CITATION: 1589680 Ontario Inc. and Toronto Standard Condominium Corporation No. 1441, 2016 ONSC 4765
COURT FILE NO.: CV-15-2875-00
DATE: 2016 07 25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
1589680 ONTARIO INC.	F. Scott Turton, for the Plaintiff
Plaintiff	
- and -	
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1441, VALERIE SMITH, ANN MATYAS, DENNIS BARDESTSKY, ROBERT SHAW and WAYNE MURDOCK	Elizabeth Bowker, for the Defendants
Defendants	
	HEARD: June 29, 2016

REASONS FOR JUDGMENT

Justice Thomas A. Bielby

INTRODUCTION

[1] The defendants have before the Court a motion, brought pursuant to Rule 21.01(b), to strike out, the now, amended statement of claim, without leave to amend, on the ground that it discloses no reasonable cause of action.

[2] The original statement of claim was issued June 22, 2015. A statement of defence has been filed on behalf of the corporate defendant. The individual defendants have filed a notice of intent to defend and in November, 2015, served and filed this motion returnable June 29, 2016.

[3] On June 23, 2016, counsel for the plaintiff filed an amended statement of claim, adding an allegation of conspiracy against the individual defendants.

[4] Pursuant to Rule 21.01(2), no evidence is admissible on the motion. For the purposes of the motion I am to deem the facts alleged in the amended statement of claim to be true.

[5] I must then determine whether it is plain and obvious that the facts do not disclose a reasonable cause of action.

FACTS

[6] The plaintiff is the owner of three retail condominium units (the “units”) located at 270 Wellington Street West, Mississauga, which he has leased out to tenants. The units were acquired in 2003.

[7] The defendants Ann Matyas, Dennis Bardetsky, Robert Shaw and Wayne Murdock are directors of the defendant Toronto Standard Condominium Corporation No. 1441, which operates the building in which the units are located. Valerie Smith is the building manager.

[8] Behind the units is a service corridor to which the units have access and the corridor leads to a room labelled “Retail Garbage”. It also provides access to a door leading out to a service laneway in the rear of the building.

[9] The door to the laneway was the means by which the deliveries to the units have been made since the plaintiff acquired the units in 2003.

[10] The Retail Garbage room was the room in which the tenants of the units have placed their garbage since 2003. The residential tenants had a separate garbage room.

[11] In January, 2015, the unit tenants were excluded from the Retail Garbage room. The lock on the door from the laneway to the service corridor was altered in order to prevent the retail tenants from being able to open the door from the outside.

[12] Delivery vehicles were being prohibited from stopping in the laneway in order to make deliveries to the retail tenants, although no such prohibition was applied to residential deliveries. The defendants have caused delivery trucks to be towed or ticketed or have threaten to do so.

[13] Despite the demands from the plaintiff, the defendants have refused to restore the use and access of the aforementioned to the retail tenants.

ALLEGATIONS

[14] On these facts the plaintiffs alleges wrongful interference with the intention of causing damage to the plaintiff (para.11), nuisance (para. 12), and conspiracy to cause injury to the plaintiff (para. 13).

[15] The plaintiff pleads that the duties of the individual defendants do not include causing the corporate defendant to carry out tortious conduct and that the individual defendants are personally liable. It is also pleaded that the actions of the individual defendants have damaged and continues to damage the plaintiff and they are personally liable irrespective of whether their actions were done pursuant to their duties to the corporate defendant.

THE LAW

[16] Justice Perell, in *Holley v. The Northern Trust Company Canada*, 2014 Carswell 1571, discussed the applicable principles that apply on Rule 21.01(1)(b) motions. At paragraph 94 he referenced the decision of the Supreme Court of Canada in *Knight v. Imperial Tobacco Canada Ltd.* 2011 SCC 42, paragraphs 17-25 and stated,

> "The Supreme Court of Canada noted that although the toll of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success."

[17] At paragraph 97 Perell J. noted that, “The courts power to strike a claim is exercised only in the clearest of cases: *Temelini v. Ontario Provincial Police Commissioner* (1990) 73 O.R. (2d) 664.”

[18] From paragraph 98 I quote,

> “Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious and beyond doubt that the plaintiff cannot succeed with the claim.”

