CITATION: Kamaleddine v. Fancamp Exploration Ltd., 2025 ONSC1331
COURT FILE NO.: CV-19-617605
DATE: February 27, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Fouad Kamaleddine and FFK Consulting Services Inc. v. Fancamp Exploration Ltd. and The Magpie Mines Inc.;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Nathaniel Read-Ellis *for Fancamp Exploration Ltd. ("Fancamp")* :
Matthew A. Fisher *for Fouad Kamaleddine and FFK Consulting Services Inc.;*

HEARD: February 25, 2025.

REASONS FOR DECISION

[1] The defendant, Fancamp Exploration Ltd. ("Fancamp") brings this motion for an order granting it leave to amend its statement of defence. The motion is opposed by the plaintiffs, primarily because it is quite late, namely two weeks before the scheduled pretrial conference and eleven weeks before the scheduled five-day trial.

Background

[2] Mr. Kamaleddine was a consultant for the defendants providing research and development services for Fancamp's mining projects. The Magpie Mines Inc. ("Magpie") is a subsidiary of Fancamp. Fancamp terminated the consulting agreement on November 21, 2018.

[3] Mr. Kamaleddine and his consulting firm, FFK Consulting Services Inc. ("FFK"), commenced this action on April 16, 2019 seeking recovery of the liquidated damages specified by the agreement and unpaid invoices. The defendants retained one lawyer and served a joint statement of defence on June 21, 2019.

[4] There were productions and discovery, and the plaintiffs set the action down for trial on August 3, 2023. On November 29, 2023 the plaintiff filed a Confirmation Form. In February, 2024, Fancamp changed lawyers to the ones it has now. On April 1, 2024 these lawyers served a notice of motion on behalf of Fancamp seeking to amend the statement of claim and add a counterclaim. These amendments included the ones now being sought.

[5] On April 2, 2024 the case came before Justice Wilson in a case conference resulting from trial scheduling court. The Fancamp motion was discussed along with a motion by Magpie's lawyer for a removal order. Her Honour made an endorsement stating that she was not prepared to delay fixing the trial date and that "motions if necessary, should have been brought prior to the action

being set down for trial." Her Honour scheduled a pretrial conference for March 12, 2025 and five-day trial starting May 12, 2025.

[6] Fancamp scheduled its motion for the first available date, February 25, 2025. On January 10, 2025 Fancamp amended its notice of motion removing the proposed counterclaim and served it with a brief affidavit sworn by its president. The plaintiffs waited until February 24, 2025, the day before the return of the motion, to serve and upload a responding motion record. The defendants served and uploaded a reply motion record. These late filings grossly violated the rules, but I reluctantly allowed them as the records were not lengthy.

Proposed amendments

[7] Mr. Fisher argued that Justice Wilson had "ruled" on this motion and barred it. She did no such thing. Her endorsement simply stated that she would not allow the motions to stop her from scheduling the trial. She proceeded to schedule the trial. I move on to the substance of the motion.

[8] Rule 26.01 makes it mandatory that the court "at any stage of an action" grant leave to amend pleadings on such terms as are just, "unless prejudice would result that could not be compensated for by costs or an adjournment."

[9] Prejudice is the issue in this motion. There are two types of relevant non-compensable prejudice: actual prejudice such as the loss of a witness relevant to the amendments; or a presumption of prejudice resulting from an inordinate delay in moving for the amendments. There is no dispute that it is the second type of prejudice, the presumption of prejudice resulting from a delay in bringing the motion, that is the issue in this motion. The moving party must rebut this presumption with an adequate justification for the delay and proof of the absence of prejudice to the opposite side; *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42 (CanLII) at para. 39.

[10] Was the delay in bringing the motion inordinately long? It was. The relevant time period is from the commencement of the action to the commencement of the motion to amend; see *Loney v. John Doe*, 2024 ONCA 748 (CanLII) at para. 17. In this case that was five years, namely the time period required by Rule 48.14 to have the action ready and set down for trial without an administrative dismissal order. In addition, I note that the motion was brought four years and ten months after the statement of defence was served, and eight months after the action was set down for trial; and is being heard eleven weeks before trial. In *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (ON CA) at para. 6, prejudice was presumed after a delay of six years. This delay, therefore, raises a presumption of prejudice that needs to be rebutted.

[11] Was there an adequate explanation for the delay? The explanation proffered by the plaintiffs was that they left the pleadings up to their previous lawyers who overlooked bringing this motion. This was the explanation that Master Muir found acceptable in *1632097 Ontario Limited v. 1338025 Ontario Inc.*, 2011 ONSC 5909 (CanLII) at para. 10. On the other hand, in *Horani v. Manulife Financial Corporation*, 2023 ONCA 51 (CanLII) at para. 34 the Court of Appeal was less impressed with this explanation. Suffice it to say here that the explanation was only passable.

