Date: 19961011
Docket: 28551
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PATRICK GARY YOUNG and RHONDA LEE HEWINS-YOUNG

PLAINTIFF

AND:

DISTRICT OF MACKENZIE, ERNEST MALENIZA and ED ELLIOTT WINDSOR

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE A.F. WILSON

(IN CHAMBERS)

Counsel for the Applicants/Defendants District of Mackenzie and Ernest Maleniza:	Wayne D. Semrau
Counsel for the Respondents/Plaintiffs:	Terrence Matte
Place and Date of Hearing:	Prince George, B.C. 23 September 1996

I INTRODUCTION

[1] In 1990, the plaintiffs purchased a home in Mackenzie, B.C. Over the next 4 years, there were considerable structural problems with the home, which required extensive repair work. After giving written notice to the District of Mackenzie, the plaintiffs commenced this action against the District; Ernest Maleniza, its building inspector at the time of construction; and Ed Elliott Windsor, the builder of the home. The District and Mr. Maleniza have applied, pursuant to Rule 18A, to have the claims against them dismissed. The District alleges failure to give the necessary notice of a claim, as required by s. 755 of the ***Municipal Act***, R.S.B.C. 1979, c. 90, and also alleges that the action was not commenced within the limitation period set out in s. 754 of the ***Municipal Act***. Mr. Maleniza alleges that the claim against him personally should be struck out, because he is protected from personal liability pursuant to s. 755.1 of the ***Municipal Act***, in the absence of dishonesty, gross negligence or malicious or wilful misconduct, which he says does not exist on the evidence.

[2] The issues to be decided are:

1. whether the required notice to the municipality under s. 755 of the ***Municipal Act*** was given, and, if not, whether that is a bar to the maintenance of the action;
2. whether the action was commenced within the limitation period for actions against municipalities provided in s. 754 of the ***Municipal Act***;

3. whether there is evidence of gross negligence on the part of Ernest Maleniza so that he is disentitled to the protection provided by s. 755.1 of the ***Municipal Act***.

II FINDINGS OF FACT

[3] In 1991, a home was constructed by the defendant, Ed Elliott Windsor, at 17 Munro Crescent, District of Mackenzie, British Columbia. At the time, the defendant, Ernest Maleniza, was the building inspector employed by the District of Mackenzie. In 1974, the District had passed bylaw number 219, a bylaw to provide for the regulation of construction, alteration, repair or demolition of buildings and structures in the District. The building inspector was responsible to administer the bylaw, and to take such action as he deemed necessary in order to establish whether the construction of any building conformed with the requirements of the building code. In 1991, the relevant building code was the National Building Code of Canada, 1977.

[4] The District issued a building permit for the construction of the home by Mr. Windsor, and various inspections were carried out by Mr. Maleniza.

[5] In October 1990, the plaintiffs purchased the home from Mr. Windsor.

[6] During the first winter in the house, the plaintiffs noticed various problems with the house: the central bearing wall developed a crack all of the way across the house, wider in the middle of the house; there were cracks above the front entry requiring the door to be slammed to close it; there were cracks from the top corners of the door to the roof, and cracks in some of the windows. The plaintiffs tried to remedy the cracks by puttying them up during the following summer.

[7] During the second winter, the crack along the upstairs bearing wall became wider, requiring the house to be jacked up, using the teleposts, steel posts in the basement. The plaintiffs also put up a plastic border to cover the crack. The cracking around the front door became worse, so that the front door became jammed shut and unusable. By that time, the plaintiffs realized they had some fairly major problems, and that there was a general problem with the foundation of the house.

[8] By 1993, one corner of the house was "waving", and by the spring, 1994, "the floor fell out of the one corner and you could shake the wall at the other end of the house".

[9] As early as 1992, the plaintiffs realized there would need to be some structural work done to remedy the problem. The extent of that became apparent by the spring of 1994.

[10] On April 20, 1994, at the request of Mr. Young, Wayne Cripps, then the building inspector of the District, inspected the house. He advised Mr. Young that he had a major problem and should consult an engineer. On the same date, Mr. Young and Mr. Cripps reviewed the District building inspection file regarding the house.

