Date: 20170718
Docket: CI 14-01-92274
(Winnipeg Centre)
Indexed as: Neurenberg v. The Rural Municipality of Lac du Bonnet et al.
Cited as: 2017 MBQB 138

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CAMERON MILES NEURENBERG,	)	Counsel:
	)	
plaintiff,	)	RICHARD W. SCHWARTZ
	)	for the plaintiff
- and -	)	
	)	
THE RURAL MUNICIPALITY OF LAC DU BONNET, DON SIKORA CONTRACTING LTD., and DONALD SIKORA,	)	CHARLES R. HUBAND
	)	for the defendant, Donald Sikora
	)	
	)	
defendants.	)	JUDGMENT DELIVERED:
	)	JULY 18, 2017

SUCHE J.

[1] Donald Sikora ("Sikora") seeks summary judgment dismissing this action as against him. For the reasons below I am granting the motion.

FACTS

[2] The evidence before me consists of the affidavits of the plaintiff and Sikora. They reveal that the plaintiff owns land within the defendant Rural Municipality of Lac du Bonnet (the "R.M.") upon which a drain was located. In 2006, the R.M. wrote to the plaintiff asking him to allow it to reroute water in nearby municipal ditches into the

drain. The purpose of this effort, it said, was to benefit area farmers as well as residents seeking water and sewer services from the R.M. It offered to take ownership of the drain and be responsible for its future maintenance and upkeep. Although the plaintiff consented, the project did not proceed.

[3] Then, in 2008, the parties entered into the agreement which is the subject of this action. They agreed that the R.M. would take ownership of the drain and an adjacent strip of land, and enlarge it for the rerouted water. The plaintiff says it was a further term of the agreement that the R.M. would install the water and sewer services, and by a certain date. The R.M. denies this, although it acknowledges that it did want to have the land available for this purpose in the future. According to the plaintiff, Sikora, who was a councillor of the R.M., approached him, saying that he could ensure that the water and sewer services would be constructed. But for this assurance, says the plaintiff, he would never have agreed to allow the work to proceed.

[4] For his part, Sikora denies that the conversation occurred or that he ever discussed the matter with the plaintiff. The defendants assert that the agreement was negotiated between the plaintiff and the R.M.'s public works officer.

[5] The R.M. hired Sikora Contracting Ltd. ("S.C.L.") to do the excavation work on the drain. Sikora is the principal of S.C.L., and operated the equipment used to enlarge the drain and adjacent municipal ditches. The work was done pursuant to the direction of and specifications provided by the R.M.

ISSUES

[6] For the most part, this dispute concerns the terms of a contract between the plaintiff and the R.M. The plaintiff says the R.M. is in breach by failing to install water and sewer lines, and leaving spoil piles on the property. In addition, the claim alleges both the design and the work itself were done negligently and, as a result, the land around the drain was damaged.

[7] The allegation against Sikora is that he was in a conflict of interest because he was both a councillor and the principal of S.C.L., and, as a result, he owed the plaintiff the duty to ensure the work undertaken was done properly.

POSITIONS OF THE PARTIES

[8] The plaintiff argues he was owed a duty of care by Sikora to ensure that the agreed upon work was done properly. He says this duty arises in part from municipal law which prohibits conflicts of interest. In this regard he relies on a line of authorities, ***Arbez v. Johnson*** (1998), 159 D.L.R. (4th) 611 (Man. C.A.), and ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 (S.C.C.).

[9] The other source of this duty, he says, is Sikora's obligation to exercise due diligence in the performance of his responsibilities as an officer or director of S.C.L., pursuant to s. 117 of ***The Corporations Act***, C.C.S.M. c. C225 (the "***Act***"). This duty was owed not only to S.C.L. but also to the plaintiff as the owner of the land on which S.C.L. carried out the work.

[10] The plaintiff acknowledges that such a duty of care has not yet been recognized by the courts. That being so, the ***Cooper-Anns*** test applies, described in ***Williams v. Canada (Attorney General)***, 2009 ONCA 378, 310 D.L.R. (4th) 710:

> [14] The *Cooper-Anns* test consists of two stages. The first stage, which determines whether the relationship between the parties justifies the imposition of a duty of care on the defendant, involves consideration of foreseeability, proximity and policy. For a duty of care to arise, more is required than foreseeability – the two parties must also be sufficiently proximate to one another: *Desormeaux* at para. 12. Proximity, explained the court in *Cooper* at para. 31, "is generally used in the authorities to characterize the type of relationship in which a duty of care may arise." Two parties are in proximity with one another if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the legitimate interests of the plaintiff: *Cooper* at paras. 32-34. The evaluation of whether a relationship is sufficiently proximate to ground a duty of care entails a consideration of the "expectations, representations, reliance, and the property or other interests involved. Essentially ... factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care": *Cooper* at para. 34.

