

CANADA / JUDGMENT

Genesis Fertility Centre Inc. v. Yuzpe

2017 BCSC 1037

COURT

Supreme Court of British Columbia

DECIDED

22 June 2017

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2017 BCSC 1037 Genesis Fertility Centre Inc. v. Yuzpe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Genesis Fertility Centre Inc. v. Yuzpe,

2017 BCSC 1037

Date: 20170622

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: The Honourable Madam Justice Gropper

On appeal from: the Supreme Court of British Columbia, dated February 1, 2017 (Genesis Fertility Centre Inc. v. Yuzpe; 2017 BCSC 167, File No. S143496)

Reasons for Judgment

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Dr. Elizabeth Lynn Taylor, Dr. Elizabeth L. Taylor Inc., Dr. Jason Adolph Hitkari, Dr. J. A. Hitkari Inc. and Olive Fertility Centre Inc.:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

June 7, 2017

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2017

Introduction

[1] This is an appeal from the order of Master Muir pronounced on February 1, 2017 (indexed as 2017 BCSC 167) dismissing the plaintiffs' application to add Gyn Wylie and Yvonne St. Pierre as defendants in this action.

[2] Rule 6-2 (7)(c) 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),

(a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,

(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.

Background

- [3] Genesis Fertility Centre Inc. (Genesis) is a fertility clinic in Vancouver, British Columbia. In the fall of 2012 it was owned by four shareholder doctors and their professional corporations: Drs. Yuzpe, Taylor, Hitkari (the defendant shareholders), and the plaintiff Dr. Sonia Kashyap.
- [4] On November 1, 2012 the defendant shareholders made an offer to buy out Dr. Kashyap by purchasing her shares in Genesis. The Shareholders' Agreement contained a "shotgun" provision which gave Dr. Kashyap the option of selling her shares or electing to purchase the shares of the defendant shareholders.
- [5] On November 28, 2012 Dr. Kashyap and her professional corporation elected to purchase the shares of the defendant shareholders. The closing date for the purchase and sale of the defendant shareholders' shares was January 31, 2013. The plaintiffs assert that until that time the defendant shareholders remained employees, shareholders and fiduciaries of Genesis. The plaintiffs allege that between November 28, 2012 and January 31, 2013 the defendant shareholders engaged in various wrongful acts that had the effect of causing loss and damage to Genesis.
- [6] The plaintiffs filed their notice of civil claim on May 7, 2014. In addition to the defendant shareholders, the plaintiffs sued Olive Fertility Centre Inc. (Olive) and Dr. Gary Nakhuda who was an employee of Genesis until he joined Olive.
- [7] In January 2017, the plaintiffs applied to add Ms. Wylie and Ms. St. Pierre as defendants to the action, claiming that while they were employees of Genesis, Ms. Wylie and Ms. St. Pierre began setting up a competing fertility clinic in breach of their duties as employees of Genesis. The plaintiffs also allege that Ms. Wylie and Ms. St. Pierre engaged in other wrongful and tortious conduct that caused loss and damage to Genesis.

- [8] The plaintiffs allege that the work that Ms. Wylie and Ms. St. Pierre performed for the defendant shareholders and/or Olive was for their own benefit and the benefit of the defendant shareholders. The conduct alleged against Ms. Wylie and Ms. St. Pierre includes taking steps to establish Olive while still employed and working for Genesis; performing work for themselves and for the benefit of the defendant shareholders and Olive while still employed by Genesis; breaching their own employment contracts with Genesis; inducing other employees to breach their employment agreements with Genesis and soliciting patients and business opportunities of Genesis for Olive.
- [9] During examinations for discovery in May 2016, Drs. Yuzpe, Taylor and Hitkari gave evidence that Ms. Wylie and Ms. St. Pierre were acting on their own initiative and not on the instruction or with the knowledge of the defendant shareholders, and were not paid by any of the defendant shareholders for the month of December 2012.

