GOMA - and - RAGHUNANDAN Court File: 08-CV-352555 PD3

David Cheifetz, for Δs. moving parties Nov. 2/11
Ryan Naimark, for Ps
Motion argued. Reserved

Master Ronald Dash

Nov. 7/11

For written reasons attached I hereby order as follows:

(1) The motion by the defendants for leave to amend their statement of defence is dismissed.

(2) The defendants shall pay to the plaintiffs their costs of this motion within 30 days fixed in the sum of $4,000.00.

Master Ronald Dash

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

MOTION RECORD

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SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE
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THIS 20th DAY OF OCTOBER 2011.
Zabongo.
Zarek, Taylor, Grossman, Hanrahan
Lawyers for the Plaintiffs

CITATION: Goma v. Raghunandan, 2011 ONSC 6598
COURT FILE NO.: 08-CV-352555
DATE HEARD: November 2, 2011
ENDORSEMENT RELEASED: November 7, 2011

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MATHEW GOMA and JOYCE GOMA-GHORI v. CHAMMATTIE RAGHUNANDAN and VERRAPM RAGHUNANDAN

BEFORE: Master R. Dash

COUNSEL: Ryan Naimark, for the plaintiffs

David Cheifetz, for the defendants

REASONS FOR DECISION

[1] Both plaintiffs were injured in a motor vehicle accident on June 23, 2006. The defendants were served with the statement of claim on April 15, 2008. The statement of defence pleads contributory negligence against the plaintiff Mathew Goma ("Mathew"), the operator of the plaintiffs' vehicle, but no counterclaim was advanced against Mathew for contribution and indemnity for the injuries suffered by the plaintiff Joyce Goma-Ghori ("Joyce"), a passenger in the plaintiffs' vehicle. In May 2011 the defendants first sought to claim contribution and indemnity from Mathew for the damages suffered by Joyce. Realizing that the limitation period for advancing a claim for contribution and indemnity set out in section 18(1) of the *Limitations Act, 2002*[1] ("Limitations Act") had passed and that a separate action or counterclaim for contribution could not be advanced, the defendants seek to advance such claim by way of equitable set-off and assert that the limitation period in section 18(1) does not apply.

[2] On this motion the defendants seek to amend their statement of defence by adding a claim for equitable set-off. The plaintiffs assert that the amendments are not tenable. The issues are (a) whether a claim for contribution and indemnity against plaintiff A for the damages claimed by plaintiff B can be advanced by way of equitable set-off or whether it must be asserted by way of counterclaim and (b) whether such claim for equitable set-off is subject to the limitation period in section 18(1) of the *Limitations Act*. Neither issue has been directly addressed by the jurisprudence to date.

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[1] *Limitations Act, 2002*, S.O. 2002, Chapter 24 Schedule B

LEAVE

[3] The plaintiffs set this action down for trial on May 15, 2009. On March 1, 2010 the defendants completed the certification form required to set pre-trial and trial dates and indicated no amendments to the pleadings would be required. On June 16, 2010 a pre-trial date and a trial date were fixed on consent of both parties. The defendants' pre-trial conference memorandum indicated that no steps were needed to be taken before trial. The pre-trial was conducted on March 23, 2011. In May 2011 the defendants' lawyer first realized that he had failed to counterclaim against Mathew for contribution to Joyce's damages and that he was clearly out of time to now bring a fresh action or add a counterclaim. When the plaintiffs refused to consent to adding a counterclaim, this motion to amend the statement of defence to add a claim for equitable set-off was served.

[4] Having consented to having this action placed on a trial list, the defendant requires leave pursuant to rule 48.04 to bring this motion. Although rule 26.01 permits a motion to amend at any stage of an action, that does not obviate the need for leave. Clearly in my view the defendant would be unable to meet the test articulated in *Hill v. Ortho Pharmaceutical (Canada) Ltd.*[2] and numerous other decisions that "there must be a substantial and unexpected change in circumstances" before leave is granted. The plaintiffs did nothing to surprise the defendants or to change the playing field. The only thing unexpected was the realization by the defendants' lawyer that he had "screwed up" by not advancing the counterclaim within the limitation period. In my view a lawyer's realization that he has been negligent is not the sort of unexpected change in circumstances contemplated by this principle so as to relieve the defendants' lawyer of the consequences of his negligence.

