

CANADA / JUDGMENT

Cisneros Mendez v. Hudson Retail Inc.

2023 BCSC 2037

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2037 Cisneros Mendez v. Hudson Retail Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cisneros Mendez v. Hudson Retail Inc.,

2023 BCSC 2037

Date: 20230825

Docket: S190976

Registry: Victoria

Between:

Olimpia Graciela Cisneros Mendez

Plaintiff

And

Hudson Retail Inc. doing business as Victoria Public Market at the Hudson, Townline Property Management Corp., Roast Sandwich Shop Inc.

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

The Plaintiff, appearing in person:

O. Cisneros Mendez

Counsel for the Defendants Hudson Retail Inc. and Townline Property Management Corporation, and the proposed personal defendants Rick Ilich, Taylor Mathieson, Justin Filuk, Jaymie Humber, and Nicole Bens:

J.K. Clark

Counsel for the Defendant Roast Sandwich Shop Inc. and the proposed defendant Maryanne Carmack:

D. Kostovic-Levi

Place and Date of Trial/Hearing:

Victoria, B.C.

August 22-23, 2023

Place and Date of Judgment:

Victoria, B.C.

August 25, 2023

[1] THE COURT (by videoconference): This is an application by the plaintiff to amend her notice of civil claim to add several new causes of action and six new defendants, all of whom are being sued in their personal capacity. The current named defendants and the proposed defendants oppose the relief sought.

I. FACTS

[2] The following facts are not disputed:

- a) The defendant Hudson Retail Inc. ("Hudson") owns land in Victoria on which it operates a public market through a sole proprietorship known as the Victoria Public Market at the Hudson (the "Market").
- b) The Market has artisanal foods, handcrafted goods, gourmet items, and live entertainment. Vendors sign leases with Hudson to occupy the units and stalls at the Market.
- c) The plaintiff leased space at the Market for the purpose of the display and sale of authentic Mexican food and beverages. The lease was dated June 27, 2013, and it was between her business, La Cocina de Mama Oli ("La Cocina"), and Hudson.
- d) The plaintiff is the covenantor of the lease.
- e) Hudson terminated the lease in July 2017 and placed locks on the premises and seized property.

- f) The defendant Roast Sandwich Shop Inc. operates a business adjacent to La Cocina in the Market .
 - g) The defendant Townline Property Management Corporation ("Townline") managed the Market and the leases on behalf of Hudson, but only until April 30, 2015. After that date, another entity, Quay Property Management Corporation, conducted the management.
 - h) Townline is a 50% owner of Hudson.
- [3] The plaintiff seeks to add the following individuals as defendants in her action:
- a) Maryanne Carmack, who is the owner of Roast;
 - b) Rick Ilich, who owns Townline, and is the President and Director of Hudson;
 - c) Taylor Mathieson, Director of Operations and Management at the Market;
 - d) Jaymie Humber, General Manager at the Market;
 - e) Nicole Bens, Management Assistant; and
 - f) Justin Filuk, Director of Development for Townline.
- [4] In essence, the plaintiff complains the termination of her lease was illegal and the manner of the termination was also illegal. From her perspective, there are a number of key events or circumstances that ground her claim, including:
- a) She alleges that an HVAC unit placed above her premises made unacceptable noise and that her subsequent complaints were not sufficiently addressed by Hudson or Townline in a timely manner.
 - b) She alleges that Roast's operations produced an unacceptable level of harmful smoke. She says that despite her complaints about this to Roast, Hudson, and Townline, nothing was done until she complained to WorkSafeBC. WorkSafeBC conducted an investigation, which apparently resulted in the issuance of an order, and sometime later a new exhaust fan was installed to address the smoke.
 - c) She believes that there was retaliation against her because of her complaint to WorkSafeBC.
- [5] The defendants allege that the plaintiff and her employees engaged in a pattern of unacceptable conduct including harassing members of the public and other vendors. They say the plaintiff was given repeated direct warnings and told her behaviour was unacceptable, but she did not improve her behaviour, which ultimately resulted in the termination of the lease.
- [6] On November 5, 2016, the police were called and attended at the Market. The parties differ as to why the police were called. In any event, the plaintiff also received a letter that day informing her that she and her staff were banned from all areas of the Market, other than her unit, the loading bay, and the washroom areas.

- [7] Approximately eight months later, the plaintiff received notice that her lease was terminated. Hudson took the view that the plaintiff was in default of her obligations under Article 5.6 of the lease because of her failure to carry out her business in a manner that does not constitute a nuisance, is not offensive, or is not an annoyance to the landlord or occupants of the Market. The letter stated that the plaintiff and her business delivered "written communications and engaged in verbal interactions with the landlord and other occupants in a threatening and derogatory manner", and it alleged that she spread offensive and malicious rumours about Hudson and the vendors.

