

CITATION: Jagosky v. Huntsville (Town), 2011 ONCA 324

DATE: 20110426

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COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Lang and Karakatsanis JJ.A.

BETWEEN

Robert Orland Jagosky and Arlene Jagosky

Plaintiffs (Appellants)

and

Corporation of the Town of Huntsville

Defendant (Respondent)

Robert A. Calder, for the plaintiffs/appellants

Andrew J. Heal and Todd Robinson, for the respondent Corporation of the Town of Huntsville

Heard and released orally: April 18, 2011

On appeal from the judgment of Justice Elizabeth Quinlan, of the Superior Court of Justice, dated August 20, 2010.

ENDORSEMENT

[1] We do not accept the appellants' submission that the motion judge's factual finding as to the date of discoverability was unreasonable. The motion judge found that the appellants were aware or ought to have been aware of the proposed new basis for a

cause of action in January 2004 based on the evidence including the Soil-Eng Report and the appellant Robert Jagosky's letter to the respondent dated February 1, 2004.

[2] The Soil-Eng Report clearly identified that "the revealed soils are not suitable for supporting foundations and do not provide frost protection for the existing foundation." In the subsequent letter, Mr. Jagosky noted that the Report represented "valuable background information as to the cause of damage inflicted upon the building" by the town. He concluded with the reference to the town's responsibility for the inspection of footings and for building permits.

[3] In our view, the cross-examination of Robert Jagosky does not undermine the evidence of the Soil-Eng Report or of his letter. There was ample evidence to support the motion judge's factual finding. This ground of appeal fails.

[4] The appellants further submit that there was no prejudice to the town. We disagree. We agree with the motion judge that the demolition of the premises actually prejudiced the town. There is no evidence in the record that the foundations are still available for testing as submitted by the appellants. Further, we are not prepared to accede to the submission that the only investigation required in order to prepare a defence to this claim would be based upon the paper records. We reject this ground of appeal.

[5] Finally, we reject the submission that this was not a new claim. The amendments sought were clearly based upon different events at a different point in time. We agree

with the motion judge that the amendment sought “constitutes a fundamentally different claim”.

[6] In conclusion, we agree with the result and with the analysis of the motion judge.

[7] The appeal is dismissed.

“Winkler C.J.O.”

“S.E. Lang J.A.”

“Karakatsanis J.A.”