[5] On the other hand, the courts have recognized that a less stringent and more flexible test for leave is to be applied when the motion involves serious matters affecting substantive rights as opposed to routine interlocutory procedural matters. In *Tanner v. Clark*[3], the court stated that where substantive rights are affected, the merits of the requested relief become a fundamental consideration to ensure the case is fully canvassed at trial subject to any prejudice to the responding party that cannot be compensated by costs. In my view the claim for contribution and indemnity from Mathew for Joyce's injuries is a serious matter affecting the defendants' substantive rights. If the amendments are granted the plaintiffs can be compensated for any costs thrown away. No other prejudice is alleged. Leave is granted to bring this motion.

DO LIMITATION PERIODS APPLY TO EQUITABLE SET-OFF?

[6] Section 4 of the *Limitations Act* provides that "Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." Under section 5(1) of the Act a claim is discovered on the earlier of the date that the party actually knew of the matters necessary to discover a claim and the date that a reasonable person ought to have known of those matters. Section 5(2) creates a presumption that a person discovered the claim "on the day the act or omission on which the claim is based took place, unless the contrary is proved."

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[2] *Hill v. Ortho Pharmaceutical (Canada) Ltd.*, [1992] O.J. No. 1740 (Gen. Div.) at para. 3

[3] *Tanner v. Clark*, [1999] O.J. No. 581 (Gen. Div.) at para. 26

[7] Section 18 of the *Limitations Act* provides with respect to claims for contribution and indemnity:

> **18.** (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

[8] In the result, the two-year limitation starts to run on the date that the statement of claim was served unless the litigant proves that he discovered that he had a claim for contribution and indemnity at a later date and could not with reasonable diligence have discovered it earlier. In this case the defendants concede that the limitation period under section 18 of the *Limitations Act* expired two years after they were served with the statement of claim and they do not assert that it could not have been reasonably discovered at any later date. They concede they cannot now initiate a claim for contribution and indemnity by commencing a new action or by amending their statement of defence to add a counterclaim (which by virtue of rule 1.03 is considered to be a separate action). The defendants submit however that if they assert their claim for contribution as an equitable set-off in their statement of defence and not as a counterclaim no limitation period applies.

[9] In *Canada Trustco Mortgage Co. v. Pierce Estate*[4] the court of appeal determined that a defence of equitable set-off was not subject to the two-year limitation period in sec. 38(3) of the Trustee Act[5] because an equitable set-off is more accurately pleaded as a defence rather than a separate counterclaim against the plaintiff. The Trustee Act section provides that an action on behalf of a deceased person shall not be brought more than two years after the death. *Canada Trustco* was not dealing with a claim for contribution and indemnity. In that action the bank sued on a loan and the defendant sought to amend the defence to plead an equitable set-off for damages based on improvident liquidation of security and negligence, breach of contract and fiduciary duties in granting the loan.

[10] The plaintiffs argue that *Canada Trustco* should be confined to the wording of the *Trustee Act* which sets a limitation period for an "action", whereas section 18 of the *Limitations Act* bars "claims" for contribution and indemnity two years after service of the statement of claim. That is an attractive and logical argument since clearly the defendants seek to advance a "claim" for contribution and indemnity whether it be by means of a counterclaim or by means of a defence of equitable set-off.

[11] In *Spiral Aviation Training Co. v. Attorney General of Canada*[6], a breach of contract case for sale of goods where the defendant sought to amend to plead equitable set-off for costs of late

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[4] *Canada Trustco Mortgage Co. v. Pierce Estate*, [2005] O.J. No. 1886, 197 O.A.C. (C.A.) at paras. 43 and 46

[5] *Trustee Act*, R.S.O. 1990, c. T.23

[6] *Spiral Aviation Training Co. v. Attorney General of Canada*, 2010 ONSC 2581, 2010 O.J. No. 1953 (S.C.J.) at paras. 6 and 8.

delivery, Beaudoin J. interpreted *Canada Trustco* as follows: "That Court held that equitable set-off operates as a substantive defence to which a statutory limitation period is inapplicable."

[12] In my view this is a most unjust result when applied to claims for contribution and indemnity. At its essence the defendants' "claim" for contribution and indemnity is to compel the plaintiff Mathew to contribute to and indemnify the defendants for any damages awarded to the plaintiff Joyce. The claim is the same and the result is the same[7] whether the contribution and indemnity is sought by means of set-off or by means of counterclaim. It is the advancing of such "claim" by any means that section 18 of the *Limitations Act* bars after two years. Although neither *Canada Trustco* nor *Spiral Aviation* were dealing with claims for contribution and indemnity, I am bound by the broad and definitive statement from a superior court judge that claims for equitable set-off are not subject to a limitation period. This is an issue that should be revisited by a higher court as it applies to claims for contribution and indemnity if such claims can be advanced by equitable set-off.

