Date: July 8, 2004
Docket: CI 02-01-29562
Indexed as: W. Loeppky and N. Kolesar v. Wolanco Construction Ltd.
(Winnipeg Centre)
Cited as: 2004 MBQB 158

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
WAYNE LOEPPKY AND NOREEN KOLESAR,	)	Gregory Fleetwood
Applicants,	)	For the Plaintiff
v.	)	
	)	
WOLANCO CONSTRUCTION LTD.,	)	Michael Finlayson
Defendant.	)	For the Defendant
	)	
	)	
	)	
	)	
	)	Judgment Delivered
	)	July 8, 2004
	)	

BRYK, J

[1] The Applicants Wayne Loeppky (Loeppky) and Noreen Kolesar (Kolesar) seek leave to extend the time to file a Statement of Claim against the Respondent Wolanco Construction Ltd.

[2] The issues to be determined are whether the Applicants have satisfied the requirements for a successful application pursuant to **The Limitation of Actions Act, R.S.M. 1987, c.150 (Act).** Specifically, they are:

a) Does the evidence establish that the Applicants have a cause of action which, subject to any defence which may be raised, has a reasonable chance of success;

b) Does the evidence establish that the Applicants first learned of a fact (s) material to their cause of action within 12 months of the Application being filed on August 28, 2002?

[3] When this Application was filed, a Statement of Claim had not been filed. At the hearing, Mr. Fleetwood informed the Court that a Statement of Claim had been filed on September 16, 2002 to "pursue other rights". That Statement of Claim is identical to the draft Statement of Claim attached to Loeppky's August 27, 2002 Affidavit filed in support of this Notice of Application. As Mr. Finlayson raised

no objection, I shall consider this as an Application to extend the time to file the Statement of Claim as presented.

BACKGROUND

[4] The facts are largely undisputed. They can be summarized as follows:

a) By written agreement dated April 11, 1995, Applicants entered into an agreement with the Respondent for the construction of a home at 1422 Louden Road in Winnipeg. The relevant provisions of that written agreement are as follows:

i) Wolanco agreed to superintend the construction of the dwelling in accordance with the plans and specifications and budget agreed to by the parties.

ii) Wolanco agreed ensure that all work on the dwelling house was done in a good and workmanlike manner.

iii) Wolanco agreed to observe and conform in all respects to all applicable building and zoning

restrictions or by-laws and to any and all laws or authorities relating to the said working material supplied.

iv) The scope of the work was to include the construction of the entire dwelling house and attached garage excluding window coverings, special finishes, and landscaping.

v) Applicants agreed to pay Respondent a manager's fee of $14,925.00 for services provided pursuant to the agreement.

b) Drainage system beneath the basement floor was installed and the basement floor was poured by August 8, 1995.

c) Construction of the home was completed in October 1995.

d) In 1996 Loeppky noticed that in some areas, the space allowance between the wooden frame and the basement floor had closed to approximately ¼ inch where the space had been 1½ - 2 inches immediately following construction.

e) Loeppky contacted Mr. Wolanco (Wolanco), a principal of the Respondent. Wolanco suggested that Loeppky hire a carpenter

and adjust the wooden frame so as to restore the 1 ½ - 2 inch spaces. This was done.

f) Loeppky observed no further significant problems with the wood framing or problems with the basement floor until 1998.

g) In the spring and summer of 1998, Loeppky observed significant heaving and movement of the basement floor. It was cracked and uneven in places.

h) In August 1998, at Loeppky's request, Wolanco attended and inspected the basement floor. He advised Loeppky that there was nothing wrong with the construction of the basement or the basement floor or the drainage system and said the likely cause of the floor heaving and cracking was soil settlement. He insisted that the cracked floor did not arise from any deficiency in construction and therefore denied warranty coverage.

i) Wolanco said that he could remedy the damage and cracks caused by the soil settlement by removing the concrete floor and replacing it with a wooden floor with a space beneath it so that any further soil movement would not affect the floor

surface. Wolanco advised Loeppky that the cost for this additional construction would be $25,000.00.

j) Loeppky said that he relied on Wolanco's information and advice and decided to wait until the soil settlement abated at which time he intended to reassess the situation.

k) Shifting and heaving of the basement floor continued, causing some additional cracking. As well, the space allowance between the wooden frame and the basement floor continued to decrease in certain areas of the basement. However these changes were not dramatic. Some further adjustments were made by cutting the studs and increasing the space between the wooden frame and the basement floor.

l) Leoppky was not required to make any further adjustments by cutting studs in 1999 or 2000.

m) Loeppky made no further inquiries or investigations during 1999 and 2000.

n) In 2001, the shifting and heaving of the basement floor caused Loeppky to become concerned that the structure of the house might be damaged if the basement floor started pushing

up against the wooden frame. As a result, he decided to contract Smith Carter, a firm of Winnipeg architects, to investigate the problem.

