
CANADA / JUDGMENT

Cheema v. Hamide

2019 BCSC 962

COURT

Supreme Court of British Columbia

DECIDED

13 June 2019

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2019 BCSC 962 Cheema v. Hamide

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cheema v. Hamide,

2019 BCSC 962

Date: 20190613

Docket: 175380

Registry: New Westminster

Between:

Jagtar Singh Cheema

Plaintiff

And

Wali Hamide and Freebies Holdings Inc.,

doing business as Domino's Pizza

Defendants

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

Counsel for the Plaintiff:

O. Hui

Counsel for the Defendant:

M. Colwell

Place and Date of Trial/Hearing:

New Westminster, B.C.

April 16, 2019

Place and Date of Judgment:

New Westminster, B.C.

June 13, 2019

- [1] Mr. Cheema is the plaintiff in an action concerning a motor vehicle accident that occurred on December 13, 2013. He alleges that Mr. Hamide rear ended him while he was stopped a stop light at the intersection of Whalley Boulevard and 104th Avenue in Surrey, B.C.
- [2] The notice of civil claim was initially filed on November 5, 2015, and only named Mr. Hamide as a defendant.
- [3] On August 4, 2017, Freebies Holdings Inc. ("Freebies"), doing business as Domino's Pizza, was added pursuant to Rules 6-1 and 6-2(7) of the Supreme Court Civil Rules.
- [4] Now the plaintiff seeks to add Domino's Pizza of Canada Ltd. ("Domino's Canada").
- [5] Curiously the issue of Mr. Hamide's insurance has not been determined and if he were uninsured, coverage would be \$200,000.
- [6] I do not know the nature of Mr. Cheema's injuries. Nor do the pleadings note that there were other people in Mr. Cheema's car who are apparently making separate claims.
- [7] The issue before the Court is whether or not Domino's Canada should be added as a defendant.
- [8] Rule 6-2(7) provides:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[9] Regarding Rule 6-2(7)(b), the Court of Appeal in *Byrd v. Cariboo*, 2016 BCCA 69 wrote:

[36] As discussed in *Letvad* at paras. 16-18, Rule 6-2(7)(b) has been given a narrow interpretation. It is intended to remedy defects in the proceeding as it stood prior to the application to add a party. "Ought to have been joined" deals with the situation where the person sought to be added has a direct interest in the outcome of the existing action. "[N]ecessary to ensure that all matters may be effectually adjudicated" deals with a situation where the participation of the person sought to be added is required in order for the existing claim to be fully and properly adjudicated. See also: *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at paras. 28-32, 61 B.C.L.R. (4th) 295.

[10] It is not clear that Domino's Canada ought to have been joined as a party. Mr. Cheema may fulsomely maintain his action against Freebies without Domino's Canada's participation.

[11] Thus the issue becomes whether there exists between Domino's Canada and any party to the proceeding a question or issue related to or connected with any relief claimed or the subject matter in the proceeding, such that it would be just and convenient to determine as between Domino's Canada and Mr. Cheema.

Background

[12] Patently, over five years have gone by since the accident. Freebies, the alleged employer, was added by order August 7, 2017.

[13] Mr. Cheema says he then attempted settlement but did not make an offer until mid-August 2018. Then the plaintiff sought a list of documents from Freebies, in particular any documents material to whether or not Mr. Hamide was an employee in the course of his employment. As well he sought the franchise agreement between Domino's Canada and Freebies, which might reveal the degree of control exercised by Domino's on the daily operations of Freebies. The franchise agreement was provided on September 5, 2018, and describes the relationship between Freebies and Domino's Canada as one of independent contractor.

[14] Examination for discovery of Freebies was set for December 4, 2018. Mr. A. Singh attended on the behalf of Freebies. Mr. Singh testified that Freebies used Domino's Canada's "tools" and systems to train employees; Domino's Canada set training standards and evaluated operation every six months; Domino's Canada could impose sanctions and deficiencies by letter and give the franchisee 30 days to fix deficiencies; Domino's Canada imposed standards with respect to dress, grooming, and appearance of employees, including a

standardized uniform the franchise buys from Domino's Canada and provides to the contract drivers without fee, except for a \$35 deposit; Freebies buys pizza bags from Domino's and provides them to drivers without fee; the drivers' vehicles may carry a sign which bears the Domino's name purchased from Domino's Canada and provided to the driver with no fee and without obligation; drivers use Freebies' debit machines without charge; Domino's Canada sets standards as to who is hired as a driver; and on at least one occasion Domino's Canada asked Freebies for a list of all employees and contract drivers, including the contract driver documents.

