2025 NBKB 144

COURT FILE NO..: FC-103-2018

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

FRONT GATE FINANCIAL GROUP (2010) LTD.

Plaintiff

– and –

TFE INDUSTRIES INC.,

JUDSON FOSS as represented by his Litigation Guardians, LINDA JUNE FOSS, DAVID JOHN FOSS and **ANGELA LYNN FOSS,**

LINDA FOSS and **DAVID FOSS**

Defendants

DECISION

Date of Hearing:	June 17, 2025
Date of Decision:	June 18, 2025
Before:	Justice Richard G. Petrie

Representation of Parties at Hearing:

Leah M. Good, Counsel for the Plaintiff;

Erika R. Hachey, Counsel for the Defendants

Petrie, J.

I. INTRODUCTION

[1.] This is my decision on a motion for summary judgment brought by the Plaintiff. As part of it's motion filed last year, the Plaintiff included what it framed as a "preliminary matter" to change the corporate name of the Plaintiff.

[2.] The Plaintiff had filed a separate motion to obtain, and have obtained, by a Consent Order, an appointment of litigation guardian for Judson Foss who is under a disability. I signed the Consent Order, April 9, 2025. That Order allows the proceeding to continue as against Judson Foss through his litigation guardians. The parties will be submitting a revised order to clarify in the style and cause that the litigation guardians are acting on behalf of Judson Foss.

Motion for Summary Judgment

[3.] By way of a very general summary, the Plaintiff's action relates to a claim for an alleged breach of contract seeking special damages of payment for a "Loan Approval Fee" in regards to the Plaintiff's work on behalf of the Defendants to secure commercial financing. It is alleged that the corporate defendant and the individual Defendants engaged the exclusive services of the Plaintiff to act as their broker to arrange and secure high risk financing on their behalf.

[4.] The Plaintiff claims that it entered a contract, known as an Authorization To Arrange Financing Agreement, both with the corporate Defendant and the individual Defendants in their personal capacities.

[5.] According to the Plaintiff, the agreement specified that the corporate Defendant and the individual Defendants would pay to the Plaintiff a loan approval fee of 4% of the total amount financed. In total, the Plaintiff claims the amount owed to be $104,000.00 based upon the final mortgage financing advanced for the Defendants' benefit.

[6.] The action also seeks, as alternative relief, damages for unjust enrichment and quantum meruit.

[7.] The Defendants have denied both entering a contract with the Plaintiff; nor any obligation to pay the Plaintiff in all of the circumstances.

[8.] The Plaintiff's Notice of Action was filed April 17, 2018. The Defendants filed a defense on June 6, 2018. The Plaintiff then amended its Notice of Action with Statement of Claim Attached on September 21, 2021. The Plaintiff's motion for summary judgment was filed August 13, 2024.

[9.] Having reviewed all of the material properly before me, plus a consideration of the parties' arguments and a review of the *Rules of Court* and numerous authorities, I am dismissing the Plaintiff's motion.

[10.] First, the "preliminary matter" of the Plaintiff's request to "change the corporate name" from Front Gate Financial Group (2010) Ltd. to Front Gate Mortgages (2010) Ltd. will be denied. Further, in these circumstances, there is no basis to grant a summary judgment in light of this finding and as the Plaintiff rightfully acknowledged. I wish to add that the named Plaintiff party was not a contractual party with the Defendants and thus would have no entitlement to sue under the contract or otherwise. I also note in passing that Mr. Brewer, the co-owner of the Plaintiff, is not named personally as a Plaintiff. As Ms. Good conceded, any claim for unjust enrichment or quantum meruit will require a trial.

[11.] To be crystal clear, in light of my decision on the "preliminary matter", I cannot conclude the Plaintiff to have established there to be "no genuine issue requiring a trial" in the context of the Plaintiff's summary judgement motion, (and see my recent decision on the principles of law applicable to summary judgment motions in *Boone v. Obeya Motors Inc.*, 2025 NBKB 46).

