CITATION: Cottage Advisors of Canada v. Prince Edward Vacant Land, 2020 ONSC **6445**
COURT FILE NO.: CV-19-00627059-0000
DATE: 20201026

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
COTTAGE ADVISORS OF CANADA INC.	)	Megan Mackey, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	Jason P. Mangano and Mahdi M. Hussein, for the Defendants
	)	
PRINCE EDWARD VACANT LAND CONDOMINIUM CORPORATION NO. 10, LLOYD SARGINSON, GRAHAM CHURCHILL, CHRISTOPHER LYNCH and NEIL BLACK	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** Orally September 30, 2020

PAPAGEORGIOU J.

Nature of the Case

[1] This case arises out of a dispute between the plaintiff, Cottage Advisors of Canada ("Cottage Advisors"), a developer and owner of condominiums against the condominium corporation, Prince Edward Vacant Land Condominium Corporation No. 10 (the "Condo Corporation") and Directors of the Condo Corporation, Lloyd Sarginson, Graham Churchill, Christopher Lynch and Neil Black (the "Individual Defendants").

[2] The essence of the claim is as follows:

a. The plaintiff is the developer of the condominium at issue

b. The plaintiff continues to own units in the development which it rents and/or is attempting to sell;

c. The plaintiff alleges the following oppressive conduct:

   i. the Condo Corporation and the Individual Defendants are exaggerating construction deficiencies and failing to repair them at the same time (e.g. the water distribution system, the sewer system, the sewer distribution system, adult pool, the gravel roadways, fitness centre, visitor centre, sport court area and communal parking areas.) These alleged deficiencies are noted in various communications like the Condominium's status certificate and are impeding the plaintiff's ability to sell and/or rent out the units it still owns. The plaintiff alleges that the Individual Defendants are breaching a duty of care set out in section 38 of the *Condominium Act, 1998*, S.O. 1998, c. 19;

   ii. the Condo Corporation and Individual Defendants have implemented rules which impede its ability to rent units such as refusing to allow large groups to book multiple cottages, prohibiting non-owners from bringing pets into the cottages, as well as that the Individual Defendants failed to repair and maintain the common elements, contrary to the obligations outlined in the *Condominium Act*;

d. The plaintiff alleges that the Individual Defendants engaged in communications with the municipality which are harming the plaintiff and constitute interference with economic relations;

Nature of the Motion

[3] This is a motion brought by the defendants for and order striking out the causes of action alleged against the Individual Defendants and dismissing the action as against them pursuant to Rule 21.01 and Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend.

[4] The defendants' main arguments are three-fold:

a. The claims against the Individual Defendants are undifferentiated and consist of the pleading of the same facts as against all defendants as a whole;

b. The claims against the Individual Defendants do not demonstrate a separate identity or interest or any separate tortious activity;

c. There are insufficient facts to support the causes of action alleged.

Decision

[5] For the reasons that follow I am striking the causes of action alleged against the Individual Defendants, without leave to amend, and dismissing the action as against them.

[6] These reasons are organized as follows:

a. History of the pleadings

b. The law applicable to Rule 25 and Rule 21.01 motions

c. The causes of action against the Individual Defendants

i. Intentional interference with contractual relations;

ii. Oppression

Analysis

History of the pleadings

[7] The Statement of Claim was issued on August 28, 2019. In this initial Statement of Claim, the facts and causes of action were pleaded against all defendants as a group in an undifferentiated fashion.

[8] On November 5, 2019 the defendants issued a Demand for Particulars requesting particulars which included particulars with respect to the facts underlying the claims against each Individual Defendant.

[9] Cottage Advisors Response to the Demand for Particulars, dated December 5, 2019, did not provide any particulars with respect to each Individual Defendant, but again, provided particulars which relate to the Condo Corporation and the Individual Defendants as a whole.

[10] On January 17, 2020 the Condo Corporation filed a Statement of Defence which included a pleading that no proper claim had been advanced against the Individual Defendants.

[11] The defendants issued a Notice of Motion to strike the causes of action against the Individual Defendants on February 11, 2020.

[12] Thereafter, Cottage Advisors submitted a proposed Amended Statement of Claim dated March 2, 2020 which purported to provide further particulars with respect to the claims against the Individual Defendants which, again, did not provide any differentiated claims against the Individual Defendants.

The law applicable to motions brought pursuant to Rule 21.01 and Rule 25 motion

[13] Rule 25 of the *Rules of Civil Procedure* sets out detailed rules applicable to pleadings and there is comprehensive body of case law discussing the various ways that pleadings may be defective.

