
CANADA / JUDGMENT

Shvalian v. Seafresh Products Distributors, Inc.

2014 BCSC 964

COURT

Supreme Court of British Columbia

DECIDED

30 May 2014

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2014 BCSC 964 Shvalian v. Seafresh Products Distributors, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shvalian v. Seafresh Products Distributors, Inc.,

2014 BCSC 964

Date: 20140530

Docket: S107074

Registry: Vancouver

Between:

Elaheh Shvalian

Plaintiff

And

Seafresh Products Distributors, Inc.

Defendant

Before: Master Baker

Reasons for Judgment

In Chambers

Counsel for the defendant:

S.L. Kovacs

Counsel for proposed third party:

S.J. Wheeldon

Place and Date of Hearing:

Vancouver, B.C.

April 28th, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2014

ISSUE

- [1] The defendant ("Seafresh") applies for leave to issue a third party notice joining The Owners, Strata Plan LMS3045 ("the Strata") and claiming liability by, or indemnification from, the Strata.

BACKGROUND

- [2] On October 29, 2008, the plaintiff Ms. Shvalian was walking on a sidewalk immediately adjacent to Kirin Seafood Restaurant when she allegedly collided with the restaurant's exterior delivery door; the door opened outward and was allegedly opened by an employee of Seafresh who was in the process of, or had just completed, a food delivery. She issued her notice of civil claim October 26th, 2010. This application also seeks leave to issue a third party notice against the restaurant, but counsel for the restaurant has taken no position, so that order will go. The Strata, however opposes the application. The trial of this matter is set for April 13, 2015 for five days. Interestingly, the notice of trial was filed by Seafresh.

PARTIES' POSITIONS

The Defendant

- [3] Seafresh argues that it is entitled to indemnity from the Strata, and that to refuse leave now would be to the greater prejudice of Seafresh. The involvement of the Strata is an essential part of the factual matrix surrounding the claim at large, submits Ms. Kovacs, and no real prejudice would be suffered by the Strata as, should Seafresh be found liable at trial it could then initiate separate proceedings against the Strata for contribution or indemnity. To add the Strata now will, she argues, avoid this possible duplication.
- [4] Addressing the obvious issue of chronology and in particular the passage of time since the 2008 incident, Ms. Kovacs points out that the plaintiff waited almost exactly two years until she issued pleadings. Seafresh was served by registered mail at its registered and records office and, no response being filed, the plaintiff took default judgment. That judgment was

eventually set aside by consent in June of 2012, so that more time was consumed in that. Finally, Ms. Kovacs acknowledged that, while Seafresh retained the same solicitors throughout, the file has passed through three of the firm's counsel, Ms. Kovacs being the third.

- [5] Ms. Kovacs submits that as Ms. Shvalian is alleging no wage loss, the only real issue at trial will be non-pecuniary damages. She doubts that experts will be required, and argues that to add third parties now will not jeopardize the 5-day trial estimate.
- [6] Ms. Kovacs addressed the specific facts and merits of the claim and defence. In particular she focussed on the existence and location of four bollards immediately proximate to the door in question. These bollards, she argues, figure prominently, if not essentially, in any question of liability. It is fundamental, she says, that the court knows who installed the bollards, when, and perhaps why. She cannot determine these facts, she submits, unless the restaurant and the Strata are joined.
- [7] On the issue of prejudice Ms. Kovacs argues that as the Strata has the same president (Mr. Abah) and caretaker (Mr. Dabrowski) and that, by Mr. Abah's admission, the two discussed the incident shortly after it happened. The facts from the Strata's perspective should therefore be accessible to the Strata, and the passage of time should not have affected memory or evidence.

