

COURT OF APPEAL FOR ONTARIO

CITATION: Westmount-Keele Limited v. Nicholas C. Tibollo Professional Corporation, 2025 ONCA 401
DATE: 20250603
DOCKET: COA-24-CV-0908

Huscroft, George and Favreau JJ.A.

BETWEEN

Westmount-Keele Limited

Plaintiff (Appellant)

and

Nicholas C. Tibollo Professional Corporation and
Nicholas C. Tibollo

Defendants (Respondents)

Kris Borg-Olivier, for the appellant

Sean Dewart and Mathieu Bélanger, for the respondents

Heard: April 29, 2025

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated August 1, 2024.

REASONS FOR DECISION

[1] The respondents, Nicholas C. Tibollo and Nicholas C. Tibollo Professional Corporation, represented the appellant, Westmount-Keele Ltd. (“WKL”), in litigation arising from a real estate dispute between WKL and Royal Host Hotels (“RH”). Because the respondents missed the limitation period, most of WKL’s claims against RH were dismissed as being statute-barred.

[2] WKL then commenced a solicitor's negligence action against the respondents. WKL appeals the trial judgement awarding it \$142,901, which is far less than it had claimed.

BACKGROUND

[3] The real estate transaction between WKL and RH closed two decades ago. Joe Ieradi, WKL's principal, wanted to purchase an outdated hotel property from RH and transform it into a condominium. However, certain aspects of the transaction did not proceed as expected, leading to litigation between WKL and RH. WKL claimed that 1) RH did not provide vacant possession of the property in a timely manner, resulting in substantial construction delay related costs, 2) RH needed to reimburse WKL for property taxes it paid while RH still occupied the property, 3) RH removed or permitted the removal of equipment and appliances that were part of the transaction, and 4) RH employees caused damage to doors and elevators, which WKL had to repair.

[4] The respondents commenced the claims on WKL's behalf. However, several years later, RH brought a motion to amend its claim and for summary judgment on the basis that WKL's action was statute barred. RH succeeded on the motions and in having most of the claim dismissed. WKL and RH went to trial on the remaining claim relating to the amount RH was entitled to receive out of monies paid into court for the costs it incurred in shutting down the hotel: see *Westmount-Keele*

Limited v. Royal Host Hotels and Resorts, 2018 ONSC 5170 (“2018 Trial Decision”).

[5] In December 2017 WKL commenced its solicitor’s negligence action against the respondents. The trial took place over four days in April 2024. WKL called three witnesses: its principal Mr. Ieradi; Joseph Sereda, who represented WKL from 2008 (after inheriting the file from Mr. Tibollo) until 2016 when he had to withdraw from the practice of law for health reasons; and Frank De Caro who handled bookkeeping tasks for WKL. Only Mr. Tibollo testified on behalf of the respondents.

DECISION BELOW

[6] The trial judge treated WKL’s claims as falling into two categories: those that would, if successful, attract “direct” damages and those that would attract “lost opportunity” damages. According to the trial judge, direct damages are “those incurred as a result of having to oppose RH’s motion to amend its defence to plead a limitations defence and for summary judgment on limitations grounds”. Lost opportunity damages arise from “WKL’s lost litigation opportunity to pursue its damages claims against RH”.

Direct Damages

[7] WKL’s direct damages claim consisted primarily of legal fees and costs incurred in opposing RH’s motion to amend and for summary judgment. The trial judge awarded WKL the agreed upon quantum for costs of the motion (and the

subsequent appeal), as well as the fees billed by the lawyer who argued the motion and appeal.

[8] However, the trial judge declined to award WKL the fees charged by its former lawyer, Mr. Sereda, who had done much of the work related to the motion. The trial judge found that an agreement between Mr. Sereda and WKL, pursuant to which Mr. Sereda would not seek the payment of his fees until the negligence action against Mr. Tibollo was resolved, was a “verbal promise to forbear [that] did not suspend the limitation period”. Although the trial judge did not expressly say this, it appears that she concluded Mr. Sereda’s claim against WKL for non-payment of fees was discoverable, and the limitation period therefore began to run, when Mr. Sereda provided his services. Consequently, by the time the action against the respondents was commenced the limitation period had passed.

[9] The trial judge also declined to award WKL the fees it paid to the respondents, concluding that the work performed by Mr. Tibollo – such as collecting documents, drafting pleadings, and providing advice to WKL about disclosure obligations – “assisted in its valuation of the damages claimed”, essentially finding that this work would have had to be done regardless.

Lost Opportunity Damages

[10] WKL claimed that it had lost the opportunity to recover from RH damages arising from RH’s failure to deliver vacant possession, RH employees damaging

entry doors, RH removing equipment and chattels from the property when these items were included in the transaction, and for broken tiles and mirrors in the elevators it had to repair. The trial judge did not award WKL any lost opportunity damages on the basis that “the assessment of damages was not possible because of [WKL’s] failure to adduce proper evidence.”