CAN A CLAIM FOR CONTRIBUTION AND INDEMNITY BE ADVANCED BY EQUITABLE SET-OFF?

[13] Rule 27.01(1) provides:

> A defendant may assert, by way of counterclaim in the main action, any right or claim against the plaintiff including a claim for contribution or indemnity under the *Negligence Act* in respect of another party's claim against the defendant.

[14] Not one case has been referred to me that determined whether a claim for contribution and indemnity against plaintiff A for injuries suffered by plaintiff B can be asserted by equitable set-off. While rule 27.01(1) permits such claim to be asserted by means of counterclaim, it does not address whether such claim can be asserted instead by pleading equitable set-off in the statement of defence. It is therefore necessary to determine this issue by examining first principles applicable to equitable set-off.

[15] The test for equitable set-off as summarized by the Supreme Court of Canada in *Holt v. Telford*[8] is as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
>
> 5. Unliquidated claims are on the same footing as liquidated claims.

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[7] The result may not be the same however if Mathew's damages, as reduced by his contributory negligence, do not exceed his percentage contribution to Joyce's injuries, since the set-off is only against Mathew's award.

[8] *Holt v. Telford*, [1987] 2 S.C.R. 193. [1987] S.C.J. No. 53 at para. 33

[16] In my view the defendants cannot satisfy either the second or third of the requirements for equitable set-off. Firstly, the grounds asserted by the defendants against Mathew do not go the root of the claim by Mathew. The root of Mathew's claim is for damages to compensate him for his injuries. Joyce has asserted a separate claim for damages for her own injuries. It cannot be said that Joyce's claim for damages, for which contribution is sought against Mathew, go to the root of Mathew's claim for his own damages. Although both injuries arose in the same accident, they are separate claims. Whether or not Mathew is partly responsible for Joyce's injuries it cannot be said that Joyce's injuries or Mathew's contribution to Joyce's injuries go to the root of Mathew's separate claim.

[17] Secondly, the claim for contribution from Mathew for Joyce's injuries is not connected to Mathew's claim for his own damages, let alone so clearly connected that it would be manifestly unjust to allow Mathew to enforce his claim against the defendants without taking into account his contribution, if any, to Joyce's injuries. Mathew's claim and Joyce's claim for their separate damages each stand on their own. While Mathew's *conduct* may be connected to both his and Joyce's injuries, it cannot be said that the claim for contribution to Joyce's injuries as a result of that conduct is in any manner connected with Mathew's claim for damages for his own injuries. Mathew is entitled to recover against the defendants for his damages as caused by the defendants reduced by any contributory negligence on his part. In my view it would not be unjust for Mathew to enforce his claims for his own injuries without taking into account whether he may be liable for part of Joyce's injuries.

[18] It has been said in some cases that to establish a right to a set-off, the defendants' claim must have been brought about by, contributed to or otherwise so bound up with the plaintiff's claim that it would be unconscionable to permit the plaintiff to proceed without permitting a set-off.[9] It cannot be said that the defendants' claim against Mathew for contribution for Joyce's injuries has been brought about by Mathew's claim for damages, contributed to by Mathew's claim for damages or so bound up with Mathew's claim for damages.

[19] "Judges have been careful to note that not every cross-claim will give rise to an equitable set-off."[10] Indeed, because of the requirement that the equitable grounds go to the very root of and be so closely connected to the plaintiff's claim before a set-off is allowed, there will not "be many cases in which a court will allow equitable set-off. The cases will be confined to those where it would be manifestly unjust to refuse the relief."[11] Since the claim against Mathew for Joyce's injuries do not go to the very root of Mathew's claims for his own injuries this is not one of the rare cases where what amounts to a counterclaim can be pleaded by means of equitable set-off.

[20] The defendants cite *Latimer v. Ellis*[12] as authority for their position that a claim for contribution and indemnity can be asserted by means of equitable set-off. What *Latimer* does stand for is the proposition that a defendant is entitled to claim contribution against plaintiff A

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[9] *Agway Metals Inc. v. Dufferin Roofing Ltd.*, [1991] O.J. No. 9 (Gen. Div.) at p. 3; *Carevest Capital Inc. v. Memoirs Estates Inc.*, [2008] O.J. No. 4333 (S.C.J.) at para.18

[10] *Cobra Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1098] B.C.J. No. 1994 (C.A.) at para. 40.

[11] *Cobra Industries*, supra at para.44.

