking to the Court or the opposing or third parties and fails to perform it.
- b. Where the lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy.

[37] The Defendants state that a lawyer must carry out their retainer by proper means and owes a duty to a non-client not to use improper means such as intentional tortious conduct or breach of undertaking in carrying out their instructions. According to the Defendants, it is the lawyer's election to use improper means that takes the lawyer outside the scope of the retainer and makes the lawyer liable to non-parties or an adverse party.

[38] The Defendants submit that Mr. Bhardwaj made false statements in the October 28, 2021 Transfer when he registered it. They argue that the statement that the *Bankruptcy and Insolvency Act* did not apply was a false statement and that Mr. Bhardwaj knew that the statement was false because Elise Blouin was an undischarged bankrupt. The Defendants state that as an undischarged bankrupt, Ms. Blouin could not incorporate a company nor act as a director of 286. The Defendants' position is that Mr. Bhardwaj's false law statements are actionable in law as an intentional tort and that his behaviour constitutes unlawful conspiracy conduct. The Defendants assert that Mr. Bhardwaj's false law statement was the condition precedent to the transfer of the property to 286, a fraudulent person. They state that it was Mr. Bhardwaj's duty to make the law statements based on evidence he had collected and reviewed, and that this was Mr. Bhardwaj's determination, not his client's.

[39] The Defendants argue that Mr. Bhardwaj has a personal interest in the transaction in issue because the Plaintiff is controlled by his brother and sister-in-law. They state that lawyers with a personal interest in the transaction can be sued and that lawyers with a direct interest in the litigation may be perceived to put their interest above their obligations.

[40] The Defendants submit that the Document Registration Agreement entered into between Mr. Bhardwaj and the Defendants' lawyer with respect to the Mortgage is analogous to an undertaking between lawyers and created a relationship of proximity independent of the Plaintiff. The Defendants state that Mr. Bhardwaj lied on behalf of his brother's company and registered a backdated Charge instrument on July 4, 2017 knowing that it was false and knowing that he had undertaken to prepare the Charge instrument accurately and make corrections when notified of errors. The Defendants argue that Mr. Bhardwaj had a contractual duty to correct that was independent of the Plaintiff. They further argue that the Document Registration Agreement created a relationship of reliance between Mr. Bhardwaj and the Defendants' lawyer for the benefit of the Defendants. They state that, at a minimum, Mr. Bhardwaj was required to carry out the Document Registration Agreement in good faith.

[41] The Defendants state that the negligence claimed in the Third Party Claim merged into the intentional torts in the claim. They also state that the Bhardwaj Parties are asking the Court to make findings of fact on this motion, which is not permissible on a Rule 21 motion.

[42] The Defendants submit that the parties' rights crystallized at the time they brought their motion and that their rights cannot be prejudiced by anything done after the motion was served. They argue that the limitation period has not expired on the facts of this case, either under the *Limitations Act* or the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("**RPLA**"). The Defendants' position is that the *RPLA* applies to the causes of action in this case. They also argue that Mr. Bhardwaj's false law statements on the October 28, 2021 Transfer extended the limitation period under the *Limitations Act* because this is a continuous cause of action.

[43] The Defendants argue that the Third Party Claim is an amendment to the Statement of Defence dated April 16, 2018 and that certain paragraphs of the original Statement of Defence contained sufficient notice to Mr. Bhardwaj of the factual matrix underpinning the claims against him.

[44] The Defendants state that the Bhardwaj Parties have not filed a Statement of Defence and, as a result, they cannot rely on a limitation period defence. The Defendants further state that they are entitled to reply to any limitation period defence.

[45] The Defendants submit that the concept of absolute privilege does not apply to wrongful conduct and that it does not protect intentional torts committed by the lawyer against the other side or the administration of justice. The Defendants also argue that the October 28, 2021 Transfer was to complete a commercial transaction and was not in contemplation of litigation.

F. DISCUSSION

[46] The Third Party Claim against the Bhardwaj Parties includes claims related to the preparation and registration of the Mortgage, and claims related to the enforcement proceedings and the October 28, 2021 Transfer. I will review them in turn.

1. Claims related to the preparation and registration of the Mortgage

a. *No reasonable cause of action*

[47] The only cause of action that is expressly pleaded against the Bhardwaj Parties with respect to the preparation and registration of the Mortgage is negligence.

