Case Name:

Condominium Corp. No. 022 5840 v. Executive Loft Inc.

Between
Condominium Corporation No. 022 5840 (Executive Lofts Condominium Corporation), Applicant (Plaintiff), and Executive Loft Inc. and Worthington Properties Inc., Respondents (Defendants)

[2010] A.J. No. 369

2010 ABQB 232

Docket: 0603 02426

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

Master W. Breitkreuz

Heard: November 25, 2009.
Judgment: April 7, 2010.

(53 paras.)

Counsel:

Jerritt R. Pawlyk, for the Applicant (Plaintiff).

Jonathan Hillson, for the Respondents (Defendants).

Reasons for Decision

MASTER W. BREITKREUZ:--

Introduction

1 This is an application by the plaintiff applicant Condominium Corporation No. 022 5840 (Executive Lofts Condominium Corporation) (the "plaintiff") to amend an amended statement of claim.

Background

2 On February 16, 2006, the original statement of claim was filed against the defendant respondents, Executive Loft Inc. and Worthington Properties Inc. (collectively, the "defendants"). It alleges that as the developers of a conversion and reconstruction of a high-rise condominium, the defendants breached various fiduciary and contractual obligations and duties of care owing to the plaintiff.

3 The original statement of claim also alleges that in December 2004, an inspection of the building updating a Reserve Fund Study discovered that the majority of the building components as listed and described in the defendants' 2002 Reserve Fund Study needed replacement in excess of $500,000.00. The plaintiff claimed $1,000,000.00 in damages plus costs and interest to rectify the deficiencies in the building components.

4 On February 14, 2007, the plaintiff served an amended statement of claim on the defendants. The amendments added particulars about the defendant's 2002 Reserve Fund Study and alleged negligent misrepresentation by the Defendants with regard to this study. The plaintiff also claimed more damages in the amount of $2,100,000.00.

5 On July 6, 2007, the defendants filed a statement of defence, denying that they owed to the plaintiff a fiduciary duty, duty of care or any other duty, and that they made any negligent misrepresentations.

6 On November 4, 2009, a notice of motion was filed to amend the amended statement of claim. The plaintiff claims that each of the proposed amendments is necessary in order to determine the real question in issue between the parties.

7 The parties agree that the two-year limitation period under s. 3 of the Limitations Act, R.S.A. 2000, c. L-12 has expired.

8 On November 25, 2009, I heard oral submissions in chambers.

The Proposed Amendments

9 Paragraph 4 of the proposed amended amended statement of claim adds Mr. White, the sole director and voting shareholder of Worthington Properties Inc. and the sole director of Executive Loft Inc., as a defendant in the action. Paragraphs 11, 12, 13 and 14 are consistent with the proposed addition of Mr. White as a defendant.

10 Paragraph 5 states that the plaintiff is responsible for the control, management and administration of the common property of the condominium project. Paragraph 6 states that the plaintiff is now suing on its own behalf and pursuant to s. 25(3) of the Condominium Property Act, R.S.A. 2000, c. C-22 ("CPA"). Paragraph 10 characterizes the defendants as "developers" under the CPA, and alleges that as developers, the defendants owed fiduciary duties to the plaintiff, including the duty to act in good faith and in the best interests of the plaintiff.

11 Paragraph 22 claims that the defendants, as "developers" under the CPA, have breached fiduciary duties, duties of care, duties of fair dealing, and duties to fairly regard the interests of the plaintiff, purchasers, and prospective purchasers of units in the condominium project owing to the plaintiff under the Act.

12 Paragraph 21 claims a new remedy. The plaintiff claims that,

> The Defendants ... have acted in a manner that is oppressive, unfairly prejudicial to the Plaintiff and purchasers and prospective purchasers of the units in the Condominium Project, and that disregards the interests and reasonable expectations if [sic] the Plaintiff ... in the Condominium Project.

13 Finally, paragraph 7 alleges that the defendants held themselves out as having particular expertise, experience and qualifications in the supervision, development and construction of a high-rise building upon which the plaintiff relied. This appears to be an additional fact satisfying an element of the cause of action for negligent misrepresentation plead in paragraph 14.

