

- [5] The Plaintiffs claim general damages of \$1,200,000 “for breach of contract, values of properties sold under value.”
- [6] They also seek \$3,800,000 for pain and suffering and \$50,000 for “the value of the belongings that the defendants threw outside the properties”.
- [7] The Statement of Claim alleges that the Plaintiffs were the co-owners of two properties, one in Toronto and one in Richmond Hill.
- [8] The Statement of Claim identifies the Defendant Moneybrokers as “the mortgage lender who lent the money to the Plaintiffs for these two properties”.
- [9] Mr. Walman is identified as “the lawyer who represented the Lenders in the lending phase and the power of sale of the properties under the power of sale”. The Statement of Claim goes on to allege that Mr. Walman “is a controlling mind of the co-defendant Moneybrokers.ca”. No particulars of this allegation are provided.
- [10] The facts set out in the Statement of Claim allege that the Plaintiffs owned the two properties, and that both properties were financed through the Defendant Moneybrokers.
- [11] The Statement of Claim alleges that Mr. Walman “advised the Plaintiffs at the time of signing the two mortgages while representing the lenders at the same time”. Again, no particulars of the alleged advice are provided, nor is there any allegation that the advice provided was negligent or improper.
- [12] Mr. Walman is alleged to have “manipulated the Plaintiffs by pretending that he was goanna (sic) do the financing, but intentionally he was playing games to set the Plaintiffs up and end up taking their properties”.
- [13] The Statement of Claim also alleges that the Plaintiffs called another lender for mortgage financing. That lender sent an appraiser to appraise the property, but “Walman intimidated the appraiser, he scared him off, and refused him access to the property.” Again, no dates or particulars are given.
- [14] The Statement of Claim alleges that Mr. Walman “showed cruelty on us in the process of foreclosing the Plaintiffs’ properties. He cared less about the Plaintiffs’ well being instead of himself financially”.
- [15] The Statement of Claim alleges that the Plaintiffs called Mr. Walman “to do the financing so that they can pay the mortgage arrears they owed Moneybroker.ca, he agreed, and then later refused to do it”. There are no particulars regarding the date of the alleged agreement, or any of its terms.
- [16] The Plaintiffs allege that Mr. Walman “sold the properties at discounts to friends”, and that he failed to provide the Plaintiffs with an accounting of the sale of their properties.

[17] Finally, the Statement of Claim alleges that the Plaintiffs had “significant equity” in the properties and that Moneybrokers sold the properties “for a value that is less than market value”, and that the Plaintiffs assert “that the sale was improvident and as such the equity which was went missing (sic) or to other parties must be returned to the Plaintiffs.”

[18] In addition, the Statement of Claim alleges that Mr. Walman’s actions are “crimes”, that he “demonstrated intent to commit malice aforethought...by stealing the equity...thereby violating human rights as well”. The Statement of Claim also alleges that Mr. Walman and Moneybrokers “intentionally violated our *Charter* rights” and conducted themselves “unethically and criminally”.

Motion to Strike a Statement of Claim

[19] Rule 21.01 (1)(b) provides:

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

...

(b) under clause (1) (b).

[20] The test to be applied under Rule 21.01(1)(b) on a motion to strike a pleading on the ground that it discloses no reasonable cause of action is well-settled:

- The court must accept the facts alleged in the pleading as proven, unless they are patently ridiculous, or incapable of proof;
- It must be “plain and obvious” that the claim cannot succeed – the pleading must have a “radical defect” before the party will be driven from the judgment seat;
- The pleading should be read generously, with allowance for inadequacies due to drafting deficiencies;
- While 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;
- It is important to note Rule 21.01(2)(b), which states that no evidence is admissible on a motion to strike under Rule 21.01(1)(b);

- While evidence is not admissible, documents referred to and relied on in the pleading are not evidence precluded by Rule 21.01 but are, in effect, incorporated into the pleading.

[21] See for example: *Kraik v. Ungar*, 2020 ONSC 7221, at paras. 14 and 15, and cases cited therein; *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, at paras. 36- 41 and cases cited therein. *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, at paras. 30-31.

