CITATION: Metropolitan Standard Condominium Corporation No. 1352 v. Newport Beach Development Inc., 2011 ONSC 5445
COURT FILE NO.: 06-CV-315710PD3
DATE: 20110916

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Metropolitan Standard Condominium Corporation No. 1352 Plaintiff	Blaine Fedson, for Plaintiff
– and –	
Newport Beach Development Inc., Canderel Stoneridge Equity Group Inc., Tarion Warranty Corporation, Enersys Engineering Group Ltd., Eric Pun a.k.a. E.P.K. Pun, and Salvatore Spampinato a.k.a. Sal Spampinato Defendants	Irving Marks and Carla Lubell, for Newport Beach Development Inc., Canderel Stoneridge Equity Group Inc. and Salvatore Spampinato a.k.a. Sal Spampinato Gregory W. Banks, for Tarion Warranty Corporation No one appearing for Enersys Engineering Group Ltd. and Eric Pun a.k.a. E.P.K. Pun **HEARD: June 23, 2011**

REASONS FOR DECISION

Corrick J.

Overview

[1] This action arises out of a dispute between a Condominium Corporation and the vendor of the condominium development over construction deficiencies. The Condominium Corporation's claim, as amended in July 2010, relates to two main issues. The first is that the condominium units leak as a result of a systemic failure of the Exterior Insulated Finish System ("EIFS"), which is the uninterrupted exterior cladding over the townhouses in the condominium development. The second relates to problems with the sanitary sewer, which have resulted in toilets overflowing, and condominium units being flooded with sewage.

[2] The action was commenced by Notice of Action dated July 25, 2006. The Statement of Claim was issued on August 24, 2006. The defendants, with the consent of the plaintiff, have not yet delivered a Statement of Defence.

The Parties

[3] The plaintiff, Metropolitan Standard Condominium Corporation No. 1352, is a condominium corporation that was registered on December 4, 2000 in respect of a property at 2111 Lakeshore Boulevard West in Etobicoke. The condominium development consists of two highrise towers containing 218 condominium units, 20 three-storey townhouses set out in two blocks, and three levels of underground parking.

[4] The defendant, Newport Beach Development Inc., is the registered declarant and vendor of the condominium project.

[5] The defendant, Canderel Stoneridge Equity Group Inc., is a real estate development corporation related to Newport, and was the construction manager of the project on behalf of Newport.

[6] The defendant, Sal Spampinato, was the vice-president of construction of Canderel, and supervised the construction of the condominium project for Canderel.

[7] The defendant, Tarion Warranty Corporation, administers the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 ("*ONHWPA*").

[8] The defendants, Enersys Engineering Group Ltd. and Eric Pun, were the consulting engineers for Canderel and Newport for the condominium project. They did not defend this action, and the plaintiff has noted them in default.

The Motion

[9] The defendants Newport, Canderel and Spampinato ("the developer defendants") move for the following:

a. an order pursuant to rule 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, dismissing the action against all of the defendants as an abuse of process;

b. alternatively, an order pursuant to rule 21.01(1)(b) striking out the plaintiff's claim for breach of warranty in respect of the sanitary sewer as a major structural defect because the alleged deficiencies do not constitute a major structural defect within the meaning of the *ONHWPA*;

c. alternatively, an order pursuant to rules 21.01(1)(a) and (3)(d) dismissing the EIFS claim against all of the defendants on the basis that it is a new cause of action added by an amendment to the statement of claim after the expiration of the limitation period;

d. an order dismissing the plaintiff's claims for breach of contract, negligence and breach of fiduciary duty in respect of all alleged construction deficiencies, as an abuse of process, pursuant to rule 21.01(3)(d), or as disclosing no reasonable cause of action pursuant to rule 21.01(1)(b); and

e. an order pursuant to rule 21.01(3)(d) dismissing the action against all defendants, except Newport, as an abuse of process by reason of section 45 of the Purchase Agreements.

[10] For the reasons that follow, the motion is dismissed.

Facts

Sanitary Sewer Claim

[11] Initially, a number of condominium units reported that the toilets did not flush properly, and were gurgling and sudsing. The problems progressed to the point that toilets in some units would overflow without notice, flooding condominium units with sewage. The Condominium Corporation had the sewer pumped out regularly to try to prevent backups.

