

CANADA / JUDGMENT

Odobas v. Yates

2020 BCSC 329

COURT

Supreme Court of British Columbia

DECIDED

10 February 2020

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2020 BCSC 329 Odobas v. Yates

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Odobas v. Yates,

2020 BCSC 329

Date: 20200210

Docket: S178536

Registry: Vancouver

Between:

Daniel Odobas and Don Francesco Restaurant (2013) Ltd.

Plaintiffs

And

Rodney B. Yates and Peterson Stark Scott, Barristers & Solicitors

Defendants

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

A.J. Piercy

Counsel for the Defendants:

J.G. Dives, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

February 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 10, 2020

- [1] THE COURT: This is an application by the plaintiffs to add Newton Arms Pub Inc. ("Newton Arms") as a plaintiff to this action and to amend the pleadings as attached to the notice of application.
- [2] The underlying action is a solicitor's negligence action where the plaintiffs allege that the defendants were negligent in their advice to the plaintiffs regarding the purchase of a restaurant, Don Francesco Restaurant (the restaurant), in 2013.
- [3] The issue was the lease on the premises being occupied by the restaurant, and the particular issue was the option to renew the then lease of the premises.
- [4] The then lease was for four-and-a-half years with a five-year option to renew. That option to renew was conditional on the restaurant paying a percentage rent, and this was referred to in the lease as "the percentage rent condition". The percentage rent condition was not triggered until the restaurant grossed approximately \$4.6 million per year. It had never done so. Until that date, the restaurant's average grosses were around \$3 million. Thus, unfortunately, when the time to renew the lease arrived, the renewal was rejected by the landlord for the restaurant's failure to pay this percentage rent.
- [5] The plaintiffs brought an action against the landlord to enforce the option to renew and on June 23, 2017, Madam Justice Sharma found that the percentage rent condition had not been met and the landlord was not obliged to renew the lease.
- [6] As a result, the plaintiffs were forced to vacate the restaurant premises on June 30, 2017, and I gather that required them to close the restaurant, and they claim damages accordingly.
- [7] Newton Arms was a pub that was owned, either directly or indirectly, by the plaintiff, Mr. Odobas. Mr. Odobas sold Newton Arms' assets in 2011 and the Newton Arms company ceased operating any business at that point, retaining the sale funds in its bank account.
- [8] The defendant, Mr. Yates, is a lawyer who acted for Mr. Odobas and Newton Arms on the sale of those assets.
- [9] In his affidavit, Mr. Odobas says in 2013:

I retained Mr. Yates for advice and representation in connection with the purchase of the assets of the company which operated the restaurant known as Don Francesco's

[10] He continues on in a similar vein, "I instructed Mr. Yates " and so forth.

[11] It is not until somewhat later in his affidavit where Mr. Odobas says:

As I was the sole director and shareholder of Newton Arms, I did not distinguish the funds of that company, which were used for the Restaurant purchase and operations, from my own funds. Consequently, I did not draw to the attention of [his counsel] that Newton Arms had contributed \$550,000 towards the purchase of the Restaurant or additional funds for operating expenses.

Beginning in September, 2019, Mr. Rob Mackay, who was to provide an expert opinion on the plaintiffs' damages, asked me to provide him with the financial statements and general ledgers of [the plaintiff company] DFR 2013.

[12] Mr. Odobas put Mr. Mackay in contact with his accountants and bookkeeper, and then his conclusion was:

November 28, 2019, Mr. Mackay advised me and Fraser Litigation Group [his counsel now] that it appeared that the funds of Newton Arms were recorded as a loan to DFR 2013, and that a substantial portion had not been repaid. As of November 28, 2019, I was not aware that this was the case, and, if I was aware of this at an earlier date, it had slipped my mind.

As the funds of Newton Arms had not been repaid, Mr. Mackay advised that it appeared Newton Arms could claim that it had suffered a loss as a result of the Restaurant having to close when the option to renew could not be exercised.

[13] Mr. Odobas attaches a copy of the report of Mr. Mackay to his affidavit.

[14] Mr. Odobas further says:

At no time prior to receiving this advice from Mr. Mackay did I think of Newton Arms having a claim against the defendants.

