

CANADA / JUDGMENT

Kerr v. M.R.G. Ventures Ltd.

2020 BCSC 275

COURT

Supreme Court of British Columbia

DECIDED

28 February 2020

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2020 BCSC 275 Kerr v. M.R.G. Ventures Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kerr v. M.R.G. Ventures Ltd.,

2020 BCSC 275

Date: 20200228

Docket: S178396

Registry: Vancouver

Between:

James Patrick Kerr

Plaintiff

And

M.R.G. Ventures Ltd. dba The Yale Saloon, John Doe 1,

John Doe 2, Insurance Corporation of British Columbia,

and Northern Event Services & Logistics Inc.

Defendants

And

Insurance Corporation of British Columbia,

John Doe 1 and John Doe 2

Third Parties

Before: Master Muir

Reasons for Judgment

Counsel for the Plaintiff:

S.E. Gibson

Counsel for the Defendant, M.R.G. Ventures Ltd. dba The Yale Saloon:

M. Iannicello

Counsel for the Defendant, Northern Event Services & Logistics Inc.:

J.A. Bank

Counsel for the Proposed Third party, The City of Vancouver:

K. Nakanishi

Place and Date of Hearing:

Vancouver, B.C.

January 31, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2020

- [1] This was an application by Northern Event Services & Logistics Inc. ("Northern") for leave to file a third party notice against the City of Vancouver (the "City") and for costs.

BACKGROUND

- [2] The underlying action arises from an alleged hit and run accident on the Granville Street Bridge in the early morning hours of August 6, 2017.
- [3] It is alleged that the plaintiff had been drinking in the Yale Saloon premises of the defendant M.R.G. Ventures Ltd. ("MRG"). He then walked across the Granville Street Bridge and at some point decided to cross the road from east to west. After climbing off the sidewalk, which is raised well above traffic, he negotiated the northbound lanes and then climbed over the centre median. The plaintiff was then allegedly struck by an unidentified vehicle, which did not remain at the scene.
- [4] It is said that the plaintiff's resultant injuries, and hence the damages claimed, are significant.

- [5] The claim is against the Insurance Corporation of British Columbia ("ICBC") as a nominal defendant for the John Does - owner and driver. ICBC did not respond to the notice of application and did not appear at the hearing of the application. I gather a British Columbia Ferry Corp. v. T&N plc., [1995] 16 B.C.L.R. (3d) 115 type settlement has been entered into between the plaintiff and ICBC.
- [6] The claim against MRG as owner of the Yale Saloon is for negligent over-service of the plaintiff and for failing to ensure his safe transit home.
- [7] The claim against Northern is for providing negligent doorman services as the security provider at the Yale Saloon on the night of the alleged accident.
- [8] The proposed claim against the City is for contribution and indemnity for, amongst other things, negligent design of the Granville Street Bridge in failing to install a handrail or other barrier between pedestrians and the roadway and for encouraging the consumption of alcohol in the Granville Strip entertainment district without providing a safe means for intoxicated pedestrians to cross the bridge.
- [9] The application is opposed by the plaintiff and the City. MRG takes no position, other than regarding some allegations made by the plaintiff and as to costs - both of which will be dealt with below.
- [10] The timeline is important. The notice of civil claim was filed on September 6, 2017 against MRG and ICBC. MRG filed a response on October 17, 2017.
- [11] The plaintiff and MRG exchanged initial lists of documents in 2017.
- [12] MRG, with leave, filed a third party notice against ICBC and the unknown driver and owner on March 12, 2019.
- [13] The trial of this matter was originally set for January 6, 2020, but was reset for 20 days commencing July 6, 2020 due to a conflict with MRG's counsel's calendar.
- [14] On January 18, 2019, the plaintiff first inquired of MRG about the identity of the doorman on the night of the accident.
- [15] After ten inquiries, counsel for MRG finally advised on June 6, 2019 that the security that night was handled by Northern.
- [16] On July 22, 2019, counsel for the plaintiff filed an application to join Northern as a defendant in this action. Northern consented to the application and the plaintiff filed the amended notice of civil claim on August 7, 2019. Northern was served on August 30, 2019. The 42-day deadline to add the City as a third party as of right passed on October 12, 2019.
- [17] On December 19, 2019, Northern advised the other parties (but not the City) of its desire that the City be added as a party.

[18] There is no explanation advanced by Northern to explain the delay in seeking to have the City added, other than perhaps in the email of December 19, 2019, in which counsel for Northern says:

Having considered this matter further, and having run this matter by a focus group in our preparations for trial next summer, I write to inquire as to whether you have taken any steps to add the City of Vancouver to this litigation.

