CITATION: *Sher v. Geo Holdco Inc. et al.*, 2026 ONSC 613
COURT FILE NO.: CV-24-00720665-0000
DATE: 20260204

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SHER MARKHAM INC.	)	*Zach Flemming-Giannotti and Michaila Pilcher*, for the Plaintiff
Plaintiffs	)	
	)	
– and –	)	
	)	
GEO HOLDCO INC., DIVERSO ENERGY INC., DIVERSO HOLDINGS INC. and DIVERSO ENERGY LIMITED PARTNERSHIP	)	*Nathaniel Read-Ellis and Rachel Allen*, for the Defendants
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** January 26, 2026

JOHN CALLAGHAN J.

REASONS FOR DECISION

[1] This is a motion under r. 21.01(1) of the *Rules of Civil Procedure*.

[2] The defendants assert that the plaintiff has failed to plead the material facts to support the causes of action asserted in the statement of claim, being claims in contract, negligence and negligent misrepresentation. The defendants also assert that the claims are statute barred because the notice of action was issued beyond the applicable limitation period.

[3] For the reasons that follow, I am dismissing the motion.

The Statement of Claim

[4] The plaintiff, Sher Markham Inc. ("Sher"), is the owner of a property located at 9704 McCowan Road in Markham, Ontario (the "Property"), where Sher is in the process of developing a community of 131 condo townhouse suites, known as Everhome Markham (the "Project").

[5] The statement of claim alleges that the defendants, or one of them, operates a business using the business name "Diverso Energy". It is alleged that the business name was not registered to s. 2 of the *Business Names Act*, RSO 1990, c. B.17 ("BNA").

[6] Pausing there, the statement of claim makes it is clear that Sher was dealing with Diverso Energy, which is only a business name, not a legal entity. This is in contravention of the BNA: s. 2. Failing to register does not invalidate any contract that might have been entered into by a party in contravention of the BNA: s. 7(3). However, as pled, Sher was not aware of which of the corporate entities operated using the business name, Diverso Energy, and therefore which entity is responsible for the alleged breach of the "Contract" (as that term is defined in the statement of claim). For this reason, the claim identifies the defendants collectively as the "Diverso Defendants".

[7] The plaintiff alleges that Sher and the Diverso Defendants entered the Contract on March 23, 2021. It is alleged that the Contract provided that the Diverso Defendants would design a geothermal energy system to supply energy to the Project ("Geothermal System"). In doing so, the Diverso Defendants were to drill boreholes and perform other work related to the supply and installation of the Geothermal System for the Project.

[8] The statement of claim also alleges that the Diverso Defendants represented to Sher that, among other things, they possessed the requisite skill, expertise and resources to execute the design and construction to install the Geothermal System in accordance with the Contract and all applicable standards. These representations are alleged to have induced Sher into entering the Contract. It is alleged that the Diverso Defendants negligently misrepresented their ability to do the work and then negligently performed the work in breach of the Contract.

[9] It is alleged that the design work was completed by July 2021. It is alleged that the construction work proceeded between November 2021-March 2022.

[10] It is alleged that it was not until June 23, 2022, that Sher first learned it had suffered damage as a result of delays caused by the alleged poor performance of the construction work. This was learned by Sher reviewing an invoice received from the construction manager which include amounts charged by the Diverso Defendants. It is further alleged that the bore holes drilled by the Diverso Defendants began leaking in September 2022 and continued until February 2023 which caused flooding to the Project. The failure to address the borehole leakage and flooding caused Sher to retain a third party to assist and repair the problem which was resolved in March 2023.

Requests For Documents and Particulars

[11] In its argument in support of this motion, the Diverso Defendants rely both on answers to request for particulars and requests for documents referred to in the statement of claim. In responding to the statement of claim, a party may request a document referred to in the statement of claim and may request particulars. As explained below, the documents and particulars may be considered on a r. 21 motion.

