QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 236**

Date: **2017 08 14**
Docket: QB 67 of 2016
Judicial Centre: Melfort

BETWEEN:

101073294 SASKATCHEWAN LTD.

PLAINTIFF/DEFENDANT

- and -

THE OWNERS: CONDOMINIUM CORPORATION NO. 101159043, JOHN DOUGLAS KIVERAGO, WALTER KIVERAGO, CHANTAL CATHERINE BAREMAN, JASON TRENT TKACHUK, MERVIANA TKACHUK, TARAS TKACHUK, TRACEY TKACHUK, DORIS MAE STEPHEN, ROY OTTO STEPHEN, DONALD ANDREW HORNE, SHIRLEY BERNADINE HORNE, HOWARD JULIUS GRONVOLD, SHIRLEY LOUELLA GRONWOLV, RICK JAMES STRACHAN AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF ORDELLA MAY STRACHAN, BRIAN DOUGLAS MORRISON, LINDA JEAN MORRISON, TYLER DEAN HILL, WALTER JOHN DROBOT, CORRINE RYBCHUK, JAMES RYBCHUK, JAMES ARTHUR STEVENSON, OLINDA ELEANORA ELASSER, REINHOLD HERMAN ELASSER, IRIS MAY CROSS, DELORES CLAIRETTE SMITH, GORDON FREDERICK SMITH, DAVE LONG, THELMA LONG, WILLIAM JOSEPH EXNER, GLORIA JEAN STUSHNOFF, NILS SOREN SORENSEN, - VALERIE JOSEPHINE SORENSEN, PERRY BRANT IVAN THOMAS, ADRIAN BIGGELAAR, YVONNE VERREAULT, SUSAN DIANE MOLDOWAN, WESLEY JOSEPH MOLDOWAN AND WADE JASON ROGERS

DEFENDANTS/PLAINTIFFS

Counsel:

William P. Langen	for the plaintiff
Neil McPhee	for the defendants

JUDGMENT MCMURTRY J.
AUGUST 14, 2017

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[1] The defendants, the Owners of Condominium Corporation No. 101159043 [Condominium Corporation] and the 38 registered owners of condominium units, collectively [the defendants], seek a summary judgment dismissing the statement of claim filed in this matter. The plaintiff, 101073294 Saskatchewan Ltd., resists the application.

[2] 101073294 Saskatchewan Ltd. [the Developer], is the developer of a condominium complex known as Stoney Creek Ridge [property]. In 2010, the Developer developed and built the property and, on March 4, 2010, sold the entirety of the property to the defendants. In 2014, the Developer sought to construct a second building on the property, a move contested by the defendants.

[3] The Developer claims that it sold the property as the first phase of a planned development. The Developer further asserts that the defendants knew of its plan to erect a second single building on the remaining half of the property, which it called Phase 2. Hoang Nguyen, the Developer's sole officer, director and shareholder, deposed that when the Developer marketed and sold the condominium units, it provided purchasers with a booklet containing a site

plan, which illustrates the building designs and unit floor plans for the Phase 1 and Phase 2 developments.

[4] On October 20, 2014, when the Developer took steps to begin construction of Phase 2, it learned that its solicitor had failed to register a developer's reservation against title, pursuant to s. 16 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*CPA, 1993*]. The Developer sought the defendants' consent to rectify the omission, which was refused, which led to the Developer issuing its claim on October 5, 2016.

[5] The defendants seek dismissal of the claim on the ground that the Developer never advised them of the planned, two-phase development on the property. Moreover, they assert that it is now too late for the Developer to rectify its failure to register a developer's reservation under the *CPA, 1993*, and its claim is doomed to fail.

Statement of Claim

[6] In its action, the Developer claims an ownership interest in the undeveloped, Phase 2 half of the property and seeks a declaratory order to that effect. It also seeks a transfer of the Phase 2 half of the property to the plaintiff, free and clear of encumbrances. In the alternative, the Developer seeks damages, although it does not describe the nature of the damages sought. In the further alternative, the Developer seeks an order directing the Registrar of Titles to register a developer's reservation against the titles held by the Condominium Corporation. Finally, the Developer seeks an injunction preventing the Condominium Corporation from dealing with the property.

