CITATION: Jagosky v. Corporation of the Town of Huntsville, 2010 ONSC 4590
COURT FILE NO.: 03-B5374
DATE: 20100820

ONTARIO

SUPERIOR COURT OF JUSTICE

2010 ONSC 4590 (CanLII)

BETWEEN:	
ROBERT ORLAND JAGOSKY and ARLENE JAGOSKY Plaintiffs	R.A. Calder, Counsel for the Plaintiffs
– and –	
THE CORPORATION OF THE TOWN OF HUNTSVILLE Defendant	A.J. Heal and T. Robinson, Counsel for the Defendant
	HEARD: July 9, 2010

QUINLAN J.:

REASONS FOR DECISION

MOTIONS

[1] The plaintiffs, Robert Orland Jagosky and Arlene Jagosky (referred to collectively as "Jagosky") seek leave to amend their claim against the defendant Corporation of the Town of Huntsville ("Huntsville") to plead allegations of negligent issuance of a building permit and negligent inspection of the footings and foundations of their residential rental building during its construction from 1957 to 1959.

[2] In response, Huntsville brings a cross-motion for summary judgment to dismiss this action in whole or in part.

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OVERVIEW

[3] In 1957, the Town of Chafee, antecedent to Huntsville, issued a building permit for a residential rental building at 112 Main Street West in the Town of Huntsville. The building was completed by 1959. In 1959, when the Town of Chafee installed sewers on roads surrounding the property using a blasting method, Jagosky alleges that the building was damaged due to an explosion. Later that same year, the Town flooded the area's sewage system. One or both of these events is alleged to have caused visible structural damage to the building.

[4] Jagosky purchased the property in 1978. He was aware of the cracks on the building but believed them to be cosmetic in nature only.

[5] In the fall of 1987, work was done on adjacent roads.[1] At that time, the Municipality that completed the work placed an additional sixty inches of overburden on the subsoil in front of Jagosky's property while raising the roadbed on Main Street to replace water and sewer services. Following that work, the exterior cracks on the building appeared to be unchanged. Jagosky continued to be of the belief that the cracks were cosmetic as opposed to structural in nature. A number of inspections were conducted on the building from 1988 until 2009. On July 1, 2009, due to lack of structural integrity, Huntsville caused Jagosky's building to be demolished.

[6] In 2003, Jagosky issued a Statement of Claim claiming damages for property damage, lost income, and malicious prosecution against Huntsville. Subsequently, in 2008 the Statement of Claim was amended to delete the claim for malicious prosecution and to claim damages for misfeasance of public office.

[7] A Statement of Defence and Amended Statement of Defence were delivered. Examinations for discovery were held in March 2009.

[8] Jagosky obtained an engineering report (the "Giffin Koerth Report") in April 2009. Jagosky's position is that it was only upon receipt of the opinion in the Giffin Koerth Report that he became aware that the most probable cause of the settlement of the building was due to footings that did not extend beneath the frost line.

[9] Jagosky now seeks to amend his claim to plead new allegations of negligent issuance of a building permit and negligent inspection by Huntsville of the footings and foundations of the building from 1957 to 1959.

[10] Huntsville resists the amendment and seeks summary judgment on the basis that the claim for damage resulting from the 1959 works is statute-barred, the 1987 works were completed by the District of Muskoka and the allegations of misfeasance are not supported by any evidence. Accordingly, there is no genuine issue requiring a trial.

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[1] One of the issues before me is whether the 1987 works were done by Huntsville or the District Municipality of Muskoka.

RELEVANT DATES

[11] As the issue of limitation periods is at the forefront, I will outline the relevant dates below.

