CITATION: 1511233 Ontario Inc v. Spallino, 2024 ONSC 2045
COURT FILE NO.: CV-18-00609557-0000
DATE: 2024-04-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1511233 ONTARIO INC. and BALDASSARE SPALLINO v. ME VA ME FRANCHISING INC. et al.

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: December 7, 2023 (in person)

COUNSEL: M. Kleinman for the plaintiffs/moving parties

D. Jalili, for the responding defendants Me Va Me Franchising Inc., Me Va Me Properties Inc. and Albert Nachumov (the "Non-Settling Defendants")

E. Ackman, for the defendants supporting the motion, Canadian Network Franchising International Ltd., (improperly named as Network Franchising International Inc.) and Clifford Richler (the "Settling Defendants")

E N D O R S E M E N T

[1] The plaintiffs commenced this action for recission of a franchise agreement and associated damages against the franchisor under the agreement (Me Va Me Franchising Inc.), the franchisor's principal (Albert Nachumov) and the franchisor landlord (Me Va Me Properties Inc.), and against the franchise broker (Canadian Network Franchising International Ltd.) and its principal (Clifford Richler). The franchisor defendants defended the action and brought a crossclaim against the franchise broker defendants for "damages for breach of contract and negligence, or either of them, in the amount of any damages which they may be found to be liable to pay to the Plaintiffs."

[2] The plaintiffs have entered into a settlement with the franchise broker defendants (the "Settling Defendants") of the claims as against the Settling Defendants. The settlement between the plaintiffs and the Settling Defendants is in the form of a "Pierringer Agreement". The Pierringer Agreement provides, among other things, that the plaintiffs will consent to a dismissal of all claims as against the Settling Defendants and will amend their pleading in the action to limit their claim against the franchisor defendants (the "Non-Settling Defendants") to that portion, or percentage, of the total damages which can be attributed to the Non-Settling Defendants."

[3] The plaintiffs bring this motion seeking certain relief in relation to the implementation of the Pierringer Agreement. The only relief sought in the notice of motion served by the plaintiffs was an order for leave to amend the Statement of Claim in accordance with the Pierringer Agreement. However, in their factums filed on the motion, the parties treated the motion as including a request for an order dismissing the Non-Settling Defendants' crossclaim against the

Settling Defendants. In their oral submissions at the hearing of the motion, counsel for all parties (including counsel for the Non-Settling Defendants) stated that they had been operating on the basis that the motion included a request to dismiss the crossclaim. Accordingly, on agreement of the parties, I allowed the plaintiffs to amend their notice of motion at the outset of the hearing to add a request for the dismissal of the Non-Settling Defendants' crossclaim, and I heard the motion on that basis.

[4] The plaintiffs' motion is supported by the Settling Defendants. The Settling Defendants took the lead on the request for a dismissal of the crossclaim and filed a factum on that issue. The Non-Settling Defendants do not oppose the motion as it relates to the amendments to the Statement of Claim, but they oppose the motion to dismiss the crossclaim.

[5] Rule 26.01 requires that leave to amend a pleading be granted "unless prejudice would result that could not be compensated for by costs or an adjournment". The amendments in this case are unopposed and there is no evidence that they would result in any non-compensable prejudice. The motion as it relates to leave to amend the statement of claim is granted. For the reasons given below, the motion as it relates to the dismissal of the Non-Settling Defendants' crossclaim is dismissed.

[6] The dismissal of a party's claim absent any adjudication on the merits or any procedural failing by the party is an extraordinary remedy. The dismissal of a non-settling defendant's crossclaim against a settling defendant in the context of Pierringer settlement is nevertheless often justified on the grounds that:

a) the dismissal furthers the important public policy objective of promoting the settlement of litigation; and,
b) the associated amendments to the statement of claim to limit the claims against the non-settling defendant to that defendant's "several" liability to the plaintiff mitigate, if not eliminate, any substantive prejudice to the non-settling defendant resulting from the dismissal.

[7] The Settling Defendants argue that both of the above grounds are present in this case. They rely on the decision in *Packard v Fitzgibbon*, 2017 ONSC 566 (CanLII) as authority for this court's support of Pierrenger settlements generally. In that case, Justice Mew summarized the benefits Pierrenger agreements as follows:

> [1] It is now well recognised that Pierrenger agreements (or "proportionate share" agreements) are a valuable tool for encouraging settlement in multi-party litigation and, thereby, reducing the time, complexity and expense of trials.
> …
> [45] Pierrenger agreements attenuate the obstacles that stand in the way of negotiating settlements in multiparty litigation. An important element of any effective Pierrenger agreement is the assurance to the settling defendants that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial: *Sable Offshore*

Energy ([2013] 2 S.C.R. 623) at para. 23. As such, these agreements, by promoting settlement, contribute to the effective administration of justice.