[48] The general rule is that a lawyer owes no duty of care to the clients of opposing counsel in litigation or commercial matters. A lawyer acting in their professional capacity owes a duty of care to their client, not to clients represented by opposing counsel. To hold otherwise would place lawyers in an untenable conflict between their duty to their client and their need to protect themselves against their client's adversary. See *Diamond Contracting Ltd. v. MacDearmid*, 2006 CanLII 24444 at para. 3 (Ont. C.A.) and *Crown Crest Financial Corp. v. Sabbah*, 2019 ONSC 7114 at para. 26.

[49] Applying this rule to this case, Mr. Bhardwaj owed no duty of care to Mr. Sobel's clients, the Defendants, in relation to the Mortgage. Since the Bhardwaj Parties did not owe a duty of care to the Defendants in relation to the preparation and registration of the Mortgage, there is no reasonable cause of action against them in negligence with respect to the preparation and registration of the Mortgage. While negligent misrepresentation is not expressly pleaded in the section of the Third Party Claim that relates to the preparation and registration of the Mortgage, such cause of action is also unavailable to the Defendants because the existence of a duty of care is an essential element of this cause of action: see *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at paras. 29-36.

[50] While lawyers do not owe a duty of care to opposing parties in litigation or commercial matters, they may owe a different type of duty or be liable to opposing parties in certain circumstances, including the following:

- a. Where a lawyer gives an undertaking to the Court or the opposing party and fails to perform it. In such circumstances, the lawyer may be ordered to do that act or make good the loss flowing from the failure to perform the undertaking as loss flowing from a breach of duty committed by a solicitor as an officer of the court. See *Wallace International Silversmiths Inc. v. Heritage Silversmiths Inc.*, [2001] O.J. No. 4133 at para. 5 (S.C.J.) and *Laiken v. Carey*, 2011 ONSC 5892 at para. 55 ("**Laiken**").
- b. Where a lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy. See *Lawrence v. Peel Regional Police Force*, 2005 CanLII 3934 at paras. 6-7 (Ont.

C.A.) (“*Lawrence*”) and *Millennium Funding, Inc. v. Bell Canada*, 2023 FC 764 at para. 61 (“*Millennium*”).

- c. Where a lawyer injured an opposing party while the lawyer was acting outside the scope of their duty as a lawyer. See *Laiken* at para. 56, *Millennium* at para. 61 and *Dufort Testing Services Ltd. v. Berube*, [2004] O.J. No. 6225 at para. 21 (S.C.J.) (“*Dufort*”); aff’d by 2005 CanLII 45189 (Ont. C.A.). For instance, in order to find that a lawyer conspired with a client, it must be established that the lawyer acted beyond the role of lawyer. An allegation of an improper act done by a lawyer cannot lie where the lawyer was acting *qua* lawyer: see *Dufort* at para. 21.

[51] In order for a claim to be maintained with respect to allegations relating to any of the types of circumstances above, sufficient material facts must be alleged: see *Millennium* at para. 61.

[52] In this case, with respect to the preparation and registration of the Mortgage, there is no allegation in the pleading that Mr. Bhardwaj failed to perform an undertaking or that he did anything other than in his capacity as lawyer for the Plaintiff. Further, while there are bald mentions of conspiracy and trespass, there are no specific particulars that set out any intentional tort on the part of the Bhardwaj Parties in relation to the preparation and registration of the Mortgage. While a pleading should not be struck merely because the pleader has failed to attach the appropriate legal label to the facts, it is my view that the facts as pleaded with respect to the preparation and registration of the Mortgage are not capable of supporting a claim in law: *Lawrence* at para. 5.

b. Statute-barred

[53] In any event, I am satisfied that the Defendants’ claims against the Bhardwaj Parties with respect to the preparation and registration of the Mortgage in July 2017 are statute-barred.

[54] Section 4 of the *Limitations Act* sets out the general rule that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. The factors governing discoverability are contained in subsection 5(1), which states:

- (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).

[55] Rule 21.01(1)(a) should not normally be used to strike out a claim as statute-barred. The courts have noted that discoverability issues are factual and that this Rule is intended for legal issues only where the facts are undisputed. However, where a plaintiff's pleadings establish when the plaintiff discovered the claim, so that that issue is undisputed, then the courts have allowed Rule 21.01(1)(a) to be used as an efficient method of striking out claims that have no chance of success. See *Kaynes v. BP p.l.c.*, 2021 ONCA 36 at para. 81.

