CITATION: [redacted] v. Minto Management Limited et al., 2017 ONSC 3131
COURT FILE NO.: CV-16-564220
MOTION HEARD: 20170515

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: [redacted], Plaintiffs/Responding Parties

AND:

Minto Management Limited and Minto Group Inc., Defendants/Moving Parties

BEFORE: Master P.T. Sugunasiri

COUNSEL: Counsel, for the Defendants/Moving Parties: E. Heersink

Counsel, for the Plaintiffs/Responding Parties: S. Carter

HEARD: May 15, 2017

REASONS FOR DECISION

[1] This is a motion brought by the Defendants ("Minto") to strike one paragraph in the Plaintiffs' Fresh as Amended Statement of Claim ("Claim") pursuant to Rules 25.06 and 25.11 of the *Rules of Civil Procedure*. For the reasons set out below, I dismiss Minto's motion with costs payable to the Plaintiffs.

Nature of the Proceeding

[2] The action arises out of [redacted] tenancy at "High Park Village" during the period May 2007-2012 ("material period"). High Park Village was owned and operated by the Minto Defendants. [redacted] (collectively the "Plaintiffs") allege that throughout the material time, the Defendants deprived them of peaceful and quiet enjoyment of their leased apartment as a result of ongoing construction projects throughout the material period.

[3] They issued a claim in November of 2015 which was later amended to its current form on November 24, 2015. The Claim alleges negligence, breach of contract, and bad faith in addressing the disruption caused by the construction. The Plaintiffs seek rent abatement, or in the alternative, damages for negligence and breach of contract and aggravated damages. The entire amount claimed is $45,000, hence proceeding under the simplified procedure rules.

[4] The Defendants have not defended the Claim. Instead, they bring the within motion to strike paragraph 7 of the Claim on the basis that it contains admissions, and plead evidence. The impugned paragraph reads as follows:

Breaches of Legislative, Contractual and Other Duties

7. Throughout the plaintiffs' tenancy at High Park Village, the plaintiffs continually were deprived of peaceful and quiet enjoyment of their leased apartment due to the acts or omissions of the defendants, its employees, directors/officers, contractors and other third party agents. These included but are not limited to the following:

    a) Constant construction and repair to the various High Park Village buildings which were conducted throughout normal weekday business hours and often after and before business hours (including as early as 5:30 am and not ending until often 8:00 pm), including "hydro demolition" which the defendants admit had a significant impact on daily activities, including "sleeping", "eating" and "talking on the phone". The defendants admitted that this construction, which occurred at many buildings in the area, would include times after 6:00pm and before 8:00am Monday to Friday and on the weekends. In a Notice dated April 5, 2012, the following was stated:

...

> *Please be advised that the hydro-demolition phase is anticipated to start on April 10, 2012 through to April 30, 2012, according to estimate schedule times. This phase requires the removal of the concrete where the most noise will occur. While every attempt has been made to confine the timeframe of the work to mitigate disruption, you will experience high levels of noise as a result of the concrete removal. This could impact your daily activities including, but not limited to eating, talking on the telephone, watching television or sleeping. We are pleased to advise that the remaining parts of each phase are not anticipated to involve the same amount of noise. ...*
>
> *The underground garage work will take place during the weekdays between the hours of 8:00 a.m. and 6:00 p.m. If at anytime weekend work is scheduled, it will be to maintain the project schedule due to lost time. When work is scheduled on weekends, we will make every attempt to provide 24 – 48 hours notice of such work. Work that takes place on Saturday will not commence before 9:00 a.m. or after 5:00 p.m. ....*

    b) This was an ongoing litany of construction projects during the tenancy, including pool upgrades, elevator upgrades, exterior stair well repairs, *inter alia*. These were continuing acts and omissions by the defendants, during which time the defendants showed callous disregard for the plaintiffs, and acted throughout in bad faith claiming that the issues that had arisen would

be addressed and compensation and/or abatement of the rent would be eventually given (which they did not) (collectively, the "Breaches").

The Defendants' Position

[5] The Defendants rely on Rules 25.06(1), 25.06(7) of the *Rules of Civil Procedure* to argue that setting out the exact wording of the notice alleged to have been posted by the Defendants is contrary to the legal principle that litigants must not plead evidence. A subset of evidence is an admission. The Defendants therefore submit that the use of the word "admit" in two places in paragraph 7 is highly prejudicial and impermissible. They allege that such pleadings constitute "trial by pleadings". In sum, Minto asks that all of paragraph 7 of the Claim be struck pursuant to Rule 25.11 as being an abuse of process.

The Plaintiffs' Position

[6] In contrast, the Plaintiffs rely on the same provisions of the Rules to contend that the quoting of the notice alleged to have been posted by Minto is for the purpose of meeting the heightened requirement of a party to plead with greater particularity when malice or intent is pleaded. They further suggest that including the wording of the notice falls squarely within the parameters of Rule 25.06(7) which states:

> The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

[7] In this case, the Plaintiffs are alleging an intentional and knowing deprivation of peaceful enjoyment of their premises and bad faith in the representations made by the Defendants in compensating them. As such, the Plaintiffs argue that it is incumbent upon them to plead the full particulars of these allegations. In any event, the Plaintiffs state that there is no prejudice to the Defendants and that if anything, the pleading gives further particularity to allow Minto to properly respond.

