

CANADA / JUDGMENT

Genesis Fertility Centre Inc. v. Yuzpe

2017 BCSC 167

COURT

Supreme Court of British Columbia

DECIDED

1 February 2017

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2017 BCSC 167 Genesis Fertility Centre Inc. v. Yuzpe IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Genesis Fertility Centre Inc. v. Yuzpe, 2017 BCSC 167 Date: 20170201 Docket: S143496 Registry: Vancouver Between: Genesis Fertility Centre Inc., Dr. Sonya Kashyap and Sonya Kashyap MD Inc. Plaintiffs And Dr. Abraham Albert Yuzpe, Aljen Capital Corporation, Dr. Elizabeth Lynn Taylor, Dr. Elizabeth L. Taylor Inc., Dr. Jason Adolph Hitkari, Dr. J. A. Hitkari Inc., Dr. Gary Samuel Nakhuda and Olive Fertility Centre Inc. Defendants Before: Master Muir Reasons for Judgment Counsel for the Plaintiffs: N.T. Mitha D.D. Rideout Counsel for the defendants, Dr. Abraham Albert Yuzpe, Aljen Capital Corporation, Dr. Elizabeth Lynn Taylor, Dr. Elizabeth L. Taylor Inc., Dr. Jason Adolph Hitkari, Dr. J. A. Hitkari Inc. and Olive Fertility Centre Inc., and, for this proceeding, for the proposed defendants Gyn Wylie and Yvonne St. Pierre: J.D. Vilvang, Q.C. Counsel for the defendant, Dr. Gary Samuel Nakhuda: D.D. McWhinnie Place and Date of Hearing: Vancouver, B.C. January 25, 2017 Place and Date of Judgment: Vancouver, B.C. February 1, 2017

introduction

- [1] This is an application by the plaintiffs for an order that Gyn Wylie and Yvonne St. Pierre, former employees of the plaintiff company, Genesis Fertility Centre Inc. ("Genesis") be added as defendants to the action and that the notice of civil claim be amended in the form attached to the notice of application.

background

- [2] The action stems from a disagreement among four shareholders in Genesis. The disagreement resulted in the defendant doctors, Drs. Abraham Albert Yuzpe, Elizabeth Lynn Taylor and Jason Adolph Hitkari, through their respective corporations (collectively the "defendant shareholders"), making an offer to purchase Genesis.
- [3] I should note that one of the defendants, Dr. Gary Samuel Nakhuda, is an employee of Genesis, not a shareholder.

- [4] As there was a shotgun clause in the shareholders' agreement, the shareholder defendants' offer to purchase Genesis triggered the right of the plaintiffs, Dr. Sonya Kashyap and her company, Sonya Kashyap MD Inc., to buy Genesis, and they did so.
- [5] The defendant shareholders then proceeded to set up a new clinic, Olive Fertility Centre ("Olive"), in competition with Genesis.
- [6] The plaintiffs claim, amongst other things, that in doing so, the defendant shareholders breached the shareholders' agreement, their fiduciary duties and duties of good faith, interfered with contractual relations of Genesis, and induced employees of Genesis to breach their contracts with Genesis. plaintiffs' position
- [7] The proposed defendants, Ms. Wylie and Ms. St. Pierre were employees of Genesis. It is alleged that, as soon as they learned that Dr. Kashyap was purchasing Genesis, Ms. Wylie and Ms. St. Pierre, while still employed and working for Genesis, set about, both on their own and in conspiracy with the defendant shareholders, to set up the new company and new offices, and to improperly take Genesis employees and confidential information. It is also alleged that Ms. Wylie and Ms. St. Pierre ultimately resigned from Genesis without giving adequate notice.
- [8] In their proposed amended notice of civil claim, the plaintiffs seek to claim the actions of Ms. Wylie's constituted:
- a) a breach of the duty of good faith owed by Ms. Wylie to Genesis,
 - b) a breach of the fiduciary duty owed by Ms. Wylie to Genesis;
 - c) conversion for the use of Olive of the confidential and other proprietary information of Genesis;
 - d) a breach of the duty of confidence owed by Ms. Wylie to Genesis;
 - e) an unlawful interference in the contractual relations between Genesis and its employees; and
 - f) inducement of employees to breach their contracts with Genesis.
- [9] Similar claims are made regarding Ms. St. Pierre.
- [10] In addition, the proposed amendment to the notice of civil claim adds the following section:
Vicarious Liability
8. Olive is vicariously liable for any wrongful acts of Wylie, St. Pierre, the individual Shareholder Defendants and Dr. Nakhuda.

