Court of King's Bench of Alberta

Citation: Woodbridge Homes Inc. v Palmer, 2023 ABKB 649

Date: 20231117
Docket: 1803 12916
Registry: Edmonton

Between:

Woodbridge Homes Inc., Woodhaven Developments Inc., Woodhaven West Developments Inc., and Texas Industries Ltd.

Plaintiffs

- and -

Caroline Palmer, Municipal District of Bonnyville No. 87, ABC Corporation, Kran Construction Ltd., SE Design and Consulting (2009) Inc., XYZ Corporation and John Doe

Defendants

Reasons for Decision of the Honourable Justice B.H. Aloneissi

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I. Introduction

[1] The Plaintiffs are a group of corporations involved in the development of lands located in the Hamlet of Ardmore (the "Ardmore Lands"), which is located in the Municipal District of Bonnyville (the "MD"). I will refer to the Plaintiffs collectively as Woodhaven.

[2] On April 4, 2011, Woodhaven applied for subdivision of the Ardmore Lands. The MD approved the application subject to two conditions: Woodhaven would enter into a Development

Agreement and Woodhaven would submit an Engineered Stormwater Management Plan (the "Subdivision Approval").

[3] Over the next five years, Woodhaven and the MD negotiated over the exact requirements of the conditions but were not able to reach agreement. As a result, the conditions were never fulfilled, and, on July 12, 2016, the MD refused to further extend the subdivision approval.

[4] On June 26, 2018, Woodhaven initiated this litigation, suing the MD, the individual Defendant Caroline Palmer, and the corporate Defendants over misrepresentations and other alleged misconduct that occurred during the negotiations between the MD and Woodhaven, as well as further allegations of trespass to the Ardmore Lands during construction work and the unlawful diversion of water onto the Ardmore Lands.

[5] In this application, the MD and Ms. Palmer ask for summary dismissal of the claims against them according to r 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010. For the reasons that follow, I am satisfied that summary disposition is a fair and just procedure in this case, and I dismiss all claims against the MD and Ms. Palmer.

II. Issues

[6] To decide this application, I must determine the following issues:

1. Did Woodhaven and the MD enter into a binding agreement at any point during the negotiations? If so, did the MD breach that agreement?
2. Did Ms. Palmer make an actionable misrepresentation in 2016, 2017, or 2018?
3. Did Ms. Palmer commit misfeasance in public office against Woodhaven?
4. Did Kran Construction Ltd. trespass onto the Ardmore Lands? If so, is the MD liable for the trespass?
5. Did the MD unlawfully divert water onto the Ardmore Lands?

[7] Additionally, for each of the causes of action alleged by Woodhaven, I must consider whether the claim was brought within the applicable limitations period. I must also consider the overarching question of whether these issues are appropriate for summary determination on the record before me.

[8] Finally, both parties raise evidentiary issues with respect to the other side's affidavit in their written arguments. The Applicants argue that Mr. McPeak's affidavit provides improper opinions and legal conclusions. Woodhaven argues that Ms. Palmer improperly deposes to events she did not personally witness. Further, Woodhaven argues that this application is premature, because there may be better evidence at trial. I will begin by addressing these three preliminary issues.

III. Preliminary Issues

A. Mr. McPeak's Affidavit

[9] The Applicants, the MD and Ms. Palmer, argue that Mr. McPeak's Affidavit contains opinions and conclusions on matters that must be decided by the Court. They rely on r 3.68(4)(a) of the *Alberta Rules of Court*, which provides:

> 3.68(4) The Court may
>
> (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

[10] The Applicants have asked me to bear this rule in mind when considering the contents of Mr. McPeak's Affidavit.

[11] Rule 3.68(4)(a) allows the Court to strike out anything in an affidavit that is irrelevant or improperly included in the affidavit: ***Questor Technology Inc v Stagg***, 2021 ABQB 636; ***Abel v Modi,*** 2020 ABQB 530 at paras 38-39***; Orr v Alook***, 2019 ABQB 713. I agree with the Applicants that no party is entitled to give legal argument as evidence or to provide legal conclusions on the issues that are in front of the Court, which is more properly the role of the Court deciding the application: ***Alberta (Human Rights Commission) v Alberta Blue Cross Plan*** (1983), 48 AR 192 (CA).

[12] I will bear this in mind as I evaluate Mr. McPeak's evidence when determining the substantive issues on this application.

B. Ms. Palmer's Affidavit

[13] Woodhaven argues that Ms. Palmer's Affidavit improperly deposes to events that she did not personally witness. In making this argument, Woodhaven relies on r 13.18(3), which requires an affidavit in support of an application that may dispose of all or part of a claim to be sworn on the basis of personal knowledge. In oral argument, counsel for Woodhaven explained that Ms. Palmer did not have any direct knowledge of Woodhaven's ability to meet the conditions proposed by the MD.

