Chodowski v. Huntsville Professional Building Inc. et al.

[Indexed as: Chodowski v. Huntsville Professional Building Inc.]

104 O.R. (3d) 73

2010 ONSC 4897

Ontario Superior Court of Justice,
Wood J.
September 13, 2010

Civil procedure -- Parties -- Adding parties -- Plaintiff in personal injury action obtaining leave to add parties as defendants within limitation period -- Amended statement of claim drafted but not stamped or served within limitation period through inadvertence of counsel -- Defendant adding parties as third parties -- Parties participating fully in discoveries -- Parties having been aware of their potential liability since date of accident -- Allowing parties to be added as defendants not resulting in non-compensable loss to them -- Special circumstances existing which justified allowing parties to be joined after expiry of limitation period.

The plaintiff was injured in 2001 when he slipped and fell in H Inc.'s parking lot. He quickly gave notice of his intention to sue and was advised that responsibility for clearing of the parking lot had been delegated to 114, who had in turn hired B to do the snow plowing. The statement of claim was issued in 2002 naming only H Inc. as a defendant. In 2003, within the limitation period, the plaintiff obtained an order granting

leave to add 114 and B as defendants. An amended statement of claim was drafted but, through inadvertence, was never stamped or served. H Inc. added 114 and B as third parties, and they both participated fully in discoveries. In 2010, the plaintiff's new counsel brought a motion for an order either validating service of the statement of claim or extending the time for filing and service. [page74 ]

Held, the motion should be granted.

Allowing 114 and B to be added as defendants would not result in non-compensable loss to them. Their approach at discoveries would not have been radically different had they been defendants in the main action. The loss of their ability to shelter behind the likelihood that H Inc. would be successful in denying liability by operation of the Occupiers' Liability Act, R.S.O. 1990, c. O.2 was analogous to their loss of the limitation defence, which is not to be considered as a non-compensable loss. To consider it a bar to adding them as defendants would fly in the face of the approach mandated by rule 1.04(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which requires a just, expeditious and cost-effective determination of each case on its merits. Special circumstances existed which justified allowing 114 and B to be joined after the expiry of the limitation period. The failure to join them in a timely fashion had been fully explained.

Cases referred to

Deaville v. Boegeman (1984), 48 O.R. (2d) 725, [1984] O.J. No. 3403, 14 D.L.R. (4th) 81, 6 O.A.C. 297, 47 C.P.C. 285, 30 M.V.R. 227, 28 A.C.W.S. (2d) 413 (C.A.); G. & R. Trucking Ltd. v. Walbaum, [1983] S.J. No. 1126, 144 D.L.R. (3d) 636, [1983] 2 W.W.R. 622, 22 Sask. R. 22, 36 C.P.C. 160, 18 A.C.W.S. (2d) 186 (C.A.); Knudsen v. Holmes (1995), 22 O.R. (3d) 160, [1995] O.J. No. 26, 27 C.C.L.I. (2d) 225, 27 C.C.L.I. (2d) 232, 11 M.V.R. (3d) 226, 52 A.C.W.S. (3d) 1136 (Gen. Div.); Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768, [2001] O.J. No. 4567, 207 D.L.R. (4th) 492, 152 O.A.C. 201, 15 C.P.C. (5th) 235, 109 A.C.W.S. (3d) 880 (C.A.); Swain Estate v. Lake of the Woods District Hospital (1992), 9 O.R. (3d) 74, [1992] O.J. No. 1358, 93 D.L.R. (4th) 440, 56 O.A.C. 327, 9 C.P.C. (3d) 169, 34

A.C.W.S. (3d) 1015 (C.A.)
Statutes referred to
Occupiers' Liability Act, R.S.O. 1990, c. O.2 [as am.]
Rules and Regulations referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04(1), 5.04(2)



MOTION for an order validating service of a statement of claim or extending time for filing and serving a statement of claim.

Sandi J. Smith, for plaintiff.

A. Eve Rogers, for plaintiff.

R.W. Howard Lightle, for defendant Huntsville Professional Building Inc.

Roger H. Chown and David W. Thompson, for defendant Douglas Wayne Beezer (Mid-North Crane & Equipment).

