

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

York County Condominium Corporation No. 18 v. Oak Ridge Manufacturing Inc., et al
2024 NBKB 126 **FC/191/2018**

BETWEEN: **YORK COUNTY CONDOMINIUM CORPORATION No 18,**

– and –

OAK RIDGE MANUFACTURING INC., JRH DEVELOPMENTS LTD., ATH DEVELOPMENTS INC., JAMES HANSON QUALITY FRAMING LTD., CAPITAL CITY CONDOMINIUMS, THE CITY OF FREDERICTON, SHAMROCK TRUSS & COMPONENTS LIMITED PARTNERSHIP, 015049 N.B. LTD., PHILLIPS ENGINEERING AND CONSULTING SERVICES LTD., B&G SPRINKLERS LTD., and AIR TECH VENTILATION LTD.

DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Fredericton, New Brunswick

DATE OF HEARING: December 21, 2023 and February 5, 2024

DATE OF DECISION: June 12th, 2024

APPEARANCES:

- Edwin R. Ehrhardt, K.C., for the Plaintiff
- Andrew Kinley and Parker Menzies, for Oak Ridge Manufacturing Ltd. and ATH Developments Inc.
- Dennise Mack, for James Hanson Quality Framing Ltd.
- Ryan Burgoyne and Andrea Pierce, The City of Fredericton
- Hugh Cameron and Sean Corscadden, for Phillips Engineering and Consulting Services Ltd.

DEWARE, C. J.

INTRODUCTION

[1] This is a motion for summary judgement brought by one of the Defendants, Phillips Engineering and Consulting Services Ltd (hereinafter “Phillips”). The Plaintiff, York County Condominium Corporation No 18, agreed to discontinue this action against Phillips following discoveries which took place in the summer of 2021. The other defendants refused to consent to the discontinuance against Phillips or did not respond to Phillips’ request soliciting their consent. Considering their inability to obtain consent from the other Defendants to have the matter discontinued as against them, Phillips filed this motion seeking leave of the Court to have the action discontinued or alternatively, summary judgement be granted on the basis there is not merit to the action against them.

FACTS

[2] This action stems from alleged deficiencies in a 48-unit condominium building constructed at 225 Serenity Lane in Fredericton, New Brunswick (hereinafter “the building”). The Plaintiff filed the Notice of Action with Statement of Claim Attached on July 24, 2018. The action has now been discontinued against the Defendants, B&G Sprinklers Ltd. And Air Tech Ventilation Ltd. The Plaintiff takes no position with respect to Phillips motion requesting either a discontinuance or summary judgement.

[3] In the Statement of Claim the Plaintiff seeks damages as a result of alleged defects or deficiencies in the building including issues with the balconies, trusses, building wrap, windows, HVAC, fire doors, fire separations, fire dampers and fire blocks.

[4] Michael Phillips of Phillips Engineering was retained as the engineer for this development. Mr. Phillips' roll was to prepare and seal the building plans that were then submitted to the City of Fredericton with the Developer's Application for a Building Permit. The contractors then constructed the building with the assistance of the plans. Construction took place over the course of several months in 2006.

[5] Mr. Phillips filed three affidavits in support of his motion. In his first affidavit of February 8th, 2023, Mr. Phillips described his involvement in the construction of the property at paragraph 13 as follows:

13. With respect to the Project, I performed the structural and the *National Building Code* review of the building plans and, once satisfied, I stamped the plans with my seal. I do not recall undertaking any onsite inspections of the Project.

[6] In his second affidavit of December 11th, 2023, Mr. Phillips deposed to his involvement in the project at paragraphs 5, 6, 13 as follows:

5. I was not involved in the construction of the Project.

6. With respect to the Project, I performed the structural and the *National Building Code* review of the building plans and, once satisfied, I stamped the plans with my seal. Again, as such, I was not involved in the

Construction of the Project. I do not recall undertaking any onsite inspections of the Project.

(...)

13. Phillips Engineering had a prior working relationship with Oak Ridge and the Hanson family. I testified at Discovery, and to the best of my knowledge, Phillips Engineering was retained by Oak Ridge to complete the structural and the *National Building Code* review of the building plans with respect to the Project and issued an invoice directly to Oak Ridge.

[7] In his third affidavit of December 18th, 2023, Mr. Phillips further explained his involvement in the Project at paragraphs 5, 6 and 20 as follows:

5. I did not design the fire stop assemblies as I only performed the structural and the *National Building Code* review of the building plans and stamped the plans with my seal.

6. I was not contracted by the Co-Defendants or anyone to perform any site inspections.

(...)

20. I was not contracted by the Co-Defendants to perform any on-site inspections of the building. Nor do I recall attending any. However, if I did attend an on-site inspection in my capacity as an Engineer, which I do not admit but expressly deny, I would have “signed off” on the City of Fredericton’s inspection by providing them with a “sign off” letter.

[8] The building was constructed within the limits of the City of Fredericton. Fredericton’s By-Law No. R-1 required the City to complete at least three inspections during construction of apartment buildings. These mandatory inspections were:

- 1) A pre backfill inspection consisting of a foundation inspection prior to any backfilling;
- 2) A pre drywall inspection consisting of a structural inspection, an insulation inspection and a vapour barrier inspection; and
- 3) A final pre-occupancy inspection.

[9] The City of Fredericton has confirmed in this case that nine inspections of the building were conducted between July 2006 and December 13th, 2006. Kevin Horncastle is a building inspector with the City of Fredericton. Mr. Horncastle was involved in eight of the inspections of this building. Mike Pospolita is the manager of building inspections with the City of Fredericton. Mr. Pospolita completed one of the building inspections in June of 2006.