[11] WKL also claimed damages for the property taxes it paid while RH remained in possession of the property. The trial judge’s reasons did not address this issue at all.

DISCUSSION

[12] WKL submits that the trial judge 1) based her reasons on factual findings that are palpably incorrect and which had a material impact on the quantum of damages awarded, 2) misapprehended or ignored critical evidence, and 3) failed to consider all of its claims or provided insufficient reasons for dismissing them.

Mr. Tibollo’s Legal Fees

[13] WKL should have been awarded damages for the legal fees it paid to the respondents. While the trial judge found that the respondents had provided “value” to WKL by, for example, providing legal advice, drafting pleadings, and assisting WKL in substantiating damages, she overlooked the fact that Mr. Tibollo’s own negligence rendered the bulk of this work irrelevant.

[14] The judgement will therefore be varied to include Mr. Tibollo's legal fees in the amount of \$29,441.85.

Mr. Sereda's Legal Fees

[15] Section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B provides that a claim not governed by another section of the *Act* must be commenced on or before the second anniversary of the day on which the claim is "discovered".

[16] The trial judge erred in finding that this claim was statute-barred. Put simply, at the time he provided his services and promised to not seek payment of his fees until WKL's litigation against the respondents was resolved, Mr. Sereda had not suffered any loss that would meet the definition of a discoverable claim under s. 5 of the *Limitations Act*. In other words, the clock did not start to run until WKL's present action against the respondents concluded, placing this claim well within the limitation period.

[17] Mr. Sereda therefore still had an enforceable claim of \$47,455 against WKL, an amount WKL is entitled to recover from the respondents.

Vacant Possession and Construction Delays

[18] The trial judge rejected WKL's claim that it received vacant possession 43 days late. While she acknowledged that WKL had a valid claim for damages arising from the 15-day delay (from March 21, 2005, when possession was supposed to be delivered, to April 6, 2025 when possession was actually delivered), she

determined that WKL had failed to prove any damages. WKL's argument on appeal focusses not so much on the length of the construction delay as on the additional costs of WKL carrying and financing its debt. It points to Mr. Ieradi's testimony that small delays at the front end could cascade and cause significant financial consequences at the back end.

[19] In the absence of sufficient evidence on the consequences of the delay, beyond Mr. Ieradi's say-so, the trial judge did not err in declining to award damages. It was open to her to reject Mr. De Caro's calculation of the carrying costs, as he did not have firsthand knowledge of the delays and therefore could not be a participant expert, nor was he proffered as an expert witness. WKL argues that Mr. De Caro need not be an expert to assist Mr. Ieradi in quantifying the damages through simple mathematics. However, the trial judge was neither obliged to accept his methodology nor the underlying figures used for the calculations.

[20] Based on the evidence before her, the trial judge made reasonable findings of fact, which are entitled to deference.

Equipment and Chattels Removal

[21] We are not persuaded by WKL's argument that the trial judge misapprehended the evidence regarding RH's removal of equipment and chattels from the property. It was open to the trial judge to conclude that there was no basis

to award damages for the claim that RH breached the contractual term requiring it to transfer and convey all equipment and chattels “owned by [it]” to WKL.

[22] The respondents’ position was that because RH did not own the items that were removed they did not form part of the sale agreement. For example, RH did not own the microwaves and mini-fridges that were removed from the guest rooms, and the four coffee machines on the property were removed by the suppliers who sold coffee to the hotel and who owned the machines.

[23] In any event, we agree with the trial judge’s finding that WKL had failed to prove its damages by not “introduc[ing] evidence about the value of the lost assets, which could have and should have been advanced at trial”. The values asserted by Mr. Ieradi appeared to be based on information from an auctioneer who had been involved many years earlier, and who was not tendered as a witness at trial. It was open to the trial judge to reject Mr. Ieradi’s evidence as being too speculative.

[24] WKL’s reliance on the following passage from this court’s decision in *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 is misguided:

[I]t is a well-established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the

damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guesswork. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best. [Emphasis added.]

[25] WKL, emphasizing this passage’s reference to “guesswork”, overlooks the qualification that this approach be confined to cases where damages are “by their inherent nature difficult to assess”. The value of the equipment and chattels in question here are not inherently difficult to assess. WKL could have easily produced evidence that accurately quantified these damages: *Cassandro v. Glass*, 2019 ONCA 654, at para. 38, but it failed to do so.

Elevator Repairs

[26] At the beginning of the appeal hearing, counsel for the respondents informed us that they had conceded at trial that there should be judgment in the amount of \$52,965 – the amount WKL paid to repair the elevators. However, for some reason, the trial judge did not address this in her reasons.

