Date: 20210625
Docket: CI 20-01-27163
(Winnipeg Centre)
Indexed as: *Howardson v. 7273887 Manitoba Inc. et al.*
Cited as: 2021 MBQB 148

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Appearances:
KURTIS HOWARDSON and	)	
JENNIFER THORKELSON,	)	J.R. Norman Boudreau and
	)	John J.R. Isfeld,
plaintiffs,	)	for the plaintiffs
	)	
- and -	)	Chad M. Penner,
	)	for the defendants 7273887 Manitoba
7273887 MANITOBA INC. operating as	)	Inc., o/a TTH Property
TTH PROPERTY DEVELOPMENT	)	Development General Contractor
GENERAL CONTRACTOR, SCOTT	)	and Scott Howardson
HOWARDSON, NIKKI KAGAN,	)	
McROBERTS LAW OFFICE LLP, WESTERN	)	Celia C.S. Fergusson and
INTERLAKE PLANNING DISTRICT, and	)	Amelia M. Peterson,
CANADIAN IMPERIAL BANK OF	)	for the defendant Western Interlake
COMMERCE,	)	Planning District
	)	
defendants,	)	
	)	
- and -	)	
	)	
FLOYD JONES, DWIGHT McGILLAN,	)	
NICHOLAS HALOWADY, RUSSELL	)	
McLEAN operating as RUSSELL	)	
CONSTRUCTION and the said RUSSELL	)	
CONSTRUCTION, RUSLAN BOBELYAK,	)	
RUSLAN BOBELYAK operating as	)	
RUSLAN CONSTRUCTION, and the said	)	
RUSLAN CONSTRUCTION,	)	
	)	JUDGMENT DELIVERED:
third parties.	)	June 25, 2021

SUCHE J.

[1] This is a motion by Western Interlake Planning District ("WIPD") for summary judgment. WIPD argues that both the action and the crossclaim by TTH Property Development General Contractor ("TTH") and Scott Howardson ("Scott"), should be dismissed as the action is statute barred by s. 21(1) of ***The Public Officers' Act*** [1] ("s. 21(1)").

BACKGROUND

[2] The action concerns construction of the plaintiffs' residence located in the Rural Municipality of Coldwell ("Coldwell"). TTH was the general contractor on the project, and Scott is its principal. Coldwell is one of several municipalities within WIPD which is responsible for administration and enforcement of development plans and building by-laws for its member municipalities. Wayne Thorkelson ("Thorkelson"), who is Jennifer Thorkelson's uncle, is employed as a building inspector by WIPD. He conducted numerous building code inspections on the residence.

[3] The plaintiffs allege breach of contract and negligence against TTH and Scott in construction of the residence. The action against WIPD is based on vicarious liability for Thorkelson, whom the plaintiffs claim was negligent. TTH and Scott's crossclaim seeks contribution from WIPD pursuant to ***The Tortfeasors and Contributory Negligence Act*** [2].

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[1] C.C.S.M. c. P230.
[2] C.C.S.M. c. T90.

FACTS

[4] In 2016, the plaintiffs obtained a building permit from WIPD and construction of their residence ensued. Numerous building code inspections were carried out by Thorkelson between October 2016 and January 2018. On at least the last inspection, and perhaps others, he identified deficiencies.

[5] By January or February 2018, the plaintiffs had developed concerns regarding the construction. They hired an independent inspector to review the project. The resulting report dated February 19, 2018 ("the Holmes Report") identified various building code violations, as well as other deficiencies in workmanship and defects in the construction.

[6] On March 14, 2018, the plaintiffs advised WIPD that Scott was no longer associated with the project and directed WIPD to only communicate with them.

[7] The plaintiffs gave WIPD a copy of the Holmes Report in early March. Shortly thereafter, Thorkelson spoke to members of the WIPD board who decided that due to the relationship between Thorkelson and Jennifer Thorkelson, an outside inspector should conduct any further inspections of the project. As a result, WIPD engaged Ken Cutts ("Cutts"), a building inspector from another municipality. Cutts inspected the residence on March 15, 2018, at which time he identified several building code deficiencies. He delivered his report regarding his inspection ("the Cutts Report") to WIPD on April 4, 2018. A copy was provided to the plaintiffs on April 6, 2018.

