

CITATION: Paus v. Concord Adex Developments Corp., 2015 ONSC 5122

COURT FILE NO.: CV-12-463822-00CP

DATE: 20150814

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DALE PAUS

Plaintiff

– and –

CONCORD ADEX DEVELOPMENTS
CORP., TORO ALUMINUM RAILINGS
INC., TODDGLEN CONSTRUCTION
LIMITED, TORONTO STANDARD
CONDOMINIUM CORPORATION NO.
1438, and PAGE + STEELE
INCORPORATED

Defendants

)
)
) *Theodore P. Charney and Brendan O’Grady*
) for the Plaintiff
)

)
)
) *Jeremy Devereux and Maureen Edwards* for
) the Defendant Concord Adex Developments
) Corp.
)

) *Michael Foulds* for the Defendant Toddglen
) Construction Limited
)

) *Kevin R. Bridel* for the Defendant Toronto
) Standard Condominium Corporation No.
) 1438
)

) *Megan Marrie* for the Defendant Page +
) Steele Incorporated
)

Proceeding under the *Class Proceedings Act, 1992*

) **HEARD:** August 12, 2015
)

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiff Dale Paus is the owner of a condominium unit in a two-building condominium complex known as “the Matrix” at 361 Front Street West and 373 Front Street West in Toronto, Ontario developed by the Defendant Concord Adex Developments Corp. (“Concord”), which was the declarant under the *Condominium Act, 1998*, S.O. 1998, c. 19. The complex was constructed by the Defendant Toddglen Construction Limited, the general contractor. The east tower is a 32-storey residential condominium building and the west tower is a 28-storey residential condominium building. The Matrix contains 642 residential units and parking, commercial and storage spaces.

[2] Mr. Paus is the owner of unit 3607 in the east tower, which he purchased in 2002 from a prior owner.

[3] Glen Woo, who is the other proposed representative plaintiff, is a tenant of unit 2306 in the west tower, where he has lived with his girlfriend since 2010.

[4] This is an action for damages because defective balcony railings had to be removed and replaced at the Matrix. The need to replace the railings arose because the railing of one unit became detached and fell off on March 1, 2011, which led to the discovery that all the balconies needed remedial work.

[5] On this motion, the Plaintiff Dale Paus seeks an order certifying the action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and ancillary relief.

[6] The Defendants consent to certification. The action was previously discontinued against the Defendant Toro Aluminum Railings Inc., which is a bankrupt corporation, and on this motion, Mr. Paus consents to a dismissal of the action against Page + Steele Incorporated.

[7] Shortly after the railing detached and fell, representatives of one or more of the Defendants entered the units in the Matrix and locked the doors to the balconies. The railings were repaired, but it took over three and a half years to complete the work.

[8] After the railing detached, the Condominium Corporation retained an engineering consulting firm, Exp Services Inc., to review the structural integrity of the railings. Exp Services subsequently removed all railings found to be in danger of falling off the buildings. Exp Services found that with the exception of one unit, all of the railings showed signs of damage, deterioration, flaws and/or distress. Exp Services concluded in its report, dated June 3, 2011, that:

the as-built guard-rail assembly does not meet the requirements of the 1997 [Ontario *Building Code*] which was in force at the time of construction of the buildings. In particular, the railing post and the wedge anchor bolts that connect the post shoes to the concrete slabs are not adequate for resisting the imposed guard and wind loads specified in the 1997 OBC.

It recommended that all existing balcony railings be removed and replaced with new ones.

[9] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[10] In the present case, the pleadings disclose causes of action in negligence and for breach of contract. I am satisfied that the first criterion for certification is satisfied.

[11] The definition of an identifiable class serves three purposes: (i) it identifies the persons who have a potential claim against the defendant; (ii) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (iii) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[12] The proposed Class is defined as:

those persons, excluding the defendants and their senior officers and directors, who owned, rented and/or ordinarily resided in a residential condominium unit at the premises municipally known as 361 Front Street West (East Tower) and 373 Front Street West (West Tower) in the City of Toronto, during the period or periods of time when access to or use of the balcony associated with the residential condominium unit was restricted, during the period commencing on March 1, 2011 to and including September 15, 2014.

[13] I am satisfied that the second criterion for certification has been satisfied.

[14] The third criterion for certification is the common issues criterion. Mr. Paus proposes the following common issues:

1. Did any or all of the defendants owe a duty of care to the Class Members in relation to the design, construction, installation, maintenance and repair of the Balcony Railings?
2. Did any or all of the defendants breach the standard of care expected of them in relation to the design, construction, installation, maintenance and repair of the Balcony Railings. If yes, which defendants, when and how?
3. Did Concord breach the Contract with Class Members in relation to the design, construction and installation of the Balcony Railings on the Balconies? If yes, when and how was the Contract breached?
4. If the answers to any of questions 1 through 3 are “yes”, did the breach or breaches cause or contribute to the Detached Railings?
5. If the answers to any of questions 1 through 3 are “yes”, what degree of fault should be assigned to each defendant?
6. Should the defendants pay prejudgment and postjudgment interest, and at what annual interest rate?
7. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?

[15] I am satisfied that the common issues criterion for certification has been satisfied.

[16] I am also satisfied that the preferable procedure criterion and the representative plaintiff criterion are satisfied.

[17] As examples of actions that have been certified as class actions to advance claims for the loss of use and enjoyment of a condominium or an apartment unit as a result of damages to the building see: *Nolevaux v. King and John Festival Corporation*, 2013 ONSC 5451; *Emam v. Bay Grenville Properties Limited*, 2013 ONSC 5526; *Krishna v. Bedford at Bloor Realty Inc.*, 2013 ONSC 5526; and *Charmley v. Deltera Construction Limited*, 2010 ONSC 7153.

[18] I, therefore, grant the motion for certification. I am also satisfied that the notices and notice plans for the respective actions should be approved. For the above reasons, I grant Mr. Paus’ certification motion.

Perell, J.

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Defendants

REASONS FOR DECISION

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Released: August 14, 2015