[10] The City of Fredericton tendered the affidavits of Mike Pospolita and Kevin Horncastle in opposition to this motion. In his affidavit of December 6th, 2023, Mr. Pospolita explains how building inspections generally work in Fredericton as well as commenting on the City's understanding of what happened with this project. Mr. Pospolita states at paragraphs 2, 14, 16, 19, 21, 24 and 26 as follows:

2. Many of the facts deposed to in this affidavit are based on the Inspection Reports in the City's possession. At all relevant times, Building Inspectors employed by the City were required to complete Inspection Reports for any building inspection completed. The Inspection Reports were to indicate the type of inspection and note any deficiencies or instructions to the developer. The developer receives a copy of every Inspection Report, and the City maintains a copy in the building file for the property.

(...)

14. As indicated in the Inspection Report, I had a question about the foundation and wanted the developer's engineer to approve it. I do not recall the specifics, but I would have been looking for the developer's engineer, Phillips Engineering, to confirm the construction of the foundation conformed with the *National Building Code* and would support the intended load of the structure before the foundation was backfilled and could no longer be observed.

(...)

16. The developer's engineer for this project was Mike Phillips of Phillips Engineering. On or about July 18, 2006, the City of Fredericton received the memo, attached as Exhibit "I", from Mr. Phillips. Mr. Phillips is providing written confirmation to the City, as per my request, that the foundation is okay to backfill and construction can proceed. It further indicates that he was on site the previous day (July 17, 2006) to do an inspection.

(...)

19. Although not required, the building inspector may ask for the developer's engineer to attend the framing inspection. The purpose of having the engineer present is to have the engineer confirm the structural components of the Apartment Building meet the *National Building Code* and Plans & Specifications.

(...)

21. Neither Mr. Horncastle nor I are engineers. When the City building inspectors request an engineer to be on site during an inspection, we are asking and relying on that engineer to advise us of any defects, deviations or deficiencies in construction from the Plans & Specifications and *National Building Code*. Mr. Horncastle's Inspection Report indicates to me that Mr. Phillips is indicating that he does not identify any such deviations, defects or deficiencies in construction. If there were any deviations, defects or deficiencies in construction observed or discussed during the inspection it would be noted in the Inspection Report. Following any inspection, the developer receives a copy of the Inspection Report and are to remedy any deficiency or defect identified therein.

(...)

24. Although not required, the building inspector may ask for the developer's engineer to attend the final inspection. During the final inspection the building inspector is looking at visible building components, such as doors, handrails, continuity of visible fire separations and emergency lighting. The purpose of having the engineer present is so the engineer can confirm that the visible components of the building, including the ones specified above, met the Plans & Specifications and the *National Building Code*.

(...)

26. As set out above, the City Building Inspectors completed the mandatory three inspections as outlined in the By-Law. The City's records indicate that Mr. Phillips attended the site for the purpose of these inspections on at least two occasions – the "pre-backfill" inspection and "pre-drywall" inspection when the Building Inspector was reviewing the structural components. The Building Inspector also instructed the developer to contact Mr. Phillips to attend the final inspection, but I am unable to verify whether Mr. Phillips attended the final inspection.

[Emphasis mine]

[11] Mr. Horncastle explained the inspections he completed on this building in 2006, as well as his recollection as to Mr. Phillips' involvement. In particular, Mr. Horncastle provided the following evidence at paragraphs 5, 10, 11, 16 and 18 of his affidavit:

5. I attended the Apartment Building on eight occasions between July 17, 2006, and December 13, 2006. As will be discussed below, I have attached a copy of the Inspection reports completed by myself at each of the eight inspections. I know that the reports were completed by myself as I recognize my handwriting and signature at the bottom of each report. **I recall the building and construction being completed, but I do not have an independent recollection of the inspections I completed.** While employed by the City I completed several inspections every week.

(...)

10. The next inspection I completed of the Apartment Building was on September 16, 2006. Attached as Exhibit "C" is a copy of my Inspection Report from September 26, 2006. At that time, I was completing a framing inspection. **On many occasions, particularly for multi-unit buildings, I would request that the developer's engineer attend inspections so that the engineer could verify that the construction, as visible at that time, met the plans and specifications that the engineer had sealed and the *National Building Code*.** The framing/structural inspection was a mandatory inspection as set out in the By-Law. My note from September 26, 2006, states as follows:

Inspection with Mike Phillips Engineer and James Hanson, developer. Support through floors ok. Beams ok. Roof trusses braced & ok. Corridor walls ok.

11. As stated in the Inspection Report, Mike Phillips and James Hanson attended the Apartment Building with me for the inspection. I would be relying on Mr. Phillips to confirm to me that the construction up to this point, particularly the structural elements of the Apartment Building, complied with the plans and specifications for the Apartment Building and the *National Building Code*. **My note indicates to me that Mr. Phillips confirmed that the structural components of the Apartment Building available for us to inspect at that time met the plans and specifications,** including the floor supports, beams, roof trusses and corridor walls. The structural inspection is completed prior to the drywall being placed so that we can see the structural components/framing of the building. Along with the structural components, I would inspect with the engineer any fire walls, fire stops and fire separations completed at the time of the inspection.

(...)

