CITATION: Goryn v. Huntington 1900 Bayview Inc., 2019 ONSC 2881
COURT FILE NO.: CV-17-573382
DATE: 20190509

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IARINA GORYN	)	*Roger Horst*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
HUNTINGTON 1900 BAYVIEW INC., DELTERA INC. and TRIDEL CORPORATION	)	*Michael Foulds*, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** February 6, 2019

REASONS FOR DECISION

W. MATHESON J.:

[1] The defendants move for summary judgment, seeking the dismissal of this claim based mainly on an exclusion clause in the agreement of purchase and sale pursuant to which the plaintiff purchased her condominium. The plaintiff's claim alleges the tort of nuisance and claims damages arising from noise from the construction of an adjacent condominium building outside the hours permitted under the applicable municipal by-law.[1]

Brief background

[2] In April 2015, the plaintiff entered into an agreement of purchase and sale ("APS") to purchase a condominium from the defendant Huntington 1900 Bayview Inc. The purchase price was $1.05 million. Before signing the APS, the plaintiff read it and reviewed it with her lawyer. The transaction closed in August 2015.

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[1] Although the statement of claim also includes complaints about light from construction equipment, plaintiff's counsel has confirmed that those items are not being pursued.

[3] The plaintiff's unit is in a condominium building that was constructed as Phase I of a 2-phase development. Before signing the APS, the plaintiff knew that there would be construction noise arising from the construction of a second condominium building directly adjacent to hers, called Phase II. However, in this action, the plaintiff claims that the actual construction took place not only in normal and permitted hours, which she expected and accepted, but also outside those hours and in contravention of the municipal noise by-law. The plaintiff alleges that there were numerous instances of construction noise outside the permitted time periods, causing disruption to her and her family. These allegations are contested. The building of Phase II is now complete.

[4] The plaintiff sued based on the tort of nuisance. The defendants include Huntington 1900 Bayview Inc. (the vendor), Deltera Inc. (the project manager that Huntington contracted with for the construction of Phase II) and Tridel Corporation (whose name appears on the APS).

[5] The defendants deny the allegations of nuisance and rely on both automatic exemptions from the applicable by-law and exemptions specifically obtained for the construction project. However, on this motion, the defendants mainly rely on a clause in the APS excluding claims based on noise. That exclusion clause forms the foundation for this motion for summary judgment.

Analysis

[6] The issues before me are as follows:

(i) whether the issues on this motion ought to be decided under Rule 20 of the *Rules of Civil Procedure*;

(ii) whether the exclusion clause in the APS covers the alleged activity;

(iii) if so, whether the exclusion clause should be enforced;

(iv) whether the defendants Deltera and Tridel can rely on the exclusion clause as third party beneficiaries; and,

(v) whether, in any event, the plaintiff has no claim as against Tridel because it had no involvement in the construction activities giving rise to the claim.

Rule 20

[7] Subrule 20.04(2) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or a defence. As set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits using the summary judgment process. This will be the case when the process: "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

[8] If there appears to be a genuine issue requiring a trial, Rule 20.04(2.1) permits the motion judge, at his or her discretion, to: (1) weigh the evidence, (2) evaluate the credibility of a deponent, or (3) draw any reasonable inference from the evidence unless it is in the "interest of justice" for these powers to be exercised only at trial: *Hryniak,* at para. 66.

[9] The parties should put their best foot forward on a summary judgment motion: *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, *aff'd*, 2014 ONCA 878.

[10] The parties agree that the APS can be interpreted on this Rule 20 motion. Even with the parties' agreement, I must still be satisfied that the contract interpretation issue can fairly and justly be decided under Rule 20. I am satisfied. The facts necessary to interpret the APS do not give rise to factual disputes that require a trial. Cases that turn on the interpretation of a contract are routinely and efficiently addressed under Rule 20: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at para. 101.

[11] The plaintiff submits that no other issues should be decided under Rule 20. The Rule 20 issue is therefore further discussed below.

Exclusion Clauses

[12] There is no dispute between the parties that the question of the enforceability of an exclusion clause involves a three-step analysis. As set out by the Supreme Court of Canada at paras. 122-123 of *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation)*, 2010 SCC 4, the three steps are as follows:

(i) Does the exclusion apply to the circumstances at issue?