[19] The Ontario Court of Appeal, in *McIlvenna v. 1887401 Ontario Ltd.,* 2015 CarswellOnt 18195, noted at paragraph 18, “The statement of claim must be read generously, allowing for inadequacies due to drafting deficiencies”.

[20] *ScotiaMcLeod Inc. v Peoples Jewellers Ltd.* (1996) 26 O.R. (3d) 481, is a decision of the Ontario Court of Appeal, and on page 7, second paragraph, it is written,

> “…Officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that company so as to make the act or conduct complained of their own.”

[21] In the following paragraph the court states,

> “To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.”

[22] The same principles are applicable to condominium corporations and directors (*Rushton v. Condominium Plan 8820668* [1997] A.J. No. 452, para. 31, 35).

[23] The same criteria and principles apply in regards to the personal liability of employees (*Tran v. University of Western Ontario,* 2014 ONSC 617).

[24] In *Grossman Holdings v. York Condominium Corp. No. 75* [1998] O.J. No. 5399, at paragraph 15, Gans J. stated,

> "As a minimum, the facts giving rise to personal liability must be specifically pleaded in the statement of claim, if not set out in the supporting material, or vice versa."

ARGUMENTS

[25] In regards to the allegation of intentional interference, counsel for the defendants submits for the tort to stand there must be intentional interference with the plaintiff's relationship with a third party, in this case, the tenants.

[26] Counsel relies on the Supreme Court of Canada decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.* [2014] S.C.J. No. 12, paragraph 3, which states,

> "The unlawful means tort creates a type of "parasitic' liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against a third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the

> plaintiff) by A (the defendants) use of unlawful means against B (the third party)."

[27] It is submitted by counsel for the moving parties that the plaintiff has not alleged that the defendants interfered with the plaintiff's relationship with its tenants. The allegation of ticketing and towing is not in and of itself unlawful. Further, the tenants would need to have a direct cause of action against the defendants.

[28] With respect to the allegation of conspiracy, counsel for the moving parties submits that the essential elements and full particulars of the tort have not been pleaded and in that regard relies on my decision in *John v. Toronto (City)* [2016] O.J. No. 1526. At paragraph 36 I referenced the Ontario Court of Appeal decision in *Normart Management Ltd. v. West Hill Redevelopments Co.* [1998] O.J. No. 391 as authority for the proposition that;

> a. The statement of claim should describe who the several parties are and their relationship with each other;
>
> b. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what the overt acts which are alleged to have been done by each of the alleged conspirators; and
>
> c. It must allege the injury and damage occasioned to the plaintiff thereby.

[29] *Powell v. Shirley* [2016] O.J. No. 2964 is relied on by counsel for the moving parties. At paragraph 67 Leach J. states,

> "A cause of action for conspiracy arises where there has been an agreement to commit an unlawful act or to do an otherwise lawful act in an unlawful

> manner, resulting in damage to the person against whom the conspiracy was formed.
>
> There are two types of actionable conspiracy. The first is where the predominant purpose of the defendant's conduct is to injure the plaintiff, whether the means used by the defendants are lawful or unlawful. The second is where the defendant's conduct is unlawful, is directed towards the plaintiff (alone or together with others) and the defendants should have known that injury to the plaintiff would result."

[30] It is noted that counsel for the plaintiff relies on the predominant purpose conspiracy argument.

[31] Counsel for the defendants also relies on the authority, *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.* [2012] O.J. No. 414, para. 74 which states,

> "A conspirator is not liable simply vicariously for what somebody else did; he or she is liable for having participated and contributed to the conspiracy. In a conspiracy pleading, it is necessary to set out the particular acts of each co-conspirator."

[32] Counsel submits that there are no particulars pleaded with respect to the overt acts of each individual defendant. Further, the target of the alleged harm was the tenants and not the plaintiff, and to succeed with an allegation of conspiracy the predominant target of the harm must be the plaintiff.

[33] Counsel for the defendants submits that the statement of claim falls short of disclosing a cause of action against the individual defendants and it is plain and obvious that the claim cannot succeed against the individual defendants.

[34] It is submitted that the claim has been amended once already and leave to amend ought not to be granted.