[56] In my view, this is such a case. As set out below, the following facts are undisputed and undisputable:

- a. On July 5, 2017, the Defendants' lawyer, Mr. Sobel, advised Mr. Bhardwaj of at least some of the alleged errors pleaded in the Third Party Claim.
- b. As pleaded in the Third Party Claim, Mr. Bhardwaj refused to correct the date on the charge instrument, despite being notified of the error.
- c. The main action was commenced on March 16, 2018. A number of the alleged errors or inaccuracies of which the Defendants complain in the Third Party Claim – including the amount owed under the Mortgage, the amount of monthly payments, and the date on which the monthly payments were to commence – are set out in the Statement of Claim.
- d. The Defendants were aware of and participating in the action by June 20, 2019 at the latest.

[57] The Defendants plead at paragraph 22 of the Third Party Claim that Mr. Bhardwaj “was notified of the error on the Charge Instrument on or about July 5, 2017”, and that despite being so notified, he “refused to correct the date on the Charge Instrument” and “continued enforcement proceedings based on an incorrect interest adjustment date of May 31st, 2017.”

[58] In support of this pleading, the Defendants have filed, with the consent of the Bhardwaj Parties, e-mails exchanged between Mr. Sobel and Mr. Bhardwaj on July 5, 2017. This exchange of e-mails between Mr. Sobel and Mr. Bhardwaj was forwarded by Ms. Alfred to the Defendants' current counsel on October 21, 2019.

[59] On July 5, 2017, Mr. Sobel sent an e-mail to Mr. Bhardwaj which stated, in part:

[...]

You also registered a back-dated mortgage for monies not advanced and must refund my client any interest to which your lender is not entitled. You did not advance the full amount required in the commitment and held my client hostage for outrageous fees and charges.

Your accounts will be assessed and the matter reported to LawPro.

You must immediately provide your Form 9D and 9E as the matter will be reported to your insurer.

Govern yourselves accordingly.

[60] Mr. Bhardwaj responded as follows on the same day:

I am confident that you understand that I acted for the lender and you as the borrowers [sic] lawyer had no concerns whatsoever before the funds were advanced to your trust account.

It was your professional duty to safeguard the interest of your client (borrower).

It is clear from your email that you have come to your senses after the transaction has closed.

I assure you that I will advise my client of his options against you in person and the firm if ever the mortgage goes in default. It is evident from your communication that you purposely decided to stay quiet and not protect your client against these concerns that you have immediately raised after closing and upon disbursing funds.

[61] Mr. Sobel responded: “Review your emails. You should immediately report yourself to the Law Society and your insurer.”

[62] With respect to damages, the Defendants plead the following at paragraph 21 of the Third Party Claim:

The Defendants state the [sic] [Mr. Bhardwaj], despite knowing the facts stated at paragraphs 19 and 20, herein, registered the Charge Instrument on July 4th, 2017, containing the inaccurate dates and amounts. The Defendants states [sic] that as a result of [Mr. Bhardwaj’s] negligence as set out at paragraph 19 and 20, herein, the Defendants have suffered damages as follows:

- i) Became liable to pay excess monthly interest payment;
- ii) Caused a Notice of Sale to be issued against the Defendants when there was no default under the mortgage and the Plaintiff had received sufficient mortgage payments at the time the Notice of sale was issued; and

- iii) A default renewal fee because he ignored the fact that no payments were due until the cottages were built and sold.

[63] It is pleaded in the Third Party Claim that the Notice of Sale is dated January 25, 2018.² As stated above, the Plaintiff's action was commenced on March 16, 2018. A number of the alleged errors or inaccuracies of which the Defendants complain in the Third Party Claim – including the amount owed under the Mortgage, the amount of monthly payments, and the date on which the monthly payments were to commence – are set out in the Statement of Claim.

[64] While the record before does not disclose when the Defendants were served with the Statement of Claim, the Notices of Motion that are before me show that by June 20, 2019, the Defendants were represented by counsel and participating in the action. The Notice of Motion dated June 20, 2019 states that the Defendants are seeking an “Order restraining the Plaintiff from completing the sale of the Property and taking possession of the property until this action is determined on its merits”.