[19] After some argument on the point, Northern sought consent of all parties to it amending its response to notice civil claim to add in allegations against the City.

[20] This application for leave to bring a third party notice against the City was filed on January 16, 2020. Receipt of the notice of application was the first notice to the City of the proposed claims.

LEGAL POSITION

[21] The British Columbia Supreme Court Civil Rules, BC Reg 168/2009, (the "Rules") provide for third party proceedings in R. 3-5. Rule 3-5(1) provides:

Making a third party claim

- (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
 - (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
 - (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
 - (c) a question or issue between the party and the person
 - (i) is substantially the same as a question or issue that relates to or is connected with
 - (A) relief claimed in the action, or
 - (B) the subject matter of the action, and
 - (ii) should properly be determined in the action.

[22] Rule 3-5(4) provides:

When leave is required

- (4) A party may file a third party notice
 - (a) at any time with leave of the court, or

(b) without leave of the court, within 42 days after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

[23] The considerations for the court on such an application have been set out in *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741 (approved on appeal, 2014 BCCA 17):

[42] In *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*, 2003 BCSC 1573 at para. 9, 27 B.C.L.R. (4th) 247 [Clayton Systems], which was decided under the Amended Rule, Allan J. held that in determining the application the court should consider the following factors in determining whether or not to exercise its discretion to grant leave:

- (a) prejudice to the parties;
- (b) expiration of limitation period;
- (c) the merits of the proposed claim;
- (d) any delay in proceedings; and
- (e) the timeliness of the application.

[43] In *Scott Management* at para. 90, the court framed the question on an application for leave to file a third notice in this fashion:

[90] The fundamental question on the applications should have been whether greater injustice and inconvenience would arise from allowing the contribution claim to continue as a third party proceeding, or from striking it and leaving it to be pursued in a separate future action. The chambers judge erred in failing to address that question. Had he done so, in my view he would have been compelled to exercise his discretion in favour of the former course, as the better of two unpalatable options.

THE APPLICANT'S POSITION

[24] Northern says that the balance of prejudice weighs in favour of granting the application. It argues that the involvement of the City is important, not just to Northern, but to the plaintiff's case. It argues that forcing Northern to commence an action for indemnity against the City is not in the interests of justice as it would risk inconsistent findings, result in duplicative proceedings, and waste judicial resources.

[25] It argues that the City would be prejudiced if it was the defendant in an indemnity proceeding as it would not be involved in this case and hence unable to defence against the plaintiff's claim.

[26] Northern argues that the trial date, albeit close, will not necessarily be lost and even if it is, Northern argues that the plaintiff will not be prejudiced in his ability to advance his claim and that any prejudice is outweighed by the prejudice of separate proceedings.

- [27] Northern argues there is no limitation issue, that its claim, based solely on the pleadings, has merit, and that the delay in its advancing the third party claim is relatively insignificant - amounting to only five months after being served with the notice of civil claim. As to timeliness, as noted, it is Northern's view that as there remain five months to the trial, that there is ample time for all parties to properly prepare for the trial.

THE PLAINTIFF'S POSITION

- [28] The plaintiff takes quite a different view. He points out that the involvement of the City would radically inflate the issues to be dealt with at the trial, that as a result, the 20 days set for trial would be insufficient and, in any event, given the short time to trial, there would be insufficient time for the parties, and particularly the City, to properly prepare to address the new issues and the end result will be a lengthy adjournment of the trial to the plaintiff's detriment.
- [29] The plaintiff points out that it is not just the trial date that is important here. The 84-day deadline for expert's reports is April 12, 2020. The plaintiff argues that the claim against the City would require expert evidence of road and bridge design issues, alcohol licencing policy, and potentially require factual investigations going back to when the bridge was constructed 70 years ago.
- [30] In addition, the plaintiff spent considerable time attempting to persuade me that the involvement of Northern preceded the date upon which it was formally joined in these proceedings. Presumably going to the question of when Northern, "knew or reasonably ought to have known that a claim for contribution and indemnity may be made" (Limitation Act, SBC 2012, c. 13, s. 16(b)), or perhaps simply going to the question of overall delay.
- [31] Counsel for the plaintiff points to the involvement of MRG, that MRG and Northern both have their offices in the Yale Saloon building, that MRG's counsel was asked repeatedly to advise who was acting as the doorman on the night in question, starting in January 2019, and that MRG and Northern's positions are totally aligned.
- [32] Counsel for the plaintiff submitted that to think that Northern was not fully aware of the potential for its involvement much earlier than when it was actually joined would be farfetched.
- [33] Counsel for MRG denied that the delay was intentional or that there had been any collusion between Northern and MRG.
- [34] My conclusion was that this argument was based on a suspicion of conspiracy with no or little evidentiary foundation. The time counsel spent trying to persuade me on this point could have been better spent.
- [35] The plaintiff, however, did raise objections based on other factors, particularly prejudice and the merits of the proposed action against the City.

