

CITATION: Tar Heel Investments Inc. v. H.L. Staebler Company Limited et al, 2025 ONSC 237

COURT FILE NO.: CV-19-69132

DATE: January 10, 2025

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
TAR HEEL INVESTMENTS INC.)	<i>S.F. Gleave and B. Needham, for the</i>
)	Plaintiff
Plaintiff)	
)	
- and -)	
)	
H.L. STAEBLER COMPANY LIMITED,)	
LISA ARSENEAU and DEBBIE SUTTON)	<i>P.A.N. Gupta and S. Johnston, for</i>
)	the Defendants
Defendants)	
)	
)	
)	MOTION HEARD:
)	November 27, 2023

DECISION ON DEFENDANTS' MOTION TO AMEND DEFENCE

[1] On November 28, 2023, I released an endorsement granting the Defendants leave to amend their Amended Statement of Defence in accordance with the Amended Amended Statement of Defence, in the form attached as Schedule "A" to the draft Order submitted, for reasons to be delivered at a later date. These are those reasons.

Background

[2] By this motion to amend, the first proposed amendment is to paragraph 33, which is essentially that George McCarter ("McCarter"), the former principal of Pearson Dunn Insurance Inc. ("PDI"), entered into an oral agreement with the Defendant, Lisa Arseneau ("Arseneau"), concerning "her book of business", which agreement is reflected in a May 31, 2009 email ("the May 2009 Email") that has been produced; the second proposed amendment is to paragraphs 37 and 38, which is essentially an allegation that Arseneau was constructively dismissed and, as a

result, any restrictive covenants or fiduciary duties that may have existed in favour of PDI were vitiated (“the Proposed Amendments”).

[3] On October 18, 2023, counsel for the Defendants, Ms. Gupta, emailed counsel for the Plaintiff, Mr. Gleave, attaching the proposed Amended Amended Statement of Defence and requesting the Plaintiff’s consent to the Proposed Amendments.

[4] On November 19, 2023, Mr. Gleave advised Ms. Gupta that the Plaintiff intended to oppose the Proposed Amendments.

[5] Mr. Gleave’s office subsequently delivered an Updated Trial Record to Ms. Gupta’s office that included a without prejudice proposed Reply to the proposed Amended Amended Statement of Defence.

Position of the Moving Party

[6] The Defendants submit that the Proposed Amendments are simply “propositions of law that flow from allegations of fact that are present in the Amended Defence or as an alternative legal proposition to the one already alleged therein”. They also contend that the Proposed Amendments were “foreshadowed” by Arseneau’s evidence given at her examination for discovery that took place on May 26, 2017 and during her cross-examination at the first trial of this action, and by the underlying facts as set out in the Amended Defence and the May 2009 Email. Given this, the Defendants argue that there is no prejudice that would result from the Proposed Amendments.

[7] With respect to the proposed amendment concerning the allegation that McCarter entered into an oral agreement with Arseneau regarding “her book of business”, the Defendants further submit that there is no surprise since the May 2009 Email was addressed in both parties’ written submissions at the first trial.

[8] The Defendants contend that the constructive dismissal allegation is not a new cause of action. Counsel for the Defendants concedes that, if this was being pled in a counterclaim and damages were being sought then the claim would be statute barred by the *Limitations Act*. However, here, the Defendants have not filed a counterclaim in the action and the constructive dismissal is being pled as an alternative defence. That is, it is simply pleading a conclusion in law based on facts which are already known to the parties as a result of discoveries and the first trial.

[9] In terms of the reason why the pleading amendments are being sought so late, counsel for the Defendants submitted that it was an “oversight” by legal counsel and her clients should not be impacted by said oversight in their ability to defend against the claim.

Position of the Responding Party

[10] The Plaintiff’s position is that these are new claims that are being pled some 8 years after the events in question and, in any event, the claims cannot succeed as pleaded. The Plaintiff claims that it would be prejudiced should the Defendants be allowed to amend their pleadings as they have requested, in part because they say that the amended pleadings are statute barred and, in part,

because of the fading of witnesses' memories, including that of McCarter, and that it has not prepared to prosecute a just cause case.

[11] Finally, the Plaintiff argues that the Defendants have not provided any evidence in support of an explanation for their failure to raise the constructive dismissal defence, let alone a satisfactory one.

Issue

[12] The issue raised on this motion is whether the Defendants should be granted leave to amend their pleadings at this stage of the proceedings.