A. Litigation History

- [8] The plaintiff filed a notice of civil claim in March 2019 against Hudson, making the following factual allegations:
- a) Several months after occupying the premises, she discovered that the venting for smoke from a neighbouring tenant's business was inadequate.
 - b) She repeatedly requested for work to be done to address the situation, but that did not happen until May 2017, which was after the plaintiff complained to WorkSafeBC about the smoke.
 - c) In mid-2016, an HVAC unit was installed above her space, which caused an unacceptable level of noise and disrupted her business. She complained to Hudson, but no repair was made until March 2017.
 - d) She alleges that the termination of the lease in July 2017 was in retaliation to her making a complaint to WorkSafeBC regarding the smoke from the neighbour.
- [9] With regard to the legal basis for her claims, she pleads that Hudson breached the terms of the lease and was negligent by failing to repair the issues with smoke and the HVAC, and that Hudson breached the lease by locking her out and seizing her property.
- [10] Almost a year later, she amended her notice of civil claim by adding the phrase "doing business as Victoria Public Market at the Hudson" to the identification of Hudson, and she added both Townline Property Management Corp. and Roast Sandwich Shop Inc. as defendants.
- [11] She modified the narrative of her facts, and I will repeat a few of those that are relevant to the issues in this application:
- a) In the original notice of civil claim, she alleges that she came to an agreement about the lease with Hudson, but now pleads that agreement to lease was made with Hudson "through their [sic] agents Townline".
 - b) In the original notice of civil claim, she says that she notified Hudson of the problem with the smoke and HVAC. In her modification, she added the phrase "Hudson through their [sic] agents Townline".

c) She accuses Hudson and/or Townline of unjust enrichment for locking her out and seizing her property, and that was done by Hudson in retaliation for making her complaint.

d) She identified that the neighbour producing the smoke was Roast.

[12] With respect to the legal basis:

a) she simply added the phrase "or Townline" to the previous allegations of negligence and breach of lease as against Hudson;

b) she also alleged Roast was negligent in failing to address the smoke;

c) she alleged Hudson or Townline breached the lease by interfering with her right of private enjoyment;

d) she said Hudson and/or Townline were unjustly enriched by the seizure of property from the premises.

[13] Hudson and Townline filed responses to the claim in March 2020 in which they denied all allegations. They also specifically asserted that Townline managed the Market and the lease on behalf of Hudson, but only up until April 30, 2015. After that time, Quay Property Management ("Quay") was retained to manage the Market. They also specified that Townline and Hudson are separate legal entities.

[14] With respect to the narrative of facts, Hudson and Townline allege that "throughout the term of the [l]ease, the [p]laintiff frequently made offensive, threatening, and derogatory comments towards Hudson, the management of the Market and other tenants". They also pleaded that the plaintiff and her employees frequently harassed other tenants and management by taking pictures and videos, arguing, and spreading offensive and malicious rumours regarding Hudson, the managers, and tenants.

[15] In the legal basis, they deny all allegations. They raise a limitation defence, in that the notice of civil claim indicates the plaintiff discovered the problems with the venting in 2013 and the problems with the HVAC in 2016, but the claim was not started until 2019. In any event, they deny there were problems, but say, in the alternative, if there were, they did not amount to negligence or breach of the lease.

[16] Roast filed its response in March 2020. It also denied all allegations. It claims it does not owe a duty of care, contractual or otherwise, to the plaintiff. Even if it did, it said it discharged its duty. It denied any smoke escaped, but says, in the alternative, if it did, Roast was not legally responsible for the ventilation. In the further alternative, even if it was responsible for the ventilation, the plaintiff sustained no injury, damage, or expense as a result of that and suffered no loss. Roast also relies on the Limitation Act, S.B.C. 2012, c. 13.

B. Other Legal Proceedings

- [17] In their response, Hudson and Townline refer to additional facts that relate to other legal proceedings:
- a) The plaintiff filed a claim in the Provincial Court in January 2018 against Consolidated Civil Enforcement B.C. ("Consolidated"). In that claim, the plaintiff sought damages for its involvement in evicting her from the premises. Consolidated issued a third-party notice naming Hudson as a third party. In October 2018, the Provincial Court proceeding was dismissed, and the third-party claim was withdrawn.
 - b) In the fall of 2017, the plaintiff filed a series of amended complaints with the Human Rights Tribunal alleging discrimination. Those complaints were filed against Hudson and Quay. The complaint was dismissed in July 2019 under s. 27(1)(c) of the Human Rights Code, R.S.B.C. 1996, c. 210, in that there was no prospect of success. In September 2019, the plaintiff filed a petition for judicial review, which remains outstanding. She also filed an application for reconsideration with the Human Rights Tribunal, which was dismissed in September 2019.
 - c) She filed a complaint with the Office of Information and Privacy Commissioner alleging inappropriate obtaining and dissemination of personal information. That file was closed.

II. THE LAW

A. Adding Defendants

- [18] Rule 6-2(7)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, governs the addition of parties. It states that at any stage of a proceeding, the court may order that a person be added as a party if either the person ought to have been joined as a party in the first instance or their participation is necessary to ensure all matters are effectually adjudicated upon: *Li v. Yan*, 2015 BCSC 1067 at para. 34.
- [19] Rule 6-2(7)(c) states that a party can be added if there may exist, between the proposed party and any party to the proceeding, a real question or issue relating to relief claimed in, or the subject matter of, the proceeding: *Li* at para. 42.
- [20] To succeed in adding a party, the court must also find that it is just and convenient to determine the issue in the current proceeding: *Li* at para. 45.
- [21] With respect to Rule 6-2(7)(c) (previously Rule 15(5)(a)(iii)), in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at paras. 45-46 [*The Owners*], the Court of Appeal held that the threshold to meet the test is low. Here, the plaintiff must simply establish that there is a real issue between her and the proposed defendants that is not frivolous, or that she has a possible cause of action against them.