[12] *Latimer v. Ellis*, [1935] O.J. No. 47, [1935] O.W.N. 288 (C.A.)

for the damages suffered by plaintiff B. It does *not* stand for the proposition that such claim may be asserted by means of equitable set-off. The word "set-off" does not appear in the judgment. Indeed, in that case the defendant's claims were asserted by *counterclaim* both for his own damages and "in addition...contribution or indemnity from each of the said plaintiffs as to any damages...which the defendant may be ordered to pay any of the other plaintiffs."[13]

[21] The defendants cite *Lewenza v. Ruszczak*[14] and *Colonial Furniture Co. (Ottawa) Ltd. v. Saul Tanner Realty Ltd.*[15] as standing for the proposition that set-off can be denied only when the plaintiff's claim is subrogated, such that all or part of the plaintiff's claim belongs to the plaintiff's insurer and as such the claim for set-off fails for want of mutuality. The cases do not stand for that proposition. In *Lewenza*, the plaintiff's insurer, who had paid to repair the plaintiff's motor vehicle damaged in an accident, brought a subrogated action against the defendant for those damages. The defendant *counterclaimed* for damages to his motor vehicle. Both parties obtained judgment. The issue was whether the two judgments, one on the claim and one on the counterclaim could be set-off against each other. The court determined that the plaintiff only nominally held the judgment against the defendant, which debt was impressed with a charge in favour of the insurer. It was in the context of setting off judgments on a claim and on a counterclaim that the court stated that "set-off can only arise where the claims to be set off against each other exist in the same right and here...the claim to set-off fails because of the want of mutuality between the two claims."[16] *Colonial Furniture* involved several actions resulting from a fire where counterclaims were asserted and where separate judgments were obtained by certain parties against each other for their respective damages. The court held that the principles in *Lewenza* were not overtaken by the subsequent decision of the Supreme Court of Canada in *Holt v. Telford* and that "as a result of subrogation the claims sought to be set off do not exist in the same right."[17] These cases deal with set-off of judgment debts when one is to the benefit of a subrogating insurer. Neither case stands for the principle that a claim for contribution and indemnity can be asserted by means of equitable set-off in a statement of defence without a counterclaim. The issue was never addressed.

[22] Prior to 1984 the practice, as set out in *Crowder v. Graham*[18], was that claims for contribution and indemnity under the *Negligence Act*[19] against a person already a party to the action, whether as a plaintiff or as a defendant, were made by making the claim for contribution within the statement of defence simply by pleading what was then section 2(1) of the *Negligence Act*, and not by counterclaim or by third party claim. That has not been the practice since 1984 when the rules of civil procedure were amended and rule 27(1) added to permit claims for contribution, even under the *Negligence Act*, to be asserted by way or crossclaim, counterclaim or third party claim. In *Crowder* the court permitted an amendment to the statement of defence to refer to and rely on section 2(1) of the *Negligence Act* to obtain contribution and indemnity

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[13] *Latimer v. Ellis*, supra at para. 18
[14] *Lewenza v. Ruszczak*, [1959] O.J. No. 390 (C.A.)
[15] *Colonial Furniture Co. (Ottawa) Ltd. v. Saul Tanner Realty Ltd.* (2001), 52 O.R. (3d) 539 (C.A.)
[16] *Lewenza v. Ruszczak*, supra para. 6.
[17] *Colonial Furniture*, supra at para. 22.
[18] *Crowder v. Graham*, [1961] O.W.N. 320 (C.A.) at paras. 7-11. Also see D. Cheifetz, *Apportionment of Fault in Tort* (Canada Law Book, 1981) at p. 88
[19] *Negligence Act*, R.S.O. 1990 c. N-1

but did not specifically permit a plea of contribution by means of equitable set-off.[20] In any event, no case since 1984 has been brought to my attention that cites *Crowder* for the proposition that a claim for contribution and indemnity against a plaintiff for damages claimed by other plaintiffs may proceed by simply pleading the *Negligence Act*, or by pleading equitable set-off or indeed by any means other than by counterclaim. It appears the practice outlined in *Crowder* was overtaken by rule 27.01(1).[21]

