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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
MILLSTREAM ENTERPRISES LTD.	REASONS FOR JUDGMENT
PLAINTIFF	OF THE HONOURABLE
AND:	MR. JUSTICE SPENCER
CORPORATION OF THE CITY OF NEW WESTMINSTER	
DEFENDANT	

Counsel for the plaintiff: William N. Fritz and Gillian M. Dougans

Counsel for the defendant: David M. Twining and Catherine E. Carter

Place and date of hearing: Vancouver, B.C. November 13, 1992

This was an application brought under Rule 18A to dismiss the action against the defendant City of New Westminster. None of the parties named in the style of cause, except Millstream Enterprises Ltd., which I shall call "Millstream", and the City, which I shall call "the City", for brevity's sake, have any further interest in the action.

The claim originated from a fire which damaged Millstream's apartment block in 1987. According to the pleadings it spread and caused more damage than it might otherwise have done because of the failure to install fire stops during the course of construction in 1964. It is admitted that the City's bylaws then required fire

stops. It is further admitted that in 1964 the City did not have a building inspector to inspect buildings under construction to ensure compliance with the bylaw, even though the bylaw required inspection. For the purposes of this application only, the City admits that it was negligent in failing to inspect in 1964 and to ensure that fire stops were installed according to the requirements of its then bylaw.

Millstream acquired the apartment building in 1974 and thus was not on the scene during its construction. It says the duty to inspect and ensure compliance is owed not only to the original owner, but also to subsequent purchasers. There is ample authority for that proposition, see for example, *Kamloops vs. Nielsen* [1984] 66 B.C.L.R. 273 (S.C.C.) where liability was sustained against a city in favour of the subsequent purchaser of a house for its failure to enforce the terms of an inspection bylaw against the original owner during construction.

It is an important fact in this case that there was an earlier fire in 1978 when Millstream did own the premises. That fire damaged a different part of the building. Afterwards, the City's fire department inspected the premises and attributed the spread of that fire to the absence of the required fire stops. Neither then, nor between the 1978 and 1987 fires, did the City's servants tell Millstream that the absence of fire stops in the part of the building damaged in 1978 suggested that fire stops were probably missing also from the rest of the building. As a result of the 1978 fire, the part of the building then damaged was reconstructed

and adequate fire stops were included at the direction of the City. They were billed by the construction firm to Millstream as an "upgrade" and were not covered by insurance.

THE BASIS OF THIS APPLICATION TO DISMISS THE CLAIM

The City's application before me is based upon the provisions of the Limitation Act. The City says that Millstream's cause of action arose not out of the damage suffered in the 1987 fire, which was only the effect of the City's negligent failure to inspect and ensure that it's bylaw was obeyed in 1964, but at the time of its negligent failures in 1964. It says the result of that was, that Millstream bought a building which was defective in its construction. It says that was the damage suffered by Millstream as a result of the City's negligence and that the fire damage was simply the way in which that damage came to be quantified. The importance of that, according to counsel for the City, is that Millstream became, or should have become aware of its damage in 1978 when it was revealed that the part of the building damaged in that fire did not have the required fire stops.

For the purposes of this discussion I shall assume that the City's contention of law is right and that the damage required to complete Millstream's cause of action arose in 1974 when it bought a defective building, or at the latest in 1978, when it was aware fire stops were missing from part of the building.

The City produces the opinions of Stan Greenfield, principal of Barclay Construction Ltd. which repaired that damage for

Millstream, and of Joseph Mirko who investigated the 1978 fire and found no fire stops, both of whom say that the absence of fire stops in the part damaged by the 1978 fire indicated that stops were probably also missing from the rest of the building. That includes the part damaged in the 1987 fire.

The City's case on this application is that Millstream knew or ought to have known in 1978 of the City's 1964 failure to inspect and ensure that fire stops were installed and that time began to run against it then.