[65] Thus, in response to being sued by the Plaintiff to enforce the Mortgage, the Defendants sought to bring a motion in June 2019 to restrain the Plaintiff from taking possession of and selling the property in issue. By that time, at the latest, the Defendants knew that:

- a. **Some loss or damage had occurred:** By June 2019, some of the loss pleaded in paragraph 21 of the Third Party Claim (reproduced in paragraph 62 above) had occurred. Among other things, the Defendants knew that a Notice of Sale had been issued and that the Plaintiff was suing them for amounts that they allege are inaccurate.
- b. **The loss or damage was caused by or contributed to by an act or omission and the act or omission was that of Mr. Bhardwaj:** The Defendants plead that Mr. Bhardwaj was notified of his errors on July 5, 2017 and that he refused to correct them. The e-mails exchanged between Mr. Bhardwaj and Mr. Sobel, the Defendants' lawyer and agent, show that Mr. Sobel was aware of Mr. Bhardwaj's alleged errors. Even if the e-mails are not taken into consideration, the Defendants would have known of the alleged errors in the Mortgage that was registered by Mr. Bhardwaj at the very latest when they received the Statement of Claim, which was before June 20, 2019.
- c. **A proceeding would be an appropriate means to seek to remedy the loss or damage having regard to its nature:** The Defendants knew or ought to have known that a proceeding was a legally appropriate means to seek to remedy the loss or damage shortly after they found out that they were sued by the Plaintiff in relation to the Mortgage, at the latest. I note that, pursuant to Rules 29.02(1) and

² The Notice of Sale is not included in the materials before me.

(2) of the *Rules of Civil Procedure*, a third party claim is normally issued within ten days after the defendant delivers a statement of defence or after the plaintiff delivers a reply. In this case, while a statement of defence has inexplicably not been delivered, one should have been delivered many years ago. I also note that this is not a case where a defendant took steps to ameliorate the loss: it is alleged that Mr. Bhardwaj refused from the get-go to correct the alleged error. See *Sosnowski v. MacEwen Petroleum Inc.*, 2019 ONCA 1005 at paras. 15-19.

The statements referring to LawPro in Mr. Sobel's e-mail dated July 5, 2017 strongly suggest that the Defendants knew back in 2017 that a proceeding was a legally appropriate means to seek to remedy the loss or damage, but it is not necessary to decide whether the Defendants knew this prior to June 2019.

[66] Thus, the Defendants had discovered their claim as against the Bhardwaj Parties in relation to the preparation and registration of the Mortgage by June 2019. Given this, that claim was statute-barred well before the Third Party Claim was commenced on January 31, 2023, three and a half years later.

[67] There is no merit to the Defendants' argument that the *RPLA* applies to the Defendants' claim against the Bhardwaj Parties. The Defendants' claim against the Bhardwaj Parties is not to recover any land or rent: see section 4 of the *RPLA*. Based on the allegations in the Third Party Claim, the Bhardwaj Parties did not own the Subject Properties, they were not in possession of the Subject Properties and they were not mortgagees or mortgagors.

[68] There is also no merit to the argument that this case involves a continuing breach and that Mr. Bhardwaj's alleged false law statements in October 2021 extended the limitation period. Any duty related to the preparation and registration of the Mortgage was not a continuing duty. Any breach of such duty would have occurred in July 2017. The failure to remedy the alleged errors does not constitute a further or continuing breach. See *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179 at para. 26.

c. Conclusion on claims related to the preparation and registration of the Mortgage

[69] In light of the foregoing, the Defendants' claims against the Bhardwaj Parties related to the preparation and registration of the Mortgage are struck out as disclosing no reasonable cause of action and because they are statute-barred pursuant to the *Limitations Act*.

[70] Given that the claims are statute-barred, leave to amend is denied because the deficiencies in the pleading cannot be cured by an amendment.

2. **Claims related to the enforcement proceedings and the October 28, 2021 Transfer**

a. *No reasonable cause of action*

[71] The Defendants' other allegations in the Third Party Claim against the Bhardwaj Parties relate to the continuation of enforcement proceedings based on an incorrect adjustment date of May 31, 2017, and the making of allegedly false law statements in the October 28, 2021 Transfer.

[72] The only causes of action that are expressly pleaded with respect to these claims are negligence and negligent misrepresentation. For the reasons set out in paragraphs 48-49 above, the Bhardwaj Parties did not owe a duty of care to the Defendants in relation to the enforcement proceedings and the preparation and registration of the October 28, 2021 Transfer. Therefore, the Third Party Claim does not disclose a reasonable cause of action for negligence or negligent misrepresentation.

[73] Before discussing the issue of whether the facts as pleaded are capable of supporting a claim in law aside from negligence and negligent misrepresentation, I turn to the issue of absolute privilege.

b. *Absolute privilege*

[74] Pursuant to the doctrine of absolute privilege, no action lies – whether against judges, counsel, jury, witnesses or parties – for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The privilege extends to documents properly used and regularly prepared for use in the proceedings. It also extends to statements made on an occasion that is incidental, preparatory or intimately connected to judicial proceedings. A statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings. See *Salasel v. Cuthbertson*, 2015 ONCA 115 at paras. 35-46 (“*Salasel*”).

