

Township cannot shift plaintiff's due diligence failures onto its lawyer by way of third party claim (2262025 Ontario Inc. v. Stewart and The Corporation of the Township of Georgian Bluffs)

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In *2262025 Ontario Inc. v. Stewart and The Corporation of the Township of Georgian Bluffs*, 2026 ONSC 5935, the Ontario Superior Court of Justice addressed an important limit on third party claims by a defendant against a plaintiff's real estate lawyer. In striking the third party claim, the court affirmed that if the real estate lawyer's alleged negligence is attributable to the plaintiff, the defendant has no cause of action against the lawyer by way of third party claim.

The action arose from the plaintiff's purchase of a property in the Township of Georgian Bluffs, Ontario. Following closing, the plaintiff sued the Township for negligence on the grounds that it failed to issue a building permit for work done on the property by the former owner and/or failed to inspect the property where a permit had been issued.

The Township denied liability. In its defence, the Township pleaded that the plaintiff should have done its own due diligence and had caused or contributed to its own damages, relying on the *Negligence Act*. The Township pointed to the Agreement of Purchase and Sale (APS), which required the buyer to satisfy itself as to title, and the waiver of a right to a home inspection.

The Township then issued a third party claim for contribution and indemnity against the plaintiff's real estate lawyer who had acted on the closing. The Township alleged that the lawyer was negligent or breached his contractual or fiduciary duties, by failing to:

- make reasonable inquiries before closing;
- recommend or arrange a proper home inspection;
- request the Township's file on the property;
- conduct a title search; and
- ask the seller for representations and warranties.

The lawyer moved to strike the third party claim under [Rule 21](#) of the [Rules of Civil Procedure](#) as disclosing no reasonable cause of action on the grounds that all of the Township's allegations related to his agency role as the plaintiff's lawyer on the closing. On a Rule 21 motion, a claim may be struck if it is plain and obvious that it has no reasonable prospect of success, with the facts as pleaded assumed to be true unless they are patently ridiculous or incapable of proof.

Fortuitously, the same motion judge had decided a motion years earlier, which was affirmed in the Court of Appeal's leading decision on claims for contribution and indemnity in *Hengeveld v. The Personal Insurance Company*, 2019 ONCA 497. In *Hengeveld*, the Court of Appeal held that whether a third party claim for contribution and indemnity discloses a reasonable cause of action is a function of whether the third party's negligence is attributable to the plaintiff. If it is, the defendant has no cause of action against the third party.

In an effort to defeat the motion to strike, the Township buttressed its position by arguing that the lawyer also acted for non-party individuals who had assigned their rights under the APS to the corporate plaintiff before closing, and that the lawyer negligently advised them in addition to the plaintiff.

On that theory, any negligence by the lawyer was not attributable to the plaintiff. Second, and in the alternative, it argued that even if the lawyer acted for the plaintiff, he was its advisor rather than its agent. That would leave room for a claim the plaintiff might not be responsible for.

The motion judge rejected these arguments and found that "the third party claim as advanced by the Township against [the lawyer] concerns an obligation belonging to the plaintiff and this claim by the Township is one which it can raise directly against the plaintiff." This finding alone was dispositive of the motion. The motion judge noted that other Canadian appellate courts have taken the same approach, citing *Adams v. Thompson*, 1987 CanLII 2590 (BC CA).

Nothing in the Township's pleadings, materials or arguments took the case outside the agency situation. The negligence alleged against the lawyer was essentially a failure in relation to the plaintiff.

As a result, the motion judge found no reasonable prospect that the claim would succeed and struck it.

Of interest to plaintiffs (and their lawyers) in real estate disputes, the decision applies *Hengeveld* in the real estate context. As a matter of law in Ontario, a defendant who blames a buyer for failing to do its own due diligence cannot seek contribution from the buyer's lawyer for the same failure. The lawyer's alleged shortcomings belong to the client, so the defendant's remedy is a contributory negligence defence against the plaintiff, not a third party claim. Artful pleading will generally not save such a claim since recasting who the lawyer acted for, or calling the lawyer an "advisor" rather than an agent, does not change the analysis where the substance of the claim is the plaintiff's own obligation. For lawyers who are named as third parties in this way, an early Rule 21 motion may be an efficient way to get out of the litigation.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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