[11] On April 21st and 30th, 1994, an engineer, John Fisher, inspected the house. On May 1, 1994, he delivered a written report. He noted substantial differences between the drawings filed with the District and the house itself. He reported that there was extensive damage to the structure from differential settlement. He noted:

> The resultant (sic) of the deflection/settling of the bottom center beam, the teleposts, the main floor laminated beam, (4 - 2 x 10's) and the 2 x 10 floor joists can be seen upstairs by the sagged, sunken living room floor, all of the cracking at the gyproc joints along the center hallway at the ceiling and especially in the master bedroom closet.

[12] He could not see any evidence of concrete being used in the foundations, and could not tell whether the wood used had been pressure treated, but saw no pressure treating stamps on any of the building materials. As a result, he made recommendations for extensive repairs, the cost of which he expected would be substantial.

[13] On June 23, 1994, Mr. Young consulted counsel, and first became aware of the need to deliver written notice to the District, which was done on that date.

[14] On July 21, 1994, this action was commenced.

III NOTICE TO THE DISTRICT OF MACKENZIE

[15] S. 755 of the ***Municipal Act*** provides as follows:

> Notice to municipality after damage
> 755. The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. . . . Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

[16] The leading case regarding compliance with the notice provisions of the ***Municipal Act*** is the decision of the British Columbia Court of Appeal in ***Grewal & Grewal v. District of Saanich et al.***, (1989) 38 B.C.L.R. (2d) 250. That case also involved cracking in the plaintiffs' house after it settled, in that case due to unsuitable soil conditions. The plaintiffs sued the defendant District, from whom they had received a building permit. At p. 256 the court stated:

> The first thing to be noticed about s. 755 is that it does not limit the time within which an action is to be brought. But the section has the same draconian effect as a limitation period because it bars recovery if notice has not been given, and if

> the saving provisions based upon reasonable excuse and no prejudice are not met.
>
> Secondly, s. 755 is not confined to giving notice that damage has been sustained but also the notice must provide information of: "the time, place, and manner in which the damage is sustained".
>
> The object of the section, like the provisions contained in s. 23(2) of the Insurance (Motor Vehicle) Act, is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.
>
> In order for the section to fulfil its apparent purpose a claimant must be in a position to know what and who has probably caused or contributed to the damage which has been sustained.
>
> The duty to give notice to the municipality of a possible claim does not arise merely from the discovery of the damage. The complainant must be able to give particulars of the time, place, and manner of the damages.
>
> Furthermore, the complainant must be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable, in whole or in part, for the damage sustained by the complainant before the duty to give notice can arise.

[17] The defendant District relies on the cases of ***Ordog v. District of Mission***, (1980) 31 B.C.L.R. 371 (S.C.) and ***Petrie et al. v. Groome et al.***, (1991) 4 M.P.L.R. (2d) 182 (B.C.S.C.) as authority for the proposition that it was incumbent upon the plaintiffs to take reasonable steps to discover the damage, and that the cause of action arose when, with reasonable diligence, they ought to have discovered it. In this case, I find that the plaintiffs have acted with due diligence. In the early years of their occupation, the plaintiffs considered the

problems to be minor, and attempted to remedy them by puttying and covering over the cracks, and jacking up the teleposts. It was only in the spring of 1994 that they realized the extent of the problems. When they did, they contacted the building inspector of the District, and reviewed his file. It was only at that time that they could reasonably have been expected to know that there was potential liability on the part of the District. They then retained an engineer, who delivered his report on May 1st, 1994. Before that report was received, it would not have been possible for the plaintiffs to give notice in writing "setting forth the time, place and manner in which the damage has been sustained". They did not have the necessary knowledge to give such notice until May 1st, 1994. As notice was given within 2 months of that date, they have complied with s. 755 of the ***Municipal Act***.

