CITATION: 1375175 Ontario Inc. v. Municipality of Chatham-Kent, 2024 ONSC 7109
COURT FILE NO.: 6468/16
DATE: 20241217

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
1375175 Ontario Inc.	)	Rodney M. Godard and Ioana Vacaru, for the Plaintiff
Plaintiff	)	
– and –	)	
Municipality of Chatham-Kent	)	Jonathan de Vries, for the Defendant
Defendant	)	
	)	**HEARD:** May 22, 2024

REASONS FOR DECISION

J.R. MACFARLANE J.

Introduction

[1] The defendant, the Municipality of Chatham-Kent ("CK"), moves for summary judgment for the claim brought by the plaintiff, 1375175 Ontario Inc. ("137"), for negligence on the basis that it is statute-barred.

[2] For the reasons that follow, I grant the motion.

Background

[3] On August 21, 2015, the Chief Building Official of CK issued an Order to Comply ("OTC") under s. 10(1) of the *Building Code Act, 1992*, S.O. 1992, c. 23. It identified 137's commercial building located at 48 Fifth Street in Chatham, Ontario (the "Building") as a single tenant use property for which multi tenant use had never been authorized. The OTC required 137 to either obtain a change of use permit (to multiple tenant use) or alternatively reduce the number of tenants to a single tenant.

[4] 137 determined that the cost of applying for a change of use to multi tenant and retrofitting the Building would require renovations under the *Ontario Building Code*, O. Reg. 332/12, that were not economically viable, so it instead evicted all its tenants but one.

[5] 137 had purchased the Building in 2010 in the belief that multiple tenant use was authorized or permissible. The Building had a long history of multiple tenants before 2010. When the OTC was issued in 2015, there were multiple tenants, consistent with the history of actual, though not necessarily lawful, use.

[6] The original claim in this proceeding was issued in 2016. It advanced a claim for negligent misrepresentation and negligence as against CK and other claims against other defendants which have since been released from the action. The misrepresentation claim was that CK was negligent in failing to advise 137 before it purchased the Building that only a single tenant use was permissible.

[7] 137 sold the Building for a substantial profit in 2017 and no longer had any damages that it could claim arising from the alleged misrepresentation.

[8] Although the negligent misrepresentation claim was no longer viable, the vaguely-pleaded claim in negligence continued and examinations for discovery took place in 2018. It is clear from a review of the transcript of the examination of CK's representative that a major focus of the questions asked by CK's counsel was whether CK knew at the time that it issued the OTC that the building had contained multiple tenants for decades.

[9] 137 claims that it only discovered its claim for negligent issuance of the OTC when it received copies of supplementary documentary productions from CK on March 17, 2021 and that its limitation clock to advance the claim for negligent issuance of the OTC started at that time; indeed, 137's former counsel, Steven Pickard, goes further in his evidence and states that 137 did not discover its claim for negligent issuance of the OTC until it received an expert opinion from Stewart Adams in October 2021. Mr. Adams concluded in his report that CK had approved a legal multi tenant office use for the Building as early as 1981; this conclusion was based on a comprehensive review of multiple documents, only two of which (amounting to three pages) had been contained in CK's supplementary productions.

[10] Eventually, CK brought a motion for partial summary judgment to dismiss the negligent misrepresentation claim, which was heard by Grace J. on December 20, 2021. 137 conceded that its negligent misrepresentation claim should be dismissed but argued that its "negligence" claim remained outstanding. At para. 6 of his endorsement, Grace J. quoted from para. 37 of 137's factum, which alleged "…Chatham was negligent in laying the second portion of the [OTC] (the requirement to apply for a change in use to have more than one tenant) and that the Plaintiff suffered significant damages." Grace J. declined to dismiss the action in its entirety and held, at para. 10, that "…the existing Statement of Claim is incomplete insofar as the allegation of negligence is concerned. A motion to amend will be required."