Analysis

[8] It is trite law to say that a pleading containing evidence may be struck out, as may be a pleading of an omission (see for example Perell, J's summary of this law in *Jacobson v. Skurka*, 2015 ONSC 1699 at paras. 44 and 45.) The fact that a pleading **may** be struck out does not mean in every instance, that it should. It is also important to keep in mind Rule 1.04 of the *Rules of Civil Procedure* which requires the Court to construe the Rules liberally in order to secure the most just, expeditious and proportional determination on the merits of every proceeding. As Justice Shaw noted in *Jourdain v. Ontario*, 2008 CanLII 35684 (SC), 91 OR (3d) 506 at para. 38, "While pleadings must not offend the Rules, it is well established that counsel may frame their pleadings as they deem advisable and this right should not be lightly infringed on by the Court."

[9] In this case, while the inclusion of the notice is possible evidence of the general allegation in paragraph 7 that the construction had a significant impact on the Plaintiffs' eating, sleeping etc., there is not always a bright line that distinguishes materials facts from evidence and/or particulars. Sometimes an allegation can be all three. Here, even if the notice may be construed as evidence, it is also material to the overall allegations of negligence, breach of contract, and bad faith, and conceivably falls within the purview of Rule 25.06(7). In other words, the effect of the notice may be material to whether or not Minto met their contractual or legal obligations to the Plaintiffs. While the Rule states that any such document need not be set out in its entirety, it does not mean that it cannot be. In this case, the notice is fairly brief and the Plaintiffs have opted to put its wording in the body of their Claim.

[10] I also agree with the Plaintiffs that because they have alleged bad faith, the Defendants' knowledge of the disruption, and the extent of it, is material. The inclusion of the notice can be readily seen as a required particularization of the Plaintiffs' basis for their allegation of bad faith or the knowing deprivation of the peaceful enjoyment of their apartment.

[11] Along the same lines, the fact that the Plaintiffs used the word "admit" in paragraph 7 does not itself warrant excising the entire paragraph from the Claim. There is nothing wrong with a Plaintiff alleging knowledge on the part of a Defendant. The fact that the Plaintiffs may have chosen their words poorly in a very small and discreet part of the Claim does not warrant the Court's intervention.

[12] Even if I am incorrect in my analysis, there is certainly no prejudice to the Defendants in leaving in paragraph 7 of the Claim. Minto can easily defend the paragraph and can test it further in discovery. This is not a case in which there is a pleading rampant with sweeping paragraphs of evidence such that there is a "trial by pleading" as the Defendants allege.

[13] Given the foregoing, I need not discuss in detail whether or not paragraph 7 is an abuse of process. A pleading that is relevant and material to the Claim cannot be abusive. Even if paragraph 7 can be seen as containing some evidence, the mere fact that a single paragraph in a five-page pleading contains evidence is not *de facto* abusive. Such an interpretation would be overly restrictive and runs afoul of the above mentioned principle that in general parties, must be left to craft their own pleadings without forensic review by the Courts. I dismiss Minto's motion to strike paragraph 7 of the Claim with costs to the Plaintiffs.

Costs

[14] This matter is unfortunately a shining example of the robust motions culture that still seems to plague our justice system. Proportionality should govern all steps a litigant chooses to take in a proceeding. In the present case, the action falls within the simplified procedure rules. Unnecessary time was spent preparing a motion and arguing about a single paragraph in a statement of claim that could have been addressed easily and efficiently in a statement of defence. I am guided by a recent decision of Mr. Justice Dunphy when he suggested that an appropriate litmus test for every decision taken in the litigation process is whether or not the step has a material impact on the actual advancement of the dispute towards its final

resolution on the merits (see *TD Bank NA v. Lloyd's Underwriters*, 2017 ONSC 2464, [2017] OJ No 1939 at paras. 13 and 14). This motion, even if it had been successful, would not have had a material impact on the actual advancement of the dispute to its final resolution on the merits.

[15] Both parties provided me with costs outlines. In this case, there is no reason to divert from the usual rule that costs follow the event. The question that remains, however, is one of quantum. One of the five-fold purposes of costs summarized succinctly by Justice Perell in *Sheppard v. McKenzie,* 2009 CanLII 46175, [2009] OJ No 3677 (SC) is to discourage frivolous steps taken by litigants. [redacted] Having regard to these considerations and the factors in Rule 57.01, the Plaintiffs are entitled to recover 10 hours' worth of work done by Mr. Carter at his partial indemnity rate, plus disbursements in the amount of $470.97.

Disposition

[16] I order the following:

a. Motion is dismissed; and

b. Costs are payable by the Defendants/Moving Parties in the amount of $2330.97 inclusive of disbursements and HST within 30 days from the date of these reasons.

Master P.T. Sugunasiri

Date: May 23, 2017