IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Unosi v. Coquitlam (City),* 2023 BCSC 791

Date: 20230510
Docket: S174122
Registry: New Westminster

Between:

Shakila Unosi, and Shakila Unois dba Mursal Hair Salon and Jennifer Wong

Plaintiffs

And

City of Coquitlam, SNC-Lavalin Constructors (Western) Inc., Graham Building Services Inc., International Bridge Technologies Canada, Inc., Jacobs Associates Canada Corporation, Rizzani De Eccher Inc., Seli Canada Inc., SNC-Lavalin Constructors (Pacific) Inc., Jack Cewe Ltd., Evergreen Rapid Transit Holdings Inc., ABC Company Ltd., and John Doe

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintff, Jennifer Wong:	M. Boultbee
Counsel for the Defendants, SNC-Lavalin Constructors (Western) Inc., Graham Building Services Inc., International Bridge Technologies Canada, Inc., Jacobs Associates Canada Corporation, Rizzani De Eccher Inc., Seli Canada Inc., SNC-Lavalin Constructors (Pacific) Inc., Jack Cewe Ltd., and Evergreen Rapid Transit Holdings Inc.:	J.M. Rees S. MacDonald, Articled Student
No other appearances:	
Place and Date of Hearing:	New Westminster, B.C. August 12, 2022
Place and Date of Judgment:	New Westminster, B.C. May 10, 2023

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Introduction

[1] The Evergreen Defendants have filed an appeal from the orders made on May 27, 2022 by Master Robertson, which provides as follows:

> (a) Jennifer Wong be added as a plaintiff to this proceeding;
>
> (b) The granting of leave to amend the style of cause accordingly and to file an Amended Notice of Civil Claim in the form attached as Schedule "A" to the Order;
>
> (c) The notice of application of the Evergreen Defendants filed November 5, 2021 is adjourned generally; and
>
> (d) The costs of both applications shall be costs in the cause.

[2] The grounds of appeal submitted by the Evergreen Defendants as follows:

> 1) The Learned Master erred in finding that it was just and convenient to add the proposed defendant, Jennifer Wong despite finding of inordinate delay and no satisfactory explanation for the delay having been proven;
> 2) The Learned Master erred in determining that there was an issue or question to determine for the proposed plaintiff connected with the underlying subject matter pursuant to Rule 6-2(7)(d) of the *Supreme Court Civil Rules* such that the plaintiff's participation was necessary; and
> 3) Such further and other grounds of appeal as may be advised and this Honourable Court may permit.

Background Facts

[3] On April 2, 2015, a water line, which had been installed under the sidewalk in front of the commercial unit owned by Jennifer Wong, broke causing the escape of a significant amount of water. The commercial unit was rented by the plaintiff, Shakila Unosi. Ms. Unosi operated a hair salon in that commercial unit. Ms. Unosi commenced an action against the Evergreen Defendants and the City of Coquitlam (the "City") for personal injury damages which she claimed to have suffered and for business losses caused by escape of water and damage to the salon.

[4] At the time of the water line breach, Jack Cewe Ltd. was conducting maintenance work on an adjacent water meter and waterline connected to the commercial unit as a component of the Evergreen Rapid Transit Project to build the

Evergreen Skyline extension. The City was responsible for municipal waterlines. Pedre Contractors Ltd. (“Pedre”), had originally installed the pipeline that burst on April 2, 2015.

[5] The plaintiff filed a Notice of Civil Claim (“NOCC”) against the defendants on October 2, 2015, and some defendants were served with the NOCC in or about January of 2016. At the time of service, the plaintiff did not require immediate filing of a response to the NOCC. The original NOCC included an “in-trust” claim on behalf of a landlord and an insurer, identified by pseudonyms, who were not named as parties in the original NOCC.

[6] There was no further communication nor steps taken in this action until February 28, 2018, when counsel for the plaintiff served a Notice of Intention to Proceed on the Evergreen Defendants and the City. The defendant parties were requested to file responses to the NOCC on or before March 21, 2018. On or about October 30, 2018, counsel for the plaintiff, the Evergreen Defendants and the City held a conference call where the plaintiff’s counsel advised that the plaintiff intended to amend the NOCC to add the landlord and its insurer to the action. However, no application to amend the NOCC referred to during that conference call was filed.

