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Mazzuca v. Silvercreek Pharmacy Ltd.

Between
Elsa Mazzuca, plaintiff, and
Silvercreek Pharmacy Limited, defendant

[2000] O.J. No. 3090
Court File No. 98-BN-04673

Ontario Superior Court of Justice
Molloy J.

Heard: August 14, 2000.
Judgment: August 17, 2000.
(10 paras.)

Practice — Pleadings — Amendment of pleadings — Name of party, misnomer.

Motion by the plaintiff Mazzuca to substitute La Gondola's Ladies Lingerie Boutique as plaintiff. Mazzuca had brought a claim in 1998 arising from a 1993 fire that destroyed her business. The fire originated at the premises of the defendant Silvercreek Pharmacy. Mazzuca ran the store that was destroyed. The store was owned by La Gondola. Mazzuca was the sole officer, director and shareholder of La Gondola. The limitation period had passed for La Gondola to bring its own claim. Silvercreek stated that it suffered prejudice as La Gondola's accountant had destroyed records in 1995 that could have been used in the litigation.

HELD: Motion allowed. Silvercreek did not suffer prejudice as it would have been in precisely the same position had La Gondola brought the action in 1998 rather than Mazzuca. The error made by Mazzuca's lawyer in naming her as plaintiff was a misnomer. It was always clear that the action was brought to recover damages to the store caused by the fire. Correcting the misnomer had no impact on Silvercreek.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 26.01.

Counsel:

R. Naimark, for the plaintiff (moving party).
J.D. Strung, for the defendant (responding party).

¶ 1 **MOLLOY J.** (endorsement):— This action was commenced to recover damages for lost inventory and loss of business sustained by a boutique named La Gondola as a result of a 1993 fire in the adjacent pharmacy owned by the defendant Silvercreek Pharmacy Limited. The action was commenced in the name of Elsa Mazzuca as plaintiff. The plaintiff now moves to substitute La Gondola's Ladies Lingerie Boutique ("La Gondola") as plaintiff.

¶ 2 The statement of claim was issued in June 1998, within the 6 year limitation period. It is apparent that the claim against the defendant is in respect of the 1993 fire and is being advanced by the owner of the business next-door, La Gondola. The named plaintiff is Elsa Mazzuca. By the time counsel of record for the plaintiff discovered that the actual owner of the business was not Elsa Mazzuca, but rather a corporation known as La Gondola's Ladies Boutique Lingerie Ltd., the limitation period had expired. However, the defendant is not in any way prejudiced by the commencement of the action in the name of Elsa Mazzuca rather than in the name of her company. She is the sole officer, director and shareholder of the company. Although the company is a separate legal entity, naming the company as a party at an earlier stage would not have altered the defendant's position in the action as there are no other individuals involved who might have been a source of information or evidence in respect of the claim. The situation for the defendant is the same whether the plaintiff is Ms. Mazzuca or her company. The defendant had specific and detailed notice within the limitation period as to the nature of the claim against it and the fact that it was being asserted by the business next door. Its defence of the action is not affected by whether the legal owner of the business is Ms. Mazzuca or her company.

¶ 3 The defendant alleges that it is prejudiced by the fact that in 1995 the accountant for La Gondola destroyed records that could potentially be used by the defendant to buttress the financial statements of the company, in which the value ascribed to its inventory is significantly lower than the value placed on it by the independent adjuster shortly after the fire. I accept that the destruction of those documents might give rise to prejudice. However, it is prejudice which arose in 1995, prior to the expiration of the limitation period. Therefore, if the action had been commenced in 1998 by La Gondola (rather than by Ms. Mazzuca), the defendant would be in precisely the same position with respect to those documents as it is now. The prejudice contemplated by the Rules is one arising from the amendment sought: Hanlan v. Serensky, (1996) 39 C.C.L.I. (2d) 107 (Ont. C.A.); Lambkin v. Chapeskie (1983) 37 C.P.C. 158 (Ont. Co. Ct.).

¶ 4 In my view, the error made by plaintiff's counsel in naming the plaintiff is properly characterized as a misnomer. As such, the decision of the Supreme Court of Canada in Ladouceur v. Howarth, [1974] S.C.R. 1111 is applicable. In that case counsel was retained by Paul Ladouceur to commence an action for damages for personal injuries sustained in a car accident. However, the writ was issued with Conrad Ladouceur (Paul's father) as the plaintiff. The Supreme Court held that this was merely a misnomer and could be amended. Counsel had not been retained by the father and had always intended to sue in the name of the person who had sustained injuries. A determining factor was that the defendant was not misled and was not prejudiced by the amendment. To a similar effect is another father and son case, Dill v. Alves, [1968] 1 O.R. 58 (C.A.). In that case the action was mistakenly brought in the name of the son for injuries and damages sustained by the father. The Court allowed the amendment and emphasized the fact that the defendant knew that the action was in respect of injuries to the father and was therefore not prejudiced.