[12] The sewer was ultimately excavated. According to the Condominium Corporation's expert reports, the excavation uncovered the fact that the sanitary sewer system was not constructed according to the approved building permit specifications, although the engineer on the project confirmed under seal that it had been. In addition, numerous violations of Ontario's *Building Code*, O. Reg. 350/06, were discovered in the design and installation of the sanitary sewer.

[13] The Condominium Corporation repaired the sewer system at a cost of $587,052.91.

EIFS Claim

[14] The Condominium Corporation began reporting problems with water penetration into townhouses 11, 21 and 22 during the first year. In the second year, it reported water penetration in townhouses 1, 12, 22 and 23. Repairs were attempted to the doors and windows of the townhouses to no avail. The Condominium Corporation alleges that the water penetration was not the result of localized problems, but rather the result of a system-wide failure of the EIFS.

Abuse of Process

[15] The developer defendants argue that the Condominium Corporation's sanitary sewer claim and EIFS claim for breach of the *ONHWPA* warranty are an abuse of process and should be dismissed against all of them under rule 21.01(3)(d).

[16] To analyze this argument, it is necessary to understand the process for making a claim to Tarion for breach of the *ONHWPA* warranty. The process is set out in the *ONHWPA* and *Administration of the Plan*, R.R.O. 1990, Reg. 892 (the "Administration Regulation") made under the *ONHWPA*.

[17] In brief, the condominium corporation is the deemed owner of the common elements in a condominium for the purposes of a warranty claim, and has the statutory authority to pursue a claim. Once a condominium corporation submits a warranty claim to Tarion, the vendor of the condominium has a specified amount of time to repair or resolve the claim. If the vendor does not resolve the claim, the condominium corporation may ask Tarion to conciliate the dispute. The vendor has 90 days from the date of the owner's request for conciliation to repair or resolve the claim. If the vendor fails to repair or resolve the claim within 90 days, Tarion shall conciliate the dispute.

[18] The conciliation process is an informal one in which Tarion sends an inspector to meet with the builder and the condominium corporation to investigate the claim. The inspector prepares a Warranty Assessment Report indicating Tarion's assessment of whether the claim is covered by the warranty. If Tarion determines that the claim is warrantable, the vendor must resolve it. If the vendor fails to repair or resolve the claim, Tarion will compensate the owner from the guarantee fund or affect the necessary repairs.

[19] The vendor has no right of appeal from Tarion's decision that a claim is warrantable. If Tarion decides that the claim is not warrantable, the condominium corporation can ask Tarion to issue a Decision Letter. The condominium corporation can appeal the Decision Letter to the Licence Appeal Tribunal (the "LAT"). The hearing before the LAT is a trial. The LAT process is governed by a set of published rules, which includes rules of evidence, disclosure and procedure that apply to its hearings. Sworn evidence is presented at a LAT hearing. There is a burden of proof. The parties before the LAT are Tarion and the condominium corporation. The LAT's standard practice is to add the vendor as a party. The LAT issues a written decision following the hearing. An appeal from a LAT decision lies to the Divisional Court.

[20] In this case, the action was started on July 25, 2006 by way of Notice of Action. Tarion began conciliation in the fall of 2006. The Condominium Corporation was obliged to give Newport the opportunity to repair or resolve the claims, and therefore did not serve the Statement of Claim at the time. The Statement of Claim was ultimately served in January 2007. Newport made repairs between January 2008 and the spring of 2010. On July 15, 2010, the Condominium Corporation amended the Statement of Claim to reflect the deficiencies that had been repaired.

Sanitary Sewer Claim

[21] The Condominium Corporation pursued a warranty claim for payment from the Tarion guarantee fund with respect to the sanitary sewer by following the process set out in *ONHWPA* and the Administration Regulation. It first reported the claim to Newport and Tarion in August 2002. It then submitted a "Common Element Report of Claim" and a "Common Element Deficiency Information Form" to Tarion in August 2005. Tarion disallowed the Condominium Corporation's claim in September 2005. The Condominium Corporation appealed the Tarion decision to the LAT on October 11, 2005. The Condominium Corporation, Tarion, and Newport, were parties before the LAT.