16. I attended the Apartment Building on December 7, 2006. Attached as Exhibit "H" is a copy of my Inspection Report from this day. My notes from this inspection state: "Final on Friday contact Mike Phillips. Have all exits complete, lights, etc." The Apartment Building must have been close to complete as my note indicates that I was planning to complete the final inspection on the Friday. **I was asking that the developer contact Mike Phillips to attend the final inspection and that the developer have the building ready for final inspection, including exits and lights.** For a building this size, I would often require the developer's engineer. In this case Mike Phillips, to attend to confirm that the building met the plans and specifications and *National Building Code*.

(...)

18. I completed the final pre-occupancy inspection on December 13, 2006. Attached as Exhibit "I" is a copy of my Inspection Report from this day. My notes from this inspection state: "Unit # 329, 333, 325, 437, all complete ok to occupy." Based on this note, I would have specifically inspected units #329, 333, 325 and 437 and confirmed that they were ready for occupancy. **I cannot recall whether Mike Phillips attended this inspection.**

[Emphasis mine]

[12] Jody Hanson, the principal shareholder of the Defendant, JRH Developments Ltd, provided an affidavit in response to this motion dated December 14, 2023. In the affidavit, Mr. Hanson provides the following evidence germane to the issues currently before the Court at paragraphs 5, 6, 8, 11, 12, 13 and 14 as follows:

(...)

5. My company, JRH Developments Ltd. as well as my father's company, James Hanson Quality Framing Ltd. were two of the four partners in Capital City Condominiums at all material times. The other two partners were the co-defendants, ATH Developments Inc. and Oak Ridge Manufacturing Inc. ATH Developments Inc. was run and owned by my cousin, Adam Hanson, and Oak Ridge Manufacturing was run and owned by my uncle, Howard Hanson.
6. Capital City Condominiums retained the co-defendant, Phillips Engineering and Consulting Services Ltd. ("Phillips") with respect to the construction of this Building.

(...)

8. Phillips reviewed the plans for the Building, and stamped those plans as required by the City of Fredericton.

(...)

11. To the best of my recollection, Phillips would have done onsite inspections of the framing of the Building. I have been shown the inspection report dated September 26, 2006 signed by building inspector Kevin Horncastle, attached to my Affidavit as Schedule "A". This inspection report specifically indicates that Mike Phillips Engineer, and my father, James Hanson, were present during the framing inspection. The building inspection report provides:

"Inspection with Mike Phillips Engineer and James Hanson, developer. Support through floors ok. Beams ok. Roof trusses braced and ok. Corridor walls ok."

12. I do not know how often Michael Phillips was on site during the Building's construction, but generally Michael Phillips would be on site on a variety of occasions.
13. Michael Phillips would attend a project if asked to come by any one of the partners of Capital City Condominiums. I also understand that Michael Phillips would attend at a project site if he was asked to do so by a city building inspector.
14. It is my understanding that the framing inspection which is mandated by the city building inspectors is done to ensure that the framing of a building has been done properly. It is my understanding that the framing inspection of the Building on September 26, 2006 was carried out jointly by the city of Fredericton building inspector, Kevin Horncastle, and Michael Phillips.

(...)

[13] Mr. Phillips has no records concerning his work on this project. All of his records including billing statements and invoices were lost in a flood following the completion of this project. The materials in the record pertinent to work conducted by Mr. Phillips are derived from documents that were included in the materials of the opposing parties. Mr. Phillips has no independent recollection of the work he completed on this project. Mr. Phillips does not recall attending any inspections of this project and does not believe that he was retained to conduct inspections.

Unfortunately, the parties that had hired Mr. Phillips for this project, no longer have in their possession the billing records related to this project. Therefore, the developers are unable to clarify for the Court whether or not Mr. Phillips was hired to do inspections in addition to reviewing and stamping the plans.

POSITION OF THE PARTIES

[14] Phillips maintains there is no valid cause of action set out in the pleadings as against it. Phillips points out all the alleged defects or deficiencies with the building are the result of defects or deficiencies in its construction. Phillips argues that it played no role whatsoever in the construction of the building. Phillips suggests the only issues between the parties are whether Phillips failed to design the building in accordance with the applicable building code or whether it failed to conduct inspections and identify defects from the plans during such inspections. As there have been no allegations made by any of the parties, nor the experts, that Phillips' plans were in any way defective there is no potential that Phillips could be held liable with respect to same. Further, Phillips submits they were not hired nor did they do inspections during the construction of the building and therefore cannot be found liable for any errors or oversights made during inspections. Finally, Phillips posits the theory that the evidentiary record is complete and there is no evidence to support the

theory that Phillips was retained nor participated in the inspections conducted during the construction of the building.

- [15] The Defendants respond to Phillips' motion arguing strenuously summary judgement is not available in this case as there are genuine issues which require a trial on liability to resolve concerning the design, construction, and inspection of the building. The Defendants further suggest that partial summary judgement is not an option in this case where there are multiple parties and various cross-claims. The Defendants maintain a trial of the issues involving all parties is the only means to avoid the potential of inconsistent findings. Finally, the Defendants point out that the Plaintiff's decision to discontinue the action as against Phillips in no way absolves Phillips potential liability to the other Defendants as a result of the cross-claims.

ISSUES

- [16] The issues for the Court to determine in this matter are as follows:
- (i) Is Phillips entitled to a discontinuance of the action by the Plaintiff pursuant to Rule 25.01 of the New Brunswick **Rules of Court**?
 - (ii) Is Phillips entitled to summary judgment pursuant to Rule 22.01 and 22.04 of the New Brunswick **Rules of Court**?

LAW AND ANALYSIS

[17] Phillips seeks a discontinuance pursuant to Rules 25.01, 25.03, 25.05, and 25.07 of the *Rules of Court*.