Defence

[7] The defendants deny any knowledge that the project was to be a phased development. It asserts that the Developer transferred the entirety of the property to them on March 4, 2010. The defendants deny that any error occurred during the transfer and submit that the Developer has no remaining ownership interest in the property.

[8] In the alternative, the defendants assert that the claim is barred under *The Limitations Act*, SS 2004, c L-16.1, because the Developer knew, or ought to have known, that it had not registered a developer's reservation prior to October 4, 2014, or two years before the Developer issued its claim.

[9] In the further alternative, the defendants assert that the Developer failed to obtain issuance of titles pursuant to an approved replacement plan, within two years of the transfer of title to the property, on March 4, 2010. By virtue of ss. 17 and 23 of the *CPA, 1993*, the Developer was required to submit an approved replacement plan, in accordance with its developer's reservation, within two years of registering the reservation. A failure to do so extinguished the Developer's rights under any reservation it may have held.

[10] Further, the defendants rely upon the conclusive proof of title provided for in s. 13 of *The Land Titles Act, 2000*, SS 2000, c L-5.1. Finally, the defendants assert that the Developer lacks standing to sue and the *CPA, 1993*, restricts the circumstances in which the Developer may sue.

Counterclaim

[11] The defendant Condominium Corporation counterclaims against the Developer for water damage of $176,000.00. It asserts that the water damage occurred because of the Developer's poor construction of the stucco exterior and the wooden build-out.

Defence to Counterclaim

[12] The Developer responds that it properly constructed the condominium building, and exercised the care and diligence of a reasonable developer. The Developer asserts further that the provisions of *The Limitations Act* bar the counterclaim.

[13] The counterclaim and defence to counterclaim are not in issue in this application.

Summary Judgment

[14] The defendants seek summary judgment dismissing the Developer's claim. *The Queen's Bench Rules* relating to summary judgment applications read as follows:

> 7-2 A party may apply, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings at any time after the defendant has filed a statement of defence but before the time and place for trial have been set.
>
> 7-3(1) A response to an application for summary judgment must not rely solely on the allegations or denials in the respondent's pleadings, but must set out, in affidavit material

or other evidence, specific facts showing that there is a genuine issue requiring a trial.

(2) The Court may draw an adverse inference from the failure of a party to cross-examine on an affidavit or to file responding or rebuttal evidence.

(3) An affidavit for use on an application for summary judgment may be made on information and belief as provided in rule 13-30, but, on the hearing of the application, the Court may draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

…

7-5(1) The Court may 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 summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

(2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:

> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> > (i) weighing the evidence;
> >
> > (ii) evaluating the credibility of a deponent;
> >
> > (iii) drawing any reasonable inference from the evidence.

(3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented

> by one or more parties, with or without time limits on its presentation.
>
> (4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.
>
> (5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.
>
> (6) If the Court is satisfied there are one or more genuine issues requiring a trial, the Court may nevertheless grant summary judgment with respect to any matters or issues the Court decides can and should be decided without further evidence.
>
> (7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.
>
> (8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

[15] In *Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd.*, 2017 SKCA 56 [*Haztech*], Whitmore J.A. for the Court of Appeal commented that the summary judgment rules are primarily concerned with whether there is a genuine issue for trial:

> 31 The new summary judgment rules, read alongside the Supreme Court's decision in *Hryniak*, significantly expanded the summary judgment process. In *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 31, [2014] 7 WWR 397, Barrington-Foote J. provided a useful overview of the summary judgment process (cited with approval in *Viczko v Choquette*, 2016 SKCA 52 at para 37, 396 DLR (4th) 449). A court's central consideration in the summary judgment application is whether there is a genuine issue requiring a trial. [Emphasis added]

[16] The evidence each party seeks to rely upon at trial must be before the court on summary judgment applications. In *101077099 Saskatchewan Ltd. v Bayhurst Energy Services Corporation*, 2015 SKQB 269, 482 Sask R 167 [*Bayhurst Energy*], a decision cited with approval in *Haztech*, Megaw J. explained the evidentiary onus in terms of an obligation on the parties to "put their best foot forward":

> 17 On a summary judgment application, the parties are required to adduce their case and present their evidence. It is not available to oppose an application on the basis something else will be done, or something else could be provided. Rather, the parties must endeavour to put before the court that which they seek to have the court consider in arriving at its decision. Rule 7-3(1) identifies the need for the respondent to show there is a genuine issue for trial.
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> 18 In *Magna*, the court stated:
>
> > 75 The defendant rightly points out that on summary judgment applications, particularly for damages, the plaintiff should not be allowed to "float trial balloons" to see whether their claim can be established and then to get another chance if the matter was directed onto trial. However, that observation applies equally to the defendant. On a summary judgment application generally, the parties have an obligation to "put their best foot forward" to allow the court both to determine the application of the summary judgment rules and, should they apply, to determine the appropriate assessment of damages in the case before it.