[18] Having made this finding, it is not necessary for me to determine whether there was reasonable excuse (the issue dealt with in the other case relied upon by the District, ***Horie & Horie v. The City of Nelson et al.***, (1987) 20 B.C.L.R. (2d) 1 (C.A.)) or whether the District was prejudiced by late delivery of the notice.

IV LIMITATION PERIOD

[19] S. 754 of the ***Municipal Act*** provides as follows:

> Limitation period for actions against municipality

> 754. All actions against a municipality for the unlawful doing of anything purporting to have been done by the municipality under the powers conferred by an Act of Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within 6 months after the cause of action shall have first arisen, or within a further period designated by the council in a particular case, but not afterwards.

[20] In ***Ordog v. District of Mission***, supra, Bouck J. (at pp. 380-381) concluded that the date from which time is calculated under s. 755 of the ***Municipal Act*** is the same date for the commencement of the limitation period pursuant to s. 754. I agree with that conclusion. As I have determined that date was May 1st, 1994, it follows that the action was commenced within the limitation period provided by s. 754.

IV CLAIM AGAINST ERNEST MALENIZA

[21] Pursuant to s. 755.1(1) of the ***Municipal Act***, no action for damages lies against a municipal public officer, or former municipal public officer, for anything done in the performance of his duty, or the exercise of his power, or for any alleged neglect or default in the performance or intended performance of his duty or exercise of his power. However, ss. 1 does not provide a defence where the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct: s. 755.1(3). In this case, it is alleged that Mr. Maleniza is not entitled to the protection of s. 755.1(1) because he has been guilty of gross negligence.

[22] Gross negligence has been defined as a very marked departure from the appropriate standard of conduct, as seen in all of the circumstances of any given case: ***Goulais v. Restoule***, (1994) 48 D.L.R. (3d) 285 at 287 (S.C.C.).

[23] In this case, the plaintiffs claim that Mr. Maleniza was grossly negligent in not meeting his obligation to ensure that construction of the house was done in accordance with the 1977 National Building Code, including ensuring the design and installation of the preserved wood foundation were done and supervised by an engineer or architect, and in ignoring those standards and approving the design and installation of the footings and foundations based on inapplicable guidelines. The defendants, on the other hand, say that Mr. Maleniza did the inspections, and did not have any concerns about the building expertise of Mr. Windsor, and there is not sufficient evidence to support a finding of gross negligence.

[24] As noted above, the report prepared by the engineer, Mr. Fisher, noted substantial differences between the drawings on file with the District and the house, as constructed. He was also not able to determine whether the foundations used adequately pressure treated preserved wood. However, those items were not dealt with in submissions, nor are they dealt with in the affidavit material which was before me on this application. Counsel for the plaintiffs alleges that Mr. Maleniza did not follow the standards set out in the 1977

National Building Code, but used inapplicable guidelines. In his examination for discovery, Mr. Maleniza said he referred to the guidelines published by the Canadian Wood Council. However, there is no evidence before me of what those guidelines were, and how they relate to the National Building Code. On the other hand, the evidence relied on by the defendants as the basis for the submission that there was not gross negligence is also very skimpy. All it establishes is that Mr. Maleniza did a number of inspections. It does not deal with the issues of the standards applied, and whether the construction was in accordance with the drawings submitted. There is not sufficient evidence, either way, to enable me to determine, on this summary trial, whether there is a potential claim for gross negligence against Mr. Maleniza.

V CONCLUSION

[25] I conclude that the relevant date from which time ran, for the purposes of s. 754 and 755 of the ***Municipal Act***, was May 1, 1994. The notice required by s. 755 was thus delivered within the requisite 2 months, and the action was commenced within the 6 month limitation period. The application that the claims against the District of Mackenzie be dismissed is thus dismissed.

[26] With respect to the claims against Ernest Maleniza, there is not sufficient material before me on this application to determine either that he was grossly negligent, or that he was

not. That portion of the application will be adjourned generally, to give counsel the opportunity to adduce further evidence, if they wish to do so.

[27] As neither of the orders sought by the defendants were granted, the plaintiffs were successful, and will be entitled to their costs, in any event of the cause.

"A.F. Wilson, J,"