25.01 Discontinuance by Plaintiff

A plaintiff may discontinue his action against a defendant, either in whole or in part

- (a) at any time before the close of pleadings,
- (b) after the close of pleadings, with leave of the court, or
- (c) at any time, with the written consent of all parties

By

- (d) filing with the clerk a Notice of Discontinuance (Form 25A), and
- (e) serving a copy of the Notice of Discontinuance on all parties who have been served with the Statement of Claim.

25.03 Costs on Discontinuance or Withdrawal

A party wholly discontinuing an action or wholly withdrawing his Statement of Defence against another party shall pay the costs of the other party to date, including the costs of any cross-claim or third party claim, unless the court orders or the parties agree otherwise.

25.05 Effect of Discontinuance on a Cross-Claim or Third Party Claim

Where an action is discontinued against a defendant who has cross-claimed or made a third party claim, the cross-claim or third party claim shall be deemed to be dismissed 30 days after the discontinuance, with costs payable by the plaintiff, unless the court orders otherwise during the 30 day period.

25.07 Application to Counterclaims, Cross-Claims and Third Party Claims

Subject to Rules 28, 29 and 30, this rule applies, with any necessary modification, to a counterclaim, a cross-claim or a third party claim.

[Emphasis mine]

[18] The complications arising from cross-claims was considered by Justice Morrison in *Relja et al v. Village of New Maryland et al*, 2016 NBQB 189 where a motion was brought to strike a claim pursuant to Rules 22 and 23 of the *Rules of Court*. In that case the Village of New Maryland as well as a firm hired to design and supervise the construction of storm sewers were sued by citizens who alleged their properties were flooded due to the negligence of the municipality and the engineers. The municipality cross claimed against the engineering firm, Opus. In dealing first with the issue of the cross claim, Justice Morrison commented at paragraph 22 as follows:

[22] Even if I had concluded that the question was a legal one appropriate for disposition under Rule 23 I must first be satisfied that it meets one of the three criteria set out in the rule. In this case, there is a cross-claim between the Village and Opus. In that cross-claim the Village, in the alternative, repeats the claims of negligence set out at paragraph 23 of the plaintiffs' Statement of Claim and cross-claims against Opus for contribution and indemnity. There can be little doubt that there is a duty of care owed by Opus to the Village given their contractual relationship and the involvement of Opus in designing the Storm Sewer Upgrade for the Village and overseeing the Contract on its behalf. Thus, even if it was determined that Opus owed no duty of care to the plaintiffs the question of its liability in negligence remains to be determined because of the cross-claim by the Village against Opus. In short, regardless of whether Opus owes a duty of care to the plaintiffs it would continue as a party to the litigation and the fundamental issue of its negligence would remain a live issue. In those circumstances I fail to see how determining the preliminary question would dispose of the action, shorten the trial or reduce trial costs.

[Emphasis mine]

[19] While the Plaintiff is willing to discontinue its action against Phillips, the remaining defendants do not consent to the discontinuance. The pleadings are now closed and Phillips' only recourse for a discontinuance of the Plaintiff's action in the absence of the co-defendants' consent is

leave of the Court pursuant to Rule 25.01(c). Leave of the Court would be appropriate in circumstances where the Court was satisfied the issues pertinent to the party requesting leave's potential liability could be decided in their favor via summary judgment. For the reasons that follow, I have determined that summary judgment is not available to Phillips in the circumstances of this case, and therefore it would be inappropriate and prejudicial to the co-defendants to grant leave to have the action discontinued against Phillips pursuant to Rule 25.01(c).

[20] Alternatively, Phillips seeks summary judgement pursuant to Rules 22.01(3), and 22.04 of the ***Rules of Court***.

22.01 Where Available

(...)

(3) After the defendant has served a Statement of Defence, the defendant may move with supporting affidavit or other evidence for summary judgment dismissing all or part of the claim in the Statement of Claim.

22.04 Disposition of Motion

General

- (1) The court shall grant summary judgment if
- (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence, or
 - (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied it is appropriate to grant summary judgment.

Powers

(2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at a trial:

- (a) weighing the evidence;
- (b) evaluating the credibility of a deponent; and
- (c) drawing a reasonable inference from the evidence.

[21] All parties agree the guiding principles on summary judgment motions are as set out by Justice Karakatsanis in *Hyrniak v. Mauldin*, 2014 SCC 7 in particular at paragraphs 27, 28 and 49 as follows:

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. **A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found.** However, that process is illusory unless it is also accessible — proportionate, timely and affordable. **The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.**

(...)

[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 on a motion for summary judgment. 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.

[Emphasis mine]

[22] There have been a multitude of cases that have considered Justice Kazakhstanis's decision in *Hyrniak* including several New Brunswick decisions both from the New Brunswick Court of Appeal and the Court of

King's Bench of New Brunswick. This developed jurisprudence has distilled the following guiding principles in the consideration of a request for summary judgment.

- 1) The test for summary judgment is whether or not there is a genuine issue requiring a trial;
- 2) There will not be a genuine issue requiring a trial if the judge is capable of the following:
 - a. Making necessary findings of fact based upon the evidentiary record before them;
 - b. Applying the law to the findings of fact; and
 - c. The summary determination is the most expeditious and least expensive means to achieve a just result for the parties
- 3) The burden of proof rests upon the moving party to satisfy the court on a balance of probabilities that there is no genuine issue requiring a trial for its resolution; and
- 4) Both parties have an obligation to put their best foot forward and to furnish their best evidence in support of or opposition to the motion for summary judgment. It is not sufficient to suggest there will be evidence at trial to support a certain hypothesis – the nature of that evidence must be provided to the motion judge within the confines of the summary judgment motion hearing.