Date	Action or Event	Information Gleaned From Action or Event
1957	Building permit issued by Huntsville.	
1959	Construction on premises completed.	
1959	Sewers installed. Blasting done and flooding to the sewage system.	Building was damaged by way of cracks to the exterior.
1960	Settlement with construction company.	The previous owner of the premises settled an action for damages to the property with the contractor who carried out the work on behalf of the Town of Chafee, now Huntsville.
1978	Jagosky purchased the premises.	Jagosky was aware of the alleged damage, being cracks in the exterior walls of the building.
July 1987	Letter from District Municipality of Muskoka to Jagosky.	Muskoka informed Jagosky that they would be undertaking road construction on Main Street West in Huntsville.
1987	Work was done on adjoining roads, placing an additional 60 inches of overburden on the subsoil in front of Jagosky's property.	The exterior cracks on the building appeared to be unchanged.
January 27, 1988	Mr. McEachern, Building Inspector for Huntsville, conducted a visual inspection of the building, both exterior and interior.	Six cracks were noted, none of which appeared recent, with no indication that any of the cracks were worsening. Concrete block foundation walls were free from any cracks or block separation. Re-grouting of the brick wall and replacement of damaged brick would be considered a full and proper repair.
January 10, 1995	Letter from Jagosky seeking a reduction in property taxes.	Jagosky advised that in 1961, "wall and footing destruction" began to show, making refinancing of the property impossible. He sought to have his taxes reduced.
June 4, 2002	Property Standards Order.	Acting on a complaint, Huntsville conducted an inspection of the

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		building, noting large cracks present in the exterior masonry structural walls. The by-laws required that every part of a building be maintained in a structurally sound condition. The order required that a professional engineer be retained by Jagosky.
June 17, 2002	Letter from Jagosky to Huntsville.	Jagosky stated that Huntsville and its contractors were negligent in the installation of sewers, causing "explosion" damage to the building, resulting in cracks. He stated that cracks were the same as they were in 1978.
July 2002	Huntsville posted notice of the Property Standards Order.	The notice was posted to inform of the alleged breach of the by-law.
July 5, 2002	Tulloch Report.	Huntsville retained Tulloch Engineering and Surveying to review the structural integrity of Jagosky's building. The report noted major cracks, some of which had developed in the footing and extended upward to the windows and to the roof. The cracks "can be related to the wall foundation/footing problem". The problem could be due to lack of foundation/footings strength, ground water level and drainage, or soil-bearing strength (beneath the foundation/footings). A soil and foundation/footing investigation was recommended to find out the cause of the foundation/footings settlements and the extent of the damage.
July 10, 2002	Order to Remedy Violation of Standards of Maintenance and Occupation.	Jagosky was to bring the property into a condition of compliance on or before September 10, 2002.
September 23, 2002	Charge of Failing to Comply with an Order issued by the Property Standards Officer.	Jagosky was charged with failing to comply with an order issued by the Property Standards Officer on or about September 11, 2002.
January 7,	Notice of Action issued (amended January 28,	Jagosky claimed damages relating

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2003	2003).	to structural damage caused by flooding and blasting activities conducted by or on behalf of Huntsville.
February 5, 2003	Statement of Claim issued.	Jagosky claimed damages for property damage, lost income and malicious prosecution. Jagosky alleged that blasting or flooding of the sewage system caused visible structural damages to the building. In addition, in 1997 (later amended to 1987), Huntsville raised the roadbed, resulting in deterioration of the building.
December 30, 2003	Soil-Eng Report	Huntsville retained Soil-Eng Limited, consulting soil, foundation and environmental engineers. Test pits were dug to the underside of the footings. The revealed soils were found to not be suitable for supporting foundations and to not provide frost protection for the existing foundation. To determine an appropriate founding level, a comprehensive borehole investigation would be required.
February 1, 2004	Letter from Jagosky to Huntsville.	Jagosky acknowledged receipt on January 20, 2004, of the Soil-Eng Report. Jagosky referred to the "silty sand" referenced in the report and stated it "would therefore not have been present during the installation of footings, which were required to be installed on "undisturbed soil" as per *Building Code* and the architectural drawings … The responsibility for inspection of footings is that of the Chief Building Official of the Town of Huntsville to ensure safe building practice and building code compliance."
June 18, 2004	Jagosky found guilty of failing to comply with the order issued by the Property	The justice of the peace referred to the problem with trying to