[12] In response to the Diverso Defendants' request for the Contract, the Diverso Defendants produced a document entitled "9704 McCowan Rd. – Geothermal Proposal" dated March 23, 2021 (the "Proposal"). The Proposal was received by Sher from "Diverso Energy" which was described on the face page of the Proposal as "A Geothermal Utility Company". However, it is agreed that "Diverso Energy" is not a company or a legal entity. As pled, it is an unregistered business name. There are no legal entities identified in the Proposal associated with Diverso Energy.

[13] The Proposal sets out various work that Diverso Energy proposes to undertake. Read with the statement of claim which defines the Proposal as the Contract, the work outlined in the Proposal is the same work alleged to be poorly performed in the statement of claim. The Proposal provides an estimate of the cost of the work and the potential savings by installing a Geothermal System. It states that a detailed engineering review will be required. The Proposal states that upon confirmation of financing, "the parties shall enter into and execute the final Thermal Energy Purchase Agreement (TEPA) based upon the terms discussed between the parties and as outlined herein." The Proposal is executed by the President of Sher. There is no signature for Diverso Energy. In signing the Proposal, Sher states it accepted the terms as offered by Diverso Energy.

[14] Pausing there, the plaintiff states that the Proposal is the Contract being sued upon. It says the work stipulated in the Proposal is the work at issue in the claim. It says that the opaque nature of Diverso Energy has required it to sue the Diverso Defendants.

[15] The Diverso Defendants made a further request for the TEPA. The plaintiff then produced the TEPA, which was referred to in the Proposal, but not the statement of claim. The TEPA is dated October 1, 2021. The TEPA sets out various work to be completed. The TEPA is between Sher and Geothermal ECD, L.P. The TEPA stipulates that Geothermal ECD, L.P. is a duly formed limited partnership acting through and represented by 10439118 Canada Inc., its general partner. There is no statement as to the owners of the general partner. There is also no indication as to who the limited partners are or whether the limited partnership is a single purpose entity. It is pointed out that the notice provision stipulates any notice provided is to be sent to an individual with an email for legal@diversoenergy.com. The TEPA has a standard entire agreement clause which includes that the TEPA "supersedes any prior understandings and agreements between the parties".

[16] There was also a request for the June 23, 2022, invoice referenced in the statement of claim. The invoice produced included a listing of invoices that related to the project received by the construction manager. The list included an invoice from Diverso Energy/Rice Group from July 5, 2022, which post-dated the reference in the claim to an invoice of June 23, 2022.

Issues

[17] The issue on this motion is whether this action should be struck under R. 21.01 because:

a) It is plain and obvious that there is no viable cause of action pled against the Diverso Defendants; and
b) It is plain and obvious that the action is statute barred.

Is There a Viable Cause of Action?

[18] Under r. 21.01(1)(b), a cause of action may be struck where it is plain and obvious that the pleading discloses no reasonable cause of action: *Hunt v Carey Canada Inc*, [1990] 2SCR 959. Another way of putting the test is that the claim should be struck if it has no reasonable prospect of success. In *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, at para. 19, the Court stated that a motion to strike is to be used to weed out hopeless claims. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial. The Court cautioned that r. 21 "is a tool that must be used with care", at para. 21.

[19] In considering whether it is plain and obvious that the claim has no reasonable prospect of success, the court must take the facts pleaded in the statement of claim as true, unless they are patently ridiculous or manifestly incapable of being proven :*Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford*), 2016 ONCA 458 (CanLII), at para. 12. The court must take a generous approach to assessing the pleading, erring on the side of allowing a novel, but arguable, claim to proceed or where the drafting of the pleading is somewhat wanting. While no evidence is admissible on a motion to strike, a claimant must plead the facts on which it intends to rely. It is those facts upon which the claim is to be evaluated: *Imperial Tobacco*, at paras. 17-22. Assuming the facts pleaded are true and there is a reasonable prospect that the claim will succeed, the action will not be struck.

[20] The *Rules of Civil Procedure* provide that an opposite party may request particulars of the claim and documents referenced in the statement of claim. The issue then becomes what use may be made of those documents on a r. 21.01(1) (b) motion which stipulates that no evidence may be adduced on a amotion to strike: r. 21.01(2)(b).

