

CANADA / JUDGMENT

West Bros. Frame & Chair Ltd. v. Yazbek

2015 BCSC 1823

COURT

Supreme Court of British Columbia

DECIDED

7 October 2015

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2015 BCSC 1823 West Bros. Frame & Chair Ltd. v. Yazbek IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: West Bros. Frame & Chair Ltd. v. Yazbek, 2015 BCSC 1823 Date: 20151007 Docket: S149719 Registry: Vancouver Between: West Bros. Frame & Chair Ltd. Plaintiff And Petra Yazbek and Sarkis Yazbek Defendants Before: Master Harper Reasons for Judgment Counsel for the plaintiff: I. Knapp Defendants: No appearance Place and Date of Hearing: Vancouver, B.C. September 28, 2015 Place and Date of Judgment: Vancouver, B.C. October 7, 2015

INTRODUCTION

- [1] The plaintiff claims that the defendants appropriated money from it, some of which they passed on to Ana Mercedes Lopez and Eduardo Lopez. The plaintiff applies to add Mr. and Ms. Lopez as defendants but has not served them with notice of the application.
- [2] The initial question that arises on this application is as follows: is a plaintiff required to give notice to a proposed defendant of its application for an order adding the proposed defendant as a party, or may the plaintiff make the application without notice on the basis that the defendant may apply to vary or discharge the order within 21 days of service of the order?
- [3] Two rules must be considered in answering this question:
- a) Rule 8-1(7) (give notice of application to a person who may be affected by the order); and
 - b) Rule 6-2(8)(c)(i) (a person made a party may apply to vary or discharge the order within 21 days of service of the order).
- [4] Counsel for the plaintiff argues that the ability to apply without notice is implied in Rule 6-2(8)(c)(i) because the defendant has the opportunity to apply to set the order aside and therefore there is no unfairness in not requiring service of the application materials.
- [5] For the reasons that follow, I conclude that the ability of a new defendant to apply to vary or set aside the order pursuant to Rule 6-2(8)(c)(i) does not displace the requirement to serve the proposed defendant with notice of the application.

- [6] There is an additional problem with the application. The existing defendants do not appear to have been served since the notice of application states "without notice". Counsel for the plaintiff did not address this point in his submissions, but if the existing defendants were not served, the application could not have been heard for that reason alone because Rule 8-1(7) requires the existing defendants to be served. discussion
- [7] A party may only be added to an existing proceeding by application pursuant to Rule 6-2(7): *Alexis v. Duncan*, 2015 BCCA 135. A proposed defendant is a person affected by an order adding him or her as a defendant and is therefore entitled to be served with notice of an application for such an order: Rule 8-1(7) and *Alexis*, para. 23.
- [8] By serving the proposed defendant with the notice of application and supporting affidavits, the defendant has the opportunity to present his or her position on the application and the court has the benefit of those submissions in assessing the merits of the application: *Alexis*, para. 24.
- [9] The possibility that the defendant may apply to set aside the order within 21 days of service does not abrogate the rule requiring service of the notice of application and supporting affidavits on the proposed defendant.
- [10] The plaintiff argues that *Alexis* does not address the effect of Rule 6-2(8)(c)(i) or *Brandt v. Volkswagen Group Canada Inc.*, 2014 BCSC 2380. *Brandt* involved an application to add a defendant. In obiter dicta, the court states at para. 17:
- [17] It is noteworthy that the rules plainly contemplate an application under Rule 6-2(7) being brought ex parte and the party added being given 21 days after service of the order to apply to vary or discharge it: Rule 6-2(8).
- [11] However, in *Brandt*, the proposed defendant appeared on the application so was obviously given notice of it. There was no discussion in *Brandt* of the requirements of Rule 8-1(7), presumably because the point was moot given that the proposed defendant had in fact been given notice. Further, given that *Alexis* was decided after *Brandt* and is a decision of the Court of Appeal, the reasoning of *Alexis* prevails.
- [12] On the merits of the application to add Mr. and Ms. Lopez as defendants, the plaintiff relies on two Court of Appeal decisions: *Owners, Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611 and *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329. In both of those cases, the proposed defendants had obviously been served with notice of the application as Rule 8-1(7) requires since they appeared on the hearing of the application to add them as parties.

- [13] Counsel for the plaintiff provided no case authority other than Brandt in support of the argument that notice is not required. In particular, he provided no case in which the court granted a without-notice order adding a defendant. Although it may have been acceptable practice in the past to apply to add parties without notice to them, the current requirement as reflected by Rule 8-1(7) is that notice must be given to proposed defendants.

CONCLUSION

- [14] The plaintiff did not serve Mr. and Ms. Lopez as required by Rule 8-1(7) and therefore the application is adjourned generally. The existing defendants must also be served. "Master Harper"
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Prepared on 27 October 2026 · Esheria