CITATION: *1778133 Ontario Inc.* v. *Laurin Contracting Ltd. et al*, 2023 ONSC 2408
COURT FILE NO.: CV-18-00077411-0000
DATE: 2023-04-20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1778133 Ontario Inc., Plaintiff

AND:

Laurin Contracting Ltd., Defendant

BEFORE: Associate Justice M. Fortier

COUNSEL: David Farace, for the Plaintiff

Charlotte Watson, for the Defendant

HEARD: December 8, 2022

ENDORSEMENT

Introduction

[1] This is a motion by the Plaintiff, 1778133 Ontario Inc. carrying on business as Ryan's Maintenance Inc. ("RMI"), seeking leave to correct the name of the Defendant and to amend the Statement of Claim.

[2] The Defendant, Laurin Contracting Ltd. ("Laurin"), does not oppose the amendment to correct the name of the Defendant. It does, however, oppose the proposed amendments to paragraphs 10, 11, 13, and 16 of the draft Fresh as Amended Statement of Claim ("the Proposed Claim").

Background

[3] RMI is in the business of providing contracting and maintenance services for commercial and government projects.

[4] Laurin is a general contractor for commercial, government, industrial, and residential projects.

[5] In August 2017, RMI, as subcontractor, entered into a contract with Laurin, as contractor, to supply labour, materials, and equipment for a project located at 4th Canadian Division Support Base, Petawawa, regarding the construction of an outdoor shooting range (the "Project").

[6] RMI's claim is for breach of contract pursuant to the August 2017 contract, as well as damages related to change orders and extras they performed at the project for which Laurin allegedly failed to make payment. RMI alleges in its Statement of Claim, issued on August 9, 2018 ("original Statement of Claim"), that it suffered damages in the sum of $1,366,410.00 for outstanding contract items and extras.

[7] Laurin delivered a Statement of Defence and Counterclaim on September 11, 2018. The Statement of Defence and Counterclaim was subsequently amended on March 12, 2020, to name Eastway Contracting Inc. as a Defendant to the Counterclaim.

[8] The parties exchanged affidavits of documents and the representative of each party was examined for discovery in July 2019.

[9] RMI retained new counsel in May 2022. On July 18, 2022, RMI delivered a copy of the Proposed Claim to Laurin, seeking consent for its filing.

[10] Laurin refused to consent to the pleading amendments at paragraphs 10, 11, 13, and 16 of the Proposed Claim on the grounds that the proposed amendments added new causes of action outside the two-year limitation period.

Position of the Parties

[11] RMI summarized the allegations against Laurin contained in the contested paragraphs of the Proposed Claim as follows:

a. Improper backcharges issued by the Defendant to the Plaintiff in respect of additional trucks and rental equipment hired by the Defendant, and payments made by the Defendant to the Plaintiff's subcontractors and/or suppliers and the Plaintiff's disagreement with issuing credits to the Defendant for these backcharges.

b. Misrepresentations in the tender documents provided by the Defendant, the impact those misrepresentations had on the project schedule, and excess costs incurred by the Plaintiff flowing from the misrepresentations; and

c. It was an express or implied term of the Contract that interest at the rate of 3% per month would accrue on all overdue amounts invoiced by the Plaintiff to the Defendant.[1]

[1] See Plaintiff's Factum, at para 14.

[12] RMI submits that the proposed amendments do not give rise to new causes of action after the expiry of a limitation period. Rather, they submit that the contested amendments simply clarify the relief sought or claim additional forms of relief or alternative remedies that are based on the same facts as originally pled, and do not give rise to a new cause of action.

[13] According to RMI, the proposed amendments all flow from the project, the same parties doing the same work in respect to the same contract, the same change orders and the same extras, over the same period of time. RMI argues that the proposed amendments simply provide more granular details of the dispute that is already pled in the original claim.

[14] RMI maintains that Laurin will suffer no prejudice if the amendments are granted. Both parties have produced their documents, and particulars of the amendments were already canvassed on discovery – consequently, no further discovery will be required.

[15] If, however, the court finds that any of the proposed amendments are subject to the limitation period, RMI argues that the court ought to allow these amendments without prejudice to Laurin's right to raise the limitations defence in its Amended Statement of Defence.