[23] Justice Morrison in *Estephan v. Dykeman et al*, 2020 NBQB 65, lays out the approach a judge must follow in the consideration of a motion for summary judgment at paragraphs 13 and 14 as follows:

[13] Amendments to Rule 22, which came into force in 2017, have significantly altered the legal landscape with respect to parties seeking summary judgment. These were in response to the encouraged use of summary judgment as part of a “cultural shift” toward simplified adjudication outlined in *Hryniak v Mauldin*, 2014 SCC 7. In *O’Toole v Peterson*, 2018 NBQA 8, Chief Justice Drapeau (as he then was) identified the key changes implemented by the new rule. In particular, he pointed out that a court is no longer restricted to cases where there is “no merit” to the defence. The court clearly stated that the test for summary

judgment under the new rule is simply whether there is a genuine issue requiring a trial (para. 68).

[14] In *Russell et al v Northumberland Co-Operative Ltd.*, 2019 NBCA 70, the Court of Appeal expanded on the import of the 2017 amendments. The key points from *O’Toole* and *Russell* can be summarized as follows:

1. The only test for summary judgment is whether there is a genuine issue requiring a trial;
2. The burden of proof is on the moving party to establish there is no genuine issue requiring a trial and it is on the balance of probabilities;
3. The importance of the parties putting their best foot forward and leading trump or risk losing is more significant under the new Rule 22;
4. The rule provides for a two-step process to determine whether there is a genuine issue requiring a trial;
5. In step one the judge must determine if the evidence presented reveals a genuine issue requiring a trial. If, on the filed evidence alone, the judge can fairly and justly adjudicate the dispute there will be no genuine issue requiring a trial and the judge must grant summary judgment;
6. If the judge cannot adjudicate the dispute on the filed evidence he will proceed to step two. A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there may be a genuine issue requiring a trial. The judge will then determine if a trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3) (the “mini-trial”);
7. The guiding principle is that it will always be in the interest of justice for a judge to make use of the mini-trial where possible.

[24] The City of Fredericton suggests the evidentiary record establishes that Mr. Phillips was present during at least 3 of the inspections conducted of the building. The affidavit of Mr. Horncastle attaches a handwritten note from Mr. Phillips related to an inspection conducted in July 2006. The handwritten note of Mr. Phillips dated July 18th, 2006 states:

RE: FOUNDATIONS – Hanson Apts. Serenity Lane. I did an inspection yesterday. The substitution of pilasters for the specified stepped footings will cause a future change in the thickened footing above, however, for now

the wall is okay to backfill. (Once the drain tile is installed).

- [25] The City of Fredericton further maintains that while Mr. Phillips is unaware as to what he did exactly in this case, he does know what he typically would do when conducting an inspection. The City of Fredericton draws the attention of the court to portions of Mr. Phillips discovery evidence where his usual process was discussed:

Q. But in any event, as I understand your evidence, if you noted anything at that time that was incorrect or didn't meet your drawings or the *National Building Code*, you would have told, presumably, Mr. Hanson and/or the City at that time?

A. **Yeah. Any typically these things where I have gone on an inspection with the builder and will look at it. The building inspector, myself and the builder will look at it. And if any of us sees anything that's wrong, we'll say that's wrong. It's got to be fixed. So you know, that's the typical process.** You go through these, like ... so any time you see anything that's not right. And the building inspectors are the same thing. You know, if they see anything they'll ... they respond in kind also, you know?

...

Q. And ... and I know you don't recall. This is checked off as a framing/carpentry inspection. But you've been on framing/carpentry inspections with the City before?

A. Absolutely, yeah.

Q. And what is the purpose of those inspections? What are you looking for?

A. You look for to make sure that the materials are right that you specified. For example, on these set of plans I specify grade of lumber, (Inaudible) number one or two. Sometimes on occasion, you're going into a building and you look and say, "Umhmm. This guy is using stud grade lumber." You look to make sure the lintels have the correct amount of bearing. You specify one-ply bearing or two-ply bearing, that they have that. So basically, you look for anything wrong with materials or anything wrong with installation.

Q. And specifically in relation what your plans say?

A. Yes, in specific ... but also good workmanship, also. You know? Like, the plans don't have everything on them. And you'll say something like, "That's pretty messy." Like sometimes .. just a recollection, I see some guys will use some shims or something under a member that's not on the plans. Like, that doesn't do it. They've got to get rid of the shims. You know? So you'll see stuff that's not on the plans that's done that's not right, just not even following the plans. Substitutions.

[Emphasis mine]

- [26] The City of Fredericton also refer to a note Mr. Horncastle made on December 7th, 2006 which states: "*Final on Friday contact Mike Phillips*". The City of Fredericton argues the evidence they have furnished clearly establishes that Mr. Phillips was involved in at least some inspections of this building. Further, the City of Fredericton points out that this evidence is not challenged by Mr. Phillips as he candidly admits he has no recollection of the work he did on this project, nor any available contemporaneous records.
- [27] In terms of the evidentiary record, the fact witnesses that have filed affidavits are Mike Phillips, Kevin Horncastle, Mike Pospolita and Joel Hanson. As noted earlier, Mr. Phillips has lost all of his contemporaneous record and has no independent recollection of this project. Mr. Hanson's memory is likewise limited. The only party that has contemporaneous records which have survived pertinent to the involvement of Mike Phillips in the design and construction of this building is the City of Fredericton.
- [28] In addition to the evidence from the factual witnesses, expert evidence has been submitted in this matter. The Defendants Oak Ridge

Manufacturing Inc., JRH Developments Ltd., ATH Developments Inc., and James Hanson Quality framing Ltd retained the services of Jill Higgins, Architect, to prepare a report in opposition to Phillips' motion for summary judgment. Ms. Higgins sets out her preliminary opinion in paragraphs 10, 11 and 12 of her affidavit of December 13th, 2023 as follows:

(...)

