

CITATION: Provis v. Makele et al., 2024 ONSC 4708
COURT FILE NO.: CV-22-00090856
DATE: 2024/08/26

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Adam Provis, Plaintiff/Defendant by Counterclaim

AND

Ramadhani Makele and Tantine Mkombozi, Defendants/Plaintiffs by Counterclaim

BEFORE: Justice R. Ryan Bell

COUNSEL: Sydney McIvor, for the Plaintiff/Defendant by Counterclaim

Christopher K. Lamm, for the Defendants/Plaintiffs by Counterclaim

HEARD: August 22, 2024

ENDORSEMENT

Overview

[1] This motion arises in the context of a failed real estate transaction. The plaintiff was the intended vendor and the defendants were the intended purchasers of a residential condominium. The parties executed an agreement of purchase and sale which provided for a closing date of June 14, 2021. The defendants were unable to close. The plaintiff entered into a new agreement of purchase and sale with new purchasers on July 24, 2021 for less than the plaintiff's agreement with the defendants.

[2] The statement of claim was issued on December 8, 2022. The defendants were not served with the statement of claim until October 27, 2023.¹

[3] The statement of defence and counterclaim was served in November 2023. The defendants plead that the claim is time-barred because the cause of action was discovered in June 2021 and they were not served until October 2023.

[4] The plaintiff moves for orders validating service of the statement of claim on the defendants and extending the time to serve the statement of claim *nunc pro tunc* to October 27, 2023. The plaintiff also moves to strike out the defendants' limitation period defence.

¹ In the statement of defence and counterclaim, the defendants admit that they were served on October 27, 2023.

[5] The defendants oppose the motion. They say the time for service should not be extended because the plaintiff has failed to provide a reasonable explanation for the delay in serving the statement of claim and the defendants have suffered prejudice: (i) the limitation period has run on their counterclaim and on any third party claim; and (ii) documentary evidence has been lost. In response to the motion to strike, the defendants argue their limitation period defence is a matter that should be left to the trial judge.

[6] For the following reasons, the motion is granted. Service of the statement of claim is validated and the time for service is extended *nunc pro tunc* to October 27, 2023. Paragraphs 13-16 of the statement of defence and counterclaim are struck out because they disclose no reasonable defence.

Preliminary issue

[7] The defendants objected to the filing of the plaintiff's second supplementary motion record which contains the affidavit of Jonathan Solomon, plaintiff's counsel, sworn June 28, 2024. I dismissed the defendants' objection, with reasons to follow in this endorsement.

[8] The defendants objected to the affidavit because it was delivered after the date set out in the timetable for the conduct of the motion. But that timetable contemplated a hearing date in mid-June and the motion did not proceed at that time. In his supplementary affidavit, Mr. Solomon provides details of a number of work and personal issues he was dealing with commencing in May 2023 that he believes "will assist the Court in understanding any factors that resulted in any delays related to service." In brief, Mr. Solomon was concerned for his own safety and that of his family because of "alarming messages" sent to him by a self-represented litigant that necessitated the involvement of the police.

[9] Mr. Solomon's first affidavit provides some explanation for the delay; the details provided in his supplementary affidavit are new. While it may have been preferable for the complete explanation to have been provided in one affidavit, it is understandable why Mr. Solomon was reluctant to make certain details part of the public record. The defendants are not prejudiced by the admission of Mr. Solomon's supplementary affidavit.

Extension of time to serve the statement of claim

[10] The plaintiff seeks an extension of time to serve the statement of claim *nunc pro tunc* to October 27, 2023, the date the defendants admit they were served. After an action is commenced, the plaintiff is required to serve the statement of claim within six months: r. 14.08(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Where the six-month deadline cannot be met, r. 3.02(1) permits a plaintiff to move for an order extending the time for service. The court may extend or abridge the time for service before or after the expiration of the time prescribed: r. 3.02(2).

[11] Whether or not to grant an extension of the time for service is a discretionary decision. The primary consideration is whether the extension of time for service will advance the just resolution of the dispute, without prejudice or unfairness to the parties: *Chiarelli v. Weins*, 2000 CanLII 3904 (ON CA) at para. 12. The plaintiff has the onus to prove that extending the time for service will not prejudice the defence; however, where the defence claims it will be prejudiced by an extension,

the defence has an evidentiary obligation to provide some details of the alleged prejudice: *Chiarelli*, at para. 14. Prejudice that will defeat an extension of time for service must be caused by the delay: *Chiarelli*, at para. 16. The court will also consider the plaintiff's explanation for the delay: *Smith v. Toronto (City)*, 2023 ONSC 4298, at para. 8.

[12] In this case, the statement of claim was served either three or four months after the six-month deadline.² While I do not find that the defendants were evading service as the plaintiff suggests, the record demonstrates that the plaintiff, through his counsel, was making reasonable efforts to locate the defendants during the six-month period following the issuance of the statement of claim and thereafter. This was not a situation where the plaintiff deliberately set out to delay service of the statement of claim.

