CITATION: Libfeld v Hariri Pontarini Architects, 2024 ONSC 6636
COURT FILE NO.: CV-17-00580948
MOTION HEARD: 20241126

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Corey Libfeld, Plaintiff, Defendant by Counterclaim

AND:

Hariri Pontarini Architects, Defendant, Plaintiff by Counterclaim

BEFORE: Associate Justice L. La Horey

COUNSEL: Meagan Marrie, Counsel for the Moving Party Defendant / Plaintiff by Counterclaim

Daniel Hamson and Sara Ray Ramesh, Counsel for the Responding Party Plaintiff / Defendant by Counterclaim

HEARD: November 26, 2024 by videoconference

REASONS FOR DECISION

[1] The defendant brings this motion seeking leave to amend its statement of defence and counterclaim and for an order requiring the plaintiff to produce a further and better affidavit of documents. The plaintiff objects to one paragraph of the proposed amended pleading and opposes the request for a further and better affidavit of documents.

[2] For the reasons that follow, the defendant's motion to amend the statement of defence and counterclaim to add paragraph 8A is dismissed. Its motion for a further and better documents is also dismissed.

BACKGROUND

[3] This action arises out of the retainer of the defendant architectural firm Hariri Pontarini Architects ("HPA") by the plaintiff Corey Libfeld in connection the design of his residence in Toronto. The plaintiff alleges that HPA breached its contract with him, was negligent in the provision of professional services, and acted in bad faith.

[4] This claim was commenced on August 16, 2017. HPA filed its defence and counterclaim on November 6, 2017. It counterclaims for unpaid accounts. HPA served a draft affidavit of documents and productions in mid-June 2018. On consent, the plaintiff amended his

statement of claim on April 25, 2019. In March 2022, Associate Justice Jolley made an order removing the plaintiff's former lawyer as lawyer of record. Current counsel for Mr. Libfeld filed a notice of appointment of lawyer on June 20, 2022. The plaintiff served his affidavit of documents on November 3, 2022. Oral examinations for discovery have not taken place.

[5] In June 2023, HPA advised it wished to amend its statement of defence and counterclaim. Mr. Libfeld does not object to the proposed amendments except for paragraph 8A. Thereafter, HPA brought this motion for leave to amend its pleading and for a further and better affidavit of documents.

LAW AND ANALYSIS

Amendment of Statement of Defence and Counterclaim

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

> 26.01 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.

[7] The applicable principles on motions to amend a pleading are well-known and have been expressed in a number of decisions of the Court of Appeal including in *Marks v Ottawa (City)*[1] where the court said:

> 19 Although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate: *Daniele v. Johnson* (1999), 45 O.R. (3d) 498 (Div. Ct.) at paras. 11-15. Further, I would agree that the proper factors to be considered are those first set out in *Simrod v. Cooper*, [1952] O.W.N. 720 (H.C.J. Master) at p. 721, aff'd at p. 723 (H.C.J.), and quoted with approval in *Vaiman v. Yates* (1987), 60 O.R. (2d) 696 (H.C.J.) at p. 698, which can be summarized as follows:
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> * An amendment should be allowed unless it would cause an injustice not compensable in costs.
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> * The proposed amendment must be shown to be an issue worthy of trial and prima facie meritorious.
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> * No amendment should be allowed which, if originally pleaded, would have been struck.

[1] *Marks v. Ottawa (City)*, 2011 ONCA 248 at para 19. See also *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42 at para 25 and *Klassen v Beausoleil*, 2019 ONCA 407 at para 25 – 33.

* The proposed amendment must contain sufficient particulars.

[8] The third principle, that no amendments should be allowed which, if originally pleaded, would have been struck, was considered by Master Graham (as his title then was) in *Eisen v Altus Group Ltd*. at paragraph 31:[2]

