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

B E T W E E N:

CONTERA CONSTRUCTION INC.	)	
	)	
plaintiff,	)	Richard M. Beamish and
	)	Jesse Rock
	)	for the plaintiff
- and -	)	
	)	
RADKA INC. and RICHARD DE LA RONDE and SANDY BAY OJIBWAY FIRST NATION	)	Joseph G. Fiorino
	)	for the defendants Radka Inc.
	)	and Richard De La Ronde
	)	
defendants.	)	Michael J. Weinstein and
	)	Martin S. Minuk
	)	For the defendant Sandy Bay Ojibway First Nation on a listening brief
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	February 15, 2024

ASSOCIATE JUDGE GOLDENBERG

INTRODUCTION

[1] Radka Inc. ("Radka") and Richard De La Ronde collectively (the "moving defendants") have brought a motion under the Court of King's Bench Rules, Man Reg 553/88 (the "Rules") for an order striking all of the Amended Statement of Claim as

against De La Ronde and parts of it against the defendant Radka. Contera Construction Inc. ("Contera" or the "plaintiff") opposes the motion. The other defendant, Sandy Bay Ojibway First Nation ("SBFN"[1]), takes no position on the motion and has filed a Statement of Defence and Crossclaim.

BACKGROUND

Procedural

[2] The plaintiff filed a Statement of Claim against the defendants, and De La Ronde brought a motion to strike it as against himself. The plaintiff then filed an Amended Statement of Claim (the "Claim"). The Claim as it relates to the moving defendants, alleges causes of action for breach of contract and fraudulent misrepresentation.

[3] The moving defendants now seek to strike the Claim in its entirety against De La Ronde and in part against Radka. The moving defendants say that the only reasonable cause of action is against Radka for breach of contract.

Factual

[4] When considering a motion to strike for no cause of action, the material facts pled must be presumed to be true unless manifestly incapable of being proven (see ***Knight v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42 ("***Knight***"). While not verbatim, the following description of the factual background is taken exclusively from the Claim. I have emphasized some words from the Claim that will later form part of my analysis on whether there are reasonable causes of action, whether the

[1] The Claim refers to Sandy Bay First Nation ("SBFN"); however, the named defendant is Sandy Bay Ojibway First Nation

pleading contains inconsistencies, and whether any portions are manifestly incapable of being proven.

[5] Contera is a construction company incorporated pursuant to the laws of Manitoba.

[6] Radka is a management and business consultant corporation incorporated pursuant to the laws of Manitoba. De La Ronde was the sole director and owner of Radka and also the Executive Director of Sandy Bay Ojibway First Nation Child and Family Services ("Sandy Bay CFS").

[7] SBFN is a First Nation, signatory to Treaty 1, located in the Province of Manitoba.

[8] In 2018, Contera was contacted by De La Ronde, as director and owner of Radka, to obtain a quote for the construction of a new head office for Sandy Bay CFS (the "Head Office") to be located on land that De La Ronde represented was under his exclusive control and authority within SBFN by virtue of a twenty-year land lease.

[9] In May 2018, in reliance upon De La Ronde's express representation that he maintained a legal interest in the land, Contera entered into a contract with De La Ronde, on behalf of Radka, for the construction of the Head Office (the "Construction Contract"[2]).

[10] Construction of the Head Office commenced in November 2018.

[2] The Claim uses the terms Construction Contract and Construction Agreement interchangeably.

[11] In June 2021:

- With the construction of the Head Office largely complete, De La Ronde's position as Executive Director of Sandy Bay CFS was terminated. Thereafter, Sandy Bay CFS terminated its lease agreement with Radka for the Head Office.
- In breach of the Construction Contract, De La Ronde advised Contera that Radka would be terminating the Construction Contract and failed or refused to pay Contera for the outstanding amount owed under the contract.
- De La Ronde, on behalf of Radka, executed an offer to purchase with Contera (the "Purchase Contract"[3]), transferring ownership of the Head Office, largely complete, to Contera, in satisfaction of all amounts due and owing by Radka under the Construction Contract.

[12] It was an express term of the Purchase Contract that included in the sale of the Head Office, would be the transfer of all land leases with SBFN as well as any other transfer required for Contera to assume/take over Radka's position with respect to the Head Office and lands on which it was situated.