[8] In his report, Cutts referenced the Holmes Report and indicated his agreement with its findings. He noted, however, that his report was limited to consideration of compliance with the Manitoba Building Code and WIPD's plumbing code.

[9] Cutts' inspection was the last inspection of the residence by WIPD.

[10] Meanwhile, Scott contacted WIPD on April 3, 2018 asking that a final inspection be conducted. He inquired as to when the Cutts Report would be available. WIPD's response was that when the report was completed, he would have to get a copy from the plaintiffs. WIPD also advised that no further inspections of the residence would be conducted until all deficiencies were remedied.

[11] Scott ultimately obtained a copy of the Cutts Report through a ***FIPPA*** request to WIPD under ***The Freedom of Information and Protection of Privacy Act*** [3].

[12] The plaintiffs continued to see problems with construction of the residence and in May 2019, they obtained a report from Dana Bell, the engineer who had prepared the initial drawings. A few months later, they consulted RAM Engineering which issued a report in August 2019.

[13] Since March 2018, the plaintiffs have communicated with WIPD about various issues regarding the project, but they have not asked it to conduct any further inspections. WIPD has said on several occasions that it will not conduct

[3] C.C.S.M. c. F175 ("***FIPPA***").

any further inspections until the deficiencies are remedied. There is no evidence that this has been done. In fact, the plaintiffs have since vacated the residence.

SUMMARY JUDGMENT

[14] Queen's Bench Rule 20.03(1) requires a judge to grant summary judgment if satisfied that a trial is not required to determine any of the issues raised in the action.

[15] In ***Hryniak v. Mauldin*** [4] the Supreme Court of Canada held that:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[16] The long accepted test for summary judgment was described in the oft-quoted case of ***Homestead Properties(Canada) Ltd. v. Sekhri et al.*** [5]:

> [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. When the defendant moves, as here, he must prove, on a *prima facie* basis, that the plaintiff's action must fail. If he meets that burden, then the plaintiff has the burden to establish that there is a genuine issue for determination. …

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[4] 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 49 and 50.
[5] 2007 MBCA 61, 214 Man. R. (2d) 148 at para. 14 ("***Homestead Properties***").

[17] Recently, the Manitoba Court of Appeal in ***Dakota Ojibway Child and Family Services et al. v. MBH***[6] concluded that the above test continues to apply to summary judgment motions, notwithstanding changes to the rules in 2018. It also confirmed that the "burdens" referred to in ***Homestead Properties*** are evidentiary burdens placed on each party. The moving party maintains the legal burden of establishing that there is no genuine issue requiring a trial[7].

[18] A fundamental principle in the summary judgment process is that if facing persuasive evidence from the moving party, the responding party must put their best and strongest case before the court. This requirement to "put their best evidentiary foot forward"[8] was explained in ***Homestead Properties***:

> [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), 1992 CanLII 2769 (MB CA), 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. …

ANALYSIS

[19] As noted at the outset, the issue before me is whether this action is statute barred under s. 21(1) which reads:

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[6] 2019 MBCA 91, 438 D.L.R. (4th) 693 at para. 73 ("***DOCFS***").
[7] ***DOCFS*** at para. 77.
[8] *See* Garry D. Watson, *Holmested and Watson: Ontario Civil Procedure* (Toronto: Thomson Reuters, 1998) (loose-leaf updated 2019), Commentary on the Rules of Civil Procedure at Rule 20, pt C, section 9, as quoted in ***DOCFS*** at para. 78.

> **Limitation of actions against public officials**
> **21(1)** No action, prosecution, or other proceedings lies or shall be instituted against a person for an act done in pursuance or execution or intended execution of a statute or of a rule or regulation made thereunder, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty, or authority, unless it is commenced within two years next after the act, neglect, or default complained of, or in case of continuance of injury or damage, within two years next after the ceasing thereof.