[14] In ***Sturgeon Lake Indian Band v Canada (AG)***, 2017 ABCA 365 at para 33, leave to appeal to SCC refused, 37899 (July 5, 2018) [***Sturgeon Lake***], the Alberta Court of Appeal held that there must be some flexibility regarding hearsay evidence on summary disposition applications. Otherwise, it would be too difficult to resolve historical claims or claims involving large organizations. Therefore, the parties to an application for summary disposition are entitled to rely on affidavits where the information is obtained from reviewing relevant and reliable documents, so long as the underling source is reliable, and the documents would be admissible at trial: *ibid*.

[15] This conclusion has been affirmed in subsequent Court of Appeal decisions: see ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Jones***] at para 38; ***Saito v Lester Estate***, 2021 ABCA 179 at para 12.

[16] In this case, Woodhaven challenges Ms. Palmer's knowledge of the conditions proposed by the MD and, specifically, if they were reasonable in the circumstances. Woodhaven specifically complains that Ms. Palmer said her July 13, 2016 e-mail, listing the MD's subdivision requirements, was a cut and paste from something else.

[17] Simply put, Woodhaven's argument confuses two different things. Ms. Palmer is not entitled to give evidence in support of this application based on hearsay unless she is relying on relevant and reliable documents that could be admitted at trial. However, it is an entirely different thing for her to base her e-mail off another document, since the e-mail was not prepared as evidence for this application.

[18] Similarly, Woodhaven complains that Ms. Palmer did not have first-hand knowledge of the engineering requirements behind the MD's conditions and whether Woodhaven could meet them. However, Ms. Palmer has not given evidence about whether Woodhaven could meet the conditions. Accordingly, she has not provided any hearsay evidence on this issue, so any complaint about her lack of understanding of the engineering requirements goes to the weight rather than the admissibility of her evidence.

[19] As I review Ms. Palmer's evidence, I will bear in mind the admissibility of the documents she relies on. I will also consider the source of the information she relied on when considering the weight of her evidence. However, there is no issue with the admissibility of her evidence on the grounds identified by Woodhaven.

C. Premature Application

[20] Woodhaven argues that this application is premature, because questioning is not complete, and there may be better evidence at trial.

[21] The law is clear that an application under r 7.3 may occur "before or at any time during the pretrial process": ***Weir-Jones*** at para 19. With respect to the adequacy of the evidentiary record, the question is whether the Court is able to make the necessary findings of fact, apply the law to the facts, and achieve a just result: *ibid* at para 21.

[22] Generally speaking, an application to access part of the trial process before summary disposition should be dismissed, unless the requesting party can demonstrate unreasonable litigation prejudice: ***Weir-Jones*** at paras 163-65, Wakeling JA, concurring; see also ***Sobeys Capital Inc v Whitecourt Shopping Centre (GP) Ltd***, 2019 ABCA 367 at para 25; ***McDonald v Sproule Management GP Ltd***, 2018 ABCA 295.

[23] On its own, the desire to question does not show prejudice. Instead, the party asking to question must show that it is necessary to fairly answer the other party's allegations: ***Weir-Jones*** at para 166. Similarly, a party cannot resist summary disposition by making a general allegation that more helpful evidence could surface at trial or through further litigation steps: ***Stony Tribal Council v Canada***, 2017 ABCA 432 at para 89, Wakeling JA, concurring; ***Poliquin v Devon Canada Corp***, 2009 ABCA 216 at para 70; ***Canada (AG) v Lameman***, 2008 SCC 14 at para 19. Instead, the party resisting summary disposition has an obligation to put their best foot forward: ***Weir-Jones*** at para 37.

[24] Woodhaven has not pointed to any specific evidence that is likely to arise in questioning or at trial, instead referring generally to the nuances of the agreements between the parties and the credibility of Ms. Palmer. Woodhaven also identified the allegation of bad faith as a reason for wanting to further question Ms. Palmer.

[25] In the lead up to this application, the parties have exchanged affidavits of records. Woodhaven has questioned Ms. Palmer on her affidavit. Woodhaven was also permitted to question Ms. Palmer and a corporate representative of the MD under r 6.8 prior to this application, as well as the corporate representatives of the other Defendants.

[26] In the circumstances, Woodhaven has had significant opportunity to question Ms. Palmer and has failed to give any specific reason that further litigation steps are necessary to resolve the underlying claims. The law is clear that a general allegation that there could be more helpful evidence is not enough. Accordingly, I conclude that this application is not premature.

IV. Analysis

A. Summary Dismissal

[27] Rule 7.3 of the *Alberta Rules of Court* provides for summary dismissal:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

[28] Under r 7.3(3)(a), the Court may dismiss one or more claims in the action if the application is successful.

