

THE GR COURT DOCKET

June 23, 2023

Lawyer not vicariously liable to opposite party in failed real estate transaction

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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There appears to be a growing propensity on the part of litigants to sue the opposite party's lawyer when a transaction fails or something else goes wrong that results in alleged damages. Although it might be natural for an aggrieved party to name as many defendants as possible as defendants to an action, it is extremely rare for the lawyer of an opposite party to be responsible in any way whatsoever for the alleged damages of the aggrieved party. In circumstances where the lawyer of the opposite party is named as a defendant to an action, the action against the lawyer can be dismissed on a pre-trial motion because such a lawsuit discloses no reasonable cause of action.

The action against the lawyer

In *Braysan Properties Inc. "In Trust" v. Muchos*, 2022 ONSC 3703 (not currently available on CanLII), the plaintiff commenced an action against multiple defendants, including a lawyer who represented some of the defendants in a real estate transaction.

The plaintiff had entered into an agreement of purchase and sale (the "APS") to buy a property in Mactier, Ontario. The closing date was affixed as September 30, 2021. Certain conditions applied to the transaction.

Before closing, the plaintiff and the owners agreed to amend the APS. Addendum #3 to the APS moved the closing date to August 31, 2021. The plaintiff also agreed to waive financing and inspection conditions and the new closing date was to be conditional on the plaintiff being able to obtain building permits for proposed new construction on the property.

In anticipation of the sale, one of the owners, G.M., entered into an agreement to buy a property in Point-au-Baril, Ontario.

On July 13, 2021, the plaintiffs and the owners entered into Addendum #7-V3. This addendum moved the closing date to August 24, 2021 and gave the plaintiff 30 days to arrange first mortgage financing of \$900,000, with

the owners agreeing to provide a vendor-take-back mortgage for the balance of the purchase price. If the plaintiff was unable to arrange financing, the plaintiff and owners agreed that Addendum #7-V3 would become null and void. In that case, the previously accepted APS would govern the contractual relationship.

The plaintiff was unable to arrange financing. Accordingly, the closing date for the transaction reverted to August 31, 2021 and the previous APS with its prior addendums applied.

The transaction did not close and the plaintiff sued. The plaintiff alleged that the defendants engaged in a fraudulent scheme to intentionally frustrate the plaintiff's ability to meet its obligations under Addendum #7-V3. The plaintiff alleged that the defendants were liable for breach of contract, inducement of breach of contract, constructive breach of contract, intentional interference with contractual relations and fraud.

With respect to the lawyer who acted for the owners in the real estate transaction, the plaintiff alleged that he was vicariously liable for the actions of his clients, including the alleged breach of contract, constructive breach of contract, inducing a breach of contract, interference with contractual relations and fraud.

The plaintiff contended that the owners' lawyer also assisted his clients in the mortgage transaction for the purchase of the Point-au-Baril property.

All of the defendants sought to dismiss the plaintiff's action on the grounds that it disclosed no reasonable cause of action, and was frivolous or vexatious or was otherwise an abuse of process of the court. The defendants relied on rules [21.01\(b\)](#), [21.01\(3\)\(d\)](#) and [25.11](#) of the [Rules of Civil Procedure](#) in seeking to have the plaintiff's claim dismissed, without leave to amend the statement of claim.

Under [r. 21.01\(b\)](#) a statement of claim can be struck in the following circumstances:

- a) the allegations do not give rise to a recognized cause of action;
- b) the plaintiff fails to plead the necessary elements of a recognized cause of action; or
- c) the allegations relied upon are simply conjecture, assumptions, or speculation unsupported by facts, or mere conclusions of law.

As set out in *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (S.C.J.) (not available on CanLII), a plaintiff is required to plead the essential elements of a cause of action that is recognized in law and to provide a concise statement of the material facts it intends to rely on to support the claim.

In general, a pleading will be read generously on a motion to strike an action on the grounds that it discloses no reasonable cause of action and the facts set out in the claim will be accepted as proven.

The Supreme Court of Canada has stated in [Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19](#) at [paragraph 49](#) that the assessment of whether a plaintiff's claim disclose a reasonable cause of action should be considered in light of the remedies the plaintiff seeks.

For the sake of completeness, [rule 21.03\(d\)](#) provides:

- (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

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(d) the action is frivolous or vexatious or is otherwise an abuse of process of the court.

[Rule 25.11](#) provides:

The court may strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

With respect to the claim against the owners' lawyer, the court explained that a stranger to a contract cannot be sued on that contract. Indeed, the essential elements for a successful breach of contract claim are:

a) the existence of a valid contract between the parties; and

b) a breach of a term of that contract.

Since the lawyer was not a party to the APS and its addendums, he could not be liable to the plaintiff for breach of contract or constructive breach of contract. The pleading disclosed no reasonable cause of action and was frivolous and vexatious.

The lawyer was also not liable for any of the other alleged causes of action, which the court found did not disclose reasonable causes of action in any event, subject to some allowance

to amend the pleadings.

The court explained that the owners' lawyer did not owe any duty of care to the plaintiff, noting that as found in [9383859 Canada Ltd. v. Saeed, 2020 ONSC 4883](#) at [paragraph 27](#), a lawyer cannot be held liable for providing favourable legal advice to his or her clients in matters of contract.

Although the court acknowledged that the lawyer acting for an opposite could in narrow and exceptional circumstances owe a duty of care to a non-client, the circumstances of the plaintiff's case did not fit within those rare circumstances.

Thus, the court struck all of the claims against the lawyer.

This case demonstrates that a plaintiff should carefully consider naming the lawyer of an opposite party as a defendant to an action. Lawyers are mere agents of their clients and are engaged to provide advice only to their clients. The law is well-established that only in rare circumstances does a lawyer owe a duty of care to an opposite party, whether in matters of contract or during litigation.

As a result of the lawyer's successful motion to the strike the claim against him, the lawyer will be entitled to an award of costs from the plaintiff.

Representation by Gardiner Roberts LLP

The successful lawyer was represented by James Cook. Mr. Cook is a senior partner and a litigation lawyer at Gardiner Roberts, LLP. Mr. Cook was assisted in this matter by Daria Risteska. Ms. Risteska is a senior associate and a litigation lawyer at the firm.

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