Application

[17] The defendants rely upon the following grounds in their application for summary judgment dismissing the Developer's statement of claim:

1. That the Developer lacks any legal development rights;

2. That any development rights the Developer may have had have been extinguished pursuant to the *CPA, 1993*; and

3. That the Developer has brought its claim outside of the limitation period established in *The Limitations Act*.

[18] The defendants assert that they were never advised the property was to be developed as a phased development, or that the Developer would be constructing Phase 2 on the undeveloped half of the property, at a later point in time. They assert that the Developer did not reserve any property rights to it and cannot dawdle and come before the court seeking relief from its error. In any event, any rights the Developer could have preserved have expired.

[19] The Developer responds that it has an ownership interest in the undeveloped half of the property. Moreover, it asserts that the evidence will establish its interest. Thus, it has raised a genuine issue requiring a trial.

[20] The issues raised by the application are:

1. Is the failure to register an interest based on a developer's reservation fatal to the Developer's claim, according to the provisions of the *CPA, 1993*?

2. Is the claim out of time under *The Limitations Act*?

Is the failure to register an interest based on a developer's reservation fatal to the Developer's claim, according to the provisions of the *CPA, 1993*?

[21] The provisions of the *CPA, 1993*, govern the development and sale of condominiums. The particular provisions in issue on this application are ss. 16, 17, 19 and 20.

[22] The process for developing and selling condominiums may be described, summarily, as follows:

1. A building or land, held in fee simple, may be divided into units by the issuance of titles pursuant to an approved condominium plan (*CPA, 1993*, s. 4);

2. Every title that is issued is for an estate in fee simple in the condominium unit to which the title refers (s. 5);

3. The registrar will issue titles, pursuant to an approved condominium plan, upon receiving the information prescribed by the *CPA, 1993*. Any interests affecting the title cancelled by the registrar must be registered against the titles issued, including an application to register an interest based on a developer's reservation (s. 5.1);

4. A developer must file a declaration for all condominium plans for which the developer is required to provide security pursuant to ss. 5.2 or 16, containing a certificate of acceptance indicating ministerial approval of the plan.

[23] Section 16 permits a developer to reserve the right to construct, at a later point in time, additional units on a parcel of land. In order to reserve that right, a developer must register an interest based on a developer's reservation when first applying to issue titles to units in a condominium plan pursuant to s. 5.1; or later, when applying to issue titles to additional units in a replacement plan pursuant to s. 23.

[24] The pertinent subsections of s. 16 read as follows:

> 16(1) An application to register an interest based on a developer's reservation in the prescribed form against the titles issued pursuant to a plan may accompany:
>
> (a) an application to issue titles to units in a condominium plan pursuant to section 5.1; or
>
> (b) an application to issue titles to additional units in a replacement plan pursuant to section 23.
>
> (2) Subject to subsection 17(2), the effect of registering an interest based on a developer's reservation pursuant to subsection (1) is to reserve to the developer the right to construct additional units and additional common facilities on the parcel.
>
> …

[25] In order to register the interest, the developer must provide certain information and documentation set out in ss. 16(3), (4) and (5). Further, and importantly, in ss. 16(6), the developer cannot register a developer's reservation, pursuant to a replacement plan, unless it signalled its intention to do so when first applying for title under the original plan:

> (6) An interest based on a developer's reservation shall not be registered against titles issued pursuant to a replacement plan unless the intention to register that interest was disclosed in the declaration that accompanied the developer's reservation

> registered against titles issued pursuant to the original condominium plan." (*CPA, 1993*, s. 16(6))

[26] Moreover, a developer may reserve the right to apply for issuance of titles under ss. 16(2) only if the developer meets the time limitation set out in ss. 17(1). If the developer does not comply with the time limitation, "all rights reserved to the developer under the developer's reservation cease" (ss. 17(2)).

