CITATION: Cicinski v. Ontario (Minister of Transportation), 2014 ONSC 443
BARRIE COURT FILE NO.: CV-06-0250
DATE: 20140120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HEATHER CICINSKI and JOHN CICINSKI	T. Thamarappallil, for the Plaintiffs
Plaintiffs	
– and –	
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO, REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO, THE CORPORATION OF THE TOWN OF WASAGA BEACH, DILLON CONSULTING LIMITED and FERMAR PAVING LIMITED	
Defendants	M. Coleman and J. Longo for the Defendant Fermar Paving Limited (Moving Party)
-and-	
THE CORPORATION OF THE TOWNSHIP OF CLEARVIEW	
Third Party	
	HEARD: December 20, 2013

HEALEY J.

Nature of the Motion

[1] The moving party Fermar Paving Limited ("Fermar") seeks summary judgment dismissing the claim and all cross-claims made against it, pursuant to Rule 20 of the *Rules of Civil Procedure*.

[2] The other defendants take no position on Fermar's motion, and all agree that if this motion is successful with respect to a dismissal of the claim, all cross-claims by and against Fermar should be dismissed on a without costs basis.

Nature of the Claim

[3] The plaintiffs' claim arises out of damages allegedly sustained by them on their property located at 8801 Highway 26, Wasaga Beach, Ontario, which they claim were caused by a highway construction project undertaken in the vicinity of their property. The project was undertaken by the Minister of Transportation for the Province of Ontario ("the MTO") to construct a Highway 26 bypass from Wasaga Beach to Collingwood, Ontario (the "project").

[4] The MTO retained Dillon Consulting Limited ("Dillon") as the designer and contract administrator for the project, whose responsibilities included overseeing the construction of the project. The MTO retained Fermar to acting as the grading contractor for Phase 1 of the project. Prior to the construction of the first phase of the project, the MTO undertook an environmental assessment which included a drainage assessment in the vicinity of the construction project.

[5] Fermar had no involvement in the design of the project or the design of a drainage plan. Fermar began working on the project in March 2003.

[6] The plaintiffs claim that their property was flooded as a result of the project. The allegation of the flooding is referred to in paragraph 6 of their Amended Amended Statement of Claim ("the claim") as follows:

> As a direct result of the ongoing realignment project on Highway 26, the Plaintiffs state that they experienced extensive flooding to their property on more than one occasion. Specifically, the Plaintiffs' property flooded on March 7, 2004, December 31, 2004 and again on January 1, 2005 as a result of ongoing realignment work to Highway 26.

[7] The claim does not assert any specific allegations of negligence against Fermar, such as failure to inspect or failure to follow Dillon's design. In response to an undertaking to provide particulars of allegations against Fermar, by letter dated July 20, 2012 the lawyer for the plaintiffs wrote:

> ...the negligence of Fermar is that it failed to keep the construction site free of obstructions which resulted in blockage of culverts resulting in water being diverted from the construction site to the plaintiffs' property.

Amendment to the Claim

[8] Although the plaintiffs have no formal motion before the court, they now seek through request made in their factum to amend their Amended Amended Statement of Claim to

add two additional dates when their property flooded, being March 31, 2004 and May 24, 2004. Mr. Thamarappallil for the plaintiffs argues that the dates set out in the claim are not exhaustive, so the inclusion of additional flood dates does not add a new cause of action and so should not be barred by a limitation period. He relies on Rule 26.01, which permits an amendment to a pleading unless prejudice would result that could not be compensated for by costs or an adjournment.

[9] In March, 2006 the plaintiffs issued their Notice of Action and Statement of Claim, neither of which named Fermar. In July 2007, Dillon's solicitors advised the plaintiffs' former lawyer that Fermar was the grading contractor for the project. On August 28, 2007, this court granted the plaintiffs' motion to amend their Statement of Claim to add Fermar as a party to the action. The Statement of Claim was further amended on June 10, 2010 to add the allegation that the plaintiffs' property continues to flood to the present day during the annual thaw/melt.