[15] The trial of the matter was set for March 4, 2019, but has been adjourned.

The Plaintiff's Argument

[16] The plaintiff says that the threshold is low for adding a party: see *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 paras. 45-48 [Neilson]:

[45] Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, 33 B.C.L.R. (4th) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).

[46] If this first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities: *Letvad v. Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296. At para. 29 of *Letvad*, Esson J.A., writing for the Court, adopted the list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282, a decision that dealt with adding further claims under R. 24. These include the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case.

- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.
- [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.
- [17] Neilson thus discloses a two step test. First, Mr. Cheema must show that there is a question or issue between him and the proposed defendant, Domino's Canada, that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. If the first step is satisfied, this Court proceeds to decide whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, and reference may be made to the factors from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161 [Teal].

[18] The Teal factors were summarized in *Amezcuca v. Taylor*, 2010 BCCA 128, where there had been a lengthy delay due to the plaintiff's attempts to settle an action against an RCMP officer who had caused a motor vehicle accident, and apparent challenges in identifying the proposed defendant, and who was representing it. The Court of Appeal in its discussion reiterated five reasons for the court to consider in late amendments to pleadings or adding a party after a limitation period, namely:

1. the length of delay;
2. the reasons for delay;
3. the degree of prejudice which in part is inferred with the loss of the limitation period;
4. the extent of the connection between the existing and proposed cause of action; and
5. the overriding consideration of justice and convenience.

[19] Here, there has patently been a lengthy delay past a limitation period. The claim arose on December 13, 2013. The claim was filed November 5, 2015. Freebies was added on August 4, 2018. No discovery was taken of Freebies until December 4, 2018, when to use the plaintiff's argument, "there was evidence of significant control by Domino's [Canada] of its franchisee at the time of the accident".

[20] This raises the issue of vicarious liability and the principles cited by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [Sagaz], where the Court opined on the policy rationale underlying vicarious liability.

[21] At para. 31 of *Sagaz*, reference was made to an earlier comment by Madam Justice McLachlin in *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 31:

The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss.

[22] It is accepted that the most common relationship attracting vicarious liability is employer and employee, or master and servant. That is to be distinguished from the relationship between employer and an independent contractor which, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability.

[23] There may well be different elements of risk in certain ventures. Take for example the City of Vancouver's parking and impounding bylaws. To enforce them it hires towing companies. The City of Vancouver has a contract with Busters to tow and impound vehicles from city streets and parks, under its impounding bylaw. It hires the towing company as an independent contractor to remove cars that are parked in the no parking zones, e.g., at times of high traffic such as 4 p.m. to 7 p.m. in the evening when people are going home from work and therefore the roads need to be clear.

- [24] It is not unheard of for the owner of a car to be incensed at a tow truck driver and thus if the tow truck driver over reacts, the tow truck driver can be "a certain risk" for the towing company. But this does not in my view give rise to a claim against the City of Vancouver.
- [25] Similarly for a franchise company that is selling a brand of pizzas and to protect the brand, sets certain kitchen standards as well as dress and punctuality but enters into contracts with independent contractors, i.e., Freebies, who in turn employ drivers, often on a contract basis, puts an extra layer into the vicarious liability structure.
- [26] I asked counsel if in fact they could point to any precedent case where the court has reached beyond the worker, being in this case the driver Hamide, and his employer Freebies (which may be an independent contractor relationship), to the grantor of the franchise, Domino's Canada. I was told there was no such reported case. That would seem to accord with the imposition of vicarious liability arising from the employer-employee relationship.
- [27] Counsel did point to a case where there could be a situation where an employee in effect had two employers: see *Downtown Eatery (1993) Ltd. v. Ontario*, 54 O.R. (3d) 161 (Ont. C.A.) [Downtown Eatery]. The Ontario Court of Appeal cautioned against allowing the complexity of modern corporate structures to construe employer-employee relationships too narrowly.
- [28] *Downtown Eatery* was not about vicarious liability. It was a wrongful dismissal case where the employer went out of business after an action was commenced. Indeed, the employee took his action to judgment for \$59,906.76 but the judgment proved empty as the company that had been paying him had been reorganized out of business. The court found there was a highly integrated or seamless group of companies running the nightclub and held the employer was entitled to establish a complex corporate structure, but at the same time that it not work an injustice in the realm of employment law. The court held Mr. Alouche was the man who had the job with salary, benefits and duties and who was wrongfully fired. The court said the word "employer" in that situation should recognize the complexity of a corporate structure, but not such as to defeat the legitimate entitlements of a wrongfully dismissed employee and pointed out the contract of employment was signed by a non-legal entity, "For Your Eyes Only", the name of the nightclub. The court held the judgment was enforceable against the remaining companies as being the true successor legal entity.
- [29] On this basis the plaintiff asserts that the classes of legal relationships attracting vicarious liability are not exhaustively defined or closed, but does concede independent contractors are less likely to be found vicariously liable: see *1738937 Alberta Ltd. v. Fair Waves Coffee Inc. (Waves Coffee House)*, 2017 ABQB 714 paras. 20 to 29.