[22] “Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial”: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17.

[23] In *Knight*, at para. 19, the Supreme Court stated that the power to strike out claims that have no reasonable prospect of success “is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.”

[24] While the pleading must be read generously in favour of the Plaintiff, the minimum requirements must be present. The court cannot draft the Statement of Claim for the Plaintiff. If a material fact necessary for a cause of action is omitted, the Statement of Claim is bad and the remedy is a motion to strike the pleading, not a motion for particulars: *Coote v. Ontario Human Rights Commission*, 2009 CanLII 55130 (ON SC), at para. 40.

[25] In a passage particularly apt for the present case, the Supreme Court stated in the *Knight* case, at para. 22:

It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

Analysis

[26] While the Statement of Claim is poorly drafted, the underlying claim appears to be based on breach of contract and improvident sale. The Plaintiffs were property owners who defaulted on their mortgage with Moneybrokers, and Moneybrokers, as the mortgagee, took possession of the property and sold it under a power of sale. Mr. Walman is alleged to have acted as the lawyer for Moneybrokers in the power of sale proceedings.

- [27] To the extent that the Plaintiffs' claim is against Mr. Walman as the lawyer for the mortgagee, the Statement of Claim discloses no cause of action. A lawyer owes a duty of care to his client and owes no duty of care to opposing parties in litigation or commercial matters. As Moneybroker's lawyer, Mr. Walman owed a duty of care to Moneybrokers, but not to the borrower: *Diamond Contracting Ltd. v. MacDermid*, 2006 CanLII 24444 (ON CA), at para. 3; *9383859 Canada Ltd. v. Saeed*, 2020 ONSC 4883, at para. 29; *2116656 Ontario Inc. v. Grant and LLF Lawyers LLP*, 2019 ONSC 114, at paras. 32-37; *Hedary Hamilton PC v. Dil Muhammad, et al.*, 2013 ONSC 4938, at para. 25; *Ahmad v. Mehta*, 2024 ONSC 3778, at para. 4.
- [28] The Plaintiffs attempt to circumvent this limit by alleging that Mr. Walman is "a controlling mind" of Moneybrokers, but no particulars to explain this allegation are provided. While 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*, at para. 31. The assertion that Mr. Walman is a controlling mind of Moneybrokers is a bald conclusory statement unsupported by any particulars or material facts.
- [29] In *Tran v. University of Western Ontario*, 2015 ONCA 295, the Court of Appeal stated, at para. 17:
- While the scope of individual liability as distinct from corporate liability is not always clear, it is undisputed that when a plaintiff purports to sue both a corporation and individuals within that corporation (whether officers, directors or employees), the plaintiff must plead sufficient particulars which disclose a basis for attaching liability to the individuals in their personal capacities [citations omitted].
- [30] The Statement of Claim fails to distinguish the acts of Mr. Walman, acting as the lawyer for the lender, from the lender, or to provide any particulars as to how Mr. Walman is a "controlling mind" of his client. Accordingly, the Statement of Claim, to the extent that it pleads against Mr. Walman for the alleged acts of the corporate co-defendant, should be struck.
- [31] The Statement of Claim indicates that the mortgage contract was between the Plaintiffs and Moneybrokers. There is no allegation that Mr. Walman was a party to the mortgage contract. To the extent that the Statement of Claim alleges an improvident sale and damages resulting therefrom, the corporate co-defendant is the only proper Defendant in this action. There is no cause of action against Moneybrokers' lawyer, who was not a party to the mortgage contract and who owed no duty of care to the Plaintiffs.
- [32] The allegations that Mr. Walman had, at some unspecified time, agreed to refinance the property and then changed his mind are, again, too amorphous to ground a cause of action. No date and no particulars of the agreed terms are set out.