[29] The leading case on summary disposition is ***Weir-Jones***. There, the Court of Appeal explained that three requirements must be met to grant a summary determination (at para 21):

> To enable “fair and just summary determination” the record before the court and the issues must:
>
> (a) *Allow the judge to make the necessary findings of fact*. An important thing to observe about this part of the test is that it assumes the summary judgment judge (or Master) is able to make findings of fact. The judge is entitled, where possible, to make those findings from the record and draw the necessary inferences. The parameters on fact finding are discussed, *infra*, para. 38. Summary judgment is not limited to cases where the facts are not in dispute. If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a "genuine issue requiring a trial". This issue is discussed, *infra*, paras. 27ff.
>
> (b) *Allow the judge to apply the law to the facts*. There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment: *Tottrup v Clearwater (Municipal District No. 99)*, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237, 401 AR 88. If the record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law. Cases like this one, based on the expiration of the limitation period, often fall into this category, as do those that turn on the interpretation of documents.
>
> (c) Assuming the first two parts of the test are met, *summary disposition must be a proportionate, more expeditious and less expensive means to achieve a just result*. This third criterion is a final check, to ensure that the use of a summary judgment procedure (rather than a trial) will not cause any procedural or substantive injustice to either party. Summary judgment will almost always be "more expeditious and less expensive" than a trial. In the end, if the judge finds that summary adjudication might be possible, but might not "achieve a just result" there is a discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute when possible.

[30] The party moving for summary dismissal must prove the factual elements of its case on a balance of probabilities and show there is no genuine issue requiring a trial: *ibid* at para 32. The party resisting summary dismissal need only demonstrate that the record, the facts, or the law preclude a fair disposition: *ibid*.

B. Contract Claim

[31] Woodhaven alleges that the MD breached a contractual obligation to continue to negotiate the subdivision approval. At the oral hearing and in their written arguments, neither party addressed the fact that this claim does not appear in the Amended Statement of Claim even on a generous reading of the pleading.

[32] It is generally inappropriate to determine a claim that has not been pleaded: ***Lloyd Gardens Inc v Chohan***, 2019 ABCA 390 at para 26. However, I am of the view that it is nevertheless appropriate to decide the contract claim in the circumstances of this case. The parties posited affidavit evidence in support of their position, and they have both provided argument on the issue. Further, for the reasons that follow, I conclude that the Applicants have proved there is no merit to this claim. So, there is no prejudice to them in deciding the issue.

[33] The Applicants argue that there is no evidence of a signed, written contract between Woodhaven and the MD. The Applicants concede that Mr. McPeak paid the municipality for servicing costs, but they argue he has received the contemplated servicing in return. Beyond that, there is no evidence of any intention to create legal relations between the parties.

[34] Woodhaven argues that a contract was created when the MD promised to complete the 52nd Street construction at its own cost, and Woodhaven reciprocated with a service payment of $158,287.34. Woodhaven argues that the agreement required the MD to participate in ongoing good faith negotiations, which it did not do. In oral argument, counsel for Woodhaven explained that the MD failed to move off its intractable and unreasonable positions about the terms of the Development Agreement and that it had an obligation to make sure Woodhaven's payment did not go to waste.

[35] It is trite law that to form a contract there must be an offer, acceptance, and *consensus ad idem*. For an exchange of promises to be legally binding, the parties must intend to create legal relations: John D. McCamus, *Law of Contracts*, 3d ed (Toronto: Irwin Law, 2020) at 118. In this case, the question is whether the parties entered into an agreement requiring the MD to continue to negotiate in good faith with Mr. McPeak.

[36] Ms. Palmer's affidavit evidence is that the MD provided Woodhaven with a draft form of Development Agreement on October 16, 2013. That draft Agreement required Woodhaven to pay for the construction and installation of water and sewer mains, connections, and related appurtenances, among other things. On January 17, 2014, the MD advised Woodhaven that the cost for the MD to provide water and sewer services would be $225,000.00.

[37] Ms. Palmer further deposed that, on March 28, 2014, the MD entered into a contract with Kran Construction Ltd. ("Kran") to supply and install underground water and sewer services to lands in the municipality, including the Ardmore Lands. On May 9, 2014, the MD provided Woodhaven's counsel with a revised draft Development Agreement, which included a requirement for Woodhaven to pay for the cost of water and sewer connections, now estimated at $175,906.50. The MD's counsel advised Woodhaven's counsel that if Woodhaven executed the

proposed agreement, then the MD would include the 20 lots on the Ardmore Lands within the scope of the contract with Kran. Otherwise, the lots would need to be serviced independently.

[38] On June 2, 2014, Woodhaven made a counterproposal to the MD regarding water and sewer services. On June 11, 2014, Council for the MD resolved that Woodhaven must pay the full cost of providing water and sewer services to the 20 lots by June 18, 2014, or the services would only be stubbed out for future hookups. On June 18, 2014, Woodhaven paid the MD $185,046.75 for the servicing. On December 31, 2014, the MD gave Woodhaven a partial refund of $26,759.41, since the cost of the work was less than estimated. In 2015, the parties continued to negotiate the proposed Development Agreement.