The Defendant

[16] Laurin argues that the proposed amendments add new causes of action outside the two-year limitation period, which amounts to non-compensable prejudice and, therefore, should not be allowed.

[17] Although RMI's proposed amendments relate to the same contract between the parties, Laurin maintains that RMI should not be permitted to plead additional facts in support of additional causes of action advanced outside the limitation period.

[18] Laurin further argues that while particulars of the dispute may have been provided at discovery, those particulars were furnished to assist the opposing party in understanding the dispute. Neither does the evidence on the discovery serve to put the opposing party on notice of new causes of action not advanced in the pleadings. Allowing a party to expand its claim through discovery evidence would undermine the purpose of limitation periods and introduce uncertainty regarding the issues in dispute and the case to be met.

The Law and Analysis

[19] Rule 26.01 of the *Rules of Civil Procedure*[2] provides:

[2] R.R.O. 1990, Reg. 194.

> 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.

[20] The principles that the court is to consider on motions to amend pleadings pursuant to Rule 26.01 are set out in the decision of the Court of Appeal in *Klassen v. Beausoleil*,[3] which read as follows from paragraphs 25 to 33:

> 25. The rule is framed in mandatory terms: the court must allow the amendment, unless the responding party would suffer non-compensable prejudice, the proposed pleading is scandalous, frivolous or vexatious, or the proposed pleading fails to disclose a reasonable cause of action: *158844 Ontario Ltd v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25; *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, 264 O.A.C. 220, at paras 15-16.
>
> 26. The expiry of a limitation period is one form of non-compensable prejudice. A party cannot circumvent the operation of a limitation period by amending their pleadings to add additional claims after the expiry of the relevant limitation period: *Frohlick v. Pinkerton Canada Ltd*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 24; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 21-23; *United Food and Commercial Workers Canada, Local 175 Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671, at paras. 64; *Davis v. East Side Mario's Barrie,* 2018 ONCA 410, at paras. 31-32. In this regard, the "addition of new statute-barred claims by way of an amendment is conceptually no different than issuing a new and separate Statement of Claim that advances a statute-barred claim" (emphasis added): *Quality Meat Packers,* at para. 64, citing *Frohlick*, at para. 24.
>
> 27. An amendment will be statute-barred if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period: *North Elgin*, at paras. 19-23, 33; *Quality Meat Packers*, at para. 65. In this regard, the case law discloses a "factually oriented" approach to the concept of a "cause of action" – namely, "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *North Elgin*, at para. 19; *Quality Meat Packers*, at para. 65.

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[3] 2019 ONCA 407.

28. An amendment does not assert a new cause of action – and therefore is not impermissibly statute-barred – if the "original pleading … contains all the facts necessary to support the amendments … [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded": *Dee Ferraro*, at paras. 4, 13-14; *North Elgin Centre Inc.*, at paras. 20-21; *East Side Mario's Barrie*, at paras. 31-32; *Quality Meat Packers*, at para. 65. Put somewhat differently, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded: *North Elgin*, at para. 23.

29. The relevant principle is summarized in Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186: A new cause of action is not asserted if the amendment pleads an alternative claim for relief outside of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon [which] the original right of action is based.

30. In the course of this exercise, it is important to bear in mind the general principle that, on this type of pleadings motion, it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies: *Farmers Oil and Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390 (Div. Ct.), at para. 23.

31. Finally, the court may refuse an amendment where it would cause non-compensable prejudice. The prejudice must flow from the amendment and not some other source: *Iroquois Falls*, at para. 20. At some point the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party is presumed. In this event, the onus to rebut the presumed prejudice lies with the moving party: *State Farm*, at para. 25.

32. Alternatively, the responding party may resist the amendment by proving actual prejudice – i.e. by leading evidence that the responding party has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *State Farm*, at para. 25.

33. Irrespective of the form of prejudice alleged, there must be a causal connection between the non-compensable prejudice and the amendment. The prejudice must flow from the amendment and not from some other source: *State Farm*, at para. 25.