[20] A number of issues were raised at the hearing of this motion to which considerable attention was paid by counsel. In the end, however, I am satisfied that only two questions need to be answered, namely:

1. Is WIPD a person within the meaning of s. 21(1)?

2. Is this a case of continuance of injury or damages?

[21] Only the plaintiffs argue that WIPD is not "a person" within the meaning of s. 21(1). However, TTH and Scott join with them in arguing that the action against WIPD involves a claim for continuing damages.

Is WIPD a Person?

[22] Planning authorities are creatures of ***The Planning Act***[9], s. 18(1) of which states:

> **Corporate status**
> 18(1) A planning district is a corporation and, subject to this Act, has all the rights, powers and privileges of a natural person for the purpose of carrying out and exercising its duties and powers under this Act.

[23] Further, ***The Interpretation Act***[10] defines "person" to include a corporation and the heirs, executors, administrators or other legal representatives of a person.

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[9] C.C.S.M. c. P80.
[10] C.C.S.M. c. I80.

[24] My view is that by virtue of s. 18 of ***The Planning Act***, a planning district falls within the meaning of "person" in s. 21(1). This interpretation is reinforced by the meaning of "person" in ***The Interpretation Act.***

[25] In addition, the Manitoba Court of Appeal, on several occasions, has concluded that a municipality is "a person" within the meaning of s. 21(1) on the basis of ***The Interpretation Act***. (see ***Koshurba v. Rural Municipality of North Kildonan and Popiel***[11]; ***Welbridge Holdings Ltd. v. Greater Winnipeg*** [12]; and ***Bellemare v. La Caisse Populaire de Saint-Boniface Ltee. et al.***[13]) While a planning district is not a municipality, the same reasoning applies.

[26] Quite clearly then WIPD is a person within the meaning of s. 21(1).

Is this a Claim for Continuous Injury or Damage?

[27] It is well established in law that a claim for continuous injury or damages is based on continuous or repetitive wrongful acts rather than a single act with continuing effects or consequences. As Philp J.A. stated in ***Manitoba v. Manitoba Human Rights Commission***[14], a case where the plaintiffs alleged discrimination as a result of compulsory retirement:

> [18] …. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.
>
> [Emphasis in original]

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[11] (1965), 52 D.L.R. (2d) 84, 53 W.W.R. 380, 1965 CanLII 601 (MBCA).
[12] [1971] S.C.R. 957.
[13] 2001 MBQB 25, 154 Man. R. (2d) 103.
[14] (1984), 25 Man. R. (2d) 117 (C.A.), as quoted in ***Corbett v. Ainley et al.***, 2007 MBCA 140, 220 Man. R. (2d) 250.

[28] A similar definition can be found in the Supreme Court of Canada's decision in ***Roberts v. City of Portage La Prairie*** [15]:

> I adopt the proposition of law stated in *Salmond on Torts,* 15th ed., at p. 791, as follows:
>
> > When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. …

[29] Thus, actions in nuisance, trespass or wrongful imprisonment, are all claims involving continuous injury. Each day the situation goes unremedied amounts to a new cause of action.

[30] It is worth noting that it is not the cause of action, but rather the nature of the duty that is the essential feature of a continuing injury. So, for example, in ***Huyton and Roby Gas Co. v. Liverpool Corp.***[16], which is relied on by TTH and Scott, the defendant municipality dug a trench for the purpose of installing water pipes. Its incorporating legislation required it to repair any streets damaged by such activity. The section of the statute said:

> When the undertakers open or break up the road or pavement of any street … they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground and reinstate and make good the road or pavement… broken up.[17]

[31] As it happened, Liverpool's employees did not properly replace and repack the soil with the result that the plaintiffs' gas pipes broke. The court held that

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[15] [1971] S.C.R. 481 ("***Roberts***") at p. 491, as quoted in ***Joyce et al. v. Government of Manitoba***, 2018 MBCA 80 at para. 69.