[23] I finally consider the case of *Placzek v. Green*[22] in which the court was called upon to determine whether the transition provisions of the *Limitations Act* applied to the defendant's proposed amendment to his statement of defence to add a counterclaim for contribution and indemnity under section 1 of the *Negligence Act* against one plaintiff for the damage claims of another plaintiff. The case explains the essence of a counterclaim for contribution and indemnity. It states that such counterclaims are not claims "for damages arising out of a tort", but are rather "claims for restitution based on unjust enrichment"[23] when a "concurrent tortfeasor bears a disproportionate share of the plaintiff's claim"[24] because of a "failure of the proposed defendants by counterclaim to pay their fair share"[25] of a plaintiff's damages. As a result, although the defendant's counterclaim against plaintiff A for the injuries suffered by plaintiff B "may be related to the tortious acts that underlie the accident, they are not founded on those acts. Rather, they are founded on the acts or omissions giving rise to a claim for restitution."[26]

[24] While *Placzek v. Green* does not determine whether a claim for contribution and indemnity can be asserted by way of equitable set-off (since the defendant in that case sought to add a counterclaim, not amend his defence to plead equitable set-off), it does help inform the analysis of the requirements for equitable set-off as summarized in *Holt v. Telford*. Joyce's claim for damages arises out of a tort, as does Mathew's claim for damages. The defendant's claim against Mathew however to contribute to Joyce's damages may be related to the tortious acts that underlie the accident (including Mathew's alleged negligent acts) but they do not arise out the tort. Rather they are a restitutionary remedy to the defendants based on Mathew's unjust enrichment. In my view, this furthers my conclusion that the defendants' proposed equitable claim against Mathew to contribute to Joyce's damages based on unjust enrichment does not go to the "very root" of Mathew's claims for his own damages based in tort.

[25] In conclusion, I am of the view that a defendant cannot claim contribution and indemnity against one plaintiff for the damages awarded to another plaintiff by pleading equitable set-off in the statement of defence. Such claims must rather be advanced by counterclaim. In this case the defendants cannot claim contribution and indemnity from Mathew for Joyce's injuries by means of equitable set-off. They are out of time for advancing such claim by counterclaim.

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[20] Interestingly, as noted, in *Latimer* the defendant had proceeded by counterclaim for his own damages as well as contribution and indemnity from the claims of other plaintiffs.
[21] *Lanworks Inc. v. Thiara*, [2007] O.J. No. 1829 at paras. 8 to 10. In that case the defendant could not proceed by counterclaim because no other plaintiff had asserted a claim against the defendant.
[22] *Placzek v. Green*, 2009 ONCA 83
[23] Ibid, para. 34
[24] Ibid, para. 38
[25] Ibid, para 33
[26] Ibid, para. 34

SHOULD THE AMENDMENTS BE PERMITTED?

[26] Rule 26.01 provides that "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" The proposed amendments however must be "legally tenable". They must "disclose a cause of action". Amendments "are to be granted unless the claim is clearly impossible of success."[27]

[27] I have determined that the defendants cannot assert a claim for contribution and indemnity against Mathew respecting Joyce's claim for damages by means of equitable set-off. The claim cannot succeed. As such the proposed amendments are not legally untenable and the motion must be denied.

[28] It is therefore not necessary to consider whether the amendments would have resulted in non-compensable prejudice to the plaintiffs. If necessary to make that determination I would have found that there is no evidence of prejudice. While the plaintiffs suggest in argument that Mathew's insurer would have to become involved at a very late stage of this action, that they may not have had an opportunity to investigate and that the action may be delayed as a result of a "new party" becoming involved there is no evidence to that effect.

COSTS

[29] The plaintiffs were successful and are entitled to their costs, notwithstanding that the issue was novel. Costs should be on a partial indemnity scale. The time spent by the defendants' lawyer and his clerk and student and their respective partial indemnity rates are reasonable. The fixing of costs however is not simply a mathematical exercise of multiplying hours by an hourly rate. The motion was on the higher end of complexity given the issues of law advanced and the novelty of the motion. Clearly the issues were important both to the defendants and to Mathew since it would directly affect whether the defendants could obtain a contribution from Mathew for Joyce's damages and in turn could have resulted in a corresponding reduction in what Mathew would receive for his own damages. In my view costs of $4,000 inclusive of disbursements and HST are fair and reasonable and should have been within the reasonable expectations of the defendants.

ORDER

[30] I hereby order as follows:

(1) The motion by the defendants for leave to amend their statement of defence is dismissed.

(2) The defendants shall pay to the plaintiffs their costs of this motion within 30 days

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[27] *Plante v. Industrial Alliance Life Insurance Co.*, 2003 O.J. No. 3034, 66 O.R. (3d) 74 (S.C.J. – Master) at paragraph 21(b)

fixed in the sum of $4,000.00.

Master R. Dash

DATE: November 7, 2011