

2025 NBKB 025

COURT FILE NO: FC-150-2017

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

JUANITA DAVIDSON,

Plaintiff/Moving Party,

- and -

**MANUEL GROCERIES LIMITED
and LOBLAWS INC.**

Defendants/Responding Parties,

DECISION

Date of Hearing: February 3, 2025

Date of Decision: February 4, 2025

Before: Justice Richard G. Petrie

Representation of Parties at Hearing:

George A. McAllister, K.C., Counsel for the Plaintiff/Moving Party;

Ryan P. Burgoyne and Gabriel Laidlaw-Bale, Counsel for Defendants/Responding Parties

Petrie, J.

Introduction

[1.] The Plaintiff brings a motion for leave of the Court to amend her Statement of Claim, pursuant to Rules 1.03 and 27.10 of the *Rules of Court*.

[2.] The Defendants oppose the motion and cite actual prejudice should leave be granted.

Background

[3.] The Plaintiff first filed her Notice of Action with Statement of Claim on May 1st, 2017. She alleges negligence in relation to her slip and fall which occurred February 9, 2016 on steps exiting a grocery store operated by the Defendant, Manuel Groceries Limited (Manuel) located on property owned by the Co-Defendant, Loblaws Inc. (Loblaws). [This decision will refer interchangeably to the terms “stairs” or “steps”]

[4.] The allegation of negligence was focused on the Defendants alleged failure to maintain the stairs in a safe condition. Paragraph 8 of the Claim spelled out several specific allegations on the alleged failure to maintain.

[5.] The Defendants each filed their Statement of Defence by September 7, 2017. They denied liability.

[6.] Needless to say this matter has not proceeded quickly. While discoveries were conducted in 2018, the matter only recently came to Motion's Day in order to be tentatively set down for trial for late this year.

[7.] Counsel for the Plaintiff first wrote to Counsel for the Defendants on June 4, 2024 as to the Plaintiff's intent to set the action down for trial.

[8.] On December 14, 2024, the Plaintiff filed its motion for leave to amend their Statement of Claim to include, for the first time, an allegation of negligence in relation to the manner by which the stairs were designed and built.

[9.] The proposed amendments include additional allegations of negligence "in designing, constructing, and in failing to inspect" the stairs. The Plaintiff also intends to allege the stairs and handrails to have not been constructed in accordance with the *National Building Code*, nor the *Occupational Health and Safety Act*.

[10.] The stairs in question were constructed in the Summer of 2015 for the Defendant Manuel, by TNT Construction.

[11.] The Defendant Manuel decided to remove and replace the stairs in June of 2024. The stairs are thus no longer available for inspection nor testing.

[12.] While the Defendants' Counsel did not provide advance notice to the Plaintiff before doing so, nor had Plaintiff's counsel previously requested access to the stairs in question.

[13.] It so happens that Plaintiff counsel retained Andrew Happer, a professional forensic engineer, in or around June 14, 2024 to produce an expert report in relation to the circumstances involving the Plaintiff's slip and fall. In his report dated October 9, 2024, Mr. Happer notes the stairs at the grocery store to "have changed since the date of the incident". It appears he has utilized photographs of the stairs taken shortly after the incident, along with computer technology to make his purported calculations of the steps (and handrail) dimensions in order to arrive at his opinion.

[14.] According to the Plaintiff's counsel it was only after receipt of Mr. Happer's report in mid-October, 2024 that he realized the Statement of Claim should be amended to allow for the

expanded grounds of negligence resulting in this motion. Upon receipt, Mr. McAllister had almost immediately forwarded Mr. Happer's report and a Notice of Expert to Defendant's Counsel.

[15.] After receipt of the Plaintiff's expert report, the Defendants retained Robert Vale, a Structural Engineer, to evaluate the steps in issue and in light of Mr. Happer's report.

[16.] Mr. Vale attests that given the stairs no longer exist, he is unable to accurately assess the dimensions, design, and construction of the steps and/or handrails in order to determine if they met all applicable Codes or might have contributed to Ms. Davidson's fall.

[17.] As a result, Defendants Counsel argues that allowing the Plaintiff's proposed amendment will cause prejudice that cannot be remedied. Mr. Burgoyne cites three (3) sources of such prejudice to include: (1) permanent loss of key evidence; (2) possible loss of an available remedy against a third-party due to expiration of a limitation period; and (3) extreme delay.

[18.] In response, Plaintiff's counsel argued the Defendants had plenty of opportunity to investigate the stairs for any third-party liability issue. Further, he argues any spoilage of evidence was as a result of the Defendants own unreasonable actions. Further Mr. McAllister strenuously

argues the amendment to be necessary in the interests of justice and which include access to justice principles. Plaintiff counsel has also offered to waive the Defendants' compliance with Rule 52.01 and extend time for any Defendants' expert's report to be provided.

Preliminary Issue – Admissibility of Affidavit Evidence

[19.] By way of preliminary argument, Mr. McAllister objects to the admissibility of portions of the affidavits provided by the Defendants, i.e. Mr. Manuel and Mr. Vale.