10. From visual inspections during the Site-Visit, I observe instances of Underwriters Laboratories of Canada (ULC) listed firestopping missing from fire separations at plumbing, electrical, or conduit penetrations, in the Building. I also observed instances where gaps and holes existed in the Building at locations where fire rated gypsum wall board met adjacent walls, ceilings, or floors.
11. The Construction Drawings for the Building provide guidance as to the firestopping requirements to be used in the construction and should be consulted by a supervising professional designer who conducts an inspection of a building. Construction Drawings set general specifications on drawing APT-78 states:

“Penetrations (plumbing, electrical, telephone/cable/computer conduit, etc.) through all or part of any fire separation shall be firestopped on both sides of vertical fire separation and on the lower side of floor and ceiling assemblies. Ensure proper support is provided for fire stopping. Gypsum plaster, insulation or foam are not approved firestop systems. Only listed firestop systems shall be used.”
12. Any improper or missing firestopping **should have been observed by the supervising professional designer during onsite inspection during construction of the Building.**

(...)

[Emphasis mine]

[29] Engineer Daniel Estabrooks was retained by Oak Ridge Manufacturing Inc., JRH Developments Ltd., ATH Developments Inc., and James Hanson Quality Framing Ltd. to provide a report in opposition to the motion for summary judgment dated December 14th, 2023. In his affidavit, Mr.

Estabrooks explains his preliminary opinion at paragraphs 9, 10, 11 and 12 as follows:

(...)

9. The reasons for my opinion are as presented below and this affidavit accurately sets out my preliminary observations, findings, and opinions, in this matter. I am reasonably certain of my opinion.
10. From visual inspections during the Site-Visit, I observed truss permanent bracing was not installed in accordance with industry standards of good practice.
11. Typically, on truss shop drawings, the manufacturer outlines the requirements for permanent truss bracing, to be installed on site. The standard requirements for site installed permanent truss bracing are referenced in “Bracing Wood Trusses Commentary and Recommendations” (BCSI 103). Attached and marked as Exhibit “C” is a true copy of pages 51-54 of BCSI 103 pertaining to permanent truss bracing.
12. **A professional structural engineer performing a framing inspection of a building would be able to identify if truss permanent bracing was not installed in accordance with industry standards using BCSI 103.**

(...)

[Emphasis mine]

[30] The City of Fredericton suggests that Phillips owed a duty of care to the Plaintiff as well as a contractual obligation during both the preparation of the plans as well as during the construction of the building. The City of Fredericton maintains that nothing in the record supports the assumption that Mike Phillips was relieved of his obligation to participate in the inspections at the property. Further, the City of Fredericton reiterates the fact that Phillips was onsite for at least two of the inspections and at those times would have had a duty to exercise the skill, care and diligence reasonably expected of an engineer.

[31] The City of Fredericton refers the court to caselaw where courts have determined that municipalities cannot be held liable for the negligence of engineers. In ***Essex Condominium Corp No. 43 v. LaSalle (Town)***, [2009] O.J. No. 5745 (Ont. Sup Ct J.), the court considered a negligence action arising out of alleged structural deficiencies in the construction of the condominiums. The Town was found not liable and it was determined it could rely upon the engineer's stamp and seal in determining of the requirements of the Ontario Building Code. In particular, the court commented at paragraph 20 as follows:

20. During the course of the construction, William Haas Limited conducted on-site inspections. Site inspection reports were provided to the Town of LaSalle with respect to each inspection. Between January 17, 1991 and July 12, 1991, nine inspection reports were prepared by William Haas Limited and sent to the Town of LaSalle.

[32] The City of Fredericton also refers the court to an excerpt from the text ***Canadian Law of Architecture and Engineering, 2nd.ed.*** in their pre-hearing brief, quoting the following passages:

Unless the contract between the architect or engineer or owner provides otherwise, the architect or engineer must supervise the work and inspect it sufficiently often to ensure that the project is being constructed in conformity with the plans and specifications and the contractor's contractual obligations. Failure to discharge this duty may render the architect or engineer liable to the project owner for damages.

...

Architects and engineers are required to exercise reasonable care, skill and diligence in supervising the work entrusted to them. On the other hand, they do not guarantee that every departure from the design will be noted and corrected, only those that reasonable supervision will disclose. The level of supervision required is such as will enable the architect or engineer to certify that the work of the contractors has been executed according to plans and specifications to the extent that reasonable supervision will disclose such to be the case. The more extreme the consequences and the greater the risk, the higher the duty of care. The supervising architect or engineer must give the project such attention as the nature and difficulty of the work reasonably demand.

...

Architects and engineers are not obliged to supervise everything done on the site. They cannot be constantly at the project, supervising each detail. However, at a minimum they, or someone representing them, should be in attendance for critical phases of the work and should inspect important aspects of the work before they are hidden from view.