(ii) If so, was the exclusion unconscionable at the time the contract was made?

(iii) Even if the exclusion does apply and is not unconscionable, should the court nonetheless refuse to enforce it because of overriding public policy concerns (for this step, the onus in on the party seeking to avoid enforcement)?

[13] The first step requires the use of normal contract interpretation principles. The clause in question must be construed to determine whether or not it applies to the circumstances at issue. In this case, the circumstances relate to construction noise and there is a dispute between the parties about whether the clause relied upon does apply.

[14] For both the second and third step, the plaintiff submits that if the clause does apply, it is both unconscionable and against public policy because "it condones illegal activity." The illegal activity relied upon is the alleged breach of the municipal noise by-law.

Interpretation of the APS

[15] There is no dispute between the parties about the principles to be applied in interpreting the APS. Generally, as set out in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at para. 47, the contract must be interpreted "as a whole, giving the words used their ordinary and

grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract". As mandated by *Sattva,* I have taken a practical, common sense approach not dominated by technical rules of construction, with due regard for proper evidence of surrounding circumstances: at para. 47.

[16] The defendants rely on the knowledge of both parties that there was a second phase of the condominium development, which meant a building would be constructed next door, specifically Phase II. This second phase is referred to in the APS so resort to surrounding circumstances is not necessary and in any event may not be permitted: *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842.

[17] The APS is a standard form contract and is lengthy and detailed. The uncontested evidence is that the form of agreement was presented to the plaintiff on the basis that she had to accept it in order to proceed. If (and only if) there is an ambiguity, and if the other rules of construction fail to allow a court to ascertain the meaning of the agreement, the *contra proferentem* rule is available. That rule provides that the ambiguity will be construed against the author of the agreement.

APS

[18] The APS comprises two pages of terms, including matters specific to the unit being purchased as well as various schedules that are stated to form an integral part of the APS. Two of the schedules are central to the issues on this motion: Schedule "A" – General Terms and Conditions; and, Schedule "AA" – Site Specific Terms & Provisions.

[19] The exclusion clause at issue is in Schedule "A" – General Terms and Conditions, within paragraph 23, as follows:

> ...and it is expressly understood and agreed that despite the foregoing, the Purchaser shall not make or pursue any claim against the Vendor (or any other party) for compensation, for an abatement in the purchase price and/or for damages or otherwise, nor initiate or pursue any claim, action or proceeding against the Vendor (or any other party) by reason of any or all of the foregoing concerns regarding noise, ... and/or any inconvenience or injury to the Purchaser (or the Purchaser's property) caused thereby,... [Emphasis added.]

[20] As quoted above, this clause applies only to "any or all of the foregoing concerns". This refers to the concerns mentioned within this paragraph 23 in Schedule "A", which also incorporates by reference concerns mentioned in paragraph 23 of the other relevant schedule – Schedule "AA".

[21] Beginning with Schedule "A", the same paragraph in which the above clause appears lists certain sources of noise. Under the heading "NOISE WARNING AND OTHER SPECIAL NOTICES", paragraph 23 commences as follows:

> 23 (a) The Purchaser specifically acknowledges and agrees ...that the proximity of the Condominium to any nearby roadways,

> highways, subways (and corresponding transit operations) and/or railway tracks and lines (and corresponding railway operations, over which trains and other railway traffic may travel), as well as any nearby industrial, commercial/retail or office buildings, any nearby public park (which may or may not contain playground facilities for children), and/or any nearby hydro sub-station or hydro corridor ..., and to any other specific sources of excessive noise and/or vibration, as more particularly described in paragraph 23 (a) of Schedule "AA" annexed hereto (if applicable), may result in noise and/or vibration transmissions to (or otherwise affecting) the Lands or any portion thereof, and may cause the noise exposure and/or vibration levels affecting the Lands to exceed the noise/vibration criteria established by the Governmental Authorities, and that despite the inclusion of noise control features within the Condominium, noise levels and vibration from any of the aforementioned sources may continue to be of concern, occasionally interfering with some activities of the dwelling occupants in the Condominium... [Emphasis added.]