[12] However, the core issue on this motion is whether there is non-compensable prejudice to the plaintiffs given the proximity of the trial. In *Horani, supra.,* para. 35 the Court of Appeal held that there was non-compensable prejudice with the proposed amendments in that case (ie. the addition of a punitive damage claim) in an amendments motion heard six weeks before a 32-day trial, as the proposed amendments depended on new facts, would have affected the way the respondent conducted its litigation and would likely jeopardize the trial as a result, a trial already delayed. In short, there is non-compensable prejudice with an amendments motion heard close to trial that significantly changes the landscape of the case for the respondent. The Court upheld the motion's judge dismissal of the motion.

[13] Do the proposed amendments in this motion so significantly change the landscape of the case for the plaintiffs that they will suffer such non-compensable prejudice? The proposed amendments have the following main features:

a) *Divergence of interest:* The amendments make it clear that the two defendants have separate interests and defences. The divergence of interest is something the plaintiffs have known for a year and should not be a surprise. In related new paragraphs 23, 24 and 32 there are the allegations that the additional services were rendered to Magpie, not Fancamp. These allegations do not appear to involve further production.

b) *Termination of previous agreements:* In new paragraphs 4, 29, 30 and 31 Fancamp pleads a term of the 2018 consulting agreement and asserts that this ended all previous agreements. This is a legal conclusion that does not appear to involve more production, only some discovery.

c) *Approval Process:* There is an allegation in new paragraphs 6, 7, 8 and 24 that Mr. Kamaleddine's entitlement to payment for additional services required the prior resolution of the Fancamp board of directors given Fancamp's limited cashflow and high expenses. It is implied that no such resolution was obtained. These are new facts. But the new facts are limited in scope. There will be no need to prove the alleged limited cashflow and high expenses. There will be a need for Fancamp to prove that this alleged requirement formed an implied term of the consulting agreement. This can be explored in a limited discovery, and with no apparent further production.

d) *Particularization:* In several new paragraphs (ie. new paragraphs 17, 18, 19, 26, 27 and 28) there is just a particularization of existing pleading. This should have been covered at discoveries.

e) *New payee:* In new paragraph 33 there is the allegation that the payee on certain invoices was stated to be FFK and not Mr. Kamaleddine, the party to the consulting agreement, thereby rendering the invoices unenforceable. This again is more of a legal conclusion that does not appear to require further production.

f) *Penalty clause:* In new paragraphs 36, 37, 38 and 39 there is a new defence pleaded that the Payout Clause on its face, and despite its expressed wording to the contrary, is a penalty clause and not a genuine pre-estimate of damages, thereby rendering the clause unenforceable. Although a new defence, these pleadings do not require further production, and can be dealt with in a brief discovery.

g) *Unconscionability:* The last sentence in new paragraph 39 contains the new allegation that the Payout Clause was unfair to Fancamp and resulted from Mr. Kamaleddine taking advantage of his position as a director of Fancamp when entering the consulting agreement. This is a new and substantive defence that introduces new facts and requires further production concerning a clause that represents half of the plaintiffs' claim, all just two weeks before the pretrial and eleven weeks before trial. It is comparable to the punitive damages claim amendment in *Horani* that was rejected by the Court on a motion heard six weeks before trial because it changed the litigation landscape for the respondent and amounted to non-compensable prejudice as a result. This sentence in new paragraph 39 similarly changes the litigation for the plaintiffs. The plaintiffs would have run their case differently had they faced this allegation.

[14] Rule 26.01 requires the court to grant leave to make amendments to pleadings at any stage "on such terms as are just" unless the proposed amendments cause non-compensable prejudice to the respondent. Based on my above noted review of the proposed amendments in this motion, I have concluded that the most just result would be to grant Fancamp the requested leave except for the last sentence of new paragraph 39. That last sentence of new paragraph 39 creates non-compensable prejudice for the plaintiffs for the reasons stated.

Conclusion

[15] For these reasons, I grant Fancamp the requested leave except for the last sentence of new paragraph 39. The scheduling of the remaining pleadings and any limited discoveries concerning these amendments can be dealt with at the pretrial conference on March 12, 2025.

[16] Concerning costs, Fancamp served and filed a bill of costs showing $8,860.57 in partial indemnity costs, $13,029.42 in substantial indemnity costs and $14,419.04 in actual costs. The plaintiff filed no costs outline. Mr. Fisher stated that, in the event of a loss by the plaintiffs, the costs should be determined by the trial judge given the immediacy of the trial.

[17] I have decided to award no costs. While largely successful, Fancamp does not deserve costs. It inordinately delayed this motion and gave only a passable explanation for the delay. They lost on an important part of their motion. The result is largely an indulgence for the defendants. I so order.

DATE: February 27, 2025

ASSOCIATE JUSTICE C. WIEBE