[21] The answer begins with r. 25.06(7) which stipulates that "the effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material". This rule was discussed *on Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.) where Borins J. said, at pp. 3-4:

> Relying on rule 25.06(7), it is my view that a statement of claim is deemed to include any statement or documents incorporated in it by reference and which form an integral part of a plaintiff's claim. The purpose of rule 25.06(7) is to avoid unnecessary verbosity in pleading and, therefore, it is not expected, or required, that a plaintiff will reproduce the provisions of an agreement or other document, upon which it must rely to establish its claim. The second reason is that the agreements are not, in my view, evidence within the meaning of rule 21.01(2). In my opinion evidence is intended to encompass affidavits, transcripts of the evidence of a witness taken under rule 39.03 or other extraneous documents not referred to in the statement of claim and which would be appropriate, for example, to a motion for summary judgment under rule 20. *Trendsetter Developments Ltd. v. Ottawa Financial Corporation* (1989), 33 C.P.C. (2d) 16 (Ont. C.A.) is an example of a case in which the court improperly considered evidence on a rule 21.01(1)(*b*) motion. Because a motion under rule 21.01(1)(*b*) challenges the facts alleged on the face of a

> statement of claim, or, more accurately, the statements alleged in the statement of claim, when a statement of claim sufficiently pleads documents within the requirement of rule 25.06(7) it is necessary that the court have before it the relevant documents in assessing the substantive adequacy of the claim. In this regard it is necessary to keep in mind the distinction between a fact as pleaded and the evidence necessary to prove the fact and to remember that rule 21.01(1) is concerned with facts only, and assuming that they can be proved, whether they raise a question of law determinative of the action or fail to disclose a reasonable cause of action. Viewed from this perspective, the agreements do not constitute evidence intended to prove facts and the provisions of the agreements relied on by the plaintiffs constitute facts just as if they were reproduced as part of the statement of claim.

[22] The general proposition is that the documents referenced in a claim may be used to assess whether a valid cause of action has been pleaded. This has been adopted by the Court of Appeal. In *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 32, the court cited Borins J., and stated:

> A motion to strike is unlike a motion for summary judgment, where the aim is to ascertain whether there is a genuine issue requiring a trial. On a motion to strike, a judge simply examines the pleading; as mentioned, evidence is neither necessary nor allowed. If the document is incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike. [see also *Web Offset Publications Limited v. Vickery*, 1999 CanLII 4462 (ON CA); *Del Giudice v. Thompson*, 2024 ONCA 70 at paras. 12-13]

[23] In *McCreight*, the court made a distinction between documents expressly pleaded in the statement of claim and those which were not. In that case, because no one objected, the court was prepared to accept a transcript of a criminal proceeding but not a manual for which the plaintiff had not pleaded the necessary factual underpinning.

[24] In this case, the Diverso Defendants point to the TEPA and assert that that is the actual contract, and it is executed by the limited partnership which is not a named defendant. It states that it is plain and obvious that this action is therefore bound to fail.

[25] Sher responds that the Contract being sued upon is the Proposal. Sher states that it accepted the Proposal. It states that even if further contracts were to be signed, then the Proposal may well be a contract to make a contract which may also ground an actionable claim: *Bawtiko Investments Inc. v. Kernals Popcorn Ltd*. 1991 CanLII 2743, 79 DLR (4th) 97(ONCA).

[26] While the documents referenced in the statement of claim may be considered on a r. 21.01(1) (b) motion, they are generally those documents referenced in the statement of claim, not documents referenced within other documents. In this case, the plaintiff does not rely on the TEPA, is not suing on the TEPA and has not referred to the TEPA in the statement of claim. As noted, Sher is expressly suing on the Proposal which it identifies as the Contract in its claim.

[27] The Diverso Defendants ask me to find that they are the wrong defendants based on the TEPA which names the limited partner. In essence they ask me to look through the Proposal such that I should conclude the Contract referenced in the statement of claim is the TEPA. However, the factual underpinning of the statement of claim is that the Proposal is the Contract. Whether the Proposal ends up being the Contract is a matter to be determined either in a summary judgment motion or a trial. As Justice Borins noted, considering "extraneous documents" is more appropriately considered on a summary judgment motion.