Jason P. Mangano, for defendant 1149636 Ontario Limited.

[1] WOOD J.: -- The defendants Douglas Beezer and 1149636 Ontario Limited have each moved for orders which would either explicitly or implicitly grant summary judgment dismissing the plaintiff's claims against them on the ground that the amended statement of claim naming them as parties' defendant was [page75 ]served and filed after the limitation period had expired. The plaintiff seeks remedial orders either validating service of the statement of claim or extending the time for filing and service sufficiently to include the date it was served.
Background

[2] The plaintiff's claim is for injuries incurred when he slipped and fell in the parking lot of the defendant Huntsville Professional Building Inc. ("Huntsville Professional") on March

1, 2001. By May 28 of that year, the plaintiff had given notice of his intention to sue and had in turn been advised that responsibility for clearing of the parking lot had been delegated to 1149636 Ontario Limited (the "number company"), who had in turn hired Douglas Wayne Beezer, who carried on business as Mid-North Crane & Equipment ("Mid-North"), to do the snow plowing.

[3] The statement of claim was issued December 16, 2002 naming only Huntsville Professional as a defendant. On January 22, 2003, counsel for Huntsville Professional requested that the plaintiff add the number company and Mid-North as defendants and on February 3, 2003 signed a consent to this being done. On April 28, 2003, the plaintiff brought a motion seeking leave to join the two parties and on July 17, 2003 an order was granted giving leave to add them as defendants.

[4] The order was issued and an amended statement of claim was drafted but never stamped or served. The file languished until October 28, 2004, when Huntsville Professional added the number company as a third party. Counsel for the number company twice wrote to counsel for the plaintiff advising of Mid-North's involvement and asking that it be added as a defendant. When nothing happened, the number company added Mid-North as a fourth party on December 2, 2005.

[5] Again, the file languished until June 12 and 13, 2007, when discoveries of all parties were conducted. Counsel for the third and fourth parties participated fully in the discoveries although they maintain that their approach would have been different had they been named as defendants in the main action. Counsel for the plaintiff maintains that both the number company and Mid-North canvassed all issues and conducted themselves as full defendants for all intents and purposes.

[6] Again, the file languished until July 8, 2008, when the plaintiff retained his present counsel. That counsel has deposed that on reviewing the file, he saw the June 17, 2003 order and the draft revised statement of claim on the pleadings board and assumed that the latter had been stamped and served. He further deposes that it was not until February 2010, when

the [page76 ]matter was being set down for trial, that the omission came to his attention.

[7] Immediately upon realizing that the third and fourth parties had not been joined as defendants, the plaintiff's new counsel had the revised statement of claim stamped by the registrar and served. These motions are the result.

Discussion

[8] It is clear from the wording of the July 17, 2003 order that it merely granted leave to add the number company and Mid-North as defendants. It did not add them. It is also clear that the actions required to add them as defendants -- filing, stamping and service of an amended statement of claim did not occur until more than six years after the plaintiff knew of their involvement. This scenario places the issue squarely within the line of cases decided under rule 5.04(2) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194], where the issue of joining parties after limitation periods have expired has been considered.

[9] The test to be applied in such circumstances is a two-part one. The first part is set out in the rule itself. The moving party must satisfy the court that "no prejudice would result that cannot be compensated for by costs or an adjournment". The second part of the test has developed through the case law. Simply stated, it requires that where a limitation period has expired, the moving party must demonstrate "special circumstances" which would justify extending the limitation period. The development and application of both parts of this test have been thoroughly and very usefully reviewed by Cronk J.A. in Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.).

[10] While the test is easily stated, the diverging results in the many cases to which I have been referred make it clear that its application is more difficult. Cronk J.A.'s observations, at para. 23 of her reasons in Mazzuca, supra, are in my view the correct starting place.

[11] Having set out rules 5.04(2) and 1.04(1) which provides that:

> 1.04(1) These Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[12] The learned justice opined as follows [at para. 23]:

> The rule of interpretation established by subrule 1.04(1) provides the basis for a proper construction of all the other rules. In my view, the combined effect of Rules 26.01, [the general pleadings amendment Rule] 5.04(2) and 1.04(1) generally, is to focus the analysis on the issue of non-compensable [page77 ]prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance the interests of timely and cost effective justice in civil disputes.