[11] This exercise involves consideration of a complex issue of law and policy which, says the plaintiff, should not be decided on summary judgment. See ***Festival Hall Developments Ltd. v. Wilkings***, [2009] O.J. No. 2400 (Ont. S.C.J.) (QL), and ***Transportaction Lease Systems Inc. v. Weaver***, 2007 ABQB 246, 35 C.B.R. (5th) 110.

[12] Subsequent to the hearing of the motion, the plaintiff also raised the argument that Sikora was guilty of misfeasance in public office. This requires proof of:

- a deliberate unlawful act by the defendant in exercising a public function;
- done with knowledge by the defendant that the conduct was unlawful and likely to injure the plaintiff;
- the defendant's conduct was the legal cause of the plaintiff's damage;

- the damages suffered are compensable in law.

See ***Odhavji Estate v. Woodhouse***, 2003 SCC 69.

[13] For his part, Sikora says that notwithstanding his adamant denial that he made the comments, even if he had, and however pleaded, the essence of the plaintiff's allegation is that Sikora made a promise that something would be done in the future, which is not actionable. The law is well settled that only statements of fact give rise to a claim for damages. See, for example, ***Andronyk v. Williams*** (1985), 21 D.L.R. (4th) 557 (Man. C.A.), and ***PD Management Ltd. v. Chemposite***, 2006 BCCA 489, [2006] B.C.J. No. 2871 (QL).

[14] As to the allegation of malfeasance in public office, Sikora says this has neither been pleaded nor have any facts been presented to support such a claim. Finally, he relies on the direction from the Supreme Court of Canada in ***Hryniak v. Mauldin***, 2014 SCC 7, that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims.

SUMMARY JUDGMENT

[15] The test for summary judgment is found in Court of Queen's Bench Rule 20. After considering the evidence advanced by the parties a court will grant summary judgment only if:

- there is no genuine issue for trial (Queen's Bench Rule 20.03(1));
- there is a genuine issue between the parties, but the court is able to find the facts necessary to decide the case (Queen's Bench Rule 20.03(4)(a)); unless

- it would be unjust to decide the issues on the motion (Queen's Bench Rule 20.03(4)(b)).

[16] The summary judgment rules in Manitoba have been in place for almost 30 years, and a well developed body of law exists on the subject. It is nicely summarized by the Court of Appeal in ***Homestead Properties (Canada) Ltd. v. Robert***, 2007 MBCA 61, [2007] M.J. No. 138 (QL), as follows:

> 14 The test for summary judgment is well established, and no further detailed explanation is needed. The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant. ...
>
> 15 When a plaintiff moves, he must prove, on a *prima facie* basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow. As was made clear in *Blanco et al. v. Canada Trust Co. et al.*, 2003 MBCA 64, 173 Man.R. (2d) 247 at para. 62, regardless of who is the moving party, the analysis is a two-step process.
>
> 16 These principles are based on Rule 20 of the Court of Queen's Bench Rules. That rule has been discussed and analyzed in numerous cases including *Podkriznik v. Schwede* (1990), 64 Man.R. (2d) 199 (C.A.), *Fidkalo v. Levin* (1992), 76 Man.R. (2d) 267 (C.A.), *Somers Estate v. Maxwell* (1995), 107 Man.R. (2d) 220 (C.A.), *Kleysen et al. v. Canada (Attorney General) et al.*, 2001 MBQB 205, 159 Man.R. (2d) 17, and *Blanco*.
>
> 17 Whether the test is cast in terms of "the action fails in law" (*Somers*, at para. 10), or that the defendant must show "the absence of a valid claim in law" (*Somers*, at para. 11), or that "the action must fail in law" (*Somers*, at para. 16), or "that at a trial it will succeed" (*Blanco*, at para. 28), or some other like phrase, the expressions amount to the same thing. The moving party must show that, *prima facie*, on the facts the responding party's case must fail. If he does, then the second step of the analysis commences, and the responding party has the burden of showing that there is a genuine issue for trial.