[11] 137 brought the motion to amend foreseen by Grace J. via a notice of motion dated May 17, 2022, which is the effective date of the commencement of the claim for limitation period purposes. The motion was contested and heard by Aston J. on October 24, 2022, and his decision was released on November 14, 2022. Aston J. allowed the motion to amend but expressed significant concerns about 137's position on discoverability and whether the

new cause of action alleged could have resulted in any damages. At para. 6 of his endorsement, Aston J. said:

> The new theory of liability advanced on this motion is that multi tenant use had been authorized and that CK's negligence consists of improperly issuing the OTC in 2015, requiring remediation or requiring the plaintiff to limit the use of property to a single tenant. The original claim did not allege the OTC was improper or invalid. The new claim would. The new claim also asserts that CK was negligent in maintaining records which did, or would have, established legal multi tenant use of the building. [Emphasis in original.]

[12] I accept that at both previous motions heard by Grace J. and Ashton J., 137 had argued that the claim for negligent issuance of the OTC was included within the scope of the original statement of claim, but both Grace J. and Aston J. accepted CK's argument that it was not. 137 now argues that it could not possibly have discovered the material facts underlying such a claim until it had received two documents that were disclosed by CK in its draft supplementary affidavit of documents served on September 21, 2020, copies of which were provided to 137 on March 17, 2021. On the other hand, CK now argues that 137 is effectively estopped from its discoverability argument because 137 itself had previously asserted that the claim for negligent issuance of the OTC was part of its claim from the commencement of the action.

[13] There is evidence from both John Norton, a former Chief Legal Officer of CK, and Sheila Handler, a lawyer for CK, that in December 2018 (Norton) and February 2019 (Handler), they each had a conversation with Mr. Pickard, the former lawyer for 137, in which Mr. Pickard alleged that his client was entitled to damages because the OTC had been improperly issued.

Issues

[14] The central issue I must determine is whether CK has established that there is no genuine issue requiring a trial with respect to the expiry of the limitation period for 137's claim for negligent issuance of the OTC.

Analysis

Has CK established that there is no genuine issue requiring a trial with respect to the expiry of the limitation period for 137's claim for negligent issuance of the OTC?

i) Principles of Summary Judgment

[15] I will begin by reviewing the principles governing motions for summary judgment.

[16] Subrule 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), provides, in part, that:

> *General*
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that 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 that it is appropriate to grant summary judgment.
>
> *Powers*
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

[17] The law respecting motions for summary judgment is well settled and understood following the landmark decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Summary judgment must be granted where there is no genuine issue requiring a trial. *Hryniak* establishes that there will be no genuine issue requiring a trial where the motion judge is able to reach a fair and just determination on the merits on a motion for summary judgment.

[18] In *Hryniak*, at para. 5, the Supreme Court of Canada directed that the summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims. On the standard of fairness, the court held, at para. 50, that "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."

[19] Writing for the unanimous court in *Hryniak*, at para. 66, Karakatsanis J. summarized the proper approach on a summary judgment motion as follows:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the

> dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole. [Emphasis in original.]

[20] As our Court of Appeal held in *Chernet v. RBC General Insurance Company*, 2017 ONCA 337, at para. 12, "[i]t is trite law that both parties on a summary judgment motion are required to put their best foot forward. Summary judgment motions are decided by evidence of the facts and by inferences drawn from those facts. Not by speculation about the facts." As such, a party is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial. The summary judgment motion judge is entitled to assume that the evidence contained in the motion record is all the evidence the parties would rely on if the matter proceeded to trial. A responding party cannot rely on unsupported allegations in the pleadings or unfounded assertions that there is a genuine issue requiring a trial. In short, a responding party must "lead trump or risk losing": see, for example, *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2014 ONSC 3312, 98 E.T.R. (3d) 306, at paras. 72 and 117, *per* Rady J., aff'd 2015 ONCA 557; *Gold Leaf Garden Products Ltd. v. Pioneer Flower Farms Ltd.*, 2015 ONCA 365, at para. 14; *Ramdial v. Davis (Litigation guardian of)*, 2015 ONCA 726, 68 R.F.L. (7th) 287, at para. 28, citing *Corchis v. KPMG Peat Marwick Thorne*, 2002 CanLII 41811 (C.A.), at para. 6; and *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), at para. 35. See also *Spencer (Litigation guardian of) v. Switzer*, 2014 ONSC 2344, 37 M.P.L.R. (5th) 286, at paras. 11-12.