o) On recommendation of Smith Carter, the concrete floor was removed by Saber Industries, another Winnipeg construction company, and the concrete and drainage system were inspected by Jaret Horbatiuk, (Horbatiuk), an employee of Smith Carter. Various photographs were also taken at the time.

p) On October 3, 2001, Horbatiuk provided Loeppky with a written report of his observations from the previous day.

q) The Horbatiuk written report dated October 3, 2001 identified the following specific deficiencies in construction:

i) the drainage system was not sufficient to prevent the accumulation of water below the concrete slab.

ii) the splice of the drainage pipe leading from the drain tiles was inadequate causing the accumulation of water.

iii) the drain lines leading to the sump pit where constructed on an uphill grade, leading to further accumulation of water.

iv) the drain lines were installed on crushed stone.

v) the basement floor concrete slab was poured to a depth of 1 ¾ inches without reinforcement.

vi) the exterior weeping tile system was installed improperly.

r) Loeppky received a further written report dated June 14, 2002 under the signature of Mr. T. Colin Gibbs (Gibbs), a professional engineer and employee of Smith Carter. This report reiterated the findings contained in Horbatiuk's October 3, 2001 report. The following examples of non-compliance with Manitoba Building Code were identified:

"1. The system as installed did not prevent the accumulation of water under the slab on ground. Standing water was recorded in the gravel layer even though two perforated pipes had been laid in the gravel layer. The clay subsoil below was also saturated.

2. The splice connections close to the wall were not watertight and high saturation levels were noted in the areas of the splice joints.

3. The pipelines were not laid on the undisturbed soil as required by the Manitoba Building Code (Code). Their original slope was insufficient at the time of installation such that water would have to run uphill to reach the sump.

4. The thickness of the concrete slab was measured in places at under two inches thick. This was in contravention of the Code which required that concrete slab be not less than three inches in thickness.

The Gibbs report concluded that "the under floor drainage as installed as part of the original construction did not meet the intent of the Code in that it did not prevent the accumulation of water beneath the slab-on-ground.

This failure has directly contributed to the heaving and resulting damage to the slab and mechanical equipment supported thereon and necessitated replacing the original slab and drainage system."

[5] The total cost to Loeppky for the floor removal, inspection, and reinstallation of the drainage system and the repouring of the basement floor was $21,676.32.

LAW

[6] In ***Einarsson et al v. Adi's Video Shop et al*** **(1992), 76 Man. R. (2nd) 218 (C.A.),** Twaddle, J.A. identified these requirements for an Application under the **Act.** The following excerpt from this decision is found at page 220:

> "The first requirement of the legislation is found in the rather obscure language of s. 15 (2). It provides:
>
> > "15 (2) where an Application is made under s. 14 to begin or to continue an action, the Court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the Court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any

> defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action."

To paraphrase that provision loosely, the applicant must prove by evidence that he has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success.

The second requirement is found in s. 14 itself. S. 14 (1) provides:

> "14(1) notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the Court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than twelve months have elapsed between:
>
> (a) the date in which the applicant first new, or, in all the circumstances of the case, ought to

have known, of all material facts of a decisive character upon which the action is based; and

(b) the date on which the application was made to the Court for leave."

Thus, an applicant must prove, at the very least, that he first learned of a fact material to his cause of action within the twelve months next before the application was filed. The fact, first learned within that period, must be "material" within the sense defined in s. 20(2); it must be of "a decisive character" as that phrase is defined in s. 20(3); and it must not be one which the applicant ought to have known about earlier."

ANALYSIS

A) DOES THE EVIDENCE ESTABLISH THAT THE APPLICANTS HAVE A CAUSE OF ACTION WHICH, SUBJECT TO ANY DEFENCE WHICH MAY BE RAISED, HAS A REASONABLE CHANCE OF SUCCESS?

[7] Respondent was paid a management fee of $14,925.00 for which it was to provide certain services which included:

a) Insuring that all work on the dwelling house was done in a good and workmanlike manner;

b) Agreeing to observe and conform in all respects to all applicable building and zoning restrictions or by-laws and to any and all laws or authorities relating to the working material supply;

c) The scope of the work was to include the construction of the entire dwelling house.

[8] The evidence presented by the Applicants includes:

1. The system as installed did not prevent the accumulation of water under the slab on ground. Standing water was recorded in the gravel layer even though two perforated pipes had been laid in the gravel layer. The clay subsoil below was also saturated;

2. The splice connects close to the wall were not watertight and high saturation levels were found in the areas of the splice joints;
3. The pipelines were not laid on the undisturbed soil as required by the Code. Water in them would also have to run uphill to reach the sump, indicative that the original slope was insufficient at the time of installation;
4. The thickness of the concrete slab in places was less than two inches thick. This was in contravention of the Code requiring that concrete slab not be less than three inches in thickness;
5. The underfloor drainage as installed as part of the original construction did not meet the intent of the Code in that it did not prevent the accumulation of water beneath the slab on ground. This directly contributed to the heaving and resulted in damage to the slab and mechanical equipment supported

thereon and necessitated replacing the original slab and drainage system.

