Court of King’s Bench of Alberta

Citation: Rick Balbi Architect Ltd v Condominium Corporation No 0824320, 2023 ABKB 241

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Date: 20230425
Docket: 1601 13021
Registry: Calgary

Between:

Rick Balbi Architect Ltd.

Appellant

\- and -

Condominium Corporation No. 0824320

Respondent

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Rick Balbi Architect Ltd. (“**RBA**”) appeals a decision of Master Farrington, as he was then known, dismissing RBA’s application for summary dismissal. RBA sought summary dismissal of Condominium Corporation No. 0824320’s (“**Condo Corp**”) action on the grounds that RBA was added as a party after the expiry of the relevant limitation period.

[2] This appeal requires me to determine whether it is sufficiently clear that the 2-year limitation period under the *Limitations Act*, RSA 2000, c L-12 plus the year for service of process allowed by the *Rules of Court* expired prior to service of the pleading that added RBA to

the proceeding. This question, in turn, requires me to determine when Condo Corp knew or ought to have known that it had a claim against RBA such that commencing a claim was warranted.

Background

[3] Sometime in late 2014, owners of units in the building (the "**Building**"), became aware of problems caused by water ingress. In July 2015, the Board of Directors of Condo Corp engaged Lee and de Ridder Architecture + Sustainable Design Inc. (the "**Consultants**") to investigate the water ingress issue.

[4] The Consultants delivered two reports; the first on September 30, 2015 and the second on October 4, 2015. The first report indicated that there was deficient construction and recommended steps to remediate the water ingress issues. The second report recommended that Condo Corp retain legal counsel to pursue litigation against parties responsible for the design and construction of the Building.

[5] The Statement of Claim commencing this proceeding was filed on September 30, 2016. The Statement of Claim named various parties, but not RBA. An Amended Statement of Claim naming RBA was filed on October 23, 2018 and served on RBA on November 7, 2018, a little more than three-years after the delivery of the two reports from the Consultants.

Summary Dismissal Standard

[6] I adopt my statement of the summary dismissal standard from ***Hindley v Rocky View Schools***, 2023 ABKB 95 at paras 6-8:

> [6] A five-member panel of the Court of Appeal set out the approach to summary disposition applications in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49. Slatter JA, writing for the Court, summarized the "key considerations" at para 47 as follows:
>
>> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>>
>> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>>
>> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine

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> issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute [emphasis in original].

[7] Following ***Weir-Jones***, some confusion remained over what was meant by a "genuine issue requiring a trial." Wakeling and Feehan JJA clarified in ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at paras 158-161 that the definition of a "genuine issue requiring a trial" to be used in Alberta is that set out by Karakatsanis J in ***Hryniak v Mauldin***, 2014 SCC 7 at para 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[8] The direction from the Court of Appeal to Applications Judges and Justices of this Court is to summarily determine cases where it is procedurally fair to do so.

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Applications Judge's Decision

[7] An appeal from a Master, now an Applications Judge, is heard *de novo*: ***Agrium v Orbis Engineering Field Services***, 2022 ABCA 266 at para 30. Nevertheless, it is important to understand the decision of the Applications Judge under appeal.

[8] Master Farrington explained why he dismissed RBA's summary dismissal application as follows:

> ...the reason that I do not think this can be determined summarily is I do not think the limitation period starts to run necessarily with receipt of the report. It starts to run with the receipt of the report plus at least a little bit of time to sort out who the architect is, and so in my view that issue needs to be determined at trial. I do not think I can determine it summarily because I do not think I can draw a clear line that it immediately started no later than September 30th or October 4th, 2015. This is certainly right around the limit but I do not think I can conclude the issue summarily, so those are my reasons for dismissing the summary dismissal application.

[9] As the balance of these Reasons explain, I agree with Master Farrington.

Was Condo Corp Out of Time to Add RBA as a Defendant?

Relevant Provisions of the Limitations Act

[10] The *Limitations Act* s 3 sets out the standard limitation period in the following terms:

...if a claimant does not seek a remedial order within

(a) 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 the conduct of the defendant, and

(iii)that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

[11] *Limitations Act* s 6 addresses the addition of claims to an existing proceeding as follows:

(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

...