[7] On November 2, 2018, counsel for the Evergreen Defendants was asked by counsel for the plaintiff about the status of Pedre in relation to the “wrap-up” policy of insurance on the Evergreen extension. On the same day, counsel for the Evergreen Defendants responded by email to state that work completed by Pedre was unrelated to the Evergreen Project and “they are not covered by under the wrap-up” (Affidavit of T. Sandhu, sworn November 5, 2021, ((the “Sandhu Affidavit”) at Ex. “C”, p. 24). On December 12, 2018, counsel for the Evergreen Defendants confirmed the consent of those defendants to the proposed amendment to include a claim under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*]. In the same email, counsel for those defendants also confirmed that, if the plaintiffs intended to add Ms. Wong and her insurer as plaintiffs in this action, a Chambers application would be necessary. In that application, these defendants would not

oppose the application on the condition that the plaintiff also seek to add Pedre as a defendant to the action and that if the plaintiff failed to bring the application to add Pedre, then the Evergreen Defendants would oppose the addition of Ms. Wong and the insurer on the basis that their claims were time barred (Sandhu Affidavit, Ex. C, p. 23). On December 20, 2018, counsel for the City advised that the City would also consent to the addition of a claim by the plaintiff under the *HCCRA* and would support the addition of Pedre as a defendant but the City would not consent to the addition of Ms. Wong or her insurer as new plaintiffs as "this request simply comes too late and is very likely out of time (Sandhu Affidavit, Ex. C, p. 22).

[8] As an aside, no application has been filed nor heard to add Pedre as a party as of the date of this appeal.

[9] On January 9, 2019, counsel for the plaintiffs wrote to all of the defendants advising that the next step was to file the amended NOCC but the only amendment then proposed was the addition of the claim under the *HCCRA*. By February 18, 2019, no application to amend had been filed and counsel for the City wrote to encourage the plaintiff to bring an application to amend its pleadings. Plaintiff's counsel advised on February 20, 2019, that an application to amend pleadings would be brought forward by the second or third week of April 2019 (Sandhu Affidavit, Ex. "C", p. 20).

The Standard of Review

[10] Justice Fenlon, as she then was, in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999, leave to appeal ref'd, 2011 BCCA 309, set out the law determining the standard of review which applies to a Master's decision:

> [7] Masters began sitting in this Court in late 1989. The standard of review to be applied on an appeal to a judge of this Court from a master's decision has been settled since early 1990:
>
> > 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
> >
> > 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing

> on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.
>
> (*Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) [*Abermin*]; *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) 124 (S.C.) [*Northland*].)

[11] The Evergreen Defendants argue, based on the above test, that the applicable standard of review is a rehearing on the merits based on the record before the Master. Ms. Wong argues that the correct branch of the test to review of the order of Master Robertson is the "clearly wrong" standard of review, because the amendment of pleadings is a purely interlocutory matter.

[12] In the case of *Mullett (Litigation Guardian of) v. Gentles*, 2016 BCSC 802 [*Mullett*], the Court heard an appeal from the decision of a Master to add a party, notwithstanding that the Master granted leave to a defendant to continue a limitation defence. As the matter of adding a party raised questions which were vital to the final issue in the case, the Court concluded that the appropriate form of appeal was a rehearing following: *Abermin Corp. v. Granges Exploration Ltd.*, (1990) 45 B.C.L.R. (2d) 188 at 193, 1990 CanLII 1352 [*Abermin*]. The decision in *Abermin* was affirmed by the Court of Appeal in *Sidhu v. Hothi*, 2014 BCCA 510 at paras. 23–24, which stated that where a matter is vital to the final issue of the case that a rehearing was "the correct form of appeal". The Court in *Mullett* adopted the same approach:

> [32] I agree with the plaintiff. Although an application to add a party is traditionally an interlocutory matter, the Master's decision to preserve the limitation defence is vital to the final issue in the case. The standard of review is a rehearing."

[13] The Court in *Mullett* concluded that the Master was in error when it was decided to add E & M Estates as a defendant and at the same time allowed that party to plead a limitation defence. It was agreed in *Mullett* that the two year limitation period had expired but that it just and convenient to add E & M Estates as a party, notwithstanding it would lose the benefit of a limitation defence.

[14] As noted at para. 19 of *Mullett*, on April 22, 2012, two persons were walking home from a rodeo event in Williams Lake. They were struck by a vehicle driven by

the defendant Gentles. One of the pedestrians, Mr. MacDonald, was killed when struck. His counsel had brought an action which alleged that Gentles had been drinking alcohol prior to the accident in a hotel pub owned by E & M Estates, also named as a defendant in that action, and claimed damages for the death of Mr. MacDonald.

[15] Counsel for the second pedestrian, Ms. Mullett, represented by a litigation guardian, also filed a NOCC based on a BC Registry Services search which showed the Overlander Pub as owned by the Overlander Motel with a person named Loughins as a director. Counsel erroneously named those parties, Gentles and two parties with the last name of Gaspirini as defendants in that action which was served on April 23, 2014. On three occasions in September, October and December of 2014, counsel for the plaintiff in the second action was notified that the wrong parties had been named, one of the Gasparinis having died twenty years earlier. In March of 2015, Ms. Mullett's counsel applied for an order adding E & M Estates as a defendant and removing Overlander Motel and the Gasparinis as defendants. The Master also granted an order preserving the right of E & M Estates to raise a limitations defence. The issue of whether the limitations defence could be maintained when adding a party who was a defendant was the subject matter of the appeal in *Mullett*.