[13] After the execution of the Purchase Contract, Contera discovered that Radka and/or De La Ronde did not have the legal authority to transfer the land leases with SBFN and, therefore, was unable to transfer the property to Contera as agreed and in breach of the Purchase Contract.

[14] De La Ronde misrepresented the nature of his interest in the land on which the Head Office was situated and knew or ought to have known that neither he nor

[3] The Claim uses the terms Purchase Contract and Purchase Agreement interchangeably.

Radka had the authority to transfer the land leases. De La Ronde misrepresented his and/or Radka's[4] degree of control over the land and used these misrepresentations to induce Contera to enter into the Construction Contract and the Purchase Contract.

[15] Contera, unaware that De La Ronde's representations of his and/or Radka's control of the land were false, was reassured by De La Ronde's representations that he and/or Radka alone controlled the land. De La Ronde intended for Contera to rely on and be reassured by his representations concerning his and/or Radka's ability to control the land as an inducement to enter into the Construction Agreement and then as a way to resolve Radka's termination of the Construction Contract by entering into the Purchase Contract.

[16] Radka and/or De La Ronde failed to meet obligations arising under both the Construction Contract and Purchase Contract. The defendants[5] breached the Construction Contract by failing to pay for the labour and materials of the plaintiff at the agreed-upon rate. The defendants breached the Purchase Contract by failing to ensure the property was transferred to the plaintiff in satisfaction of the debt obligations arising from the Construction Contract.

DECISION

[17] Subject to some deficiencies, for which I am prepared to grant the plaintiff leave to amend, I find that the Claim sets out a reasonable cause of action against both moving defendants for breach of contract and fraudulent misrepresentation.

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[4] Earlier in the Claim, the representation referred to concerns De La Ronde's control of the land. Later in the Claim, the reference is to De La Ronde and/or Radka's control of the land.

[5] From the context of the Claim, it does not appear that the reference to the defendants breaching the contracts was meant to include SBFN.

ANALYSIS

[18] The motion to strike is brought under Rule 25.11, which provides as follows:

> **25.11(1)** The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious;
> (c) is an abuse of the process of the court; or
> (d) does not disclose a reasonable cause of action or defence.

[19] The moving defendants seek to have the Claim struck against them on the grounds that it does not disclose a reasonable cause of action or, alternatively, that it is scandalous, frivolous or vexatious. In addition, they say it violates various rules of pleading including Rule 25.06(11) which provides as follows:

> Nature of act or condition of mind
> **25.06(11)** Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Failure to disclose a reasonable cause of action

[20] There is no dispute between the parties to the motion, and the law is quite settled, that for a claim to be struck under Rule 25.11(1)(d), it must be "plain and obvious" or beyond doubt, assuming the facts stated in the statement of claim can be proved, that there is no cause of action. Furthermore, it is a remedy that should be used sparingly and is only reserved for the "clearest of cases".

[21] In ***Grant v. Winnipeg Regional Health Authority***, 2015 MBCA 44, our Court of Appeals sets out the following description of the test at paras. 36 and 37:

> **36** The remedy of striking out a pleading, however, is to be used sparingly. It is reserved only for the "clearest of cases" (*Ellett and Kyte v. Qualico Securities (Winnipeg) Ltd. et al.* (1990), 64 Man.R. (2d) 318 at para. 6 (C.A.)). A claim or defence, or part thereof, should not be struck out unless the

> moving party demonstrates that it is "plain and obvious" that the cause of action or defence, as pleaded, is certain to fail (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, [2003] 3 S.C.R. 263).
>
> **37** On a motion to strike, the claim or defence should be read generously notwithstanding any imprecision in the language used in it. Factors such as the novelty of a claim or defence, the length or complexity of the issues raised by it, or the likelihood that the opposing party has a strong position that will likely defeat the claim or defence are not reasons alone to strike out the pleading (*Hunt* at p. 980). If a claim or defence has a reasonable prospect of success, it should not be struck out (*Imperial Tobacco Canada Ltd.* at para. 17; *Driskell v. Dangerfield et al.*, 2008 MBCA 60 at paras. 11-13, 228 Man.R. (2d) 116).

