CITATION: Alphyn Homes Inc. v. Colin Tiltak, 2024 ONSC 1917
COURT FILE NO.: CV-23-00003218
DATE: 20240402

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Alphyn Homes Inc., Plaintiff

AND:

Colin Tiltack, Medical Respiratory Care Inc. o/a MRC Healthcare Inc. and MRC Sleep, Defendants

BEFORE: J. Di Luca J.

COUNSEL: Jason Huang-Kung and Alyssa Suddard, Counsel for the Plaintiff

Nikolay Chsherbinin, Counsel for the Defendants

HEARD: March 6, 2024

ENDORSEMENT

[1] This is a Rule 21.01(1)(b) motion by the corporate defendant, Medical Respiratory Care Inc. ("MRC"), to strike the action against it on the basis that the Statement of Claim discloses no reasonable cause of action.

[2] The action relates to an alleged breach of contract for construction/renovation services provided by Alphyn Homes in relation to Mr. Tiltack's personal residence. The defendants argue that the plaintiff has impermissibly pleaded the action by alleging a breach of contract against Mr. Tiltack and/or MRC, without providing any particular allegations in relation to the corporate defendant. In short, the defendant argues that the plaintiff has "pleaded in the much condemned, conjunctive-disjunctive fashion, using 'and/or' and 'or either of them.'"

[3] The plaintiff's position is that it is unclear who the parties to the contract are and as a result, the pleadings include both the individual defendant and the corporate defendant. The plaintiff submits that it would gladly discontinue the action against the corporate defendant if Mr. Tiltack, through counsel, would undertake not to later take the position that the contract was with the corporate defendant.

[4] During the hearing of the motion, the court asked counsel, who acts for both defendants, whether he was prepared to give an undertaking to not take the position that the corporate entity was a party to the contract in exchange for the plaintiff discontinuing the action against the corporation. Counsel declined to do so, essentially stating that in his view he was not required to provide any such undertaking in the face of fatally flawed pleadings.

Background Facts

[5] On July 14, 2023, the Statement of Claim was issued. At paragraph 5 of the Statement of Claim, the plaintiff pleads:

> On or about May 5, 2021, Alphyn Homes entered into a contract with Mr. Tiltack and/or MRC for the supply of labour and materials for the improvement of the Subject Property (the "Contract"). The parties' contract was set out in a construction agreement prepared by Alphyn Homes. While it was not executed, the Defendants agreed to the terms and conditions.

[6] At paragraph 13 of the Statement of Claim, the plaintiff pleads:

> Despite the Subject Property being Mr. Tiltack's place of residence, Mr. Tiltack requested that Alphyn Home's invoices be issued to "MRC Healthcare Inc.". Alphyn Homes agreed to issue invoices to "MRC Healthcare Inc.", despite the Contract being with Mr. Tiltack.

[7] The plaintiff also pleads that six payments were made towards the amounts owing on the contract, including three payments made by a cheque from "MRC Healthcare Inc."

[8] On August 24, 2023, the defendants served an initial Request to Inspect which resulted in production of an unsigned contract between Alphyn Homes and MRC, dated May 5, 2021 and a copy of an invoice dated December 5, 2022 issued to "Mr. Colin Tiltack."

[9] On August 31, 2023, the defendants served a further Request to Inspect seeking copies of the invoices allegedly issued to MRC, as specified in paragraph 13 of the Statement of Claim. That same day, the plaintiff responded and admitted that there were no such invoices.

[10] The defendants requested that the action be discontinued against MRC. Instead, the plaintiff amended the Statement of Claim by deleting paragraph 13 and adding the words "or either of them" where the word "defendants" appear in paragraphs 5 and 11.

[11] The defendant describes the plaintiff's efforts to keep MRC in the litigation as "an abuse of process" and a "vexatious pressure tactic."