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	Standards Officer.	understand who is responsible with (sic) the foundation. He stated that Jagosky thinks the Township "has the problem".
December 9, 2004	Statement of Defence delivered.	
June 2, 2005	Appeal of the *Provincial Offences Act* charge dismissed.	
April 17, 2008	Smith Report	Huntsville retained Smith Architect to do a "Feasibility Study for Remedial Structural Repairs and *Building Code/Fire Code* "Upgrades versus Demolition." The soil report by Soil-Eng was used as the basis for determining the bearing capacity of the soil. Physical measurements and visual inspection were relied upon. The determination was that the building was structurally unsound due to lack of sufficient bearing capacity of the substrate, lack of foundation, differential settlement causing shear cracking and torsional stresses on the exterior walls, and undersized structural members on the interior and exterior walls.
September 30, 2008	Amended Statement of Claim filed.	Jagosky withdrew his claim for damages for malicious prosecution and sought damages for misfeasance of public office, alleging that Huntsville "acted not in furtherance of its public duty but with the express purpose of causing harm" to Jagosky. The date of the raising of the roadbed was amended from 1997 to 1987.
February 19, 2009	Amended Statement of Defence delivered.	
March 3&4, 2009	Examinations for Discovery held.	
April 29, 2009	Giffin Koerth Report	Giffin Koerth, forensic engineers, was retained by Jagosky to provide a report. Two small pits were

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		hand-excavated to examine the footing conditions. Soil-Eng had previously determined that the footings were not located below the frost line. Giffin's excavations similarly found that the footings were just below the elevation of the rear parking lot. Based on the finding that the building foundations did not extend to below the frost line, the conclusion was that the cause of the cracking was most likely caused by settlement and/or frost movement over time. It was possible that the density of the soil beneath the footings was insufficient to minimize settlement.
July 1, 2009	Building demolished pursuant to a Property Standards Order.	
November 16, 2009	Jagosky brings motion for leave to file Fresh as Amended Statement of Claim. Motion is adjourned to and heard July 9, 2010.	Jagosky claims that deterioration in the building flowed from a lack of integrity in the foundation of the building. He claims that Huntsville was negligent in its issuance of the building permit and/or in its inspections of the soil and footings.

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JAGOSKY'S MOTION FOR LEAVE TO AMEND THE STATEMENT OF CLAIM

Amendments sought and positions of the parties

[12] Jagosky seeks leave to file a Fresh as Amended Statement of Claim to allege negligence on the part of Huntsville in its issuance of a building permit and in its inspection of the building during its construction from 1957 to 1959.

[13] Jagosky states that he did not know, nor ought he to have known that the footings had been installed improperly and did not extend below the frost line until receipt of the Giffin Koerth Report dated April 29, 2009.

[14] Huntsville's position is that Jagosky knew that there were problems with the foundation as early as 1995, as shown by the letter Jagosky wrote to MPAC attempting to reduce his taxes.

[15] If Jagosky did not or should not have known in 1995, Huntsville states that Jagosky knew by January 20, 2004, upon receipt of the Soil-Eng report. This is demonstrated by Jagosky's February 1, 2004 letter to Huntsville.

[16] The parties agree that if Jagosky knew or should have known that the deterioration in the building flowed from a lack of integrity in the foundation, and as such knew or should have known of the cause of action for negligence in relation to the issuance of the building permit or the inspection of the footings,

(i) upon receipt of the 2009 Giffin Koerth report,[2] Jagosky would be within the limitation period to advance his additional claim against Huntsville;

(ii) upon receipt of the Soil-Eng Report on or about January 20, 2004, the limitation period would be governed by the *Limitations Act, 2002*[3] and would be two years. The limitation period would have expired January 20, 2006; and

(iii) by 1995, when he wrote the letter to MPAC seeking to reduce his taxes, the limitation period would be governed by the *Limitations Act* and would be six years.[4] As the limitation period would have expired on January 10, 2001, Jagosky would have to show special circumstances to extend the limitation period.

Analysis

The Test for Amendment of Pleadings

[17] Rule 26.01 of the *Rules of Civil Procedure*[5] ("the *Rules*") states that, "On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment."

Limitation Periods

[18] The *Limitations Act, 2002* (the "New *Act*") came into force on January 1, 2004. The New *Act* states as follows:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.[6]

[2] The parties also agree that if Jagosky knew or should have known upon receipt of the 2008 Smith Report, he would be within the limitation period.
[3] S.O. 2002, c.24, Sched. B at s.4. The *Limitations Act, 2002*, came into force on January 1, 2004. The new *Act* states as follows: "Unless this *Act* provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."
[4] R.S.O. 1990, c. L.15, at s.45.
[5] R.R.O. 1990, Reg. 194.
[6] *Supra* note 3 at s. 4.