[15] The amendments to the notice of civil claim are relatively straightforward and simple. It simply adds in Newton Arms in various places alleging factually that Mr. Yates had represented Mr. Odobas and Newton Arms in 2011 and prior to that, and that Mr. Yates was aware that Newton Arms had money. In paragraph 6 of the proposed amended notice of civil claim, it adds in Newton Arms into the assertion that Mr. Odobas retained the defendants in January 2013 so it now reads "Mr. Odobas and Newton Arms retained the defendants to act as their solicitor".

[16] At paragraph 6A it says:

Mr. Yates was aware that, while a new company would be incorporated as the purchaser, some or all of the purchase price for the transaction would be advanced by Newton Arms.

- [17] That is the sole pleading that establishes the relationship between Mr. Yates and Newton Arms.
- [18] The defendants assert that the pleading is deficient, that there are no facts as opposed to conclusions of mixed fact and law that are pleaded that would support the bald assertion that Newton Arms retained the defendants in 2013 and, hence, that there is not a sufficient basis for me to conclude that this would be an appropriate joinder.
- [19] Further, the defendants take strong issue with this amendment going at this late date, and I say that because the trial presently is scheduled for March 2, 2020. Mr. Yates has provided affidavit evidence where he confirms that the existence of a claim for negligence hanging over his head is oppressive, that he wants, and frankly I agree he is entitled to have that proceeded with expeditiously, and that this trial has already been adjourned once due to the plaintiffs retaining new counsel.
- [20] Mr. Yates further gives evidence that the length of time since the transactions in issue has been so long that both his memory and the memory of Mr. Odobas on examination for discovery have clearly eroded. Documents may have been put beyond reach. I say "may" because there is no evidence that they in fact have been, but there is that concern.

analysis

- [21] Generally speaking, on this kind of an application, the test is set out by the Court of Appeal in *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329, at paras. 45 to 48:
- [45] Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, 33 B.C.L.R. (4th) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).
- [46] If this first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities: *Letvad v. Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296. At para. 29 of *Letvad*, Esson J.A., writing for the Court, adopted the list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282, a decision

that dealt with adding further claims under R. 24. These include the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case.

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

[22] With respect to the test for joining a plaintiff, the threshold is low. The rule requires that the court may order a person be added as a party if that person ought to have been joined as a party or if that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, or where there may exist a question or issue connected with any relief claimed in the proceeding.

[23] The two claims, that by Newton Arms and that by the existing plaintiffs, are obviously inextricably intertwined, assuming that the pleadings are true or will be upheld.

[24] I am satisfied that this is not a frivolous claim. There is some substance to it, at least on the basis of the pleading. It is quite clear from the decision in Strata Plan VIS3578 that it is not my job to weigh or assess whether the plaintiff can prove those allegations. I think the pleading is sufficient to establish the cause of action.

[25] The chore then is to turn to see whether it would be just and convenient to have Newton Arms joined. That is, of course, a discretionary decision and the factors are set out in para. 46 of Strata Plan VIS3578, which are:

- the extent of the delay;
- the reasons and explanation for the delay;
- any prejudice arising from the delay; and
- the degree of connection between the existing action and the new parties and claims contemplated.

The overriding question is what is just and convenient in the circumstances.

[26] The plaintiff argues, first of all, that the delay is essentially insignificant on several bases. First of all, they say that they had no way of knowing that there was a claim until the decision of Sharma J. in June 2017. Thus, that this application is brought, not within the two-year limitation, but within the two-year limitation plus one year for service of the notice of civil claim, which has been held to be the time within which there is a presumption of prejudice.

[27] The defendants assert that I should look at the decision of Mr. Justice Pitfield in Strata Plan LMS 343 v. Coquitlam (City), 2005 BCSC 1150 where they argue that Pitfield J. concluded where a postponement is argued, one should look back to the outset, if I can put it that way, to determine whether there has been any prejudice. Thus, the defendants' argument that memories have faded and documents may have been put beyond the reach of the parties would be as a result of the delay since the outset, rather than the argument of the plaintiffs here that that kind of prejudice would not have arisen in the last year or so.