Issues and Analysis

[12] The first issue raised deals with what is alleged to be the improper withdrawal of an admission by the plaintiff. In particular, the defendants assert that paragraph 13 of the initial Statement of Claim amounted to an admission that the contract was with Mr. Tiltack only and not MRC. Assuming that to be the case, the defendants argue that the Amended Statement of Claim impermissibly withdrew the admission in violation of Rule 51.05 of the

Rules of Civil Procedure which stipulates that an admission in a pleading may be withdrawn on consent or with leave of the court.[1]

[13] The caselaw takes a restrictive approach to the definition of an admission. In order to be valid, an admission must be an intentional, unambiguous and deliberate concession. It is rare to find an admission in a Statement of Claim, see *Vale Canada Limited v. Solway Investment Group Limited et al.*, 2021 ONSC 7562 at paras. 135-139 citing, *Canadian Premier Life Ins. Co. v. Sears Canada Inc.*, 2011 ONSC 1670, at para. 22, *Yang (Litigation Guardian of) v. Simcoe (County)*, 2011 ONSC 6405, at para. 46, and *Stronach v. Stronach*, 2021 ONSC 3801, at paras. 82-84.

[14] The simple answer to the issue in this case is that the original paragraph 13 did not amount to an admission that the contract was only with Mr. Tiltack. It was simply a "choice of words" which when viewed in the context of the whole Statement of Claim was obviously not intended to clearly and unequivocally admit that the contract was only with Mr. Tiltack. Indeed, in eight other instances in the Statement of Claim, Alphyn Homes alleged that it contracted with Mr. Tiltack and/or MRC.

[15] I turn next to central issue, which is whether the pleading is improper insofar as it makes undifferentiated allegations against Mr. Tiltack and MRC.

[16] The parties agree on the test for striking a claim under Rule 21.01(1)(b). A claim will only be struck where it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action, see *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, at para. 17 and *Abbasbayli v. Fiera Foods Company*, 2021 ONCA 95, at para. 20. Viewing the test in the context of this action, I must determine whether, assuming all the facts pleaded are true, it is plain and obvious that the plaintiff contracted with either the personal defendant or his company or both. If so, the action survives the review. The action against the corporate defendant fails if, assuming the facts pleaded to be true, it is plain and obvious that the plaintiff only contracted with the individual defendants.

[17] In the ordinary course, no evidence is admissible on a Rule 21.01(1)(b) motion. However, where a pleading refers to a specific document, such as a contract, the court can consider the document in determining whether the claim should be struck, see *Gaur v. Datta*, 2015 ONCA 151, at para. 5 and *McCreight v. Canada*, 2013 ONCA 483, at para. 29.

[18] The defendants argue that MRC is not a party to the contract with Alphyn Homes. They also argue that the pleadings fail to allege material facts against MRC and that in the absence of properly pleaded material facts, there is simply no cause of action against MRC. In effect, MRC is left in the dark in terms of knowing what is specifically alleged against it by the plaintiff.

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[1] The defendants' Notice of Motion does not plead reliance on Rule 51.05 or Rule 26 dealing with amendment of the pleadings. The plaintiff argues the resort to these Rules in the context of the Rule 21.01(1)(b) motion is therefore improper. In view of my analysis of the substantive issue, I need not address this issue.

[19] In support of this argument, the defendants cite a body of caselaw that is critical of undifferentiated pleadings which draw no factual distinction between the acts of a corporate entity and the acts of employees or directors of the corporate entity, see for example, *ACI Brands Inc. v. Aviva Insurance Co. of Canada*, 2014 ONSC 4559, at para. 12 and *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, 1999 CanLII 789 (ONCA), at paras. 7-8 and *Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc*., 2010 BCCA 329, at para. 71.

[20] There is no issue that privity of contract must be established in order for the terms of a contract to be enforced as against a party. There is also no issue, that in some circumstances, it may be improper to plead undifferentiated facts against a corporate entity and its directors and/or employees, particularly where there is an attempt to "pierce the corporate veil."