Issues

14 From the foregoing, the issues to be determined in this application are as follows:

> Is the proposed amendment to add Mr. White as a defendant saved by s. 6(4) of the Limitations Act? If it is, does it disclose or sufficiently plead a cause of action?
> Is the proposed amendment to sue the defendants as "developers" under the CPA saved by s. 6(4) of the Limitations Act? If it is, does it disclose or sufficiently plead a cause of action?
> Is the proposed amendment to plead the oppression remedy allowed?
> Is the proposed amendment to add the material fact of expertise allowed?

The Law

A. General Principles for Amending Pleadings

15 The starting point for determining whether amendments to pleadings should be accepted within the limitation period is Rule 132 of the Alberta Rules of Court:

> The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties.

16 Rule 132 gives the Court broad discretion to allow amendments. In Balm v. 3512061 Canada Ltd., 2003 ABCA 98 at para. 43, 327 A.R.149, Ct J.A. held: "The classic rule is that an amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired."

17 The evidentiary threshold for proposed amendments is low. A modest degree of evidence will justify an amendment to pleadings within the limitation period: Balm, supra at para. 29. No evidence is needed in support of an amendment when the changes or additions are "trivial" or merely clarify wording or correcting details: Waquan v. Canada, 2002 ABCA 110 at para. 26, 2 Alta. L.R. (4th) 1. Evidence is also not required if sufficient facts upon which the new cause of action is based are contained in the original pleading: Balm, supra at para. 11; CT Communications Edmonton Ltd. v. Shaw Communications Inc., 2007 ABQB 473 at paras. 22-23, 423 A.R. 338.

B. Approach to Proposed Amendments After the Limitation Period

18 In Marin v. Rask, 2000 ABQB 931 at para. 14, 282 A.R. 308, Veit J. delineated the four exceptions in which the general rule allowing amendments to pleadings does not apply:

> There is no amendment where it would create serious prejudice which payment of costs could not repair; there is no amendment where the amendment would be hopeless; there is no amendment where the amendment would add a new cause of action outside the limitation period for suing; there is no amendment where the failure to plead earlier, or the amendment itself, involves bad faith.

19 Two of the four exceptions do not apply here. The defendants do not argue serious prejudice or bad faith. Rather, they argue that the proposed amendments are barred by the Limitations Act or that the amendments are hopeless because they do not disclose or sufficiently plead a cause of action.

20 In the case at bar, the parties agree that the two-year limitation period under s. 3 of the Limitations Act has expired. Thus, the court must apply the statutory framework outlined in s. 6 of the Limitations Act to determine whether an amendment will be allowed: Hunter Financial Group Ltd. v. Maritime Life Assurance Co., 2007 ABQB 263 at para. 17, 428 A.R. 150, citing Stout Estate v. Golinowski Estate, 2002 ABCA 49 at para. 100, 299 A.R. 13; Marlborough Ford Sales Ltd. v. Ford Motor Co. Of Canada Ltd., 2003 ABQB 298 at paras. 31-33, 13 Alta. L.R. (4th) 336; Alberta v. Canadian National Railway Co., 2001 ABQB 984 at para. 12, 309 A.R. 157.

21 Section 6 of the Limitations Act provides as follows:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> When the added claim
>
> > is made by a defendant in the proceeding against a claimant in the proceeding, or
> > does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.
>
> When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
>
> > the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
> > the defendant must have received, within the limitation period applicable to the added claim plus

the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

Under this section,

the claimant has the burden of proving

that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

[Emphasis added.]

22 If the proposed amendments meet the statutory exceptions set out in the Limitations Act, then I will consider whether the amendments are allowed on the basis that they disclose or sufficiently plead a cause of action or are supported by sufficient evidence.

Analysis

A. Proposed Amendment to Add Mr. White as a defendant

Applicable Statutory Provisions

23 Section 6(4) of the Limitations Act permits the addition or substitution of a defendant after the relevant limitation period has expired if the plaintiff can show that the claim which adds a defendant is related to the conduct, transaction or events described in the original pleading.

