CITATION: Matlock v. Ottawa-Carleton Standard Condominium Corporation, 2021 ONSC 390
COURT FILE NO.: CV-19-81142
DATE: 20210119

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MICHAEL MATLOCK Plaintiff	Matthew Morden, for the Plaintiff
– and –	
OTTAWA-CARLETON STANDARD CONDOMINIUM CORPORATION No. 815, RAY HESSION, CATHERINE ZONGORA, JOCELYN LAMARCHE, ROUZBETH ZADEH, JEAN LOUIS BELLMARE, DR. MANEESH SHARMA, RELIANCE CONSTRUCTION GROUP and S & R PLUMBING Defendants	Martin A. Smith, for the Defendants, OCSCC No. 85, Ray Hession, Catherine Zongora, Jocelyn Lamarche, Rouzbeth Zadeh, Jean Louis Bellmare and Dr. Maneesh Sharma.
	HEARD: January 5, 2021

REASONS FOR DECISION

BEAUDOIN J.

Overview

[1] The Plaintiff, Michael Matlock ("Mr. Matlock"), is the owner of a condominium unit at 90 George Street in the City of Ottawa. The Defendant, Ottawa-Carleton Standard Condominium Corporation No. 815 (OCSCC 815) is the Condominium Corporation. At various times, Ray Hession ("Mr. Hession"), Catherine Zongora, Steven Kerzner, Jean Louis Bellmare and Dr. Maneesh Sharma were members of the condominium's Board of Directors.

[2] Mr. Matlock claims that after he purchased his unit, he discovered various deficiencies including problems with the elevators, the heat actuator controllers, the fire suppression system, the masonry, flooding, sewer gas as well as poor cleaning services.

[3] Mr. Matlock claims against OCSCC 815 based on negligence and breach of its statutory obligation. In addition to his claim against the Condominium Corporation, Mr. Matlock claims against the board member defendants personally on the basis of negligent misrepresentation, a breach of the statutory duty of care, and negligence in their failure to take reasonable steps to address the deficiencies detailed in his claim.

[4] The statement of claim was issued on August 18, 2019. On January 10, 2020, the board member defendants advised that they would move to strike the claim as against them. In response, the Plaintiff proposed an amended statement of claim. The amended statement claims to, *inter alia*, add to the claim against the board member defendants and add Steven Kerzner, a board member, as a party. The board member defendants oppose these amendments and advance a crossclaim to strike the claims against the board member defendants in their entirety.

[5] These Defendants do not oppose the balance of the proposed amendments to the amended statement of claim, including the correction of the proper name of the Condominium Corporation, typographical errors and the discontinuance of the action against Jocelyn Lamarche and Rouzbeth Zadeh, and the additional pleadings with respect to the issue of liens that were lodged against the Plaintiff's condominium unit. Lamarche and Zadeh are seeking costs of the discontinuance of the action as against them.

[6] The court must decide whether it is plain and obvious that the proposed amended statement of claim discloses a reasonable cause of action against the board member defendants.

The Law

The applicable Rules

[7] Rule 26.01 governs the amendment of pleadings. Although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings as

discussed by the Court of Appeal in *Marks v. Ottawa (City)* 2011 ONCA 248 at para .19, 2011 CarswellOnt 2165. The factors to be considered are:

- An amendment should be allowed unless it would cause an injustice not compensable in costs.
- The proposed amendment must be shown to be an issue worthy of trial and *prima facie* meritorious.
- No amendment should be allowed which, if originally pleaded, would have been struck.
- The proposed amendment must contain sufficient particulars.

[8] Rule 21.01(1)(b) allows a party to move before a judge to strikeout a pleading on the ground that it discloses no reasonable cause of action. The test is set out by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 35 at paras. 17 and 19:

> **17 …** A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: (Internal citations removed).
>
> **19** The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[9] Rule 25.11 (b) permits the court to strike out all or part of a pleading, with or without leave to amend, on the basis that the pleading is scandalous, frivolous or vexatious.