¶ 5 In the case before me, the action was mistakenly brought in the name of Ms. Mazzuca. This is not a situation in which a conscious decision was made to sue in her name rather than in the name of her company, La Gondola. It was simply an error. Counsel always intended, and indeed was instructed, to bring the action to recover damages sustained to the business. The defendant always understood that it was the owner of the business who was suing for damages and defended on that basis. Correcting the misnomer has no impact on the defendant. There is no new cause of action being asserted and no new facts are alleged.

¶ 6 Whether an amendment should be granted to correct the misnomer is governed by Rule 26.01 which provides that the amendment shall be granted unless it would cause prejudice that cannot be compensated for by costs or an adjournment. The amendment in this case causes no prejudice. Therefore, in my view, leave to amend must be granted.

¶ 7 Cases that were decided prior to 1984 when the mandatory language in Rule 26.01 was first introduced must be regarded with caution. Most of the cases cited by the defendant can be distinguished on that basis. Also, a careful distinction must be made between cases in which the proposal is to add a defendant who had not previously been a party to the litigation and those in which the proposal is merely to change the name of the plaintiff. Generally speaking, the purpose of a limitation period is to provide a sense of security to people so they know after a specified time that they do not need to be concerned about the possibility of claims arising from a past incident, do not need to locate or preserve evidence in respect of the incident and can plan their lives accordingly: see Deaville v. Boegeman (1984), 48 O.R. (2d) 725, 14 D.L.R. (4th) 81 (C.A.). Therefore, courts are cautious about adding strangers to an action as defendants after a limitation period has expired: Swain Estates v. Lake of the Woods Hospital (1992), 9 O.R. (3d) 74 (C.A.); Swiderski v. Broy Engineering Ltd. In particular, it has been held that an amendment to add a party to an action after the expiry of a limitation period is not automatic, even in the absence of prejudice: Swiderski v. Broy, supra. The courts have refused to add parties to an action after the expiry of a limitation period unless "special circumstances" are shown: Swain Estates v. Lake of the Woods, supra; Swiderski v. Broy, [1992] O.J. No. 2406, Knudsen v. Holmes (1995), 22 O.R. (3d) 160 (Ont. Ct. Gen. Div.). However, the same considerations do not apply to a person who was formally put on notice of a claim and made a party to an action within the limitation period. In my opinion, it is not necessary to show special circumstances in order to substitute a plaintiff for an existing plaintiff when no prejudice is caused by the amendment. However, if special circumstances are required, they exist in this case. The Court recognized in Swain Estates that the fact that proposed defendants were already involved in the action (although in a different capacity) was a factor that could be considered a "special circumstance". In the case before me, not only has the defendant been involved in the lawsuit, it has been involved in exactly the same capacity and in respect of exactly the same claim.

¶ 8 The defendants also rely upon the decision of T.K. Group & Associates v. Wolfe (1998), 21 C.P. C. (4th) 366 (Ont. Ct. Gen. Div.) in which the court refused to substitute an individual plaintiff for the named plaintiff "T.K. Group & Associates", relying on case law to the effect that where an original plaintiff had no cause of action, a new plaintiff could not be substituted. However, the cases relied upon were all prior to the 1984 amendments to the Rules. Also, the court in T.K. Group & Associates v. Wolfe does not appear to have been directed to binding authorities such as Dill v. Alves, supra, or Ladouceur v. Howarth, supra, in which a new plaintiff was substituted for an existing plaintiff who did not have a cause of action. Further, the court does not appear to have been directed to the distinction

between adding a plaintiff but not changing the nature of the claim against the existing defendant and adding a defendant who is essentially a stranger to the action and against whom a claim had not previously been asserted. Finally, in any event, the decision in T.K. Group is distinguishable from the case before me on two bases: (1.) the originally named plaintiff T.K. Group & Associates was not a legal entity; and (2.) the court found that the defendants in that case had been prejudiced.

¶ 9 Accordingly, in my opinion, the plaintiff is entitled to the relief sought. An order shall issue substituting La Gondola Ladies Boutique and Lingerie Limited for the originally named plaintiff and permitting the plaintiff to deliver an amended statement of claim in the form attached as Exhibit A to the affidavit of Thomas Hanrahan sworn February 1, 2000.

¶ 10 The plaintiff has been successful on the motion. However, it was the error of the plaintiff, or her solicitors, that made this motion necessary. In the circumstances, it was not unreasonable for the defendant to resist the motion. Therefore, there shall be no order as to costs.

MOLLOY J.

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