- [22] The Court of Appeal also held that the determination can be made on the basis of proposed amendments to a notice of civil claim or the parties can provide affidavit evidence. However, if they do provide affidavit evidence, the court is not to weigh that evidence or ask if a party can prove the allegations. Instead, the court examines the evidence only enough to determine if the required issue between the parties does exist.
- [23] Once that first requirement is met, the court asks if it is "just and convenient to decide the issue between the parties in [the] proceeding": *The Owners* at para. 46. That determination is discretionary.
- [24] The factors to be considered mirror those that are considered when adding further causes of action, including the extent of the delay, the reasons and any explanation for the delay, prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated.
- [25] In *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16 (recently cited in *Walter v. Insurance Corporation of British Columbia*, 2021 BCCA 259 at para. 25), the court set out the principles for the addition of a party:
- 1) A party should be added where that party's participation is necessary for the proper determination of the case: *Van de Perre v. Edwards* [2001] 2 S.C.R. 1014 at para. 48;
 - 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: *Northern Construction Co. v. British Columbia Hydro and Power Authority*, [1970] B.C.J. No. 26 at para. 14;
 - 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined: *MacMillan Bloedel Ltd. v. Binstead*, [1981] B.C.J. No. 1611 at para. 12;
 - 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties: *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, [1999] B.C.J. No. 2796 at para. 15;
 - 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action: *Harrington (Guardian ad litem) v. Pappachristos*, [1992] B.C.J. No. 2600;
 - 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550 at para. 43.
- [26] Where a limitation period has expired, the Court of Appeal in *Letvad v. Fenwick*, 2000 BCCA 630, approved of the following principles as summarized in *Byrd v. Cariboo (Regional District)*, 2014 BCSC 2239 at para. 25, *aff'd* 2016 BCCA 69:

[25] In *Letvad*, the Court of Appeal, at paras. 23-30, addressed the factors to be considered in an application to add a party where the limitation period has expired. The Court of Appeal relied heavily on its judgment in *Teal*. The principles articulated in *Letvad* and *Teal* may be summarized as follows:

1. The same principles apply regardless of whether the plaintiff seeks to add a new party or add a new cause of action against an existing party.
2. Where the plaintiff has not exercised due diligence in bringing on its application, it is not an automatic bar to the relief sought. All of the relevant circumstances must be considered.
3. The Court must exercise its discretion judicially, in accordance with the evidence adduced and the guidelines established in the authorities.
4. The guidelines to be applied require a consideration of certain factors: (a) "the extent of the delay"; (b) "the reasons for the delay"; (c) "any explanation put forward to account for the delay"; (d) "the degree of prejudice caused by delay"; and (e) "the extent of the connection, if any, between the existing claims and the proposed new cause of action."
5. What is just and convenient is an overriding question.
6. There is a presumption of prejudice to the proposed defendant if the limitation period has expired.

B. Adding Causes of Action

[27] With regard to adding new causes of action to an existing claim, the test is the same as when assessing whether to dismiss a claim because it disclosed no cause of action. The question is if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *Olenga v. British Columbia*, 2015 BCSC 1050 at para. 17; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[28] Again, the threshold is low, and if the proposed pleadings disclose a reasonable cause of action, the application should be granted: *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021 at para. 24, *aff'd* 2017 BCCA 202. However, the court added an important exception in cases where: a) the pleadings propose a new cause of action with an expired limitation period; b) the amendment is clearly invalid at law; c) or the amendment will prejudice another party.

[29] In *Colter Developments Ltd. v. Squamish JV Ltd.*, 2015 BCSC 415 at para. 23, the court held that a proposed amendment is deficient if it is not supported by material facts.

III. PRELIMINARY ISSUES

[30] Before turning to the substantive matters, I need to address some preliminary issues.

A. Defective Affidavit

- [31] The plaintiff represented herself and has drafted her own material. I am aware of the duty of this Court to ensure that in-person litigants are not disadvantaged by reason that they are not represented by counsel. To the extent reasonable, without impairing the integrity of the court proceedings, especially the fairness to other parties, the court may offer guidance to an in-person litigant without overstepping its role not to advocate, give legal advice, or impair its neutrality. Overall, it must ensure the in-person litigant understands the proceedings and understands the issues that she needs to address. I am satisfied that I have fulfilled those obligations during this hearing.
- [32] The plaintiff expressed concern because English is not her first language, but I find she had no problem effectively communicating her case. It was obvious to me that she had a thorough knowledge of her own case and her material. I have no doubt it is stressful and difficult to represent oneself in court. The plaintiff was able to present her case well. In addition, I was able to read the narrative portions of all of the affidavits, and all of the pleadings relevant to the application before the hearing began.
- [33] I explained to the plaintiff at the beginning of the hearing that there was significant defect in her material. I explained to her that affidavits are meant to contain evidence and should contain only evidence that would be admissible for someone if they gave evidence in the witness box. I told her my concern that the overwhelming majority of her affidavits were inadmissible.
- [34] Specifically, I identified the following concerns:
- a) Her affidavits are replete with citation and quotes from caselaw, argument, and submissions. None of that is admissible as evidence.
 - b) Her affidavits also contain inadmissible or inappropriate content, including allegations against counsel and other people, some of which appear to be based on pure speculation, opinions, hearsay, double or triple hearsay, and belief stated without a source of that belief being identified.
 - c) She makes reference to exhibits in her Affidavit #9 filed May 5, 2023, and Affidavit #10 of June 2, 2023, but no exhibits were attached to these affidavits to be affirmed by the commissioner that took her affidavit. Instead, she provided in the application record a number of exhibits that had been attached to previous affidavits.
 - d) She quotes at length and relies heavily on a number of e-mails that are not attached to her affidavit as exhibits.
 - e) She failed to attach to her notice of application the proposed amended notice of civil claim, although I note that was included in the material elsewhere.