[22] Pre-hearings were held before the LAT, and documents and expert reports were exchanged. Starting in March 2006, the Condominium Corporation sought the advice of the LAT

and Tarion about its ability to pursue its claim regarding the sanitary sewer, together with other claims against Newport and other defendants, in a single action in the Superior Court – foregoing an appeal to the LAT. After an exchange of correspondence between Tarion and the Condominium Corporation's counsel between March 2006 and May 29, 2006, which was copied to Newport, the Condominium Corporation withdrew its appeal before the LAT on June 15, 2006, six days prior to the scheduled hearing of the appeal. Tarion did not object to the Condominium Corporation proceeding to court. Newport was not asked, and did not provide its position on the matter.

[23] The Condominium Corporation commenced this action shortly after withdrawing its appeal. The sanitary sewer claim advanced in this action is the same as the subject matter of the sanitary sewer appeal that was before the LAT.

[24] The developer defendants argue that by withdrawing its appeal to the LAT, the Condominium Corporation chose to be bound by Tarion's decision that the sanitary sewer claim was not warrantable, which is a final decision as between the Condominium Corporation and Newport and it privies. The developer defendants move under rule 21.01(3)(d) to stay or dismiss the action on the grounds that it is an abuse of the court's process. They rely on issue estoppel and argue that the sewer claim is a collateral attack on the Tarion decision.

EIFS Claim

[25] The Condominium Corporation also pursued a warranty claim pursuant to *ONHWPA* and the Administration Regulation with respect to its claim for EIFS deficiencies. Tarion also disallowed this claim on October 25, 2010, and the Condominium Corporation has appealed that decision to the LAT. The Condominium Corporation, Tarion and Newport are parties to the appeal before the LAT. Although the Condominium Corporation's appeal to the LAT is pending, it has acknowledged within its notice of appeal to the LAT that it cannot proceed with an appeal to the LAT and a civil action with respect to the same subject matter concurrently, and that the appeal is launched out of an abundance of caution pending a court ruling. On consent of all parties, the LAT hearing regarding the EIFS claim is stayed pending resolution of this motion.

[26] The subject matter of EIFS warranty claim and the EIFS claim in this action are the same.

[27] Newport argues that the EIFS claim for breach of warranty in this action is a collateral attack on the Tarion EIFS decision and should be stayed or dismissed as an abuse of process.

Analysis

Abuse of Process

[28] In my view, the argument to strike both the sanitary sewer and EIFS claims on the basis of issue estoppel must fail because the decision made by Tarion was neither a judicial one nor a final one: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.

[29] The Supreme Court of Canada in *Danyluk* set out three preconditions for the operation of issue estoppel:

a. that the same question has been decided;

b. that the judicial decision that created the estoppel was final; and

c. that the parties to the judicial decision or their privies were the same persons as the parties or their privies to the new proceeding in which estoppel is raised.

[30] There is no evidence before me that Tarion's decisions made in response to the Condominium Corporation's warranty claims were judicial ones. The decisions were not made by a tribunal or administrative authority exercising an adjudicative function. Rather, the evidence is that the decisions were made by Tarion following a conciliation process. "Conciliation" is defined in s. 1 of the Administration Regulation as "a process whereby the Corporation [Tarion] determines whether a disputed item listed on a notice of claim given to the Corporation under this Regulation, including section 4 or any of section 4.2 to 4.6, is covered by a warranty and whether repairs or compensation are required." Conciliation is an informal process during which Tarion investigates the claims made. There may be meetings between the parties, but there is no evidence before me to indicate that Tarion was performing an adjudicative function at the conciliation stage of the process or when it issued the Warranty Assessment Report or Decision Letter.

[31] In addition, I find that the decisions made by Tarion are not final. In its Decision Letter regarding the EIFS claim, dated October 25, 2010 and addressed to the Condominium Corporation, a Tarion official wrote, "If you appeal, Tarion is prepared to consider any new relevant information that supports your claim for compensation. Please submit the information to me prior to a scheduled hearing in accordance with the rules of the Tribunal."

[32] Similarly, in a letter dated January 28, 2011, addressed to Newport and to counsel for the Condominium Corporation, a Tarion official wrote, "Please note that Tarion will consider all new documents and information properly disclosed to Tarion in the appeal and Tarion may re-assess its decision at any time."

[33] In my view, these two letters support the notion that the process undertaken by Tarion to prepare the Warranty Assessment Report and Decision Letter is more investigative than adjudicative, and that the decision it makes is subject to change if it receives new information. Its decision, therefore, is not final. Other courts have reached the same conclusion: *Griffin v. T & R Brown Construction Ltd.* (2006), 59 C.L.R. (3d) 299, [2006] O.J. No. 4724 (S.C.J.); *Radewych v. Brookfield Homes (Ontario) Ltd.* (2007), 158 A.C.W.S. (3d) 523, [2007] O.J. No. 2483 (S.C.J.).

