CITATION: McKenzie v. Fabco Holdings Inc., 2024 ONSC 6325
COURT FILE NO.: CV-16-129168-00 & CV-18-136865
DATE: 20241114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GARY MCKENZIE AND JENNIFER MCKENZIE Plaintiffs	Patrick Summers and Star Deak, for the Plaintiffs
– and –	
FABCO HOLDINGS INC., JAYMOR SPECIALTY HOUSING GENERAL PARTNER INC. and YOUR COMMUNITY REALTY INC. Defendants	Matthew Harris and Yonatan Lipetz, for the Defendants
AND BETWEEN:	
GARY MCKENZIE AND JENNIFER MCKENZIE Plaintiffs	Patrick Summers and Star Deak, for the Plaintiffs
-and-	
GERALD ANTHONY also know as GERALD VAN ERP Defendants	Kevin MacDonald and Jamie Sanderson
	HEARD: December 4, 5, 6, 2023, January 23 and February 6 and 7, 2024 and submissions received in writing on May 31, 2024

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REASONS FOR JUDGMENT

McCarthy J.:

Introduction

[1] This litigation involves two claims. The first claim (the "Fabco claim") arises out of an aborted Agreement of Purchase and Sale dated July 9, 2016 (the "Fabco APS") with respect to the property at 130 St. John's Sideroad East in Aurora (the "McKenzie property"). The second claim (the "title claim") arises out of a claim for damages for slander of title/injurious falsehood related to the McKenzie property.

[2] The Plaintiffs, Gary McKenzie and Jennifer McKenzie, are spouses, who jointly owned the McKenzie property between May 14, 2004 and April 20, 2018. Before that time, the McKenzie property had been owned by Gary's parents and, earlier, by his grandparents.

[3] The Defendant, Fabco Holdings Inc. ("Fabco"), is a duly incorporated entity whose principal was at all material times Fabrizio Lucchese ("F.L."). The Defendant, Jaymor Specialty Housing General Partner Inc. ("Jaymor"), is a related corporation principally owned and controlled by F.L.

[4] The Defendant, Gerald Anthony (also known as Gerald Van Erp, but referred to in this litigation as "Anthony") is the registered owner of property at 202 St John's Sideroad East (the "Anthony property"), which abuts the McKenzie property to the east.

[5] Throughout the relevant time giving rise to the claims, the Plaintiffs were represented by solicitor, John Peddle ("J.P.").

Pre-Litigation Background about the Two Properties

[6] The evidence establishes the following chronology pertaining to the abutting McKenzie and Anthony properties:

i) On November 7, 1991, Anthony's predecessors in title (the "Fultons") obtained a certificate of first registration (the "1991 R-plan") for the Anthony property, which was brought under Land Titles Absolute ("LTA").
ii) On December 12, 1997, Anthony took title to the Anthony property from the Fultons jointly with his then partner, Dana Van Erp.
iii) On September 27, 1999, the McKenzie property was converted to Land Titles Conversion Qualified ("LTQ").
iv) On May 14, 2004, the Plaintiffs acquired title to the McKenzie property.
v) In October 2005, the Anthony property was transferred from joint ownership to Anthony alone.
vi) On November 29, 2012, the Avanti Topographical Survey was created (the "Avanti Survey").

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The Fabco "APS"

[7] The Plaintiffs became interested in marketing the McKenzie property in or around 2012. They retained realtor, Lynn Knowles ("L.K."), to act as listing agent in the process. Following a series of abandoned or unsuccessful offers from unrelated parties, the Plaintiffs were approached by F.L., who expressed an interest in purchasing the McKenzie property on behalf of Fabco. F.L. gave the Plaintiffs a letter of intent on June 10, 2016. On July 9, 2016, the Plaintiffs and Fabco entered into the Fabco APS for a purchase price of $4,500,000. The key terms of the APS were as follows:

- An initial deposit of $100,000 with the accepted offer;
- A second deposit of $100,000 on or before September 30, 2016;
- The Plaintiffs would receive a vendor take back mortgage ("VTB") in the amount of $2,500,000 with an interest rate of 5% for a two-year term;
- The property was being purchased on an "as is, where is" basis with the parties agreeing that no warranties or representations would be given as to the state of the property on the closing date;
- A right for Fabco to assign the APS to Jaymor; and
- A closing date of November 30, 2016.