[21] At the same time, as the Court of Appeal said in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at paras. 33-37, the summary judgment motion judge must "assess the advisability of the summary judgment process in the context of the litigation as a whole."

[22] The authorities are also clear that the onus is on the moving party – here, the defendant – to establish that there is no genuine issue requiring a trial with respect to a claim or defence: see *Lang v. Kligerman*, [1998] O.J. No. 3708 (C.A.), at para. 9, cited in *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.), at para. 30, *per* Morden J.A., quoted in *Great America Leasing Corp. v. Yates* (2003), 68 O.R. (3d) 225 (C.A.), at paras. 33-35, per Borins J.A. See also *Chao v. Chao*, 2017 ONCA 701, 99 R.F.L. (7th) 281, at para. 16.

[23] 137 argues that this is a motion for partial summary judgment because it has advanced claims against CK for both negligence in issuing the OTC and negligent maintenance of records and CK's motion seeks to dismiss only the former claim. In oral argument, 137 argued that the claim for negligent maintenance of records is "akin to spoliation", but spoliation is an intentional tort that is not pleaded. In reply argument, CK argued that there

is no “free-standing” tort of negligent maintenance of records and that the net result of any negligent maintenance of records leads back to the issuance of the OTC.

[24] The Ontario Court of Appeal has repeatedly noted the problems that are inherent in partial summary judgment motions. In *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 29-34, the court held:

> [29] The caution expressed pre-*Hryniak* in *Corchis* is equally applicable in the post- *Hryniak* world. In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC,* partial summary judgment raises further problems that are anathema to the stated objectives underlying *Hryniak*.
>
> [30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.
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> [31] Second, a motion for partial summary judgment may by very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.
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> [32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since *Hryniak,* are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.
>
> [33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial, therefore increasing the danger of inconsistent findings.
>
> [34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in [page569] a cost-effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most

expeditious and least expensive determination of every civil proceeding on its merits.

ii) The Limitation Period

[25] The *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the "Act") provides at ss. 4 and 5, in part, as follows:

> **Basic limitation period**
>
> **4** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **Discovery**
>
> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place unless the contrary is proved.

[26] It is common ground that the relevant date of the commencement of the proceeding in this matter is the day that the motion for leave to amend the claim was served, or May 17, 2022. Applying the relevant provisions of the *Act*, 137 was presumed to know it had a claim on August 21, 2015, the date the OTC was issued. If that presumption is rebutted, the issue becomes on what date 137 knew or ought reasonably to have known the elements set out in s. 5(1)(a)(i-iv) of the *Act*.

[27] As previously stated, 137 claims that it did not discover its claim for negligent issuance of the OTC until March 17, 2021 when it received copies of certain documents, the existence of which had not been disclosed by CK until it produced an unsworn supplementary

affidavit of documents in September 2020. If that is correct, then the action was commenced within the limitation period; if the claim was discovered on or before May 17, 2020, then it is statute barred.

[28] The Ontario Court of Appeal summarized the proper approach to a discoverability analysis in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, 144 O.R. (3d) 385, at paras. 41-42 as follows:

> [41] The discoverability analysis under s. 5(1) of the Act involves, in part, determining when a claimant first knew that an injury, loss or damage had occurred and was caused by an act or omission of the defendant. The jurisprudence concerning when a claimant possesses such knowledge is summarized in Graeme Mew, Debra Rolph and Daniel Zacks, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis, 2016), at 3.50:
>
> > [I]t has been recognized that discoverability means knowledge of the facts that may give rise to the claim. The knowledge required to start the limitation running is more than suspicion and less than perfect knowledge. Or, to put it another way, the plaintiff need not be certain that the defendant's act or omission caused or contributed to the loss in order for the limitation period to begin to run. The limitation begins to run from when the plaintiff had, or ought to have had, sufficient facts to have *prima facie* grounds to infer the defendant's acts or omissions caused or contributed to the loss. It is reasonable discoverability -- rather than the mere possibility of discovery -- that triggers a limitation period.
>
> …
>
> [42] As this court observed in *Lawless*, at para. 23, the question to be posed in determining whether a person has discovered a claim is whether the prospective plaintiff knows enough facts on which to base a legal allegation against the defendant. In support of that proposition, *Lawless* cited the decision of this court in *McSween v. Louis* where Feldman J.A., writing for the majority, stated:
>
> > To say that a plaintiff must know the precise cause of her injury before the limitation period starts to run, in my view places the bar too high. Both the one year limitation period itself [in s. 17 of the *Health Disciplines Act*], as well as the production and discovery process and obtaining expert reports after acquiring knowledge through that process, are litigation procedures commonly used by a plaintiff to learn the details of how the injury was caused, or even