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection 3(c), if in issue, has been satisfied.

and

(b) the defendant has the burden of proving that the requirement of subsection 3(b) or (4)(b), if in issue, was not satisfied.

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When Did the Limitation Period Start to Run?

[12] RBA's burden, pursuant to ***Weir-Jones***, is to establish that there is no genuine issue for trial. That means that RBA must establish that the limitation period plus the time provided by law for service of process expired prior to service of the amended pleading on RBA on November 7, 2018.

[13] The Court of Appeal held in ***Milota v Momentiv Specialty Chemicals***, 2020 ABCA 413:

> [21] A limitation period will start to run "once the plaintiff 'ha[s] access to all of the facts required to determine that they had a cause of action'". Mere suspicion is not sufficient to trigger a limitation period; the plaintiff can be said to have "known" of her injury only when she has some support for her suspicion.
>
> [22] Alternatively, the limitations clock starts when the material facts ought to have been discovered by the plaintiff by the exercise of reasonable diligence. While the latter test is primarily objective, courts may consider aspects of the plaintiff's circumstances in determining whether a reasonable person would conclude proceedings were warranted in Alberta. A defendant's statements, actions or omissions can affect a plaintiff's state of knowledge and duty to inquire [citations omitted].

[14] Justice Poelman explained in ***McDonnell v Csaki*****,** 2014 ABQB 452 at para 28 "[t]he burden is not high to establish at least a triable issue on due diligence, but it is usually expected that the plaintiff to put forward some evidence of steps taken to ascertain the identity of tortfeasors and give a reasonable explanation for why information was not obtainable with due diligence earlier...." Now, after ***Weir-Jones***, the burden is on the applicant – which in this case is the defendant RBA – to show that there is no triable issue, but the point holds that the plaintiff is not held to a high standard on the question of reasonable diligence: see, ***Canadian Natural Resources Limited v Husky Oil Operations Limited*****,** 2020 ABCA 386 at para 32.

[15] RBA submits that the limitations period started to run on either September 30, 2015 or October 4, 2015 when the Consultants' reports were received by Condo Corp. RBA says that pursuant to *Limitations Act* s 6(4)(b) that Condo Corp was required to provide notice to RBA of the claim within three years – the 2-year limitation period in *Limitations Act* s 3 plus the one-year provided for service under the *Rules of Court,* Rule 3.26 – of the commencement of the limitation period. According to RBA, since the amended claim naming RBA was served on November 7, 2018, Condo Corp is out of time.

[16] RBA states that Condo Corp knew or ought to have known upon receipt of the Consultants' reports that it had a claim against the architect of the Building. RBA submits that Condo Corp did not have to know the identity of the architect for the time to start running. RBA further submits that the identity of RBA could have been ascertained quickly if Condo Corp had exercised reasonable diligence.

[17] The submission that Condo Corp did not have to know the identity of the architect for the time to start running cannot be sustained on the facts of the present case. The design documents received from the City of Red Deer listed Bearden Engineering as the provider of architectural services and the principal of Bearden Engineering, Terry Bearden, was the only professional who stamped the drawings. There was no reason for Condo Corp to believe that there was another firm not disclosed on the design drawings providing architectural services.

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[18] Condo Corp says that it took reasonable steps to determine the identity of the architect of the Building. Condo Corp did not have the original design drawings for the Building. Condo Corp took steps to obtain the original design drawings, including seeking all of the materials filed with the City of Red Deer in connection with the permitting of the construction of the Building. The City of Red Deer responded slowly to Condo Corp's inquiries and the design drawings eventually obtained by Condo Corp did not identify RBA.

[19] RBA says that Condo Corp should have inquired of the other defendants in the litigation as to the identity of the architect. While no such inquiry was made, Mr. Hafso who is the principal of the Defendant and proponent of the condominium project, Hafso Developments Ltd., remains an owner of units in the Building. Mr. Hafso attended the Condo Corp annual general meeting on February 2, 2016. At the AGM, Mr. Hafso downplayed the problems with the Building and advised that he had met with the former principals of Bearden Engineering, the firm identified on the design drawings, to discuss the water ingress issues with the Building. Mr. Hafso did not identify RBA as the architect. Whether Mr. Hafso would have identified RBA as the architect if asked cannot be known but the evidence suggests that he was working at cross-purposes to Condo Corp.