[8] The APS failed to close. In March 2017, the Plaintiffs re-listed the property and entered a subsequent APS with Rocco Marcello on November 5, 2017 (the "Marcello APS") for the purchase price of $2,875,000 with a closing date of December 11, 2017. The closing date for the Marcello APS was extended on consent, with the deal ultimately closing on April 20, 2018

The Claims

(i) The Fabco Claim

[9] The Fabco claim sounds in breach of contract. The Plaintiffs seek damages for the difference in the purchase price between what they would have received under the Fabco APS and what they received under the Marcello APS, as well as the expenses and damages they incurred due to Fabco's breach. The Plaintiffs also seek a declaration that the $200,000 deposit paid by Fabco and held in trust by their real estate agents has been forfeited and should be paid out to them as part of any damages award.

[10] The Plaintiffs concede that Fabco should be credited for the difference between the commission they would have paid under the Fabco APS ($152,500) and the commission they actually paid under the Marcello APS ($97,462.50). That difference is $55,037.00.

(ii) The Title Claim

[11] The title claim is based on the twin torts of injurious falsehood and slander of title. It derives from Anthony's attempt to claim an interest in a certain portion of the McKenzie property (the "disputed acreage") by way of adverse possession. The disputed acreage encompassed the approximately 4 to 5 acres surrounding a pond on the eastern edge of the McKenzie property.

[12] Damages sought in the title claim include loss of bargain on the Fabco APS, loss of interest income on the VTB, interest charges on a TD line of credit ("the line of credit"), together with the carrying costs incurred arising out of both the aborted Fabco APS and the delayed closing of the Marcello APS.

Statutory Considerations

[13] Section 51 of the *Land Titles Act*, R.S.O. 1990, c. L.5 reads as follows:

> No title by adverse possession, etc.
>
> 51(1) Despite any provision of this Act, the Real Property Limitations Act or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.
>
> Operation of section
>
> (2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place.

Chronology of the Litigation

[14] The evidence establishes that the following key events occurred following the execution of the Fabco APA:

- F.L. met with Anthony on or about August 24, 2016, at which meeting Fabco's purchase of the McKenzie was discussed.
- On August 31, 2016, Fabco's solicitors advised J.P. that they were "very concerned about a successful adverse possession claim" on the McKenzie property. They also requested, as a condition of closing, "a written acknowledgment from the easterly neighbour that it did not have any possessory rights to any portion of the (McKenzie lands) and waives [waived] any right to an adverse possession claim."

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- On September 21, 2016, J.P. replied to Fabco's solicitors advising that Anthony had no valid claim for adverse possession because the McKenzie property had been registered in LTQ and the Anthony property had been registered in LTA and was encompassed in the 1991 R-Plan.
- On September 22, 2016, J.P. delivered a letter to Anthony which stated, inter alia, "It is the position of my clients that you have no right, whether it by way of some claim to adverse possession or otherwise, to use or enjoy any portion of [the] McKenzie lands."
- On September 30, 2016, Fabco paid the second deposit required by the Fabco APS.
- On October 11, 2016, J.P. reminded Fabco's solicitors that the McKenzie property was converted to LTQ on November 17, 1997, and that the Anthony property was subject to an R-plan registered in November of 1991, which showed that no sheds or other structures encroached onto the McKenzie property.
- On November 11, 2016, Fabco assigned the Fabco APS to Jaymor.
- On November 24, 2016, J.P. provided Fabco's solicitors with a statutory declaration from the Fultons (the "Fulton declaration"), which effectively confirmed that there had been no historical encroachment on the disputed acreage.
- On November 28, 2016, Fabco's solicitors wrote to J.P. stating their client's position that the Plaintiffs could not provide good and marketable title.
- On November 29, 2016, J.P. wrote to Fabco's solicitors insisting that the Plaintiffs were able to convey good and marketable title and reminding them that:
    i) Anthony would have to establish adverse possession on the disputed acreage back to September 1989;
    ii) The Fulton declaration had established that there were no sheds or other structures on the disputed acreage during their ownership period;
    iii) The1991 R-Plan showed no encroachment on the parcel;
    iv) Anthony could not establish adverse possession; and
    v) Fabco should reconsider its position on marketable title.
- On November 29, 2016, J.P. furnished Anthony with a proposed release of any interest in the McKenzie property for his consideration and execution. Anthony declined to execute the same.
- The APS failed to close on November 30, 2016.
- The Plaintiffs commenced the Fabco claim on December 16, 2016.
- The Plaintiffs re-listed the McKenzie property for sale in March 2017.
- In a note to the Plaintiffs dated June 23, 2017 (the "Anthony note"), Anthony stated, inter alia, the following:
    i) it was clear that the disputed acreage qualified for conveyance under the laws of adverse possession;
    ii) litigation would tie up the sale of the McKenzie property for years at considerable cost;

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iii) that the Plaintiffs' real estate agent had a duty to inform potential buyers that a dispute was outstanding;
iv) that if the dispute could be resolved there would be no risk of being sued by a buyer after the sale; and
v) that the Plaintiffs should convey the disputed acreage to Anthony for a nominal but fair price.