[10] As such, the same lens is applied to the proposed amendments to the statement of claim: no amendment should be allowed which, originally pleaded, would have been struck as disclosing no reasonable cause of action.

The relevant legislation

[11] Section 37 of the *Condominium Act, 1998*, S.O, 1998 c. 19 sets out the following:

Standard of Care

37 (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

(a) act honestly and in good faith; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 1998, c. 19, s. 37 (1).

Validity of Acts

(2) The acts of a director or officer are valid despite any defect that may afterwards be discovered in the person's election, appointment or qualifications. 1998, c. 19, s. 37 (2).

Liability of Directors

(3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,

(a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a condominium manager who provides condominium management services to the corporation under an agreement between the corporation and either the manager or a condominium management provider represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or

(b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion. 1998, c. 19, s. 37 (3); 2004, c. 8, s. 47 (1); 2015, c. 28, Sched. 2, s. 80 (5).

Pleadings Against Individual Board Members

[12] It has been held that pleadings against individual directors, officers, or board members are subject to higher scrutiny. In *Ontario Consumers Home Services v. Enercare Inc.,* 2014 ONSC 4154 (CanLII), O'Marra, J. referred to the heightened scrutiny that courts are directed to make of claims advanced against officers and directors.

[13] The starting point in any analysis of the claims asserted in this action is this often-cited passage in the Ontario Court of Appeal in *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd*., (1995), 26 O.R. (3d) 481 (Ont. C.A.):

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: …and the cases referred to therein. Additionally, there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. (Emphasis mine)

[14] The Plaintiff relies on the Court of Appeal's subsequent decision in *ADGA Systems International Ltd. v. Valcom Ltd*., (1991), 43 O.R. (3d) 101 (Ont. C.A.) where the Court concluded that there was no principled basis for protecting the director and employees of a corporation from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation.

[15] In that case, a director and two senior employees of the defendant corporation had convinced all but one of the plaintiff's technical employees to permit the defendant corporation to use their names in order to successfully bid on a government contract.

[16] The Court of Appeal acknowledged the policy reasons to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation.

[17] The Court decided that such protections would not extend to the facts of that case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors. What emerges from that decision is that the alleged liability for inducing a breach of fiduciary duty did not arise from the individual defendants' status as either a director or a senior employee of the defendant corporation; their conduct was actionable on its own.

[18] The Plaintiff also cites *Peel Condominium Corp. No. 222 v. 394514 Ontario Ltd*., 2004 CanLII 16109 (ON SC), where the Court heard an appeal of a Master's decision permitting an amendment to a claim where the same allegations are made against the corporation are also made against the individual directors, officers, and employees. Justice Macdonald agreed that that officers, directors, and employees could be held liable for the same tort as their employer, providing their own conduct was tortious. The short endorsement does not disclose the material facts that were pleaded in that case.

The Case Law in Relation to Motions to Strike in Condominium Corporations

[19] It is not uncommon for owners of condominium units to take issue with alleged deficiencies in their units or in the building. The case law reveals that plaintiffs have been unsuccessful when they have attempted to extend their claim to include individual board members in relation to undisclosed efficiencies or a failure to repair deficiencies.

[20] In *Channa v. Cobisa*, 2013 ONSC 7399 (CanLII) at para. 33, Quigley, J. observed that: "A condominium board is presumed to be operating in good faith and in furtherance of its statutory duties."

[21] In *Toronto Standard Condominium Corp. No. 2123 v. Times Group Corp.*, 2018 ONSC 4799 (CanLII), ("*TSCC*"), the plaintiff was the condominium corporation itself and it sought damages arising from deficiencies in the construction of the plaintiff condominium building. The plaintiff asserted claims of breach of statutory duty, breach of fiduciary duty, breach of contract and tortious misconduct against the principals of the defendant, Times Group.

[22] In reviewing the case law, Justice Allen first identified the necessity to differentiate allegations levelled against a corporation from those against the principals. Allen J. made these observations at para. 57 of her decision.