[34] The developer defendants rely on the decisions of *Gomori v. Greenvilla Development Group Inc.* (2007), 64 C.L.R. (3d) 254, 2007 CarswellOnt 6227 (S.C.J.) and *Roumanes v. Dalron Construction Ltd.*, 2010 ONSC 2891, 91 C.L.R. (3d) 295 (S.C.J.) in support of the proposition that the Decision Letters issued by Tarion were judicial decisions that were final because the Condominium Corporation did not appeal them to the LAT. In both of the cases relied upon, a full hearing was conducted before the LAT. The plaintiffs' actions were commenced after the LAT heard and dismissed their complaints with Tarion's decisions. As such they are distinguishable from this case, where no hearing has been held before the LAT. It may well be

that once a hearing has been held by the LAT, issue estoppel applies and the Condominium Corporation would not be permitted to bring an action related to the same subject matter, subject to the discretion recognized in *Danyluk*.

[35] In my view, the *Roumanes* case does not stand for the proposition that Decision Letters issued by Tarion are judicial decisions that are final. The Court in that case dealt only with the "Tribunal's" decision – the tribunal being the LAT.

[36] In the *Gomori* case, Ferguson, J. concluded that Tarion's issuance of a Decision Letter was an exercise of adjudicative authority, and that the decision was made in a judicial manner. He held that Tarion's Decision Letter was a final decision if not pursued further. Ferguson, J. also noted that that the conciliation process, which results in a Warranty Assessment Report, is not an arbitration or quasi-judicial decision-making process. He goes on to note that if a home purchaser is not happy with the Warranty Assessment Report, the purchaser can ask Tarion to issue a Decision Letter, which forms the basis of an appeal to the LAT. It is unclear what evidence there was that Tarion performed an adjudicative function between the time of issuing the Warranty Assessment Report and issuing its Decision Letter. I am not persuaded by this case that Tarion's Decision Letter is either a judicial decision or a final decision.

[37] I find that the action as it relates to both the sanitary sewer and EIFS claims is not barred by the doctrine of issue estoppel because neither claim has been finally determined, or judicially determined.

[38] The developer defendants also argue that the claim should be struck as an abuse of process because once the Condominium Corporation began down the path of submitting a claim to Tarion to pursue a remedy for the sanitary sewer and the EIFS, it was precluded from bringing a civil action for the same relief. I do not accept that argument.

[39] There is nothing in the legislation that requires the Condominium Corporation to pursue all available remedies under *ONHWPA* before commencing a civil action. The legislature could have required that, as it has done in the *Workplace Safety and Insurance Act*, S. O. 1997, c. 16. Absent express language in the statute, I am unable to conclude that the Condominium Corporation is barred from seeking a remedy from the civil courts. The facts of this case are very similar to those in *Griffin v. T & R Brown Construction Ltd.*, *supra*, in which Clark J. concluded that a plaintiff could commence a civil action notwithstanding the fact that the plaintiff abandoned an appeal of Tarion's decision five days before the scheduled hearing.

[40] The court in *Radewych*, *supra* also concluded that scheme set out in *ONHWPA* was not exclusive or a bar to court proceedings. Rather, *ONHWPA* gives rights to homebuyers that they might otherwise not have.

[41] For the reasons above, the motion to strike the sewer claim and EIFS claim as an abuse of process is dismissed.

Action Against Tarion

[42] Newport submits that the sanitary sewer claim against Tarion must be dismissed as an abuse of process for the following three reasons:

a. If the claim is dismissed against all defendants except Tarion, Newport remains potentially liable through a third party claim brought by Tarion.

b. There is no civil cause of action against Tarion.

c. Section 45 of the Purchase Agreements provides that the purchaser shall have no cause of action or claim against any legal entity other than Newport.

[43] It is unnecessary to deal with the first reason given that I have not struck the sewer and EIFS claim against Newport.