[8] Similarly, Justice McLeod held in *Allianz v Canada (Attorney General)*, 2017 ONSC 4484 (CanLII) at para 11:

> There is a public policy in favour of supporting settlements. Pierringer agreements should be approved and supported if possible because there are benefits to the parties involved in the litigation but also systemic benefits to the justice system as a whole. Of course the implementation of the agreement must also be fair to the non-settling defendant which is left to face the litigation alone.

[9] In both *Packard* and *Allianz*, the court engaged in analysis of the benefits of Pierringer agreements, both generally and to the parties involved, because the orders sought in those cases were required for the implementation of the Pierringer agreement. In *Packard*, the settlement was specifically contingent on the settling defendants obtaining an order dismissing the non-settling defendant's crossclaim (at para. 6). In that case, the court's failure to grant the requested order would have terminated the settlement. In *Allianz*, McLeod J. considered whether granting the requested relief on terms that were unacceptable to the settling defendants would "imperil the settlement" (at para 20). In both cases, the primary benefit of the requested order was that it would allow the settlement to proceed.

[10] The Pierringer settlement in this case is not contingent on the dismissal of the Non-Settling Defendants' crossclaim. The recitals to the Pierringer Agreement describe the bargain made by the plaintiffs and the Settling Defendants as follows:

> "The Settling Defendants have agreed to pay to Spallino [the plaintiffs] the all total sum of [amount redacted in the motion record] inclusive of pre-judgment interest, and costs, provided that they and their principals and insurers are all fully and finally released from the Action, and will be defended and indemnified from any and all other actions or claims which have been, or may be, commenced or asserted against them arising from the franchise purchase, including the existing cross-claim brought by the Non-Settling Defendants in the Action" [my emphasis]

[11] Similarly, the relevant operative clauses of the Pierringer agreement provide that:

> "1. The recitals above are true and correct.
>
> 2. Upon execution of this Agreement, Spallina shall consent to an Order in the form attached as Appendix "A",[1] dismissing all of its claims against the Settling Defendants …

[1] The appendices to the Pierringer Agreement were not included in the record

….

4. Spallino further agrees that it shall indemnify and save harmless the Settling Defendants from any and all actions, causes of action, claims, suits, debts, sums of money, dues, expenses, general damages, special damages, aggravated damages, punitive damages, interest, costs, and demands of any and every kind whatsoever, at law, or in equity, or under any statute, which the Non-Settling Defendants or any other person or entity with a derivative claim had, now has, or hereinafter can, shall or may have against the Settling Defendants arising from or in any way related to the facts and issues pleaded in the Action or which otherwise from the franchise purchase.

5. In the event that any type of action, cause of action, claim. suit for general damages, contribution or Indemnity, special damages, aggravated damages, punitive damages, Interest, costs. and any and every kind whatsoever, at law, or in equity. or under any statute, which the Non-Settling Defendants, or any other person or entity had, now has, or hereinafter can, shall or may have is made against the Settling Defendants arising from or in any way related to the facts and Issues pleaded in the Action, or which otherwise arise from or are in any way related to the franchise purchase, then Spallino shall provide a defence to the Settling Defendants for any such claims."[my emphasis]

[12] The Pierringer Agreement requires the plaintiffs to defend and indemnify the Settling Defendants from the Non-Settling Defendants' crossclaim. There is no requirement in the Pierringer Agreement that the crossclaim be dismissed. In providing that the Non-Settling Defendants' crossclaim "will be defended", the Pierringer Agreement on its face contemplates that the crossclaim will continue.

[13] There is no evidence in the record before me that the parties to the Pierringer Agreement contemplated that the settlement would be contingent on the dismissal of the crossclaim. As noted above, there was no request for a dismissal of the crossclaim in any motion record filed in advance of the hearing. In their oral submissions, counsel for the Plaintiff and for the Settling Defendants took the view that the Pierringer settlement would be undone if the crossclaim was not dismissed, but they could point to no evidence in support of this assertion. Even if they could, such evidence would be extrinsic to the agreement and contrary to its terms and therefore of little weight.

[14] As the Pierringer Agreement in this case is not contingent on the dismissal of the crossclaim, the requested order does not engage the public policy in favour of supporting settlements, either in this case or generally. Absent such a public policy rationale, the plaintiffs and Settling Defendants have provided no basis for what is otherwise an extraordinary remedy, the dismissal of a party's claim. I would dismiss the motion to dismiss the crossclaim on this basis alone.