- f) Her proposed amended notice of civil claim and her notice of application have several differences with regard to the proposed claims to be added; they do not match.
- [35] I explained these problems to the plaintiff at the beginning of the hearing. I am satisfied that she understood. I estimate that if the inadmissible material were removed from her affidavit, her 33-page Affidavit #9 of May 5, 2023, in support of the application would constitute less than three pages. The proportion of inadmissible material is the same in her affidavits filed June 2, 2023, and August 14, 2023.
- [36] Rather than simply not considering the overwhelming majority of her affidavits, I accept those inadmissible portions as representing her submissions to the court, rather than as evidence.

B. Differences between the Notice of Application and
the Proposed Notice of Civil Claim

- [37] In her notice of application, the plaintiff seeks to add the following (the descriptions are taken directly from the plaintiff's application):
- a) from Roast, Maryanne Carmack, who is the owner of Roast and former manager at the Market;
 - b) from Hudson and the Market,
 - i. Rick Ilich as President and Director of Hudson, the Market, and Townline;
 - ii. Taylor Mathieson, Director of Operations Management at Hudson;
 - iii. Jaymie Humber, Manager at Hudson;
 - iv. Nicole Bens, the management assistant; and
 - c) from Townline, Justin Filuk who is Townline's Director of Development.
- [38] She seeks to add the following new causes of action, and I will identify, where possible, commonality and differences between the notice of application and the proposed amendments to the notice of civil claim:
- a) In the application, she alleges fraud against Taylor Mathieson, Jaymie Humber, and Nicole Bens. That claim is similar to the proposed amendment, except that in her proposed amendment, she cites s. 21 of the Criminal Code, R.S.C., 1985, c. C-46, and specifically identifies fraud as the issuance of default over a false call to police made by Nicole Bens.
 - b) In the application, she pleads fraudulent misrepresentation against Taylor Mathieson, Maryanne Carmack, Jaymie Humber, and Nicole Bens. In the proposed amended notice of civil claim, that plea is made against the same people with the exception of Taylor Mathieson. The specifics of the claim are declaring to the police about an event they did not witness, made on the basis of false representations committed by the fraud identified above.

- c) She pleads libel against Rick Ilich, Maryanne Carmack, Jaymie Humber, and Justin Filuk. She does not identify the allegedly libelous statements in either pleading.
- d) The tort of knowing assistance is alleged against Taylor Mathieson, Jaymie Humber, Maryanne Carmack, and Nicole Bens, and the claim is the same in both the application and proposed notice of civil claim.
- e) The tort of conspiracy to "take her out of her business" is against all six proposed defendants, and that is the same in the proposed notice of civil claim.
- f) The tort of conspiracy to take over her business is made against Maryanne Carmack. That allegation is not contained in her proposed notice of civil claim.
- g) The tort of intentional interference with economic interest through a conspiracy to cause injury by unlawful means is made against Taylor Mathieson, Jaymie Humber, Maryanne Carmack, and Nicole Bens, and that matches her proposed notice of civil claim.
- h) The application contains an allegation of breach of trust against Rick Ilich, Taylor Mathieson, and Jaymie Humber that is not in her proposed notice of civil claim.
- i) The application contains a claim for breach of duty of care against Rick Ilich, Taylor Mathieson, Jaymie Humber, and Nicole Bens that is the same as in her proposed notice of civil claim.
- j) Both pleadings contain a claim for vicarious liability against Hudson and Townline.
- k) The application contains a claim for punitive damages against Rick Ilich, Taylor Mathieson, Jaymie Humber, and Nicole Bens that is not in her proposed notice of civil claim.
- [39] The proposed notice of civil claim also includes a claim of conduct contrary to the Competition Act, R.S.C., 1985, c. C-34, but that does not appear in the notice of application. There is also an allegation in that proposed claim that the Roast contamination constituted "management indifference" contrary to occupier liability, and that claim was not in the notice of application.