[10] The evidence presented on this motion by the plaintiffs does not give rise to any argument regarding discoverability; the plaintiffs were aware that they experienced a flood on their property on March 31, 2004 and May 24, 2004. As a result of s. 4 of the *Limitations Act*, 2002, they are prohibited from commencing a claim in respect of these additional claims after March 31, 2006 and May 24, 2006, respectively. When the Statement of Claim was amended to add Fermar as a party in 2007, and amended again in 2010, the claims remained silent as to these additional dates. While the plaintiffs assert that these dates were not added to their claim "by inadvertence", they do not provide any explanation for how this could have occurred, given that the facts giving rise to such a claim have always been within their knowledge.

[11] The amendment does not relate to facts already pled, but to new facts involving separate incidents of flooding, and accordingly raises a new cause of action, as opposed to claiming the same or alternative relief: *Dee Farraro Ltd. v. Pellizzari*, 2012 ONCA 55.

[12] Further, the passing of a limitation period always gives rise to a presumption of prejudice, and courts are to give recognition to the principle of finality protected by limitation periods: *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3. The plaintiffs offer no evidence or argument to rebut the presumption of prejudice to Fermar that arises from the expiry of the limitation period.

[13] A request to amend a claim in the face of a motion for summary judgment, made informally at the time of the motion, unquestionably causes prejudice to the defendant, who has conducted examinations, documentary discovery, and prepared its motion on the basis of the existing claim. Fermar seeks by this motion to bring its involvement in this proceeding to an end; not to prolong it by having to respond to new claims and evidence brought forward over nine years after they achieved Substantial Completion on the project, and over six years after they say that they received any notice that the property had flooded.

[14] Finally, the plaintiffs have provided no evidence that they are in a position to satisfy an award of costs that may otherwise be made to compensate Fermar for a) an adjournment

of this motion to permit the claim to be amended; and b) the steps involved in investigating the new allegations and preparing for trial or a motion for summary judgment on the basis of the amended claim.

[15] For the foregoing reason, the request to amend the claim is dismissed.

The Law

[16] The purpose of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for summary judgment was to make summary judgment more readily available. It was also to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment. As noted in *Healey v. Lakeridge Health Corp.* 2010 ONSC 725, 72 C.C.L.T. (3d) 261, at para. 22, aff'd 2011 ONCA 55, 103 O.R. (3d) 401, "Rule 20.04(2.1) is a statutory reversal of the case law that held that a judge cannot assess credibility, weigh evidence, or find facts on a motion for summary judgment."

[17] As stated in *Canadian Imperial Bank of Commerce v. Mitchell*, 2010 ONSC 2227, [2010] O.J. No. 1502, at para. 20, the change in the wording in the Rules, combined with the powers granted to the motions judge to make evidentiary determinations, necessarily permits a more meaningful review of the paper record and expressly permits the motions judge to make evidentiary determinations and credibility findings. "As a result, consistent with the new principle of proportionality in the Rules, cases or issues need not proceed to trial unless a trial is genuinely required": *Canadian Imperial Bank of Commerce v. Mitchell*, supra, at para. 20; *Cuthbert v. TD Canada Trust*, 2010 ONSC 88, 88 C.P.C. (6th) 359, at para. 10.

[18] To succeed on a motion for summary judgment, the moving party must establish that there is no genuine issue of material facts requiring a trial with respect to a claim or defence: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at. pp. 549-50; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.). "[T]he test for summary judgment – whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v. Galanis* – has not changed" under the new Rule 20: *Cuthbert v. TD Canada Trust, supra*, at para. 11. If the moving party establishes that there is no genuine issue requiring a trial, the respondent must then establish his claim as being one with "a real chance of success": *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para.15; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27.