Domino's Canada Argument

[30] In summary Domino's Canada argued:

1. the claim is limitation barred;
2. the claim against Domino's Canada is bound to fail; and

3. it is not just and convenient to add Domino's Canada.
- [31] It is not in issue that the basic limitation period of two years has passed: Limitation Act, S.B.C. 2012, c. 13.
- [32] It is evident and conceded that Mr. Hamide's vehicle struck Mr. Cheema's vehicle. It is further evident and conceded that Mr. Hamide's vehicle was marked as a "Domino's Pizza" van and thus Mr. Cheema knew from the outset Domino's Canada was involved in some fashion, i.e., scattered pizza boxes and a Domino's roof sign on the vehicle and Mr. Hamide saying to the plaintiff he "was getting late to work".
- [33] Counsel referred to *Bukmeier v. Greyke*, [1998] B.C.J. 1319, and *Happy Investments Management Ltd. v. Dorio* (1988), 23 B.C.L.R. (2d) 245, for the proposition the plaintiff had not taken the reasonable and obvious steps to determine the correct name of Domino's Canada.
- [34] The pleadings as proposed against Domino's Canada in para. 6.1, and para. 3, Part 3, in the further amendments to the notice of civil claim, state that Freebies was at all material times a franchisee of Domino's Canada. The plaintiff claims that Domino's Canada is vicariously liable for the actions of the defendant Hamide, and separately, at all material times the defendant Freebies was the franchisee of the proposed defendant Domino's Canada and was conducting its business under the control of Domino's Canada, and therefore Domino's Canada is vicariously liable for the negligence of Hamide.
- [35] No particulars have been plead as to the nature of the relationship of Hamide and the proposed defendant.
- [36] Counsel for Domino's Canada argues the allegation of control by Domino's Canada is deficient.
- [37] Hamide has stated he was late for work, not that he was in the course of employment; there is no contractual relationship between Domino's Canada and Mr. Hamide; that Mr. Hamide supplied his own vehicle to deliver pizza for Freebies and was free to accept or reject work; and the standard franchise agreement as between Freebies and Domino's Canada stated Domino's Canada and Freebies were independent contractors.
- [38] If there is control as suggested by the plaintiff, it is not in this case a ground for imposing vicarious liability, e.g., a parent is not liable for the torts of his or her children, school teachers are not liable for the torts of the pupils, and so on. In sum, the relationship between the defendant Hamide and the proposed defendant Domino's Canada is not sufficiently close to make the claim appropriate: see G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed., (Toronto: Carswell, 1990) at 252.

- [39] Plainly in terms of prejudice there is the accrual of limitation and a lengthy delay. I acknowledge the trial was adjourned. It is submitted that is inexplicable, given that it was clear at the accident scene Domino's Canada in some form was known from the outset of the claim, and could easily have been identified by a corporate registry search.
- [40] Domino's Canada submitted it would be at an evidentiary disadvantage in obtaining contemporary records and any potential witness availability, had been deprived of any timely investigation, and was being asked to bear a significant cost due to the delay and uncertainty of the nature of the plaintiff's claim.

Decision

- [41] The arguments are well canvassed by counsel, and my findings and views of the same set out above.
- [42] Neilson at para. 45 provides Mr. Cheema must first show there is a question or issue between him and Domino's Canada that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low.
- [43] Mr. Cheema has failed to meet the threshold. No particulars have been plead as to the nature of the relationship of Hamide and the proposed defendant. Without weighing the evidence or determining Mr. Cheema's ability to prove the allegations, it is readily apparent that the law is unlikely to recognize the vicarious liability of Domino's Canada for the negligence of Mr. Hamide. Absent a possible case of vicarious liability, there is no issue as between the plaintiff and the proposed defendant related to Mr. Cheema's alleged damage.
- [44] Having found the first step described in Neilson is not satisfied, I need not proceed to the subsequent stages of the analysis detailed at para. 46 and onward.
- [45] In sum, the proposed basis for vicarious liability is in my view, is not backed up by evidence, and is less than tenuous at law. I decline to add Domino's Canada as a defendant in this action.
- [46] The proposed defendant is entitled to its costs.

"Crawford J."

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