[39] Mr. McPeak's affidavit evidence is that he met with representatives of the MD in May 2013, and they agreed the MD would be responsible for everything to do with water and sewer lines. They also agreed that Woodhaven would pay for the tie-ins to the 20 proposed lots on the Ardmore Lands. Further, the parties agreed that the MD would continue to negotiate in good faith. Mr. McPeak deposes that, on June 18, 2014, he provided the MD with $185,046.75 for the services to the lots on the Ardmore Lands. He later received $26,759.41 back from the MD.

[40] Looking at the record as a whole, the only evidence that the parties agreed the MD would continue to negotiate in good faith is Mr. McPeak's statement to that effect. In the circumstances, this evidence is insufficient to raise a triable issue.

[41] The law is clear that a bald allegation or a self-serving affidavit is not enough to raise a triable issue on an application for summary disposition: ***Guarantee Co of North America v Gordon Capital Corp***, [1999] 3 SCR 423 at para 31; ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 113, Slatter JA, dissenting; ***Sturgeon Lake*** at para 40; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 46; ***Parks v McAvoy***, 2023 ABCA 211 at para 29.

[42] In this case, Mr. McPeak merely asserts that the parties agreed that the MD would continue to negotiate in good faith. He does not provide any details of how they reached this agreement or what exactly was agreed to. There is no other evidence on the record that supports an agreement that the MD would continue to negotiate with Woodhaven. A bald allegation, on its own, does not raise a triable issue.

[43] Woodhaven would seem to argue that the parties' negotiations created binding legal obligations on the MD. However, the evidence of both sides is that no Development Agreement was ever entered into, and the record shows continued negotiations between the parties until 2016, when the MD decided not to further extend the subdivision approval. In other words, the parties never reached a final agreement. Suffice to say that negotiations alone do not create enforceable legal terms, absent the necessary legal elements for a binding contract.

[44] Taking a different approach, Woodhaven also argues that the MD is in breach, because the amount paid for servicing never benefitted the Ardmore Lands. However, the Council Resolution on June 11, 2014 states that the MD was willing to accept payment from Woodhaven for providing water and sewer services for 20 lots according to the schedule in the contract with Kran. Mr. McPeak's correspondence on behalf of Woodhaven, which he sent with the requested payment, states that the payment was for the cost of services. Both parties were *ad idem* about what the payment was for, and, on the record before me, both parties agree that Kran installed the servicing to the 20 lots. Therefore, the MD met its obligations under the parties' agreement.

[45] On a balance of probabilities, I conclude that the parties did not enter into an agreement to continue to negotiate in good faith. There is no triable issue on Woodhaven's contract claim.

C. Misrepresentation

[46] Woodhaven alleges that the Applicants are liable for three misrepresentations. The first alleged misrepresentation occurred in 2016, when Ms. Palmer recommended to the Municipal Planning Commission (the "MPC") that they not approve the requested extension of the subdivision application, because Mr. McPeak refused to sign the MD's proposed Development Agreement (the "2016 Representation").

[47] Ms. Palmer then e-mailed Woodhaven, saying that it would have to meet the following conditions to obtain a subdivision:

> a. Apply for subdivision.
>
> b. Enter into a Development Agreement which is to include the following:
>
> > i. $50,000 security for the grading plan (security deposit required may change as future costs fluctuate)
> >
> > ii. Storm pond costs of $33,563.15 per ha
> >
> > iii. Servicing fees for water is $3600 per lot and for sewer $2000 per lot
> >
> > iv. $82,500 that is outstanding from the upsizing of the waterline in the
> >
> > late 70's shall be paid.
>
> c. Again, the clean-up you enquire about on the site shall be discussed with yourself and Darcy Zelisko, Director of Transportation and Utilities
>
> (the "Subdivision Conditions").

[48] The second alleged misrepresentation occurred in March 2017, after the MD had decided not to extend the subdivision approval (the "2017 Representation"). Ms. Palmer declined a request to meet with Woodhaven's agent, and, in doing so, she repeated the Subdivision Conditions.

[49] Finally, the third alleged misrepresentation occurred on March 2018, when Ms. Palmer made a presentation to the MPC repeating the same Subdivision Conditions (the "2018 Representation").

[50] For the purposes of this application, the Applicants accept that events occurred as alleged by Woodhaven. However, the Applicants argue that Woodhaven has failed to make out any of the requirements for either an intentional or a negligent misrepresentation. The Applicants provide a number of arguments in support of this position.

1. The Representations are statements of future intention, which are not actionable.
2. There is no evidence the statements are false. Instead, they are consistent with prior representations of the requirements.
3. The 2016 and 2018 Representations were made to the MPC and not Woodhaven.