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[19] The predecessor *Limitations Act* (the "Old *Act*") still remains relevant for claims based on acts or omissions that took place before January 1, 2004. Under the Old *Act*, the relevant limitation period was 6 years.[7]

[20] The *Limitations Act, 2002* provides that where a former limitation period expired prior to January 1, 2004, no proceeding may be commenced for that claim. If the former limitation period did not expire before January 1, 2004, whether the relevant limitation is the six-year period under the Old *Act* or the two-year period under the New *Act* is determined by the principle of discoverability.[8]

[21] The four criteria for determining the date of discoverability are specifically set out in the New *Act*. In particular, a plaintiff is deemed to have discovered his claim on the earlier of when he actually knew, or when a reasonable person with the abilities and in the circumstances of the plaintiff ought to have known, the following:

> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it…[9]

[22] A plaintiff is presumed to have discovered the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved. Accordingly, the burden is on Jagosky to establish when discovery reasonably ought to have taken place.[10]

[23] It is a well established rule that amendments such as those sought by Jagosky should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment. However, under the New *Act*, amendments to a Statement of Claim will be rejected if they seek to advance new claims after the 2-year limitation period has expired.[11]

[24] Arguments based on "special circumstances" are available under the Old *Act*. They are no longer available to a party seeking to add new claims after the expiry of the applicable limitation period under the New *Act*.[12]

Discoverability

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[7] *Ibid.* at 24(2); *supra* note 4 at s. 45.
[8] *Supra* note 3 at s.24.
[9] *Supra* note 3 at s.5 (1).
[10] *Supra* note 3 at s.5 (2).
[11] *Jourdain v. Ontario* (2008), 91 O.R. (3d) 506 at para. 12 (S.C.J.); *Robinnson Motorcycle Ltd. V. Fred Deeley Imports Ltd.*, [2009] O.J. No. 401 at para. 10 (Master); *Fava v. Califi*, [2009] O.J. No. 1621 at para. 4 (S.C.J.).
[12] *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 at paras. 13, 16, 25 and 27 (C.A.).

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[25] Time should not begin to run against a plaintiff until he knows of the defect or could, with reasonable diligence, have discovered it. In other words, for a person to have an actionable loss, he must be aware of it or must reasonably be taken to be aware of it, and the limitation period will not start to run until such time.[13]

[26] A plaintiff does not need to know the precise cause of injury before the limitation period starts to run, or the full extent of the loss suffered. Such a threshold for the commencement of a limitation period "places the bar too high". Instead, a plaintiff need only know enough facts to base its allegation against the defendant.[14]

[27] When dealing with complex matters involving building defects, it would be impractical to expect the owner to be able to identify all latent deficiencies at any given point in time just because one patent deficiency had been identified. In such cases, the limitation period begins to run when the plaintiff knew or ought to have known of each of the latent deficiencies.[15]

[28] In his letter of January 10, 1995, Jagosky, in an attempt to reduce his taxes, referred to "wall and footing destruction" that began to show in 1961. Jagosky advised on his cross-examination on his Affidavit sworn May 12, 2010, that at the time of writing the 1995 letter, he knew nothing about the foundation footings except what was reflected in architectural drawings. He advised that the purpose of the letter was to inform the Municipal Property Assessment Corporation that the building was not worth the assessed value.

[29] In 2002, Jagosky wrote to Huntsville, taking the position that the cracks in the building were as a result of explosion damage related to the installation of sewers.

[30] Considering the foregoing, I am not satisfied that Jagosky in fact knew or ought to have known of the structural issues in relation to the footings and foundation in 1995 or even in 2002. Just because he was aware of the explosion and flooding done to the area and of the cracks in his building does not mean he knew or ought to have known of the footings and foundation problem. I find that his understanding at that time was that the wall and footing destruction was linked to the explosion and flooding damage related to the sewers.