24 The defendant then has the burden of showing that s. 6(4)(b) is not satisfied, namely, that "within the limitation period applicable to the added claim plus the time provided by law for the service of process, the defendant had sufficient knowledge of the added claim such that the defendant will not be prejudiced in maintaining a defence to it on the merits."

Position of the Parties

25 The plaintiff argues that the added claim relates to the conduct, transaction or events described in the original proceeding on the basis that each of the claims made against Mr. White are also made against the defendants and are based upon facts already pleaded in the amended statement of claim.

26 The plaintiff points out that the defendants have not adduced evidence proving that Mr. White did not have sufficient notice of the added claim within the limitation period. In the alternative, the plaintiff argues that s. 6(4)(b) is satisfied based on Mr. White's position. At all material times, the plaintiff alleges that Mr. White was the controlling mind of the defendants as the sole director and shareholder. As corporate director of the defendants, Mr. White had knowledge of the original claims when the plaintiff served the defendants with the amended statement of claim in 2007.

Consequently, Mr. White had sufficient knowledge of the claim so as not to be prejudiced in maintaining a defence on the merits.

27 The defendants argue that s. 6(4)(a) of the Limitations Act is not satisfied. It is not determinative that the additional claims arise from the same event. The plaintiff's amendment arises from a different "relational" connection; specifically, the amendments against Mr. White do not arise from a direct commercial relationship with the plaintiff but rather from his role as the director of two corporations that are said to have a direct commercial relationship with the plaintiff. According to the defendant, this is a fundamentally different relationship because it has different obligations and legal duties.

28 The plaintiff's evidence in support of the proposed amendment is the affidavit of Mr. Newton Wing, who is the president of the plaintiff condominium corporation. The affidavit is brief. Mr. Wing deposes that Mr. White is the sole director and voting shareholder of the defendant Worthington Properties Inc., as well as the sole director of the defendant, Executive Loft Inc., and as such had sufficient knowledge of this action from the time the defendants were served with the amended statement of claim. In addition, Mr. Wing deposes that the claim against Mr. White arises from his position as the controlling mind of the defendants, and as such Mr. White is related to the conduct, transactions or events that form the basis of the original claim.

29 The plaintiff submits corporate registry searches for both defendant corporations that support Mr. Wing's affidavit. I note that the earliest corporate registry searches included in the materials were conducted on February 14, 2007, just prior to when the statement of claim was amended. However, it was not until this application that the plaintiff proposed to add Mr. White as a defendant to the lawsuit.

Application to the Case at Bar

30 In this section I will discuss whether the proposed amendment to add Mr. White as a defendant passes both tests in s. 6(4) of the Limitations Act, and if it does, is the proposed amendment still disallowed because it does not disclose or sufficiently plead a cause of action.

31 I believe the plaintiff has satisfied the requirement in s. 6(4)(a). Courts have found the "relational" requirement to be a low threshold: Royal Trust Corporation of Canada v. Lodge at Waterton Lakes Inc., 2005 ABQB 775 at paras. 36-38, 389 A.R. 391; Stolk v. 382779 Alberta Inc., 2005 ABQB 440 at para. 36, 383 A.R. 203. For example, in Greentree v. Martin, 2004 ABQB 365 at para. 13, 368 A.R. 263, Clackson J. held:

> While the cause of action established by the amendment is different from the cause of action in the original pleading, the [Limitations Act] does not speak of causes of action but rather events and occurrences. In my view, that is a much broader perspective.

32 In Calgary Mack Sales Ltd. v. Shah, 2005 ABCA 304 at para. 14, 380 A.R. 195 the Court of Appeal held that the relational requirement has a broad meaning, citing the majority of the Supreme Court of Canada's interpretation of "related to" in Slattery v. Slattery, [1993] 3 S.C.R. 430 at 445-446.

33 I have considered whether the evidence establishing Mr. White as the director of both defendant corporations is sufficient to relate him to the conduct, transaction or events in the original pleading. However, it is difficult to argue that Mr. White, because of his position, is not related to the events plead in the original statement of claim. Each of the claims made against Mr. White are also made against the existing defendants, and each of the claims are based upon facts already pleaded in the amended statement of claim. Given the low threshold under this subsection, I find that the plaintiff has satisfied its burden.

