CITATION: Trudell v. Sandpoint Developments Inc., 2009 ONCA 168
DATE: 20090224
DOCKET: C49321

COURT OF APPEAL FOR ONTARIO

Borins, Cronk and LaForme JJ.A.

BETWEEN

Patricia Trudell

Plaintiff/Appellant

and

Sandpoint Developments Inc., Essex Condominium Corporation #97,
The Corporation of the City of Windsor, Hanna, Ghobrial & Spencer Ltd.,
Medhat Ghobrial, Vijay Vasantgadkar, Cochrane Engineering Ltd.,
Peter P. Leong, Halsall Associates Ltd., Jay R. Leedale,
Tarion Warranty Corporation, Vidican Engineering Ltd., Joseph Vidican,
Bob Pedlar Real Estate Limited and David Pedlar

Defendants/Respondents

Jeffrey J. Hewitt, for the appellant

Arthur M. Barat, for the respondents Hanna, Ghobrial & Spencer Ltd. and Medhat Ghobrial

Cindy L. Scharff, for the respondents Cochrane Engineering Ltd. and Peter P. Leong

James A. LeBer, for the respondents Halsall Associates Ltd. and Jay R. Leedale

Heard: February 17, 2009

On appeal from the order of Justice Steven Rogin of the Superior Court of Justice dated August 7, 2008.

ENDORSEMENT

[1] The appellant appeals from the order of Rogin J. of the Superior Court of Justice dated August 7, 2008 dismissing her action against three sets of engineers and engineering firms, namely, Hanna, Ghobrial & Spencer Ltd. and Medhat Ghobrial (the "HGS respondents"), Cochrane Engineering Ltd. and Peter P. Leong (the "Cochrane respondents"), and Halsall Associates Ltd. and Jay R. Leedale (the "Halsall respondents"), (collectively, the "Subject Engineers").

[2] This dispute arose from difficulties experienced by the appellant with her condominium townhouse in Windsor following its acquisition in August 2002. After the appellant took possession of her new residence, serious leaks developed in the basement and elsewhere, mold set in and the appellant and members of her family began to experience health problems. When the appellant's complaints regarding these problems were not resolved to her satisfaction, she commenced proceedings against the developer of the condominium project, the developer's engineers, the condominium corporation, the involved municipality, and the Subject Engineers, among others. In her action, the appellant sought damages for negligence and breach of contract, among other relief.

[3] On motions for summary judgment, the motion judge dismissed the appellant's action against the Subject Engineers on the basis that the appellant had failed to establish that they owed a duty of care to her in the circumstances, under the two-pronged test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728; and *Cooper v. Hobart*, [2001] 3 S.C.R. 537. In particular, the motion judge held that the requisite degree of proximity between the appellant and the Subject Engineers had not been demonstrated. Further, in the circumstances of this case, there were sound policy reasons for not imposing a duty of care on the Subject Engineers in respect of the appellant. The motion judge also concluded that the *Professional Engineers Act*, R.S.O. 1990, c. P-28 does not give rise to a private law duty of care owed by the Subject Engineers to the appellant.

[4] We found it necessary to hear only from the HGS respondents, who were hired by the developer as design engineers for the structural and storm water management features of the condominium project.

[5] The appellant argues that her condominium townhouse as built by the developer did not conform with the design prepared by the HGS respondents. She has pleaded that the HGS respondents owed a duty of care to her to exercise reasonable care, skill, diligence and competence as structural engineers in designing and supervising the structural components of the development to ensure that the premises were safe and

habitable. She maintains that the HGS respondents' design of the premises was negligent and that their periodic site inspections were negligently performed.

[6] For four reasons, we are satisfied that the motion judge did not err in dismissing the appellant's action against the HGS respondents.

[7] First, the record before the motion judge established that the HGS respondents had no contractual relationship with the appellant; no role in the construction of the condominium project or in the renovations completed at the premises; and no on-site responsibilities, except for the conduct of periodic inspections to ascertain the general conformity of the development with the design drawings prepared by the HGS respondents.

[8] Second, neither the appellant's pleading nor the reports of her own engineering experts support her contention of negligent or deficient design by the HGS respondents. The primary focus of the appellant's experts' reports is the alleged negligence of the developer and its subcontractors – including, presumably, the developer's engineers – in the construction of the condominium project and the claim that the premises, as constructed, materially deviated in numerous respects from the design drawings prepared by the HGS respondents. These deviations from the original design in the "as-constructed works" were admitted by the appellant in her statement of claim. Paragraph 45 of her pleading contains an acknowledgement that the problems with the premises "constitute significant deviations or departures" from the construction drawings.

[9] Third, the complaints of the appellant's engineering experts regarding the on-site inspections conducted by the HGS respondents concern the alleged need for specific on-site quality control and other tests. But under the terms of their retainer, the HGS respondents did not carry out, nor were they required to carry out, on-site tests or physical measurements during their inspections of the premises. Rather, their inspections consisted of periodic reviews of the premises to ensure their general conformity with the design drawings.

[10] Finally, this court has recently held that the *Professional Engineers Act* does not create a private law duty of care owed by engineers to members of the public: see *1087086 Ontario Inc. v. Totten Sims Hubicki Associates (1997) Ltd.*, 2007 ONCA 627.

[11] In all these circumstances, we agree with the motion judge that no genuine issue for trial arises in respect of the appellant's claims against the HGS respondents.

[12] The appeal is dismissed. The Subject Engineers are entitled to their costs of the appeal, fixed in the total amount of $7,000 for each of the HGS, Cochrane and Halsall respondents.

"S. Borins J.A."

"E.A. Cronk J.A."
"H.S. LaForme J.A."