[17] Importantly, the court notes, both parties are required to put their "best and strongest case" before the court:

> 19 Parties moving or responding on summary judgment matters ought to put their best and strongest case before the court, since the motion, and possibly the case, will be disposed of on the basis of the evidence before the court. See, for

> example, the comments of Helper J.A. in *Atlas Acceptance Corp. et al. v. Lakeview Development of Canada Ltd. et al.* (1992), 78 Man.R (2d) 161 (C.A.) (at para. 35):
>
> > It is not enough for a party opposing a motion for summary judgment to [advert] to evidence that may be forthcoming at trial to support its claim. The affidavit evidence must establish that the evidence upon which the party relies does in fact exist and, if accepted, will establish the claim presented. ...

[18] It is also well established that it is generally considered "unjust" within the meaning of Queen's Bench Rule 20.03(4)(b) to grant summary judgment where a case involves a developing area of law. In ***Shell v. Barnsley***, 2006 MBCA 133, [2006] M.J. No. 424, the Manitoba Court of Appeal said:

> 14 In *Jane Doe*, this court concluded that it was unjust to decide, on a summary basis, complex issues involving developing areas of the law involving the Canadian Charter of Rights and Freedoms. In that case, we noted that, although complexity does not preclude summary judgment, it can be an important consideration. More importantly perhaps, where the law is developing, a full trial record is needed to provide the full factual underpinning for the decision. See also *Valley Agricultural Society v. Behlen Industries Inc. et al.*, 2004 MBCA 80, 184 Man.R. (2d) 263, and *Lawrence v. Peel Regional Police Force* (2005), 250 D.L.R. (34th) 287 (Ont. C.A.).

ANALYSIS AND DECISION

[19] Factually, this is a very straightforward case. Whether the R.M. is in breach of the terms of the agreement will require a trial to resolve. As for the claim against Sikora, even if the plaintiff's evidence is accepted, I am satisfied that the action will fail in law.

[20] Sikora is correct that in circumstances such as this a statement that a third party will do something in the future is not actionable. This principle is nicely summarized in

PD Management Ltd.

> 12 ... a "representation" is "a statement ... in regard to some past or existing fact, circumstance or state of facts pertinent to the contract, which is influential in bringing about the agreement" (*Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990) at 1301 [*Black's*]). A promise that something will be done in the future cannot properly be construed as a statement respecting some past or existing fact. As such, it is not a representation.
>
> 13 However, even if, as found by the learned chambers judge, the alleged representations were true representations, they did not give rise to actionable misrepresentations. A "misrepresentation" is an "intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it" (*Black's, supra* at 1301).

However, I do not agree that this ends the matter, as the plaintiff bases his claim on the breach of a duty of care by Sikora.

1. Does a conflict of interest create a duty of care?

[21] I start with the observation that a conflict of interest is not a cause of action but a state of being. Certainly it is a circumstance prohibited by statute in a variety of situations. To the extent that it is a concept incorporated into municipal law, this is by virtue of ***The Municipal Council Conflict of Interest Act***, C.C.S.M. c. M255, which prohibits municipal councillors from performing certain of their usual duties, that is participating in meetings or decisions or any attempt to influence matters where they have a conflicting interest, which is specifically defined in the legislation. Should a councillor violate these provisions, on application to the court by the municipality or an elector their seat will be declared vacant. This was the nature of proceeding in both ***Arbez*** and ***Old St. Boniface Residents Assn.***, relied on by the plaintiff. In neither case was a duty of care by a councillor to an elector alleged.

[22] In any event, the plaintiff does not suggest that Sikora violated ***The Municipal Council Conflict of Interest Act***. Rather, he simply says Sikora was in a conflict of interest because he had loyalty to both the R.M. and S.C.L. As a result, he was owed a duty of care by Sikora to ensure S.C.L. and the R.M., or one of them, it seems, carried through on their commitments. This, in my view, is not a novel or evolving area of law but a claim unknown in law.

2. Does Sikora's duty as a director of S.C.L. give rise to a duty of care to the plaintiff?

[23] As to the plaintiff's claim that Sikora was in breach of his statutory duty as an officer of S.C.L., s. 117(1) of the ***Act*** provides:

> **Duty of care of directors and officers**
> 117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[24] The plaintiff has not adduced any facts to show Sikora did anything that arguably violates this duty or any law to suggest that the duty imposed by s. 117 extends to persons who have no relationship with the corporation. This is very different than the situations in ***Festival Hall*** or ***Transportaction Lease Systems***, the cases relied on by the plaintiff.