[22] In addition to the above-listed sources of noise, subparagraph 23(b) of Schedule "A" lists other activities that could cause noise or other inconvenience. The listed activities include the following, in relevant part:

> In addition to any special notices, warnings and/or provisions which the Vendor wishes to bring to the Purchaser's attention, and which may be set out in paragraph 23(b) of Schedule "AA" annexed hereto (if applicable), the Purchaser is hereby advised that:
>
> ...
>
> iv) as and when other units (and/or any exclusive use common elements areas) in this Condominium are being completed and/or moved into, excessive levels of noise, vibration, dust and/or debris are possible, and the same may accordingly temporarily cause noise and inconvenience to the dwelling occupants; and
>
> v) on Closing (and even for some period of time after Closing), there still may be outstanding construction and/or finishing work to be undertaken by the Vendor to portions of the existing exterior and/or interior of the condominium building, which may require the continued placement and use of an exterior hoist (for hauling or conveying construction materials, workers and/or debris) that is temporarily anchored to the exterior façade of the building, immediately outside of or near the Purchaser's dwelling unit, which in turn may ... give rise to an increase in noise and/or vibration levels during construction hours (between 7 AM and 7 PM), pending the completion of all construction and finishing work in respect of the

> Condominium, which ... noise and/or vibration may be of concern to the Purchaser and which may interfere with some activities of the dwelling occupants; [Emphasis added.]

[23] None of the above-listed sources of noise include the construction of a new condominium building or make any reference to Phase II.

[24] There are then the sources of noise incorporated by reference from paragraph 23(a) of Schedule "AA" – the site-specific schedule.

[25] Subparagraph 23 (a) of the site-specific schedule is under the heading "NOISE WARNING AND OTHER SPECIAL NOTICES". Subparagraph 23(a) contains a similar acknowledgment and agreement that lists some additional sources of excessive noise, as well as cross-referencing the general terms and conditions in Schedule "A" :

> 23 (a) The Purchaser specifically acknowledges and agrees that in addition to the sources of excessive noise and/or vibration referred to in Paragraph 23 (a) of the Schedule "A", it is understood and agreed that the proximity of this Condominium to Highway 427, to the Eva Road exit ramp from Highway 427 and to Pearson International Airport (and increasing pedestrian, vehicular and/or airport traffic noises generated therefrom) and to future nearby high-rise, condominiums, may result in noise,... to (or otherwise affecting) this Condominium and the respective occupants of the dwelling units in this Condominium, and may cause the noise exposure, vibrations,... affecting this Condominium and the occupants therefor to exceed the noise/vibration/... established by the Governmental Authorities. ...[Emphasis added.]

[26] There is no express reference to construction in paragraph 23(a) of Schedule "AA", nor to Phase II. The defendants rely on the general reference in subparagraph 23(a) to "future nearby high-rise, condominiums" in support of their position that the exclusion clause covers the alleged noise at issue in this action.

[27] Schedule "AA" does refer to the Phase II development elsewhere. In the definitions in paragraph 2, Phase II is defined as follows: "The "Phase II Condominium" means the future condominium to be developed and registered on the Phase II Lands..." The "Phase II Lands" are defined as the westerly portion of the Huntington Site, which is the same site as the existing condominium building from which the unit was sold under the APS. The APS therefore incorporates the plan to build an adjacent condominium building. This is not an issue. The plaintiff agrees that she was aware of it.

[28] There is also an express reference to Phase II in paragraph 23 of Schedule "AA". However, it is not in the above-quoted subparagraph (a). Subparagraph (o) gives notice that the Declarant reserves the right not to proceed with Phase II.

[29] The plaintiff submits that the APS, and more specifically the exclusion clause relied upon by the defendants, does not apply to the circumstances at issue in this case. More specifically, the plaintiff submits that the APS, properly interpreted, does not apply to the Phase II construction noise outside of the times permitted by the noise by-law.

[30] The APS must be interpreted as a whole. In this case, in interpreting the reach of the exclusion clause in paragraph 23 of Schedule "A", I have regard for not only that paragraph but also for the portion of paragraph 23 of Schedule "AA" that is incorporated by reference, all within the context of the entire agreement.