[14] In *Cerqueira v. Ontario*, 2010 ONSC 3954, at para. 11, Strathy J., as he then was, set out the following principles applicable to pleadings which are relevant in this case:

> (a) the purpose of pleadings is to give notice of the case to be met, to define the matters in issue for the parties and for the court, and to provide a permanent record of the issues raised: *1597203 Ontario Limited v. Ontario*, [2007] O.J. No. 2349; *Aristocrat Restaurants v. Ontario*, [2003] O.[J]. No. 5331 (S.C.J.) at para. 15; *Somerleigh v. Lakehead Region Conservation Authority*, 2005 CarswellOnt 3546 (S.C.J.) at para. 5;
>
> (b) the causes of action must be clearly identifiable from the facts pleaded and must be supported by facts that are material: *CIT Financial Ltd. v. Sharpless,* 2006 CarswellOnt 3325;
>
> (c) every pleading must contain a concise statement of the material facts on which the party relies but not the evidence by which those facts are to be proved: rule

> 25.06; this includes pleading the material facts necessary to support the causes of action alleged;
>
> …
>
> (f) the court may strike part of a pleading, with or without leave to amend, on the grounds that (a) it may prejudice or delay the trial of an action, (b) it is scandalous, frivolous or vexatious, or (c) it is an abuse of the process of the court: rule 25.11;
>
> …
>
> (i) allegations of fraud, misrepresentation, negligence and conspiracy must be pleaded with particularity: *Lana International Ltd. v. Menasco Aerospace Ltd.* [1996] O.J. No. 1448.

[15] As noted in the recent Court of Appeal decision, *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, at para. 16:

> … Each defendant in a statement of claim should be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm and when did I do it?

[16] Under Rule 21.01(1)(b), a party may move to strike out a pleading on the ground that it does not disclose a cause of action. On such a motion, the following principles apply:

a. All allegations of fact, unless plainly ridiculous or incapable of proof, must be accepted as proven;

b. The defendant, in order to succeed, must show that it is plain and obvious and beyond doubt that the plaintiff could not succeed in the claim;

c. The novelty of the action will not militate against the plaintiff;

d. The Statement of Claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting deficiencies. *Jacobson v. Skurka*, 2015 ONSC 1699, 125 O.R. (3d) 279, at para. 73; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at pp. 972-973; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at para. 9.

e. A claim will be found legally insufficient when its allegations "do not give rise to a recognized cause of action or it fails to plead the necessary elements of an otherwise recognized cause of action…[A] plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed. Vague allegations that make it impossible for [the defendant]

to reply should be struck": *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574, at paras. 18-19.

[17] Leave to amend will only be denied in the clearest of cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment: *Mitchell v. Lewis*, 2016 ONCA 903, 134 O.R. (3d) 524, at para. 21; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100, at para. 16; *South Holly Holdings Ltd. v. The Toronto-Dominion Bank*, 2007 ONCA 456, at para. 6.

The causes of action against the Individual Defendants

Interference with contractual relations

[18] The elements of the tort of intentional interference with contractual/economic relations are as follows:

a. The defendant intended to injure the plaintiff's economic interests;

b. The interference must have been by illegal or unlawful means;

c. The plaintiff must have suffered economic harm or loss as a result.

Grand Financial Management Inc. v. Solemio Transportation Inc., 2016 ONCA 175, 395 D.L.R. (4th) 529, at para. 62.

[19] In *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, at para. 35, the Court emphasized the need for particularity in pleadings of intentional interference with contractual relations:

> The pleading of intentional interference with economic relations is an intentional tort that requires full particulars. As noted in *Lysko v. Braley* (supra), the strict pleading requirements relating to a plea of conspiracy apply equally to a plea of intentional interference with economic relations. The particulars must set out with clarity and precision each of the overt acts which are alleged to have been done in furtherance of the intentional interference with economic relations.

[20] As noted above, the pleadings filed by the plaintiff claim that the Individual Defendants contacted the municipality to discuss the plaintiff' s contractual obligations, demanded that the municipality withhold the return of the surety which the plaintiff filed for the site plan and reserve fund until the Board was satisfied with the common elements. The claim does not indicate who it was or when these alleged communications took place. With respect to the alleged Board member who contacted the municipality, during the motion, and in its factum, the plaintiff argued that the plaintiff knew or believed that one of the Board members had contacted the municipality, but it did not know who because the Individual Defendants had not yet filed a defence. The plaintiff required discovery to determine who it was.

[21] There are a number of difficulties with the plaintiff's position.