The Strata

- [8] Mr. Wheeldon argues that it has been approximately 40 months since Seafresh first received the claim (by service described above, para. 4). He submits that, given the passage of time, the law requires a clear and acceptable explanation by Seafresh as to its delay in either issuing or applying to issue third party proceedings. A lack of an acceptable explanation is, he says, fatal to the application.
- [9] Even with a relatively short delay as in, for example, *Tyson Creek Hydro Corp. v. Kerr Wood Leidal Associates Ltd.*[1], if prejudice to the proposed third party is demonstrated, the application will be refused. Such prejudice exists here, says Mr. Wheeldon: while Messrs. Abah and Dabrowski continue to be involved with or employed by the Strata Corporation, its management company has changed as has many of its members. It is almost six years since the incident and, while acknowledging that the ultimate limitation has not yet passed, Mr. Wheeldon argues that the Strata will be hard pressed to assemble the facts and evidence required to defend itself.
- [10] He also submits that the trial date is seriously at risk: he doubts that Ms. Shvalian's case and third party issues could be completed in five days.

ANALYSIS

[11] Rule 3-5(4) stipulates that a third party notice may be brought without leave within 42 days of being served with a Notice of Civil Claim; thereafter leave of the court is required. This is a departure from the previous Rule 22(3), which permitted a party to bring a third party notice without leave at any time before a notice of trial had been received or, if a notice had been received, up to 120 days before the trial. The new rule is clearly more restrictive, a point commented on by Goepel J. in *Tyson Creek Hydro Corp. v. Kerr Wood Leidal Associates Ltd.*[2] In response to a submission that the new Rule would encourage indiscriminate use of the procedure he said:

The New Rule does not require the indiscriminate use of third party proceedings. The New Rule does, however, force a defendant to give early consideration to the question of adding additional parties. That is consistent with the object of the rules to secure the just, speedy and inexpensive determination of every proceeding on its merits. This is not, I suggest, a significant burden for a defendant.

[12] *Tyson Creek* is, perhaps, one of the more helpful decisions as it canvassed the changing perspective brought to third party proceedings by the change brought with the new Rules. Previous to the new Rules the avoidance of multiplicity of proceedings was emphasized[3]. The new Rules, however, have:

diluted the overriding importance of that consideration. By limiting the time in which a third party notice can be issued without leave, the rule makers have clearly signalled that other factors must be considered [4]

[13] The decision was upheld on appeal. It should be noted, however, that the prejudice, in Goepel J.'s view, weighed in favour of the plaintiff, as permitting the third party proceeding in the complex litigation of *Tyson Creek* would have required adjourning a 30-day trial. In the instant case the plaintiff has taken no position respecting the proposed third party proceedings and Ms. Kovacs assures the court that to add the third parties will not prejudice the 5-day trial currently set.

[14] In *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*[5], Allan J. held that in exercising its discretion to grant leave for third party proceedings the court needed to consider the following factors:

- 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.

I will consider them slightly out of order, leaving the question of prejudice until last.

[15] It is agreed by the parties that, the matter being governed by the previous Limitation Act[6], the ultimate limitation has not yet expired. Moreover Seafresh's rights against the Strata, and therefore its cause of action, if any, will not arise until and unless liability is found against Seafresh. There is no issue, therefore, respecting limitation periods.

[16] In assessing merits, the court may not require or consider evidence respecting the proposed claim against the Strata, as the court found in McNaughton:

Material facts sufficient to support the claim must be pleaded. However, the right to plead a claim historically has not depended on adducing evidence in support of it. The pleading sets out the claim or defence; the facts supporting it were not required to be adduced until trial.[7]

In its proposed third party notice Seafresh alleges that the Strata was the registered owner of the common property where the incident occurred and that, as such was an occupier responsible for the control over and condition of the walkway, " the activities conducted on the premises or the walkway, and the persons allowed to enter the premises or the walkway." These allegations, it should be noted, are against both the Strata and the other proposed third party, Kirin Restaurant, so that the reference to "premises" would not, I think, involve the Strata; that reference relates to the restaurant. I take only the allegations regarding the walkway or common property as relating to the Strata.