[31] Giving the words of the APS their natural and ordinary meaning, and interpreting the APS as a whole, I conclude that Phase II construction noise outside the permitted hours does not fall within the sources of excessive noise that are the subject of the exclusion clause relied upon by the defendants. I reach this conclusion as follows:

(i) Although Phase II is expressly defined in the APS, and referred to in paragraph 23(o) of Schedule "AA", there is no express reference to it in either list of sources of noise caught by the exclusion clause, as set out in paragraph 23 of each of Schedule "A" and "AA".

(ii) There is an express reference to construction noise in paragraph 23(b)(v), amongst the list of sources of noise, yet it does not apply to Phase II.

(iii) The above specific references to construction noise and to Phase II in the APS support an interpretation that, if the construction of Phase II was intended to form part of this exclusion clause, it would have been expressly listed in the sources of noise in the APS.

(iv) In addition, the express reference to construction noise was qualified to relate only to noise between 7 AM and 7 PM, which were the regular times permitted under the noise by-law. This reference to construction noise within permitted times suggests that if the intention was to exclude construction noise outside the permitted hours, it would be done expressly.

(v) The words relied upon by the defendants, referring generally to "future nearby high-rise, condominiums", neither mention Phase II nor construction noise.

(vi) The absence of express references to: (1) Phase II, (2) construction noise, and (3) outside permitted hours, in the detailed lists of sources of noise in the APS, interpreting the APS as a whole, is in conflict with the interpretation proposed by the defendants.

[32] I conclude that the natural and ordinary meaning of the exclusion clause is not ambiguous. Construction noise regarding Phase II, outside permitted hours, is not a source of noise that is caught by the exclusion clause. However, if the words relied upon by the defendants could be interpreted either way, giving rise to an ambiguity, there are two other principles that would lead to the same outcome. First, this is an exclusion clause and as such common sense suggests that in

the event of an ambiguity this type of clause should be interpreted narrowly. Second, given that the vendor prepared the contract at issue in this case, applying the *contra proferentem* rule would lead to the same result.

[33] Among other arguments, the plaintiff also relies on the agreement between Huntington and Deltera, under which Deltera agreed to "manage and supervise, on behalf of the Owner, the construction of the [Phase II] in accordance with the provisions of all applicable government laws and regulations." The plaintiff submits that this agreement shows that the vendor intended that the Phase II construction take place within, not outside, permitted hours. That may be so, but I conclude that this agreement, not known to the plaintiff at the time, is beyond the surrounding context that ought to be considered when interpreting the APS.

[34] Given that I have decided that the exclusion clause does not apply to the circumstances of this case, I need not proceed to address the other issues regarding whether this exclusion clause would be enforceable. Nor need I address the third party beneficiary rule. The only remaining issue is the free-standing basis for the motion to dismiss the claim as against Tridel.

Tridel

[35] Apart from the exclusion clause in the APS, the defendants submit that there is no tenable claim in nuisance against Tridel because it did not engage in any conduct that could amount to nuisance.

[36] In support of this aspect of the summary judgment motion, the defendants rely on their sole affiant, the site superintendent for the Phase II site from Deltera. That individual attests that Tridel had no employees on site and was not involved in the construction activities at the site. Deltera had control of the site. He further attests, on information and belief from his project director at Deltera, that Tridel's involvement in the project was limited to allowing Deltera to use the Tridel name for marketing purposes pursuant to a licensing agreement between Huntington and Tridel. However, that licensing agreement is not disclosed nor is there evidence from anyone at either party to that agreement, specifically Huntington or Tridel.

[37] The plaintiff's claim is based on an allegation that Tridel is the owner and/or the directing mind of both Huntington and Deltera. The plaintiff's evidence shows that these three companies share a head office address and have some overlapping officers and directors, supporting a corporate relationship between these parties. Further, Tridel's name appears at the top of the APS even though it is otherwise not mentioned as a party to the agreement.

[38] The defendants accept that courts "have struggled to come up with an exhaustive definition of the tort of nuisance". The defendants rely on *French v. Chrysler*, 2014 ONSC 4573, *aff'd*, 2015 ONCA 104, in which the court discusses aspects of the law of nuisance and related authorities.