9. The Defendants Yuzpe, Alco, Taylor, Bethco, Hitkari, Jasonco and Nakhuda are vicariously liable as employers for the actions of Wylie and St. Pierre and are liable for any damages caused by the wrongful acts of Wylie and St. Pierre. the defendant shareholders' and the proposed defendants' position
- [11] The defendant shareholders and the proposed defendants resist the application. The defendant shareholders say they are willing to formally admit that all of the actions alleged to have been taken by the two proposed defendants were either undertaken as the employees or agents of the defendant shareholders and within the bounds of the employment or agency. The defendant shareholders further say they will agree to be fully liable for any damages found to flow from any wrongful actions of the proposed defendants.
- [12] Further, the proposed defendants said they would agree to a term of the order that they would both attend a pre-trial examination in accordance with Rule 7-5 of the Supreme Court Civil Rules. I note that there are also provisions in Rule 7-5(5) for obtaining documents under that Rule, although I gather from counsel for the proposed defendants that they have voluntarily produced documents already.
- [13] As a result, the defendant shareholders and the proposed defendants take the position that the addition of the proposed defendants to this action is completely unnecessary and not in keeping with the underlying principles of proportionality and a just and speedy resolution of the matters in issue.
- [14] That position is endorsed by Dr. Nakhuda.

analysis

- [15] The plaintiffs referred me to the reasons of Master MacNaughton, as she then was, in *Terasen Gas Inc. v. TNL Construction Services Ltd.*, 2011 BCSC 1345, as follows:
- [6] Rule 6-2 (7) governs the adding of a party. In this case, although not specified, I presume Fortis relies on subrule (c) which 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), ...
- (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.
- [7] Although the wording in Rule 6-2(7) has changed slightly from the previous Rule 15(5)(a)(iii), there has been no substantive change in the applicable test which has two parts:

- a) whether there is a question or issue between the parties and the proposed defendants which relates to the relief, remedy, or subject matter of the action; and
 - b) whether it would be just and convenient to determine that question or issues in the existing proceeding.
- [8] The first part requires the plaintiff to show that a real and not frivolous issue exists between the parties and the proposed defendants. The threshold is a low one. The plaintiff must plead sufficient material facts to support the claim but does not have to show that the allegations can likely be proven. A number of cases have described this element as requiring the plaintiff to show a "possible cause of action".
- [9] Under the second part, courts have considered a number of factors to determine whether it would be just and convenient to add the proposed defendants. These factors include:
- a) the stage of the proceedings when the application is made;
 - b) the length of a delay in applying;
 - c) the reason for the delay;
 - d) whether a limitation period has expired;
 - e) any prejudice caused by the delay;
 - f) the extent of any connection between the existing claims and the proposed new causes of action and whether it is suitable that the issues be tried together; and
 - g) whether the proposed new claims will not only increase the number of parties but also the issues and overall scope of the litigation, with resulting costs and delay.
- [16] Counsel for the defendant shareholders did not take issue with that statement of the law, but did argue that on a plain reading of the rule that Rules 6-2(7)(b) and (c) should be read conjunctively: 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.
- [17] Counsel argued that doing so would make it clear that to be joined as a party a person's participation in the proceedings must also be necessary, and here, because of the acceptance of liability by the defendant shareholders, the participation of Ms. Wylie and Ms. St. Pierre is not necessary.
- [18] I do not agree with counsel on this point. I believe that the cases are clear that Rules 6-7(b) and (c) stand on their own, and for an applicant to succeed in an application under Rule 6-7(c) the person's participation need not be necessary, but it must be just and convenient that the issue be determined in the action.
- [19] Counsel for the plaintiffs advanced in argument, although it was not in the plaintiffs' notice of application, that it is necessary to join Ms. Wylie and Ms. St. Pierre as defendants as the claims of breach of contract and breach of fiduciary duty cannot be adjudicated without them being parties. Further, they argue that the shareholder defendants cannot be vicariously liable for breaches of contract and fiduciary duty.
- [20] The short answer with respect to breach of contract is that although there are allegations that Ms. Wylie and Ms. St. Pierre owed contractual obligations, there is no claim advanced in the proposed amended notice of civil claim for breach of their contracts.
- [21] As to breach of fiduciary duty, it is judicially accepted that an employer can be vicariously liable for an employee's breach of fiduciary duty. See e.g. *C.A. et al v. Critchley et al.*, 1998 CanLII 9129 (B.C.C.A.).
- [22] There is no question that a claim can be advanced for vicarious liability without having the employee or agent named as a party. Counsel for the defendant shareholders referred to *Powell Estate v. British Columbia (Workers' Compensation Board)*, [2011] B.C.J. No. 1459 (S.C.). In that case, Mr. Justice Johnston refused an application to join an employee of the Workers' Compensation Board on the basis that any damages flowing from his actions, which were alleged to constitute misfeasance in public office, would be recoverable against the Worker's Compensation Board.
- [23] Counsel for the plaintiffs also advanced the proposition that not having Ms. Wylie and Ms. St. Pierre as parties would tie the hands of the court and circumscribe its ability to fully determine issues of liability. Other than the points dealt with above, however, he did not advance, and I do not see any, issues that could not be determined at the trial regardless of whether the proposed defendants are added as parties.

- [24] Looking at the factors to be considered, although it seems to be conceded that there is no limitation issue, there has been considerable delay. The plaintiffs had indications from the outset in late 2012 or early 2013 that the proposed defendants had acted to further the plans of Olive and the defendant shareholders.
- [25] This action has been proceeding for two and a half years. Documents have been disclosed and discoveries held. No specific prejudice is advanced by the proposed defendants, however, other than the fact that they would be forced to defend themselves, and that would increase the costs to them and result in delay and increased costs and complexity for all parties.
- [26] I am swayed by the fact that there will be no benefit to joining the proposed defendants as parties that will not be achieved by the admissions and concessions of the defendant shareholders and the proposed defendants.
- [27] Those will actually simplify the litigation, as the complex issues around an employee or agent acting within the scope of their authority will not have to be delved into at the trial, having been dealt with in the admissions.
- [28] After considering all of the factors here, including the objects of the Rules, I do not consider that it is just and convenient to add the proposed defendants as parties. Thus, paras. 1 and 2 of the notice of application are dismissed.
- [29] The amendments sought in para. 3 are allowed other than those which join Ms. Wylie and Ms. St. Pierre as parties.
- [30] This order includes the following terms, consented to by the shareholder defendants and the proposed defendants:
- a) All of the actions alleged in the proposed amended notice of civil claim to have been taken by Ms. Wylie and Ms. St. Pierre, if proved, were either undertaken as the employees or agents of the defendant shareholders and were within the bounds of their employment or agency.
 - b) The defendant shareholders are fully liable for any damages found to flow from any wrongful actions of Ms. Wylie and Ms. St. Pierre. And,
 - c) Ms. Wylie and Ms. St. Pierre will attend a pre-trial examination by the plaintiffs in accordance with Rule 7-5.
- [31] The plaintiffs, having been unsuccessful on this application, will be liable for the costs of this application in the cause. "Master Muir"

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