> **57** Additional principles come into play in cases where a claim is being advanced against a corporation and its directors/officers. The sustainability of the pleadings must be considered in the context of the principles developed by courts deciding liability of corporate defendants as distinct from the personal liability of an individual director/officer:
>
> - To establish liability the actions of principals of corporations must themselves be tortious or demonstrate a separate identity or interest from the corporation so as to make the impugned conduct their own;
>
> - If a principal is undertaking the regular actions of a principal on behalf of a corporation and the action is found deficient, this does not mean that liability automatically flows through the corporation to the principal who caused the corporation to take the action;
>
> - Where actions claim liability against principals for inducing breach of contract and where liability is sought against principals in insolvency actions, the facts giving rise to personal liability have been specifically pleaded in every case where liability is found;
>
> - Cases where principals of corporations have been found personally liable for actions presumably carried out under a corporate name are fact specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare.
>
> - Cases involving piercing the corporate veil frequently involve transactions where the corporate structure was used as a sham from the outset or as an after-thought to a deal gone sour;
>
> - Bald or vague assertions of intentional tortious conduct are insufficient to sustain the pleading. The pleading of intentional torts must meet a strict standard of particularity, that is, they must be pleaded with "clarity and precision". There must be sufficient pleading of the necessary elements of a specific and separate tortious act.

> - A claim in negligence can lie against a director/officer personally for breaching a duty of care if the director/officer himself or herself acted negligently towards the plaintiff;
>
> - The plaintiff cannot establish liability of directors/officers by simply converting a straightforward action against the corporation, for breach of contract and breach of fiduciary duty arising out of that contract, into a personal action against the officers/directors of the corporation. To do this is to simply window-dress the separate identity or interest of the directors/officers;
>
> - The claims against the corporate entity and the officers/directors must be sufficiently differentiated so as to make the claims against the principals independent. The use of "and/or" in pleadings related to the individual defendants with every claim made against the corporation is also nothing more than window dressing.
>
> - The court struck a claim for conspiracy against directors of a corporate defendant that were based in the same underlying facts as pleaded against the corporations for breach of contract and breach of fiduciary duty. (emphasis added)

[23] The threshold issue of differentiation of the allegations was found to be enough by itself to strike a claim *in Cottage Advisors of Canada Inc. v. Prince Edward Vacant Land Condominium Corp. No. 10*, 2020 ONSC 6445 (CanLII) where Justice Papageorgiou held at paras. 25 and 26:

> **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.

[24] In *TSCC*, after extensively reviewing the case law, Justice Allen concluded at paras. 63 to 65:

> **63** When the Times Principals on behalf of Times Group entered into purchase and sale contracts with unit owners, made warranties and representations, made decisions, gave directions and assurances on the construction and maintenance of the building and other matters, they were acting as the directing minds of the corporate entity. That is what directing minds do.
>
> **64** Those are the ordinary functions of directors/officers. Assuming that the Times Principals fell short of their obligations as alleged by the plaintiff, when they did this they were also acting as the directing minds of the corporation unless it be shown actions on the principals' part that took them beyond their roles as directors/officers into activities that expose a separate interest from the corporation.
>
> **65** The plaintiff has not particularized any actions by the Times Principals that show a separate personal interest. The facts pleaded in breach of contract, negligent and fraudulent misrepresentation, breach of fiduciary duties and oppression do not contain particulars of any acts committed by the Times Principals that are in themselves tortious or exhibit a separate identity: … What flows from this is that the alleged wrongs by the Times Principals as pleaded create liability for the corporation and not themselves. (emphasis added)

[25] In *Channa*, the plaintiff, the owner of a condominium, alleged that the board member defendants failed to exercise their duties in relation to the installation of a new HVAC system, failed to advise her that the main water valve was in her unit, improperly registered a lien against her unit, and improperly permitted the installation of a satellite dish onto her roof. In arriving at his decision, Justice Quigley referred to *Rushton v. Condominium Plan No. 8820668*, [1997] A.J. No. 452 where the Court held that a board is not something independent from the condominium corporation. Quigley, J. held at para 41:

> 41 Like in *Rushton*, there are no allegations that are sufficient to cause the members to shed their identity with the condominium corporation and expose themselves to personal liability. The role of the board was limited to being the directing mind of the condominium corporation. As Master Funduk stated:
>
> > If board members can be personally liable in situations such as this no one would agree to be a board member….where the board members have not shed their identity with the condominium corporation there cannot be a personal liability by them for the condominium corporations failures, either misfeasance or nonfeasance.