[22] First, as held in *Ontario Consumers Home Services*, at para. 27, citing *Balanyk v. University of Toronto,* 1999 CanLII 14918 (Ont. S.C.), at para. 29:

> If the plaintiff does not, at the time of the pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.

[23] Furthermore, the way in which this claim is pleaded runs afoul of the principles of pleading specifically applicable to officer and director liability. In *Ontario Consumers Home Services*, at paras. 67-68, O'Marra J. discussed the heightened scrutiny that courts are directed to make of claims advanced against officers and directors:

> [W]here a plaintiff asserts personal liability of an individual defendant there is a heightened onus at the pleading stage. In *Tran v. University of Western Ontario*, [2014] O.J. No. 407 (S.C.J.) E.M. Morgan J. noted at para. 16 the following:
>
> > [D]espite the fact that the onus in a Rule 21 motion is on the moving party to demonstrate that it is "plain and obvious" the claim must fail, *Hunt v. T&NPLC*, [1990] CanLII 90 (SCC), [1990] CanLII 90 (SCC), [1990] 2 SCR 959, at para. 36, a party who pleads personal liability against the employees of a corporate defendant with which he has had dealings must satisfy a rather stringent test. As the Prince Edward Island Court of Appeal put it in *Kay Aviation v. Rofe* (2001), 2002 DLR (4th) 683 at para. 25, "[t]he minimum level of material facts in a statement of claim founded on causes of action against an

> officer, director or employee of a corporation with whom the plaintiff has contracted is very high.
>
> In order to give rise to personal liability the factual underpinnings to the claim must be specifically and sufficiently pleaded.

[24] In *Burns*, the Court of Appeal upheld the striking out of a claim against employees on the basis that it was an undifferentiated claim, at para.17:

> Mr. Burns' statement of claim does not provide either Ms. McLean or Ms. Oslizlok with an individualized answer to that question. The heart of Mr. Burns' claim against Ms. McLean and Ms. Oslizlok is found in paras. 29 through to 35 of his statement [of] claim, much of which is reproduced above. None of those paragraphs of the statement of claim inform Ms. McLean or Ms. Oslizlok what each did individually that Mr. Burns alleges constitutes actionable wrongs against him for which he seeks a remedy, and when did they it. Instead, his pleading lumps the defendants together, without providing the necessary separate, differentiating material facts that could support a claim against each individual.

[25] In this case, the claims made against the Individual Defendants with respect to intentional interference with contractual relations are unparticularized and undifferentiated claims.

[26] On that basis alone, the pleading must be struck out as it fails the basic principles of pleading. There is no need to consider the substantive law on officer and director liability and whether the facts pleaded are sufficient because the plaintiff has failed to provide sufficient particulars as to what each Individual Defendant is alleged to have done.

[27] Given the plaintiff's oral submissions, its factum, and the fact that it has already provided Particulars and an Amended Statement of Claim in response to this motion, which do not provide any additional material facts, there is no reason to suppose that the plaintiff could add anything else to this claim that would support the cause of action of interference with contractual relations. Leave to amend is denied. This is not the same situation as in *Burns*, where the Court of Appeal granted leave to amend, since the plaintiff has already had that opportunity and has been unable to add anything material.

[28] This claim is struck out. Leave to amend is denied given the plaintiff is not able to provide any further and necessary particulars at this time.

Oppression

[29] Section 135 of the *Condominium Act* provides as follows:

> 135(1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> (2) On an application, if the court determines that the conduct of the owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> (3) On an application, the judge may make any order the judge deems proper including,
>
> (a) an order prohibiting the conduct referred to in the application; and
>
> (b) an order requiring the payment of compensation.

[30] The requirements for an oppression action are set out by the Supreme Court of Canada in *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037, at para. 24, as follows:

a. The complainant must identify the expectation that he or she claims have been violated by the impugned conduct and that her expectations were reasonable;

b. The complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded her interests.

[31] In *Wilson*, the Court affirmed Doherty J.A.'s decision in *Budd v. Gentra* (1998), 111 O.A.C. 288, which held that the principles set out in *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 129 D.L.R. (4th) 711 (Ont. C.A.), and *Normart Management Ltd. V. West Hill Redevelopment Co. Ltd.* (1998), 155 D.L.R. (4th) 627, with respect to officer and director liability are inapplicable to oppression claims that may be brought against them. Instead, a director or officer can only attract personal liability in a claim for oppression under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, when:

a. The oppressive conduct is be properly attributable to a director/officer because he or she is implicated in the oppression (i.e. the director/officer exercised or failed to exercise his or her powers so as to effect the oppressive conduct); and

b. The imposition of personal liability is fit in all the circumstances.

