CITATION: Tripsetter Inc. v 2161907 Alberta Ltd. 2023 ONSC 5104
COURT FILE NO.: CV-21-665331
MOTION HEARD: 20230815

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tripsetter Inc., Plaintiff

AND:

2161907 Alberta Ltd., Canopy Growth Corporation and Justin Farbstein, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Adrienne Boudreau and Denna Jalili, counsel for the moving party plaintiff

Christopher Horkins and Peter Voltsinis, counsel for the responding party defendant Canopy Growth Corporation and the proposed defendant Tweed Inc.

Peter Smiley, counsel for the responding party defendants, 2161907 Alberta Ltd. and Justin Farbstein and the proposed defendant Jurgen Schreiber

HEARD: 15 August 2023

REASONS FOR DECISION

[1] The plaintiff has sued the present defendants on the basis that its business arrangement with the defendant 2161907 Alberta Ltd. ("216 Alberta") was a franchise within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "Act"), that 216 Alberta was a franchisor within the meaning of the Act and that the defendants Canopy Growth Corporation and Justin Farbstein were "franchisor's associates" as defined in the Act and are, as a result, jointly and severally liable with 216 Alberta for all amounts found to be owing to the plaintiff.

[2] The proposed defendant Tweed Inc. owns the Tokyo Smoke trademarks, licensed them to 216 Alberta and allowed 216 Alberta to sublicense those marks to the plaintiff for its Oshawa location. The proposed defendant Jurgen Schreiber is a director of 216 Alberta. On this motion, the plaintiff seeks leave to add Tweed Inc. and Mr. Schreiber as defendants on the basis that they, too, are franchisor's associates, as defined in the Act.

[3] Tweed Inc. objects to the relief sought. Mr. Schreiber does not oppose his addition but seeks terms removing or limiting the plaintiff's right to examine him for discovery.

Structure of the Act and Notice Requirements

[4] The Act provides that, where a franchisor fails to provide a franchise disclosure document before the franchisee enters into the franchise agreement, the franchisee has two years from the date it entered into the agreement to rescind it. Following receipt of a notice of rescission, the franchisor has sixty days to compensate the franchisee pursuant to a formula set out in the Act. If the franchisor fails to provide compensation, the franchisee's right to sue arises on the earlier of the date the franchisor rejects the rescission or the expiry of the sixty days.

[5] On 1 June 2021 the plaintiff delivered a notice of rescission to 216 Alberta. It alleged that 216 Alberta failed to provide it with a disclosure document before it entered into what the plaintiff characterizes as a franchise agreement. 216 Alberta admits that it did not provide a disclosure document as it never considered itself to be a franchisor and disputes that its relationship with the plaintiff is governed by the Act.

[6] Assuming the rescission notice was rejected on the date it was sent, the plaintiff had until 1 June 2023 to bring its action. It argues that, even had it had not commenced the action when it did on 9 July 2021, it would still be within time to bring this claim against Tweed, as it filed its motion to add Tweed on 27 March 2023, well within that two year window. It alternatively argues that the clock did not begin to run until the evidence of the proposed defendants' involvement came to light during the defendants' discovery on 8 March 2022.

The Law

[7] Rule 5.02(2) provides that at any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. The court retains discretion whether to permit the joinder of a proposed party notwithstanding that the threshold test has been satisfied. However, following the dicta of the Court of Appeal in *Schembri v Way* 2012 ONCA 620, "amendments to add parties should be presumptively approved, unless there is abuse of the court process or non-compensable prejudice."

[8] Tweed agrees with the test but argues that the law is equally clear that, where a proposed pleading discloses no reasonable cause of action, it should not be permitted. It further argues that the limitation period to add it as a defendant has expired.

The Limitation Period

[9] It is common ground that the plaintiff did not give notice of rescission to the proposed defendants. Tweed argues that, in order for the plaintiff to advance a claim for rescission against it, the plaintiff was required to deliver a notice of rescission to it within two years of entering into the agreement. Because it did not provide that notice, it is out of time to

bring an action for rescission against Tweed. The plaintiff argues that the Act only requires it to give notice of rescission to the franchisor, which it did.

[10] Subsection 6(3) of the Act provides that:

> "Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement."

[11] The Act's regulation speaks to the method and location of delivery of the notice of rescission in the context of a "franchisor".

[12] Subsection 6(6) of the Act does go on to provide that "The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission" take certain steps in relation to the franchisee, such as refunding funds received or purchasing inventory.

[13] Tweed argues that service of the notice of rescission on a franchisor's associate must be read into the notice requirement or else subsection 6(6) requiring a franchisor's associate to take certain actions would be meaningless, as it would not know of the proposed rescission.

[14] I do not find, at least for the purposes of this motion, that subsection 6(3) requires a franchisee to give notice to an alleged franchisor's associate or lose its right to claim damages from that associate. It is open to Tweed to plead that issue in its defence and argue the point of law at trial.

[15] Tweed argues in the alternative that the claim is out of time as the plaintiff was aware of its role and involvement when it signed the agreement on 7 June 2019 without receiving a disclosure document.

[16] The plaintiff argues that Tweed's role only came to light during the discovery of Mr. Farbstein, who testified that Tweed was involved in approving the terms of the agreement before it was signed and was closely involved in the grant of franchise. Before that time, the plaintiff knew only that Tweed was the owner of the Tokyo Smoke trademarks. On learning of its expanded role, the plaintiff concluded that Tweed had sufficient involvement and control to be considered a franchisor's associate. On the evidence before me, I am not satisfied that the proposed claim is out of time on this basis either. Again, Tweed is at liberty to plead the facts to support its argument that the claim is out of time and argue the issue at trial.