[27] Section 17 reads as follows:

> 17(1) For each phase of development disclosed in the declaration that accompanied the developer's reservation registered against titles issued pursuant to the original condominium plan, a developer must submit an application for and obtain the issuance of titles pursuant to an approved replacement plan pursuant to section 23 within:
>
> > (a) two years after the day on which an interest based on a developer's reservation was registered for the phase against titles issued pursuant to the previous plan; or
> >
> > (b) any period of extension allowed pursuant to section 19 or 20.
>
> (2) Subject to any extension pursuant to section 19 or any order of the court pursuant to section 20, where issuance of titles is not obtained within the time required by subsection (1), all rights reserved to the developer under the developer's reservation cease.
>
> [Emphasis added]

[28] As stated in ss. 17(1)(b), the time limitation under ss. 17(1)(a) is subject to two periods of extension. The first, in s. 19, permits an extension of time to submit an application for titles pursuant to a replacement plan, up to

"four years after the day on which the interest based on a developer's reservation for that phase is registered pursuant to section 16" (ss. 19(4)). The developer must go through a number of steps to secure the extension, including obtaining consents to proceed from the condominium corporation and the relevant minister.

[29] The second extension is found in s. 20. Section 20 permits a developer to apply to the court for an order extending the time for obtaining titles in relation to the replacement plan. However, the developer cannot apply "later than one year after the expiration of the time allowed for obtaining the issuance of titles pursuant to a replacement plan".

[30] The parties agree that the extensions in ss. 19 and 20 are cumulative. Accordingly, I do not need to determine whether a developer is entitled to an extension under s. 19 and another, subsequently, under s. 20.

[31] Sections 19 and 20 read as follows:

> 19(1) Subject to subsections (2) and (3), the time allowed for the completion of any additional units or additional common facilities may be extended where:
>
> (a) the corporation, by special resolution, approves the extension;
>
> (b) a certificate of acceptance is granted by the minister; and
>
> (c) before the expiry of the time allowed for completion, an amendment to the interest based on a developer's reservation has been registered, accompanied by:
>
> (i) a notice of extension in the prescribed form; and

(ii) a declaration endorsed with the certificate of acceptance mentioned in clause (b).

(2) A developer may apply to the minister for a certificate of acceptance for the purposes of clause (1)(b) by providing the minister with a copy, certified by an officer of the corporation, of the special resolution that extends the time for completion of the additional units or common facilities.

(3) The minister may endorse a declaration with a certificate of acceptance for the purposes of subclause (1)(c)(ii) where the minister has received a copy of the special resolution.

(4) The period or periods of extension granted pursuant to this section for the submission of an application for titles pursuant to a replacement plan for a particular phase of a phased development must not exceed four years after the day on which the interest based on a developer's reservation for that phase is registered pursuant to section 16.

(5) No extension of time is effective unless an amendment to the interest based on a developer's reservation has been registered.

20(1) A developer may, not later than one year after the expiration of the time allowed for obtaining the issuance of titles pursuant to a replacement plan, apply to the court for an order amending the declaration or extending the time for obtaining the issuance of titles pursuant to the replacement plan.

(2) An application pursuant to subsection (1) is to be served on the corporation, the local authority, the minister and any other person the court considers appropriate, and each party is entitled to appear and be heard in person or by counsel.

(3) On hearing an application pursuant to subsection (1), the court may make any order it considers appropriate including:

(a) restoring the rights of the developer under the developer's reservation on any terms and conditions that the court considers appropriate;

(b) directing the minister to grant a certificate of acceptance;

> (c) directing the Controller of Surveys to approve the replacement plan;
>
> (c.1) directing the registrar to issue titles pursuant to the approved replacement plan; or
>
> (d) directing the developer's reservation to lapse and directing the registrar to take any necessary steps to give effect to the order.
>
> [Emphasis added]

Discussion

[32] The parties agree that the developer's reservation interest should have accompanied the initial application to issue titles, as set out in ss. 16(1)(a), which occurred on March 4, 2010. Section 17 directed the Developer to act on any reservation, within two years, by March 4, 2012. Both parties agree that with the extensions permitted under the legislation, in ss. 19 and 20, the time available to obtain issuance of titles under Phase 2 expired on March 4, 2015. It is uncontested that the Developer met none of these deadlines.