4. There is no evidence of reasonable reliance. There is no evidence Woodhaven changed its position. It is also unreasonable not to reapply.
5. There is no evidence of damages. The only loss Woodhaven refers to is the payment for servicing, which was made before any of the three Representations were made.

[51] Woodhaven argues that the Representations mischaracterize the past understanding between Woodhaven and the MD. Further, Woodhaven argues that it relied on the Representations by not applying for a subdivision application that was doomed to fail. Woodhaven acknowledges that it knew the Representations were false but relied on them anyway, because they were made by a public figure with authority.

[52] To make out a claim for intentional misrepresentation, the Plaintiff must prove:

1. The Defendant made a false representation;
2. The Defendant had some level of knowledge that the representation was false, whether true knowledge or recklessness;
3. The false representation caused the Plaintiff to act; and
4. The Plaintiff's action resulted in a loss.

(***Bruno Application and Furniture, Inc v Hryniak***, 2014 SCC 8 at para 21).

[53] Similarly, for a negligent misrepresentation, the Plaintiff must prove:

1. There is a duty of care based on a special relationship between the Plaintiff and the Defendant;
2. The Defendant's representation was untrue, inaccurate, or misleading;
3. The Defendant acted negligently in making the representation;
4. The Plaintiff reasonably relied on the representation; and
5. The reliance was to the Plaintiff's detriment in that sense that loss resulted

(***Queen v Cognos Inc***, [1993] 1 SCR 87 at 110; ***Giustini v Workman***, 2021 ABCA 65 at para 36).

[54] Considering the record before me, I agree with the Applicants that there is no triable issue about whether any of the alleged misrepresentations were false.

[55] In the 2016 Representation, Ms. Palmer told the MPC that Mr. McPeak refused to sign the MD's draft Development Agreement. The evidence of both sides is that no Development Agreement was ever signed. Moreover, the evidence demonstrates that Mr. McPeak repeatedly disagreed with the terms in the draft Development Agreements sent over by the municipality. Notably, he continues to contest the MD's proposed terms in this action and in his affidavit. I do not think that on the record before me there is a triable issue about whether Mr. McPeak refused to sign the draft Development Agreement.

[56] Subsequently, as part of the 2016 Representation, Ms. Palmer e-mailed Mr. McPeak and outlined the Subdivision Conditions he would need to meet for a future subdivision approval.

These were the same conditions that she repeated in the 2017 Representation and the 2018 Representation.

[57] Contrary to Woodhaven's submissions, there is no evidence that those conditions no longer applied, nor were the conditions false, inaccurate, or misleading.

[58] The evidence shows that the Subdivision Conditions accurately represented the MD's position on what was required for a subdivision approval. Most significantly, the same conditions appeared in previous draft Development Agreements.

- The $82,800 oversizing cost was a condition of the 2008 subdivision approval. It also appeared as a condition in every one of the draft Development Agreements proposed under the 2011 subdivision approval.
- The requirement for a $50,000 security payment appeared in the 2014 draft Development Agreement and the 2015 draft Development Agreement.
- The storm pond costs first appeared in the 2015 draft Development Agreement, replacing the previous requirement for a stormwater management plan, which was a condition of the subdivision approval.
- The requirement that Woodhaven pay water and sewer connection fees appeared in the 2013 draft Development Agreement, the 2014 draft Development Agreement, and the 2015 draft Development Agreement.

[59] Many of Woodhaven's arguments deal with the practicalities of the MD's proposed Subdivision Conditions and whether they are reasonable. However, that is not the content of Ms. Palmer's statements. She does not make any representation about the purpose of the Subdivision Conditions or how they were arrived at. Instead, she represents the Subdivision Conditions as the position of the MD, which the record shows to be accurate.

[60] Woodhaven also complains that Ms. Palmer's representations do not accurately reflect previous negotiations, according to which Woodhaven would pay the oversizing cost on a per lot basis. I agree with Woodhaven that in each previous draft Development Agreement the $82,800 oversizing cost was payable on a per lot basis as each lot in the development sold. However, since Ms. Palmer's representations do not include anything about how the amount would be paid, I do not think there is a genuine triable issue on this point.

[61] Even if I am wrong, I conclude that Woodhaven's misrepresentation claims are nevertheless doomed to fail for two reasons. First, as the Applicants point out, Ms. Palmer's description of the Subdivision Conditions refers to the conditions that would need to be met in the future. Statements of future intention are generally not actionable as misrepresentations: ***Motkoski Holdings Ltd v Yellowhead (County of)***, 2010 ABCA 72 at paras 43-44; ***Keyland Development Corp v Rocky View (Municipal District No 44)***, 2016 ABQB 735 at para 133; ***Neufeld v Mountain View (County of)***, 2016 ABQB 676 at para 153 [***Neufeld***].