[21] However, in this case, I see no issue with the pleadings. There is a live issue as to who the parties to the contract are. The Statement of Claim clearly sets out the particulars of the agreement and the nature of the alleged breach of the agreement. It alleges that the agreement was entered into by either Mr. Tiltack in his personal capacity and/or Mr. Tiltack on behalf of his company MRC. The written unsigned contract at the core of the dispute directly gives rise to this issue as it stipulates "MRC Sleep, by Colin Tiltack" as a signatory party. As well, the Statement of Claim pleads the fact that payments on the contract came from both Mr. Tiltack personally and MRC.

[22] In these circumstances, there is nothing flawed about the pleadings. While at trial it will be up to the plaintiff to prove who the contract was with, at this stage it cannot be said that the test for striking the claim as it relates to MRC has been met. Moreover, to the extent that the pleadings are crafted so as to prevent Mr. Tiltack from later taking the position that the contract was with "MRC Sleep" and not him, the concern is entirely valid. When offered the opportunity to assure the plaintiff that this would not be the defence, counsel declined. Viewed in context, the defendants' motion seems entirely tactical as opposed to substantive.

[23] Lastly, I turn to addressing the submission that the claim of unjust enrichment as against MRC should also be struck as the legal test for unjust enrichment cannot be established vis-à-vis MRC. In short, the defendants argue that there are no pleaded facts revealing how MRC benefitted from the construction/renovation work performed by the plaintiff. Secondly, the defendants argue that juristic reasons including the remedy for breach of contract and resort to the *Construction Act* would serve to bar resort to the doctrine of unjust enrichment. In this regard, the defendants rely on *Ciccocioppo Design/Build Inc. v. Gruppuso*, 2017 ONSC 2012, at paras. 18-21.

[24] While I agree that the plaintiff may face significant hurdles in establishing an unjust enrichment claim against MRC, I am not satisfied that the pleadings should be struck at this stage. Simply stated, the pleadings are not so flawed or lacking so as to meet the high threshold under Rule 21.01(1)(b).

[25] In other words, assuming the facts pleaded are true, it is not plain and obvious that the claim for unjust enrichment will fail. In context, this issue would arise if the corporate defendant is proven to be the sole party to the contract, in which case it is arguable that the principle of

unjust enrichment would apply in relation to the benefit received by the individual defendant. That said, the arguments advanced by the defendants may be more properly considered in the context of a summary judgment motion, once the action is defended and the evidence develops.

[26] The motion is dismissed.

[27] In terms of costs, I note that the defendants' costs outline reveals costs totalling approximately $8,900 all-inclusive on a partial indemnity basis. The plaintiff's costs outline reveals costs totalling approximately $7,000 all-inclusive on a partial indemnity basis and $10,500 on a substantial indemnity basis.

[28] I find that the costs incurred by the plaintiff are reasonable as measured against the costs incurred by the defendants and in terms of the materials prepared in response to the issues raised.

[29] I also find that this motion was needless and purely tactical. It could have been resolved instantly. Indeed, the plaintiff repeatedly offered to "cut" the corporate defendant if Mr. Tiltack would simply agree that he was the sole contracting party. Mr. Tiltack, through counsel who acts for both defendants, refused to do so and instead forced this motion wherein he essentially took the position that he was the sole contracting party.

[30] In an era where the court resources are stretched to the limits, scarce court time should be reserved for cases that present legitimate issues for determination. An objective and reasonable observer would readily conclude that this motion had nothing to do with legitimate litigation goals. This is conduct that warrants a measure of costs in excess of partial indemnity.

[31] Having considered the relevant factors, including reasonableness and proportionality and considering the nature of the defendant's conduct which needlessly necessitated the motion, I find that costs of $8,000 all-inclusive are appropriate. The costs are to be paid within 30 days.

J. Di Luca J.

Date: April 2, 2024