CITATION: Kay v. Caverson, 2010 ONSC 6743
COURT FILE NO.: 03-BN-10495-00A1
DATE: 20101221

2010 ONSC 6743 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Diana Kay Plaintiff	James Kay, for the Plaintiff
- and -	
Gerard Caverson, Guiliana D'Orazio Caverson also known as Julie Caverson, The Corporation of the City of Mississauga and M & I Contracting Inc. Defendants	Brian E. Lucas, for the Defendants Gerald Caverson, Guliana D'Orazio Caverson, also known as Julie Caverson Scott E. Hamilton, for the Defendant The Corporation of the City of Mississauga
Namroud Khachi and Architectural Technology Services Third parties	Julian Binavince, for Defendant M & I Contracting Inc.

TRIAL RULING # 3 RE: PLAINTIFF'S MOTION TO AMEND THE STATMENT OF CLAIM

DALEY J.

[1] The plaintiff brought a motion returnable October 12, 2010, seeking to amend her statement of claim a second time. The motion was made returnable on that date as the trial in this action was scheduled to continue at that time; however it did not, due to a scheduling conflict.

[2] Upon resumption of the trial on November 29th, 2009, the plaintiff's motion was argued.

[3] The statement of claim, which initiated this action, was issued on October 20, 2003. The statement of claim was previously amended on June 1, 2006.

[4] The trial of this action commenced on November 23, 2009 and the plaintiff closed her case on January 18, 2010. The plaintiff's motion to amend her statement of claim was made after 28 days of evidence had been presented. Counsel for the plaintiff had indicated during the course of the evidence that the plaintiff would be seeking to amend her statement of claim; however the plaintiff's motion was not filed with the court until September 30, 2010.

[5] The plaintiff submitted an affidavit, sworn September 27, 2010, in support of her motion seeking leave to amend her statement of claim at this time. The affidavit is brief and largely deals with the plaintiff's counsel's efforts in seeking the consent of the defendants allowing for the amendments to the statement of

2010 ONSC 6743 (CanLII)

claim. Appended to the affidavit are excerpts from the trial evidence along with a copy of a by-law of the City of Mississauga (“Mississauga”) and sections from the *Drainage Act*, R.S. O. 1990, c. D.17.

[6] No explanation is provided by the plaintiff in her affidavit as to why the amendments are sought at this time, nor as to the delay in moving to amend her statement of claim.

[7] Appended as Exhibit “A” to the plaintiff's affidavit is a copy of the proposed amended statement of claim.

[8] Counsel for Mississauga took the lead in making submissions on behalf of his client and generally on behalf of the other defendants as many of the proposed amendments were more specifically related to the defendant Mississauga.

[9] In the midst of the submissions from counsel for the defendant, Mississauga, regarding the plaintiff's motion to amend her statement of claim, counsel for the plaintiff provided a further revised version of the proposed Second Amended Statement of Claim. That final version of the proposed amended statement of claim was marked as trial Exhibit “GGG.”

2010 ONSC 6743 (CanLII)

[10] Plaintiff's counsel also filed a document entitled “Causes of Action,” which was a marked as trial Exhibit “HHH.” In this document, counsel for the plaintiff outlined the purported causes of action he asserts are set forth specifically in paragraphs 10, 16 and 25 of the final version of the proposed Second Amended Statement of Claim (Trial Exhibit GGG). This was filed to specifically identify the nature of the causes of action being asserted in the paragraphs mentioned so as to allow for a determination as to whether any applicable limitation period had passed. Upon further consideration I have reached the conclusion that the proposed Second Amended Statement of Claim is the only document that should be considered and that the extrinsic evidence in the document entitled “Causes of Action” must not be considered by me.

[11] Counsel for Mississauga made submissions on behalf of his client and on behalf of the other defendants. Limited submissions were provided by counsel for the other defendants, as the principal submissions opposing the amendments were made by counsel for Mississauga. At my request counsel for the plaintiff filed written submissions on issues related to whether a limitation period had passed that would impact on the granting of leave to amend the plaintiff’s statement of claim. Counsel for Mississauga, as directed, also filed in reply written submissions on this issue. The plaintiff’s counsel then delivered, without leave, further written submissions on this issue. As the plaintiff’s counsel had

2010 ONSC 6743 (CanLII)

more than ample opportunity to make both oral and written submissions on the issue, leave to file further submissions was not granted. I did not consider the last submissions filed on behalf of the plaintiff.

[12] While there are a number of amendments indicated in the final version of the proposed Second Amended Statement of Claim, counsel for the defendants did not oppose all of the amendments sought.