[33] The Developer asserts that the defendants were made aware of the planned Phase 2 development, when each purchaser was provided with a site plan that showed both Phase I and Phase 2 developments. The Developer further asserts that it had no knowledge of its failure to register a developer's reservation before October 20, 2014. For these reasons, the Developer is seeking equitable relief in its claim for its mistake in failing to register the reservation.

[34] The defendants submit that Developer is out of time. The legislation provides certain time limitations, all of which have been exceeded. The last date the Developer could have applied for issuance of titles was on March 4, 2015. The Developer did not do so. Therefore, whether or not the reservation was registered, the right to act on the reservation has expired.

Decision

[35] It is clear that, without an extension under ss. 19 or 20, under ss. 17(2), a developer loses the rights reserved by a developer's reservation:

> (2) Subject to any extension pursuant to section 19 or any order of the court pursuant to section 20, where issuance of titles is not obtained within the time required by subsection (1), all rights reserved to the developer under the developer's reservation cease.
>
> [Emphasis added]

[36] Further, the extensions provided in ss. 19 and 20 do not assist the Developer here because it did not act before March 2015 to obtain issuance of titles under Phase 2. Moreover, the Developer has not provided any basis for its entitlement to a further extension beyond the extensions provided in the legislation.

[37] I do not accept that a developer who fails to register a reservation under s. 16 is in a better position than a developer who complies with s. 16, when applying to issue titles pursuant to a replacement plan. Therefore, I must agree with the defendants that the Developer is out of time by virtue of ss. 17, 19 and 20 of the *CPA, 1993*. Accordingly, it does not matter whether the

Developer can get around its failure to register a developer's reservation; there is no genuine issue for trial.

Was the plaintiff's claim brought outside the limitation provided in *The Limitations Act*?

[38] If I am in error with regard to my determination that the Developer is out of time under the *CPA, 1993*, I will go on to determine whether the Developer is barred from proceeding with its claim under *The Limitations Act*.

[39] Section 5 sets out the general limitation of actions:

> 5 Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.

[40] The Developer claims it discovered the lack of a developer's registration on October 20, 2014. Accordingly, its claim filed on October 5, 2016 is not barred under s. 5. However, the defendants rely on the discoverability principle set out in s. 6 of *The Limitations Act*, which holds that the time started running under s. 5 from the date the Developer first knew or ought to have known it failed to register the reservation. Section 6 provides:

> 6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
>
> (a) that the injury, loss or damage had occurred;

> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.
>
> [Emphasis added]

Discussion

[41] The defendants assert that a reasonably diligent developer would have known that the titles lacked a developer's reservation when the titles were issued on March 4, 2010. Alternatively, they assert that the Developer ought to have noticed the lack of a reservation by March 4, 2012, which was its deadline to issue titles for the Phase 2 replacement plan under s. 17 of the *CPA, 1993*. Finally, the Developer ought to have known that it lacked a developer's reservation prior to March 4, 2014, which was the deadline to apply for an extension for the issuance of titles under s. 19.

[42] The Developer responds that a further extension was available to it under s. 20 to March 4, 2015. In any event, the defendants have put forward no evidence that it knew or ought to have known of its claim earlier than October 20, 2014, as it was required to do on a summary judgment application.

Decision

[43] As held in *Bayhurst Energy* (at paras 17-20), the parties were required to "put their best foot forward" on this application. I agree with the Developer that the defendants have failed to establish that the Developer ought to have known before October 2014 of its failure to register a developer's interest. On this basis, there is a genuine issue for trial under *The Limitations Act*.

[44] However, because the Developer cannot get around the time limitations for application of titles under the *CPA, 1993*, its success on this argument does not assist the Developer in the final analysis.

Conclusion

[45] The Developer failed to obtain issuance of titles before March 2015, as required under the *CPA, 1993*. As such, whether the Developer can establish an equitable basis for finding its development rights were preserved, notwithstanding its failure to register the reservation, time has run out for the Developer to obtain issuance of titles for Phase 2. Consequently, there is no genuine issue for trial and, pursuant to Rule 7-5(1)(a) of *The Queen's Bench Rules*, the Developer's claim is dismissed.

[46] The defendants are entitled to one set of costs.

J.

J.E. MCMURTRY