C. Duplicative Applications

- [40] I also address briefly the issue of duplicative applications. I am concerned by the evolution of this application as this was not the first time some of the issues were contained in an application.
- [41] The plaintiff filed a notice of application on August 8, 2022, that was heard on August 31, 2022. She sought:
 - a) to amend the notice of civil claim to include:
 - i. claims for negligence of employment in hiring, retention, and supervision;
 - ii. conspiracy "to take [her] out" and take over her business;

iii. defamation on the part of Hudson, Townline, and Roast; and

iv. punitive damages.

b) an order to open the police file, by which she meant to get an unredacted copy;

c) an order for the production of documents from the defendants.

[42] The court granted the production of the unredacted police file. The parties believe all other claims were adjourned; however, the court order that was entered makes no reference to adjournment.

[43] There is some commonality with the current notice of application in terms of the allegations of conspiracy, defamation, and punitive damages, but these are not supported in the application by the pleading of any material facts. The claim of "negligence of employment, in hiring, in retention and supervision" does not appear to have material facts to support it, but the plaintiff does list a number of sections from the lease.

[44] There was an application filed December 19, 2022, that seeks to add the same six proposed defendants, and, having reviewed it, I find that it is completely duplicated by the application of May 5, 2023.

[45] I will address these overlaps at the end of my judgment. It is not in the interests of the public, the efficient operation of this court, nor the efficient progress of this litigation to allow duplicative pleadings or confusion as to which issues have already been considered and dismissed.

IV. ANALYSIS

[46] Given the new causes of action, the plaintiff seeks to add the proposed defendants. As such, the two issues are intertwined. I am mindful that there are separate legal tests and considerations, but there is overlap and commonality. Both tests have a low threshold. That the plaintiff is seeking to add the causes of action and parties after the limitation period has expired is relevant, not determinative, to both tests. I turn to that issue first.

A. The Limitation Period

[47] A major defect with the plaintiff's application that she cannot overcome is that the claims she seeks to add are all well beyond the limitation period. In terms of her justification for seeking the amendments, she claims she received "new information", which was a combination of e-mails and the unredacted police report. Her claim in conspiracy is largely based on these sources.

[48] The original police report relates to the police attendance at the Market on November 5, 2016. As is customary in the first instance of production, the police report redacted the names of people and their personal information. Therefore, it did not identify the name of the person who called the police.

- [49] The unredacted copy of the police report reveals that Nicole Bens called the police. The plaintiff also says she "discovered" within the unredacted report that Maryanne Carmack and Jaymie Humber were involved with the police on the day of the call.
- [50] She believes that the unredacted report exposes lies in statements sworn by Taylor Mathieson and others, which partially forms the basis for the plaintiff's claims in fraud and fraudulent misrepresentation. She also claims information in the unredacted police report exposes that the defendants made a wrongful denial to her Notice to Admit.
- [51] Section 8 of the Limitation Act states that the claim is discovered on the first day a person "knew or reasonably ought to have known all of the following": 1) injury, loss, or damage occurred; 2) it was caused by or contributed to by an act or omission; 3) the act or omission was that of the person against whom the claim is made; and 4) and the court proceeding is an appropriate means to seek a remedy.
- [52] It is important to remember that the crux of the plaintiff's entire lawsuit is the alleged wrongful termination of her lease and loss of her business. The lease termination occurred over six years ago, in 2017. Almost all of the proposed claims are inextricably linked to that event because she says that is how she suffered damage--by the forced closure of her business. I am mindful that the expiry of the limitation period is not definitive, so I will turn to the other factors listed in Byrd respecting the addition of parties.
1. The Extent of the Delay
- [53] This factor weighs very heavily against the plaintiff. The events underlying her action occurred over six years ago. To the extent that her complaints are grounded in the alleged fraudulent call to the police, they are almost seven years ago. In addition, it has now been more than four years since she originally filed the notice of civil claim. I note that prejudice is presumed because this is well beyond the limitation period.
 2. The Explanation/Reasons for the Delay

[54] The plaintiff says that she did not, and had no way to, know about the proposed causes of action and the possible liability of the proposed defendants until she received the e-mails and the unredacted police report. She received the amended list of documents in December 2020. She received the unredacted police report about a year ago.

[55] The plaintiff argues until she saw that unredacted police report and understood it together with the e-mails, she could not have known that the proposed individual defendants were, in her mind, "conspiring against her." Her allegation that a combination of people worked against her also rests on her assertion that the call to the police was somehow fraudulent.

[56] I note that she is also seeking to add Rick Ilich and Justin Filuk, who are not named in the police report.