[13] The amendments sought by the plaintiff in the following paragraphs of the proposed Second Amended Statement of Claim are opposed by the defendants: 1(b), 1(c), 1(f), 4, 9, 10, 12, 13, 16, 17, 20, 21, and 25.

[14] As the defendants do not oppose any of the other amendments sought by the plaintiff in the proposed Second Amended Statement of Claim, leave is granted to the plaintiff to deliver a Second Amended Statement of Claim reflecting the inclusion of the unopposed amendments only, on the terms outlined below at the conclusion of these reasons.

[15] The defendants oppose the proposed amendments on three basis:

(a) granting leave to the plaintiff to amend paragraphs 1 (b), 1 (c), 10, 16 and 25 of the proposed Second Amended Statement of Claim would result in non-compensable prejudice to Mississauga;

2010 ONSC 6743 (CanLII)

(b) granting leave to the plaintiff to amend paragraphs 10, 16, and 25 as set out in the proposed Second Amended Statement of Claim would give rise to claims that are statute barred pursuant to the *Limitations Act*, 1990 c. L. 15;

(c) granting leave to the plaintiff to amend paragraphs 1 (b), 1 (f), 4, 9, 10, 12, 13, 16, 17, 20, 21 and 25 as set out in the proposed Second Amended Statement of Claim would result in the inclusion of claims that lack the required particulars.

2010 ONSC 6743 (CanLII)

Analysis

[16] Rule 26.01 provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[17] Rule 26.01 is mandatory, but contemplates an exception where prejudice would result which could not be compensated for by costs or an adjournment.

[18] Generally the burden of establishing that the required level of prejudice would result is on the party opposing the amendment. As was stated by Moldaver J. A. in *Andersen Consulting Ltd. v. Canada (Attorney General)* [2001] O.J. No.

3576 (C.A.), at para. 37, the test for granting leave to amend a pleading is one of presumptive approval rather than presumptive refusal:

> Amendments like those sought in the present case should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the courts process; or they disclose no reasonable cause of action.

2010 ONSC 6743 (CanLII)

[19] It was further held by the Court Of Appeal in *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669 (C.A.), at para. 6:

> While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.

[20] In *Ontario Securities Commission v. MacLachlan*, [2009] O.J. No. 1993 (Div. Ct.), in considering the decision in *Family Delicatessen Ltd.,* the Divisional Court noted that the principle set out above is not limited to cases in which the plaintiff seeks amendments to pleadings under circumstances where a limitation period has expired. The motion judge in the court below stated that the moving party in those circumstances must lead evidence to support both the proposed amendments and evidence to support his claim that he was otherwise unable to make this motion until the time it was brought. The Divisional Court, in *Ontario Securities Commission,* indicated that the moving party did not have to introduce

evidence in support of the merits of the substantial elements of the proposed new matters pleaded, but rather the party was required to offer some explanation for the delay in seeking the amendments and to consider the presence or absence of prejudice to the opposite party.

[21] This action was commenced by the issuance of the statement of claim in October 2003, which was subsequently amended in 2006. Counsel for the plaintiff, following documentary disclosure, elected to set the action down for trial without conducting oral examinations for discovery.

[22] In support of the plaintiff's motion seeking leave to again amend her statement of claim, no evidence is offered on behalf of the plaintiff as to why the amendments are being sought at this late date nor explaining the delay in seeking the amendments.

[23] Where there is no opportunity for an adjournment or cross examination on a new position that would be advanced, if leave were granted to amend a pleading, non-compensable prejudice would result. Amendments should not be allowed that are late and substantially alter the case to be met or to "cooper up" a case after a first run: *Robinson v. Robinson* [1989], 70 O.R. (2d) 249 (H.C.J.), at para. 255-6, varied on other grounds, [1993] O.J. No. 2172 (C.A.); *Pace v. DelZotto*, [1996] O.J. No. 143 (Gen.Div.) at para. 5-10.

2010 ONSC 6743 (CanLII)

As to the Amendments Proposed in Paragraphs 1 (b), 1 (c), 10, 16 and 25 of the Second Amended Statement of Claim:

[24] In paragraph 1 (b) of the draft Second Amended Statement of Claim, the plaintiff proposes to add Mississauga to the injunctive relief previously sought exclusively against the defendants Gerard Caverson and Juliana D'Orazio Caverson ("Caversons"). Similarly, in paragraph 1(c) of the draft Second Amended Statement of Claim the plaintiff proposes to add the words "alone, or with the City" to the mandatory relief previously sought exclusively against Caversons.

