

**CITATION:** 1672736 Ontario Inc. v. Savini, 2023 ONSC 5979  
**COURT FILE NO.:** CV-21-00004511-0000  
**DATE:** 2023 10 30

**SUPERIOR COURT OF JUSTICE – ONTARIO**

7755 Hurontario Street, Brampton ON L6W 4T6

**RE:** 1672736 ONTARIO INC.

**AND**

EZIO SAVINI IN HIS CAPACITY AS THE CHIEF BUILDING OFFICIAL and THE CORPORATION OF THE CITY OF MISSISSAUGA

**BEFORE:** The Honourable Justice Ranjan K. Agarwal

**COUNSEL:** Luke Johnston and Michael Nemanic, for the plaintiff  
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**HEARD:** October 23, 2023, In person

**ENDORSEMENT**

**I. INTRODUCTION**

[1] The plaintiff 1672736 Ontario Inc. (**Dunpar Homes**) is building Streetsville Centre, a new housing community in Mississauga. The project has been significantly delayed—Dunpar Homes alleges that these delays have cost it millions of dollars in losses. It blames the defendants The Corporation of the City of Mississauga and Ezio Savini, the City’s Chief Building Official. In particular, Dunpar Homes claims that Savini acted maliciously, recklessly, or negligently in failing to conduct a “careful, reasonable, and fair review” of Dunpar Homes’s building permit applications.

Dunpar Homes sues the defendants for over \$10 million in damages for misfeasance in public office and negligence.

- [2] The defendants move to strike Dunpar Homes’s claim, without leave to amend, on the grounds that it discloses no reasonable cause of action.
- [3] For the reasons discussed below, I endorse an order dismissing the defendants’ motion to strike. I also endorse an order that the defendants pay to Dunpar Homes the costs of this motion on a partial indemnity basis, inclusive of fees, disbursements, and taxes, fixed in the amount of \$15,000 within 30 days.

## II. BACKGROUND

### A. Factual Background

- [4] I have taken the background from the factual allegations in Dunpar Homes’s fresh as amended statement of claim. For a motion to strike, these allegations have to be accepted as true. See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *The Catalyst Cap. Grp. Inc. v Veritas Investment Rsch. Corp.*, 2017 ONCA 85, at para 21.
- [5] The Local Planning Appeals Tribunal approved Dunpar Homes’s application to redevelop an old factory into a new townhouse community. The redevelopment proposed 194 townhomes, back-to-back townhomes, and semi-detached homes.
- [6] In mid-2020, Dunpar Homes submitted an “alternative solution” application, which proposed construction of “grade-related, vertically divided, 4-storey townhouse building blocks without basements”. An alternative solution is a proposal for building materials, systems, and designs that differs from, yet still provides the same level of performance as, the technical requirements found in the *Building Code*, O Reg 332/12. The alternative solution report’s authors concluded that it would be appropriate for Dunpar Homes to construct the townhouse building blocks under Part 3 of the

*Building Code* without having to meet the design, material, and method technical standards under Part 9 of the *Code*.

- [7] Savini, building inspectors, and other City staff appointed under the *Building Code Act, 1992*, SO 1992, c 23, refused to approve Dunpar Homes’s alternative solution proposal. Instead, they directed Dunpar Homes to revise the drawings to comply with Part 9 of the *Building Code*. They represented to Dunpar Homes that the review of its Building Permit Applications under Part 9 of the *Building Code* would be a simpler and more expedient process compared to review of the site under Part 3 of the *Code*.
- [8] In August 2020, the City granted site plan approval under the *Planning Act*, RSO 1990, c P.13, which permitted the issuance of unconditional permits under section 8 of the *Building Code Act*. Dunpar Homes submitted building permit applications. Under section 8 of the *Building Code Act*, the CBO must decide, within the period prescribed by the *Code*, whether to issue the permit or refuse to issue it, which was either 15 days or 20 days here.
- [9] The City often exceeded the prescribed period for Dunpar Homes’s building permit applications.
- [10] In October 2020, Dunpar Homes asked Savini to issue conditional permits for the construction of the foundations for some units—otherwise, there would be unreasonable delay and risk. Savini refused to do so because of an informal and unwritten policy that the City won’t issue conditional permits for townhouse building subject to the technical standards regulations under the *Building Code*. Dunpar repeated its request; Savini never responded.
- [11] On October 27, 2021, a City Council member directed Savini to immediately investigate and issue orders against Dunpar Homes to prohibit further construction at the site. Savini issued several orders to comply and stop work orders. Dunpar

Homes appealed the orders. This court affirmed the orders to comply, but ordered that the stop work orders be rescinded. See *1672736 Ontario Inc. v Savini*, 2022 ONSC 6177.