Master Muir's Decision

- [10] In reaching her decision to dismiss the plaintiffs' application to add Ms. Wylie and Ms. St. Pierre as defendants, the Master noted that the defendants were willing to formally admit that all the alleged actions of Ms. Wylie and Ms. St. Pierre were undertaken as employees or agents of the defendants and/or Olive and within the bounds of that employment or agency. The defendants agreed that they would be fully liable for any damages found to flow from any wrongful actions of the proposed defendants (at para. 11).
- [11] In her analysis, Master Muir referred to *Terasen Gas Inc. v. TNL Construction Services Ltd.*, 2011 BCSC 1345, which sets out a two-part test and analyzes each at paras. 7 to 9:

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.

[Citations omitted]

[12] As noted, Master Muir declined to add Ms. Wylie and Ms. St. Pierre as defendants. She explained at paras. 19 to 22:

[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.

[13] The Master continued at paras. 24 to 28:

[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.
- [14] The defendant shareholders and the proposed defendants agreed to the order set out in para. 30:
- [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.

Standard of Review

- [15] The parties agree that an appeal from a Master's decision on an interlocutory matter requires the applicant to establish that the Master's decision was "clearly wrong": *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188.
- [16] I adopt the plaintiffs' summary of the decisions that discuss what may constitute a "clearly wrong" decision: *Stancroft Trust Ltd. v. Can Asia Capital Co.*, [1991] B.C.J. No. 931 at page 5; *Lau v. Canada (Attorney General)*, 2014 BCSC 2384 at para. 138.
- [17] A "clearly wrong" decision is made where:

- a. the master abuses her discretion by acting arbitrarily or capriciously;
- b. the master exercises her discretion under a mistake of law;
- c. the master erred in law or principle;
- d. the master misdirected herself;
- e. the master disregards a principle;
- f. the master misapprehends facts or takes into account irrelevant factors; or
- g. the order of the master would result in an injustice.

Analysis

- [18] In reaching her decision, the Master relied on the admissions of the defendant shareholders, referred to in para. 11 of her decision, as the basis of their position that the addition of the proposed defendants was completely unnecessary and not in keeping with the underlying principles of proportionality and a just and speedy resolution of the matters in issue. She also relied on the defendants' agreement that they would be vicariously liable for any breaches of contract and fiduciary duty if such was found against Ms. Wylie and/or Ms. St. Pierre.
- [19] I have referred to para. 20, where the Master finds that there is no claim advanced in the proposed amended notice of claim against Ms. Wylie or Ms. St. Pierre for breach of their contracts.
- [20] I find that this conclusion is neither an answer to the breach of contract claim, nor is it factually correct. The proposed amended notice of civil claim sets out the implied terms of the employment agreement that Ms. Wylie and Ms. St. Pierre had with Genesis, including a duty to act with loyalty, honesty, and good faith towards Genesis; to work honestly and diligently to represent the interests of Genesis; not to act in a conflict of interest or in a manner detrimental to the interests of Genesis; to maintain the confidentiality imparted to them during the course of their duties for any purpose other than to serve the interests of Genesis; not to remove from Genesis' present premises any of its property including confidential information and documents; to refrain from directly or indirectly competing with Genesis; to refrain from directly or indirectly soliciting for any other employer the employees of Genesis; and provide reasonable advance notice of their resignation from employment.