[25] In paragraph 1 (b) of the proposed Second Amended Statement of Claim the plaintiff proposes to add an element of mandatory relief by adding the words "and correct". This proposed amendment seeks injunctive relief to cease alleged nuisance, trespass, destruction of/or diminished the value of the plaintiff's property.

[26] In paragraph 10 of the draft Second Amended Statement of Claim the plaintiff proposes to add the words "Planning Act…. Building Act, Drainage Act" and "The City has not complied with some or all of the Statutes and Regulations pertaining to construction, property maintenance, and drainage".

2010 ONSC 6743 (CanLII)

[27] In paragraph 16 of the proposed Second Amended Statement of Claim the plaintiff proposes to add the words "Planning Act, Building Act, Drainage Act" and "proper drainage maintenance". The plaintiff also proposes to plead that Mississauga was negligent and in default in respect of compliance with "its statutory and regulatory obligations."

[28] In paragraph 25 of the proposed Second Amended Statement Claimed the plaintiff proposes to add sentences alleging that Mississauga breached particular sections of the statutes mentioned above, as well as the never before referenced by law 1127-85.

[29] The breaches alleged by the plaintiff in the proposed amendments raise for the first time what appear to be violations of the *Planning Act*, R.S.O., 1990 c. P. 13, *Building Act*, R.S.Q. c. B-1.1 and the *Drainage Act*, R.S.O. , 1990 c. D. 17, more than seven years after the issuance of the statement of claim. The *Building Act*, R.S.Q. c. B1.1 is a Québec statute and has no application to this action.

[30] In my view, this case falls squarely within the principles enunciated in the decisions of *Family Delicatessen Ltd.* and *Ontario Securities Commission*. The plaintiff brings her motion to amend her statement of claim seeking to make substantial amendments to include both statutory causes of action and claims at

2010 ONSC 6743 (CanLII)

common law after the close of the plaintiff's case and essentially at the end of the defendants' case and after 28 days of trial.

[31] No evidence whatsoever was offered by the plaintiff as to why the amendments are sought at this time, nor was any explanation offered as to the very lengthy delay in moving to seek leave to make the amendments. Further, there is no evidence whatsoever that there were any material facts unknown to the plaintiff, which have only recently come to her knowledge and which would give rise to any basis for granting leave to make the amendments sought which would include new allegations against the defendants and new causes of action being asserted.

[32] In my view, given the lengthy and unexplained delay by the plaintiff, prejudice to the defendants must be presumed to be present, absent any evidence from the plaintiff that there is in fact no prejudice to the defendants in spite of the lengthy and unexplained delay. Further, as explained below, I find that the prejudice present cannot be compensated for by costs or an adjournment.

[33] In addition to the presumed prejudice, which I have found is present, this is a case where there will be actual and clear and non-compensable prejudice to the defendants, and in particular the defendant Mississauga, if the amendments

2010 ONSC 6743 (CanLII)

sought in respect of the proposed paragraphs 1 (b), 1 (c), 10, 16, and 25, of the proposed Second Amended Statement of Claim were granted.

[34] The proposed amendments of these paragraphs would fundamentally and retroactively alter the issues at stake in this action and in the trial. Numerous witnesses, both lay and expert, have testified and the defendants have conducted their defence of the action on the basis of the trial record as it existed at the commencement of the trial.

[35] The defendants could not in any reasonable manner now be expected to respond to the proposed amendments. This would not simply involve the recalling of defence witnesses, as has been urged by counsel for the plaintiff. The defendants have lost the opportunity to properly and fully respond to the plaintiff's claims, cross examine the plaintiff's witnesses including expert witnesses and to lead evidence that would deal with the proposed amendments to the statement of claim.

[36] Neither an adjournment nor an award of costs can remedy the prejudice that would result from the granting of the amendments sought.

[37] The defendants are entitled to know the case they are to meet at trial as a matter of trial fairness. They cannot now, after 28 days of evidence, be called

2010 ONSC 6743 (CanLII)

upon to entirely re-craft the defence of their case in order to respond to the fundamentally new allegations that would retroactively change the nature of the action and the claims faced by them.