## **B. Pleadings and Proceedings**

- [12] In December 2021, Dunpar Homes sued the defendants for \$10 million in general damages and \$750,000 in punitive and aggravated damages. It also seeks declarations that the City owed it a duty of care and that Savini’s alleged failures were “malicious, in bad faith, and a misfeasance of public office”.
- [13] In its statement of claim, Dunpar Homes claims for the torts of misfeasance in public office and negligence. The plaintiff amended its claim in August 2023 to, in part, remove its claim for negligence against the City.
- [14] In September 2023, the defendants moved to strike the fresh as amended statement of claim as disclosing no reasonable cause of action. See *Rules of Civil Procedure*, r 21.01(1)(b). The defendants argue that neither of the claims made by Dunpar Homes plead the necessary elements of the causes of action.

## **III. LEGAL FRAMEWORK**

- [15] The bar for striking a pleading is very high.
- [16] For a claim, the question is whether the action has no reasonable prospect of success or whether it is plain and obvious that the action can’t succeed. This high standard applies to determinations of fact, law, and mixed fact and law. The facts pleaded are treated as true unless they are “manifestly incapable” of being proven. And the pleadings should be read generously, accommodating any drafting deficiencies because cases should be determined on their merits based on the evidence presented before judges at trial. See *PMC York Properties Inc. v Siudak*, 2022 ONCA 635, at paras 30-31.

- [17] When a reasonable prospect of success exists, the matter should be allowed to proceed to trial. The correct posture for the court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that isn't doomed to fail. See *Atl. Lottery Corp. Inc. v Babstock*, 2020 SCC 19, at para 90
- [18] The motivating rationale behind this high standard reflects the liberal construction of rules and pleadings that underlies the *Rules of Civil Procedure* and the requisite generous approach to pleadings in general, in order, as rule 1.04(1) provides, to “secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.” See *PMC York Properties*, at para 33.
- [19] Pleadings are critical. They frame the proceedings and the case that must be met. Motions to strike can serve a useful purpose at early stages of a proceeding to weed out clearly untenable causes of action that have no chance of success. But when parties are quibbling over whether a known cause of action has been pleaded with sufficient particularity, unwise use of motions to strike inevitably lead to proceedings becoming mired down. See *PMC York Properties*, at para 34.

#### IV. ANALYSIS

##### A. Misfeasance in public office

- [20] To succeed on a misfeasance claim, Dunpar Homes must show:
- (a) Savini was a public official<sup>1</sup> exercising public functions at the relevant time;
  - (b) Savini deliberately engaged in an unlawful act in his public capacity;

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<sup>1</sup> Though the amended statement of claim is unclear, misfeasance can be alleged only against a public official, meaning that Dunpar Homes's claim can only be against Savini.

- (c) Savini was aware both that his conduct was unlawful and that it was likely to harm Dunpar Homes;
- (d) Savini’s tortious conduct was the legal cause of Dunpar Homes’s injuries; and
- (e) the injuries suffered are compensable in tort law.

See *Ontario (AG) v Clark*, 2021 SCC 18, at para 22; *Meekeis v Ontario*, 2021 ONCA 534, at para 73.

- [21] This tort may arise by conduct that is “specifically intended to injure a person or class of persons” (Category A). Or it may arise where a public officer acts “with knowledge both that [they have] no power to do the act complained of and that the act is likely to injure the plaintiff” (Category B). See *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 22.
- [22] No action for damages shall be instituted against a chief building official for any act done in good faith in the execution or intended execution of any power or duty under the *Building Code Act* or the regulations or for any alleged neglect or default in the execution in good faith of that power or duty. See *Building Code Act*, s 31(1). Though a claim against Savini alleging that he engaged in bad faith conduct may not be subject to this immunity, the claim must still be pleaded with precision and full particulars. See *Potis Holdings Ltd. v The Law Soc’y of Upper Canada*, 2019 ONCA 618, at para 24; *Rules of Civil Procedure*, r 25.06(1), (8).
- [23] While the material facts may lack detail in the early stages of a proceeding, at the pleadings stage it is generally enough for a plaintiff to establish “a narrow window of opportunity” to make out a misfeasance claim at trial. That said, the tort requires more than a “bald pleading” that a public official acted for an improper purpose; there must be material facts about specific officials and their specific unlawful

purpose in acting as they did. See *MEEKIS*, at paras 76-77; *Pispidikis v Scroggie*, 2002 CanLII 23209, at paras 35-36 (Ont Sup Ct), aff'd 2003 CanLII 27059 (Ont CA).