[31] As in *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*,[16] distinct construction deficiencies not discoverable by due diligence may give rise to separate causes of action. Although the destruction due to the explosion and/or flooding is not a

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[13] *Grey Condominium Corp. No.27 v. Blue Mountain Resorts Ltd.*, [2008] O.J. No. 1893 at paras. 39-48 and 65-73 (C.A.).
[14] *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 at para. 51 (C.A.); *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 at para. 42 (S.C.J.); *Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376 at para. 45 (S.C.J.), aff'd. [2009] O.J. No. 5170 (C.A.).
[15] *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.* (2001), 47 R.P.R. (3d) 32 at para. 52 (Ont. S.C.J.), aff'd 15 R.P.R. (4th) 161, [2004] O.J. No. 597 (C.A.) as referred to in *Grey Condominium*, *supra* note 13.
[16] *Ibid*.

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construction deficiency, I find that the footing and foundation problem is a distinct deficiency that would give rise to a separate cause of action.

[32] The issue is when Jagosky knew or should have known that the deterioration in the building flowed from a lack of integrity in the foundation, and as such knew or should have known of the cause of action for negligence in relation to the issuance of the building permit or the inspection of the footings.

[33] I find that the evidence supports that Jagosky had the requisite state of knowledge or deemed knowledge on January 20, 2004. That day, Jagosky was served with the Soil-Eng report. In his February 1, 2004 letter to Huntsville, he referred to the fact that the silty sand may not be suitable for supporting foundation. He referred to footings that were required to be installed on "undisturbed soil" as per the *Building Code Act* and the architectural drawings. Jagosky noted that the responsibility for inspection of footings was that of the Chief Building Official of the Town of Huntsville. He attached not only the architectural drawings, but also a copy of the then current application for building permit, having circled the section requiring inspection when footings, foundations and drainage had been installed.

[34] In his cross-examination, Jagosky agreed that when he used the word "inspection"[17] he was "talking about the start of construction…when the permit is taken out". He referred to the inspection of footings because he had been told by the Mayor of the Town of Huntsville that the Town was responsible for the safety of its inhabitants and the inspection and safety of buildings.

[35] Jagosky took no steps at the time to conduct any independent testing. He conferred with Oza Inspections with respect to investigating damage to the building sometime in 2004. He did not retain any engineer or other expert to investigate the causes of the cracks and the structural integrity of the building until 2009.

[36] I find that Jagosky knew or ought to have known on January 20, 2004, when he received the Soil-Eng Report, that there was deterioration in the building that rendered it structurally unsafe, and that that deterioration flowed from a lack of integrity in the footings and foundation of the building.

[37] I also find that Jagosky knew that Huntsville issued a building permit and conducted or should have conducted periodic inspections during the course of the construction.

[38] This matter is thus governed by the new *Limitations Act, 2002*. The limitation period expired January 20, 2006.

Prejudice

[39] The expiry of a limitation period raises a presumption of prejudice that cannot be compensated for by costs or an adjournment. The normal rule is that this presumption of

[17] In his letter, Jagosky stated that Huntsville was responsible for the "inspection of footings".

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prejudice is determinative. It is the plaintiff who must establish why, on the facts of the case, the court should not apply that rule.[18]

[40] The amendment Jagosky seeks to make constitutes a fundamentally different claim. The "presumption of prejudice occasioned by the passing of the limitation period therefore applies and the party seeking the amendment must rebut the presumption".[19]

[41] In addition to the presumed prejudice, I find that Huntsville will suffer actual prejudice if the amendments are allowed. Prior to the current proposed amendments, every allegation against Huntsville pertained solely to allegations regarding work or conduct completely separate from the original building construction in 1959. Investigations already performed focused on issues of structural integrity and the feasibility of repairing the building, not its construction.

[42] Throughout this litigation, Huntsville has never investigated liability for alleged negligent inspection during construction of the building. Alleged negligence in work performed around the building is quite distinct from alleged negligence in the issuance of the building permit and inspection of work performed during construction of the building itself in 1959.

[43] The building on the property was demolished on July 1, 2009. No expert has ever been retained by Huntsville to respond to the issue of liability for alleged negligent issuance of a building permit or negligent inspections. With the building demolished, a proper liability inspection cannot be performed.[20]

[44] I find that Jagosky has not rebutted the presumption of prejudice. In addition, Huntsville would suffer actual prejudice if the amendments were allowed. This actual prejudice cannot be compensated for by costs. In addition, the actual prejudice that Huntsville would suffer is directly related to the fact that Jagosky did not raise the claim in a timely manner and within the limitation period. Had he done so, liability inspections f the footings and foundation could have been undertaken before the building was demolished in 2009.