- [57] More importantly, she submits there is no prejudice because the additional individuals are simply part of the management of Hudson and Townline. Her reasoning is that she was particularizing more claims against people "already involved."
- [58] I do not agree. Without focusing on the elements of the legal claims at this point, I find there is no doubt--by her own admission and in her own material--that the plaintiff was aware of the nature of the animus against her. She would have been aware of Roast, Maryanne Carmack, and management because of the events involving the fumes and her subsequent complaints.
- [59] Specifically, she e-mailed Maryanne Carmack in October 2016, referring to her "being 'negative' as management likes to call me, and you too, now." It is implicit in that e-mail that the plaintiff believed in her mind that both Maryanne Carmack and management had negative feelings about her.
- [60] I also find the content of her complaints to the Human Rights Tribunal to be highly relevant. I am mindful that the substantive basis of the complaint to the Human Rights Tribunal (that there was discrimination in the cancellation of her lease) is an entirely different legal matter, but it is relevant to the issue before me in terms of how the plaintiff described the issue. In the amendment made October 2017, she refers to being called "negative" and a "nuisance." She points out her belief that management was giving preferential treatment to Maryanne Carmack and Roast. While framed as discriminatory, the important point is that, based on her knowledge at that time of ill treatment, she listed Maryanne Carmack, Roast, and Quay.
- [61] In other words, she knew to start the proceedings against Hudson (who owned the land and was the landlord) and the company that managed the leases and the Market, which was Quay and not Townline. Despite this, in her proposed amendments to the notice of civil claim, she incorrectly identifies Taylor Mathieson, Jaymie Humber, and Nicole Bens as being from Hudson, which they are not. At all relevant times they worked for Quay, a party that has never been named in this litigation, and which the plaintiff does not seek to add.
- [62] This also compromises her position on the next factor.
3. The Connection between the Existing Claims and Proposed New Causes of Action
- [63] The plaintiff submits that the e-mails and the unredacted police report are merely further examples of bad behaviour by the existing defendants. However, that is not the case, and I find that fatal to her attempts to add Taylor Mathieson, Nicole Bens, and Jaymie Humber to the lawsuit. Those individuals worked with Quay, and therefore they have no connection to the existing claims.
- [64] She submits that Hudson and Townline should be treated as the same entity, but they are separate legal entities. She has known of their position since they filed the response to notice of civil claim.

- [65] To a large extent, the claims of fraud and conspiracy depend upon what she says was the lie exposed when she found out that Nicole Bens made the call to police in November 2016. She emphasizes this point. The problem is that the lease was not terminated until July 2017. There is a full eight months between those events. It is difficult to see the nexus, as she alleges. Instead, her argument amounts to speculation.
- [66] Her explanation that finding out Nicole Bens was the person who called the police also depends on her allegation that is contained in previous proceedings--that Taylor Mathieson and Maryanne Carmack, or potentially others, "lied." She says this was "new" information.
- [67] She says that an affidavit filed in the human rights matter, sworn in August 2018 by Taylor Mathieson, stated that several tenants and a day vendor felt so harassed by behaviour of the complainant and her staff, they informed Quay that they would call the police if she or her staff continued to enter their unit or market stall, or approach them. Taylor Mathieson deposed that in two cases, other vendors called the police to report harassment by the complainant and her staff.
- [68] The plaintiff says the revelation that Nicole Bens called the police in November 2016 proved that Mr. Mathieson lied.
- [69] The revelation does not prove he lied because there is no identification in his affidavit that he is only referring to the November 2016 incident. There could have been other calls to the police that he was told about. Furthermore, the notice in November 2016 that he gave to her was not termination of the lease. That was one of the written warnings that restricted her movement in the Market. Even on her own pleadings, the connection she alleges is not with the termination of the lease.
- [70] She also says the unredacted police report gave her new information because it shows the involvement of Maryanne Carmack and Jaymie Humber in that November 2016 call to the police. This, too, suffers from a lack of a nexus to the termination of the lease.
- [71] However, more importantly, on its face, the police report does not show they were involved at all. The report only mentions Jaymie Humber as someone that Nicole Bens suggested could be contacted to get information about a business. There is no indication that the police spoke to her. The report also explained that the WorkSafeBC issue had to do with fumes from Roast owned by Maryanne Carmack.
- [72] In the unredacted copy, it says, "fumes coming from the Roast, owned by" and then the name is blocked out. The plaintiff knew who owned Roast at all times. It is clear on the record she had direct communication with Maryanne Carmack. The plaintiff obtaining the unredacted police report did not give her any new information about Maryanne Carmack. And, again, there is no indication the police spoke to Maryanne Carmack.

- [73] For all those reasons, the plaintiff has not established why learning that Nicole Bens placed a call to the police has any connection to the essence of her complaint, which is the cancellation of her lease.
- [74] Moreover, the plaintiff is ignoring a fatal defect to her attempt to add individuals who are management. In her submission, she was simply "mistaken" to identify or attempt to connect Taylor Mathieson, Jaymie Humber, and Nicole Bens with Townline.
- [75] I do not accept her statement for several reasons. More than once the plaintiff acknowledged she received the letter in 2015 that management of the Market was being transferred to Quay. She correctly identified Hudson Retail Inc. and its agent, Quay Property Management, in her human rights complaint. She specifically mentions that Jaymie Humber was with Quay. She amended her human rights complaint in October 2017 and, again, identifies Quay as agent and identifies Jaymie Humber and Taylor Mathieson by names being connected to Quay when detailing her complaint about the smoke.
- [76] Quay is not in this lawsuit. Taylor Mathieson, Nicole Bens, and Jaymie Humber are all employees of Quay, not Townline. Accordingly, those individuals are not connected to the existing lawsuit. The prejudice of being added to this lawsuit that was started over four years ago, based on events that happened six to seven years ago, is obvious.
- [77] I add that the human rights complaint was dismissed and the dismissal upheld on reconsideration.
4. Just and Convenient
- [78] Unless there is prejudice, the case law says that the addition of parties should be granted liberally. Here, the prejudice is presumed as the limitation period has passed, and I find the prejudice is significant.
- [79] I emphasize that I have given the plaintiff considerable leeway to explain in her submissions at the hearing the reasons for her delay and other matters. To a large extent, many of her oral submissions are not contained in her notice of application or proposed amended notice of civil claim. In other words, the delay is not explained in the materials she filed, but I relied on her oral submissions. Had any of her oral submissions found traction, there could be a real issue as to whether the defendants had fair notice of the submissions given to explain the delay. However, I do not find her explanations had traction, and therefore I am content to proceed.
- [80] Adding six individuals greatly expands the scope of the lawsuit and cost of the length of any trial. Each one is entitled to their own lawyer. This increases the existing prejudice to the existing defendants that comes from the expiry of the limitation period. I note that the litigation has progressed to a certain degree.