- [33] A plaintiff is, at a minimum, required to plead the basic elements of a recognized cause of action. To the extent that the Plaintiffs' cause of action is founded on breach of contract, the Statement of Claim discloses a complete absence of material facts and must be struck out against Mr. Walman.
- [34] To the extent that the Statement of Claim alleges that Mr. Walman violated the Plaintiffs' *Charter* rights, it must be struck out. Section 32 of the *Charter* of Rights and Freedoms specifies that the *Charter* applies to the legislative, executive and administrative branches of government. It does not apply to private disputes and does not apply to Mr. Walman in this case. The allegations set out in the Statement of Claim do not involve any exercise of governmental action that could invoke the *Charter* rights relied on by the Plaintiffs: *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 SCR 573, at para. 34; *Pugliese v. Chartwell*, 2024 ONSC 1135, at para. 118.
- [35] Mr. Walman also argues that the Statement of Claim is replete with "scandalous, frivolous and vexatious" allegations that should be struck out under Rule 25.11, including the allegation that Mr. Walman "manipulated" the Plaintiffs, was "playing games", "showed cruelty", "set the Plaintiffs up", "intent to commit malice aforethought", "intimidated" and "scared off" the appraiser and committed crimes and human rights violations to "satisfy his need for greed".
- [36] Mr. LaFramboise, counsel for the Plaintiffs, acknowledged that many of these statements were "inflammatory", but explained that his clients insisted that they be included in the Statement of Claim.
- [37] Given my decision with respect to Rule 21.01, it is not necessary for me to parse each paragraph and strike those specific parts of the pleadings that offend Rule 25.11.
- [38] Notwithstanding Rule 21.01(2)(b), which provides that no evidence is admissible on a motion to strike under Rule 21.01(1)(b), the Plaintiffs each filed an affidavit to support their position. Given Rule 21.01(2)(b), I have not considered these affidavits in this decision.
- [39] Although documents referred to and relied on in the pleading are not evidence precluded by Rule 21.01, no such documents are referred to in the Plaintiffs' Statement of Claim and no such documents were produced by the Plaintiffs on this motion.

Should Leave to Amend be Granted?

- [40] The Plaintiffs take the position that, if I am persuaded to strike the Statement of Claim against Mr. Walman, leave to amend the Statement of Claim should be granted.
- [41] I am not inclined to do so for the following reasons.

- [42] The Defendant Walman served this motion to strike on the Plaintiffs on January 31, 2023. The Notice of Motion set out in great detail Mr. Walman's position with respect to the deficiencies in the Statement of Claim.
- [43] The Defendant served his factum in support of the motion to strike on the Plaintiffs on May 5, 2023. The factum provided even greater detail with respect to the drafting deficiencies in the Statement of Claim.
- [44] Due to the backlog of scheduling long motions after COVID, this motion was not heard until June 24, 2024 – almost 17 months after the Notice of Motion was served and more than a year after the factum was served.
- [45] In *1806700 Ontario Inc. v. Khan*, 2018 ONSC 6364, I stated, at para. 45:

One of the risks that a defendant takes in bringing a motion to strike before pleadings are closed is that it may provide the plaintiff with a blueprint on how to redraft or amend the statement of claim to cure the defects identified in the motion to strike. If the plaintiff amends the statement of claim it may well render the motion to strike moot.

- [46] The Plaintiffs have already had more than a year to amend their Statement of Claim to address the deficiencies identified by Mr. Walman but have failed to do so. Given the deficiencies identified, and the fact that the Plaintiffs' claim against Moneybrokers remains extant, there is no purpose to giving the Plaintiffs additional time to amend the claim against Mr. Walman. If there is a cause of action for improvident sale, it is against the remaining Defendant, Moneybroker, and the Plaintiff remains free to pursue that claim.

Conclusion

- [47] This Court Orders that the Statement of Claim is struck as against the Defendant Terry Walman and the action is dismissed against Terry Walman.
- [48] Costs payable by the Plaintiffs, jointly and severally, to the Defendant Terry Walman, fixed at \$10,000 on a partial indemnity basis.

Justice R.E. Charney

CITATION: Nnane v. Moneybroker.ca, 2024 ONSC 3993

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GEORGE NNANE and JOLENE NNANE

Plaintiffs

– and –

MONEYBROKER.CA and TERRY WALMAN

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: July 15, 2024