[24] Savini makes three arguments about the deficiency of Dunpar Homes's pleading. First, it says Dunpar Homes hasn't pleaded an "unlawful act". I disagree. Dunpar Homes pleads at least two allegedly unlawful acts:

- Savini didn't issue building permits within the prescribed periods under section 1.3.1.3 of the *Building Code*
- the stop work orders breached the *Building Code Act*

[25] On the latter point, Savini argues that this court found the decision to issue the stop work orders to be reasonable. In paragraph 61 of *1672736 Ontario Inc.*, the court, in obiter, said the City's decision wasn't "misguided". In any case, the court found that the City made a palpable and overriding error in making the stop work orders.

[26] Second, Savini argues that Dunpar Homes hasn't pleaded an improper purpose. If Dunpar Homes proves that Savini was acting for the improper purpose of deliberately harming Dunpar Homes, this will be sufficient to prove both the unlawful act and knowledge elements of the tort. See *MEEKIS*, at para 83.

[27] In paragraph 48, Dunpar Homes pleads improper purpose:

- Savini had the "erroneous and resentful belief" that John Zanini, Dunpar Homes's President, sought "special treatment" from Mississauga's Mayor "due to their longstanding friendship"
- Savini was "retaliating" against Dunpar Homes because it and Zanini organized "Mississauga-based, low-rise developers in the Fall of 2021" to "critique and reform" the City's Building Department

- [28] In other words, Dunpar Homes’s claim is that Savini delayed issuing building permits and issued unlawful stop work orders because of his resentment of Zanini’s relationship with the Mayor and in retaliation for Dunpar Homes’s organizing efforts. This pleading is enough to show an improper purpose. The plaintiffs need only plead “circumstances, particulars or facts” sufficient to “infer or find malice”. See *Gratton-Masny Env’t Technologies Inc. v Ontario*, 2010 ONCA 501, at para 89.
- [29] Dunpar Homes also pleads that Savini’s exercise of his statutory discretion to refuse approval of the alternative solution or issue conditional permits was tainted by malice or an improper purpose, and therefore unlawful. I’m persuaded that the facts and allegations in the amended statement of claim are enough to provide a basis for Dunpar Homes to establish, on a full evidentiary record, that Savini acted or failed to act out of resentment or to retaliate against Dunpar Homes in refusing these approvals. For an analogous case, see *6165347 Manitoba Inc. v Winnipeg (City)*, 2023 MBKB 114, at paras 215-16.
- [30] Third, the defendants argue that pleading lacks particulars because it repeatedly refers to Savini’s “delegates” (paras 20, 23) and “City Staff” (which are defined as “building inspectors and other members of City staff appointed under the *Building Code Act*”) (paras 19, 40, 48(a), (g), (h), 63). Savini says that the failure to identify these individuals or name them as defendants makes it harder for him to respond adequately to Dunpar Homes’s claims. But that’s not grounds for a motion to strike. Instead, it’s a basis to demand particulars under rule 25.10 or for information at examination for discovery.
- [31] That said, I do think the parties are making something out of nothing. For example, paragraph 48(a) discusses a February 2020 meeting involving “City Staff” and the mayor’s chief of staff. Savini can identify the individuals that attended this meeting. At the same time, Dunpar Homes can’t assume that it’ll be allowed to use its overly broad pleading to go on a fishing expedition.

## B. Negligence

[32] To advance a successful claim in negligence, Dunpar Homes must show that:

- (a) the defendants owed it a duty of care;
- (b) the defendants' behaviour breached the standard of care;
- (c) Dunpar Homes sustained damage; and
- (d) the damage was caused, in fact and in law, by Dunpar Homes's breach.

See *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, at para 3.

[33] Dunpar Homes's claim for negligence is based on the City's vicarious liability for the conduct and actions of Savini. See *Ontario v Madan*, 2023 ONCA 18, at paras 50-55.

[34] The defendants argue that there is no private law duty of care on municipalities "to make a final decision on a development permit application within a reasonable time". See *Wu v Vancouver (City)*, 2019 BCCA 23, at para 38.

[35] In response, Dunpar Homes relies on *Carson v Kearney (Twp.)*, 2016 ONSC 1940, aff'd 2016 ONCA 975. There, the trial judge held that the municipality had a duty of care to the plaintiffs in respect of their application for building permits. The plaintiffs bought a residence, intending to convert it into business. They needed a building permit to do the renovations and a permit rezoning the property so it could be used for commercial purposes. Their interactions with the various municipal officials started in the summer of 2010, and didn't finally resolve until five years later. The plaintiffs alleged that the municipality's conduct led to delays in obtaining the necessary permits and that those delays resulted in substantial business losses.

[36] At times, a proposed cause of action is "so obviously at odds with precedent, underlying principle, and desirable social consequence" that regardless of the

evidence adduced at trial, the court can say with confidence that it can't succeed. See *Babstock*, at para 87.