[75] The immunity afforded by absolute privilege extends to any action, however framed, and is not limited to actions for defamation. See *Salasel* at para. 38. It applies even where words may be knowingly false and spoken in bad faith and/or with actual malice. See *Cook v. Milborne*, 2018 ONSC 419 at paras. 19-20.

[76] If the references to “enforcement proceedings” and “sale proceedings” in the Third Party Claim refer to the main action commenced by the Plaintiff and/or other judicial proceedings,³ then some of the Defendants' allegations regarding the enforcement proceedings are barred by the doctrine of absolute privilege, including the allegation that despite being notified of his error, Mr.

³ The use of the word “proceedings” suggests that the reference is to a court proceeding. However, this is admittedly unclear.

Bhardwaj continued enforcement proceedings based on an incorrect interest adjustment date. The doctrine of absolute privilege applies to the statements in the Statement of Claim, even if such statements are incorrect and knowingly false.

[77] However, I find that the doctrine of absolute privilege does not apply to statements made in the October 28, 2021 Transfer. These statements were not made before a court or a tribunal, or in a document prepared for use in a court proceeding. The transfer of the property occurred without the court's involvement and in the absence of a court order. Therefore, the October 28, 2021 Transfer was not incidental, preparatory or intimately connected to judicial proceedings. The statements were made for the purpose of transferring the property, not for the purposes of judicial proceedings.

[78] Consequently, statements made in the October 28, 2021 Transfer are not protected by the doctrine of absolute privilege. Further, given that they were made less than two years before the commencement of the Third Party Claim, they are not statute-barred pursuant to the *Limitations Act*.

[79] I now return to the issue of whether the facts as pleaded are capable of supporting a claim in law aside from negligence or negligent misrepresentation.

c. Other potential causes of action and leave to amend

[80] With respect to the statements in the October 28, 2021 Transfer, there is no allegation in the Third Party Claim that Mr. Bhardwaj failed to perform an undertaking or that he did anything other than in his capacity as lawyer for the Plaintiff. Further, while there are bald mentions of conspiracy and trespass, there are no specific particulars that set out any intentional tort on the part of the Bhardwaj Parties in relation to October 28, 2021 Transfer. Even though a pleading should not be struck merely because the pleader has failed to attach the appropriate legal label to the facts, it is my view that the essential elements of another cause of action have not been pleaded with respect to the statements in the October 28, 2021 Transfer: *Lawrence* at para. 5.

[81] Although I have doubts regarding the Defendants' ability to plead a valid cause of action against the Bhardwaj Parties in relation to the October 28, 2021 Transfer, leave to amend should be denied only in the clearest of cases and, in my view, this case is not one of them. The statements made by Mr. Bhardwaj in the October 28, 2021 Transfer, their alleged falsehood, and Mr. Bhardwaj's knowledge of their falsehood are clearly raised in the Third Party Claim. While all the essential elements of a valid cause of action have not been pleaded, I am not satisfied that it is impossible for the Defendants to cure the deficiencies in the pleading by appropriate amendments and by alleging further material facts that they know to be true to support the allegations.

[82] Accordingly, the Defendants' claims related to the enforcement proceedings and the October 28, 2021 Transfer are struck, but leave to amend is granted with respect to claims related to the October 28, 2021 Transfer. However, any such claims must be pleaded in a manner that complies with the principles set out in paragraphs 48-51 above with respect to claims against the lawyer of an opposing party.

G. CONCLUSION

[83] The motion is granted. The Third Party Claim is struck as against the Bhardwaj Parties. Leave to amend is granted only with respect to claims related to the October 28, 2021 Transfer. However, any such claims must be pleaded in a manner that complies with the principles set out in paragraphs 48-51 above with respect to claims against the lawyer of an opposing party. Further, the Defendants shall ensure that all of the essential elements of any cause of action are sufficiently pleaded and, in accordance with Rule 25.06(8) of the *Rules of Civil Procedure*, full particulars must be pleaded if one of the elements of a cause of action includes intent or malice.

[84] The Defendants are ordered to deliver an Amended Amended Third Party Claim that complies with this decision within 30 days of the date of this decision.

[85] If costs cannot be agreed upon, the Bhardwaj Parties shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, by April 8, 2024. The Defendants shall deliver their responding submissions (with the same page limit) by April 22, 2024. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

Vermette J.

Date: March 25, 2024