[13] The efforts undertaken by the plaintiff and his counsel include:

- In January 2023, plaintiff's counsel reached out to the real estate brokerage involved in the failed real estate transaction to try to ascertain the defendants' address. Plaintiff's counsel was advised the brokerage did not represent the defendants and could not speak for them.
- Also in January 2023, plaintiff's counsel provided a copy of the statement of claim to the defendants' real estate lawyer. While the lawyer acknowledged receipt of the claim, she advised plaintiff's counsel that she was not authorized to accept service of the claim on the defendants' behalf.
- In February 2023, plaintiff's counsel reached out to the defendants' real estate brokerage. They advised plaintiff's counsel to follow up with the defendants' real estate lawyer.
- As detailed in the plaintiff's affidavit, he and his wife made continuous efforts to search for the defendants' address.
- I have already referred to Mr. Solomon's personal circumstances commencing in May 2023. In July 2023, plaintiff's counsel caused a property search to be conducted in the names of the defendants. The search did not yield any information.
- In September 2023, the plaintiff tracked down the TikTok account of one of the defendants. Through that account, the plaintiff learned that Ms. Mkombozi would be attending an event in Gatineau on October 21, 2023. Plaintiff's counsel retained a process server to serve the statement of claim on Ms. Mkombozi at the event but the process server was advised that she did not attend. Ultimately, Ms. Mkombozi was served within the week.

² The plaintiff and the defendants differ as when the limitation period on the plaintiff's claim began to run.

[14] The defendants say they will suffer prejudice if the time for service is extended. First, they say the delay in serving the statement of claim has extinguished their claim against the plaintiff for the return of the deposit and has extinguished any third party claim against their mortgage broker. Second, they say records related to the failed real estate transaction have been lost: to date, their real estate lawyer has been unable to produce all correspondence, including correspondence between the defendants and their real estate agent and their mortgage broker for the period June 15 to 24, 2021.

[15] There are problems with both assertions. In a claim for contribution and indemnity, the limitations period does not commence to run until the defendants were served with the statement of claim, that is, October 27, 2023: s. 18(1), *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Any third party claim will not be extinguished by an extension of time for service of the statement of claim.

[16] As for the counterclaim, either the defendants discovered their alleged claim for the deposit monies around the time the real estate action failed to close, in which case they had the same limitation period as the plaintiff or they discovered their claim when they were served with the statement of claim. This is a matter that will be determined at trial, on the basis of a complete record. I also observe that if the plaintiff had issued his claim on the last day of the limitation period and then served the defendants on October 27, 2023, the defendants would still be in the same position regarding their counterclaim and the applicable limitations period. Crediting the defendants' argument and refusing to grant the extension of time for service on this basis would effectively penalize the plaintiff for having issued the statement of claim well before the expiry of the limitation period.

[17] There is no evidence that the real estate lawyer's correspondence was lost or destroyed during the delay in serving the statement of claim. Prejudice that will defeat an extension of time for service must be caused by the delay. That is not the case here.

[18] Having regard to the short period of delay, the efforts made by the plaintiff to serve the defendants, and the absence of any prejudice to the defendants caused by the delay, an extension of the time for service of the claim will be granted, *nunc pro tunc*, to October 27, 2023. This will allow for a just resolution of the proceeding on its merits. Service of the claim is validated under r. 16.08.

The defendants' limitation period defence

[19] The plaintiff moves to strike out paragraphs 13-16 of the statement of defence and counterclaim on the basis that they disclose no reasonable defence: r. 21.01(b). In these paragraphs, the defendants plead that the plaintiff's cause of action is time-barred because it was discovered on June 26, 2021 and the plaintiff failed to serve the claim within two years.

[20] These paragraphs disclose no reasonable defence to the plaintiff's claim. The basic limitation period set out in s. 4 of the *Limitations Act, 2002* applies in this case: a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. A proceeding is commenced by the issuance of an originating process: r. 1.03(1);

Wall v. Shaw, 2018 ONCA 929, at para. 32; *Boyce v. The Co-Operators General Insurance Company*, 2013 ONCA 298, at para. 3.

[21] Where pleadings are closed and the facts relevant to the limitation period are undisputed, it is appropriate for the court to address limitations issues on a pleadings motion: *Toussaint v. Canada (Attorney General)*, 2023 ONCA 117, at para. 11. Whether the limitation period on the plaintiff's claim began to run in June 2021 (the defendants' position) or July 2021 (the plaintiff's position) is immaterial because the claim was commenced in December 2022, well within the two-year limitation period.

Conclusion

[22] Service of the statement of claim on October 27, 2023 is validated. The time to serve the statement of claim is extended to October 27, 2023. Paragraphs 13-16 are struck out from the statement of defence and counterclaim.

[23] In the event the parties are unable to agree on costs of the motion, they may make brief written submissions, not to exceed three pages. The parties are to provide their written submissions by September 3, 2024. In the event no submissions are received within this timeframe, costs will be determined based on the materials previously provided.

Date: August 26, 2024

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Released: August 26, 2024