34 It must be noted that according to s. 6(5)(b) the defendants have the burden of proving that the requirement of subsection (4)(b) was not satisfied, and they have not done so. The defendants provided no evidence to show that Mr. White did not have sufficient notice of the added claim against him within the limitation period. Thus, the proposed amendment is saved under s. 6(4) of the Limitations Act.

35 The issue then becomes whether the proposed amendment is not allowed on the basis that it does not disclose or sufficiently plead a cause of action or is not supported by sufficient evidence: Marin, supra. There must be "a modest degree" of evidence to justify an amendment to pleadings: Balm, supra at para. 29.

36 The defendants argue that the proposed amendment should not be allowed because it does not disclose a cause of action. Courts have historically been reluctant to recognize a fiduciary duty in the context of a purchase of property. In the absence of a direct contractual relationship, a plaintiff cannot sue the director of a defaulting corporation in contract. A director is only personally liable for the actions of a corporation when the director has performed an independent

actionable wrong or exhibited a separate identity or interest from the corporation. Neither has occurred in this case. Moreover, the allegation of negligent misrepresentation against Mr. White was not plead with sufficient particularity. Finally, the proposed amendments are not supported by sufficient evidence. Consequently, the defendants submit that the application be dismissed.

37 I find that the proposed amendment adding Mr. White as a defendant does not sufficiently support a cause of action. The actions of a shareholder, officer, director or employee of a corporation may give rise to personal liability in tort where those actions are themselves tortious or exhibit a separate identity or interest from that of the corporation: Blacklaws v. Morrow, 2000 ABCA 175 at para. 41, 261 A.R. 28, citing ScotiaMacleod v. Peoples Jewellers (1995), 26 O.R. (3d) 381 (C.A.), leave to appeal dismissed [1996] S.C.C.A. No. 40. The plaintiff has adduced no evidence that Mr. White's actions were tortious or exhibited a separate identity or interest from the corporation. The only evidence before the Court is that he was the sole director of both defendant corporations at the relevant time. The personal liability of a director may not be inferred merely from the fact of close control of a corporation or general direction: Mentmore Manufacturing Co. Ltd. et al. v. National Merchandise Manufacturing Co. Inc. et al (1978), 89 D.L.R. (3d) 195 (Fed. C.A.) (per Le Dain J.) at p. 172. The plaintiff has made various claims as against the corporations, but there are no material facts plead to suggest how Mr. White would be personally liable as director. It is a fundamental and well-known legal principle that a corporation has a separate legal personality.

38 The same evidentiary problem arises with the claims against Mr. White for breach of fiduciary duty, negligence, breach of contract, and negligent misrepresentations as described in paragraphs 11, 12, 13 and 14 of the proposed amendments.

39 As a result, the proposed amendment adding Mr. White as a defendant to this action is not allowed.

B. Proposed Amendment to Claim Against the defendants as "developers" under the Condominium Property Act

40 Neither party addressed whether the new cause of action under the CPA was barred by s. 6(4) of the Limitations Act, even though the claim appears to change the capacity in which the defendants are sued and the limitation period has expired. In any event, I find that the proposed amendment is not supported by sufficient evidence.

41 The plaintiff argues that the defendants, including Mr. White, are "developers" under the CPA and breached a duty of fair dealing and fiduciary duty owing to the plaintiff under the Act. Section 1(1)(j) of the CPA states that "developer means a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction."

42 The defendant argues that there is no evidence that Mr. White was a "developer" within the meaning of the CPA. The defendants did not address whether there was evidence as against the corporate defendants.

43 I agree with the defendants. The proposed amendments to amended statement of claim alleges that Mr. White had a financial interest in, and control of, the condominium project (para. 4); that the defendants held themselves out as having particular expertise and qualifications in the supervision, development, and construction of multi-unit residential condominium facilities (para. 7); and that the defendants participated in the conversion and reconstruction of the condominium project for the purposes of selling the units and shares in the common property (para. 8). However, the plaintiff does not plead the material fact necessary to meet the definition of "developer" under the CPA, namely that the developer sells, or offers for sale to the public, units that have not previously been sold to the public. Without this fact, the claim that the defendants breached a duty of fair dealing and a duty to fairly regard the interests of the plaintiff as well as purchasers and prospective purchasers of the condo units does not make sense.

