

**CITATION:** Gagnon et al. v. Genesis Gardens Inc. et al., 2024 ONSC 758  
**COURT FILE NO.:** CV-17-73323  
**DATE:** 2024/02/05

## **SUPERIOR COURT OF JUSTICE**

**RE:** Marthe Gagnon, Estate Trustee for the Estate of Solange Plourde-Gagnon and Marthe Gagnon, Plaintiffs

**AND:**

Genesis Gardens Inc. and Julie Rondeau, Defendants

**BEFORE:** C. MacLeod RSJ

**COUNSEL:** Gary Boyd, for the plaintiffs (moving parties)

Jordan Petruska, for the defendants (responding parties)

**HEARD:** January 25, 2024

### **DECISION AND REASONS**

[1] This is a motion by the plaintiff to amend the statement of claim. The governing rule is Rule 26.01, which provides that the court shall grant leave to amend a pleading at any stage in the proceeding unless prejudice would result that could not be compensated for by costs or an adjournment.

[2] It is common ground that seeking to add a new cause of action when a limitation period has clearly expired or seeking to amend the claim in a manner that offends the rules of pleading would be examples of such prejudice and are impermissible.<sup>1</sup> The parties disagree as to whether certain of the proposed amendments cross either of those lines.

[3] As set out below, I am granting leave to amend the pleadings.

#### **Background**

[4] Solange Plourde-Gagnon was a resident of Le Genesis, a private retirement home operated by the defendant. In July of 2015, she was apparently assaulted by the defendant Rondeau who was a cook in the employment of Le Genesis. Besides damages for the assault itself, the plaintiffs also claim failure to properly provide or obtain medical care. Unfortunately, Solange passed away

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<sup>1</sup> See *Klassen v. Beausoleil*, 2019 ONSCA 407 @ paras. 24 – 33 and see *Plante v. Industrial Alliance Life Insurance Co.*, (2003) 66 OR (3d) 74 (Master) @ para. 21.

in April of 2020, after this action was commenced. The action is being continued by the estate and by Marthe Gagnon who advances a *Family Law Act* claim in her own right.

[5] Certain of the proposed amendments are not objectionable. They relate primarily to the fact that the action is now being pursued by the estate instead of the deceased herself. The amendments that are opposed are the addition of claims for breach of contract, breach of fiduciary duty, breach of particular statutes. Other proposed paragraphs are said to be pleading of evidence contrary to Rule 25.06 (1).

### **Analysis & Decision**

[6] A pleadings motion is not the appropriate forum to determine whether the limitation period has expired if it is an open question or to put it another way if it would be a genuine issue requiring a trial. It is only when the pleading is attempting to add a new cause of action that is clearly outside the limitation period that the amendment should be refused.<sup>2</sup>

[7] The plaintiff asserts that the breach of fiduciary duty claim is not statute barred even if it is regarded as a new cause of action. This is because pursuant to s. 16 (1) (h.2) (iii) of the *Limitations Act, 2002*, there is no limitation period for an action based on assault if, at the time of the assault, the person with the claim was financially, emotionally, physically or otherwise dependent on the other person.<sup>3</sup> There is no suggestion in the pleading that the deceased was incompetent or a person under a disability, but the amended pleading does plead that she was dependent on the defendant physically, emotionally and medically. It is therefore possible that there is no limitation period applicable if this reliance can be proven. This reliance and vulnerability is the basis for the claim of breach of fiduciary duty. The pleading at paragraphs 41 to 43 is therefore permissible, but without prejudice to the defendant pleading a limitation defence.

[8] The breach of contract claim is not a new cause of action. Our rules of pleading permit, but do not require, the pleading of legal conclusions. Failing to protect Solange from abuse, failing to provide training to staff, failing to keep Solange reasonably safe, failing to have an emergency plan and failing to contact emergency services are already pleaded as particulars of negligence. It is also evident from the original pleading that the plaintiff was a resident of the Le Genesis and that the defendant carried on business as a retirement residence and that the plaintiff and the defendant were in a contractual relationship.

[9] I do not consider the amendment to plead that the assault and the other particulars of negligence are also breaches of contract to be a new cause of action. The plea of breach of contract arises from the same facts.<sup>4</sup> Paragraph 30 of the claim does plead terms of the contract that were not in the original pleading, but the duties imposed by the contract are by and large duties forming part of the original pleading. The original pleading already contained reference to the Resident's Bill of Rights and to breach of the *Retirement Homes Act*. The fact that the contract specifically

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<sup>2</sup> See *The Toronto-Dominion Bank v. 1633092 Ontario Ltd. et al.*, 2021 ONSC 7588 and authorities cited therein.

<sup>3</sup> S.O. 2022, c. 24, Sched B as amended to January 30, 2024

<sup>4</sup> See *French v. H & R Property Management Ltd. et al.*, 2019 ONCA 302 @ para 26 - 27

referred to the legislation does not fundamentally alter the claim that the defendants were bound to deliver service to the plaintiff in accordance with the legislation and the *Resident's Bill of Rights*.

[10] I do not consider the proposed amendments to constitute new causes of action which are clearly statute barred.

[11] I agree with the defendant that paragraphs 33 through 35, which plead details of a prior investigation, findings of an investigation after the incident and a fine imposed by the regulator appear to be pleadings of evidence. Not all pleadings of evidence are prohibited by Rule 25, however, because in some instances the evidence is a material fact. The distinction between material facts, particulars and evidence is not always a bright line.<sup>5</sup> The fact of a previous investigation and the findings of the post incident investigation as well as the conclusion of the Retirement Homes Regulatory Authority may be relevant to the claim for punitive damages. Striking them from the pleading would not render those facts inadmissible.

[12] In argument, the plaintiff conceded that paragraph 35 referring to the fine is a plea of evidence and can be removed.

[13] In conclusion, with the exception of paragraph 35, the amendments will be allowed. Leave is granted to amend the amended statement of claim in the form proposed (except for paragraph 35). This is without prejudice to the right of the defendant to deliver an amended defence and to plead a limitation defence if it believes it is appropriate to do so.

### **Costs**

[14] I advised counsel I would fix costs on the basis of the costs outlines. The plaintiff seeks \$16,743.21 in partial indemnity costs. The defendant indicates it would be seeking \$8,430.20 if successful.

[15] The plaintiff is entitled to costs as the successful party on the motion, but I am also conscious of the fact that as a consequence of the amendments, the defendant will incur costs of delivering a new statement of defence. The amendments may also give rise to additional production and discovery although those costs will be recoverable as costs in the action.

[16] This was not a complex motion. The rule and the jurisprudence are well established. Taking all of the factors in Rule 57.01 into account, but particularly reasonableness and complexity, I fix the costs at \$5,000 to be paid by the defendants to the plaintiff within 30 days.

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Justice C. MacLeod

**Date:** February 5, 2024

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<sup>5</sup> *Giangrande v. Secure Insurance*, 2021 ONSC 761

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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Estate of Solange Plourde-Gagnon and  
Marthe Gagnon, Plaintiffs

**AND:**

Genesis Gardens Inc. and Julie Rondeau,  
Defendants

**BEFORE:** Regional Senior Justice Calum MacLeod

**COUNSEL:** Gary Boyd, for the plaintiffs (moving  
parties)

Jordan Petruska, for the defendants  
(responding parties)

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**DECISION AND REASONS**

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Regional Senior Justice C. MacLeod

**Released:** February 5, 2024