[44] The developer defendants submit that the Condominium Corporation has no civil cause of action against Tarion. They rely on the decisions of *Gomori, supra* and *Clark v. 1650336 Ontario Limited (c.o.b. Mclelwain Construction)* 2010 ONSC 4562 (S.C.J.) in support of their submission. In my view, the *Gomori* case did not hold that there is no civil cause of action against Tarion. In the *Clark* case, the court granted Tarion summary judgment in an action commenced by a plaintiff who no longer owned the home that was the subject of the action. The sole issue before the court was whether the plaintiff had standing to bring the action against Tarion. I am advised by Mr. Banks, counsel for Tarion, who also argued the *Clark* case on behalf of Tarion, that the issue of whether a civil action lay against Tarion was not argued in *Clark*. Notwithstanding this, the court made an *obiter* statement that any claim for damages the plaintiff may have had resulting from Tarion's decision was lost when the plaintiff did not follow the procedure set out in *ONHWPA*, and appeal the decision to the LAT. Although the *Clark* decision was appealed to the Ontario Court of Appeal, the appeal was withdrawn.

[45] The *Clark* decision is contrary to the decisions of *Belanger v. 686853 Ontario Inc.* (1990), 74 O.R. (2d) 114 (Dist. Ct.), *Ottawa-Carleton Standard Condominium Corp. No. 650 v. Claridge Homes Corp.*, [2009] O.J. No. 2139, 2009 CarswellOnt 2911 (S.C.J.), *Amtel Contracting & Design Ltd. v. Ontario New Home Warranty Program*, [2003] O.T.C. 480, [2003] O.J. No. 2184 (S.C.J.), and *Radewych, supra*, which was upheld on appeal to the Ontario Court of Appeal (*Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 ONCA 721), all of which have held that parties are entitled to sue Tarion directly. Although not determinative, counsel for Tarion agrees that the Condominium Corporation is entitled to sue it directly. There is nothing in *ONHWPA* precluding a civil action against Tarion. I do not accept that there is no civil cause of action against Tarion.

[46] The final reason the developer defendants put forward as a basis for dismissing the action against Tarion relates to s. 45 of the Purchase Agreements, which reads as follows:

> 45. The Purchaser shall not have any claim or cause of action (as a result of any matter or thing arising under or in connection with this Agreement) against any

person or other legal entity, other than the person or entity named as the Vendor in this Agreement.

[47] Section 45 is a broadly worded exclusion clause drafted by Newport, the vendor. To the extent that there is any ambiguity in this clause, the ambiguity must be resolved in favour of the purchaser. In my view, the clause is ambiguous with respect to Tarion. It is not clear that Tarion's statutory obligations under *ONHWPA* are "matters arising under or in connection with" the purchase agreement precluding any claim or cause of action against Tarion by the purchaser. Resolving the ambiguity in favour of the purchaser, the Condominium Corporation is entitled to bring an action against Tarion, and this claim is therefore not an abuse of process. I dismiss the motion to strike the claim against Tarion.

The Remainder of the Condominium Corporation's Claims

[48] The developer defendants argue that the remainder of the Condominium Corporation's claims are an abuse of process or disclose no reasonable cause of action for the following reasons:

a. section 23 of the Purchase Agreements provides that the only warranties available to the purchasers are the *ONHWPA* warranties, and thus the Condominium Corporation can have no claim for breach of contract or negligence for the alleged construction deficiencies; and

b. the Condominium Corporation is precluded from pursuing any claim of any kind against any of the defendants, other than Newport, as a result of s. 45 of the Purchase Agreements.

[49] Section 23 of the Purchase Agreements reads as follows:

> 23. The Purchaser acknowledges and agrees that any warranties of workmanship or materials, in respect of any aspect of the construction of the condominium including the Unit whether implied by this Agreement or at law or in equity or by any statute or otherwise, shall be limited to only those warranties deemed to be given by the Vendor under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c.O.31 ("O.N.H.W.P.A.") and shall extend only for the time period and in respect of those items as stated in the O.N.H.W.P.A., it being understood and agreed that there is no representation, warranty, guarantee, collateral agreement, or condition precedent to, concurrent with or in any way affecting this Agreement, the Condominium or the Unit, other than as expressed herein.

[50] This clause limits the warranties given by the vendor to the purchaser of the units to those expressed in *ONHWPA*. It does not exclude or limit a party's liability for negligence, breach of contract, breach of a statutory duty or breach of a fiduciary duty. It deals solely with warranties of workmanship and materials. In my view this clause does not preclude an action by the Condominium Corporation against the defendants for breach of contract, negligence or breach of fiduciary duty.