2010 ONSC 6743 (CanLII)

As to the Lack of Particulars in Paragraphs 1 (b), 1 (f), 4, 9, 10, 12, 13, 16, 17, 20, 21 and 25 of the draft Second Amended Statement of Claim:

[38] Although the Plaintiff tendered a version of a proposed amended statement of claim in the motion record filed, and then followed with the draft Second Amended Statement of Claim (trial exhibit GGG), which was presented to the court and counsel in the midst of submissions by counsel for the defendant Mississauga, in my view, the plaintiff has failed to meet the minimum requirements of rule 25.06 (2) which reads as follows:

> A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

[39] In my view the amendments sought with respect to the above referenced paragraphs should not be granted as the material facts upon which the plaintiff relies have not been pleaded in conjunction with the statutes, regulations and bylaws as referred to.

[40] Material facts must be pleaded with sufficient particularity to enable the defendants and the court to identify the issues to be decided. Rule 25.06 mandates a minimum level of material fact disclosure. If the level is not reached,

the remedy is not a motion for particulars under rule 25.10 but rather a motion to strike out the pleading. It is only where the minimum level of material fact disclosure is reached that the pleading becomes a regular: *Yordanes v. Bank of Nova Scotia,* [2006] O.J. No. 280 (Ont. S.C.J.); *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1998] O.J. No. 391 (Ont. C.A.).

[41] Similarly, where a statute is pleaded, particulars of the sections relied upon must be pleaded. The plaintiff has failed to plead the explicit particulars of the sections relied upon in paragraphs 10 and 16 of the proposed Second Amended Statement Claim in respect of the *Planning Act, Building Act, and Drainage Act.*

[42] In Paragraphs 10 and 16 of the Second Amended Statement of Claim, as proposed, the plaintiff has made broad and sweeping allegations of breaches of the legislation referred and to other statutory and regulatory obligations. None of the statutory provisions are referred to. There are simply bald allegations of breaches of the legislation and bylaws without any particulars nor underlying material facts set forth.

[43] As the plaintiff's proposed amendments do not meet the minimum requirements for proper pleading, leave to amend the statement of claim in

2010 ONSC 6743 (CanLII)

respect to paragraphs 1 (b), 1 (f), 4, 9, 10, 13, 16, 17, 20, 21 and 25 must be denied.

2010 ONSC 6743 (CanLII)

As to the Application of the Limitations Act, R.S.O. 1990 c. L. 15 to the amendments proposed in paragraphs 10, 16 and 25, of the Second Amended Statement of Claim:

[44] In view of the fact that I have determined that the plaintiff should not be granted leave to amend her statement of claim with respect to the disputed amendments sought in paragraphs 10, 16, and 25, for the reasons expressed, I see no need to consider whether the causes of action asserted in the proposed amendments in those paragraphs are statute barred.

[45] Moreover, as noted above, I have concluded that it would not be appropriate to consider extrinsic documents in order to determine whether or not the proposed amendments in paragraphs 10, 16 and 25 assert causes of action that are statute barred. Considering the allegations in paragraphs 10, 16 and 25 and taking into account the lack of particularity as to the legislative provisions relied upon and the lack of underlying facts asserted, it is most difficult to reasonably consider what causes of action are being asserted and when the causes of action commenced and what limitation period would apply.

Conclusion

[46] In the result, the plaintiff is granted leave to amend her statement of claim in all respects as outlined in the Second Amended Statement of Claim, which was marked as trial exhibit GGG, save and except with respect to the amendments sought and as set out in the proposed paragraphs 1 (b), 1 (c), 1 (f), 4, 9, 10, 12, 13, 16, 17, 20, 21, and 25.

[47] The plaintiff shall make the amendments in accordance with the terms of these reasons and the order to issue, within 20 days from the date of release of these reasons and shall thereafter serve and file the Second Amended Statement of Claim. The defendants shall deliver any amended statements of defence to the Second Amended Statement of Claim within 20 days following the service of the amended pleading upon their counsel. Counsel for the plaintiff shall amend the trial record accordingly.

[48] Costs with respect to the plaintiff's motion shall be determined at the conclusion of the trial.

_____

DALEY J.

Released: December 21, 2010

2010 ONSC 6743 (CanLII)

CITATION: Kay v. Caverson, 2010 ONSC 6743
COURT FILE NO.: 03-BN-10495-00A1
DATE: 20101221

2010 ONSC 6743 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Diana Kay

Plaintiff

- and –

Gerard Caverson, Guiliana D'Orazio Caverson also known as Julie Caverson, The Corporation of the City of Mississauga and M & I Contracting Inc.

Defendants

- and –

Namroud Khachi and Architectural Technology Services

Third Parties

RULING 3 RE: PLAINTIFF'S MOTION TO AMEND THE STATMENT OF CLAIM

DALEY J.

Released: December 21, 2010