- On July 4, 2017, Anthony advised J.P. that he was prepared to bring an action and file a certificate of pending litigation on the McKenzie property if a mutually beneficial agreement could not be reached.
- On September 7, 2017, Anthony issued a claim for adverse possession against the McKenzie property (the "Anthony claim").
- On October 18, 2017, a caution was registered on title to the McKenzie property.
- On November 5, 2017, the Plaintiffs entered the Marcello APS, which stipulated a purchase price of $2,875,000 and a closing date of December 11, 2017. The Marcello APS acknowledged that the property was being sold in an "as is condition" and that the buyer was aware of the pending litigation. The contracting parties inserted terms designed to address that pending litigation.
- On November 17, 2017, Anthony registered an Application (General) on title to the McKenzie property, without notice to the Plaintiffs. The Application claimed an ownership interest by way of adverse possession.
- On January 2, 2018, the contracting parties extended the Marcello APS closing to April 20, 2018. The APS closed on that date.
- On May 8, 2018, this court granted summary judgment in favour of the Plaintiffs on the Anthony claim (the "judgment"), concluding that there was no genuine issue requiring a trial of the adverse possession claim. Amongst its conclusions, the court found that:
  i) the evidence from the Fultons was uncontroverted;
  ii) the 1991 R-Plan did not support any claim for adverse possession;
  iii) the R-Plan set out the boundaries between the McKenzie and Anthony properties;
  iv) there had been no intention by the Fultons to exclude the Plaintiffs from the disputed acreage;
  v) Anthony did not have a claim in law for the required 10-year period.
- On February 21, 2019, the Court of Appeal upheld the judgment. The court emphasized that the 1991 R-plan was consistent with the evidence that there was no basis for a claim of adverse possession over the disputed acreage. The court also found that there was "overwhelming" evidence that the Fultons had no intention to exclude the Plaintiffs from the disputed acreage.

[15] It is against this factual background that the disputes before me must be considered. This was not an opportunity to re-litigate the Anthony claim or the adverse possession issue.

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The conclusions of this court as found in the judgment, and affirmed by the Court of Appeal, are binding on me.

Analysis

(i) The Fabco claim: breach of contract

[16] The Fabco claim turns mainly on the issue of whether the Plaintiffs could convey good and marketable title to the McKenzie property on the date of closing (November 30, 2016).

[17] The law is clear (and the parties agree) that an agreement of purchase and sale is breached when a purchaser fails to complete the purchase of a property due to the purchaser's own reasons: see *Azzarello v. Shawqi*, 2018 ONSC 5414, at para. 32.

[18] It is clear to me that the Plaintiffs were able to convey good and marketable title and were entirely blameless for the Fabco APS not closing. I find that Jaymor, as Fabco's assignee, repudiated the APS for its own reasons and not because of any claim to adverse possession by Anthony.

[19] The facts which underpinned the judgment are as clear today as they were before the motions judge. Objectively, no reasonable person – Fabco, Jaymor, and F.L. included – could have given the adverse possession claim any credence.

[20] Fabco adduced no evidence to suggest that Anthony's assertions ever had any reasonable basis. Those assertions were baseless and unsubstantiated. There was no caution, caveat, or application registered on title prior to closing. Fabco was represented by counsel, who must have understood that due to the LTQ and the LTA characteristics of the respective properties, the adverse possession claim was without merit. Fabco had the Avanti survey. They were furnished with the Fulton declaration. There is no evidence that Fabco's solicitors took any investigatory steps to discover whether the adverse possession claim was legitimate.

[21] Fabco's real reason for wanting to escape from the obligations in the Fabco APS can be discerned from contemporaneous exchanges between various important actors, including Murray Palmer ("M.P."), who was retained to act on behalf of Fabco in respect of the development of the McKenzie property and by the conduct of F.L., Fabco, Jaymor and their advisers in the aftermath of the August 24, 2016 discussion between F.L. and Anthony.

[22] Certainly, nothing that Anthony might have said to F.L. at the August 24, 2016 meeting deterred Fabco from moving ahead with the Fabco APS.

[23] Fabco's lawyers never contacted Anthony to ascertain the nature, extent, or propriety of the Anthony claim. I find it highly improbable that competent real estate solicitors of a client involved in a multi-million-dollar purchase would not have made immediate and thorough inquiries of any legitimate claimant in these circumstances.