[25] In ***Festival Hall***, the plaintiff was the landlord of a corporation and the defendant was its sole director. At a time when the corporation was significantly

indebted to the plaintiff and was incurring further indebtedness to it, the defendant stripped the corporation of its financial resources by paying himself bonuses he was not entitled to receive, and reimbursing expenses he was not entitled to be reimbursed. The plaintiff sued, alleging the defendant breached his duty of care as a director. In dismissing the motion to strike the statement of claim MacDonnell J. relied on the Supreme Court of Canada decision of ***Peoples Department Stores Inc. (Trustee of) v. Wise***, 2004 SCC 68, [2004] 3 S.C.R. 461, which held that:

- the statutory provision establishes that directors of a corporation owe a duty of care to creditors (although not a fiduciary duty), which requires them to diligently manage and supervise the affairs of the corporation;
- this duty of care does not entitle creditors to sue directors directly for breach of their duties; that is, the section does not provide an independent foundation for a tort action (as determined by ***Canada v. Saskatchewan Wheat Pool***, [1983] S.C.J. No. 14 (S.C.C.) (QL));
- to determine whether conduct that falls short of the statutory standard gives rise to cause of action in negligence, a duty of care at common law must be found;
- a breach of the statute should be considered in the context of the general law of negligence. Within that context a breach of statutory duty may constitute evidence of negligence and the statutory duty may provide a standard by which to judge the reasonableness of the conduct in issue.

[26] MacDonnell J. found the facts pleaded could support findings of sufficient foreseeability and proximity to give rise to a duty of care, and refused to strike the claim for failing to disclose a cause of action.

[27] In ***Transportaction Lease Systems***, the defendant was a director and officer of a corporation that supplied vehicle leasing services to the plaintiff. She disposed of vehicles without the plaintiff's consent, which was contrary to the terms of the agreement between the parties. The plaintiff sued in negligence and claimed the defendant had breached the duty of care in the Alberta equivalent of s. 117(1) of the ***Act***.

[28] The defendant was the person the plaintiff dealt with at all times. As such, she knew that the agreement with the plaintiff provided its equipment could not be sold without its consent, and that the plaintiff was entitled to the proceeds from the sale of any of its equipment. Further, in addition to being in involved in the sale of the equipment, she was involved in the wrongful distribution of sale monies to other parties.

[29] The defendant brought a motion for summary judgment which was dismissed. While rejecting the notion that a breach of the statutory duty of care gave rise to a cause of action against a director, the court held that the nature of the allegations against the defendant might well give rise to a claim in negligence. This would then require that the ***Cooper-Anns*** test be undertaken to determine whether the relationship between the plaintiff and the defendant was sufficiently proximate to support an action in negligence. Murray J. concluded that "this is not a stage in the

litigation process when such questions should attempt to be answered" by the court (para. 54).

[30] These decisions do not assist the plaintiff. First, those plaintiffs each had a contractual relationship with the corporations in issue. In fact, they were creditors, a group the law recognizes as sufficiently proximate to be owed a duty of care. In the situation before me, however, S.C.L. was a stranger to the plaintiff. Its contract was with the R.M.

[31] In addition, in both cases there was evidence that the defendants had acted in a violation of their duty of due diligence: In ***Festival Hall***, the defendant had paid himself bonuses he was not entitled to; in ***Transportaction Lease Systems***, the defendant sold vehicles and paid the monies to third parties contrary to the corporation's agreement with the plaintiff.

[32] Here, the plaintiff has neither pleaded nor presented evidence suggesting Sikora did anything that violated his duty of due diligence to S.C.L. To the extent that he says the excavation was done negligently (which would be unlikely to amount to a violation of s. 117(1) of the ***Act***), the evidence is that Sikora followed the specifications provided by the R.M. In any event, he does not allege that Sikora was negligent, only S.C.L. and the R.M. He also has not presented any evidence to support his claim that the excavation was not done properly.

3. Misfeasance in public office

[33] The claim of misfeasance in public office is also doomed to fail. As Sikora argues, the claim was not pleaded nor was any evidence presented to support the required elements.

[34] For all these reasons, then, I am satisfied that Sikora is entitled to summary judgment dismissing the claim against him.

[35] Costs will follow the event. If the parties are unable to agree on the amount, this can be spoken to.

_____ J.