Conclusion on Motion to Amend Pleadings

[45] Accordingly, the motion for leave to amend the Statement of Claim is dismissed.

MOTION FOR SUMMARY JUDGMENT BY HUNTSVILLE

[46] Huntsville brings a cross-motion for summary judgment dismissing this action in whole or in part. It takes the position that there are no material factual issues that require a trial.

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[18] *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 at para. 17 and 22 (C.A.).
[19] *Ibid*. at para. 30
[20] *Prosperine v. Ottawa-Carleton (Regional Municipality),* 2004 CarswellOnt. 434 at paras. 10-12 (S.C.J.), aff'd. [2004] O.J. No. 5137 (C.A.).

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The new test for Summary Judgment

[47] A defendant may, after delivering a Statement of Defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the Statement of Claim.[21]

[48] Beginning in January 2010, the amended Rule provides for a summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim. In determining whether there is a genuine issue requiring a trial, the motion judge may now exercise powers of (i) weighing evidence, (ii) evaluating credibility, and (iii) drawing reasonable inferences from the evidence, unless it is in the interests of justice for such powers to be exercised only at trial.[22]

[49] The purposes of the amendments to Rule 20 were (i) to make summary judgment more readily available and (ii) to recognize that, with the court's expanded powers to evaluate evidence, while there may be issues appropriate for a trial, those issues may nevertheless not *require* a trial.[23]

[50] The policy implications for the rule change was underscored in the Supreme Court of Canada decision of *Canada (Att.Gen.) v. Lameman*[24]:

> Trying unmeritorious claims imposed a heavy price in terms of time and the cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[51] The issue of "discoverability" of a claim was dealt with in *Lawless v. Anderson*.[25] The motions judge reviewed the written record before him and concluded that the moving party had demonstrated that there was no issue for trial and that the claim was commenced beyond the limitation period. The court noted that "one likely consequence of the new powers exercisable by a motion judge will be an enhanced ability to determine discoverability issues on summary judgment motions because the fact finding restrictions placed on judges under old Rule 20 have been removed, or at least very significantly loosened."[26]

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[21] *Supra* note 5 at Rule 20.01(3).
[22] *Ibid*. at Rule 20.04(2) and (2.1).
[23] *Healey v. Lakeridge Health Corp.*, [2010] O.J. No. 417 at para. 23 (S.C.J.).
[24] (2008), 1 S.C.R. 372 at para. 10.
[25] 2010 ONSC 2723 at para.22.
[26] *Ibid*. at para. 22.

[52] The amended Rule expressly overrules jurisprudence that prevented a motions judge from making evidentiary determinations and permits a more meaningful review of the paper record.[27]

[53] Rule 20.02(2) provides that, in response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.[28]

[54] The burdens have not changed: the moving party must show that the claim does not raise a genuine issue requiring a trial and the responding party must put forward evidence in support of its position. A responding party must still "lead trump or risk losing" and "put its best foot forward" by setting out specific facts and coherent evidence that is organized to show a genuine issue.[29]

[55] There has been no new case law changing the rule that a self-serving affidavit containing only bold assertions is insufficient to create triable issues in the absence of detailed facts and supporting evidence.[30]

Claims against Huntsville

Damages that flow from the 1959 works

[56] In 1959, the Town of Chafee, antecedent to the Town of Huntsville, installed sewers on roads surrounding the property now owned by Jagosky. In doing so, the building was damaged and sustained cracks on its exterior. The previous owner settled an action for damages to the property with the contractor who carried out the work on behalf of the Town.

[57] Jagosky purchased the property in 1978. It is acknowledged that he knew of the cracks when he purchased the building: prior to purchasing the property he was told that the damage to the building was allegedly caused by the 1959 excavation work.

[58] By letter dated January 10, 1995, Jagosky wrote to MPAC, seeking a reduction in property taxes, noting the damage to the building was "evident" and "was very apparent to this day". He stated that the "building is broken in two halves top to bottom". He attached a letter from adjusters for the then owner's insurance company with respect to the claim involving explosion damage to the building.