> about the existence of other possible causes and other potential defendants. [Citations omitted.]

[29] In *Collins v. Cortez*, 2014 ONCA 685, 39 C.C.L.I (5th) 1, at para. 11, the court held that to determine a limitation period defence on a summary judgment motion, "[t]he court must consider the evidence in the motion record to determine whether there is a genuine issue requiring a trial, and, if so, determine whether it is in the interest of justice to use the enhanced powers under rules 20.04(2.1) and (2.2) to determine the issue without a trial."

[30] In *AssessNet Inc. v. Taylor Leibow Inc.*, 2023 ONCA 577, 168 O.R. (3d) 276, at paras. 34-35, the court held that:

> [34] The expiry of a limitation period is raised by a defendant as an affirmative defence, and the defendant has the burden of proving that defence. When the issue is raised by a defendant in a summary judgment motion, the defendant has the onus of establishing that there is no issue requiring a trial with respect to the limitation period.
>
> [35] A defendant may rely on the presumption in s. 5(2) that the claim was discovered on the day the act or omission on which the claim is based took place. In order to rebut the presumption in s. 5(2) the plaintiff need only prove that its actual discovery of the claim within the meaning of s. 5(1)(a) was not on the date of the events giving rise to the claim. Once the presumption is rebutted, the burden remains on the defendant, who is asserting the defence, to prove that the plaintiff knew or ought reasonably to have known the elements of s. 5(1)(a) more than two years preceding the commencement of the proceeding. [Citations omitted.]

iii) Findings of fact and application of the law to the evidence

[31] First of all, I will address the issue of whether this is a motion for partial summary judgment. On all the evidence, I conclude that it is not. The claims of negligent issuance of the OTC and negligent maintenance of records are clearly included in the amended claim, as noted by Aston J. when he granted leave to amend at para. 6 of his endorsement; however, it is also clear that the allegations are inextricably intertwined. Paragraph 30 of the amended statement of claim alleges that:

> 30. C-K fell below the standard of care owed to 137 by:
>
> a. Improperly issuing an order to comply making multi-tenant office an illegal use, when such use was duly authorized by Chatham at least by 1981; and,
> b. Improperly maintaining building permit records that might have assisted C-K in determining that the order to comply was inappropriate.

[32] The allegation that CK improperly maintained building permit records is akin to a particularization of CK's alleged negligence in issuing the OTC rather than a free-standing cause of action. The manner in which paragraph 30 of the amended statement of claim is pleaded confirms that it was the "improper" or "inappropriate" issuance of the OTC that was the alleged proximate cause of 137's loss. Moreover, 137 is clearly seeking "[a]n Order for Summary Judgment dismissing this action…" in its notice of motion.

[33] I am satisfied that 137 has met its burden to rebut the presumption set out in s. 5(2) of the *Act*. The evidence is uncontradicted that 137 purchased the Building in 2010, that it was occupied by multiple tenants at that time, and that for the first five years of 137's ownership of the building it had been occupied by multiple tenants. However, it is clear that when it issued the OTC, CK believed that only a single-tenant use was permissible, and there is no evidence to suggest that 137 would have been in a position to say that CK had been incorrect about the legal use of the Building at the moment that the OTC was issued. There is no evidence before me, for example, that the zoning by-law for CK was ever formally amended to permit a multi-tenant use. Instead, 137's claim is based on inferences drawn from a review of decades of documents received by 137 from CK both before the action was commenced and produced by CK in the course of this litigation.

[34] The issue therefore is whether CK has met its burden to show that there is no genuine issue requiring a trial with respect to whether 137 knew or ought reasonably to have known the necessary elements of its claim before May 17, 2020. I am satisfied that CK has met this burden.