[26] The case of *Cottage Advisors of Canada* involved a dispute between the plaintiff, a developer and owner of condominiums against the condominium corporation, and the directors of

the condo corporation. As against the individual defendants, the plaintiff alleged a breach of the duty of care under the *Condominium Act,* oppressive conduct on the part of the individual directors of the condominium Corporation, and the tort of intentional interference with economic relations. The plaintiff's complaints included failing to repair construction deficiencies including issues with the water distribution, sewer system come up pool, roadways fitness center, parking and other such claims.

[27] Justice Papageorgiou struck the causes of action alleged against the individual defendants without leave to amend stating at para. 37:

> **37** …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.

The Proposed Amendments

[28] The relevant paragraphs in the amended statement of claim are set out in Schedule A to this Decision.

Analysis and Conclusion

[29] I deal first with the allegations found at paragraph 62 of the amended statement of claim. These are the allegations as the group of individual Defendants. A plain reading of these allegations reveals that these complaints are directed against the individual board members in their role as the directing minds of the Condominium Corporation. There are no pleadings of material facts that make the conduct complained of their own.

[30] The essence of the claims against the defendant board members is in respect of how they conducted the affairs of the Condominium Corporation. Counsel for Mr. Matlock conceded that

the allegations contained in the pleadings relate to the defendant board members' decision making on behalf of the Condominium Corporation.

[31] The Plaintiff attempts to differentiate between the two claims by stating that his claim against the Condominium Corporation arises from its failure to disclose deficiencies and to maintain and repair various parts of the common elements, whereas his claim against the individual directors arise from the alleged negligence in their decision making process. Given that a corporation is an inanimate piece of legal machinery incapable of thought or action, the Court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. The liability of the Condominium Corporation flows from the decision making of the individuals. There is no real distinction.

[32] It is plain and obvious that the Plaintiff cannot succeed against the individual board member defendants in the action as originally pleaded or in the proposed amendments.

[33] With the exception of the claims against Mr. Hession, the claims against the individual defendant directors are undifferentiated and consist of pleading the same facts against all of the defendant directors as a whole. The pleadings lump the Defendants together without differentiating material facts that could support a claim against each individual and these claims are struck on that basis alone.

[34] I turn now to the claim of negligent misrepresentation against Mr. Hession. It is not enough that particulars of a tort have been pleaded. There must be an independent tortious act or an act that involves a separate identity of interest. The original statement of claim itself reveals that there is no such separation. Paragraphs 11 and 12 of the amended statement of claim are fatal to the Plaintiff's argument. Those paragraphs state that Mr. Hession represented to Mr. Matlock "on behalf of OCSCC 815".

[35] The attempt to provide particulars at paragraph 60.1 and 60.3 provides no assistance in that the Plaintiff claims that Mr. Hession ought to have taken reasonable steps to inform himself of the status of OCSCC 815's construction deficiencies The pleading makes clear that Mr. Matlock's reliance on representations by Mr. Hession were in relation to Mr. Hession's position as a director of OCSCC 815. In *Toronto Standard Condominium Corp 2123*, when the principals of a

corporation made warranties and representations, the personal claims against them were struck because they were acting as the directing mind of the corporation.

Further Leave to Amend

[36] In this motion, the Plaintiff sought leave to amend his pleadings when he was put on notice of the deficiencies in his original pleadings. I have found the proposed amendments to be wholly deficient. There is no reason to believe that the Plaintiff's case could be improved by any further amendment. This amended statement of claim is the Plaintiff's best effort at enhancing his claim against the individual board member defendants. The Plaintiff ought not be afforded a third opportunity.