If one assumes that Millstream's cause of action did arise in 1978 when the first fire happened, the question to answer is, whether Millstream was then aware, or should have become aware of the absence of fire stops in the rest of its building, and that the absence was due to the City's 1964 negligent failure to inspect and enforce its bylaw. That question arises under s.6(3) of the Limitation Act. Millstream claims that the running of the limitation period is postponed against it because there were no facts then within its means of knowledge that a reasonable man, having taken the appropriate advice, would have regarded as giving him a reasonable chance of success against the City. The burden of proof lies on Millstream under s.6(5).

Millstream's principal, Mr. Crasemann, deposed that he was not aware in 1978 that there were insufficient fire stops in the undamaged part of the building. He was told that fire stops should be added to the damaged part as an upgrade, that is to say an

addition to the building to bring it into conformity with the building code as at the date of the repairs. He did not see the Mirko report which told its insurers that the 1978 fire spread because of the failure to install fire stops as required by the Building Code in 1964. That report and its covering letter, in my opinion, fairly suggest that the failure may well apply to the whole of the building. But the evidence is that Millstream was not told about it. Millstream did receive a letter from the City's Fire Department that required it to install a new supervised fire alarm and new latch sets on the stairwell doors. The letter said nothing about the absence of fire stops either in the damaged part or in the rest of the building.

The evidence which the City relies upon to show Millstream's knowledge, or what ought to have been its knowledge in 1978, is that the company sued the tenant whose carelessness caused the 1978 fire for damages, and the tenant defended by alleging that the fire spread through Millstream's negligence in failing to install fire stops. There was a similar allegation in third party proceedings against Millstream in an action brought by other tenants for damage to their property. In those actions, the pleadings included reference to the City's bylaws Nos. 1670, 1728, 2014, 21279, 2630 and 3098, and to a Building bylaw amendment No. 1 of 1965. There is nothing to show when those bylaws came into force, except that I presume the last one mentioned dates from not earlier than 1965. I am thus unable to say that reference to them in the pleadings brought actual knowledge home to Millstream that there was a requirement for the inclusion of fire stops in 1964 when the

building was constructed or that there was any requirement for inspection by the City to see that the building conformed to its plans and to any bylaw requirements.

Even if the evidence showed those bylaws did impose a duty on the City in 1964 to inspect the building under construction, the evidence is that the actions in which those bylaws were pleaded, although in Millstream's name, were in fact for claims subrogated to or brought against its insurers. Under that circumstance I am unable to attribute the lawyers' knowledge, whatever it was, to Millstream as I suggested it might be during argument. They were not his agents but the insurer's. Mr. Crasemann testified that the lawyers never suggested to him that Millstream might have some action against the City.

As the evidence stands I am unable to find either that Millstream knew or that it ought to have known in 1978 that the City required fire stops in 1964 and that it had failed to inspect to ensure they were present. Even if the absence of fire stops in the damaged part of the building, discovered after the 1978 fire, should have alerted it to the possibility that there were no fire stops in the rest of the building, that fact does not mean that Millstream was, or should then have been, aware that it had any claim for negligence against the city. To have known that would require that the company should have been aware, in 1978, that in 1964 the City bylaw required both the installation of fire stops and an inspection by the City's officials to ensure they were there. There is no evidentiary basis for such a finding. Nor is

there any evidentiary basis for finding that Millstream knew, or should have known that the City was negligent in the annual or semi-annual inspections by its fire department since 1964 by failing to detect the absence of fire stops in the rest of the building. The evidence is that the stops are enclosed in the course of construction and not visible to any reasonable inspection.

To say that Millstream had no reason to know in 1978 that the City had been negligent in 1964 does not mean that Millstream might not be liable for some contributory negligence by not checking to see if there were fire stops in the rest of the building. I was not asked to, nor have I considered that question. I mention it simply to distinguish between any duty that may have fallen upon Millstream to look out for itself, and any knowledge that might have triggered the running of the limitation period in favour of the City.

The absence of any evidentiary basis for Millstream to have known in 1978 that the City had any duty in 1964 to inspect and ensure that fire stops were present, precludes the running of the limitation period until the occurrence of the 1987 fire. The City's application for summary judgment dismissing the action against it on that basis is therefore dismissed.

There will be costs to Millstream in any event of the cause.

"J.E. Spencer, J."

Vancouver, B.C.
November 25, 1992