[35] The evidence put forward by 137 characterizes two documents produced by CK in its supplementary affidavit of documents as a kind of double-barreled smoking gun, which led 137 to conclude that the multi-tenant use of the Building had been legal since at least 1981 and that CK was therefore negligent in issuing the OTC in 2015. I reject this argument.

[36] These two documents, which were not put before Aston J. at the time of the motion to amend the claim, are in evidence before me. They are described in the affidavit of Mr. Pickard sworn February 29, 2024 at paras. 15 and 16 as follows:

> 15. In particular, the document contained in the Defendant's Supplementary Affidavit of Documents dated June 23, 1987 contained a handwritten note on it which stated: "*Owner not changing use of floor area or number of tenants. Enquired as to whether permit required to remove interior partition wall and erect new one. Advised him no permit required as per discussion with John Oostveen.*" From my prior dealing with the Municipality, I had a faint recollection at that time that Oostveen could have been a previous building department employee of the Municipality.
>
> 16. On another document contained in the Defendant's Supplementary Affidavit of Documents, namely, a blueprint of 48 Fifth Street dated March 10, 1981 which document appears to have been reviewed and approved by the Municipality's building department, had the following notes written on

> it: "*1. PUBLIC CORRIDOR TO HAVE 1 HR FIRE RATING" "2. ALL DOORS OPENING TO PUBLIC CORRIDOR TO HAVE MIN 30 MIN FIRE RATING.WIRED GLASS MAY BE USED IN THE DOORS PROVIDING IT CONFORMS TO SECTION 3.1.9.3 OBC …*"

[37] Mr. Pickard goes on in his affidavit to state that "[b]ased on the above two documents referred to in the preceding paragraphs herein, it appeared that might be some evidence to support the theory that multi-tenant use had in fact been previously approved by [CK] and that [CK's representative] Lacina might have issued the [OTC] negligently."

[38] These two documents are pieces of evidence from which it might be inferred, along with other evidence, that CK had previously approved a multi-tenant use of the Building. However, they hardly rise to the level of importance attributed to them by 137. As noted by Aston J. at paras. 17-18 of his endorsement:

> [17] The problem with accepting that this inference only arose in March 2021 is that the plaintiff had evidence of multiple building permits and fire safety orders from which the same inference (that CK knew the building was a legal multi tenant office use) might be drawn. It had this kind of information when the original Statement of Claim was served in 2016. In fact, specific examples are cited in paragraphs 25-29 of that Statement of Claim.
>
> [18] The new documents discovered in March 2021 have not been shown to reveal anything that was not already within the plaintiff's knowledge years earlier. Rediscovering something you already know is not a new discovery.

[39] As previously noted, Aston J. did not have the benefit of the actual documents, but I have reviewed those documents, as well Mr. Pickard's affidavit and the report of Mr. Adams, and am satisfied that the new documents, while relevant, do not reveal anything that was not already within 137's knowledge years earlier.

[40] In the words of the Ontario Court of Appeal in *Zeppa*, at para. 42, "…the question to be posed in determining whether a person has discovered a claim is whether the prospective plaintiff knows enough facts on which to base a legal allegation against the defendant." Here, the inferred facts (that CK knew that the Building was a legal multi-tenant office use) forming the basis of the legal allegation (that CK was negligent in issuing the OTC in 2015) were known to 137 at the time that it issued its original claim. Indeed, I find that 137 could have pleaded its current cause of action (negligent issuance of the OTC, including negligent maintenance of documents), as an alternative claim in its original pleading based upon the same factual matrix that was pleaded in the original claim. Rule 25.06(4) of the *Rules* provides that: "A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative."

[41] If 137 did not know in 2016 that there was some evidence from which it could be inferred that the Building had a legal multi-tenant office use, it certainly knew there was such evidence by the time the examinations for discovery had been conducted in 2018. The original productions (which formed the majority of the evidence upon which Mr. Adams based his opinion in 2021) and the verbal assertions of a claim for negligent issuance of the OTC by Mr. Pickard in conversations with Mr. Norton in December 2018 and Ms. Handler in February 2019 all serve to confirm that the allegation could have been made and, indeed, had been made. I reject the assertion by 137 that the conversations between Mr. Pickard and Mr. Norton and Ms. Handler were privileged.