The Law

[13] Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out a "presumptive" test for pleading amendments, allowing them at any stage of a proceeding unless prejudice can be demonstrated. The rule provides as follows:

On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[14] In *Yvonne Andersen et al. v. St. Jude Medical, Inc. et al.*, 2010 ONSC 77, Lax J. explained the effect of Rule 26.01 at para. 11:

Rule 26 clearly contemplates that pleadings may be amended on motion at any stage of an action and amendments are frequently granted on "the eve of trial", at trial, and during trial unless prejudice is demonstrated that cannot be addressed by costs or an adjournment.

[15] In *Horani v. Manulife Financial Corporation*, 2022 ONSC 2350, at para. 47, Vermette J. summarized the test for amending pleadings in civil proceedings, previously articulated by the Court of Appeal for Ontario in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, at para. 25, as follows:

- a. Rule 26.01 requires the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action.
- b. The amendment may be permitted at any stage of the action.
- c. There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source.
- d. The non-compensable prejudice may be actual prejudice, i.e., evidence that the responding party has lost an opportunity in the litigation that cannot be compensated

as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided.

- e. Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial.
- f. At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed.
- g. The onus to prove actual prejudice lies with the responding party.
- h. The onus to rebut presumed prejudice lies with the moving party.

[16] As a general rule, proposed amendments under Rule 26.01 are presumptively approved. However, there is no absolute right to amend a pleading and the court retains a residual discretion to deny the right to amend in certain circumstances. The factors the court may consider have been summarized as follows: (a) an amendment should be allowed unless it would cause an injustice not compensable by costs or an adjournment; (b) the proposed amendment must be shown to be an issue worthy of trial and *prima facie* meritorious; (c) no amendment should be allowed which, if originally pleaded, would have been struck; and (d) the proposed amendment must contain sufficient particulars: see *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2012 ONSC 6000, at para. 7, affirmed 2013 ONSC 1251, affirmed 2013 ONCA 626, leave to appeal refused, [2013] S.C.C.A. No. 489, 2014 CarswellOnt 2617.

Analysis

[17] For the reasons set out below, I conclude that leave should be granted to the Defendants for the Proposed Amendments.

[18] First, I find that allowing the amendments would not cause an injustice not compensable by costs or an adjournment. The factual matrix of the working arrangement between Arseneau and PDI is already firmly in issue and the facts in support of both parties' positions in this regard are likely to be led as evidence in any event. It is difficult for the Plaintiff to assert any prejudice to the Defendants' allegations of an oral agreement or constructive dismissal given that the statement of claim puts the parties' working relationship, the nature of Arseneau's employment and compensation arrangement, and the termination of same squarely in issue. It would be unjust to deprive Arseneau of the ability to plead her full case.

[19] With respect to the presumed prejudice as a result of the lengthy delay in seeking the Proposed Amendments, in my view, the Defendants have rebutted that presumption by showing that the facts underlying the Proposed Amendments have been known to the parties since before the first trial, the relevant documents have been produced, and some testimony previously elicited on aspects of the issues.

[20] In my view, the Plaintiff has not met its onus of proving actual prejudice. To meet that onus, the Plaintiff was obliged to adduce specific evidence of actual prejudice: see *1588444 Ontario Ltd.*, at para. 31.

[21] The Plaintiff has not filed evidence alleging any prejudice as a consequence of the Proposed Amendments that cannot be compensated by costs or an adjournment. There is no indication that any specific witnesses are no longer available. Rather, counsel for the Plaintiff submits that it will be negatively impacted by the faded memory of its principal witness, McCarter, and, potentially, other witnesses as to the events and facts relating to the Proposed Amendments. However, as held by the court in *1588444 Ontario Ltd.*, at para. 31, “[n]oting that witnesses’ memories may have faded is really just a generalized description of presumed prejudice. Such evidence lacks the required degree of specificity to qualify as evidence of actual prejudice”. The parties have had extensive disclosure, and have had the benefit of discoveries and of cross-examinations at the first trial. Much of the evidence has been canvassed. There is no evidence that the passage of time since this action was commenced in 2019 has affected McCarter’s ability to offer evidence in this proceeding. Thus, the alleged actual prejudice regarding his evidence is hypothetical only. The absence of evidence in this regard is revealing.