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[24] On August 31, 2016, Fabco retained MMM Group ("MMM") to investigate whether the McKenzie property could support additional development. MMM embarked on an investigation to ascertain whether the floodplain could be altered.

[25] On September 30, 2016, Fabco went ahead to pay the second $100,000 deposit. I find that had Fabco seriously believed that Anthony had a proprietorial claim to any portion of the McKenzie lands, it would have declined to make the second deposit.

[26] On October 17, 2016, a funding partners' meeting was held in respect of Fabco's purchase of the McKenzie property. There is no evidence that any of the funding partners were advised about the adverse possession claim or expressed the least bit of concern about the issue.

[27] On October 19, 2016, a preliminary executive summary was prepared by M.P. concerning the potential development of the McKenzie Property. There was no mention of any title or adverse possession issue.

[28] On November 11, 2016, Fabco assigned the Fabco APS to Jaymor. While this was a non-arm's length transaction, it demonstrated that Fabco still believed that the APS was viable and that its assignee anticipated receiving good and marketable title from the Plaintiffs.

[29] Some time between November 7 and November 21, 2016, Steve Van Haren advised M.P. that MMM's investigation had led to the conclusion that the McKenzie property could not support "further intensification."

[30] In an email from M.P. to Steve Van Haren dated November 21, 2016, the McKenzie property is described as "undevelopable".

[31] The inescapable inference to draw from these developments and communications, which postdate the alleged disclosure of Anthony's possessory claim, is that F.L. and, by extension, Fabco, Jaymor and their solicitors, gave no real weight to the adverse possession claim. Rather, as F.L. came to understand that the development potential of the land was limited and possibly nonexistent, he needed to find grounds to resile from an APS wherein he had agreed to accept the property "as is, where is". This made it necessary to seize upon the adverse possession claim as a way out of what was now a bad deal for F.L., Fabco and Jaymor.

[32] Fabco turned to something that went to the very heart of title. This was nothing more than a tactic which sought to obscure the reason for Fabco not closing the APS (frustrated development plans) and instead to promote the notion of the Plaintiffs' inability to convey good and marketable title.

[33] The evidence satisfies me that Fabco/Jaymor's true reason for not closing the APS was its discovery, realization, or acceptance that the McKenzie property was unsuitable for the development they had envisioned. It was not the inability of the Plaintiffs to convey good and marketable title; and it was certainly not Anthony's baseless adverse possession claim.

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[34] Fabco and Jaymor cannot rely on the "reasonable threat of litigation" line of cases to justify the repudiation of the APS. In *Gajasinghe v. Dewar*, 2007 CanLII 37682 (Ont. S.C.), the purchasers refused to close on the basis that there was a cloud over title, with potential litigation by a neighbour being one of the alleged factors clouding title. This case stands for the proposition that not only must there be a real threat that a suit would be brought but that the suit, if brought, would be based on substantial rather than idle grounds: *Gajasinghe* at para. 41; see also *Logan v. Stein*, [1958] O.J. No. 471 (C.A.).

[35] That logic and reasoning apply here. I do not accept F.L.'s evidence that he believed that Anthony's assertion of adverse possession was meritorious or even rational. Indeed, the judgment makes it clear that there was no objectively reasonable basis to believe that a suit would be brought on substantial grounds.

[36] The Fabco APS was repudiated by Fabco/Jaymor when it refused to close the transaction on November 30, 2016. That amounts to a breach of contract. The repudiating party is therefore responsible for damages that flow from that breach.

(ii) The Fabco Claim: The Breaching Party

[37] On November 11, 2016, Fabco assigned its rights and obligations as purchaser under the Fabco APS to Jaymor. In doing so, it invoked the assignment clause contained in the Fabco APS at Schedule A3, which states:

> The Buyer shall have the right at any time prior to closing, to assign the within Agreement of Purchase and Sale to any person, persons, corporation, either existing or to be incorporated, and upon delivery to the Seller of notice of such assignment, together with the assignee's covenant in favour of the Seller to be bound hereby as Buyer, the Buyer hereinbefore named shall stand released from all further liability hereunder.

[38] The Plaintiffs assert that Fabco breached the Fabco APS by failing to close on November 30, 2016. The transfer of the APS to Jaymor 20 days before closing amounted to an exercise in bad faith, and Fabco should not be able to rely upon it to insulate itself from liability for breach of contract. The Plaintiffs add that the duty of good faith and honest performance in a contractual setting requires that the parties act reasonably, candidly, and honestly in the performance of the contract: see *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 65 and 66.