> 31 In opposing the amendments, the plaintiff relies on the last two of these factors. The plaintiff submits, and I agree, that any of the proposed amendments that would not survive a motion to strike should not be permitted. In this regard, the plaintiff relies on *Canadian National Railway v. Brant*, [2009] O.J. No. 2661 (S.C.J.) and in particular paragraphs 27 - 29:
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> > 27. A pleading must contain a "concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved": rule 25.06; D*avis v. Canada (Attorney General)* 2004 NLSCTD 153, 240 Nfld. & P.E.I.R. 21, [2004] N.J. No. 274. Unnecessary paragraphs should be struck so as to refine and focus the pleading. A pleading or a portion of a pleading may be struck if it is scandalous, frivolous or vexatious, may prejudice or delay the fair trial of the action, or is an abuse of the process of the court: rule 25.11 of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*. No pleaded fact that is relevant can be scandalous: *Duryea v. Kaufman* (1910), 21 O.L.R. 161 (H.C.J.) at 168:
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> > Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded - ***but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect on the result ...***
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> > 28 ***A pleading of fact will be struck if it cannot be the basis of a claim or a defence in the action*** and is designed solely for the purpose of atmosphere: *Wilson v. Wilson*, [1948] O.J. No. 62 (H.C.J.). If the only purpose of the pleading is to cast the opposing party in a bad light, it will be struck. Pleadings of historical facts, whether those facts are true or not, that have no relevance to the proceeding, will also be struck: see, for example, *Davis v. Canada (Attorney-General)*, above; *Desjarlais v. Canada* (2002), 224 F.T.R. 37, [2002] F.C.J. No. 1272.
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> > 29. One of the reasons for this rule is that the pleadings define the issues in the action. If a party is required to respond to irrelevant facts, inquire into those facts on discovery, and respond to evidence of those facts at trial, the

[2] 2016 ONSC 3212. See also *Thunder Bay Multi-Trades Inc. v. Hupe Manufacturing Ltd*., 2021 ONSC 1316 at paras 24 - 26

> litigation and trial will be diverted by inquiries into facts that have no connection to the real issue before the court. [emphasis in original]

[9] Portions of a pleading that are irrelevant, argumentative or inserted solely for colour should be struck out as scandalous. Therefore, leave to make such amendments should be refused.[3]

[10] The proposed pleading must be tenable and comply with the general rules applicable to all pleadings.[4]

[11] The proposed paragraph in dispute reads as follows:

> 8A. Libfeld failed to disclose in early discussions with HPA that his first architect, Richard Wengle ("Wengle") and his second architect, Wayne Swadron ("Swadron") resigned or were terminated from the Project as a result of conflicts, disputes or disagreements with Libfeld arising, amongst other things, from Libfeld's actions or inactions of a nature described in paragraph 11, below.

[12] Mr. Libfeld takes the position that the proposed amendment is not tenable and does not comply with the rules of pleading. He submits that the proposed amendment is not relevant to the performance of the contract between the plaintiff and defendant which forms the basis of the claims and defences in this action. He further submits that the amendment is a matter of historical fact, atmosphere and colour.

[13] HPA submits that Mr. Libfeld has already put into issue the retention of the two prior architects in paragraphs 6 and 7 of the statement of claim which states:

> 6. Prior to engaging the Defendant's services, the Plaintiff had worked with other Toronto architects. The Plaintiff decided that it would be beneficial to move on from those arrangements and ultimately, the Plaintiff met with Hariri as a representative of the Defendant. The Plaintiff provided Hariri with background regarding his previous arrangements and received assurances from Hariri that his experience with the Defendant would be suitable to the Plaintiff's needs and would meet the Plaintiff's objective and allow the Plaintiff to be involved in the process from start to finish. The Plaintiff's desire to be involved was not a surprise to the Defendant but ultimately was used by the Defendant as one of its unfounded reasons for withdrawing its services.
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> 7. During the course of the pre-engagement meetings with the Defendant and thoughout, Hariri, as the primary representative and partner involved, of the Defendant reiterated representations in the nature of those set out in paragraph 6

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[3] *Thunder Bay Multi-Trades Inc.* at para 26

[4] *Marsh, Christopher and Blockchain Markets Inc. v Electronica AI Inc. and Aristotle Andrulakis,* 2024 ONSC 5869 at paras 11-12, *Kalkanis v. Lofranco,* 2023 ONSC 6065 at para 7; *Royal Bank of Canada v. DCM Erectors, Inc.*, 2016 ONSC 3313 at para 8 – 9

hereof both to induce the Plaintiff to engage the Defendant's services and thereafter to make the payments referred to.

[14] I agree with the defendant that the reference to the prior architects in the amended statement of claim is a matter of background and historical fact. Indeed, the paragraph is the first paragraph after the heading "Background". The statement that the plaintiff had previously worked with other Toronto architects sets the stage for the defendant's retainer by Mr. Libfeld.

[15] Paragraphs 6 and 7 of the amended statement of claim do not put in issue the contracts and relationships that the plaintiff had with the prior architects. What is put in issue is what Mr. Libfeld said (orally or in writing) about the prior architects in terms of what he was looking for in an architect.

[16] Paragraphs 8 and 9 of the current statement of defence and counterclaim also reference the prior architects. Paragraph 8 states in part that "HPA was wary of the troubled history [the fact that the plaintiff had previously engaged two prior architects], however Libfeld personally assured [HPA] that he would follow HPA's procedures and protocols for an orderly design process." Paragraph 9 states that Libfeld represented to HPA that he would be a cooperative client and "breakdowns as in the case of his previous client/ architect relationships, would be avoided."