[35] Counsel for the plaintiff submits the pleadings do raise reasonable causes of action. If the pleadings lack particulars pursuant to Rule 25.10, particulars can be demanded. The remedy is not to strike the statement of claim.

[36] It is submitted that the purpose of Rule 21.01(b) it to weed out the cases which cannot possibly succeed.

[37] Counsel for the plaintiff submits that three causes of action are pleaded; intentional interference, nuisance and predominant purpose conspiracy as against the individual defendants. It is submitted that it is not plain and obvious that such causes of action cannot succeed.

[38] The plaintiff relies on the case of *Midwest Properties Ltd. v. Thordarson* 2015 ONCA 819, paragraph 113, from which I quote,

> "It is well-established in the law of Ontario that "employees, officer and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation": *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), at para. 26."

[39] In regards to nuisance, the plaintiff submits that this tort consists of an interference with use and enjoyment of land. (*Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)* 2013 S.C.C. 13)

[40] It is submitted that the existence of the tort was not challenged by counsel for the moving parties.

[41] The plaintiff submits that the defendants denied his tenants access to the service corridor, laneway and Retail Garbage room and, as a result, the plaintiff suffered a loss.

[42] It is submitted that the intentional acts of the defendants, including the individual defendants, were unlawful and while the immediate target was the tenants, the real target was the plaintiff who is owner of the three units. The unlawful acts would be actionable by the tenants.

[43] In regards to the allegations of predominate purpose conspiracy, counsel for the plaintiff submits that the tort is made out where the purpose is to cause injury to the plaintiff using lawful or unlawful means. The actions of the defendants interfered with the tenants' reasonable enjoyment of their premises and that the conduct of the directors and the building manager was intended to so interfere. The real target of these actions was the plaintiff who would suffer economic loss because it has had to compensate the tenants or has lost tenants.

[44] As stated in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* [1983] 1 S.C.R. 452, at pp. 471-472,

> "Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss

> caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful."

[45] Counsel for the plaintiff submits that the motion ought to be dismissed as it cannot be said that it is plain and obvious that the causes of action cannot succeed. Alternatively, if any or the entire claim is struck, leave to amend ought to be granted as there is no reason why leave ought not to be granted.

ANALYSIS

[46] The statement of claim clearly sets out the facts upon which the claim is made. Access allowed to the plaintiff's tenants for a period of 12 years, was denied to them. As a result, the tenants were denied of certain benefits enjoyed by them.

[47] I find that the amended statement of claim pleads the necessary facts to allege the torts of intentional interference, nuisance and conspiracy.

[48] The plaintiff pleads that the wrongful interference with the use and enjoyment of the retail units was done intentionally at the instigation and direction of the four directors and the building manager (para 11).

[49] In regards to conspiracy, the identity of the alleged conspirators is pleaded. The reference to unknown directors or employees does not distract from this in relation to the named individual defendants.

[50] The relationship of the individual defendants to each other is pleaded. They are all involved in the operation of the condominium.

[51] The pleadings state that conspirators agreed to and it was the objective to cause financial injury to the plaintiff by disrupting the businesses of the plaintiff's tenants. Why they would wish to do so is unknown but in my opinion the alleged agreement to harm the plaintiff is sufficient to plead conspiracy.

[52] In regards to the alleged loss suffered by the plaintiff, I find that what has been pleaded is sufficient to support the allegation of conspiracy. The plaintiff alleges he had to compensate tenants and/or lose tenants because of the acts alleged by the defendants. Further and more detailed particulars will be required prior to the trial, but what is pleaded is sufficient.

[53] I find that in regards to the allegation of nuisance, the pleadings are sufficient.

[54] As noted, the threshold in regards to the requirements of a statement of claim is fairly low. It cannot be said that it is plain and obvious that there is no cause of action against the individual defendants. The three causes of action of nuisance, conspiracy and intentional interference are pleaded sufficiently to allow the statement of claim to stand.

[55] If the defendants require further particulars they can move under Rule 25.10.

[56] The motion to dismiss the statement of claim is dismissed.

[57] I will accept written submissions for costs of no more than three pages together with a bill of costs. The plaintiff's submissions must be received by me within two weeks of the release of this ruling and the submissions of the defendants within 10 days thereafter.

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Bielby J.

Released: July 25, 2016

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