[39] The Plaintiff relies on the decision of the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32. In *Wastech*, the court determined that a party must exercise contractual discretionary powers in good faith and in a manner consistent with the purposes for which the discretion was granted in the contract and not in a capricious fashion. The Plaintiffs contend that the timing and manner in which the assignment was made was not consistent with Jaymor

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having the willingness and the ability to close the transaction or to bear damages if the contract was breached.

[40] Doubtless, assigning the APS to Jaymor was a way to shelter Fabco from any liability for breach of contract. In my view, however, it did not represent a breach of contract, an exercise in bad faith, or any kind of unconscionable transaction.

[41] The assignment option was contained in a separate schedule in the APS, and it referenced Jaymor as possible assignee. The assignment clause was plainly worded and unambiguous. It appears in the same schedule and next to the "as is, where is" clause, which the Plaintiffs now rely upon to seek damages on a loss of bargain basis.

[42] There was no requirement of consideration for the assignment. Moreover, the wording of the assignment clause makes it clear that upon assignment, "the Buyer hereinbefore named shall stand released from all further liability hereunder." It must have been apparent to the Plaintiffs and their solicitor that the assignment would relieve Fabco from legal liability. Yet, no attempt was made to seek a larger deposit, to insert conditions or terms upon which the assignment could be invoked, or to reserve liability to Fabco in the event of any breach by its assignee.

[43] The assignment clause complied with all the formalities; it contained the stipulations called for in the APS schedule. There is no evidence that the assignment was motivated by bad faith; nor is there evidence that Jaymor is judgment-proof or any less capable of paying a damages award than Fabco. Both were closely held numbered companies, either of which were contractually entitled to take beneficial ownership of the McKenzie property.

[44] Moreover, there is no evidence that the Plaintiffs or their counsel (including litigation counsel) raised any issues about the assignment at the time, despite receiving notice of it. Indeed, the Plaintiffs and their counsel admitted that they expected the APS to be assigned. J.P. conceded that Fabco did not breach the APS because of the assignment. J.P. contemporaneously accepted the assignment and drafted the closing documents with Jaymor as purchaser. Two days following the aborted closing, J.P. confirmed in writing that the Plaintiffs had accepted Jaymor's breach of the Fabco APS.

[45] It is not the function of this court to rewrite the bargain reached between the parties. Setting aside the assignment or implicating Fabco in a judgment for breach of the APS would be tantamount to doing so.

[46] Therefore, while there was a breach of the Fabco APS, it was not a breach by Fabco. In assigning the APS to Jaymor in advance of closing, per the terms of the APS, and upon notice to the Plaintiffs, Fabco contractually divested itself of its obligations under the APS in favour of its assignee, Jaymor.

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(iii) The Fabco Claim: Damages

[47] It follows that Jaymor, being the assignee and breaching party without a reasonable excuse for not closing the Fabco APS, must be responsible for the damages suffered by the Plaintiffs.

[48] I would award damages in favour of the Plaintiffs as follows:

1) Damages for Loss of Bargain: The difference between the Fabco APS purchase price and the Marcello APS purchase price was $1,625,000 ($4,500,000 - $2,875,000 = $1,625,000). In a failed real estate transaction, the Plaintiff is entitled to be put in the position it would have been in had the contract been performed: see *Bang v. Sebastian*, 2018 ONSC 6226, at para. 40. I see no reason to depart from that approach in the case before me.

2) Interest on the VTB: I would allow interest on the VTB (5% annually on $2.5 million or $342.47 per diem) for the 376 days between November 30, 2016 and December 11, 2017 by which time the Marcello APS would have closed but for the intervening tortious conduct of Anthony. The per diem multiplied by the 376 days equals $128,768.72. This is a justified head of damages since the Plaintiffs lost that aspect of the bargain that would have earned them this interest income on a portion of the sale price but for Jaymor's breach.

3) Line of Credit: The Plaintiffs borrowed $660,000 on the line of credit to allow them to close on a property they had purchased in Caledon in July 2016. Jaymor must be held responsible for the interest charges incurred on that line of credit from November 30, 2016 to December 11, 2017. Had the Fabco APS closed, the line of credit would have been paid out of the proceeds of sale, and that obligation with accompanying interest would have been extinguished. But for the intervening tortious conduct of Anthony, that line of credit would have been paid out upon the Marcello APS closing on December 11, 2017. That period contains 376 days with a per diem of $64.70. This equates to interest paid of $24,327.20 attributable to the Jaymor breach.

4) Extra Expenses: The Plaintiffs also incurred extra expenses on the McKenzie property for taxes, insurance, water, heating, hydro, and maintenance between November 30, 2016 and December 11, 2017. These expenses totaled $15,082.73. These were necessary to maintain and preserve the property. They would not have been incurred but for the Jaymor breach. They are recoverable as damages.