[51] *ONHWPA* sets out certain warranties that every vendor of a home gives to a purchaser notwithstanding any agreement or waiver to the contrary: s. 13(1) and (6). They include a warranty that the home (which includes a condominium unit and the common elements) is fit for habitation and is constructed in accordance with the Ontario Building Code. The Statement of Claim alleges that the condominium buildings, particularly the sanitary sewer system, were not constructed in accordance with the Ontario Building Code and as a result, sewage backups in some units rendered them unfit for habitation.

[52] Section 45 of the Purchase Agreements is, as stated above, a broadly worded exclusionary clause. The developer defendants submit that Newport was not obliged to bring this clause to the attention of the purchasers, particularly in the absence of any evidence that the purchasers did not read the clause. The developer defendants rely on the following facts in support of their submission that s. 45 is not unconscionable, unfair or unreasonable, and is therefore enforceable.

[53] Firstly, the Purchase Agreements are significant contracts for the conveyance of real property, not casual short-term contracts.

[54] Secondly, the Purchase Agreements state, above the signature line, that the purchasers acknowledge reading all paragraphs and schedules of the agreement.

[55] Thirdly, the purchasers are entitled to extra consumer protection in the form of a statutory rescission period. Had the purchasers felt that the provisions of the Purchase Agreements were unfair, they could have taken advantage of this rescission provision.

[56] In the circumstances of this case, a determination of whether this broad exclusionary clause is enforceable must be determined on an evidentiary record that is not before me. The Condominium Corporation alleges the following: that the developer defendants did not build the sanitary sewer system in accordance with the Ontario Building Code or the plans filed with the municipality pursuant to which the building permit was issued; that they concealed this fact from the purchasers; that a professional engineer responsible for the building project confirmed under his signature and professional seal that the system has been constructed in accordance with the Ontario Building Code and plans submitted to the municipality; and that the developer defendants gained an economic advantage by doing this.

[57] It would be important to know, for example, whether the sewer system had been constructed at the time the purchasers signed the Purchase Agreements. It appears that purchasers who bought units prior to construction signed the same Purchase Agreement as those who bought units post-construction.

[58] The court must determine what the parties intended to exclude at the time of signing the agreement. Did they intend to exclude the right of the purchaser to have an action against a party that has breached statutory duties? Could the nature of the deficiencies have been within the contemplation of the parties at the time of signing the Purchase Agreements? In my view, these questions cannot be determined at this stage of the proceeding when Statements of Defence have not even been delivered.

[59] The developer defendants submit that the Condominium Corporation has no cause of action for breach of fiduciary duty against them because builders of a condominium project do not owe purchasers of condominium units a fiduciary duty in relation to construction deficiencies. The existence of a fiduciary relationship is a question of fact to be determined on evidence: *Simone v. Daley* (1999), 43 O.R. (3d) 511, [1999] O.J. No. 571 (C.A.). It is not something that should be determined by a review of a Statement of Claim.

[60] The developer defendants have not satisfied me that the remainder of the Condominium Corporation's claims are an abuse of process or fail to disclose a reasonable cause of action, and I therefore, dismiss the motion to strike them.

Sanitary Sewer Claim does not constitute a Major Structural Defect

[61] The developer defendants submit that the Condominium Corporation has no cause of action for breach of warranty for the sanitary sewer system because deficiencies in the sewer system do not constitute a major structural defect as defined in *ONHWPA*. They therefore move to strike the claim pursuant to rule 21.01(1)(b).

[62] The Condominium Corporation alleges in paragraph 11 of the Statement of Claim that the non-functioning sanitary sewer constituted a major structural defect within the meaning of *ONHWPA*. If it is a major structural defect, it is covered by the statutory warranty set out in section 13(1)(b) of *ONHWPA*.

[63] Major structural defect is defined in the Administration Regulation as follows:

> 1. In this Regulation
>
> (1) "major structural defect" means, ... , any defect in work or materials,
>
> (b) that materially and adversely affects the use of such building for the purpose for which it was intended,
>
> including significant damage due to soil movement, major cracks in basement walls, ... , **but excluding** any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, **damage to drains or services**, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage; [emphasis added]

[64] The developer defendants submit that a sewer is a type of drain, and that damage to a sewer is damage to a drain and is excluded from the definition of major structural defect in the regulation.