[62] Second, I do not think there is a triable issue about whether Woodhaven reasonably relied on Ms. Palmer's representations. I agree with the Applicants that there is nothing on the record to show that Mr. McPeak changed his position in any way. Furthermore, Mr. McPeak states in his affidavit that he is an experienced developer. As such, he would have understood that the final decision about the subdivision approval would be made by the MPC and not Ms. Palmer. So, it was not reasonable for him to rely on her representations as opposed to the decisions made by

the MPC. Therefore, I find there is no triable issue on whether Mr. McPeak reasonably relied on Ms. Palmer's representations.

[63] The Applicants raise other potential issues with Woodhaven's claim for misrepresentation, including the question of whether this is a collateral attack on the decisions of the MPC and whether the Applicants are protected from liability by the provisions of the *Municipal Government Act*, RSA 2000, c M-26. In light of the above, I do not think it is necessary for me to consider these issues.

[64] I conclude that, on a balance of probabilities, the 2016, 2017, and 2018 Representations were not false. Even if they were, they are statements of future intention and are therefore not actionable. Moreover, on a balance of probabilities, Woodhaven did not reasonably rely on any of the Representations. I find that there is no triable issue on Woodhaven's misrepresentation claim.

D. Negligence

[65] Woodhaven relies on the duty of care set out in ***Build-A-Vest Structures Inc v Red Deer (City of)***, 2006 ABQB 869 [***Build-a-Vest Structures***] to argue that the MD was negligent in implementing a planning policy. Woodhaven argues that when Council passed its resolution on June 11, 2014, the development relationship between the parties became a legislated policy. The MD's failure to implement that policy was operational negligence.

[66] The Applicants argue that a claim in simple negligence does not entitle Woodhaven to damages for pure economic loss. Alternatively, ***Build-A-Vest Structures*** was a claim in the nature of negligent misrepresentation. If this claim is of the same nature, then it fails for the reasons already discussed.

[67] In my view, this claim can be disposed of quite simply. As I have already found, there is no evidence on the record that the parties entered into a contract that governed their negotiations, aside from Mr. McPeak's bald allegation. Similarly, there is no indication in the Council Resolution that it dealt with anything other than the limited issue of water and sewer services to the 20 lots on the Ardmore Lands. In other words, there was no overarching policy governing the parties' negotiations, and, as a result, there is no evidence on the record of a policy to implement, negligently or otherwise.

[68] Without a policy to implement, the MD's actions cannot be construed as operational or, in other words, the implementation of a policy. Instead, the parties were negotiating a development agreement. The law has long recognized that entering into a development agreement is a policy decision for which a municipality is immune from liability in negligence: ***Nelson (City of)* v *Marchi***, 2021 SCC 41; ***Kamloops (City of) v Nielsen***, [1984] 2 SCR 2; ***RVB Management Ltd v Rocky Mountain House (Town of)***, 2014 ABQB 51 at para 183ff, aff'd on other grounds 2015 ABCA 188; ***Neufeld*** at para 159. Therefore, the MD is immune from liability for negligence in its actions taken to negotiate a development agreement.

[69] On a balance of probabilities, I find that Woodhaven's claim in negligence is not made out. There is no triable issue to this claim.

E. Misfeasance in Public Office

[70] Woodhaven alleges that Ms. Palmer's representations in 2016, 2017, and 2018 were a misfeasance in public office. In support of this position, Woodhaven points to Ms. Palmer's admissions that:

- She did not know some of the details of past negotiations between Woodhaven and the MD;
- She could not explain the details behind the oversizing charge and the work that had been done;
- She did not know if it was possible for Woodhaven to meet the technical requirements for the conditions in the draft Development Agreements; and
- She took the Subdivision Conditions in her July 13, 2016 e-mail from another source.

[71] Woodhaven asks the Court to draw the inference that Ms. Palmer had an extreme dislike of Mr. McPeak and wanted to make her life easier by removing him from her life.

[72] The Applicants argue that there is no evidence on the record that Ms. Palmer was acting in a deliberately unlawful way. The MD has the authority to require an applicant for subdivision approval to enter into a Development Agreement under s 655(1)(b) of the *Municipal Government Act*. The MD also has the authority to require an applicant:

- To install or pay for the installation of a public utility that is necessary to serve the subdivision (*ibid*, s 655(1)(b)(iii));
- To give security to ensure the Development Agreement is complied with (*ibid*, s 655(1)(b)(vi)); and
- To pay for all or part of an oversize improvement under a Development Agreement: *ibid*, s 651(1).

So, the Subdivision Conditions communicated by Ms. Palmer were lawful. Moreover, in each of the alleged Representations, Ms. Palmer repeated the same subdivision approval conditions that had already been communicated.

[73] There are two elements to the tort of misfeasance in public office:

1. Deliberate unlawful conduct in the exercise of a public function; and
2. Awareness that the conduct is unlawful and likely to injure the plaintiff.