[33] Phillips suggests the Court does have all the facts necessary to consider the liability issues in summary fashion. Phillips argues the fact there are no records available from Phillips, or the Plaintiff, setting out the scope of his retainer is not dispositive of the request for summary judgment. Phillips suggests the evidentiary void which exists due to the lack of available records should not be perceived as indicative there is evidence “somewhere” which supports the allegations of negligence against it. Phillips suggests the current evidentiary record mirrors the evidence that will be available for the trial judge. Further, Phillips does not dispute the existence of the records from the City of Fredericton which indicate he was present during one or more inspections. However, Phillips maintains the mere fact that he might have been present does not mean he may be liable for construction deficits in the building, nor does it establish he was retained to conduct inspections.

[34] The Defendants argue granting summary judgement in this case would not be appropriate as it would be a partial summary judgement and would not result in any efficiencies for either the parties or the court. The Defendants suggest that multiple cases considered by the Court of King’s

Bench of New Brunswick have dismissed requests for partial summary judgment on such a basis. In *Graysbrook Capital Ltd. v. Viva Development Inc., Joseph Vautour, and Mathieu Vautour*, 2023 NBKB 237, Justice Grant denied a request for partial summary judgment brought by third party insurers. In dismissing the motion Justice Grant commented at paragraphs 36 to 39 as follows:

[36] In *Babin v. C.J.M. Dieppe Investments Ltd. et al*, 2019 NBCA 44 where the Court of Appeal adopted the Supreme Court's statement in *Hyrniak v. Mauldin*, 2014 SCC 7 at para. 60 that caution should be used in applications for partial summary judgment. The Court in *Babin* also adopted the statement of Pepall, J.A. in *Butera v. Chown, Cairns LLP* 2017 ONCA 783 that partial summary judgment "... **should be considered to be a rare procedure reserved for issues that may be readily bifurcated from those in the main action ...**".

[37] The third party claims in this action include joint and several claims in negligence against all of the third parties. All the allegations of negligence are made against the third parties collectively.

[38] The claim against the third parties is fact-driven and largely based on evidence that involves the actions or inactions of Sears' employees. The defendants allege that all of the third parties are liable for those actions or inactions. The issue of whether or not any one of the third parties is liable to the defendants is not severable from the issue of whether or not the other two are liable to them. Therefore, in order to avoid partial summary judgment, the dismissal of GAIC's motion mandates the dismissal of the motions of Sears and Anderson for summary judgment.

[39] Moreover, because the claim against GAIC must proceed to trial and will require evidence from Sears employees, granting summary judgment in the other two motions would not achieve any judicial economy in my view.

[Emphasis mine]

[35] This is not a case where bifurcation of certain issues is easily done. As was the situation considered by Justice Grant in *Graysbrook*, the claims in negligence as alleged in the Statement of Claim against the various defendants, as well as cross-claims between the co-defendants, are

largely fact-driven. The central question to be answered to determine Phillips potential liability is whether he conducted inspections, and if so, when and of what? The resolution of these questions requires an analysis of the liability of the City of Fredericton, and this question would proceed to trial even if summary judgment were granted to Phillips. Granting summary judgment to Phillips, if it was available, would not result in any judicial economy in this case, as was the situation in **Graysbrook**.

[36] The Defendants suggest that they have put their best foot forward in opposing Phillips' request for summary judgment. The Defendants point to the scope of the 1200-page record filed on the motion, as well as the initial findings of their experts. The Defendants further note Phillips has furnished no expert opinion in this matter to confirm that he did meet the standard of care owed by him to the Plaintiff. Finally, the Defendants reiterate the Plaintiff's decision to discontinue the action against Phillips is in no way dispositive of the issues between Phillips and the remaining Defendants.

[37] Justice Morrison dismissed the motion for summary judgement in **Relja** largely due to the fact that it was premature. In **Relja**, unlike the present matter, the parties had yet to exchange affidavit of documents, proceed to discovery nor exchange expert reports. Justice Morrison explained the evidentiary deficiency in the record at paragraph 34 as follows:

[34] Returning to the two broad basis for potential liability of Opus (whether its design and supervision met the professional standard of care) it seems to me that expert opinion evidence will feature prominently in the adjudication of this issue. Of course, that is not unusual in construction and engineering cases where the professional standard of care is in issue. How can an expert be expected to provide an opinion without confidence that he or she has been provided with all relevant documents? That confidence can only come from the exchange of rule-compliant Affidavits of Documents. In the Trudell case discussed earlier the court was able to determine the question of duty of care only after there had been an exchange of detailed experts' reports and an investigation of the nature and extent of the engineers' involvement in the oversight of the development. In the present case, that has not yet occurred. **In my view, the failure of Opus to produce an Affidavit of Documents in the circumstances of this case is fatal to its motion for summary judgment.** It does not lie in the mouth of counsel for Opus to say "it is hypocritical for the other parties to insist on compliance when they have failed to deliver their own Affidavits of Documents". There are mechanisms in the rules available to Opus to compel compliance which it has not explored. This underlines the plaintiffs' argument that this motion is premature. **It may be that as this litigation unfolds through the document production and discovery stage and the exchange of likely experts' reports that it might ripen into one which is ready for summary disposition. It is not at that stage yet.**

[Emphasis mine]

[38] Justice Morrison's comment at paragraph #20 in *Relja* is helpful to the present analysis:

[20] Opus also relies upon the decision in *Trudell v. Sandpoint Developments Inc.*, 2009 ONCA 168. In that case the Ontario Court of Appeal upheld a summary judgment which concluded that the engineers of a developer of a condominium project owed no duty of care to purchasers of a condominium unit who experienced serious health problems as a result of leaks in the unit. The court articulated four reasons for upholding the summary judgment:

1. There was no contractual relationship between the engineers and the plaintiff;
2. None of the experts' reports, including those submitted on behalf of the plaintiff, supported the plaintiff's contention that the engineers failed to meet professional standards in the design of the project;
3. The engineers were not required to carry out on-site tests or measurements but only periodic reviews to ensure general conformity with design drawings; and
4. The Professional Engineers Act did not create a private law duty of care to members of the public.