[22] Both parties to the motion rely on several authorities. I found two of them to be the most useful to my analysis, namely: ***Fasteners & Fittings Inc.***, 2020 ONSC 1649 ("***Fasteners***"), relied upon by the moving defendants, and ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 129 ("***Caspian***"), relied upon by the plaintiff.

The Causes of Action

[23] The moving defendants articulate the causes of action against them as breach of contract and misrepresentation/fraud in the inducement. The plaintiff says that the Claim adequately sets out causes of action for the breach of contract and the tort of fraudulent misrepresentation. Given that the plaintiff's position is that the Claim adequately sets out a reasonable cause of action for the tort of fraudulent misrepresentation, my analysis will be from that perspective.

Breach of Contract

[24] The Claim alleges breach of contract against both moving defendants regarding both the Construction Contract and the Purchase Contract.

[25] There are six elements that must be pled with sufficient material facts in order to plead breach of contract properly: (1) the nature of the contract, (2) the parties to the contract, (3) privity of contract between the plaintiff and defendant, (4) the relevant terms of the contract, (5) which term was breached; and (6) the damages that flow from the breach. (See ***Fasteners*** at para. 91.)

[26] The moving defendants say there is no reasonable cause of action for breach of contract against De La Ronde. There is no allegation of privity of contract between the plaintiff and De La Ronde or an existing contract alleged to which the plaintiff and De La Ronde are parties. There is no assertion that De La Ronde contracted in his personal capacity; rather, the Claim pleads that these contracts were entered into by De La Ronde "on behalf of" Radka.

[27] While the plaintiff acknowledges that there is no allegation that De La Ronde was a party to either contract, it takes the position that it is not plain and obvious that the plaintiff's claim against De La Ronde for breach of those agreements must fail. It is the plaintiff's position that because De La Ronde was the sole directing mind of Radka, as well as the executive director of Sandy Bay CFS, and given the allegations of fraudulent misrepresentation, this gives rise to a potential lifting of the corporate veil concerning De La Ronde's involvement in these matters.

[28] While De La Ronde was at all material times the sole director of Radka, at law, that does not mean that personal liability will flow through the corporation to De La Ronde even if De La Ronde, as its "directing mind", caused Radka to breach either of the contracts. On the contrary, directors and officers of a corporation are not liable

for their corporation's breach of contract when acting in the normal course of business of the corporation. (See ***Fasteners*** at para. 18).

[29] The plaintiff says this is an appropriate case to "pierce the corporate veil" and relies on ***Caspian*** and in particular, paragraphs 34 to 36, which provide as follows:

> **34** When I consider the defendants' arguments under this category of objection, I have noted that, pursuant to the City's theory, the Caspian Defendants, for example, are alleged to have acted, for all intents and purposes, as a single entity in altering invoices and quotes, creating false invoices and quotes and submitting them to the City as legitimate. In the context of that allegation, the City contends, in the present case, that the corporate veil ought to be pierced. While the City acknowledges that as a general rule, a corporation is a distinct legal entity, they accurately note that courts have recognized that the separate identities (either of the parent company or its subsidiary or of a corporation and its officers, directors or shareholders) can be disregarded in some circumstances. The circumstances in which the piercing of the corporate veil may take place was discussed in the Ontario Court of Appeal decision of ***Yaiguaje v. Chevron Corporation***, 2018 ONCA 472 (CanLII) ("***Chevron***") where the Court confirmed the applicable test. It was noted in ***Chevron*** at paras. 36 and 66 that a party must establish that:
>
> > a) there is a complete domination of the corporation such that it does not function independently or it is a mere puppet of either the parent company or the individual (as the case may be); and
> >
> > b) the corporation was incorporated for a fraudulent or improper purpose or used as a shell for fraudulent or improper conduct.
>
> **35** In respect of the above factors, the City has alleged in para. 78 of its statement of claim that the contractor principals controlled and were the directing minds of the contractors, and the consultant principals controlled and were the directing minds of the consultants, and that the contractors and consultants were used to perpetrate the fraudulent Scheme. Given the theory of the City and the manner in which the City seemingly intends to prosecute its claim, it is not unreasonable for the City to suggest that insofar as there is any so-called lumping together of the defendants, it is because the City is alleging that they are in an identical relationship vis-à-vis the City. Given the facts pleaded by the City respecting how the Scheme was perpetrated, any blanket allegations made against the defendants are similarly not unreasonable.
>
> **36** The jurisprudence would seem to suggest that there are cases and circumstances where the lumping together of defendants does not represent a deficiency and indeed, such a manner of pleading may even be appropriate. See ***Europro (Kitchener) Limited Partnership v. Dream Office Real Estate Investment Trust***, 2018 ONSC 7040 (CanLII) ("***Europro***") at para.