[21] In his analysis as to what constitutes a new cause of action, Associate Justice Frank stated the following in *Navigator Limited v. Owens*[4] from paragraphs 25 to 26:

> 25. As set out in *Farmers*, a cause of action is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." The test for determining if amendments are permissible is to assess "whether the proposed amendments do, or do not, arise out of the same facts, or the factual matrix, that was pleaded in the original statement of claim. If they do, then the amendments should be permitted. If they do not, and the limitations period has expired, then the amendments should be refused.
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> 26. Based on the factually oriented approach to determining what constitutes a new cause of action, "if the defendant has notice of the actual matrix underlying the claim being advanced, then amendments that arise out of, or do not depart from, that factual matrix do not constitute 'new' causes of action that would not be allowed by way of amendment.

[22] With these principles in mind, the following must be determined:

a. Do the contested amendments in the Proposed Claim assert new causes of action and if so, are the amendments statute-barred?

b. Regardless of the above, is this a situation where granting the amendments would result in a non-compensable prejudice?

Contested Paragraphs of the Proposed Claim

[23] A copy of the original Statement of Claim is attached as Appendix "A". The text of the contested paragraphs of the Proposed Claim are reproduced in the paragraphs below.

[24] Paragraphs 10 and 11 of the Proposed Claim deal with alleged improper back charges by Laurin and read as follows:

> 10. During RMI's performance of the Work, representatives from Laurin advised representatives from RMI that Laurin would be hiring additional trucks to haul material from the stockpile and supplying rental equipment at no cost to RMI. Laurin did so and much to RMI's surprise, purported to backcharge the cost of hiring additional trucks and rental equipment to RMI. RMI never agreed to incur those costs. Without RMI's authorization, Laurin unilaterally paid RMI's subcontractors and/or suppliers, and backcharged RMI for those payments. In respect of hiring

[4] 2022 ONSC 251.

> additional trucks, supplying rental equipment and paying RMI's subcontractors, Laurin issued in or around forty-nine change orders for backcharges to RMI in or around the amount of $576,851.00 including HST (the "**Backcharges**").
>
> 11. In or around October 2017, Laurin stated it would not process any further payments under the Contract and/or Change Orders to RMI, unless RMI agreed to the Backcharges and issued credits to Laurin for the Backcharges. Although RMI disputed the basis for the Backcharges, it was forced by Laurin to issue credits for the Backcharges. If RMI did not issue these credits, Laurin would withhold making further payments to RMI, which would have crippled RMI financially. From October 2017 to July 2018, Laurin proceeded to issue change orders for the Backcharges, which resulted in Laurin deducting the Backcharges from amounts that remain due and payable by Laurin, in respect of the Work performed by RMI.

[25] Although brief, the claim for back charges in the sum of $510,487.61 is expressly pled at paragraph 15 (B) 6 of the original Statement of Claim. In my view, there is no new cause of action asserted in the proposed paragraphs. Rather, RMI has added HST to the amount claimed for back charges, for a total of $576,851.00, and provided additional facts upon which the original right of action is based. These proposed paragraphs clarify the relief sought with respect to the back charges and provide particulars of the allegation already pled.

[26] Paragraph 13 of the Proposed Claim relates to alleged tender misrepresentations and reads as follows:

> 13. The Tender Misrepresentations required the supply of additional materials and labour as stated in the Change Orders and Extras. Specifically, the Rock Work and the Swamp Work added a minimum of six weeks to the Project schedule, which derailed the Project's critical path. The additional time required to perform this work that arose from the Tender Misrepresentations resulted in the following repercussions:
>
> > (a) Delayed completion of the Project, which was scheduled to be completed by October 31, 2017 ("**Initial Completion Date**"); and
> >
> > (b) RMI incurred significant excess costs including but not limited to employee overtime, supplying extra material, hiring additional trucks, various expenses arising from the Project not being completed before the winter and costs to work in winter conditions, which were not anticipated, due to the Initial Completion Date.

[27] The alleged misrepresentations and inaccuracies in Laurin's tender documents and change orders are expressly pled in paragraphs 8, 9, 11, 13, 14, and 15 (B) 1-10 of the original Statement of Claim. In my opinion, the proposed amendments at paragraph 13 do not depart from the factual matrix of the original claim regarding the alleged misrepresentations and

inaccuracies – rather, the proposed amendments provide further particulars with respect to the allegations and do not create a new cause of action.

[28] While the original Statement of Claim could have been drafted with more particularity, and as conceded by counsel for RMI, is "not elegant and orderly", in my view, it contains all the facts necessary to support the amendments at paragraphs 10, 11, and 13 of the Proposed Claim and must be read generously and with some allowance for drafting deficiencies.