Costs

[37] The successful Defendants are to submit their costs submission in writing within 20 days of the release of this Decision. The Plaintiff is to provide his responding costs submissions 20 days thereafter. Costs submissions are not to exceed ten pages.

The Honourable Mr. Justice Robert N. Beaudoin

Released: January 19, 2021

Schedule A

60.1 Mr. Hession owed a duty of care to Mr. Matlock when he answered Mr. Matlock's questions about the status of building deficiencies. Mr. Hession knew that Mr. Matlock asked these questions prior to purchasing the unit. Mr. Hession knew that Mr. Matlock was relying on the answers.

60.2 In answering Mr. Matlock's questions, Mr. Hession ought to have been honest and, as a director of OCSCC 815, ought to have taken reasonable steps to inform himself as to the status of OCCC 815's construction deficiencies. If he had no knowledge of OCSCC 815's deficiencies, he ought not to have made the representation he made to Mr. Matlock.

60.3 Unfortunately, Mr. Hession's representations turned out to be untrue because either he did not take reasonable care to inform himself as to the status of OCSCC 815's deficiencies or he did not know.

60.4 Mr. Matlock relied upon Mr. Hession's representations when he made the decision to purchase the unit. Mr. Matlock will suffer damages in relation to his purchase of the unit, including, among other things, decline in the value of the unit and is exposure to increased common element fees and special assessments to cure deficiencies set out in these pleadings. Mr. Hession is liable for Mr. Matlock's damages which could have been avoided but for Mr. Hession's negligence.

62. The director defendants have failed to act in accordance with the standard of care set out in section 37 of the *Condominium Act, 1998*. With respect to the radiators, heat actuator controllers, fire suppression system (including firestops between floors),flooding caused by air conditioning pumps and systemic pressure, flooding caused by water from the commercial unit entering the lobby, the cleaning contract, the handling of the masonry repairs, and the sewer gas entering into Mr. Matlock's unit, the director defendants met from time to time to discuss and were obliged to make decisions about these issues. The director defendants failed to meet their statutory standard of care because, among other things:

(a) the director defendants have not made consistent, focused or good faith efforts to address the above noted issues;

(b) the director defendants did not consider in good faith and act with reasonable prudence in relation to the reasonable recommendations and issues raised by Mr. Matlock in relation to the above noted issues;

(c) the director defendants failed to take reasonable steps to investigate the above noted issues on their own;

(d) the director defendants did not seek out professional advice in relation to the cause and possible resolutions of each defect;

(e) if the director defendants did obtain professional advice, they failed to take reasonable steps to assess it, particularly when faced with competing explanations and recommended resolutions;

(f) if the director defendants did obtain advice composition to consider whether the person or persons providing that advice to them had a material interest in the recommended resolution(s) proffered by to the director defendants, i.e. they did not consider the potential conflict of interest of their advisors;

(g) if the person providing advice did have a material interest in the recommended resolution(s) proffered to the director defendants, they did not critically evaluate the recommended resolutions or obtain an independent assessment of such recommendations (which would have been prudent in the light of clear conflicts of interest);

(h) if they did obtain the report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion, the director defendants did not rely in good faith on such opinion(s);

(i) the director defendants did not act with reasonable amount of care, diligence skill, and dispatch having regard to the *Limitations Act, 2002*, S.O. 2002, c. 24 Sched B and the prejudice that delay might cause and respect of claims the corporation has against third parties;

(j) the director defendants did not act with a reasonable amount of care, diligence, skill and dispatch hang in regard to the effect of that their delay would increase the cost of remedying and loss associated with the above noted issues;

(k) the director defendants did not act with a reasonable amount of care, diligence and dispatch having regard to the effect that their delay in making decisions would have on the value of the units;

(l) the director defendants did not act with a reasonable amount of care, diligence and dispatch having regard to the effect of their delay would have on residents; and

(m) the director defendants failed to act in good faith or exercise the care diligence and skill a reasonably prudent person would exercise in relation to supervising and directing the property manager.

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Defendants

REASONS FOR DECISION

Beaudoin J.

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