[20] Condo Corp submits that it only discovered that RBA was the architect of the Building in February 2018 when the daughter of a deceased unit owner discovered RBA's name on some of the original promotional materials for the condominium project. Subsequent to this discovery, Mr. Lennie, a unit owner and Condo Corp board member, realized that he too had copies of the original marketing materials for the condominium project that identified RBA as being associated with the design of the Building.

[21] RBA says that the fact that Mr. Lennie had the marketing materials in his possession means that he knew or ought to have known, exercising reasonable diligence, that RBA was the architect for the Building. Further, RBA submits, Condo Corp should be deemed to have the knowledge of Mr. Lennie because he is a board member. I disagree. Marketing documents are not obviously relevant to the subject-matter of the claim and might reasonably fall outside the scope of the record gathering and review process. Based on the evidence before me, there is no reason to conclude that reasonable diligence in a case about a design failure would include looking at marketing materials. Further, the Ontario Court of Appeal has declined to impute the knowledge of a single board member to a condominium corporation: ***Orr v Metropolitan Toronto Condominium Corporation No. 1056***, 2014 ONCA 855 at paras 125-126.

[22] RBA relies on ***Condominium Corporation No. 0213028 v Pasera Corporation,*** 2016 ABQB 477 aff'd 2017 ABCA 375. Strekaf J, as she then was, found that the plaintiff in ***Pasera*** should have known the architect's identity because it had in its possession original architectural drawings that identified the architecture firm by name. The present case is distinguishable because the design drawings did not identify RBA. RBA was only identified as the architect on promotional materials which were fortuitously discovered. A party in Condo Corp's position exercising reasonable diligence would do what Condo Corp did, which is endeavour to obtain copies of the original design documents to identify the parties involved with the design of the Building.

[23] RBA also relies on ***Condominium Corporation No 0610078 v Pointe of View Condominiums (Prestwick) Inc,*** 2016 ABQB 609. Strekaf J wrote at para 23:

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> Once a party becomes aware that it has suffered damage that merits bringing proceedings, then it is incumbent on that party to take reasonable steps to identify the parties responsible for that damage. The only evidence that the Plaintiff took any steps to attempt to identify the identity of POV's consultants and contractors prior to obtaining POV's documents and questioning its corporate representative in the period of almost four years between October 2009 and August 2014 was the single letter written by its counsel in March 2010. In my view, that does not constitute reasonable diligence. There is no evidence that the Plaintiff or its counsel took any other steps to identify the contractors involved in the Project, which might have involved performing searches, reviewing the plans and permits or making inquiries of the City of Calgary or of POV's counsel after the lawsuit was commenced or of counsel for the other entities named as third parties.

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[24] The present case is distinguishable from ***Pointe of View*** because Condo Corp took some of the steps that Strekaf J was critical of the plaintiff in ***Point of View*** for failing to take such as performing searches of municipal records to obtain drawings submitted in support of permit applications.

[25] There is some evidence in the present case that Condo Corp exercised reasonable diligence. Certainly, Condo Corp is in a better position than the plaintiffs in either ***Pasera*** or ***Point of View***. Of course, there are other steps that Condo Corp failed to take such as inquiring of counsel of other parties. But it should be noted that such steps might not have been possible until after parties defended the claim which would have been some time after the commencement of the claim in 2016. I am satisfied that it is a triable issue whether Condo Corp exercised reasonable diligence and whether it should have identified the identity of RBA sooner than it did. It is not clear to me at this stage of the proceeding that Condo Corp acting with reasonable diligence should have identified RBA as the architect by November 7, 2015 – just over a month after the second report of from the Consultants – as would be required to grant RBA summary dismissal.

Conclusion

[26] The appeal is dismissed with costs to Condo Corp. If the parties are unable to agree on costs, they may make written submissions of 2 pages or less supported by a bill of costs.

Heard on the 06th day of April, 2023.
Dated at the City of Calgary, Alberta this 25th day of April, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Jeremy Ellergodt, Whitelaw Twining LLP
for the Appellant

Randolph Mitchell, McLeod Law LLP
for the Respondent

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