[19] The court must take a hard look at the evidence on a motion for summary judgment to determine whether there is, or is not, a genuine issue for trial, and may freely canvass the facts and law in doing so. The moving party bears the onus of establishing that there is no triable issue; however, the responding party on a motion for summary judgment must "lead trump or risk losing": *1061590 Ontario Ltd. v. Ontario Jockey Club, supra*, at p. 557. Although the onus is on the moving party to establish the absence of a genuine

issue requiring a trial, there is an evidentiary burden on the responding party, who may not rest on the allegations or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. It is only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution, that the burden shifts to the responding party to prove that its claim or defence has a real chance of success: *Cuthbert v. TD Canada Trust*, *supra*, at para. 12, citing *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.).

[20] Even with the change to Rule 20, however, it is to be remembered that the purpose of Rule 20 is not to deny the parties due process. As stated in *Dawson v. Rexcraft Storage and Warehouse Inc.*, *supra*, at para. 29, "[summary judgment] is not intended to deprive plaintiffs and defendants of their day in court absent demonstrated compliance with its requirements. . . [I]ts purpose is to weed out cases at the pre-trial stage when it can be demonstrated clearly that a trial is unnecessary". This principle has been reiterated in the now leading case under Rule 20.04, *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1 ["*Combined Air*"]. At para. 38 of *Combined Air*, the Court of Appeal emphasized that the purpose of the new rule is to eliminate unnecessary trials, not to eliminate all trials, and that the guiding consideration is whether the summary judgment process will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.

[21] *Combined Air* has of course articulated the "full appreciation test" as being that which the motions judge must apply to determine whether or not a trial is required in the interests of justice. The motions judge must ask the question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial? At para. 54 of *Combined Air*, the court directs the motions judge to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues. Unless full appreciation of the evidence and issues is attainable on the motion record, the judge cannot be satisfied that the issues are appropriately resolved on a motion for summary judgment. At para. 52 of *Combined Air* the court notes that the full appreciation test may be met in cases where there are limited contentious factual issues, particularly in document-driven cases with limited testimonial evidence. This is such a case; I find that there is no need to hear from the parties to supplement or clarify the evidence provided in order to fairly reach dispositive findings in this matter.

[22] As stated in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at para. 17, "[t]he motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial." It is not sufficient for the responding party to say that more and better evidence will or possibly may be available at trial. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue requiring a trial: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.), at p. 238; *Canadian Imperial Bank of Commerce v. Mitchell*, *supra*, at para. 18.

Issue

The issues to be resolved on this motion are:

(1) Whether there is a genuine issue requiring a trial that Fermar failed to keep the construction site free of obstruction prior to or on March 5, 2004 and/or December 31, 2004 and/or January 1, 2005, which resulted in water being diverted from the construction site to the plaintiffs' property; and

(2) Whether there is a genuine issue requiring a trial as to whether Fermar breached the requisite standard of care in the circumstances.

The Facts

[23] The uncontroverted evidence of Fermar is that during their involvement on the project, there were extremely heavy rains and storm events that delayed the completion of the project. In an e-mail of March 9, 2004, Brian Huston of Dillon noted that the runoff/snowmelt conditions in 2004 were much more extreme than normal, and in fact at 100-year levels. Due to the weather, Fermar made a claim for increases to the payment under the contract, and the MTO paid Fermar's claim of approximately $450,000 in addition to the contract amount.

[24] Fermar has deposed that a representative was on site every day during the term of its contract and monitored for drainage issues, and kept accurate logs and records of observations and issues on the site.

[25] Fermar's construction manager, Steven Clay, has deposed that on occasion the extreme weather conditions and storm events would cause issues at the site, including falling trees, but that these issues were remedied immediately after they were detected. Also, during the course of the project there were issues with respect to water flows. Dillon occasionally requested that Fermar construct rock flow check dams, straw bale check dams, spillways, etc. to slow the flow of water.

[26] The project involved the construction of culverts under the bypass to assist with drainage. One such culvert was Culvert #5, which was constructed in February and March 2005. At Culvert #5, there was a small natural drainage swale running from the south to the north. To maintain the drainage, Fermar's subcontractor, Soncin Construction, built a diversion channel immediately adjacent to the culvert.