[16] It should be noted that in the case at bar, the limitation defences had already been advanced at the outset of the proceedings. It is the newly added plaintiff, Jennifer Wong, who seeks to avoid the consequences of a limitation defence. As noted in *Mullett* at para. 34, the addition of a party under Rule 6-2(7) eliminates any limitation defence which "might otherwise be available to the proposed party if separate proceedings were brought against it". That said, the proposed party in the case at bar is a plaintiff who would not in any case advance a limitations defence.

[17] Although an application to add a party is typically an interlocutory matter, the Master's decision regarding the limitation defence is vital to the final issues of the

case. I find that the order made by Master Robertson was vital to the final issues in the case, and are therefore reviewable by way of a rehearing on the merits.

Rehearing on the Merits

[18] The defendants submit that the limitation period for the claim of the plaintiffs and Ms. Wong expired on April 2, 2017. Given the rule that service of pleadings must occur by one year of filing a claim, that deadline expired on April 2, 2018.

[19] On June 24, 2016, an engagement letter was sent to the adjuster for Ms. Wong's insurance claim, Wes Chowen. The claims examiner for the insurer, Ms. Angela De Haan, in her affidavit (at tab. 19) filed on February 16, 2022, stated that she instructed Monroe & Company to advance a subrogated claim on behalf of the insured, Jennifer Wong and Peace Hills General Insurance Co. ("Peace Hills"). Ms. De Haan stated that she relied upon Monroe & Company to advance a claim that she assumed was properly pleaded to advance the interests of Ms. Wong and Peace Hills. Once Ms. De Haan discovered that the claim she had instructed counsel to bring forward had not been filed, she stated she had retained new counsel to bring the current application pursuant to an engagement letter dated February 28, 2018.

[20] The plaintiffs then issued a notice of intention to proceed which was filed on February 28, 2018 asking the defendants to file the responses. During a telephone conference between counsel for the parties, counsel for Ms. Unosi advised they would be seeking to amend the plaintiff's claim to include Ms. Wong and her insurer on October 30, 2018. As noted above, counsel for the Evergreen Defendants advised counsel for the plaintiff that an application in Chambers would be required to add a party, however no such application was required if the party being added was Pedre. Counsel for the City advised the other parties that the City was opposed to the addition of Ms. Wong on the basis of a limitations defence.

[21] In July 2019, Ms. Unosi brought an application to add Pedre but did not bring an application to add Ms. Wong as a party, but rather sought to amend the original in-trust claim to include a reference to Ms. Wong and her insurer. The latter

application was adjourned following discussions between the parties because the plaintiff had not proceeded on the basis discussed between counsel for the parties in December 2018.

[22] No further steps in the litigation were taken for several years. In November 2021, the appellants filed an application to strike out the in-trust claim. It was at that point that the proposed plaintiff retained new counsel and in January 2022 brought an application to add Ms. Wong and her insurer as plaintiffs in this proceeding.

[23] Ms. Wong relies on Rule 6-2(7)(b) and (c) in arguing that she should be added as a plaintiff in this action. As stated in *Smithe Residences Ltd. v. 4 Corners Properties Ltd.*, 2020 BCCA 227 [*Smithe*], this Rule requires the considerations of two factors:

> [49] The judge may order a person be added as a party if two conditions are met: first, there may exist between the person and any party to the proceeding a question or issue relating to or connected with (i) any relief claimed in the proceeding or (ii) the subject matter of the proceeding; and second, that in the opinion of the court, it would be just and convenient to determine that question or issue.

[24] In this case, the first factor in *Smithe* is met. There is a real issue between Ms. Wong and the defendants that is not frivolous.

[25] For the second *Smithe* factor, when the limitation period for a claim has otherwise expired, there are additional considerations: *Smithe* at para. 51. As noted in *Mullett*, s. 4(1) of the former *Limitation Act*, R.S.B.C. 1996, c. 266 (now s. 22(1)(d) of the new *Limitation Act*, S.B.C. 2012, c. 13), permits adding or substituting a new party as a plaintiff or a defendant under any applicable law. When the Court considers whether to add a new party, the Court is required to consider the following criteria, as outlined in *Letvad v. Finley*, 2000 BCCA 630 at para. 29:

> (1) the extent of the delay,
>
> (2) the reasons or explanation for the delay,
>
> (3) prejudice caused by the delay,
>
> (4) the connection between the existing claim and the proposed new cause of action; and

(5) the expiration of the limitation period.