5) Legal Fees: The Plaintiffs incurred legal fees with J.P. for the closing of the Marcello APS in the amount $9,492.00. The costs of the second closing would not have been incurred but for the breach of the Fabco APS. Those damages should be allowed.

6) Credit on Damages: The Plaintiffs concede that Jaymor should be afforded a credit for the difference between the commission charged by L.K. on the Marcello APS

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($97,462.50) compared to what they would have paid L.K. had the Fabco APS closed ($152,500 notional). The credit is $55,037.50.

[49] I find that the Plaintiffs are entitled to recover their damages attributable to Jaymor's breach of the Fabco APS in the total amount of $1,747,633.15 ($1,802,670.65 less the $55,037.50 credit) from the Defendant, Jaymor.

[50] Since Jaymor was the assigned purchaser that repudiated the APS, the $200,000 deposit is forfeited and should be applied towards the satisfaction of judgment for the above damages.

The Title Claim – Liability for the Twin Torts of Slander of Title/Injurious Falsehood

i) Is Anthony Liable for Damages Related to the Fabco APS?

[51] Slander of title is a specific form of the tort of injurious falsehood: *Hornstein v. Kats et al*., 2020 ONSC 870, 24 R.P.R. (6th) 107, at paras. 235 and 236; *Raimondi v. Ontario Heritage Trust,* 2017 ONSC 3389, 84 R.P.R. (5th) 221, at para. 152. As the Plaintiffs submissions address both slander of title and injurious falsehood, I will be considering the tests for both torts in my analysis.

[52] In order to succeed in its claim for slander of title, the Plaintiffs must prove that:

1) The Defendant published words of disparagement about the Plaintiffs' property;
2) The words were false;
3) The words were published with malice; and
4) The Plaintiffs sustained damages as a result.

See *International Sausage House Ltd. v. Hammer Estate*, 2015 BCSC 1155, 57 R.P.R. (5th) 97, at para. 206.

[53] The test for the tort of injurious falsehood is similar. It was concisely set out by the Court of Appeal in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at para. 133, and requires the Plaintiffs to prove that:

1) False statements reflecting adversely on the Plaintiffs' property were published by the Defendant;
2) The statements were published maliciously;
3) The Defendant intended the statements to induce persons not to deal with the Plaintiffs; and
4) The Plaintiffs suffered actual damages as a direct or natural result of the publication.

[54] The law is clear that a publication may include a bilateral act by which a publisher makes available to a reader, listener, or observer in a comprehensible manner the defamatory information: Raymond E. Brown, *Law of Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. (Toronto: Carswell, 1994) (loose-leaf updated 2024, release 2024-4), §7.2. In my view, Anthony's oral assertion to F.L. of his

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claim for adverse possession was sufficient to constitute a false statement to a listener reflecting adversely on the Plaintiffs' ability to convey marketable title to their property. Anthony's subsequent registration of a caution and an application containing a description of his claim for adverse possession was a publication of false statements adversely affecting the Plaintiffs' property.

[55] Was the false statement made with malice? There can be no better indication of Anthony's true intent than the Anthony note of June 23, 2017. It is clear from the tone, content, and timing of the Anthony note that its author was bent on obtaining an advantage out of his phantom interest in the disputed acreage. I find that the "win-win" points he enumerates were nothing more than a poorly veiled attempt to extract a cheap conveyance of the disputed acreage from the Plaintiffs. While Anthony does not specify what a "nominal but fair price" would amount to, it is obvious that he wanted something for nothing or for very little and was prepared to intimidate his neighbours with the threat of "litigation costs."

[56] Even before the Anthony note, however, I find that one of Anthony's aim was to dissuade prospective or committed purchasers from buying the McKenzie property. Anthony was aware of Fabco's interest in the McKenzie property by the time of his conversation with F.L. in August 2016. Anthony was reminded of this when he was asked to sign the release by J.P. on November 29, 2016. From these interactions, Anthony would have understood that F.L. and Fabco were interested in developing the McKenzie property and that any cloud on title or compromise to the integrity of the McKenzie property might delay or prove fatal to an APS. A few days before he was asked to sign the release, Anthony's lawyers received the Fulton declaration, which clearly contradicted any notion that his predecessor in title had encroached on the McKenzie property. Thus, at a critical hour, Anthony was provided with the clearest evidence that his claim could not succeed. He was then afforded the opportunity to withdraw the false and recklessly released information he disseminated in August, right up to the APS closing date. Yet he persisted in his untenable position, as evidenced by his refusal to sign the proffered release.