[27] On consent, the judgment will be varied to include damages in this amount.

Property Taxes

[28] We accept that the trial judge erred by not addressing WKL’s request for reimbursement of municipal property taxes it paid while RH remained in possession of the property. As the record equips us to decide this issue there is no need to remit it back to the trial court for consideration.

[29] In support of its claim for these damages, WKL relies on the testimony of Mr. Ieradi and three pieces of documentary evidence: 1) the statement of adjustments from the real estate transaction, 2) cheques from WKL to the City of Toronto, and 3) a statutory declaration that property taxes were paid by the purchaser WKL. WKL's argument is essentially that it would have been entitled to reimbursement of property taxes paid on RH's behalf if its breach of contract claim had not been statute-barred. This claim covers two periods: from January 1 to February 21, 2005 (the closing date), and from February 22 to April 6, 2005 (vacant possession date). WKL argues that RH was obliged, at a minimum, to pay the taxes for the first period, and that its obligation should extend to the second period as well.

[30] The evidence proffered by WKL is weak and unpersuasive. For the first period, January to February, WKL relies solely on Mr. Ieradi's testimony, which is not supported by the documentary evidence. For example, the statement of adjustments, which WKL relies upon, indicates that RH was responsible for the taxes for the first 52 days of the year, that RH paid a portion of those taxes, and that the balance was credited to WKL on closing. This undermines rather than supports WKL's argument. And, while Mr. Ieradi testified that the statement of adjustments is not accurate there is no indication that it was challenged at closing or that a revised version supporting Mr. Ieradi's testimony was requested or produced.

[31] WKL's reliance on the statutory declaration is similarly misplaced. It did not figure prominently, if at all, at trial and was introduced into evidence during Mr. De Caro's evidence and only because he referred to it in a different document. The statutory declaration was not explored in any detail and its accuracy was questioned in the action regarding the surviving claim between WKL and RH: 2018 Trial Decision, at para. 47.

[32] Furthermore, we do not place much weight on the cheques for property taxes and the related transaction records. It is unclear whether these documents cover payments made before closing, after closing, or both. They shed little light on the property tax payments made by WKL during the relevant periods.

[33] We therefore decline to award WKL any damages related to property taxes.

Additional Issue

[34] In the event we allow the appeal and award further damages, the respondents ask us to find that WKL's failure to plead equitable set-off in the litigation with RH amounts to a failure to mitigate its damages against the respondents. Notably, the defence of equitable set-off is not subject to a limitation period: *Canada Trustco Mortgage Co. v. Pierce* (2005), 197 O.A.C. 369 (C.A.), at para. 46, leave to appeal refused, [2005] S.C.C.A. No. 336 (Pierce), [2005] S.C.C.A. No. 337 (Canada Trustco Mortgage Co.); *Grand Financial Management*

Inc. v. Solemio Transportation Inc., 2016 ONCA 175, 346 O.A.C. 173, at para. 94, leave to appeal refused, [2016] S.C.C.A. No. 183.

[35] This argument presumes that simply pleading equitable set-off would have allowed WKL to set off any damages it would have been entitled to if its claim were not barred by the limitation period, against RH's entitlement to its costs of shutting down the hotel. The effect of such a pleading is far from clear. We were not referred to any authority where all other claims were statute-barred and then in effect revived through a pleading of equitable set-off. In these circumstances, we are unable to conclude that the respondents have established that pleading equitable set-off is a "reasonable" step that WKL was required to take to mitigate its damages: *Curley v. Taafe*, 2019 ONCA 368, 146 O.R. (3d) 575, at para. 38.

CONCLUSION

[36] For these reasons, the appeal is allowed with respect to the elevator repairs, Mr. Sereda's legal fees, and Mr. Tibollo's legal fees. The judgment is therefore varied to include the following:

- i) WKL is awarded damages in the amount of \$52,965 for repairs to the property's elevators;
- ii) WKL is awarded damages in the amount of \$47,455 for the legal fees it owes its previous counsel, Mr. Sereda; and
- iii) WKL is awarded damages in the amount of \$29,441.85 for the legal fees it paid to the respondents.

[37] The balance of the appeal is dismissed.

[38] The parties have agreed that whoever is successful should be awarded \$10,000 for costs of the appeal. While not entirely successful, WKL achieved substantial success on this appeal, and is therefore entitled to its costs in the agreed upon all-inclusive amount of \$10,000.

[39] The parties expect to be able to agree on the costs below based on certain Rule 49 offers once the outcome of the appeal is known. If they are unable to do so, they may provide brief written submissions not exceeding three pages within 21 days following the release of these reasons.

“Grant Huscroft J.A.”

“J. George J.A.”

“L. Favreau J.A.”