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[27] *Ibid*. at para. 22; *Cuthbert v. TD Canada Trust*, 2010 ONSC 830 at para. 10.
[28] *Supra* note 5, at Rule 20.04(2.1).
[29] *Langille v. Toronto (City)*, [2010] O.J. No. 196 at paras. 19-20 (S.C.J.); *Rogers Cable TV Limited v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 at pp. 27-28 (Gen. Div.); *Toronto-Dominion Bank v. Schrage*, 2009 CarswellOnt. 5157 at para. 38 (S.C.J.); *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 at pp. 237-238, 242 (Gen. Div.).
[30] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 31; *Toronto-Dominion Bank v. Schrage, Ibid*. at paras. 35 and 38.

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[59] Structural damage to the building is the basis of Jagosky's claim.[31] I find that by no later than January 10, 1995, Jagosky was aware of the damage *and* who he alleged was responsible for it, i.e. Huntsville.[32] There is no genuine issue for trial as to when Jagosky was substantially aware of the 1959 works allegations.

[60] The discoverability principle rests by definition on the requirement of due diligence by the plaintiff, who has an obligation to show he acted with reasonable diligence in pursuing the discovery of his claim. A plaintiff must also act with diligence in requesting and receiving an expert opinion, if required, so as not to delay the commencement of the limitation period.[33]

[61] Jagosky has provided no evidence that he took any steps or made any efforts to investigate his claim between 1995 and commencing this action on January 7, 2003.

[62] The limitation period expired no later than January 10, 2001. The Notice of Action was issued January 7, 2003.

[63] Since the cause of action was discovered prior to January 1, 2004, "special circumstances" *may* permit the extension of the limitation period. However, a lack of diligence by Jagosky in investigating their claim is not "special circumstances".[34]

[64] I find that Jagosky's action for damages that flow from the 1959 works is statute-barred: he actually discovered his claim by 1995, but did nothing material to investigate further and did not sue within six years.

[65] I find that there are no special circumstances to rebut the presumption of prejudice.

[66] Jagosky's claim against Huntsville in relation to the 1959 works is dismissed.

Damages that flow from the 1987 works

[67] There is no evidence Huntsville had anything to do with the 1987 works. Rather, the District Municipality of Muskoka ("Muskoka") had and continues to have jurisdiction over the roadway adjacent to the property. Muskoka was responsible for the road reconstruction. Muskoka placed the sixty inches of overburden on the subsoil in front of Jagosky's property. I find that it was Muskoka, not Huntsville that performed the 1987 road works.

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[31] Other than the misfeasance in public office allegation.

[32] Although I am not satisfied that Jagosky knew or ought to have known of the structural issues in relation to foundations or footings by 1995, he knew of the structural damage to the building by then.

[33] *Zapfe v. Barnes*, [2003] O.J. No. 2856 at paras. 19 and 24 (C.A.); *Soper v. Southcott* (1998), 39 O.R. (3d) 737 at pp. 743-744 (C.A.); *Findlay v. Holmes*, [1998] O.J. No. 2796 at para. 28 (C.A.); *Alexis v. Toronto Police Service Board, Supra* note 14 at para. 34.

[34] *Meady v. Greyhound Canada Transportation Corporation* (2008), 90 O.R. (3d) 774 at para. 24 (C.A.); *Frohlick, supra* note 19 at para. 25.

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[68] The evidence before me is that Huntsville did not assume any responsibility or liability on behalf of Muskoka for the 1987 road works: Jagosky has led no evidence to the contrary.

[69] Jagosky cannot recover damages from Huntsville caused by Muskoka's work.

[70] There is no genuine issue requiring a trial into this aspect of Jagosky's claim. Accordingly, Jagosky's claim for damages in relation to the 1987 road works fails.