[26] As noted above, the consideration of a limitation defence is difficult in a case where the evidence presented is very sparse. The accident in which Ms. Unosi was injured took place on April 2, 2015. The NOCC was filed on behalf of Ms. Unosi on October 2, 2015 and was served on the defendants in January 2016. The limitation period would expire on April 2, 2017 and the additional year for service would expire April 2, 2018.

[27] The affidavit of Wes Chowen, sworn on the 24 of June 2019, contains no mention of any claim brought or initiated against any of the defendants. At para. 10 contains a statement of belief without any attributed source of belief. This is not a helpful statement of any evidentiary value, even if only hearsay. The affidavit of G. Munroe contains a history of the pleadings in the file, but Mr. Munroe's information is based on understandings and incomplete intentions of the lawyer acting for the plaintiff and incomplete statements of responding parties. This affidavit provides little evidentiary assistance.

[28] The Master in this case heard submissions that the affidavit of Angela DeHaan should not be admitted. This issue was not resolved by the Master. However, like the affidavits above, Ms. Dehaan's affidavit is virtually devoid of particulars. She states for instance that she instructed Munroe & Company to act as counsel to bring a subrogated claim on behalf of Ms. Wong and Peace Hills but provides no information as to when or how she instructed the law firm. These issues are within her knowledge, but no details were provided. This affidavit provides little assistance to determining issues in this case.

[29] A recent case which dealt with similar issues, *Walter v. Insurance Corporation of British Columbia*, 2020 BCSC 758, affirmed on appeal 2021 BCCA 259, concerned the destruction of a number of motor vehicles by fire. The company, Paccar, was named on a policy of insurance as a co-insured, was also the lessee of a truck to another defendant, New Future. Allegations of arson had been leveled by ICBC against the principals of New Future and ICBC sought to exclude Paccar on

the basis that Paccar would somehow benefit from that crime. The Court below found that Paccar was a necessary party so that the legal question of the innocent co-insureds could be adjudicated effectively and it was just and convenient to add Paccar. The Court of Appeal found the Chambers judge was well aware that ICBC intended to deprive Paccar of its claim to insurance proceeds but that there was nothing unjust or contrary to interests of justice to prevent Paccar from pursuing its claim as a plaintiff, a claim ICBC was seeking to avoid.

[30] As noted at para. 40 of *Walter*, the threshold for adding a plaintiff is low to ensure all matters in the action are effectively adjudicated upon (See *Odobas v. Yates,* 2020 BCSC 329). In relation to the application to add Ms. Wong as a party, it is clear that the in-trust claim is relevant to the outcome of this action as a whole and that the low threshold has been met. However, given the state of the evidence, this Court is not in a position to rule on the limitations issues raised before the Master. Those matters will be determined by the trial judge or on an application fixed for that purpose. As noted in *Walter* at para. 47, before Justice Crerar, in exercising the Court's discretion to add a party, the Court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the proposed party and the relief or the subject matter of the litigation.

[31] Considering *Smithe*, *Letvad*, and *Walter*, I now turn to the second factor, and find that it is just and convenient to add Ms. Wong as a plaintiff. Even though there was a period of delay in Ms. Wong bringing this application to be added as a plaintiff, the defendants had notice of her claim, both through the in-trust claim in the NOCC, and from the various correspondence from counsel. While I also do not find the explanation for the delay (error of counsel) to be entirely satisfactory, that consideration is not determinative. Based on the submissions of the applicant, the defendants have not clearly established, as the evidence stands, that despite the expiration of the limitation period, that prejudice has been suffered by the defendants. The defendants had knowledge of her claims since the outset through the in-trust claim, and have had some notice of the case they had to answer. Finally,

the quantum of damages is not significantly increased by the addition of Ms. Wong, as the in-trust claim was already pled in the NOCC.

[32] Overall, considering the overall interests of justice, I am satisfied that Ms. Wong should be added as a plaintiff and the NOCC should be amended accordingly in the form appended to the application.

[33] The case of *Gingrich v. 0775606 B.C. Ltd.*, 2021 BCSC 2306, is an example of a decision where the issue of limitations defences were left for a trial judge when an application had been brought to add an additional defendant after the apparent expiry of the three year limitation period and a complaint of prejudice caused by delay and a lack of reasonable explanation therefore. The Court in *Gingrich*, relied upon *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 47:

> [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the *Limitation Act* is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.,* 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
>
> > 1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
> >
> > 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
> >
> > 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the *Limitation Act*.

[34] Given the circumstances of this case, I find that result persuasive. As such the application to add Ms. Wong as a party was correctly granted and therefore, appeal herein is hereby dismissed. The issue of *Limitation Act* defences will be determined by the trial judge.

[35] Costs of this application will be costs in the cause.

"Ball J."