[39] The defendants' case law shows that the tort is potentially available to those whose use and enjoyment of private land is being interfered with by the unreasonable use of another's land: *French v. Chrysler*, at para. 20, citing *Halsbury's Laws of Canada – Torts* (2012 Reissue). This is the essence of the plaintiff's complaint.

[40] Liability will depend upon the defendant's degree of control in fact or in law: *French v. Chrysler*, at para. 21, citing Salmond, *The Law of Torts*, 18th ed. 1981, at p. 48, cited with approval in *Engemoen Holdings Ltd. v. 100 Mile House (Village)*, [1985] B.C.J. No. 267 (S.C.), at para. 28.

[41] The defendants submit that because Tridel simply loaned its name to the project, there was no conduct that could amount to a nuisance.

[42] I have two difficulties with this submission. First, it is based upon weak evidence, not emanating from Tridel. I accept the evidence that Deltera had control of the job site and Tridel employees were not on site. However, the plaintiff relies on conduct outside the job site. The only evidence from the defendants in support of the proposition that Tridel's only conduct was lending its name is information and belief from a Deltera manager about an agreement between two other companies, without including the agreement itself or any evidence from those other companies, specifically Huntington and Tridel. I find this evidence insufficient, especially given the second difficulty I have with the defendants' position. Specifically, the case law put forward by the defendants shows that this tort lacks an exhaustive definition. In *French v. Chrysler*, at para. 29, the court quotes from a decision on a motion to strike out pleadings in *Morguard Real Estate Investment Trust v. ERM Canada Corp.*, 2012 ONSC 4195. In that case, at para. 50, the court summarized the law as follows:

> The respondents further insist that there is no requirement that a defendant own or occupy adjoining lands in order to make a claim in private nuisance. At a minimum, the case law is divided on this issue. What is clear is that:
>
> - the courts have commented extensively on the difficulty in providing an exhaustive definition of the tort of nuisance;
>
> - the categories of nuisance are not closed; and
>
> - the principles of private nuisance are sufficiently elastic to deal with less typical cases of nuisance.

[43] No law has been put before me that displaces this summary of the non-exhaustive and elastic nature of this tort.

[44] Having regard to the evidence and law before me, I find that Tridel has not met its burden to prove that its only conduct was lending its name to the project. I therefore need not address the issue of whether lending its name would be insufficient conduct to found a claim for nuisance. Further, I do not find that the extended powers under Rule 20 provide a solution to this situation. This is a case where the evidence put forward is inadequate, not a situation where the motion turns on disputed facts.

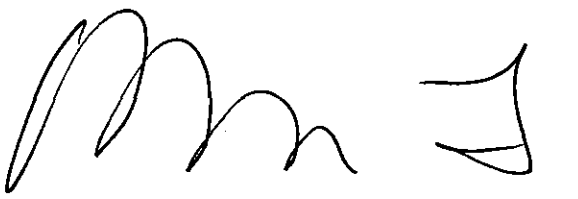
[45] In oral submissions, plaintiff's counsel submitted that Rule 20 was not an appropriate process for the determination of a number of other issues. It appears from the material before me that there are significant disputes between the parties regarding questions such as whether the events relied upon by the plaintiff occurred as alleged and whether they would amount to

compensable nuisance. However, these issues were not brought forward to be decided on this motion. The scope of the motion was very limited. It is therefore not necessary to decide whether or not the Rule 20 procedure would be suitable for those matters.

Order

[46] This motion is therefore dismissed. In accordance with *Hryniak*, at para. 78, I would ordinarily seize myself of this matter. However, I have recently commenced a very lengthy trial and conclude that in these special circumstances seizing myself will not serve the efficient progress of this matter. I therefore do not do so in this case.

[47] If the parties are unable to agree on costs, they shall make their costs submissions in writing as follows: the plaintiff shall deliver brief written submissions (up to 5 pages) plus any supporting material by May 27, 2019. The defendants may respond by brief written responding submissions (up to 5 pages) and any supporting material, by June 14, 2019.



Justice W. Matheson

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REASONS FOR DECISION

W. Matheson J.

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