[20.] Mr. McAllister objects to statements by Mr. Manuel and his attaching of the 2016 insurance adjuster's report, which he says are not introduced based upon personal knowledge and/or information and belief. He cites Rule 4.05(2). Mr. McAllister also objects to an exhibit to Mr. Manuel's affidavit which is a letter between Mr. Burgoyne and Mr. McAllister. Mr. McAllister says that is not evidence of "anything". He also emphasises the absence of any context to Mr. Vale's affidavit, which he says makes it irrelevant.

[21.] Mr. Burgoyne, in response, points out that his letter attached by Mr. Manuel is already in evidence by way of Ms. Smith's affidavit. Further he makes the point that the adjuster's report is referenced and relied upon by Mr. Happer and by Mr. McAllister himself, in other evidence

of the Plaintiff already within the Record. Mr. Burgoyne says the affidavit evidence is otherwise compliant with the *Rules of Court*.

[22.] First, I will state that I fully recognize the importance of Rule compliant affidavit evidence. Chief Justice DeWare discusses deficiencies in affidavits, at length, in *Stevens v. Association of Lodges of the Village of Douglastown Trust*, 2018 NBQB 82.

[23.] However, in this matter, I am not convinced the objections are well made. Rule 4.05(2), which directs affidavits to be confined to personal knowledge, goes on to state “except as provided in these Rules”. Rule 4.05 thus needs to be considered in light of Rule 39.01(4) which allows for statements to be made beyond personal knowledge, if made on information and belief.

[24.] By and large, Mr. Manuel’s impugned statements are, in fact, made upon either his personal knowledge or on his stated belief.

[25.] While he attaches the adjuster’s report without indicating information and belief, that report is reference by the Plaintiff’s evidence in Mr. Happer’s report and other evidence brought by the Plaintiff in this motion. I would add that the adjuster’s report is not tendered for the truth of its

contents but rather to confirm the investigation of the accident was completed in and around 2016. A fact not otherwise disputed.

[26.] I am also not aware of any requirement in the *Rules*, that a person attaching an exhibit need to state it to be a “true copy”.

[27.] In the end, I am not convinced of any serious deficiency to the Defendants’ affidavit evidence that would require me to rule it inadmissible for purposes of this motion.

Issue

[28.] The issue to be determined is whether the proposed amendments, and more particularly the delay by the Plaintiff in proposing the amendments, raises actual prejudice to the Defendants? Is this one of the “rare circumstances” where leave should be refused?

Law

[29.] Rule 27.10(2)(c) provides that where it’s too late to amend a pleading as of right, and the consent of the other party is not forthcoming, a Plaintiff may amend his pleading only with leave of the Court. Before me, the pleadings have long closed and the Defendants have withheld their consent.

[30.] Also relevant to this motion is Rule 27.10(1) and Rule 1.03(2) which state:

27.10 Amendment of Pleadings

General Power of Court

- (1) Unless prejudice will result which cannot be compensated for by costs or an adjournment, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.

1.03 Interpretation

...

- (2) These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.

...

[31.] Courts have a discretion to grant leave to amend pleadings or not. In doing so, the Court may grant leave on terms that are just. The Courts in New Brunswick have adopted a very liberal, indeed generous approach, to requests to amend pleadings effectively only refusing such where actual prejudice can be established that cannot otherwise be compensated by an order of costs or an adjournment. (*See Enbridge Gas NB v. Modern Construction*, 2003 NBCA 78, at para. 15).

[32.] Refusal to allow amendments to any pleadings will only occur in rare circumstances (*Enbridge Gas NB* at para. 15). Mere delay is not a justification to deny leave.

[33.] Justice Walsh in *ALGO Enterprises Ltd. And NBP Enterprises Inc. v. REPAP New Brunswick*

Inc., 2013 NBQB 176 states at para. 18 and 19:

[18] A leading case in the modern era is *Triathlon Leasing Inc. v. Juniberry Corp.*, (1995) 1995 CanLII 6225 (NB CA), 157 N.B.R. (2d) 217 (C.A.). The Court of Appeal's interpretation of Rule 27.10 is found in the following passage:

These are rules of procedure as opposed to the substantive law which defines substantial legal rights and claims. The rules are the vehicle that enables rights to be delivered and claims to be enforced. As such, a Court should interpret and apply the rules to ensure to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in serious prejudice or injustice. Accordingly, amendments to pleadings are generally allowed. ... **As a general principle, therefore, the rules of procedure should not be used to prevent the delivery of rights; nor should they be used to preclude the enforcement of claims which are derived from the substantive law.**

(Emphasis added)
(at para. 30)

[19] This interpretation reflects that earlier found in *Moore v. State Farm Fire & Casualty Company*:

While leave to amend is a discretionary right, the practice is for the court to allow adjustments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties. Generally speaking, an amendment should be allowed, however, negligent or careless may have been the first omission and however late the proposed amendment, if it can be done without injustice to the other side; and there is no injustice to the other side, if it can be compensated by costs.