[17] The proposed notice includes allegations that the Kirin or the Strata did not take care to protect against hazards offered by the door, bollards near it, or the walkway itself. These allegations would constitute, if proven, a cause of action.

[18] Delay and timeliness seem, naturally, related. I take 'delay' to refer to the application itself i.e. Has the applicant delayed in bringing it and, if so, why? I take timeliness to refer to other factors e.g. Will the order affect other aspects of the case as, for example, examinations or more importantly the trial date?

[19] In her application Ms. Kovacs concedes that the application could have been more timely. I conclude that she means by this that it could have been brought earlier. On the other hand she emphasized in the hearing that the order would not jeopardize the trial date or other steps in the case. By her submissions, then, I understand her to argue that while delayed the application is still timely.

[20] I disagree in both instances. As Mr. Wheeldon has pointed out, some 40 months passed after the claim was served before this application was brought. That is inordinate delay. The facts surrounding the claim seem fairly basic and little time would be required for Seafresh to have considered the circumstances and the possible liability of other parties. Ms. Kovacs has explained the delay, but the explanation is not an excuse. Seafresh was properly served in the first instance yet allowed default judgment to be taken. After that the file passed through three separate counsel with, even in the same firm, the inevitable delays and interruptions, I infer, that occur when there is a change of counsel.

- [21] I also question the timeliness. Ms. Kovacs, as I said, is convinced that the plaintiff's claim can be heard, together with two third party proceedings, in five days. I understand there is no wage loss claim but I do not have any indication of the severity or degree of her injuries or symptoms. I do not know if she has or is alleged to have any pre-existing injuries. I think it would be reasonable to assume that each third party proceeding could take a full day. That, in my respectful view, puts a 5-day trial in jeopardy. I heard no evidence that further days were available. Ms. Kovacs argued that she did not think that experts were required in respect of the plaintiff's claim, but I can anticipate they may arise if the third party proceeding is allowed: what was the condition of the sidewalk and what would be the standard of care on the point? How were the bollards situated and was that done correctly?
- [22] When Seafresh argues that joining the Strata as third party is essential to examining, understanding, or proving issues respecting the placement of the bollards (para. 6, above), the argument ignores Rule 7-5 and the Rules' authority to examine non-party witnesses.
- [23] Given my conclusion that there has been inordinate delay it falls to Seafresh to demonstrate that serious prejudice to the Strata does not arise. The applicant has not persuaded me of this. The admitted fact that the Strata has the same chairperson and caretaker as it did when the claim arose is not sufficient to rebut prejudice: over 5 ½ years have passed and it is unlikely that either Mr. Abah's or Mr. Dabrowski's recollection of the event would be sufficiently detailed or reliable to aid in the Strata's defence. I was not referred to any records or reports (as one often finds, for example, in motor vehicle accident claims) that would assist or refresh their memories.
- [24] There is another aspect to this: the argument is frequently made that adding the proposed third party will avoid the duplication and expense of a second proceeding. But what if Seafresh is successful in its defence? What if liability is not proven? In that case the third parties would have weathered the expense and stress of a 5-day (at least) trial for no purpose. Seafresh, on the other hand, should it fail in its defence, could still pursue an action against the Strata. It seems to me that the expense and trouble of duplicated proceedings must consider the cost to a third party particularly when liability by the defendant is denied and is genuinely and actively defended. In that respect I would reference, again, the Court's conclusions in Tyson Creek above at para. 12.
- [25] The application for leave to issue third party proceedings against the Strata is therefore dismissed with costs.

"D. C. Baker, M."

[1] 2013 BCSC 1741, 2014 BCCA 17 on appeal

[2] 2013 BCSC 1741, at para. 61

[3] viz, for example, *MacNaughton v. Baker* (1988), 25 B.C.L.R. (2d) at p. 21

[4] *Tyson Creek* at para. 53

[5] 2003 BCSC 1573 at para. 9

[6] R.S.B.C. 1996 c 266

[7] at p. 23

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