[13] I take this to mean that in considering the addition of a party after a limitation period has expired, the court should not slavishly apply the limitations prohibition nor allow the relief as a matter of course. Rather, the court should approach the facts in a holistic fashion, taking into account not only prejudice if the parties are added but also the circumstances surrounding the missed deadline, the reason therefore, the prejudice to the moving party if the relief is not granted and whether justice is best served by allowing or rejecting the request for an extension. I am encouraged in this belief by Cronk J.A.'s quotation with approval of the words of Bayda C.J.S. in G. & R. Trucking Ltd. v. Walbaum, [1983] S.J. No. 1126, [1983] 2 W.W.R. 622 (C.A.) [at para. 28]:

> The purpose behind the power of the amendment is to correct an injustice that would otherwise ensue as a result of a mistake, often of an informational or procedural nature, and usually made unwittingly and not by the person most likely to suffer, that is, the litigant. The English courts have adopted a conservative, strict constructionist approach, placing emphasis on the limitation periods. The Canadian courts on the other hand -- particularly as demonstrated in

the more recent cases -- have sought to balance the two principles of law involved here and have perhaps adopted a more even-handed approach. In so doing, they have been more lenient in allowing amendments where no real prejudice resulted to the opposite party (apart from the right to rely on the statute of limitations), but at the same time, have been careful not to unfairly attenuate the exacting force of the limitations periods. That approach, in my respectful view, is the right one.

[14] Bearing these comments in mind, I turn to the first part of the test.

Will allowing the defendants to be joined result in non-compensable loss to them?

[15] It is settled law that loss of the limitations defence is not to be taken as non-compensable loss (see G. & R. Trucking, supra). What other loss will the defendants suffer?

[16] The defendant Mid-North's factum lists the following factors which it says prejudice the defendants:

(1) First and most importantly, it has lost the ability to shelter behind the likelihood that the defendant Huntsville Professional would be successful in denying liability by operation of the Occupier's Liability Act, R.S.O. 1990, c. O.2. Under the provisions of that statute, if it can demonstrate that it was reasonable for it to have delegated responsibility for clearing the parking lot, it will not be held liable. In this scenario, a [page78 ]finding that liability rested with either the number company or Mid-North would have no practical effect on them as the principal defendant having been found not liable would have no reason to proceed with its third party action.

(2) Secondly, the defendants maintain that had they been joined in the main action their approach at discoveries, to seeking undertakings, to defence medicals and to surveillance might have been different.

[17] Dealing first with the second head of prejudice, it must be remembered that both defendants have been aware of their

exposure since the day after the incident. Both were aware of the order allowing them to be joined as defendants in the main action, and both participated fully in discoveries as third and fourth parties. In addition, the defendant Mid-North undertook surveillance of the plaintiff, albeit somewhat half-heartedly (only one attempt was made). I am not persuaded that their approach to the defence of this relatively minor slip-and-fall case would have been radically different had they been defendants in the main action. Any further discovery or medical examination required can be accommodated as the matter has not yet been set down for trial. In short, I do not find that the possibility that the defendants might have done things differently constitutes non-compensable damage.

[18] With respect to the loss of any immunity afforded to them by the defendant Huntsville Professional's Occupier's Liability Act defence, I consider this analogous to the loss of the limitations defence which is not to be taken into consideration. The loss of immunity conferred by this method has nothing to do with the merits of the case. In fact, were they not joined, a successful defence based on the Act, would ensure the anomalous result that a finding of fault against them would confer immunity on them from that finding's consequences.

[19] In my view, to consider this a bar to adding the defendants to the main action would fly in the face of the approach mandated by rule 1.04(1), which requires a just, expeditious and cost effective determination of each case on its merits (my emphasis).