[16] [1926] 1 K.B. 146 ("***Huyton***").

[17] ***Huyton*** at 15, as quoted in ***Inhat v. Jenkins***, [1972], 3 O.R. 629 (C.A.).

Liverpool's default continued until the work was properly completed. Thus, the claim was for a continuing injury.

[32] Here, the claim against WIPD is based on its vicarious liability for negligence of an employee, specifically, Thorkelson's alleged negligence in conducting building code inspections. It may be that Thorkelson's negligence, if proved, has had continuing effects or consequences. However, I am satisfied that the act of default itself, to use the phrase adopted in ***Roberts***, is "wholly past". It is not a continuing injury.

[33] As to the date that the negligence occurred, the evidence is that Thorkelson's last inspection was in January 2018. The last inspection by WIPD, which was completed by Ken Cutts, was on March 15, 2018. The statement of claim was not issued until May 2020.

[34] On this point, the plaintiffs argued that a visit to the residence by two WIPD board members in September 2019 was the last date an act of neglect or default occurred. I was not told, however, what these individuals neglected or failed to do. Further, the evidence about this visit is very thin. Whatever their purpose, these individuals were not there to conduct an inspection. I also note this assertion is not in the statement of claim, and also contradicts Kurtis Howardson's admission on cross-examination that the last inspection done by WIPD was in March 2018. In the end, I see no merit in the argument.

[35] In addition, the plaintiffs allege that WIPD was negligent or otherwise in breach of its duty to them because it did not satisfactorily answer questions or

provide information to clarify its position that further inspections would not be done until defects had been remedied. They say this is an ongoing injury.

[36] Again, this allegation is not in the statement of claim and the plaintiffs have not asked to amend the claim. Nor should they, as even if such a duty existed (which they have not established), they have not provided any evidence to show they suffered any damage as a consequence of its breach. Accordingly, I reject this argument.

[37] TTH and Scott also argue that WIPD is in violation of its ongoing obligation to conduct a final inspection. They say that this is an ongoing default like that in ***Huyton***. The plaintiffs do not join in this argument.

[38] In support of this assertion, TTH and Scott point to Scott's e-mail to WIPD on April 4, 2018 asking that a final inspection be conducted. However, this was after the plaintiffs had removed Scott from the project, and told WIPD to communicate only with them. Very clearly, Scott was a stranger to the project by this point. He had no authority to request a final inspection. I need not go any further than this to conclude the argument is without merit.

[39] Several other arguments were raised by TTH and Scott, which I also find of no merit, including that Thorkelson had actively concealed defects from the plaintiffs.

[40] The only real issue raised in the claim against WIPD is whether Thorkelson was negligent in inspecting the project. The evidence presented shows that the last date of neglect or default was in January 2018, or perhaps March 15, 2018.

This was more than two years before the action was commenced. In conclusion, I find that the claim is statute barred by virtue of s. 21(1).

CROSSCLAIM BY TTH AND SCOTT

[41] The crossclaim is limited to a request for contribution and indemnity from WIPD pursuant to s. 2(1)(c) of ***The Tortfeasors and Contributory Negligence Act*** which provides:

> **Where damage suffered**
> 2(1) Where damage is suffered by any person as a result of a tort, whether a crime or not,
>
> ….
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person is entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[42] The law is well settled that where a crossclaim only seeks contribution, if the main action fails due to a limitation period, the crossclaim must fail. (see ***Parkland (County of) v. Stetar et al.***[18]; ***Carriere v. Fejes et al., Reid v. Ekair Inc. et al. and Nicol v. Ekair Inc. et al.***[19])

[43] In the result, I am satisfied that WIPD has established that no genuine issue exists in this action that requires a trial. The summary judgment motion has allowed me to make a fair and just determination on merits of WIPD's defence. I

[18] [1975] 2 S.C.R. 884.
[19] 2005 MBQB 273.

am allowing the motion and grant judgment dismissing both the action and the crossclaim as against WIPD.

[44] Costs may be spoken to if the parties are unable to agree.

_____ J.