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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

APPLICATION UNDER PART II of *The Limitation of Actions Act*, R.S.M. 1987, c. L150, Section 14

B E T W E E N:

JOHN EMBIL,	)	Counsel:
	)	
applicant,	)	RICHARD S. LITEROVICH and
	)	KAREN R. POETKER
- and -	)	for applicant
	)	
S. MARIC CONSTRUCTION LTD. and,	)	DAVE G. HILL
LLOYD SECTER,	)	for the respondent, S. Maric
	)	Construction Ltd.
respondents.	)	
	)	DAVID I. MARR and
	)	AMBRE K. ANJOUBAULT
	)	for the respondent Lloyd Secter
	)	
	)	JUDGMENT DELIVERED:
	)	AUGUST 30, 2017

CHARTIER J.

INTRODUCTION

[1] The applicant seeks leave to bring an action against the respondents, pursuant to s. 14(1) of ***The Limitation of Actions Act***, C.C.S.M. c. L150 (the "***Act***"), in respect of an alleged faulty design and construction of his custom built

home in Winnipeg. The applicant alleges that the notice of application filed on May 27, 2015 was filed within 12 months of the discovery of all material facts. The applicant seeks leave to commence an action against the respondents in negligence and contract. In particular, the applicant states that the respondent Lloyd Secter ("Secter") is liable to him in negligence and in contract for failing to design and oversee the construction of the property in accordance with his legal obligations. The applicant also says that S. Maric Construction Ltd. ("Maric ") is liable to him in negligence and contract for failing to perform its services as general contractor in accordance with its legal obligations.

FACTS

[2] In 2006, the applicant retained the services of the respondent Secter for the purpose of designing plans for a new house. They entered into an oral agreement whereby Secter would manage all the aspects of the project, including tendering to a builder and serving as the project manager. At the recommendation of Secter, Maric was hired by the applicant to act as the general contractor in respect of the construction of the new house.

[3] The construction of the house began in August 2007 and the applicant began living in the new house on June 21, 2008.

[4] The applicant experienced a number of issues with the house and wrote a letter to his lawyer John Cassidy of Cassidy Ramsay, dated October 5, 2009, outlining the issues in detail. The issues raised in the letter included signs of past moisture and condensation in the garage ceiling and attic area, that air

leakage likely existed throughout the residence, as well as a number of other problems.

[5] In a report dated July 13, 2009, Jonathon Braun of JDB Consulting noted that there were "signs of past moisture infiltration and or condensation noted at the garage ceiling/attic". Later in 2009, the applicant engaged Crosier Kilgour & Partners Ltd. ("Crosier") to look at the possible causes of the moisture in the garage. Crosier's report letter, dated November 6, 2009, indicated that the moisture entering the applicant's garage through the ceiling was as a result of condensation (as opposed to water infiltration or penetration) which was related to a problem with air leakage into the house which had primarily concentrated itself over the garage because it was the path of least resistance.

[6] Also, between 2009 and 2011, the applicant noticed deformation of the window frames on the south and west sides of the property. In 2012, the windows were determined to be defective and the window manufacturer offered to replace the windows on the property. The applicant chose instead to replace the windows with a higher quality window and hired Crosier to design and oversee the window replacement. The window replacement project commenced in the summer of 2014 and involved removing the stucco from around the exterior of the house. During the week of June 22, 2014, Paul Cantor of P.C. Home Restoration Ltd. ("P.C. Home") discovered rotting oriented strand board ("OSB") sheathing and framing beneath the exterior stucco of the house. This was also observed by Crosier, who subsequently provided an opinion that the

"cause of the damage is clearly uncontrolled water penetration in behind the fabric water barrier" and concluded that the drawings by Secter provided "no direction or details on the window installation or how the water sheathing membrane should be tied into the window rough opening for effective water shedding" (Crosier report letter dated March 26, 2015, p. 4).

THE LAW

[7] The test to be applied on this application is set out in the ***Act*** and in several decisions, including ***Cahill v. Pasieczka***, 2014 MBQB 217, [2013] M.J. No. 291 (QL). The onus is on the applicant to file sufficient evidence to support the application. The requirements on an application for leave were summarized by this court in ***Sochasky v. Winnipeg (City)***, 2013 MBQB 204, [2013] M.J. No. 291 (QL), as follows:

> 22 Taken together, these sections provide that in order to be successful on an application for leave under sections 14(1) and 15(2) of ***The Limitation of Actions Act***, the moving party must:
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> (a) prove by evidence that he or she has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success;
>
> (b) prove, at the very least, that he or she first learned of a fact material to his or her cause of action within the 12 months next before the application was filed;
>
> (c) establish that the fact, first learned within that period, is "material" within the sense defined in section 20(2); it must be of "a decisive character" as that phrase is defined in section 20(3);
>
> (d) establish that the fact must not be one which the applicant ought to have known about earlier.
>
> See ***Einarsson et al. v. Adi's Video Shop et al.*** (1992), 76 Man. R. (2d) 218 at paras. 10-13 (C.A.).