[20] I am encouraged in these findings by the decision of the Ontario Court of Appeal in Swain Estate v. Lake of the Woods District Hospital (1992), 9 O.R. (3d) 74, [1992] O.J. No. 1358 (C.A.). In that case, two doctors who had participated fully in the action as third parties opposed their joinder as defendants in the main action after expiry of the limitation period. In finding that the doctors' joinder was appropriate, Arbour J.A., for the court, held [at para. 28]: [page79 ]

> In the present case, the existence of the third party claim

against the doctors has provided them with enough notice and exposure to remove any significant prejudice. The doctors have filed a statement of defence to the third party claim, as well as a statement of defence to the statement of claim of the plaintiffs. In the special circumstances of this case, it would be a vindication of form over substance to allow the doctors to defend without being defendants. I wish to stress that no single factor, neither the lack of real prejudice nor any one of the special circumstances of this case, would have in itself sufficed to displace the defendants' entitlement to rely on the limitation period. However, considering all the circumstances, I think that this is a case where the interests of justice are better served by allowing the amendment.

Are there special circumstances which justify allowing the defendants to be joined after the expiry of the limitation period?

[21] The decisions in this area have made it clear that there is no definitive list of special circumstances although some attempts have been made to catalogue them. See, for instance, the decision of Epstein J. in Knudsen v. Holmes (1995), 22 O.R. (3d) 160, [1995] O.J. No. 26 (Gen. Div.), at para. 24. In a frequently quoted passage from Deaville v. Boegeman (1984), 48 O.R. (2d) 725, [1984] O.J. No. 3403 (C.A.), MacKinnon A.C.J.O. of the Ontario Court of Appeal set out the approach to be taken as follows [at para. 18]:

> A number of courts have made rather heavy weather out of the meaning of "special circumstances" and have sought to establish conditions or detailed guidelines for the granting of relief after the expiry of the limitation period. This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion. While it is true that the discretion is not one that is to be exercised at the will or caprice of the court, it is possible to outline only general guidelines to cover the myriad of factual situations that may arise.

[22] It is clear from the case law that special circumstances

do not include a previous deliberate decision by counsel not to add a party. Nor do they include an unexplained failure to meet a limitation period or simple forgetfulness. However, where the circumstances of the case fully explain the failure to meet the limitation deadline allowing the relief sought is appropriate (see Mazzuca v. Silvercreek, supra, at para. 36).

[23] In the present case, the plaintiff's original counsel moved in a timely fashion for leave to join the number company and Mid-North. Having obtained an endorsement, he prepared the formal order and the amended statement of claim. However, when he or an agent attended to take out the order, the amended statement of claim was not stamped. This error was compounded by no action being taken to serve the amended statement of claim. [page80 ]

[24] Subsequent to these events, plaintiff's counsel was twice given notice of the fact that the two defendants had not been properly joined but nothing was done about it. Some explanation for this failure is provided in the affidavit of the plaintiff's new counsel who explains his failure to act sooner by the presence of the amended statement of claim on the pleadings [board] leading him to conclude that the new claim was in force.

[25] Counsel for the defendants have argued that only a deliberate decision by plaintiff's counsel could have led to failure to join their clients. I do not agree. The history of this file indicates that at some point it fell off the plaintiff's counsel's radar screen. His relatively prompt move for leave to amend clearly demonstrates that he intended to add the parties. His failure to act when reminded, while not excused, may be explained by the fact that his file looked as if he had done so. It is all too easy, particularly from the bench, to forget the pressures and distractions of practice. I note that plaintiff's first counsel was a generalist whose practice was not attuned to the requirements of tort litigation. While this is no excuse, in my view it lends credibility to the argument that this was a sin of omission rather than commission. The full participation of counsel for the number company and Mid-North in the discovery process may

also have lulled the plaintiff's counsel into a false sense of security.

[26] I believe that this is a perfect example of the "mistake, often of an informational or procedural nature, and usually made unwittingly and not by the person most likely to suffer . . ." contemplated by Bayda C.J.S. in G. & R. Trucking Ltd. v. Walbaum, quoted above. I find that the failure to join the defendants in a timely fashion has been fully explained. The conduct of the proceedings as a whole and the nature of the mistake in that context are in my view special circumstances sufficient, when coupled with the lack of real prejudice to the defendants, to justify an extension of time to issue and serve a new statement of claim on the defendant number company and Mid-North to March 1, 2010, the date of service.

[27] I would therefore allow the plaintiff's motion and dismiss the motion of each of the defendants. Parties may arrange either to speak to costs or file written submissions through the trial coordinator.

Motion granted.