> 32. Such an approach seems particularly viable and appropriate where, as in the present case, the City's theory asserts that the contractors and the contractor principals similarly misrepresented the fraudulent or inflated quotes, invoices and change orders to the City as true and accurate. In such circumstances "it is not improper to place them together in the same paragraph" (at para. 35).

[30] Courts are cautious about piercing the corporate veil. However, it is not for me to determine the merits of doing so on this motion, rather, I am to determine if the plaintiff has set out the requisite elements in the Claim to seek this relief.

[31] The moving defendants rely on several cases in support of their position that the plaintiff cannot ask the court to pierce the corporate veil where this relief is not pled in the Claim (See: ***Millar v. 1189691 Alberta Ltd.***, 2010 ABQB 297, ***Laurier Glass Ltd. v. Simplicity Computer Solutions Inc.***, 2011 ONSC 1510 and ***Growth Capital Corp. v. 2221448 Ontario Inc. d.b.a. Caliber Express***, 2020 ONSC 1880). They say that because the Claim does not set out the phrase "pierce the corporate veil" or any articulation of a similar concept of relief, the claim against De La Ronde for breach of contract must fail.

[32] Upon review, it is apparent that the courts in those cases cited by the moving defendants were not satisfied that the relief of piercing the corporate veil was pled. However, the cases are not very specific in what must be pled to ask the court for this relief. For example, must the claim expressly ask for the corporate veil to be pierced, or is it sufficient that the necessary elements from ***Chevron***, as described in ***Caspian***, are set out in the Claim?

[33] In ***Caspian***, the statement of claim alleged that the principals of certain corporations controlled and were the directing minds of those corporations and that the corporations were used to perpetrate a fraudulent scheme.

[34] The paragraph of the ***Caspian*** statement of claim is summarized in the decision, though not set out in its entirety. It is helpful in the present analysis to consider exactly what was set out in that claim. Para. 78 of the ***Caspian*** claim states as follows:

> 78. At all material times, the Contractor Principals and the Consultant Principals were the ultimate owners and directing minds of the Contractors and/or the Consultants and perpetrated and controlled the Scheme described herein. The City pleads that the Principals, in perpetrating the Scheme, are personally responsible for their own tortious and/or fraudulent conduct and that the Contractors and the Consultants are jointly and severally liable for such tortious and/or fraudulent conduct, both directly and indirectly.

[35] The court found as follows at para. 68:

> 68 Given the theory of the City and the submissions being made on this motion, I am not persuaded the defendants can rely upon the above position to pre-empt the related allegations in the City's claim. For the purposes of this motion to strike, I am persuaded by the City's position, which insists that these allegations do indeed contain a reasonable cause of action against the personal defendants insofar as the City has pleaded that the corporate veil should be pierced such that they would be jointly and severally liable with the corporate defendants for the breaches of contract. Whether the corporate veil is to be pierced will be decided in due course as will any connected determinations respecting liability. At this stage, however, it is not possible to persuasively argue on the basis of the pleadings that this aspect of the City's claim can be definitively seen to disclose no reasonable cause of action.

[36] I have reviewed the ***Caspian*** claim and have confirmed that nowhere in the claim are the words "pierce the corporate veil", or words to that effect, used in the pleading. Nevertheless, the court was satisfied that the City had pled that the corporate veil should be pierced such that the personal defendants could be found

to be jointly and severally liable with the corporate defendants for breaches of contract.

[37] Accordingly, I find that the lack of express wording "pierce the corporate veil", or words to that effect, does not in and of itself mean that the Claim does not disclose a reasonable cause of action for breach of contract against both the personal and corporate defendant in this case.