[17] Proposed paragraph 8A puts in issue the reasons for the termination of the prior architects, not what Mr. Libfeld said about the relationships. Whether Mr. Libfeld was correct his characterization of those relationships and the reasons for termination in communications with HPA is not relevant to the issues in this litigation. The contracts with the prior architects are not germane to the plaintiff's causes of action or HPA's defences and counterclaim for unpaid fees.

[18] If I permitted the amendment in paragraph 8A, the door would be opened to litigating the termination of the contracts with the prior architects. The reasons for the termination of those contracts do not have any bearing on the rights of the parties in this action and are irrelevant. The facts alleged in paragraph 8A are immaterial and will have no effect on the result of the litigation. The proposed amendment has not been shown to be an issue worthy of trial. It would have been struck out as being irrelevant and therefore scandalous if contained in the original pleading. Therefore, leave to amend the statement of defence and counterclaim to include draft paragraph 8A is refused.

[19] The plaintiff also submits that leave to amend should be refused because of the presumed prejudice to him because of the plaintiff's delay in seeking the amendment. Because I deny the amendment for other reasons, I do not need to deal with this argument.

Further and Better Affidavit of Documents

[20] The defendant seeks an order compelling the plaintiff to produce a further and better affidavit of documents that discloses all documentation related to the plaintiff's retainer and termination of the prior architects.

[21] Rule 30.06 of the *Rules of Civil Procedure* provides that where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, the court may order the service of a further and better affidavit of documents.

[22] In the recent decision of *Stronach v Stronach*,[5] Justice Osborne summarized the test to be applied as follows:

> 29 In determining that a document may have been omitted and should be ordered to be produced under Rule 30.06, the following factors apply:
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> a. there must be evidence that specific documents exist that have not been produced;
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> b. the documents must meet the test of relevance; and
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> c. the documents must satisfy the proportionality requirements of Rule 29.2.03.
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> See *Gamble v. Black & McDonald Limited*, *2020 ONSC 811*, at paras. 3-4, quoting with approval *Bow Helicopters v. Textron Canada Ltd*., *[1981] O.J. No. 2265* ("*Bow Helicopters*"), at paras. 5-9.

[23] HPA submits that Mr. Libfeld's affidavit of documents is deficient because it does not disclose any documentation related to Mr. Libfeld's retention and termination of the prior architects. It submits that even if I do not grant the amendment, the productions are relevant by virtue of the existing pleadings. It points to paragraph 6 of the amended statement of claim, as well as paragraphs 9 and 11 of HPA's statement of defence and counterclaim.

[24] I have dealt with paragraph 6 of the amended statement of claim and paragraph 9 of the statement and defence and counterclaim above. They do not make relevant Mr. Libfeld's files with the other two architects.

[25] Paragraph 11 of the statement of defence and counterclaim gives a list of alleged conduct on the part of Mr. Libfeld which "fundamentally undermined the client/ architect relationship and led to its termination" including failing to make timely decisions, demanding design changes that impacted the schedule, and insisting on illegal design changes. How Mr. Libfeld conducted himself with regard to the two prior architects is not relevant to the plaintiff's conduct during the performance of the contract between the plaintiff and HPA.

[26] In oral argument, Ms. Marrie said that the proposed files were relevant to Mr. Libfeld's "course of conduct in dealing with architects". The problem with this submission is that

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[5] *Stronach v Stronach*, 2024 ONSC 4524

Mr. Libfeld's "course of conduct in dealing with architects" is not relevant to the issues in the litigation.

[27] What was said in the conversations or documents between the plaintiff and defendant about Mr. Libfeld's expectations of architects by way of reference to his dealings with the other two prior architects is relevant and may be explored in discovery, but the files related to the plaintiff's retainer and termination of the prior architects are not relevant.

DISPOSITION

[28] The defendant's motion for leave to amend its statement of defence and counterclaim is granted only with respect to the uncontested amendments. Its motion to amend the statement of defence and counterclaim to include draft paragraph 8A is dismissed and its motion for a further a further and better affidavit of documents is also dismissed.

[29] The parties have agreed that the successful party is entitled to partial indemnity costs fixed in the sum of $4,000 and payable within 30 days. As the plaintiff was the successful party, the defendant shall pay the plaintiff costs in the sum of $4,000 within 30 days of the release of this endorsement.

[30] Finally, I wish to thank both counsel for the quality of their materials and oral submissions.

L. La Horey, A.J.

Date: November 27, 2024