[22] With respect to the adequacy of the explanation for the delay in seeking the Proposed Amendments, I note that this was only a submission made by counsel at the hearing of the motion that it was due to counsel’s oversight and was not put in as evidence before me. However, I accept and adopt the approach taken by the court in *158844 Ontario Ltd.* explained, at para. 42: “... if a moving party were able to establish that the responding party would suffer no non-compensable prejudice by reason of the amendment, then it would be an odd result if the presumption was not rebutted simply because an adequate explanation for the delay had not been established”. Since I have found that there is no non-compensable prejudice in the circumstances here, the adequacy of the explanation for delay carries less weight in the determination to be made.

[23] Second, I am satisfied that the Proposed Amendments are tenable at law.

[24] This is a motion to amend pleadings. The focus of the test for granting leave is on prejudice rather than the merits of the amended pleadings. Thus, I am not required at this stage to make a binding determination regarding the applicability of a limitation period to the new allegations that the Defendants want to advance against the Plaintiff. Even if the amendments are allowed, the Plaintiff is able to plead the application of any limitation period and the issue can be determined at trial.

[25] Finally, I find that the Proposed Amendments contain sufficient particulars. They serve to add a new defence based primarily on facts already pleaded. The new allegations are not inconsistent with the original pleading. The Defendants are not withdrawing an admission or adding a new counterclaim by which they are seeking damages.

[26] The following passage from Morden & Perrell, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014), at p. 142, is frequently cited to explain when a proposed amendment does not constitute a new cause of action:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

[27] The Plaintiff relies on the decision in *Family Delicatessen Ltd. v. London (City)*, 2006 CarswellOnt 1021, [2006] O.J. No. 669 (Ont. C.A.), in support of its argument that there is no justification for the inordinate delay in the Defendants bringing their motion to amend. In that case, at para. 6, the court explained: “while delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.”

[28] In *Family Delicatessen*, the City had participated in the proceeding for six years as a “nominal defendant”. The proposed amendment would have put the City in a very different position with serious allegations of misrepresentation being brought against it. The court found that the City’s litigation strategy may well have been “entirely different” had the proposed amendment been made earlier in the proceeding. The court concluded that the prejudice to the City could not be rectified by additional discoveries since it “could not be put in the position it would have been to meet these allegations had they been made in a timely fashion” (at para. 7).

[29] Most importantly, in *Family Delicatessen*, the court held that there was no prejudice to the appellants by a denial of the amendments since, among other things, refusing the motion to amend did not negatively alter their position in the litigation. In the case before me, I am not able to reach that same conclusion.

[30] The Plaintiff also relied on *1588444 Ontario Ltd.*, a case which I find to be distinguishable. In that case, the motion judge found that the proposed amendments to the defence would effectively restart the litigation process and the plaintiff had lost the ability to obtain evidence to respond to a claim of arson. Here, the Proposed Amendments would not effectively restart the litigation and the Plaintiff is not facing an impediment to finding evidence to respond to the new allegations.

[31] I am satisfied that any presumed prejudice due to the delay in seeking the Proposed Amendments has been rebutted. Counsel for the Defendants has shown that the facts pleaded and certain evidence given relate to the Proposed Amendments. Whether or not Arseneau is an employee has been a key issue between the parties. It flows from the Plaintiff taking the position that there was (or was to be) an employment agreement between PDI and Arseneau that the facts surrounding the termination of the working relationship would be relevant and a legal position taken by the Plaintiff and arguments made in respect of same.

[32] In my view, there is no “significant harm to a legitimate litigation interest” if the Proposed Amendments are allowed: *Kosteckyj v. Paramount Resources Ltd.*, 2022 ABCA 230 (Alta. C.A.), at paras. 12, 41-42. The addition of the Proposed Amendments would not change the inherent nature of the evidence to be called or require amendments to the expert reports on damages.

[33] It should be noted, however, that a party who seeks an amendment at so late a stage as the trial runs the risk of being obliged to bear the costs if the opposing party chooses to avail itself of an adjournment or to conduct further examination for discovery.

Disposition

[34] In the result, the Defendants’ motion is granted. Leave is hereby given to the Defendants to amend their Amended Statement of Defence in accordance with the Amended Amended Statement of Defence, in the form attached as Schedule “A” to the draft Order submitted.

[35] The Plaintiff is entitled to respond to the amended pleading by way of a reply.

[36] I had advised the parties on November 28, 2023 that, if it wished, the Plaintiff could request permission for an adjournment of the trial in order to allow it to continue discoveries.

[37] I may be spoken to about costs of this motion.

MacNEIL J.

Released: January 10, 2025