[38] ***Fasteners*** is an example of a decision where the plaintiff's claim for breach of contract against individual defendants such as directors was struck without leave to amend. The court found no privity of contract between the plaintiff and directors of the corporations that had contracted with the plaintiff. It found that the claim did not plead the material facts necessary to advance claims against the individual defendants in their personal capacities. There was nothing pled to support an allegation of conduct by the individual defendants that was either tortious itself or that exhibited a separate identity of interest from that of the corporations. While the plaintiff alleged that the personal defendants had committed the tort of fraudulent misrepresentation, the court found no valid claim against them personally because their representations were made only as representations of their respective corporations.

[39] What distinguishes ***Fasteners*** from the present case, is that here, the Claim alleges that the personal defendant misrepresented the nature of his and/or the corporation's interest in the land. That is to say, De La Ronde was making representations not only about Radka's interests but also his own. Further, De La

Ronde is alleged to have a separate identity from that of Radka, namely, that he was the Executive Director of Sandy Bay CFS. In my view, that interest is relevant given that the Construction Contract was for the construction of the Head Office for Sandy Bay CFS, and the Purchase Contract purported to transfer ownership of the Head Office to the plaintiff including the transfer of all land leases with SBFN. Therefore, the Claim supports an allegation of conduct by De La Ronde that is itself tortious and that exhibits a separate identity from that of Radka.

[40] The Claim alleges that De La Ronde represented that he and/or Radka alone controlled the land and alleges that De La Ronde misrepresented his and/or Radka's degree of control over the land and used those misrepresentations to induce Contera to enter into both the Construction Contract and Purchase Contract. The Claim also alleges that De La Ronde knew or ought to have known that neither he nor Radka had the authority to transfer the land leases. Finally, the Claim alleges that after the execution of the Purchase Contract, Contera discovered that Radka and/or De La Ronde did not have the legal authority to transfer the land leases with SBFN and, therefore was unable to transfer the property to Contera as agreed and in breach of the Purchase Contract. I find that the degree of detail set out in the Claim sufficiently alleges that Radka was used as a shell for fraudulent or improper conduct.

[41] Nevertheless, while I am prepared to find that it is not necessary to use the phrase "pierce the corporate veil" (albeit that might be good practice), I find that the Claim falls short of properly setting out the relief. In ***Caspian***, while the words "pierce the corporate veil" are not expressly stated, the claim does go further than

the present Claim by pleading the relief that should flow from such a finding. In particular, the ***Caspian*** claim pleads that certain personal defendants in perpetrating the fraudulent scheme are personally liable and that the corresponding corporate defendants are jointly and severally liable for such tortious and/or fraudulent conduct, both directly and indirectly. Also, at the outset of the clam where the personal defendants are identified, it states that they were directing minds of their respective corporations and were personally involved in and responsible for the acts, omissions and breaches alleged in the claim. The plaintiff also pled and relied upon the provisions of *The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90.

[42] I find that the present Claim falls short in properly pleading the relief of piercing the corporate veil. If the plaintiff wishes to pursue its claim against De La Ronde for breach of contract, it must amend its claim to allege that De La Ronde is liable, along with Radka, for the breaches of the contract. Leave is granted for the plaintiff to do so, failing which, the claim for breach of contract against De La Ronde will be struck for failure to disclose a reasonable cause of action.

Fraudulent Misrepresentation

[43] In ***Fasteners***, the court sets out the elements and particulars of a fraudulent misrepresentation claim as follows at paras. 119 and 120:

> **119** The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages.

> **120** The particulars of a fraudulent misrepresentation claim are: (a) the misrepresentation; (b) the when, where, how, by whom and to whom the statement was made; (c) its falsity; (d) the defendant knowing the statement to be false or being reckless about the truth or falseness of the statement; (e) the defendant's intention that the plaintiff should rely upon the statement; (f) the plaintiff detrimentally relying on the statement; and (g) resulting loss or damage to the plaintiff.

[44] The moving defendants say that the Claim does not disclose a reasonable cause of action against either of them for fraudulent misrepresentation. Further, they say the Claim does not allege the necessary particulars required under Rule 25.06(11) for a claim of this nature.

[45] Before addressing whether the Claim discloses a reasonable cause of action for fraudulent misrepresentation, including whether such a claim is properly particularized, I will comment on the claim being made against both moving defendants.