[81] I detail below why I find that even if I accepted the pleadings that she put in the notice of civil claim as true, they do not disclose causes of action. Since naming the proposed defendants depends on those causes of action, I adopt those comments here as another reason why I do not find that she can add the defendants.

[82] For all of those reasons, I find it is not just and convenient to add the proposed defendants.

B. Adding Causes of Action

[83] As noted in Byrd, all of the above reasoning also applies to the addition of a cause of action, but I will address the issue more specifically.

[84] I add that regardless of the conclusions above, which I am satisfied result in disallowing the amendment, I also find that the causes of action are not supported by the pleading of material facts. The causes of action are also all clearly outside the limitation period.

1. The Breach of Trust, Knowing Assistance, Fraud,

and Competition Act Claims

[85] During the hearing and at the end of the plaintiff's submissions, I identified that breach of trust and knowing assistance, as well as fraud, did not appear on their face in the pleadings to be supported by any material fact, and that is even taking into account those portions of her affidavit that are inadmissible as submissions. I asked her to explain what supported her addition of those claims. I gave her extra time to prepare her answers, and she did provide those the next day.

[86] Her answer did not overcome what I found to be fatal flaws. No material facts were pleaded to support the claim, whether in her notice of application, her proposed notice of civil claim, or her affidavits. They simply do not address the basic elements of those particular claims, and she was unable to provide that information the next day. Those claims were immediately dismissed.

[87] The same analysis applies to the claims related to the Competition Act. I find that there are no material facts pleaded that could possibly support these claims, even on the lowest possible threshold.

[88] Additionally, the tort of knowing assistance is completely dependent on there being a breach of a fiduciary duty, and she has not even alleged a fiduciary duty.

[89] I turn to the other claims.

2. The Fraud and Fraudulent Misrepresentation Claims

- [90] In the notice of application, the plaintiff alleges fraud against Taylor Mathieson, Jaymie Humber, and Nicole Bens, but the proposed notice of civil claim actually cites the Criminal Code. With respect to the fraud, the plaintiff explains, based on the concept that by lying to the police and conspiring together and then having the landlord cancel the lease, they committed fraud.
- [91] I have already addressed when dismissing her claim why fraud cannot be sustained generally, but I will add that you cannot plead a criminal violation in a civil case. Even if I accepted that her submissions amounted to pleadings, I cannot see how a person lying to the police, even in concert with others, which does not result in charges, can be fraud when it was not alleged there was any lie or deception directed at her.
- [92] For fraudulent misrepresentation, again, there is no allegation in her facts that people deceived her and that she relied on it. The allegation is that they deceived the police, but that did not result in a charge, and the lease cancellation had nothing to do with the police incident.

3. The Libel Claim

- [93] The test for libel is contained in *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28. It is well known. The impugned statement must be defamatory, in that it would lower the plaintiff's reputation in the eyes of a reasonable person, it refers to the plaintiff, and it has been published.
- [94] To establish a defamatory statement, the question is whether the words are reasonably capable of having a defamatory meaning and, if so, whether the words used have that defamatory meaning.
- [95] In addition, Rule 3-7(21) states that if a person alleges libel because the words are used in a derogatory sense, other than their ordinary meaning, they must give particulars of the facts and matters on which the plaintiff relies in support of that meaning.
- [96] The material is defective because she did not, in her notice of application or in her proposed amendments in the notice of civil claim, identify the specific defamatory words. She simply alleged libel, and that is fatal.
- [97] Given that she is an in-person litigant, I gave her the benefit of identifying the libel that she alleged, based on the portions of her affidavit that I accepted as her legal argument. She relies on a number of e-mails, and I am not going to repeat them, but they were identified on the record.
- [98] The parties agree that the words were in an e-mail. They agree that even if that e-mail was sent only to one person, it can amount to publication. I accept that the e-mails referred to her. Therefore, at least two elements of libel are met.

[99] However, her material does not explain how they were defamatory, and I gave her the opportunity to make that submission during the hearing. Even if I could have considered her argument in her affidavit as constituting pleading, I am not satisfied she particularized the libel to the satisfaction of the rule.

[100] In *Tilbury v. Coulson*, 2023 BCSC 189 at para. 120, the court also pointed out that to meet the threshold, the plaintiff must show how the statement lowers one's reputation. Here, the plaintiff did not do so.