[37] Dunpar Homes's negligence claim isn't "so obviously" at odds with precedent that it should be struck for that reason alone. Though the reasoning in *Wu* is persuasive, I find that the facts are too different for me to say, at this early stage, that Dunpar Homes won't succeed. In that case, the plaintiffs sought to demolish their house, which is in a heritage district. The municipality sought to retain the house. The municipality didn't designate the house as a heritage property (because it would have to compensate the plaintiffs). After the plaintiffs started legal proceedings, the municipality passed a bylaw that established the plaintiffs' neighborhood as a heritage community, meaning that the plaintiffs couldn't demolish the house without approval from the Director of Planning and the municipality didn't have to pay compensation.

[38] The Court of Appeal's reasons disclose the unique nature of that case:

[63] In this case, the bylaws in issue were concerned with protecting the heritage character of a certain part of Vancouver. The regulatory framework exists to promote a conception of the public interest or public good by regulating the type and character of new construction in FSD. The primary objective of the scheme is to promote the public good. In the circumstances, I do not think it can be said that the regulatory framework, standing alone, either explicitly or by implication, creates a relationship of proximity capable of giving rise to a prima facie duty of care.

[39] I'm not persuaded that this case alone allows me to say that a developer can never succeed in a lawsuit against a municipality based on unreasonable delay in issuing permits. Indeed, the Court of Appeal recognized that, in some cases, a duty of care might arise between a public official and a private party:

[70] Importantly, this does not foreclose the possibility that a relationship of proximity could be created in the context of a scheme, including this one, and specific facts and circumstances arising from

interactions between the parties. There could be a case in which a public official negligently misrepresented certain facts that were relied on by an applicant. This is not such a case. Alternatively, a public official could act in such a way so as to assume a responsibility to have regard for the private interests of an applicant who in turn relies upon that assumption of responsibility. Again, this is not such a case. The representations the judge referred to were, at best, general statements about process. I see nothing in the evidence that would warrant treating them as actionable misrepresentations, and the judge did not do so.

[40] The pleading is enough to disclose a cause of action in negligence.

## V. COSTS

[41] Subject to the provisions of an act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. See *Courts of Justice Act*, RSO 1990, c C.43, s 131.

[42] In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, together with the result in the proceeding and any offer to settle or to contribute made in writing, the factors listed in rule 57.01 of the *Rules of Civil Procedure*.

[43] In the usual case, costs are awarded to the prevailing party after judgment has been given. The traditional purpose of an award of costs is to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards are “in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought”. See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 20-1.

- [44] The main objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant. See *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (Ont CA) at para 26.
- [45] Although each costs assessment is a fact-driven exercise related to a particular case, consistency with comparable awards in like cases is desirable and the reasonableness of costs that represent an outlier must be objectively scrutinized, considering the chilling effect on litigation that this kind of award could have. See *Boucher*, at para 63. That said, the amount of the costs award by itself doesn't mean that the award is unreasonable or reflect an error in principle. See *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587 at para 64.
- [46] The party seeking costs bears the burden of proving them to be reasonable, fair, and proportionate. The absence of dockets isn't an automatic bar to proving or receiving an award of costs. See *Leonard v Zychowicz*, 2022 ONCA 212 at para. 33. That said, absent dockets, a description of the activities for which fees and disbursements are claimed must be sufficient to permit for the kind of close scrutiny that the court is required to undertake. The material provided for the assessment must allow the court to come to a conclusion about the time reasonably required by the party seeking costs to deal with all aspects of the proceedings for which costs are claimed, including whether there was over-lawyering or unnecessary duplication of legal work. Bald statements don't assist the court with this task but give rise to the kind of mechanical calculation of hours times rates that the court cautioned against in *Boucher*. See *Apotex*, at para 66.
- [47] Dunpar Homes seeks \$15,951.82 in costs, which includes costs thrown away from two prior, aborted motion hearings. The defendants argue that \$6000 is a more reasonable, fair, and proportionate amount for the motion to strike. In support, the

defendants argue that they were partially successful because their motion led Dunpar Homes to amend its pleading to correct some deficiencies.

[48] Dunpar Homes was the successful party here. Though the motion may have had some salutary effect on its pleading, the defendants persisted in arguing that the entire claim should be struck out. They failed. The parties' costs outlines show that they each spent around 75 hours preparing for this motion, though Dunpar Homes used timekeepers with varying hourly rates. Given the importance of the issues to the parties, \$15,000 is a fair, reasonable, and proportionate amount for costs of this motion.

[49] I'm not otherwise seized.

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Agarwal J.

Released: October 30, 2023

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**Endorsement**

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