[28] There are other limitation arguments that I will not go into out of interests of time.

- [29] The issue with respect to delay is based on the report of Mr. Rob Mackay. The plaintiffs say that they had no way of knowing, first of all, that there had been a contribution from Newton Arms and, secondly, that it had any significance at all in the claim being advanced by the them until the report of Mr. Mackay was produced in November 2019 and, hence, there has been no significant delay. The plaintiffs argue they have brought this application on as expeditiously as possible in the circumstances.
- [30] The overriding question of what is just and convenient in the circumstances of a case is one that is often, as it is here, fraught with difficulty, for what is just for one party is frequently unjust or would be argued to be unjust for the other.
- [31] Here, it is my view that the interests of justice dictate that the matters at issue between the parties should be fully explored and the plaintiffs are entitled to fully explore their claim, despite their overlooking, if I can put it, at its best, as they say, necessary involvement of Newton Arms.
- [32] Thus, I conclude that the application of the plaintiffs to join Newton Arms should be allowed.
- [33] It is argued by the defendants that I should only do so on the basis of preserving the limitation defence, given their assertion that the argued postponement by Mr. Odobas or by the plaintiffs has no basis in fact, in that the actual opinion of Mr. Yates was much broader than that asserted by them.
- [34] In that regard, the plaintiffs say that Mr. Yates advice was to pursue the renewal on the basis that the percentage rent condition had in fact been triggered. The defendants, however, say that Mr. Yates opined that the percentage rent condition required that it be triggered for two full years, but that it was at least worth arguing that payment of a month in any year might trigger it for the purposes of the option to renew.
- [35] The defendants say if this application is allowed, as I have determined that it should be, it should only be done on the basis that the limitation defence that they might have against Newton Arms be preserved. That is something that Strata Plan VIS3578 also addresses in the paragraphs that I quoted earlier, and I note in particular the reference in para. 48 to the fourth option, which is the one that is urged upon me by the defendants here, and I will quote:
- . . . He suggested [this is referring to Mr. Justice Lambert in *Lui v. West Granville* -- he suggested] that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted [and so forth] . . .

- [36] I conclude that that is the appropriate avenue to take here. I am not satisfied that the extinction of the limitation defence is justified and, as I said before, it is my view that the factual underpinnings of the plaintiffs' claim are entitled to be explored, but I have concluded that the defendants are entitled to preserve their limitation defence as against Newton Arms.
- [37] Now, the issue is the trial. The plaintiffs assert that the trial can proceed, that because the allegations are so very similar to the existing allegations that only a limited amount of disclosure and perhaps examination for discovery would be required.
- [38] The defendants are skeptical, to say the least. They believe that serious investigation of the allegations of retainer by Newton Arms is required and, further, that a serious investigation of the alleged postponement of the limitation period will be required and, in those circumstances, they submit that it would be extraordinarily prejudicial to proceed to trial on March 2, given, of course, that that is less than a month away.
- [39] I agree. I do not see--despite the fact, I should add, that the defendants are very eager to get on with this, I do not think that it would be in the interests of justice to push the trial ahead in all of the circumstances. As I said, it is my view that the factual underpinnings need exploration and there will need to be time to do so.
- [40] The plaintiffs' application is allowed with the preservation of the limitation defence of the defendants. The trial is adjourned generally.
- [41] I did a trial management conference earlier. I am going to adjourn that trial management conference so that a further trial management conference must be held before any reconvened trial dates.
- [42] I will hear you on costs.
- [43] MR. DIVES: Before we deal with costs, I just wonder if you might want to add a term vacating the directions just --
- [44] THE COURT: Oh yes, of course.
- [45] MR. DIVES: -- to clarify that.
- [46] THE COURT: I made orders at the trial management conference. Those obviously are now out of date and are vacated as orders.
- [47] And costs?
- [SUBMISSIONS ON COSTS]
- [48] THE COURT: What I am going to do is order costs in the cause, so whoever wins at the end of the day will have costs of this application. All right, thank you both.
- [49] MS. PIERCY: Thank you, Your Honour.

"Master Muir"

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