Wilson, at para. 31, citing *Gentra*, at para. 46.

[32] From a pleading perspective, Doherty J.A., in *Gentra*, set out the test, at para. 47, as follows:

> In deciding whether an oppression action claiming a monetary order reveals a reasonable cause of action against directors or officers personally, the court must decide:
>
> * Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the C.B.C.A.?
>
> * Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?

[33] The parties indicated that there is only one case where the courts have considered the personal liability of directors pursuant to section 135 of the *Condominium Act*, *Dewan v. Burden*, 2018 ONCA 195. In that case the director had engaged in a long history of self-dealing, lack of financial disclosure, charging the condominium corporation for personal matters, failing to declare conflicts, refusing to produce records despite being court ordered to do so, and implementing an invalid by-law. The Court concluded:

> Where, as here, it is clear that a director is the motivating force behind the oppressive conduct, he or she should be held personally liable. To hold otherwise in the present case would result in the oppressed minority owners being denied their costs or making CCC396 liable for those costs. The latter result would be particularly inequitable, as it would perpetuate Mr. Burdet's practice of having CCC396 pay the legal costs associated with defending his oppressive conduct.

[34] With respect to the first branch of Justice Doherty's test in *Gentra*, at its highest, and despite the lengthy pleadings describing the alleged oppressive conduct, the plaintiff pleads that

all defendants improperly assert that deficiencies remain, that they advise prospective purchasers and others of these deficiencies and that they have put in place restrictions regarding how many people can occupy rental units and the ability of renters to bring pets.

[35] There are no particulars regarding what each Individual Defendant is alleged to have specifically done. Justice Doherty faced a similar situation in *Gentra*, even in the context of a case where the conduct alleged truly did prefer the interests of some stakeholders, and he concluded that unparticularized, undifferentiated claims against the Board as a whole were insufficient:

> …No person should have to defend a lawsuit absent allegations which identify the conduct of that person said to render him or her liable to the plaintiff. This statement of claim utterly fails to deal with the director defendants or management defendants on an individual basis: at para. 48.
>
> I am left with the uneasy impression that the claim against the directors and officers personally is included in the appellant's statement of claim for purposes other than to ultimately establish their personal liability. If this impression is correct, those claims are properly characterized as an abuse of process. A "shot gun" approach to the naming of defendants in a lawsuit which serves to needlessly add parties to the proceedings must be discouraged. It can only further complicate and prolong what will of necessity be lengthy and complicated litigation: at para. 50

[36] With respect to the second branch of Justice Doherty's test in *Gentra*, it is not enough for the plaintiff to make bald allegations that the alleged behavior is targeted at the plaintiff. In *Gentra*, Doherty J.A. concluded that there was no reasonable basis for a claim against Board members in similar circumstances, at para. 52:

> [T]he remedial reach of s. 241 is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation

in which a director or officer may be held personally liable to rectify corporate oppression.

[37] In my view, there is no reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally. The alleged conduct did not result in any personal benefit to the Individual Defendants and it did not increase their control in any way. Although it is alleged that they breached their duty to the Condo Corporation, the specific conduct alleged involves the Board making decisions about how to manage the Condo Corporation's day-to-day affairs. They may be wrong in these decisions or their assessment as to the extent of the deficiencies and need for repair, but it should not be that errors in the day-to-day management of the affairs of the corporation, which do not even personally benefit them should result in a personal order against them. Allowing actions of this sort to proceed against directors of condominium corporations would serve as a disincentive to their raising deficiencies with developers and properly advising potential purchasers such deficiencies.

[38] The motion is granted and the action is struck out against the Individual Defendants. Leave to amend is denied because the plaintiff has already had an opportunity to amend the Claim and make submissions during the hearing. The plaintiff has not alluded to any additional facts which it could plead if leave were granted and there is no reason to suppose that they may be able to do so. This is not a case involving technical deficiency in the pleading which could be cured with an amendment, but rather the absence of underlying facts which support the causes of action claimed.

[39] After the hearing the parties suggested a costs order in the approximate amount of $7,000 would be appropriate. I find this amount fair and reasonable and am awarding the defendants costs in such amount.

Papageorgiou J.

Released: October 26, 2020

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Plaintiff

– and –

PRINCE EDWARD VACANT LAND CONDOMINIUM CORPORATION NO. 10, LLOYD SARGINSON, GRAHAM CHURCHILL, CHRISTOPHER LYNCH and NEIL BLACK

Defendants

REASONS FOR JUDGMENT

Papageorgiou J.

Released: October 26, 2020