[27] Once Culvert #5 was completed, the diversion channel was decommissioned. Fermar's evidence is that the concrete for Culvert #5 was poured on March 23, 2004, and the framework inside the culvert was removed on March 29, 2004. It was backfilled on April 20, 2004, at which time the diversion channel was no longer used. It is Fermar's position that as of March 29, 2004, water was diverted through the culvert and not the diversion channel. There is no evidence to the contrary.

[28] On April 15, 2004, Dillon prepared revised engineering drawings indicating the addition of three berms around Culvert #5 to deflect groundwater away from the culvert both east and west. This resulted in a change order, for which Fermar was paid extra.

[29] There were no complaints about Fermar's work during the course of the project. Fermar completed its work on the contract and achieve Substantial Completion on July 12, 2004.

[30] The plaintiffs purchased their property in 1993 and had never experienced flooding to their property before the commencement of the project. After the commencement of the project their property flooded on March 5, 2004 (it is common ground that this is the correct date, even though the claim states March 7), and again on December 31, 2004 and January 1, 2005. Since 2005, their property has experienced ongoing flooding during every spring/snow meltdown.

March 5, 2004 Event

[31] During the March 5, 2004 flooding, water entered the basement of the plaintiffs' home and damaged appliances, their furnace, and the contents of the basement. Mrs. Cicinski contacted the MTO and a representative from MTO attended at her property. The MTO arranged for a contractor (not Fermar) to excavate through the snow to divert water.

[32] On March 6, 2004, Brian Huston attended the project site to review flooding issues. His handwritten notes state "Walked to Culvert 5 - no apparent problems". Mr. Huston subsequently prepared a memo dated March 8, 2004 regarding his attendance on March 6, 2004, which makes the same observation.

[33] Similarly, the notes in the Inspector's diary prepared by Lawrence Pye of Dillon dated March 6, 2004 indicates that he also attended the project site on March 6, 2004, and that there were no major problems at the site.

[34] Mr. Huston wrote a further memo on July 18, 2007, in which he stated that the primary cause of the March 5, 2004 flood at the plaintiffs' property was the blockage of the diversion channel at Culvert #5. His position was based on observations made on April 5, 2004, one month after the flood. During his examination for discovery on behalf of Dillon, Mr. Huston acknowledged that a review of his notes from his March 6, 2004 site attendance and his subsequent memo of March 8, 2004 caused him to alter the position that he took in his memo of July 18, 2007. Mr. Huston acknowledged that it was possible that the blockage he observed on April 5, 2004 was not in place on March 5, 2004. Mr. Huston did not have any knowledge to support the position that the diversion channel at Culvert #5 was blocked on March 5, 2004, and he admitted that the conclusion in his memo of July 18, 2007 was not supported by the documentation. Mr. Huston stated that once Culvert #5 was completed and the berms were installed, there was no reason why Culvert #5 would contribute to the plaintiffs' alleged ongoing flooding.

December 31, 2004/January 1, 2005 Events

[35] There is no evidence indicating that Fermar was responsible for the December 31, 2004 or January 1, 2005 floods. There does not appear to be any allegation in the claim that they are responsible for any alleged damage occurring on those dates, nor does it there appear to be any allegation that Fermar is responsible for the ongoing flooding at the plaintiffs' property.