44 I am cognizant that the evidentiary threshold at this stage is low. Although Balm was in the context of an amendment within the limitation period, Ct J.A. held at para. 14 that "the court must allow an amendment even though it raises a doubtful plea, if it is arguable." However, in the present case, the issue is not that the cause of action is not arguable. The case law indicates that definition of "developers" under the CPA is understood broadly and can even include relators and legal counsel to the developer: Condominium Plan No. 0020701 v. Investplan Properties Inc., 2006 ABQB 224 at para. 14, 57 Alta. L.R. (4th) 310, citing Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd., 1998 ABQB 1023, 235 A.R. 217. Rather, the issue is that the relevant facts needed to bring the defendants under the statute were not pleaded.

45 Moreover, it is not a case where the impugned claim or cause of action overlaps with other claims or causes of actions which are clearly arguable. An overlapping claim requires additional consideration, since "disallowing an amendment whose legal validity is debatable but whose facts overlap parts not attacked, produces a real risk of injustice (if the new claim is actually open in law), but no real advantage (even if it is bad in law)": Balm at para. 14. In the case

at bar, the new claim under the CPA was not previously plead and involves different duties and different bases for claiming that those duties were breached. The defendants have a different role under the statute that was not previously plead, namely as developers offering the units for sale instead of as participants in the supervision, development and construction of the condominium project. Thus, the proposed amendment is not saved on the ground that it overlaps with other causes of action already plead.

46 Thus, the proposed amendment to claim against the defendants, including Mr. White, as "developers" under the CPA is not allowed.

C. Proposed Amendment to Plead the Oppression Remedy

47 In paragraph 21 of the amended amended statement of claim, the plaintiff does not state whether it is seeking the oppression remedy under corporate legislation or s. 67(1)(a)(iv) of the CPA (nor does it need to). However, in its brief, the plaintiff argues the oppression remedy under the Alberta Business Corporations Act, R.S.A. 2000, c. B-9. Section 25(5) of the CPA expressly states that the Business Corporations Act does not apply to a condominium corporation. A corporation created under the CPA is a creature of statute and unknown to the common law and to other corporations. Thus, prima facie this proposed amendment is not allowed because it is hopeless.

48 Even if I ignore the plaintiff's brief and consider the proposed amendment on its face (for example, assuming it to be the oppression remedy under s. 67(1)(a)(iv) of the CPA), then the amendment is still not allowed since it can only be obtained if there is a breach of the statute. Thus, without the proposed amendments claiming a cause of action under the CPA, an amendment to add an oppression remedy does not make sense.

D. Proposed Amendment to Add the Material Fact of Expertise

49 Paragraph 7 of the proposed amendments to the amended statement of claim alleges that the defendants held themselves out as having particular expertise, experience and qualifications in the supervision, development and construction of the condominium facilities upon which the plaintiff relied. This appears to be an additional fact satisfying an element of the cause of action for negligent misrepresentation plead in paragraph 14 of the original statement of claim.

50 The proposed amendment is allowed in so far it relates to the existing corporate defendants. It seeks to clarify the claim for negligent misrepresentations regarding the Reserve Fund Study plead in the original statement of c laim. As previously discussed, no evidence is needed in support of an amendment when the changes or additions are "trivial" or merely clarify wording or correct details: Waquan, supra.

51 The proposed amendment is not allowed as against Mr. White because new evidence is needed to support this claim which has not been provided: see e.g. Balm, supra at paras. 16, 19.

Conclusion

52 In the result, one of the proposed amendments is allowed as against the existing defendants (not Mr. White) to assist the parties in determining the real question in issue. The other proposed amendments are not allowed because the pleadings are insufficient.

53 As to the question of costs, in respect of this application I am prepared to hear submissions on behalf of the parties within sixty (60) days of my decision. Otherwise, given that the plaintiff made the application to amend the amended statement of claim, I direct that the costs be payable to the defendants in the cause.

MASTER W. BREITKREUZ

cp/e/qlcct/qlpwb