[9] Although Respondent did not install the underground drainage system or pour the basement floor, arguably, it had the responsibility to ensure that the job was done in workmanlike fashion and in accordance with existing building codes. I find that the Applicants have met the requirements of s.15(2) of the **Act**.

B) DOES THE EVIDENCE ESTABLISH THAT THE APPLICANTS FIRST LEARNED OF A FACT (s) MATERIAL TO THEIR CAUSE OF ACTION WITHIN 12 MONTHS OF THE APPLICATION BEING FILED ON AUGUST 28, 2002.

[10] The Notice of Application was filed on August 28, 2002. In order to comply with s. 14(1), they must have first learned of the material fact(s) of a decisive matter about which they ought not to have known earlier between August 28, 2001 and August 28, 2002.

[11] I find that the Applicants first learned of the defects and deficiencies in the construction of the drainage system and basement floor on October 3, 2001 when they received Horbatiuk's written report. That report identified deficiencies in the manner of construction of the drainage system and non-compliance with the Code. These deficiencies caused water to accumulate beneath the concrete basement floor which in turn caused it to heave and crack.

[12] Mr. Finlayson argues that the Applicants first learned of facts material to their cause of action as soon as they noticed the basement floor shifting in 1996. I disagree. At that time, all they knew or reasonably ought to have known was that there was some heaving of the basement floor causing the space between it and the wooden frame to diminish. They contacted Wolanco, the person who logically would have had some knowledge of the problem. He gave no indication of any defect or deficiency in the concrete floor or the drainage system and suggested some remedial steps which the Applicants followed.

[13] Respondent's counsel points out that the heaving of the basement floor continued in 1997. If so, it was not so significant as to cause the Applicant undue concern. In 1998, when the floor began to crack and the spaces between it and the wooden frame diminished again, the Applicants again showed concern. They contacted Wolanco who assured them that the problems were the result of soil settlement. He intimated that the problem was not related to the installation of the drainage system or workmanship when he denied the Applicants' warrantee coverage. He suggested remedial steps at a cost of $25,000.00. Not unexpectedly, the Applicants chose not to spend an additional $25,000.00 on a house that was only 3 years old. Again they relied on Wolanco's assurances that the problems were caused by soil settlement. The Applicants reasonably assumed that in time, once the soil settled, the problems would diminish or disappear.

[14] During 1999 and 2000, there were no significant problems such and the Applicants were not required to make any adjustments to the wooden frames.

[15] This changed in 2001. At a time 6 years following completion of construction of the house when the Applicants might reasonably have expected the soil beneath his basement to have settled, the problems became so acute that the Applicants became concerned about structural damage to the house. Having sought advice and direction from Wolanco on two previous occasions, which advice and direction proved to be incorrect, Applicants sought independent advice. They did so prudently and expeditiously. They agreed to have their basement floor broken up so as to permit inspection of the concrete and the drainage system beneath. This was a significant step and one which the Applicants must have known would be expensive. Nonetheless, they proceeded and learned of the facts material to their cause of action, that is, facts of a decisive character. Those facts included the improper installation of the drainage system and the thinness of the concrete floor in certain areas. The only way in which these facts were discoverable was to have the basement floor broken up. While this could have been done earlier, it was not unreasonable or imprudent for the Applicants to have initially sought

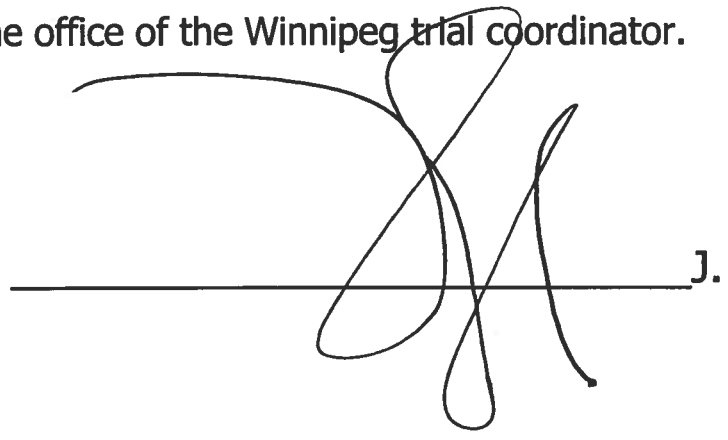
and then relied upon the advice of the Respondent who supervised the construction of their home.

[16] I find that the Applicant has met the criteria of s. 14(1) of **The Limitations of Actions Act** and leave is therefore granted to extend the time to file the Statement of Claim against the Respondent Wolanco Construction Ltd.

[17] As the Statement of Claim has already been filed, there is no need to fix a time to commence the action.

COSTS

[18] The Applicants shall have their costs in accordance with the appropriate tariff. If the parties cannot agree, I am prepared to hear their further submission in that regard. Arrangements for a hearing would be made through the office of the Winnipeg trial coordinator.



J.