- [36] The plaintiff submitted that it was unlikely in the extreme that a court would find that the City was negligent in the circumstances of this case. The merits argument is dealt with below in more detail, in dealing with the position advanced by the City.
- [37] Further, the plaintiff pointed out that there is no real prejudice to the City or to Northern if the contribution claim is brought in a separate action. Northern will be fully able to defend against the plaintiff's claim and the City's position will be protected by the defences raised in this action by Northern and MRG.
- [38] The plaintiff argued, however, that he would suffer significant prejudice if the application was allowed as the involvement of the City would inevitably require an adjournment of the trial.
- [39] Further, the plaintiff is from Ireland and has already attended here for a number of independent medical examinations that will have been wasted, or at least need to be refreshed, if the trial is delayed.
- [40] Given counsel's calendar, an adjournment now would mean trial dates would be delayed to at least 2023 - without even considering the availability of other counsel.
- [41] The plaintiff points to the Court of Appeal decision in *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Ltd.*, 2014 BCCA 17 (the appeal of Justice Goepel's decision referred to above) for the proposition that such delay amounts to prejudice. The Court noted:
- [41] Loss of the trial date would involve significant prejudice to the plaintiff. This is substantial litigation and the earlier its resolution the better for the plaintiff. No evidence is required to reach that conclusion. The setting of a new trial date does not simply involve nudging the trial down the calendar. It is common experience that reservation of a large block of trial time, as much as ten weeks, would be well into the future, certainly a year, probably closer to two years. This is simply a reality of trial scheduling. The plaintiff should not lose the benefit it has diligently obtained for itself in getting this litigation ready for trial in a reasonable time. I also think that it is important to all litigants to have the issues tried while discovery evidence is relatively fresh.

THE POSITION OF THE CITY OF VANCOUVER

- [42] The City takes the position that to allow the application will either significantly prejudice the plaintiff due to an adjournment of the trial, or will dramatically prejudice the City by not allowing it sufficient time to properly prepare for the trial.
- [43] Counsel for the City pointed out that although the five-month delay might not be considered to be inordinate when compared to other cases where leave has been granted for third party claims, there has not been any explanation advanced for the delay by Northern.

- [44] The City argued that it was incumbent on Northern to explain why it could not, or did not, advance a third party claim in the required time. Particularly given that the application is untimely as it will inevitably result in an adjournment of the trial presently set for July. He pointed to the reasons of Goepel, J. in Tyson Creek:
- [63] The New Rule mandates that after the 42-day window has expired, a defendant can only bring a third party application with leave of the court. When the application is brought after a notice of trial has been issued and the joinder will likely lead to the adjournment of a trial to the prejudice of a plaintiff, it will usually be incumbent on the applicant to explain by affidavit the reason why the application is being brought at such a late date and why the court should exercise its discretion in its favour. On such an application it will be important for the court to know when the applicant knew, or reasonably ought to have known, that a claim for contribution or indemnity against the proposed third party could be made and the explanation for any delay in bringing the application.
- [45] Counsel also referred to a decision of Justice Rogers in *Fehling v. Leger*, 2016 BCSC 418:
- [27] I take these passages to mean that a defendant must apply himself to whether he seeks contribution or indemnity from a third party and he must make that deliberation in a timely way. If he goes about his duty slowly and if in the result he seeks to add a third party at a time when doing so will result in the loss of a trial date, then he must explain his sloth. Absent an acceptable explanation and in the face of the prejudice caused by adjournment of the trial, the application to add a third party may well be denied. That was, in fact, the result in Tyson Creek.
- [46] That was the result urged upon me by the City. Counsel submitted that a proper balancing required that the application be dismissed and that Northern be required to bring any claim for contribution as a separate action.
- [47] Counsel for the City also addressed the merits of the proposed claim. He argued, on the basis of *Soprema Inc. v. Wolridge Mahon LLP*, 2016 BCSC 813, a decision of Justice Grauer (appeal allowed on another issue), that the degree of merit in the proposed third party claim is a factor in balancing the justice and convenience here and that in this case, it militates against allowing the application.
- [48] The City went further, however, and after reviewing the law, submitted that the claims are so demonstrably without merit that they are doomed to fail, or at least sufficiently tenuous as to merit the dismissal of this application without more.