[46] In ***Fasteners***, the court struck the claim for fraudulent misrepresentation against several personally named defendants who were owners, officers, directors and employees of two of the defendant corporations. As noted earlier, the court found that their representations were made only as representatives of the corporations. There were no material facts to support an allegation of conduct by the individual defendants that was either tortious or exhibited a separate identity of interest from that of the corporations. For the reasons set out above, the facts of this case are distinguishable. I find that the Claim sets out that De La Ronde was not only making representations as the representative of Radka but also on his own behalf based on his personal interest in the land. In addition, he was also the executive director of Sandy Bay CFS, which I find to clearly be a separate identity of

interest from that of Radka. The degree of connection between the plaintiff and either of the moving defendants is a matter for evidence at the trial.

[47] To the extent that there is some lumping together of the moving defendants regarding this cause of action, I find that, like in ***Caspian***, this does not require that the Claim be struck. The questions of whether fraudulent representations were made by De La Ronde on behalf of himself and/or on behalf of Radka, and in particular, whether Radka was used for fraudulent or improper conduct, are issues to be determined at trial. I am satisfied, subject to my analysis on whether there are full particulars provided, that De La Ronde and Radka can adequately respond to the Claim.

[48] The moving defendants say that the Claim must be struck for no cause of action because the plaintiff cannot succeed in a claim against the defendants for fraudulent misrepresentation because it is "manifestly incapable of being proven." They say that upon examination of the Claim and the contracts incorporated into it by reference, that it is plain and obvious that Contera's accusations against them relating to misrepresentation are manifestly incapable of being proven.

[49] The Purchase Contract states at section 18 that:

> 18. This offer contains all of the promises, agreements, representations, warranties and terms between the parties relating to the transaction hereby contemplated, and:
> a) Anything not included in writing in this Offer will have no force or effect;
> b) Any amendment made to this Offer will have no force or effect unless it is in writing and signed by each party hereto;
> c) In making this Offer, the Purchasers rely entirely on Purchasers; personal inspection of the property and the Vendors' promises contained (and only those contained) in this Offer.

[50] The moving defendants say, therefore, that the plaintiff has pled a signed agreement containing explicit terms that render impossible Contera's allegations that they made misrepresentations outside of the Purchase Contract and that such misrepresentations were relied upon by Contera. They say that only a breach of contract claim against Radka should be permitted to remain since the contract contains all of the promises, representations etc., contemplated by the parties.

[51] The case law does provide that pleadings are assumed to be true unless they are "manifestly incapable of being proven" (see ***Knight***). However, I am not prepared to strike the Claim on this basis. I am not persuaded that where, as here, fraudulent misrepresentation is alleged it is plain and obvious that there is no cause of action because a written contract says that the document contains all representations between the parties. That may be an issue for summary judgment but is not to be determined on a motion to strike.

[52] I will now turn to of whether the Claim sets out all of the elements of the tort of fraudulent misrepresentation and if it is properly particularized. I find that all of the elements for a claim of fraudulent misrepresentation are set out in the Claim. Specifically:

(1) A false statement: the Claim alleges that De La Ronde misrepresented his and/or Radka's degree of control over the land (see paragraph 13).

(2) Defendants' knowledge that the statement was false: the Claim alleges that De La Ronde knowingly misrepresented the false statement (see paragraph 13).

(3) Intention to deceive: the Claim alleges that De La Ronde intended for Contera to rely on and be reassured by his representations concerning his and/or Radka's ability to control the land (see paragraph 14).

(4) False statement is material and induced the plaintiff to act: the Claim alleges that the false statements induced the plaintiff to enter into the Construction Agreement and that they were relied upon by the plaintiff in entering into the purchase agreement (see paragraphs 15 and 16).

(5) Detrimental reliance and damages: the Claim sets out that the plaintiff has relied upon the misrepresentations to its detriment and has suffered damages (see paragraph 16).

[53] Paragraph 120 of ***Fasteners*** sets out the requirements for the particulars for fraudulent misrepresentation. In addition to the elements already referred to above, the particulars of fraudulent misrepresentation are listed as the when, where, how, by whom and to whom, the statement was made.

[54] The moving defendants say that the Claim falls very short in particularizing the alleged fraudulent misrepresentation and that the Claim in that regard should be struck against both of them without leave to amend because the plaintiff has already amended the Claim once.