(***Odhavji Estate v Woodhouse***, 2003 SCC 69 at para 32 [***Odhavji***]; ***Ontario (AG) v Clark***, 2021 SCC 18 at para 22 [***Clark***]).

[74] Typically, the unlawful conduct behind a misfeasance claim falls into one of three categories: (1) an act in excess of the public official's powers, (2) an exercise of a power for an improper purpose, or (3) a breach of a statutory duty (***Odhavji*** at para 24; ***Clark*** at para 23). The minimum requirement of subjective awareness has been described as "subjective recklessness" or "conscious disregard": ***Odhavji*** at para 25; ***Clark*** at para 23.

[75] In my view, Woodhaven has not raised a triable issue on whether Ms. Palmer was engaged in unlawful conduct. As the Applicants have pointed out, the MD has authority under

the *Municipal Government Act* to require the applicant to enter into an agreement with the municipality and to impose conditions relating to the installation of public utilities, the payment of security, and the payment of costs for oversize improvements. From this, it is clear that the MD's proposed Subdivision Conditions were permitted by the *Municipal Government Act*.

[76] Woodhaven seems to suggest that Ms. Palmer acted for an improper purpose, because her true motivation was to get Mr. McPeek out of her life. However, the record does not support this inference. As I have already discussed, the Subdivision Conditions listed in the 2016, 2017, and 2018 Representations repeat positions that had already been taken by the MD in the various draft Development Agreements, which predated Ms. Palmer taking over the file. Ms. Palmer's evidence, given on Questioning under r 6.8, was that she took these requirements from the MD's previous position on the matter.

[77] Woodhaven also relies on the fact Ms. Palmer did not know all the technical details behind the Subdivision Conditions. However, there is nothing on the record to suggest that this was part of her role. Instead, in her r 6.8 Questioning, Ms. Palmer was forthcoming about what she did and did not know, and she identified the various actors at the MD who were responsible for each aspect of the technical details. In the circumstances, I do not think that Ms. Palmer's ignorance supports an inference that she was acting in bad faith.

[78] Finally, Woodhaven relies on an e-mail from Eileen Kirby to Gary McPeak, in which Ms. Kirby describes the March 2017 MPC meeting and says that "Carolyn gave the impression that [it] was just impossible to deal with Gary McPeak". Taking into account the hearsay nature of this evidence and the remainder of the evidence about Ms. Palmer's conduct, I do not think this is enough to raise a triable issue on whether Ms. Palmer acted for an improper purpose.

[79] On a balance of probabilities, I find that Ms. Palmer did not engage in misfeasance in public office. There is no triable issue to this claim.

F. Trespass

[80] The parties agree that, in 2014, the MD hired Kran for the supply and installation of water and sewer services to lands in the MD, including the Ardmore Lands, as well as the construction and installation of stormwater infrastructure in the area of 52nd Street. Woodhaven alleges that, as part of that construction, Kran pushed fill and other debris onto the Ardmore Lands, which is still there. Woodhaven argues that this is a trespass for which the MD is vicariously liable.

[81] The Applicants argue that Woodhaven's claim for trespass is limitations barred, because the events occurred more than two years before the Statement of Claim was filed. The Applicants also argue that Woodhaven has not provided adequate evidence that the trespass is continuing to this day. Further, the municipality did not in any way authorize, request, or direct Kran to construct any ditches on or adjacent to the Ardmore Lands.

[82] On the record before me, I do not need to decide if Kran trespassed onto the Ardmore Lands or if the limitations clock has run on any trespass, whether continuing or otherwise. It is possible to resolve this claim on the issue of whether the MD is vicariously liable for the alleged trespass.

[83] In oral argument, Woodhaven took the position that hiring Kran was enough to put the MD in a position of vicarious liability. However, vicarious liability will only be imposed on an employee and not an independent contractor: ***671122 Ontario Ltd v Sagaz Industries Canada***

Inc, 2001 SCC 59 at para 33 [***Sagaz***]; ***Heikkila v Apex Land Corporation***, 2016 ABCA 126; ***Vargo v Hughes***, 2013 ABCA 96.

[84] In law, whether a person is an employee or an independent contractor depends on the degree of control that the employer has over the worker: ***Sagaz*** at para 34. The Court must consider the relationship between the parties to determine if the person who has been engaged to perform the services is performing them as a person in business on his own account: *ibid* at paras 46-47.

[85] In her affidavit, Ms. Palmer explains that Kran was hired through a public procurement process for the supply and installation of water and sewer services and the construction and installation of stormwater infrastructure. She also provides the terms of the contract between the MD and Kran, which required Kran to ascertain the boundaries within which the work was to be performed and to not enter any lands other than those provided by the property owner without obtaining prior written permission. Ms. Palmer deposes that, to the best of her knowledge, the MD did not otherwise authorize, direct, or permit Kran to construct ditches adjacent to the Ardmore Lands or at all.