[29] In paragraph 16 of the Proposed Claim, RMI seeks to "clarify" that "[i]t was an express or implied term of the Contract that Laurin would pay the full amount of any invoice rendered by RMI within 30 days from the date of the invoice, failing which interest at the rate of 3% per month would accrue on all overdue amounts." RMI drew the court's attention to the clause at the bottom of RMI's invoices sent to Laurin in 2018 that stated: "3% interest charged on all overdue invoices".

[30] RMI argues that while the original Statement of Claim did not specify that 3% was due and payable on overdue accounts, particularization of the interest rate is not a new cause of action. Rather, the original Statement of Claim pled breach of contract and that a term of the contract is that 3% interest accrues on all overdue invoices. I do not agree.

[31] There is no claim for interest on overdue accounts in the original Statement of Claim. The only claim for interest in the original Statement of Claim is for back charges, not interest on overdue accounts as is sought in the amendment at paragraph 16. There is no authority in support of the argument that claims for interest can be implied into a Statement of Claim. Reference to a contract in a Statement of Claim does not mean that a cause of action is being advanced with respect to every term in that contract. A party that is seeking a particular rate of interest pursuant to a contract must include the claim for interest and the applicable rate sought in the Statement of Claim or Notice of Application. This was not done. The material facts giving rise to the claim for interest on overdue accounts have not been previously pleaded. Accordingly, in my view, the claim for interest on the overdue accounts is a new claim.

[32] I must now consider whether the new claim was brought before the expiry of the limitation period. The *Limitations Act, 2002*[5] establishes that a claim must be commenced within two years from the date on which the claim is "discovered". Therefore, the claim will not be viable where RMI failed to commence the action within two years of discoverability.

[33] Laurin argued that RMI would have discovered its claim for interest on any overdue invoices in 2017 and 2018. Moreover, RMI had until 2020 to amend its claim to seek interest within its invoices and failed to take this step until four years after the action was commenced.

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[5] S.O. 2002, c. 24, Sched. B, s. 4.

[34] Based on the evidence before me, I find that RMI discovered its claim for 3% interest on its overdue invoices at the latest in 2018, when it delivered its invoices to Laurin. Accordingly, in my view, the amendment sought at paragraph 16 of the Proposed Claim is statute-barred by the provisions of the *Limitations Act, 2002* as it was discovered well outside of the two years of discoverability.

[35] As previously stated, Rule 26.01 is mandatory and the court must allow the amendment, unless the responding party would suffer non-compensable prejudice. The expiry of a limitation period is one form of non-compensable prejudice.[6] Accordingly, RMI's amendment sought at paragraph 16 of its Proposed Claim is denied.

[36] In my view, there is no evidence of non-compensable prejudice to Laurin in granting the amendments sought at paragraphs 10, 11, and 13 of the Proposed Claim. I do not accept Laurin's argument that they are prejudiced by RMI's delay in bringing this motion four years after the claim was commenced. The general rule is that an amendment shall be granted at any stage of an action on such terms as are just unless prejudice would result that cannot be dealt with by costs or an adjournment. I find that the motion was brought promptly after RMI retained new counsel. It was reasonable to seek to amend the poorly drafted Statement of Claim. Moreover, there is no requirement for an adjournment nor evidence of additional costs that would be incurred as a result of the amendments.

Disposition

[37] For the reasons outlined above, RMI is to remove paragraph 16 of its draft Fresh as Amended Statement of Claim and is granted leave to deliver a Fresh as Amended Statement of Claim correcting the name of the Defendant and including the balance of the paragraphs in accordance with the draft Fresh as Amended Statement of Claim attached to its Motion Record at Tab C, Schedule "A''.

[38] In its factum, Laurin objected for the first time to proposed amendments at paragraph 15 of the Proposed Claim. The issues related to paragraph 15 were resolved at the hearing of the motion. RMI is to produce a representative to answer questions arising from the amendments at paragraph 15 and any questions arising from the amendments at paragraphs 10, 11, and 13 of the Fresh as Amended Statement of Claim.

[39] The parties may schedule a case conference before me to establish a timetable for the proceeding.