[55] My findings on these particulars are as follows:

By Whom

[56] The Claim says that De La Ronde made the representations. For the reasons already articulated I find that the moving defendants can respond to this allegation even if they are lumped in together in the sense that such a representation is alleged to have been made on behalf of De La Ronde and/or Radka.

To Whom

[57] The Claim says that the representations were made to the principals of Contera. The moving defendants say this is too vague, that they are entitled to know the names of the representatives of Contera to whom the representatives were

made. In its brief, the plaintiff states that the representations were made to "the principals of Contera with whom De La Ronde was negotiating contracts, and who ultimately were the signatures to these agreements." Accordingly, I find that at a minimum, the Claim ought to set out that further degree of particularization, which presumably will enable the defendants to identify the names of the Contera principals to whom the representations were made.

When

[58] The Claim says at paragraph 13 that the misrepresentations were made "from the outset of discussions with Contera, and again upon termination of the Construction Contract and the execution of the Purchase Agreement." Later in that paragraph, it also says that the representations were made "throughout the negotiations surrounding the execution of both the Construction Contract and the Purchase Agreement."

[59] In its brief, the plaintiff says the Claim sets out three distinct times, namely:

i. at the outset of discussions, meaning prior to the execution of the Construction Contract;
ii. upon termination of the Construction Contract; and
iii. upon execution of the Purchase Contract.

[60] The particularization by the plaintiff in its brief is inconsistent with paragraph 13 of the Claim, in particular with the last sentence which says, "throughout the negotiations surrounding the execution of both the Construction Contract and the Purchase Agreement." If there are three distinct times, those should be particularized in the Claim.

[61] As for "from the outset of discussions with Contera", the plaintiff says in its submissions that this means prior to the execution of the Construction Contract. The fact that some explanation is needed suggests that "the when" is not properly particularized. I agree with the moving defendants that "from the outset of discussions with Contera" is vague. At paragraph seven, the Claim states that the Construction Contract was entered into on or about May 14, 2018. There is reference in that paragraph to reliance on a representation by De La Ronde when the Construction Contract was entered into on May 14, 2018. In my view, the plaintiff must be as specific as it can about when prior to the execution of that contract the representation was made. At paragraph six of the Claim, the plaintiff says that it was contacted by De La Ronde on or around 2018 and that Contera submitted a quote to Radka on or about March 29, 2018. While I am not prepared to say that a specific date is necessary, at minimum, the plaintiff must clarify in the Claim that the representation was prior to the execution of the Construction Contract in May 2018 and must be as specific as it can be as to when it was made.

[62] As to the second time, namely "upon termination of the Construction Contract", the Claim says that the Construction Contract was terminated on June 11, 2021. Accordingly, I find that the timing is sufficiently particularized.

[63] As to the third time, namely "upon the execution of the Purchase Agreement", the Claim says that it was executed on June 11, 2021. Therefore I find that it too is properly particularized.

Where and How

[64] The Claim does not expressly state where or how the representations were made. I agree with the moving defendants that they should not be required to guess. The nature of the representations, in particular whether they were verbal or written, should be known to the plaintiff. It has already pled that the representations were made to the principals of Contera. If that was done verbally, then the plaintiff must set that out in the Claim. And, if it was a verbal representation, the plaintiff should provide particulars as to where the conversations took place.

[65] While it is true that the plaintiff has already amended its claim once, I do not find that as sufficient justification in this case to strike the pleadings without leave to amend. While I agree that more particulars are needed at the pleading stage, leave ought to be granted to the plaintiff to amend its Claim to provide further particulars regarding to whom, when, how and possibly where the representations were made. If the plaintiff can provide these further particulars, its claim for fraudulent misrepresentation can stand against both moving defendants.

[66] I find that it is not appropriate for me to go further regarding what exactly must be particularized. This is not a motion to consider whether the provision of particulars was properly made. In that case, the court would consider why the defendants say they need further particulars and the plaintiff's reasons for refusing to provide the particulars, and decide whether further particulars are warranted. Even though Rule 25.06(11) requires full particulars, the same level of analysis is

not possible on a motion to strike for no cause of action because no evidence can be considered by the court on such a motion.