[86] There is simply no evidence on the record to show that Kran was in an employment relationship with the MD. Furthermore, there is no evidence on the record that the MD directed or otherwise authorized Kran to commit the alleged trespass. Instead, the contract terms provided by Ms. Palmer make Kran responsible for ensuring it does not trespass onto private lands. As a result, there is no evidence to support the allegation that the MD is vicariously liable for Kran's conduct.

[87] I find that, on a balance of probabilities, the MD has proven it was not vicariously liable for Kran's alleged trespass. There is no triable issue to this claim.

G. Diversion

[88] Woodhaven alleges that water is draining onto the Ardmore Lands through ditches and culverts constructed by the MD. According to Woodhaven, this also constitutes trespass.

[89] The Applicants argue that there is insufficient evidence on the record that any diversion occurred, given that Woodhaven relies solely on Mr. McPeak's assertion that water is draining onto the Ardmore Lands. There is also no evidence that the MD intended to direct or discharge water onto the Ardmore Lands. Moreover, upgrades to 52nd Street occurred in 2014, and all surface water is now directed to a curb and gutter system. As such, any possible diversion claim is limitations barred.

[90] Trespass has three elements:

1. A direct and physical intrusion onto land that is in the possession of the Plaintiff;
2. The trespass is voluntary; and
3. The trespass is actionable without proof of damage

(Allen M. Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at 11.01).

[91] Once the Plaintiff establishes a direct interference with the right to possession, the onus is on the Defendant to show a lack of intention or negligence: *ibid* at 11.5.

[92] Mr. McPeak's evidence is that without his permission the MD constructed a ditch on the Ardmore Lands, running west from 52nd Street to flow surface water onto the Ardmore Lands. Mr. McPeak says that surface water continues to flow onto the Ardmore Lands.

[93] Ms. Palmer's evidence is that, to the best of her knowledge, the MD did not authorize, direct, or permit Kran to construct ditches adjacent to the Ardmore Lands or at all.

[94] Mr. Engman is the corporate representative for the Defendant SE Design and Consulting (2009) Inc. In his r 6.8 Questioning, Mr. Engman described the north-south ditch near the Ardmore Lands and said that it was part of the existing drainage system. He also stated that the ditch was located on the MD's road allowance and not on private land. Mr. Engman explained that they re-established the existing north-south drainage ditch as part of the work they did in 2014. Mr. Engman further explained that there was an existing ditch that ran onto the Ardmore Lands but clarified that they did not do anything to that ditch as part of the work on the north-south drainage ditch.

[95] Mr. Engman provided record drawings as part of his undertakings to provide as-built drawings of the different phases of the MD's project. The Phase IV drawings are dated November 2016, and they show that the drainage culverts running east-west under 52nd Street were all removed.

[96] Regardless of whether the MD diverted water onto the Ardmore Lands, I agree with the Applicants that Woodhaven's claim is out of time. Under the *Limitations Act*, RSA 2000, c L-12, a claimant must seek a remedial order within:

> 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> > (i) that the injury for which the claimant seeks a remedial order had occurred,
> >
> > (ii) that the injury was attributable to conduct of the defendant, and
> >
> > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> (s 3(1)(a)).

[97] The diversion claim was first raised by Woodhaven in the Amended Statement of Claim, which was filed on June 13, 2019. The drawings provided by Mr. Engman show that the culverts were removed by November 28, 2016, which makes that the latest point at which water could have drained under 52nd Street onto the Ardmore Lands. The Amended Statement of Claim was filed more than two years later. As a result, I find that Woodhaven did not bring the diversion claim within the time required by the *Limitations Act*.

[98] In reaching this conclusion, I note that Mr. McPeak gave evidence that water is still draining onto the Ardmore Lands. However, I find that this bald allegation is not enough to raise a triable issue, especially since it is contradicted by the evidence of Mr. Engman and the record drawings he has provided.

[99] On a balance of probabilities, I conclude that the diversion claim is out of time. Moreover, Woodhaven has failed to raise a triable issue to this claim.

V. Conclusion

[100] On a balance of probabilities, the Applicants have disproven Woodhaven's claims against them, and, in my view, Woodhaven has failed to raise a triable issue on any of the claims. Accordingly, the application is granted, and I dismiss all Woodhaven's claims against the MD and Ms. Palmer.

[101] If the parties cannot agree on costs, they may contact me in writing within 30 days of this decision.

Heard on the 13th day of June, 2023.
Dated at the City of Edmonton, Alberta this 17th day of November, 2023.

B.H Aloneissi
J.C.K.B.A.

Appearances:

Paul Barrette
Prowse Chowne LLP
for the Plaintiffs

Daina Young & Andrew Skeith
Reynolds Mirth Richards & Farmer LLP
for the Defendants