[40] If the parties cannot agree on costs, they may file written submissions not exceeding three pages, exclusive of their respective bills of costs. The plaintiff shall file its costs submissions

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[6] *Klassen*, at paras 25-26.

within 20 days of the release of this decision. The cost submissions of the defendants shall be filed within 10 days thereafter.

Marie T. Fortier

Associate Justice Fortier

Date: April 20, 2023

APPENDIX "A"

FORM 14A
Courts of Justice Act

CV-18-000-77411-0000

IN THE SUPERIOR COURT OF JUSTICE
At OTTAWA

(Court seal)

1778133Ontario Inc	*PLAINTIFF*
vs	
Laurin ContractingLtd	*DEFENDANT*

STATEMENT OF CLAIM

TO THE DEFENDANT

LAURIN CONTRACTING LTD

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

(Where the claim made is for money only, include the following:)

IF YOU PAY THE PLAINTIFF'S CLAIM, and $500 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date ..August 9 2018..... Issued by .....
Local registrar

Address of

161ELGIN ST.OTTAWA court office

TO LAURIN CONTRACTING LTD

43AurigaDrive Ottawa On K2E7Y8

CLAIM

1. The Paintiff claims: *(damages in the amount of $1,366,410 against the Defendants.*
2. *The Plaintiff is a maintenance company hired by the Defendants pursuant to a contract for maintenance of 1,318,572.95*
3. *The Defendant is a General Contractor hired by D.C.C*
4. *The Plaintiff and Defendant agreed to a progress payment contract.*
5. *The Defendant advanced $50,000 and agreed upon payments of $100,000 on future progress payments.*
6. *By Purchase order dated August 1,2017the Plaintiff signed a Purchase Order and the Defendant made a payment o$ 50000*
7. *On August 21,2017 the Defendant made a final payment of $30000.*
8. *The defendant negligently tendered inaccurate drawings which required change orders. This frustrated the contract requiring change orders.*
9. *Further there were 40% more rock than detailed by the Defendant requiring change orders for blasting and delayed the project 13 days The project contained conflicting specifications.*
10. *The South berm had a wall on top of it requiring the berm to have a structural component*
11. *Replacement material was required to fill the swamp.*
12. *There were huge inaccuracies found in the tender survey data provided by the Defendant which required the Plaintiff to hire a survey company to perform surveys at several tiines. Due to the inaccurate drawings additional materials, excavation and finishing were required.*
13. *The project shut down by Dec 17, 2017due to the negligence of the Defendant. The Plaintiff incurred significant excess costs such as employee overtime and bringing in extra material and incurred winter costs as the project was to have been completed by Oct 31,2017.*
14. *The Defendant by its misrepresentations frustrated the Plaintiffs ability to complete the contract and caused the Plaintiff extensive damages.*
15. *The Plaintiff states that the Defendant owes the Plaintiff the following:*

15(A)OUTSTANDING CONTRACT ITEMS

May 2018 progress invoice.	*$46464.92*
June 2018 progress invoice.	*$43,994.25*
July 2018progress invoice.	*$(54118.01).*
Project holdbacks	*$146,271.33*

15(B).The plaintiff was required to perform extras as follows:

1.Borrow Material.	$123494.07
2.suopply gran b type 1 and Gran A	$225505.19
3.Additional fill material supplied(92000 cu)	$165,736.25
4.Additional Survey Costs for Equipment	$14,000
5. Road Maintenance.	$7000.
6. Back Charges	$510,487.61
7.Spring additional work and repairs.	$28,408.67
8.Interest Charges on Back charges.	$99,67.54
9.Stripping of Stockpile	$8,884.43
10. Delays	
Total Owing.	$1,366,410.51

Wherefor the Plaintiff claims from the Defendant the sum of $1366,410.51 plus costs

(Then set out in separate, consecutively numbered paragraphs each allegation of material fact relied on to substantiate the claim.)

(Where the statement of claim is to be served outside Ontario without a court order, set out the facts and the specific provisions of Rule 17 relied on in support of such service.)

(Date of issue)

(Name, address and telephone number of lawyer or plaintiff)

Leonard Levencrown

1402-90 George St

OTTAWA ON K1N0A8. 613-244-2106

Court File No: CV-18-000-77411-0000

1778133 ONTARIO INC.

Plaintiffs and

Defendants

LAURIN CONTRACTING LTD

Ontario

Superior Court of Justice

STATEMENT OF CLAIM

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