CONCLUSION

- [49] This is not a case where the claim of Northern will be barred if the third party proceeding is not allowed. It is a choice between having a claim against the City proceed as part of the present action, or having the claim proceed separately.

- [50] The delay by Northern in seeking leave to bring a third party action is not as long as some cases where the court has granted leave. Given the complete lack of an explanation for the delay, however, I have no ability to weigh whether the failure of Northern to bring a third party claim in the time allowed by the Rules was in any way reasonable or necessary.
- [51] What is without question in my mind is that to allow the application will result in an adjournment of the trial.
- [52] The new claims advanced at this late date would seriously prejudice the trial preparation of the City and would, in my view, require an adjournment.
- [53] The present claim is a relatively straightforward assessment of the alleged negligence of the Yale Saloon and its servants and agents. Allowing the claim against the City would require an analysis of the policies of the City in its design, refurbishment, and maintenance of the Granville Street Bridge and in its promotion of the Granville Strip as an entertainment district. That would require trial time beyond what has presently been allotted and, hence, necessitate an adjournment.
- [54] The prejudice to the plaintiff in an adjournment is obvious and is exacerbated by his living in Ireland, making any updated medical examinations or examinations for discovery particularly burdensome.
- [55] The application must also be considered in light of the merits of the proposed action against the City. Given the circumstances of the accident and the defences open to the City, the proposed claim seems to be questionable and it also appears to be without precedent. That is not to say that I consider this to be an appropriate time to be weighing the evidence - but rather, as Grauer, J. noted in *Soprema Inc.*, it is a factor to consider in the balancing that must be performed on this application.
- [56] There is little prejudice to anyone if Northern is required to bring its action for indemnity against the City in a separate action. The allegations involving the City are discrete from those between the plaintiff, MRG, and Northern. In my view, there is a very limited basis for concern that there will be inconsistent findings of fact and duplicative and wasteful proceedings, as argued by Northern.
- [57] I conclude that the interests of justice are best served by dismissing the application, and I do so.

COSTS

- [58] The parties scheduled this application for two hours. The log notes indicate that the application commenced at 2:05 p.m. and ended at 4:50 p.m. on a Friday afternoon. At the outset, I warned the parties that they had only two hours and that they should govern themselves accordingly.

- [59] Time estimates are notoriously difficult, particularly where there are more than two counsel involved. Counsel are all expected, however, to tailor their submissions so that they can conclude within the time estimated, including time for reply, argument on costs and for the court to give reasons. Obviously here, that was not done.
- [60] When it became clear that the parties were not going to finish their submissions on the application in the two-hour time estimate, I warned them that I was considering costs consequences.
- [61] Had I been given time, I would have delivered reasons from the bench and the parties would not have had to wait for a decision. In the circumstances, however, I could not in good conscience keep the clerk and the sheriffs involved any later.
- [62] In submissions on costs, the plaintiff took the position that he had always been of the view that this should have been a long chambers application, although that is not what the plaintiff's application response indicates. I have already noted that plaintiff's counsel wasted significant time on a point that had no persuasive value to me.
- [63] The parties argued, essentially, that they had kept to their time estimates. If that was the case, however, we would have concluded at 4:20 p.m., allowing time for the afternoon break, with me having given reasons.
- [64] In *Sangha v. Goel*, 2018 BCSC 2267, Chief Justice Hinkson had occasion to deal with the issue of costs where an application ran significantly over time. He noted:
- [34] The Sangha and Dhaliwal parties set the hearing of their petitions for 1 hour and 45 minutes on a busy Chambers day.
- [35] The hearing of the petitions, including the Goel parties' adjournment application, in fact occupied almost 2 hours and 45 minutes with the result that applications by other litigants could not be heard that day.
- [37] Given the circumstances set out in para. 34 and 35 above, I decline to award the costs of the applications to any party. Counsel who underestimate the time required for the hearing of their applications in chambers at the expense of other counsel or litigants must be discouraged from so doing. It serves no one's interests to terminate a hearing whose required time has been underestimated at the completion of that time estimate, and the only means by which such inaccuracy can be addressed is by refusing costs where such conduct occurs.
- [65] Although the underestimation here was not as egregious, I have concluded for the same reasons that costs should be refused. It is entirely possible that this application, which clearly should have been scheduled as a long application, bumped other matters that could properly have been heard in Chambers. As a result, the parties will not have costs of this application.

"Master Muir"

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