[57] There is no evidence or possibility of *bona fides* on the part of Anthony. He had no independent verifiable information to support his claim. The Avanti survey showed no encroachment. Although the boundary line was fixed by the R-plan, Anthony never asked to see it and did not visit the registry office to view it. Anthony never investigated the actual boundaries of his property and never commissioned any survey to support his position. Even though Anthony was provided with the Fulton declaration, he did nothing to withdraw his spurious claim. There is also no evidence that Anthony sought legal advice about his phantom possessory claim before raising it with F.L. He must have known that his property was under LTA and either understood what that entailed or turned a blind eye to it.

[58] I find that it was Anthony's intention to prevent both Fabco and prospective purchasers after Fabco from dealing with the Plaintiffs or their property. This was his intention when he spoke to F.L. and when he refused to sign the release proffered by J.P. It remained his intention when he sent the Anthony note to the Plaintiffs, engaged with L.K. about

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prospective purchasers and then registered the caution and application on title. The third prong of the test is easily satisfied.

[59] The Plaintiffs' claim, as it pertains to the damages flowing from the breach of the Fabco APS, must however founder upon the fourth prong, which is the requirement for direct or natural damages to flow from the injurious falsehood or for damages to result from the slander of title. I am unable to find a direct or natural connection between Anthony's "publication" to F.L. and the damages suffered by the Plaintiffs arising out of the aborted Fabco APS.

[60] My reasoning above pertaining to Fabco/Jaymor's true basis for resiling from the APS is applicable here. Any claim Anthony had to the McKenzie property was without legal or factual foundation. Only a highly naïve or gullible person (and F.L. was neither) would have believed Anthony. At the very least, the prospect of an adverse possession claim, however flimsy, should have prompted F.L. to have his lawyers investigate it. His company was, after all, knee deep into a real estate deal for $4.5 million. Instead, it is reasonable to infer that F.L., and by extension Fabco and Jaymor, simply used Anthony's meritless assertions as a pretext to escape an otherwise valid and legitimate deal for the purchase of the McKenzie property.

[61] That being the case, there is no direct or natural connection between Anthony's assertion of August 2016 and the damages suffered by the Plaintiffs on the Fabco claim. A legitimate connection cannot be established. It follows that the Plaintiffs are not entitled to any award of damages for slander of title or injurious falsehood relative to the Fabco APS as against Anthony. The Plaintiffs must look solely towards the assigned party, Jaymor, to recover those damages.

ii) The Title Claim: Damages

[62] The same is not true for the period after December 11, 2017. The losses suffered by the Plaintiffs after that date are directly and solely attributable to Anthony. His tortious conduct caused the delay of the Marcello APS and the accompanying damages.

[63] Anthony's claim to an interest in the disputed lands was no better after the repudiated Fabco APS than it was before. Yet he persisted in his designs on those lands and went as far as to register first the caution, then the application on title. Anthony did so knowingly, without legal foundation or factual justification. He did so in bad faith.

[64] Slander of title or injurious falsehood may be found based upon the registration of documents against title that are based on false grounds: *International Sausage House Ltd*., at para. 206; see also *Almas v. Spenceley* (1972), 25 D.L.R. (3d) 653, at p. 657. In the case at bar, I find that first the caution and then application were registered on title without *bona fide* grounds, in bad faith, and as part of a campaign to oblige the Plaintiffs to accede to Anthony's demands for a "resolution" without which a clean sale of the property was ever going to be possible.

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[65] The evidence establishes that the Marcello APS was legitimately delayed by both parties while the Plaintiffs set about taking steps to rid the property of these registered clouds on title. There is no evidence to suggest that the Marcello deal would not have closed on December 11, 2017, but for Anthony's adverse possession claim and the illegitimate and unwarranted registered clouds on marketable title. There can also be no suggestion that the parties to the Marcello APS acted unreasonably in delaying the closing.

[66] In registering both the caution and the application on title to the McKenzie property, Anthony was solely responsible for creating a landscape, which left the Plaintiffs ability to convey clear title questionable. Moreover, it fully justified the parties to the Marcello APS to negotiate an extension of the closing date.

[67] Unlike the context of the Fabco closing, where there was no real and palpable cloud on title and no legitimate concern whether clear marketable title could be conveyed, the parties to the Marcello closing were faced with an actual registration of a legal process, which needed to be addressed and responded to before the deal could close.

[68] Most importantly, Marcello never attempted to rescind the APS on flimsy grounds; rather, he worked together with the Plaintiffs and their lawyer to extend the date for closing. This was done reasonably and proportionately.

[69] Nonetheless, the Plaintiffs sustained damages because of this delay.