Allegations of misfeasance of public office

[71] There are two forms of the tort of misfeasance of public office:

(i) conduct by a public officer that is specifically intended to injure a person or class of persons, and

(ii) a public officer acting with knowledge *both* that he has no power to do the act, and that the act is likely to injure the plaintiff.[35]

[72] Two elements must be proven in either form of the tort:

(i) the public officer engaged in deliberate and unlawful conduct in his capacity as a public officer, and

(ii) the public officer was aware that both the impugned conduct was unlawful *and* it was likely to harm the plaintiff.[36]

[73] The tort is limited in scope. It is not directed at a public officer who inadvertently or negligently fails to adequately discharge the obligations of his office. It is directed at public officers who *could* have discharged their public obligations, but wilfully chose to do otherwise. An element of "bad faith" or "dishonesty" is required.[37]

[74] There is no evidence before this court supporting that any unlawful conduct was undertaken by Huntsville or its representatives. There is no evidence before this court that Huntsville or its representatives were aware its conduct was unlawful and likely to cause harm to Jagosky. There is no evidence before this court that there was bad faith or dishonesty in the manner in which Jagosky was treated by Huntsville and its representatives.

[75] I find that the evidence discloses that Huntsville and its Chief Building Official followed Huntsville's ordinary procedures in carrying out its statutory duties under the *Building Code Act*. A complaint was received and investigated, and a Property Standards Order was issued. A subsequent Order to Remedy was issued as a result of Jagosky's non-

[35] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 22.
[36] *Ibid*. at para. 23.
[37] *Ibid*. at paras. 24-26 and 28.

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compliance with the Property Standards Order. I find that the public officials of Huntsville properly posted notices in order to alert tenants to the problems, in accordance with the ordinary practice of Huntsville.

[76] After non-compliance with the Order to Remedy, Jagosky was charged under s.15 of the *Building Code Act.* Huntsville acted lawfully by charging and prosecuting Jagosky under the *Building Code Act.* He was convicted and that conviction was subsequently upheld on appeal. None of this was done or caused by unlawful or wilfully malicious acts of Huntsville or its representatives.

[77] There is no evidence that any officer of Huntsville did anything but act in accordance with the public duties set out under the *Building Code Act* and in the course of his authority as a Chief Building Officer.

[78] I find that I can safely predict the trial outcome in relation to the claim for misfeasance of public office. There is no evidence to support Jagosky's claim, and this claim too, shall fail.

Conclusion on Summary Judgment Motion

[79] I am satisfied that there is no genuine issue requiring a trial with respect to the Statement of Claim Jagosky issued against Huntsville, as amended in 2008. In coming to this decision, I have reviewed the evidence, including letters from Jagosky, his examination for discovery and cross-examination and the cross-examination of the representative from Huntsville and drawn reasonable inferences from the evidence.

[80] Accordingly, Huntsville's motion for summary judgment dismissing Jagosky's claim against Huntsville is allowed.

COSTS

[81] Huntsville seeks its costs on a partial indemnity basis. It seeks costs of $45,000.

[82] Jagosky's counsel does not take issue with the hourly rates or the time expended by lawyers. He asks that I critically consider the time spent by clerks, which amounts to approximately $3,500.

[83] Jagosky sought judgment for over $2,000,000 for alleged damage to his apartment building, and for misfeasance of public office. Huntsville was entirely successful in resisting Jagosky's motion to amend the Statement of Claim and in obtaining summary judgment dismissing the action.

[84] The claim was above average complexity. Jagosky made detailed allegations of fact involving several causes of action and various legal defences. The claims were stale-dated and had to be refuted through detailed affidavit evidence and legal arguments.

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[85] Jagosky has been dilatory throughout this proceeding. The action was commenced in 2003. Examinations for discovery only took place in 2009. There remained as of the date of the motion issues regarding the answering of undertakings by Jagosky. No meaningful quantification of damages claimed had yet been provided. No steps to investigate the source or cause of the visible cracking were taken by Jagosky until 2009.

[86] Jagosky refused to admit that Huntsville was not responsible for the 1987 works, despite clear evidence to the contrary.

[87] Jagosky maintained a claim for misfeasance despite the fact that the conviction of Jagosky under the *Building Code Act* was upheld on appeal.

[88] I have reviewed the Bill of Costs of Huntsville and find that the amounts claimed for fees and disbursements is not unreasonable. However, I have also considered what an unsuccessful party might expect to pay.

[89] I find that a reasonable amount for costs is $40,000. Accordingly, Jagosky shall pay to Huntsville its costs of the action in the amount of $40,000.

QUINLAN J.

Released: August 20, 2010

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