[67] I have set out the areas where I find that the particulars are lacking and have given the plaintiff leave to amend. This will not prevent the moving defendants from seeking further particulars if they are of the view that they require something further to respond.

Failure to follow the rules of pleading

[68] The moving defendants also allege that the Claim fails to follow the rules of pleading. For example, they say that the following sentence from paragraph 15 of the Claim is improper and ought to be struck without leave to amend:

> There was no purpose for Contera to enter into the Purchase Agreement if it would not be able to take control of the land upon which the building was situated.

[69] The moving defendants say this is evidence in the form of argument. They also say it is conjecture, does not advance any of the plaintiff's claims, and is contradicted by paragraph 11 of the Claim which states in part:

> The Plaintiff entered into the Purchase Contract in order to allow for direct negotiation with the community so that the building could be completed…"

[70] The plaintiff denies that this sentence is argumentative or contradictory. It says it is a material fact that supports its reliance on the misrepresentations of De La Ronde to its detriment, a required element of the cause of action in fraudulent misrepresentation.

[71] I agree with the plaintiff that the statement is appropriate given the need for it to adequately particularize its claim. The plaintiff must establish that the

representation was material and induced it to act. Nor do I see it as inconsistent with the statement at paragraph 11 of the Claim.

[72] The moving defendants also seek to strike certain portions of the Claim because it contains inconsistencies. These allegations relate primarily to the alleged breaches of the two contracts. The moving defendants say it is incompatible for the plaintiffs to allege that they breached the Construction Contract yet also plead that the Purchase Contract was in satisfaction of all amounts due and owing under the Construction Contract.

[73] While there may be a live issue as to the appropriate remedy if breaches of either contract are found, I do not find that the plaintiffs are precluded from alleging that both contracts were breached by Radka. Even if the Purchase Contract was "in satisfaction of all amounts due and owing by Radka to Contera under the terms of the Construction Contract" as pled at paragraph 11 of the Claim, it is not plain and obvious that there is no remedy for breach of the Construction Contract, particularly where, as alleged here, the Purchase Contract was also breached.

[74] In my earlier analysis, I have already noted an inconsistency between earlier and later positions of the Claim relating to De La Ronde representing only his interest in the land versus his and/or Radka's interest in the land. While I am not satisfied that this would be fatal to the Claim, the plaintiff should take the opportunity afforded with leave to amend to correct that inconsistency as well as the other minor deficiencies noted by the footnotes in these reasons.

The claim is scandalous, frivolous and vexatious or an abuse of process

[75] The moving defendants submit that the Claim is an abuse of the court's process and consists of allegations that are scandalous, frivolous and vexatious pursuant to Rule 25.11(1)(b) and (c). They say that Contera has included De La Ronde as a defendant to harass him and bring media attention and public pressure against him. They say it has brought legal claims without justification against De La Ronde that it should have known had no hope of success

[76] I am not satisfied on the evidence presented that the Claim is scandalous, frivolous or vexatious or an abuse of the process of the court. While the moving defendants assert that bringing the Claim against the defendant De La Ronde personally was done to cause embarrassment and harm to him, and to gain attention and to assert pressure on the moving defendants, I do not accept this to be the case. I am not satisfied with that assertion based on the evidence presented, and particularly given my findings that the Claim does disclose a reasonable cause of action against De La Ronde.

CONCLUSION

[77] While I found the Claim to be deficient in a few areas, I grant the plaintiff leave to amend the Claim to correct these deficiencies. The plaintiff is granted leave to amend as follows:

1. To better plead the relief of piercing the corporate veil. In particular, to set out that De La Ronde is liable for the breaches of contract by Radka.

2. To better particularize the Claim for fraudulent misrepresentation, in particular with respect to whom, when, how and possibly where the representations were made.
3. To eliminate the inconsistency that the Claim alleges in some paragraphs that the representation was only concerning De La Ronde's interest in the land, whereas in others, it refers to De La Ronde and/or Radka's interest.
4. To correct what appear to be minor typographical errors.

[78] The amendments must be made within 30 days following the date of the Order, failing which, the Claim against De La Ronde will be struck in its entirety, and the Claim against Radka will be struck with respect to fraudulent misrepresentation.

[79] Success on the motion was mixed and I direct that costs for the motion shall be in the cause.

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J. L. Goldenberg
Associate Judge