[70] The Plaintiffs may therefore look to Anthony for recovery of their damages flowing from the delayed closing of the Marcello APS.

[71] There were 130 days between when the Marcello APS was due to close on December 11, 2017 and the actual Marcello closing of April 20, 2018. The Marcello APS would have closed on December 11, 2017 but for the tortious conduct of Anthony. I would allow damages against Anthony for the delays related to the Marcello closing as follows:

a) Interest on the line of credit at $64.70 per day X 130 days= $8,411. Again, those charges would not have been incurred but for the tortious conduct of Anthony. The proceeds of disposition would have been available to pay off the line of credit.
b) Loss of interest income on the VTB based upon a per diem of $342.47 over the 130 days between the original closing date for the Marcello APS and its actual closing date. This equates to $44,521.10.
c) Carrying expenses for the McKenzie property for the 130 days: Taxes $1,430; Insurance $432.30; Water $15.03; Heat $815.68; Hydro $665.77; and Snow and Grass $1,500 = $4,858.78. These must be the responsibility of Anthony. They would not have been incurred by the Plaintiffs but for the delay caused by his tortious conduct.

[72] The allowable damages against Anthony for slander of title/injurious falsehood total $57,790.88.

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Mitigation

[73] Failure to mitigate is an affirmative defence. The party asserting this defence bears the onus of proving that the party seeking damages failed to reasonably mitigate: see *Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd*., 1997 ABCA 179, 51 Atla. L.R. (3d) 1.

[74] I am not persuaded that the Plaintiffs failed to mitigate their losses stemming from the repudiated Fabco APS. The Plaintiffs re-listed the property for $4,900,000 as recommended by L.K. in March 2017. This was reasonable timing since legitimate efforts were made to salvage the Fabco APS in the weeks following its repudiation. The re-listing price was well over the $4.5 million sale price on the Fabco APS.

[75] L.K. re-listed the property and expanded the listing to the residential and commercial divisions of the Toronto Real Estate Board. This was accompanied by renewed signage, discussions with other real estate agents, newspaper advertising, and brochures. The decision to reduce the listing price first to $4,499,000 on May 13, 2017, and then to $3,500,000 on July 26, 2017, was neither precipitous nor ill-advised considering market conditions and comparable properties.

[76] Nor was it unreasonable for the Plaintiffs to only entertain unconditional offers and to insist upon significant non-refundable deposits during the time between the repudiated Fabco APS and the execution of the Marcello APS. The Plaintiffs had learned that offers with financing conditions or due diligence clauses would tie up the McKenzie property and take it off the market for months at a time. The Plaintiffs also would have understood that modest deposits did not serve as a deterrent to prospective purchasers prepared to resile from agreements.

[77] As stated in *Lecco Ridge Developments Inc. v. Vaquero*, 2022 ONSC 6547, at para. 23, "a Plaintiff is not required to act perfectly, nor take all possible steps to reduce its loss, so long as it acted reasonably in view of [the] circumstances at the time."

[78] I find that the Plaintiffs effectively and meaningfully mitigated their damages sustained as a result of Jaymor's breach. The Plaintiffs attempted to revive the Fabco APS before re-listing the McKenzie property in line with their realtor's advice and market realities. The Plaintiffs reasonably held firm to the twin stipulation that due diligence conditions would not be entertained and that significant deposits must accompany offers.

[79] Mitigation was not pleaded in the statement of defence to the title claim, nor was there any evidence led that would establish that defence.

Counterclaim

[80] There is no basis for any counterclaim. The Plaintiffs did not breach the Fabco APS. They were ready, willing, and able to close and convey good and marketable title to the McKenzie property on November 30, 2016. The Defendants counterclaim is hereby dismissed.

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Disposition

[81] In the result and for the foregoing reasons, the Plaintiffs claims are allowed in both the Fabco claim and the Title Claim.

[82] The Plaintiffs shall have judgment against the Defendant, Jaymor in the amount of $1,747,633.15 plus pre-judgment interest to be agreed upon or determined**.** The $200,000 on deposit is forfeited by Fabco/Jaymor and is to be paid out to the Plaintiffs in partial satisfaction of the judgement.

[83] The Plaintiffs shall have judgment against the Defendant, Gerald Anthony (also know as Gerald Van Erp) in the amount of $57,790.88 plus pre-judgment interest to be agreed upon or determined.

[84] There shall be judgement to go accordingly. If the parties are unable to agree upon the form and content of any judgment or upon the issue of costs and/or pre-judgment interest, they shall take out an appointment through the Trial Coordinator to appear before for me to address these remaining issues.

J.R. McCARTHY J.

Released: November 14, 2024

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