(Emphasis added)
((1982) 1982 CanLII 4194 (NB CA), 42 N.B.R. (2d) 667 (C.A.) at para. 10)

[34.] J. Walsh further addresses the issue of prejudice, as a result of a proposed amendment, at

paragraphs 33 through 35 of *ALGO Enterprises Ltd.*:

[33] From my understanding of the Court of Appeal precedent, the only question for me to address is this: **would the amendment prejudice the Defendant to an extent that it could not be remediated by, for example, an**

appropriate award of costs and/or an adjournment? What then is meant by prejudice?

[34] **In my respectful opinion, prejudice cannot be equated with the other side’s disappointment that the claim originally advanced (or was perceived to be advanced) was more readily defended in the law, or because of the expense, inconvenience and delay now caused, or, indeed, because of this Court’s frustration with the bifurcation of these proceedings and the loss of valuable court time brought on by the inexcusable timing of the Motion. These “unfairness” concerns can be addressed by costs and adjournments. Rather, it seems to me that the concept of prejudice must mean more than that; it must in some way relate to the ability or, more accurately, the inability to fairly meet the case against them, regardless of when or why advanced.** This point is made by Carthy J.A. for the Ontario Court of Appeal in *Kings Gate Developments Inc. v. Colangelo*, interpreting a similar provision to that of New Brunswick’s:

The unfairness and prejudice to the respondent is manifest. The frustration of a judge, when faced with such a last-minute application, is understandable. Yet rule 26.01 requires that amendments be permitted unless the prejudice cannot be compensated for in costs. The reasons of Chapnik J. speak eloquently as to why it is unfair to request relief, but do not address any item of non-compensable prejudice, such as death of a material witness or destruction of essential files.

(Emphasis added)

(1994 CanLII 416 (ON CA), [1994] O.J. No. 633 (Ont. C.A.) at para. 5)

[35] **The raison d’être of the modern law on amending pleadings is to procedurally facilitate, to ensure as much as possible that claims made under the substantive law are heard and decided; a fortiori, prejudice in the context of amendments sought by plaintiffs and applicants must mean serious impairment of the right and ability of defendants and respondents to defend against any such substantive law claims.** I hearken back to *Triathlon Leasing Inc. v. Juniberry Corp.*, supra:

... a Court should interpret and apply the rules to ensure, to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in a serious prejudice or injustice. ...

(supra, at para. 30)

(Emphasis Added)

[35.] As I understand it, the prejudice to the Defendants, in this case, must stem from the proposed amendment and not from some other source.

[36.] There is an onus on the responding parties if looking to establish actual prejudice, to provide some details. (see *158744 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, at para. 25) Before me, the Defendants have done so.

Decision

[37.] The Defendants have satisfied me that this is one of those “rare circumstances” and that they will suffer actual prejudice in the form of lost evidence, namely the now replaced staircase. The delay and resulting loss of this evidence gives rise to a substantial risk that a fair trial would not be possible if the Plaintiff’s motion were allowed

[38.] Further, even a generous reading of the Plaintiff’s original Statement of Claim, does not allow me to reasonably conclude that the Defendants were put on notice of any alleged deficiency with respect to the design and construction of the stairs or handrails in question. Pleadings are critical in defining the issues. In my view, there was simply no material reason for the Defendants to have appreciated design and construction type issues as “live”. Effectively, neither did Plaintiff’s counsel until very late in the game. I would add that there is also an absence of evidence to explain the significant delay by the Plaintiff in obtaining its expert report in the circumstances.

[39.] I am satisfied that the significant delay in seeking the amendment here, being in excess of seven (7) years, has resulted in key evidence lost which would impair the Defendants' ability to fairly defend the action. The destruction of this evidence, in circumstances which I consider to be without criticism, results in prejudice that cannot be remedied by an adjournment or an award of costs. It reflects an unfairness which would go to the very ability of the Defendants to defend the case against them if allowed to be amended.

[40.] While not strictly necessary, I also accept the Defendants' position that, given the very lengthy delay, should the amendment be allowed, the Defendants would likely face the prejudicial loss of a remedy to shift some or all potential liability, to a third party, TNT Construction, due to the (likely) availability to TNT Construction now being able to rely upon a limitation period defence.

Disposition

[41.] The Plaintiff's motion seeking leave to file an amended Statement of Claim is therefore dismissed.

[42.] The Defendants are entitled to one order of costs on the motion in the sum of \$1,250.00 inclusive of disbursements and HST.

[43.] As discussed during the hearing, I am prepared to conduct a Case Management Call to discuss anticipated next steps with Counsel in light of my decision, including confirming the scheduling of the settlement conference and trial dates. Counsel are asked to identify multiple available dates/times and advise the Clerk's Office as soon as possible.

DATED at Fredericton, N.B. this 4th day of February, 2025.

Richard G. Petrie, J.C.K.B.