

CANADA / JUDGMENT

Taylor v. Save on Foods

2020 BCSC 1835

COURT

Supreme Court of British Columbia

DECIDED

26 November 2020

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2020 BCSC 1835 Taylor v. Save On Foods IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Taylor v. Save On Foods, 2020 BCSC 1835 Date: 20201126 Docket: S202263 Registry: New Westminster Between: Judith Esther Taylor Plaintiff And Save On Foods, A Division of Overwaitea Food Group LP, A Jim Pattison Business Defendant And Alpine Building Maintenance Inc. Third Party Before: The Honourable Mr. Justice Schultes Reasons for Judgment Counsel for the Third Party: M.D. Wehrung Application by Written Submissions: New Westminster, B.C. June 22, 2020 Place and Date of Judgment: New Westminster, B.C. November 26, 2020

- [1] This is an application by the third party in this matter, Alpine Building Maintenance Inc., for leave to file and serve what is described as a fourth party notice against Manpreet Kaur Ratol dba HMH Janitorial Services. Ms. Ratol has not filed a response, although there is an affidavit indicating that she was properly served with the application material.
- [2] The plaintiff Ms. Taylor's claim is for damages arising from what is commonly known as a slip and fall incident at the defendant Save On Foods's store on 152 Street in Surrey, on June 22, 2016.
- [3] She filed her notice of civil claim on May 10, 2018. Save On filed its response and a third party notice seeking contribution and indemnity from Alpine on June 11 of that year, and Alpine responded to the third party notice on August 30. Ms. Taylor and Save On conducted their examinations for discovery of each other in June 2019. No other discoveries have been scheduled yet, and there is also no trial date.
- [4] I infer that Save On's third party claim against Alpine reflected the position that Alpine had caused or contributed to the accident through the negligent performance of its janitorial duties.
- [5] Ms. Ratol was a subcontractor of Alpine. The terms of her contract required her to carry out her cleaning services in a "good and workmanlike manner" and to indemnify Alpine in the case of any negligence by her in the course of those duties. The proposed fourth party notice alleges that any loss suffered by Ms. Taylor or Save On was caused or contributed to by Ms. Ratol's negligence or other fault.

- [6] Leave is required pursuant to Rule 3-5(4)(a) of the Supreme Court Civil Rules, because it has been more than 42 days since Alpine received its notice from Save On.
- [7] Like Ms. Ratol, Ms. Taylor and Save On have not filed any responses to the application.
- [8] The principles guiding the resolution of an application of this nature are summarized in *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.*, 2016 BCSC 2089: 36. These various considerations have since been synthesized and crystallized so that courts now, in exercising their discretion to grant leave, focus on the following discrete factors: a) prejudice to the parties; b) expiration of the limitation period; c) the merits of the proposed claim; d) any delay in proceedings; and e) the timeliness of the application. See *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*, 2003 BCSC 1573 at para. 9; and *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 16-17 [Tyson Creek C.A.]. 47 A dominant object of third party proceedings is to avoid a multiplicity of proceedings. Thus, the "starting point" of any analysis under Rule 3-5 is this consideration; see *Tyson Creek C.A.* at para. 24.
- [9] Applying these factors here, Alpine's counsel submits that granting leave will avoid the necessity of it potentially proceeding against Ms. Ratol in a separate action. Its claim is sufficiently meritorious for current purposes, in that the facts it alleges could, if proven at trial, result in liability being apportioned. The limited progress of proceedings so far means that Ms. Ratol will not have any difficulty in performing her necessary steps in it before any trial is held. Finally, to the extent that there is any prejudice to her from the delay, it is outweighed by the prejudice to Alpine from having to pursue a separate claim: see *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 90.
- [10] Alpine's counsel did not address the reason for the gap in time between it receiving Save On's third party notice and this application for leave to issue its own.
- [11] The most important factor in this application is the effect of the relevant limitation period. Counsel cites the basic two-year limitation period in s. 6(1) of the Limitation Act, S.B.C. 2012 c. 13 as being the one that applies here. He refers to that period not having expired, although Alpine received the third party notice on June 11, 2018 and this application was not provided to me as a CV-19 Application by Written Submissions until June 22, 2020. His notice of application is dated May 28, 2020, so that may account for the discrepancy.
- [12] Although counsel did not refer to it, an additional relevant part of the Act is s.16, which provides that: Discovery rule for claims for contribution or indemnity 16 A claim for contribution or indemnity is discovered on the later of the following:
- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

- [13] No evidence is currently offered that would suggest that Alpine learned that a claim for contribution and indemnity "may be made" by it after it was served with Save On's third party notice. In the absence of such evidence, one could conclude that the current claim was discovered when Alpine was served, which would put it outside a two year period from June 11, 2018.
- [14] Even more critical is s. 22(2), which must be read in the context of ss.(1): Counterclaim or other claim or proceeding 22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
 - (b) third party proceedings may be brought;
 - (c) claims by way of set off may be advanced;
 - (d) new parties may be added or substituted as plaintiffs or defendants.
- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution or indemnity after the expiry of a limitation period applicable to that claim. [Emphasis added]
- [15] Section 22(2) has been interpreted as precluding the commencement of third party proceedings for contribution or indemnity after the expiry of a limitation period that applies to it: see the thorough analysis of Master Elwood in *Dhanda v. Gill*, 2019 BCSC 1500, which was cited with approval by Justice Kent in *Sohal v. Lezama*, 2019 BCSC 1709 at para.58.
- [16] In *Sohal*, Kent J. emphasized that Rule 3-5(4) is only a procedural rule, so leave granted pursuant to it cannot supersede a statutorily-imposed limitation period. He also commented on the appropriate procedure to be followed where the application of a limitation period to the viability of a third party claim is in issue: 58 * if the merits of any such limitation defence are in question (e.g. date of discovery, waiver or estoppel, et cetera), the court should direct that the issue be determined in the proposed third party proceeding or, if considered more appropriate, by way of a separate action. 74 *if the parties disagree as to whether the limitation period has expired, and the court is unable to determine this issue on the leave application, the court should consider the factors for the exercise of its discretion under Rule 3-5(4), and if it is otherwise inclined to grant leave, direct that the merits of the limitation defence be decided in the third party proceedings on a more fulsome evidentiary platform.

- [17] I am not yet convinced that I would exercise my discretion to grant leave based on the other relevant considerations here, so as to justify deferring the limitation defence to the third party proceedings. It is also important to note that a party who makes an application based on inadequate or incomplete material runs the risk of it being dismissed without further inquiries. Nevertheless, I conclude that it would be potentially unjust to resolve this matter on the basis only of a written submission. I do not currently know why counsel believed that the limitation period had not expired as of the date this application was made, or why ss. 16 and 22 of the Act were not addressed. I also do not know what role access to the courts during the COVID-19 pandemic may have played in the delay between the filing of the application and the day it was provided to me to be considered. Finally, I take into account that Ms. Ratol has chosen not to participate in the current application, so there is no prejudice to her in giving Alpine the opportunity to address these issues more fully than it has done so far.
- [18] Accordingly, I direct that this application be adjourned generally, to be rescheduled for an oral hearing in chambers. The other parties and Ms. Ratol must be re-served for the new hearing date, and these reasons must be brought to their attention. Alpine has leave to file additional material and make additional submissions in support.
- [19] I am not seized of the application, but these reasons must also be brought to the attention of the hearing judge.
- [20] There will be no order for costs in relation to this written stage of the matter. "Schultes J."

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