[65] In my view however, damage to drains or services is not what is excluded from the definition, but rather it is "any defect attributable in whole or in part to damage to drains or services" that is excluded. Even if a sewer is a drain, and I am not persuaded it is, the

Condominium Corporation is not claiming a defect attributable to damage to drains. It claims that the sanitary sewer did not function because it was not installed in accordance with the Ontario Building Code. Improper or illegal installation is not a defect attributable to damage to drains or services, nor is it damage to drains or services. This part of the motion is dismissed.

EIFS Claim is Barred by the Expiration of the Limitation Period

[66] The final argument is that the EIFS claim is a new cause of action added to the Statement of Claim after the expiration of the limitation period, and must be dismissed pursuant to rule 21.01(1)(a). The developer defendants argue that the Condominium Corporation knew or ought to have known of the EIFS claim by January 30, 2008, and had two years from that date to commence the EIFS claim. The Statement of Claim was amended on July 15, 2010, at which time the developer defendants submit the EIFS claim was added.

[67] In my view, this argument fails for two reasons. Firstly, this claim was pleaded in the Statement of Claim, which was issued on August 24, 2006. Paragraphs 9 and 10 of the Statement of Claim refer to two documents that specifically raise the issue of water leaking into the townhouses. The Technical Audit Report dated November 26, 2001 and prepared by Halsall Associates Limited, cited in paragraph 9 of the Statement of Claim, refers to leaks through the doors of townhouses 11 and 22, leakage through the ceiling vent in the basement of townhouse 22 during heavy rain, and water pooling on all ground-floor patios of the townhouses. A further report prepared by Halsall on April 15, 2003, referred to in paragraph 10 of the Statement of Claim, lists leakage into townhouses 1, 12 and 23 through exterior walls/doors as an outstanding item to be addressed by Newport. The Amended Statement of Claim simply pleads additional facts that came to light after the delivery of the Statement of Claim that explain the cause of the leakage, and does not plead a new cause of action.

[68] Secondly, if I am wrong in concluding that the EIFS claim was pleaded in the Statement of Claim issued on August 24, 2006, a motion to strike the EIFS claim on the basis of the expiration of the limitation period pursuant to rule 21.01(1)(a) is premature given that no statement of defence has been delivered: *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (C.A.). The Court of Appeal in *Beardsley* suggested that a claim could be struck pursuant to rule 21.01(1)(a) on the basis of the expiry of a limitation period prior to the delivery of a statement of defence if it was obvious from the statement of claim that, "no additional facts could be asserted that would alter the conclusion that a limitation period had expired" [para. 21]. However, as D. M. Brown J. notes in *Greatrek Trust S.A./Inc. v. Aurelian Resources Inc.*, [2009] O.J. No. 611 (S.C.J.),

> [18] A court cannot gain a complete picture of the issues in a case without reading all the pleadings. To permit defendants to move to strike using yet-to-be-pleaded limitation defences would distort the pleadings process. Rule 25.06 does not require plaintiffs to plead their claims anticipating defences which might be raised. Replies function to respond to pleaded defences.

[69] Given my conclusion that the EIFS claim was pleaded in the original Statement of Claim, it is unnecessary for me to address the developer defendants' application for leave, pursuant to

rule 21.01(2)(a), to introduce evidence related to the Condominium Corporation's discovery of the EIFS claim.

[70] For these reasons, I dismiss the motion to strike the EIFS claim on the basis of the expiration of the limitation period.

Disposition

[71] The motion is dismissed.

Costs

[72] Counsel have exchanged costs outlines and provided them to me. They did not make submissions on costs. I urge counsel to attempt to agree on costs; however, if they are unable to do so, they may file brief written submissions as follows. The Condominium Corporation and Tarion shall serve and file brief written submissions on costs within 14 days of the release of these reasons and the brief response of the developer defendants shall be served and filed within 14 days thereafter.

Corrick J.

Released: September 16, 2011

CITATION: Metropolitan Standard Condominium Corporation No. 1352 v. Newport Beach Development Inc., 2011 ONSC 5445
COURT FILE NO.: 06-CV-315710PD3
DATE: 20110916

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Metropolitan Standard Condominium Corporation No. 1352

Plaintiff

– and –

Newport Beach Development Inc., Canderel Stoneridge Equity Group Inc., Tarion Warranty Corporation, Enersys Engineering Group Ltd., Eric Pun a.k.a. E.P.K. Pun, and Salvatore Spampinato a.k.a. Sal Spampinato

Defendants

REASONS FOR DECISION

Corrick J.

Released: September 16, 2011