[42] It is notable that in cross-examination, Mr. Pickard asserted that at the time of his conversation with Ms. Handler he was of the view that the original statement of claim already included a claim for negligent issuance of the OTC in 2015 when he stated "…Ms. Handler essentially threatened a summary judgment motion because she felt that there were not damages on her theory of the way we pled the case. And I told her that I didn't feel that there is any deficiency in the pleadings." This is of course consistent with the erroneous position later taken by 137 before both Grace J. and Aston J. that the claim did not require amendment at all. By February 2019 at the latest, 137 and its lawyer had the ability to make the allegation and had in fact made the allegation; they just had not pleaded it.

[43] With good reason, Aston J. was very skeptical about 137's position on discoverability. In my view, CK has met its burden on this motion for summary judgment to show that there is no genuine issue requiring a trial with respect to CK's discovery of its claim.

[44] Even if I had not found that CK had met its burden on the discoverability issue, I am unable to discern how 137 would ever prove any damages arising from CK's negligent issuance of the OTC, including its negligent maintenance of documents. This issue is touched upon by Aston J. in paras. 27 to 31 of his endorsement. I agree with and adopt his statements in those paragraphs, which read as follows:

> [27] There is an additional consideration that I have not addressed because it was not addressed in the factums or in oral submissions.
>
> [28] I have some difficulty understanding how the OTC causes any damages, whether or not it was in error in reciting the legal or authorized use.
>
> [29] The problem with the new theory of liability is that if no permission for multiple tenant use has ever been given, the OTC is proper and unassailable. On the other hand, if permission was granted, that does not obviate the plaintiff's obligation to comply with the Building Code. In other words, the inaccuracy (if it is one) in the OTC asserting that the building is only single tenant use is irrelevant to the need to comply with the Building Code's requirements for multi tenant buildings.

> [30] It seems to me the plaintiff's cause of action does not rest on the "validity of the OTC" but on the representation within that document stating that multi tenant use was not permissible. Because the plaintiff, by its own admission, was unwilling to spend the money needed to bring the building into multi tenant compliance, the representation in the OTC about single use does not cause the plaintiff any loss, even if it can be proven to be a misrepresentation.
>
> [31] Expressed another way, the plaintiff did not sustain any loss of rent or loss in the value of the property because CK stated that only single tenant use was permissible. If that assertion is true, there is no loss. If that assertion is false, there still is no loss, because the plaintiff would have had to do the upgrades required by the Building Code, an option it voluntarily declined for economic reasons.

Conclusion

[45] For the foregoing reasons, and without resorting to the enhanced powers provided in r. 20.04(2.1), the defendant CK's motion for summary judgment is granted and the action is dismissed. A judgment shall issue dismissing the action and amending the title of proceedings to substitute the plaintiff 1375175 Ontario Inc. with that corporation's current name, "Warrener Properties Inc.", as requested in the notice of motion.

[46] My presumptive view is that costs should follow the outcome, and I expect that experienced counsel will be able to agree on costs. Should they be unable to do so, the parties may make submissions with respect to the scale and quantum of costs in writing of no more than five (5) pages conforming strictly to the document standards provided in r. 4.01 (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the following schedule:

a. The defendant shall deliver its submissions within thirty (30) days following the release of these reasons;

b. The plaintiff shall deliver its submissions within twenty (20) days following service of the defendant's submissions;

c. The defendant shall deliver its reply submissions, if any, which shall be limited to no more than two (2) pages, within ten (10) days following service of the plaintiff's submissions; and,

d. If either party fails to deliver its submissions in accordance with this schedule, that party shall be deemed to have waived its rights with respect to the issue of costs, and the court may proceed to make its determination in the absence of that party's input or give such directions as the court considers necessary or advisable.

J. Ross Macfarlane
Justice

Released: December 17, 2024

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1375175 Ontario Inc.

Plaintiff

– and –

Municipality of Chatham-Kent

Defendant

REASONS FOR DECISION

J. R. MACFARLANE J.

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