[8] The issue to be determined is whether this court ought to grant an extension of time to the applicant to commence an action against the respondents in accordance with these relevant provisions of the ***Act***. The respondents do not take issue with the first of the four requirements set out in ***Sochasky***, but say that the application should fail on the balance of those four requirements.

[9] Having considered the evidence, I find it is only during the week of June 23 to 27, 2014 when the work done by P.C. Home disclosed the rotting OSB sheathing and the subsequent discussions with Crosier, and after reviewing the Crosier report, did these deficiencies in the house become apparent and might be caused by the negligence or breach of contract of the respondents. In my view, it is only during that week in June 2014 did the homeowner find the material facts of a decisive nature. The subsequent receipt of the expert engineering report identified that the problems were likely caused by defective workmanship and problems with the drawings.

[10] The respondents relied on the decision of ***Morry v. Janzen***, 2015 MBCA 86. However, I find that the facts in that case are quite different from the facts here. In ***Morry***, the appellants were made aware of the structural issues prior to retaining an expert to give an opinion on those issues. In the present case, at no time prior to the week of June 23, 2014 was the applicant aware or ought to have been aware of any issues of moisture penetration. There were no physical

manifestations anywhere on the interior or exterior of the house that suggested any water penetration in the house. It was not until P.C. Home removed the stucco on the exterior of the house as part of the window replacement project that the material facts became apparent and that the applicant did not and could not have known of this before that time.

[11] I do not agree that the defects in the OSB sheathing related to the other defects that had been previously found, including the water condensation issues in the attic of the garage. This latter issue was dealt with by the applicant and was resolved. The defects in issue in the proposed action involve water penetration, which were defects of a wholly different nature than the previously discovered defects. The applicant acted quite reasonably in methodically dealing with the various issues relating to his new home and cannot be faulted in not bringing an action relating to those issues, but rather in dealing with them as he did. He took various steps to see that the problems were addressed. True, the applicant did express concerns to John Wells, professional engineer with Crosier, about possible water penetration, but testing conducted on his house did not bear that out.

[12] In that regard, the applicant had two thermographic surveys done. This testing, conducted more than once, did not indicate the presence of water penetration or infiltration. The survey done in December 2011 indicated "minor to very minor air leaks are occurring at or near many of the numerous pot light fixtures" and "minor thermal bridging" along beams (p. 3). The survey report

dated January 2, 2012 mentioned condensation regarding the pot lights and thermal bridging. Neither of those thermographic surveys indicated nor referred to water penetration. The damage involving the water penetration to the wall is entirely different and unrelated to the other issues the applicant was having. I do not agree that the applicant had sufficient information available to him at the time to justify the issuance of a statement of claim in order to obtain discovery from the respondents before the limitation period. Also, I find the applicant acted, in all the circumstances, with due diligence. This is not a case where he slept on his rights. On the contrary, he dealt with the various discrete problems he encountered with his new home as they arose. The problem with the OSB sheathing was an unrelated and undiscoverable issue. It was only during the week of June 22, 2014 that the applicant became aware that there was structural damage that would require significant remedial work. It was then that he became aware of a reasonable prospect of an action succeeding against the respondents and that the action would result in damages sufficient to justify bringing the action.

[13] The delay in repairing the windows is irrelevant, because at this point in time the applicant did not know, and could not know, about the damage to the OSB sheathing caused by water penetration. Moreover, the problems with the windows were also unrelated to the damage to the OSB sheathing: the windows were defective and the manufacturer offered to replace them. There was no evidence of water penetration in relation to the windows.

CONCLUSION

[14] I am satisfied that the facts learned during the 12 months before the filing of the application are material facts pursuant to s. 20(2) of the ***Act***, and in particular s. 20(2)(a) of the ***Act***. While there were a number of other issues related to the house, which the applicant took other means to address rather than bringing an action, those involved unrelated issues. The applicant cannot be faulted for having taken the particular steps he did relating to those problems. The materials facts learned by the applicant were also of a decisive nature because it was only when these facts were learned that an action against the respondents would have a reasonable prospect of success. The applicant first knew of all material facts of a decisive character in or about June 23 to June 27, 2014, or sometime after that date.

[15] In my view, therefore:

(a) the applicant first learned of a fact material to his or her cause of action within the 12 months before the application was filed;

(b) the material fact is of a decisive character within the meaning of s. 20(3);

(c) given the nature of the damage which was behind walls and involved water penetration, it was not one that the applicant ought to have known about earlier.

[16] I am therefore granting leave to the applicant to begin an action against the respondents. The applicant will be permitted to file and serve his statement

of claim within 30 days of the signing of the order. The application is granted with costs in the cause.

_____ J.