[12.] I also note that the Defendants have not filed for summary judgment, and this Court has no authority to consider a "boomerang summary judgment" as per the New Brunswick Court of Appeal in *Abrams v. RTO Asset Management*, 2020 NBCA 57.

Dismissing the "Preliminary Matter"

[13.] First, the so-called "preliminary matter" request by motion is flawed both procedurally and substantively.

[14.] The motion expressly relying on Rule 2.02, states the requested relief to be that "the Plaintiff's corporate name be amended". The Plaintiff's brief expresses it as a desire to "change the corporate name".

[15.] In regards to the requirements of Rule 37.03(b), while the motion does cite Rule 2.02, it fails to cite the (most) applicable rules in the circumstances, namely: Rule 5.04 and/or Rule 27.10 which expressly deal with substituting or adding parties, or correcting the name of a party.

[16.] Rule 2.02 in the circumstances, and given the nature of the relief sought, is not of much assistance. Let me also say that Rule 2.02 is not a catch basin for irregularities that could have been avoided by care and attention. Rule 2.02 does not cure jurisdictional flaws caused by carelessness or otherwise.

[17.] The Plaintiff's brief references Rule 27.10 but absolutely no authority was cited in support. In oral argument, Ms. Good referred the Court to three cases which I have now reviewed: *Co-op Atlantic Ltd. v. Brunswick Bulk Transport*, 1996 182 NBR 2nd 48 (NBCA), *York Equipment Ltd. v. Dabrowski Estate*, 1995, 161 NBR (2d) 305 and *Juniberry Corp. v. Triathlon Leasing Inc*., 1995, 157 NBR (2d) 217.

[18.] In the end, the non-compliance by the Plaintiff's motion with Rule 37.03(b) cannot be said to be "manifestly inconsequential", (see *Optimum Insurance v. Donovan*, (2009) NBJ 18 (NBCA).

[19.] The New Brunswick Court of Appeal has on numerous occasions reiterated the importance of pleadings. Just for instance, see *New Brunswick Real Estate Association v. Estabrooks*, 2014 NBCA 48.

[20.] Rule 37.03 requires any motion to set out the precise relief sought and to cite any Rule or statute being relied upon. While a number of other rules are in fact cited in the Plaintiff's motion, I find none are germane to the issue and to the requested relief which is ostensibly to substitute or add a party as Plaintiff or correct the name as per Rule 5 or Rule 27.10. Nowhere in the motion are those rules cited and this can be fatal, (see *Gillespe v. Donovan*, (2008), (2009 NBJ 18 NBCA)).

[21.] In my view and importantly in these particular circumstances, adding or substituting a Plaintiff cannot be characterized so expeditiously and peremptorily as the Plaintiff wishes, and as merely an oversight or procedural error. By characterizing the requested name change as a mere preliminary matter to the main motion, I believe the Plaintiff likely set out to effectively attempt to summarily move beyond this issue as though there is "nothing to see here". The Defendants quite correctly say, "not so fast".

[22.] The original affidavit, and tellingly, the supplemental affidavit of Mr. Kent Brewer, just filed, some 10 months after the motion was filed, purports to address, in a rather obtuse way, the wish to change the Plaintiff's corporate name, to Front Gate Mortgages (2010) Ltd. In their brief, the Plaintiff actually further "clarifies" the appropriate name involved in the dispute to be "Front Gate Mortgages (2010) Ltd. doing business as Mortgage Alliance Front Gate Mortgages".

[23.] I wish to add that the alleged Authorization To Arrange contract which is central to the Plaintiff's claim actually purports to identify the parties to the contract as the Defendants and, yet possibly another named corporate entity, "Mortgage Alliance Front Gate Mortgages (2010) Ltd."

[24.] Both "Front Gate" corporations are owned and operated by two parent corporations, each of which, in turn, are solely owned by Kent Brewer and Steven Morse. Mr. Brewer sets out a number of points about the workings of the Front Gate Companies and Front Gate Mortgages (2010) Ltd.'s franchise relationship with Mortgage Alliance Company of Canada, yet this is information that would not have been widely known.