- [21] The proposed amended notice of civil claim sets out the particulars with regard to the alleged breach of fiduciary duty against Ms. Wylie and Ms. St. Pierre. It specifies the actions of Ms. Wylie and Ms. St. Pierre as breaches of the duty of good faith owed by them to Genesis; or breaches of fiduciary duty owed by them to Genesis; conversion for the use of Olive of the confidential and other property information of Genesis; and a breach of duty of confidence owed by Wylie to Genesis.
- [22] I agree with the plaintiffs that while the term "breach of contract" does not appear in the proposed amended notice of civil claim, the claims against Ms. Wylie and Ms. St. Pierre are claims that they breached the implied terms of their employment agreements, which is a breach of contract claim.
- [23] This however does not lead me to a conclusion that the Master's decision was "clearly wrong".
- [24] I do find, however, that the Master was "clearly wrong" when she applied the principles of vicarious liability of an employer without having the employee or agent named as a party.
- [25] In doing so she relied on the decision of *Powell Estate v. British Columbia (Workers' Compensation Board)*, 2011 BCSC 1036. In that case the plaintiffs brought an action against the defendant board and sought to add the board employee (Mr. Bates) who was involved in the adjudication of the plaintiff's application to the Workers' Compensation Board (WCB). After reviewing the authorities regarding adding a party, Mr. Justice Johnston addressed the position stated by counsel for the defendant WCB:
- [84] Mr. Carroll, as counsel for the defendant W.C.B., accepts that if misfeasance in public office can be proven based on the actions of Mr. Bates, those actions were in the course and scope of his employment and the defendant W.C.B. would be liable to pay any damages caused by the misfeasance, thus making Mr. Bates's joinder unnecessary to ensure that all matters in the proceeding might be effectively adjudicated.
- [26] Johnston, J. concluded at para. 88:
- [88] On balance, as I have not been shown any prejudice to the plaintiff if Mr. Bates is not joined, but, conversely, have been persuaded that the plaintiff's claims can be fully adjudicated based on allegations that Mr. Bates misconducted himself, and any damages proved to have been caused by any misfeasance in public office on the part of Mr. Bates will be payable by his employer, the defendant W.C.B., the application to join Mr. Bates as a defendant is dismissed.
- [27] With respect, the *Powell Estate* decision is not apposite to the case here. In that case the plaintiff sought to add an employee of the defendant. In this case, the plaintiffs seek to add Ms. Wylie and Ms. St. Pierre in respect of their employment with Genesis. Even if Ms. Wylie and Ms. St. Pierre were acting for the benefit of the defendant shareholders and Olive and in furtherance of their objectives while they were employed by Genesis, they were not employed by any of the defendants. It is uncertain if Olive was a legal entity at that time. At

all relevant times, the defendant shareholders were the employers of Ms. Wylie and Ms. St. Pierre in their capacity as shareholders of Genesis.

- [28] The agreement by the defendant shareholders to accept vicarious liability for the actions of Ms. Wylie and Ms. St. Pierre is an irrelevant consideration. The defendants did not employ Ms. Wylie and Ms. St. Pierre during the relevant period; Genesis did. The duties that were owed by Ms. Wylie and Ms. St. Pierre were to Genesis and not to any other employer. If Ms. Wylie and Ms. St. Pierre were taking actions for the benefit of and in furtherance of the objectives of Olive or the defendants, that may demonstrate that the allegations made by the plaintiffs against them are made out. I do not have to decide that point.
- [29] I also find that the Master was clearly wrong in her analysis of the limitation period, when she acknowledged at para. 24 that it had not expired, but went on to address the matter of delay. The import of the limitation period not having not expired is that the plaintiffs could file a separate action against Ms. Wylie and Ms. St. Pierre, which would not simplify things, as the Master found, but would lead to a multiplicity of proceedings, and other complexities that would be avoided by adding Ms. Wylie and Ms. St. Pierre to the current action.
- [30] The benefit of adding Ms. Wylie and Ms. St. Pierre as defendants is that they must be before the court as parties to the action so that the court may adjudicate the plaintiffs' claims against them; apportion liability to them; and provide an opportunity for the plaintiffs to pursue a remedy from them, without having to bring a separate action against them.
- [31] It is my conclusion that the Master was "clearly wrong" because:
- a. She misdirected herself by considering and giving undue weight to the irrelevant factors, particularly, to admissions that the defendants were prepared to make as the "employer" of the proposed defendants, when they were not in fact employed by the defendants at the relevant time;
 - b. She failed to identify that the amended notice of civil claim contains stand-alone claims against the proposed defendants for breach of contract and fiduciary duties that are not claims against the other defendants; and
 - c. She erred by concluding there is no benefit to adding the proposed defendants.
- [32] I am convinced that the addition of Ms. Wylie and Ms. St. Pierre as defendants in this action is not frivolous; that they are both necessary parties and it is just and convenient to add them as parties to the action.
- [33] I set aside the Master's order in its entirety. I order that Ms. Wylie and Ms. St. Pierre be added as parties and permit the proposed amendments to the notice of civil claim.
- [34] The plaintiffs are entitled to costs of this application in any event of the cause.

"Gropper, J."

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