[39] The Court must determine if there is a genuine issue requiring a trial in this matter. The determination of whether or not Mike Phillips conducted inspections of the building is a key finding of fact that must be made before an analysis of whether or not Mr. Phillips breached a standard of care can be determined. In reviewing this voluminous record, the evidence is contradictory, and I am unable to conclude if Mr. Phillips conducted inspections, nor what the scope of any inspections he might have done would have been. While there is an apparent lack of evidence that Mr. Phillips was present and actively engaged in each inspection conducted by the City of Fredericton, Mr. Phillips has no independent knowledge of whether or not he did perform inspections. Mr. Phillips does not dispute the evidence and records of Mr. Horncastle and Mr. Pospolita that he was on site on at least two occasions. Further, Mr. Phillips does not dispute he signed the memo of July 18th, 2006 to the City of Fredericton where he stated:

"I did an inspection yesterday. The substitution of plasters for the specified stepped footings will cause a future charge in the thickened footing above, however, for now the wall is okay to backfill. (Once the drain tile is installed.)"

[Emphasis mine]

[40] Summary judgments motions have become a linchpin of civil litigation dockets at superior courts across Canada. Summary judgment motions now appear to be as commonplace as discoveries and disclosure in the

typical steps a civil lawsuit will follow leading to trial. Along with the significant increase in summary judgment motions filed since the “*cultural shift*” heralded by the Supreme Court of Canada in ***Hryniak***, has been a corresponding escalation in the complexity of these motions. This motion is a prime example of this phenomena. In the present matter, we have a record which exceeds 1200 pages, nine affidavits, and three expert reports. The Court is then asked to distill this evidentiary record down to the key factual findings, consider those factual findings through the lens of the relevant law, and then issue a decision. The hearing of these motions rarely require more than a day where a trial on the same issues would likely take five to seven days. One of the key questions for the Court to consider while analyzing the ***Hryniak*** factors is whether or not a summary synthesis of the evidence is feasible.

[41] In the present matter, Mike Phillips doesn’t believe he was hired to do the inspections but concedes he could have been onsite for a couple of them. The evidence on the issue is somewhat equivocal. No party is certain if Phillips was retained to do inspections and the only records available to either confirm it or deny it come from the City of Fredericton. Phillips points out that even if he was present during a couple of inspections, those inspections are not related to the alleged construction deficiencies. Phillips maintains that while the evidence on the inspections is a little murky, there is no clear evidence that he was hired to do inspections, and

the evidence at trial will be no better than what is currently before the Court.

[42] Returning to the test for summary judgment, the Court must first determine if there is a genuine issue for trial. Phillips' request for summary judgment fails at this first stage as I am unable to make the necessary findings of fact based upon the evidentiary record before me. I cannot conclude what, if any, inspections were conducted by Phillips, and therefore I am unable to proceed to apply the law to those findings of fact in order to ascertain whether or not Phillips could have breached the standard of care owed to the Plaintiff in this case. As I am unable to draw upon conclusive findings of fact to determine the issue of Phillips' potential liability in summary fashion, I am likewise unable to draw conclusions on the likely outcome of any cross-claims.

[43] This case is distinguishable from the situation considered by Justice Morrison in *Relja*. Unlike *Relja*, this motion was not premature. The parties have been to discovery, affidavit of documents have been exchanged and preliminary opinions of expert witnesses have been shared. The inability to grant summary judgment at this stage, in this case, stems from the evidentiary void concerning the role, or lack thereof, taken by Phillips during the inspection stage of the project. In the present matter, a trial judge, having considered and evaluated the testimony of all the

witnesses, may very well conclude on a balance of probabilities that Phillips was not retained to do inspections or participate in any oversight of the construction. Given the contradictory evidence, as well as the uncertainty of the evidence of Mike Phillips, I am unable to make that key finding of fact to allow me to then proceed to the next stage of the analysis.

- [44] All parties request costs on this motion. This Court has granted increasingly elevated cost awards against unsuccessful parties on motions for summary judgment. These cost awards are to acknowledge the significant expense involved in prosecuting or defending a motion for summary judgment, particularly in circumstances where the position of a party is bereft of merit. This is not one of those cases. However, it is appropriate costs be awarded to the successful parties who defended the motion. The Defendants, Oak Ridge Manufacturing Ltd, ATH Developments Inc., James Hanson Quality Framing Ltd, are granted one order of costs of \$1,500.00 payable by Phillips. The Defendant, City of Fredericton, is granted an order of costs of \$750.00 payable by Phillips.

CONCLUSION AND DISPOSITION

- [45] For all the aforementioned reasons, Phillips' Notice of Motion is dismissed with costs of \$1,500.00 payable to the Defendants, Oak Ridge Manufacturing Inc., JRM Developments Ltd, ATH Developments Inc., and

James Hanson Quality Framing Ltd, and costs of \$750.00 payable to the City of Fredericton.

DATED at Moncton, New Brunswick this 12th day of June 2024.

Tracey K. DeWare,
Chief Justice of the Court of King's Bench
of New Brunswick