[101] In *Northwest Organics, Limited Partnership v. Roest*, 2018 BCSC 866 at para. 171, Justice Iyer noted that a contextual assessment is needed. She highlighted that not all negative statements about a person are defamatory, and distinguished between merely derogatory, offensive, or insulting statements, and defamatory ones that give rise to legal remedies. I find that all of her allegations of libel fail on that count.

4. Conspiracy "to Take her out of her Business", Conspiracy, Intentional Interference, and Breach of Duty of Care Claims

[102] The plaintiff seeks to add the tort of conspiracy to take her out of business against the six proposed defendants. I will treat that claim the same as the tort of conspiracy against Maryanne Carmack and the tort of intentional interference with economic interests through a conspiracy to injure by unlawful means. She does not identify the unlawful act that could found the conspiracy. She refers to a false allegation to the police, but that was based on Nicole Bens not witnessing the alleged behaviour, and that does not prove that it was false.

[103] Even if I accepted her version, giving inaccurate information to the police is not illegal. I am not satisfied that she plead material facts to tie the police incident inextricably to the cancellation of her lease.

[104] I already found the breach of trust claim could not be made out because there was no identification of how a trust relationship could exist. She referred to payments that were made for management in addition to rent, but that does not create a trust relationship.

[105] With respect to breach of duty of care, she did not plead facts to show why a duty of care would exist among any of these parties. These are all commercial arrangements, and they do not create trust or duty of care relationships.

5. Vicarious Liability Claim

[106] In terms of the claim for vicarious liability against Hudson and Townline, it is invalid on its face because the proposed defendants are not with Townline, except Justin Filuk. In any event, I think the plaintiff meant to say that the corporations had to be vicariously liable for the individuals, but she did not specify for what acts in the pleadings or in her arguments. I assume she meant for all the other acts contained in the pleadings, but those fail for the reasons I have already given.

[107] For all of those reasons, I find none of the causes of action are supported by the pleaded facts material to those claims. There is a total failure to even address some of the elements of the causes of action.

[108] Also, the attempt to add causes of action fails for the same reasons that I found that the test to add the parties had not been met: that it is not just and convenient to do so. Those reasons primarily include the limitation expiry, the presumed prejudice, the real prejudice, and the lack of explanation or reason to justify the expiry of the limitation period or provide connections to the gravamen of her case.

[109] For all of those reasons, it is not just and convenient to allow the additional causes of action. The application is dismissed.

VI. DUPLICATIVE APPLICATIONS

[110] I want to briefly address the other applications that are outstanding. I note that the order stemming from the August 8, 2022 application only states that one order was granted. I believe the court notes say the rest of the orders were adjourned, but that is not reflected in the order that was entered. In any event, there was duplication, and I want the parties' submissions.

[SUBMISSIONS FROM PARTIES ON DUPLICATIVE APPLICATIONS]

[111] I heard submissions from the parties on the concerns I identified earlier regarding duplicative notices of application.

[112] I want to be clear that I am not criticizing the plaintiff. I appreciate and acknowledge that she is doing the very best she can in representing herself. I appreciate that she, in her mind, wanted to be timely and that is why she filed certain applications when she did.

[113] However, when she filed the application that is in front of me in May, she repeated certain issues that were contained in previous applications because she believed they should be decided together. I do not want to leave any confusion about what has been granted and what has not been addressed. I add that it is unfortunate that the order that was granted after the hearing in August 2022 does not speak to this.

[114] From today's judgment, the following bullets in paragraph 1 of Part 1 of the August 8, 2022 application are duplicative; They are now moot, as they have been dismissed:

-Conspiracy to take me out and take over my business

-Defamation from the part of Hudson, Townline and Roast; and

-Punitive damages

- [115] I did not address and do not need to address the first bullet in para. 1 of Part 1 of the August 8, 2022 application as it was not raised before me (the claim in "negligence of employment, in hiring, in retention, and in supervision").
- [116] As I understand it, the parties believe everything under paragraph 3 of the August 8, 2022 application was adjourned. If it was, I make no comment on that.
- [117] With regard to the application filed December 19, 2022, I am satisfied, having read it myself and having heard from the parties, that the application does not contain anything that was not contained in the May 5, 2023 application. The May 5, 2023 application has been dismissed. Therefore, all relief sought in the December 19, 2022 application has been addressed, and cannot be pursued.

VI. COSTS

[SUBMISSIONS FROM PARTIES ON COSTS]

- [118] I heard submissions from all the parties on costs. The defendants and the proposed defendants do seek their costs payable in any event of the cause forthwith pursuant to R. 14-1(12) of the Rules. They make a valid point that the parties, who were sought to be added and were not successfully added, possibly have a stronger entitlement than the normal successful party to have their expenses reimbursed.
- [119] However, there is an underlying lawsuit here. In dismissing the addition of causes of action and proposed defendants, I was making no comment on the litigation itself. I appreciate that the proposed defendants may want to get their costs, but I am also alive to the fact that the plaintiff is representing herself.
- [120] I want to compliment her on the degree to which she understands her own material when she comes before the court and how difficult that must be. She lost her business. She may not win her lawsuit, but she could.
- [121] For that reason, in all the circumstances, I find it appropriate that costs are in the cause.

"Sharma J."

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