[15] Even if I had found that the Pierringer Agreement was contingent on the dismissal of the crossclaim, I would not have dismissed the crossclaim as it is not solely a claim for contribution and indemnity in negligence. The court will normally dismiss a non-settling defendant's crossclaim based on a Pierringer Agreement only when the crossclaim is solely for contribution

and indemnity in negligence. This is based on the court's ability to apportion liability in negligence among tortfeasors even if not all tortfeasors are parties to the action at trial. As explained by Justice Hackland in *Laidler v. The Office of the Public Guardian and Trustee*, 2015 ONSC 943 (CanLII) at para 7:

> In light of the apportionment provisions in the Negligence Act and the courts inherent jurisdiction to control its own process, the courts have found that, in cases of negligence, where there is no contract between joint tortfeasors, it is not necessary for the Settling Defendants to be part of the action at trial in order for the court to apportion liability amongst the Settling and Non-settling Defendants. Consequently, in the face of a Pierringer Agreement, a court, when faced with a motion to remove the Settling Defendants from the action, will normally so order. The end result, based upon the Pierringer Agreement, is that a trial judge will determine the degree of fault amongst both Settling and Non-settling Defendants. Once the trial judge makes that determination, the trial judge will only order that the Non-settling Defendants pay to the plaintiff their share of the damages, on a several basis, in relation to their degree of fault.

[16] Because the court does not require the participation of a settling defendant to apportion liability in claims for negligence, the narrowing of a plaintiff's claim in accordance with a Pierringer agreement to the several liability of non-settling defendant negates the need for any crossclaim by the non-settling defendant for contribution and indemnity in negligence as against the settling defendant. The crossclaim can be dismissed without causing any prejudice to the non-settling defendant.

[17] A crossclaim by a defendant that extends beyond a claim for contribution and indemnity for the plaintiffs claims in negligence, such as a crossclaim based on a contract between defendants, is not negated by the plaintiff's narrowing of its claim to the defendant's several liability. In those circumstances, the crossclaim cannot be determined absent the participation of all parties to the crossclaim at trial. The courts have therefor declined to dismiss crossclaims that go beyond contribution and indemnity for negligence based on Pierringer agreements. For example, in *Laidler*, *supra*, *Amello v. Bluewave Energy Limited Partnership*, 2014 ONSC 4040 and *Chu de Québec-Université Laval v. Tree of Knowledge International Corp*, 2021 ONSC 5946 this court allowed crossclaims based in contract to continue, including crossclaims based on contractual indemnity.

[18] In this case, the Non-Settling Defendants' crossclaim goes beyond contribution and indemnity for negligence. The crossclaim seeks damages against the Settling Defendants for both breach of contract and negligence. The crossclaim specifically pleads that the Settling Defendants breached their oral contract with the Non-Settling Defendants. The crossclaim seeks damages "in the amount of any damages which the [Non-Settling Defendants] may be found to be liable to pay to the Plaintiffs". While not artfully pleaded, I agree with the submissions of the Non-Settling Defendants that this language in the crossclaim operates only as a cap on the quantum of damages sought, and does not restrict the crossclaim to a flow-through claim for contribution and indemnity. I would therefore have dismissed the motion to dismiss the Non-Settling Defendant's crossclaim, even if I had found that the Pierringer settlement was contingent on the dismissal of the crossclaim.

Disposition

[19] The motion plaintiff's motion for leave to amend the Statement of Claim in the from attached as Tab 1 to the Plaintiff's Supplementary Motion Record is granted. The plaintiff's motion to dismiss the Non-Settling Defendants' crossclaim is dismissed.

[20] The amendments to the statement of claim will remove the Settling Defendants as defendants to the action. Pursuant to Rule 23.03(1.1) "Where an action against a defendant against whom a crossclaim has been made is discontinued, the crossclaim shall be deemed to be dismissed thirty days after the discontinuance, unless the court orders otherwise during the thirty-day period." I raised Rule 23.03 with the parties at the hearing of the motion. All parties agreed at that time that if I decided the Non-Settling Defendants' crossclaim could continue in some form, that would constitute an order under Rule 23.03(1.1) that the crossclaim is not dismissed by reason of the discontinuance of the plaintiffs' claims against the Settling Defendants. Having found that the Non-Settling Defendants' crossclaim can continue, I therefore order pursuant to Rule 23.03(1.1) that the Non-Settling Defendants' crossclaim is not dismissed.

Costs

[21] There will be no costs for the motion to amend as it was unopposed. The Non-Settling Defendants were entirely successful on the motion to dismiss the crossclaim and should have their costs. They seek costs of the motion on a partial indemnity scale in the amount of $7183.41 based on a Costs Outline, filed. The Settling Defendants, who filed a factum and took the lead on the motion to dismiss, were seeking partial indemnity costs in the amount of $10,040.05 if successful on the motion. The plaintiffs, who filed no factum and made limited submissions on the motion to dismiss were seeking $2,000 plus disbursements if successful.

[22] Based on the costs sought by the Settling Defendants and the plaintiffs, I find that the costs sought by the Non-Settling Defendants are within the reasonable expectations of the parties. Those costs should be paid by the Settling Defendants and the plaintiffs in equal shares. The Settling Defendants and the plaintiffs shall each pay to the Non-Settling Defendants costs fixed in the amount of $ 3,591.70 (inclusive of HST), for a total of $7,183.40, payable within 30 days.

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D. Michael Brown, Associate Judge

DATE: April 7, 2024