The Proposed Amendments

[17] The plaintiff proposes to amend its claim to allege that Tweed Inc. and Schreiber are "franchisor's associates" under section 8 of the Act and are, as a result, jointly and severally liable with 216 Alberta.

[18] Section 1(1) of the Act defines "franchisor's associate" as a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.

[19] Tweed argues that the proposed amendment has not pleaded the requirements of control, as set out in paragraph 1(1)(a) above, and notes specifically that there is no allegation in the proposed pleading that Tweed controls or is controlled by 216 Alberta.

[20] For the purposes of this motion, I find the pleading sufficient. In particular, the plaintiff proposes to plead the following:

> 38. At all material times, the defendants controlled or were controlled by the Franchisor, or were controlled by another person who also controlled, directly or indirectly, the Franchisor [addressing the requirements of (a) of the definition];
>
> 39. The defendants, or any of them, were directly involved in the grant of the franchise to Tripsetter by reviewing and approving the grant of the franchise and/or by making representations to Tripsetter on behalf of the Franchisor for the purpose of granting the franchise, marketing the franchise, or otherwise

> offering to grant the franchise [addressing the requirements of (b) of the definition].

[21] Tweed argues that it cannot be a franchisor's associate since it does not directly or indirectly control 216 Alberta, nor is it directly controlled by 216 Alberta or another person who also directly or indirectly controls 216 Alberta. The allegations of control in the pleading are taken to be true for the purposes of this pleadings amendment motion. It is open to Tweed to refute the allegations on evidence at trial. The cases of *Zwaniga v Johnvince Food Distribution* 2012 ONSC 5234 and *Raibex Canada Ltd. v. ASWR Franchising Corp*. 2016 ONSC 5575, on which Tweed relies, were not pleadings motions. They were motions for summary judgment decided on evidence filed concerning the exercise of control.

[22] The plaintiff further proposes to plead that Tweed Inc. is a franchisor's associate on the basis that it is a "de facto franchisor". The proposed pleading states that:

> "43. In addition or in the alternative, the corporate defendants Canopy and/or [Tweed Inc.] are franchisor's associates on the basis that they are "de facto franchisors". These defendants, together with 216 Alberta, approached the Franchise Business as a common enterprise, and acted in concert or as one entity vis-à-vis Tripsetter with respect to all or virtually all aspects of the Franchise Business. The particulars of the corporate defendants' common or cooperative approach to the Franchise Business include, but are not limited, to determining the terms of the grant of franchise to Tripsetter, effecting the grant of franchise rights to Tripsetter, determining the contractual terms pursuant to which Tripsetter would operate as a "Tokyo Smoke", providing initial funding to Tripsetter, exercising significant control over Tripsetter's operations and/or providing significant assistance and/or direction to Tripsetter to ensure its ongoing operations complied with the "Tokyo Smoke" brand standards."

[23] Tweed argues that the pleading of "de facto franchisor" is not a concept known in law and cannot support a cause of action. I do not read the pleading to be an alternative theory of liability or an attempt to create a new statutory category of "de facto franchisor". I read the pleading as alleging that the defendants operated as a single entity or common enterprise, where they controlled each other or were controlled by each other and together exercised significant control over or assistance to the plaintiff's operations. In coming to this conclusion, I am guided by the principle that amendments are to be read generously with allowance for deficiencies in drafting, and are granted unless the claim is "clearly impossible of success" (Vale Canada v. Solway Investment Group Ltd. 2021 ONSC 7562 at paragraph 82).

[24] As noted in *WP (33 Sheppard) Gourmet Express Restaurant Corp. v. WP Canada Bistro & Express Co. Inc.*, 2010 ONSC 2644, on a motion to strike certain allegations in a claim as untenable, "to the extent that there is a dispute in the case law or among the parties regarding the interpretation of a franchisor's associate in the [Act] because the law is

unclear or ill-established, the court should not at this stage of the proceeding dispose of the matter." (see paragraph 162)

Duty of Fair Dealing under Section 3 of the Act

[25] While Tweed is not referenced in that portion of the pleading that deals with breaches of the duty of fair dealing, it remains concerned because section 1(h) of the statement of claim seeks damages for breach of the duty of fair dealing against all defendants. The plaintiff has confirmed that it is not pursuing a section 3 claim against Tweed. This is to be reflected in the proposed amended pleading that is issued.

Conclusion

[26] The plaintiff's motion to add Tweed Inc. and Jurgen Schreiber as defendants and to amend its statement of claim in the form attached as Schedule "A" to this motion is granted.

[27] The amendment is without prejudice to Tweed Inc. and Mr. Schreiber pleading any defences they propose, including a limitations defence.

[28] Tweed and Schreiber both seek an order that they not be examined for discovery. If discovery is permitted, Tweed seeks an order that it not be required to answer any question that Canopy Growth was asked.

[29] Such an order is not appropriate. The plaintiff is required to prove its case at trial and should not limited on the questions it may ask these defendants. The plaintiff has confirmed that Mr. Schreiber is being examined in his personal capacity and not as a further representative of the defendant 216 Alberta, which has already been examined for discovery.

[30] Mr. Schreiber is not seeking costs and no costs are sought as against him. The plaintiff and Tweed Inc. are encouraged to agree on costs. If they are unable to do so within 30 days of the release of this decision, they may file a two page supplementary costs outline with Ms. Meditskos at Christine.Meditskos@ontario.ca to address any offers made.

Associate Justice Jolley

Date: 11 September 2023