[28] Moreover, even if I accepted the TEPA as a contender for the pled Contract, it would not be plain and obvious that the action would not succeed. The statement of claim asserts that pursuant to the Contract, that the design work was completed by July 2021. This is long before the TEPA was signed in October 2021 but only months after the Proposal was signed in March 2021. Clearly, the statement of claim is addressing work beyond what might be included in the TEPA.

[29] Also, the parties each invited me to make a close comparison between the terms of the TEPA and the Proposal and suggested that the work alleged to be poorly performed in the statement of claim was included in either of the two documents. In neither case is the comparison plain on its face and even if the TEPA is properly referred to in assessing the pleading, such an exercise would require further evidence not only to interpret the Proposal and the TEPA but also to understand the actual work performed to determine if the work performed is consistent with either document. These are factual findings beyond a r. 21 motion.

[30] The plaintiff has pled that the Proposal is the Contract and whether that is so is a matter that should be addressed by the trier of fact. In my view, it is not plain and obvious that the contract claim will fail.

[31] In respect of the negligence and negligent misrepresentation claims, it is argued by the Diverso Defendants that the negligence claim is "based on the same false premise that there was a contractual relationship" between the Diverso Defendants and Sher. It asserts that without a contractual relationship there is no proximity.

[32] In cases of negligent misrepresentation or performance of a service, the Supreme Court has stated "two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance…. Specifically, '[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so': *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35 (CanLII), [2020] 3 SCR 504, at para. 32, quoting from *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 30.

[33] As I have found that the pleading properly asserts a contract based on the Proposal, the foundation of the Diverso Defendants objection is rejected.

[34] Moreover, the plea of negligence is based on work that is described in the Proposal, pled in the statement of claim and that is alleged to have been performed below the standard of care.

The statement of claim pleads the elements of negligence (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, at para. 18. I am satisfied the statement of claim sufficiently sets out a cause of action in negligence and it is not plain and obvious that the claim in negligence will fail.

[35] The same analysis applies to the negligent misrepresentation claim. Sher has pled that the Diverso Defendants owed it a duty based on a special relationship, that they negligently made representations they knew were misleading, untrue or inaccurate, that the statements were reasonably relied upon and that damages were suffered: *Queen v Cognos Inc*., 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87, at para. 34. Based on the pleading, it is not plain and obvious that the action in negligent misrepresentation will fail.

[36] The motion under s. 21.01(1)(b) to strike the statement of claim for disclosing no viable cause of action is dismissed.

Is the Action Statute Barred?

[37] It is asserted that the action was commenced after the applicable two-year limitation period set out in the *Limitations Act*, SO 2002, c. 24.

[38] The plaintiff issued a notice of action on May 22, 2024. In the statement of claim, the plaintiff alleged it "first learned it suffered damages as a result of the Diverso Defendants delay in performing, and poor performance" on June 23, 2022, when it received an invoice from the project manager. When asked to produce the invoice, the plaintiff produced a document from the project manager listing a series of invoices relating to the Project from October 2021 to March 2022. I am asked to infer that Sher had these invoices before the summary was sent on June 23, 2022. There is no basis for me to conclude that is the case given the clear statement in the pleading which expressly states that Sher *first learned* of the damage occurring on June 23, 2022.

[39] Moreover, the pleading clearly refers to further damage that occurred as a result of leaking in the boreholes that took place from September 2022 to February 2023. That damage is well within the limitation period given that damage could only have been discovered after September 2022, being when the leaking first occurred. Moreover, the claim does not allege or otherwise suggest that the leaking was somehow foreseeable before it occurred. Again, a full factual record may prove otherwise but, in my view, it is not possible to establish on the basis of the invoice that the plaintiff knew of the damage arising from the alleged breaches prior to June 23, 2022.

[40] As such, the motion to strike on the basis of an expired limitation period is denied.

Disposition

[41] The motion is dismissed.

[42] The plaintiff is entitled to its partial indemnity costs. On agreement of counsel, that amount is $10,000 all inclusive.

Callaghan J.

Released: February 4, 2026