[25.] Clearly, the Plaintiff's request to effectively substitute Front Gate Mortgages for Front Gate Financial Group is more substantive as it almost certainly raises *Limitations of Actions Act*, SNB 2009, c L-8.5 (section 5) issues given the late nature of this proposed amendment. The claim was filed in 2018. The motion in 2024. Any claim to now be made by a different Plaintiff would presumptively be well beyond the two-year limitation period.

[26.] The Plaintiff corporation, as acknowledged by Mr. Brewer, in his supplemental affidavit in particular, is and remains an ongoing, active corporation that occasionally is in the very same commercial lending business as the proposed corporation. Furthermore, Mr. Brewer states, at the time the alleged authorization contract was entered into, both corporate entities were active in commercial lending. To be more specific, in his affidavit of June 5, 2025, at paragraph 6 and 7, he states:

> 6. At the time of commencing the within action, Front Gate Financial Group (2010) Ltd. and Front Gate Mortgages (2010) Ltd. offered commercial mortgages.
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> 7. However, as the file progressed, it became clear that the Defendants entered into a contract with Front Gate Mortgages (2010) Ltd. which has a registered business name "Mortgage Alliance Front Gate Mortgage."

[27.] It is certainly not obvious that the Plaintiff simply made a mistake at the time the action was filed when it named the Plaintiff. It is not established that the Plaintiff and counsel made a mistake, at the time, in naming the Plaintiff as opposed to deliberately choosing one corporate party over another. Nor is it plain that the Defendants ought to have known the Plaintiff made such a mistake. Indeed nowhere does the Plaintiff put forth a real explanation for the alleged misnaming of the Plaintiff nor at what point it became aware of the "mistake". There is no suggestion, nor evidence, that this was simply a misnomer or that it was necessarily intended to name the *proposed* corporation as Plaintiff all along. The word "mistake" is not used in the pleadings or in any brief or affidavit filed by the Plaintiff. In fact, no excuse is put forward to explain the circumstances or the apparent lack of diligence by the Plaintiff. "As the file progressed" is certainly not a meaningful explanation. The relevant information rested with Mr. Brewer all along and potentially with his counsel throughout.

[28.] Furthermore, no convincing authority or argument is cited by the Plaintiff to allow, at this late stage and in the context of summary judgment, the substitution of the Plaintiff. I have a discretion and I acknowledge a need to exercise it judicially. By "judicially", I must consider the interests of all parties, not just the Plaintiff. While I acknowledge my authority to allow for the amendment of pleadings including adding parties at any

stage exists in particular where it is in the "interests of justice" and in order to address the merits of any dispute, I am not convinced the Plaintiff has made out such a case in this instance. Further, it is not merely procedural but, in fact, substantive rights that are in issue.

[29.] Still further, in my view the Plaintiff has not convinced me of any "special circumstances" by which the Defendants could have or did have actual knowledge of the "proper" Plaintiff party before the expiration of the limitation period or otherwise, especially given the rather unclear and ambiguous Authorization To Arrange contract language setting out the parties to the Agreement in question.

[30.] As per Rule 5.04 and 27.10, it is well settled that leave to amend pleadings, including changing names or adding parties, is generally granted unless prejudice will result which cannot be compensated for by costs or an adjournment (*Moore v. State Farm Fire and Casualty Company*, (1982)(42 NBR 2nd 667 NBCA) at paragraph 10). Further, a court will generally refuse to extend time for the issuance of an originating document where the action is statute barred, since the Rules do not take precedence over a provision of a positive right, see *LeBlanc v. Wawanesa Mutual Insurance Company* (1987) 86 NBR (2nd) 85.

[31.] Where the proposed amendment would raise a claim that would otherwise be statute barred, leave to amend should be denied (Leveque v. New Brunswick, 2011 NBCA 48, at paragraph 38 and 78.