Expert Reports

[36] The plaintiffs have delivered two expert reports, being a Flood Analysis Report from Y. Saigh of Totten Sims Hubicki Associates dated September 12, 2006 ["the TSH Report"], and a report from Frank Fisl of Watercom Engineering dated December 23, 2009 ["the Watercom Report"]. The TSH Report does not mention any work by Fermar. The Watercom Report lists probable causes of the flooding, none of which relate to Fermar's work. The probable causes relate to the design of the project. There is no evidence that Fermar had any involvement in the project design. The Watercom Report makes the following statement with respect to probable causes of surface flooding:

> As per the 2006 Flood Analysis Reporting Letter by Totten Sims Hubicki, the sub-base of the new Highway has redirected flows which would normally be conveyed north to flow in the easterly direction towards Airport Road and then north towards the subject site. The numerous natural swales across the location of the new highway, conveying runoff from the farmland in the south to the culverts across to the existing Highway 26 at the north, were blocked by the highway sub-base and subsequently redirected to the east towards Airport Road and then north towards the subject property once the ponding elevation exceeded the sub-base elevation. Culverts, installed across the sub-base, were blocked by debris, resulting in additional redirection of flows around the sub-base and towards the subject property. To correct the situation, the debris was cleaned out and a ditch was dug across the sub-base by the MTO in 2005. The drainage patterns downstream of the new highway location may, however, already have been altered, resulting in further redirection of flows....

[37] This passage contains the only reference to blockage by debris, and there is no indication in the report as to the type of blockage or when such blockage occurred. More importantly, blockage by debris is not identified in the executive summary as one of the probable causes of surface flooding and high groundwater problems at the plaintiffs' property. Instead, design issues are identified as the cause.

[38] The plaintiffs have not delivered any expert report which describes the standard of care owed by Fermar, nor one which indicates that Fermar has breached the applicable standard of care. The plaintiffs have not delivered an affidavit from either of their experts.

Analysis

[39] The only evidence of debris contributing to the flood of March 5, 2004 is the opinion expressed by Mr. Huston in his July 18, 2007 memo, from which he fully resiled at his examination for discovery. Fermar has shown evidence that both Huston and Pye were on the site on March 6, 2004, and found no evidence of anything blocking the diversion channel. The plaintiffs have no contrary evidence. Any evidence of blockage at a later date is irrelevant. In this case there are daily logs and records kept by Fermar's representatives, who were on site, and the plaintiffs have not been able to point to any evidence suggesting that Fermar failed to make regular inspection, or that they failed to inspect during the days leading up to March 5, 2004.

[40] The plaintiffs have produced no evidence that there was any blockage contributing to the alleged flooding on December 31, 2004 and January 1, 2005. Fermar's work on the project was done by July, 2004.

[41] Moreover, I agree with the submissions of Fermar's counsel that, even if the plaintiffs could prove that a blockage existed, and that the blockage contributed to the flooding, they will be unsuccessful on the issue of liability because they have failed to provide any evidence of the standard of care required of Fermar in the circumstances, and failed to provide evidence of a breach of such standard. In *1041590 Ontario Ltd. (c.o.b. as Due West Clothing Co.) v. Camley Investments Inc.*, 2010 ONSC 6471 (Sup. Ct.), the court concluded by way of summary judgment that the failure to present any evidence as to the standard of care to be met by the defendant in a construction dispute case was fatal to the plaintiff's claim.

[42] The trial judge would need some evidence as to the standard of care of a grading contractor, and some evidence that Fermar's conduct fell below that standard. Of the two expert reports produced by the plaintiff, neither speaks to the standard of care of a grading contractor generally, or specifically with respect to keeping diversion channels free from blockages. As previously stated, neither makes an express allegation that a specific blockage contributed to the flooding on the dates in question. Even if the plaintiffs are able to prove that debris caused blockages which led to flooding, they still have no possibility of being successful on liability given the contents of the expert reports.

[43] Accordingly, there are no issues raised by the claim in respect of Fermar that require a trial. The motion is granted and the claim shall be dismissed as against Fermar, as well as all crossclaims by and against it.

[44] If counsel is unable to agree upon costs they may make brief submissions in writing not exceeding two double-spaced pages, together with any cost outline or offers on which they rely. The moving party's submissions are due January 29, 2014 and the respondent party's submissions are due by February 5, 2014, and any reply by February 10, 2014, to be filed with my judicial assistant in Barrie.

HEALEY J.

Released: January 20, 2014