[32.] I am also of the view that the Defendants would be prejudiced in maintaining their defence on the merits should the proposed corporate Plaintiff be substituted in the circumstances. In addition, they may well be prejudiced due to the passage of time as two (likely) material witnesses, Judson Foss and the Defendant's lawyer at the time, Keith Allen, are no longer able/available to address the evidentiary impact of the proposed amendment.

[33.] In *Larke v. Vitalite Health Network*, 2022 NBCA 26, the Court of Appeal addressed the issue of whether a trial judge erred in denying a Plaintiff's motion under Rule 5.04 and 27.10 seeking leave to add various doctors to an action he had commenced against a hospital on the basis that it was statute barred. In confirming the trial judge's decision, the Court of Appeal makes various statements, in particular at paragraphs 41, 42 and 43:

> [41] In *Lévesque and BMG Farming Ltd. v. Province of New Brunswick and New Brunswick Crop Insurance Commission*, 2011 NBCA 48, 372 N.B.R (2d) 202, the motion judge allowed the plaintiffs (appellants on appeal) to amend their respective Statements of Claim for the purpose of: (1) joining an additional party (the Commission) as a defendant long after the limitation period had passed; and (2) adding claims for breach of contract and restitution based on *quantum meruit*.
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> [42] At trial, the Commission moved for non-suit. The trial judge held that the appellants' right to commence proceedings against the Province for breach of contract and restitution was extinguished by the time those claims were added in 2006.
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> [43] On appeal, Drapeau C.J.N.B. confirmed that the appellants should not have been granted leave to amend their respective Statements of Claim and that such an order should not be granted where the defendants, as in the case before us, confirmed their intention to plead the limitation period and nothing in the record disentitles the defendants to plead and rely upon the same (see paras. 38 and 78). See also *Charest (F) Ltée and Tessier (René) Ltée v. New Brunswick* (1985), 1985 CanLII 4137 (NB KB), 60 N.B.R. (2d) 436, [1985] N.B.J. No. 142 (QL), at para. 21, affirmed on

> different grounds in (1986), 1986 CanLII 5328 (NB CA), 68 N.B.R. (2d) 268, [1986] N.B.J. No. 10 (QL) (C.A.), where Creaghan J. refused an amendment to a pleading that would have had the effect of preserving a cause of action restricted by legislation.

[34.] Furthermore, at paragraph 44, the Court of Appeal confirms:

> [44] In summary, a limitation period is a substantive right. The motion judge did not have the inherent power to extend it. Doing so would have denied the doctors a substantive right resulting in prejudice. Once the motion judge determined Mr. Larke had not met the limitation period, it was not necessary to address Rules 5.04 and 27.10. I would dismiss this ground of appeal.

[35.] I also generally accept the points made by Ms. Hachey in her, late-filed, brief at para. 40 and 41:

> 40 The Defendants note that this pleading was originally filed on April 17, 2018. An Amendment was already completed on September 1, 2021, of the contents of the Statement of Claim. The Plaintiff has only now recently clarified that the corporation pleaded has absolutely nothing to do with the current litigation. Moreso, neither the currently named Plaintiff, nor the requested amended corporation were signatories to the Authorization which is at the heart of this dispute. The name on the Authoriation is not a business name but presented as a limited company, meaning its own corporation.
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> 41. This is also not a mistake that has just become known to the Plaintiff. The Plaintiff is the only one with the knowledge as to which corporation was related to Mortgage Alliance Front Gate Mortgages (2010) Ltd. The biggest issue is the Defendants just becoming aware on this motion that this corporation does not exist at all and is just a business name or a completely different corporation which was not mentioned at the examination or in any previous communication or affidavits.

[36.] In light of my decision in refusing the Plaintiff's "name change" motion, the summary judgment motion will also necessarily be denied.

II. COSTS

[37.] The Defendants are entitled to one order of costs in the circumstances. That cost order would have been more significant had the Defendants' brief been filed on time.

[38.] The Plaintiff is ordered to pay one set of costs of $1,000.00, plus reasonable disbursements to the Defendants.

DATED at Fredericton, N.B. this ___ day of June, 2025.

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