COURT OF APPEAL FOR ONTARIO

CITATION: Wirring v. The Buffalo Group Developments Ltd., 2012 ONCA 810
DATE: 20121122
DOCKET: C55741

Weiler, Blair and Hoy JJ.A.

BETWEEN

Balraj Wirring, Mandeep Kaur Wirring
and Amber Wirring by her Litigation Guardian Balraj Wirring

Plaintiffs (Appellants)

and

The Buffalo Group Developments Ltd.

Defendant (Respondent)

Samia M. Alam, for the appellants

No one appearing for the respondent, The Buffalo Group Developments Ltd.

Christopher P. Klinowski, for the respondent, 2132226 Ontario Inc.

Heard and released orally: November 9, 2012

On appeal from the judgment of Justice John Cavarzan of the Superior Court of Justice, dated March 9, 2012.

ENDORSEMENT

[1] The issue on this appeal is whether the motion judge erred in refusing to amend the statement of claim to permit the appellants (hereinafter referred to simply as Wirring) to add the proposed defendant 2132226 Ontario Inc. and to amend the location in which an alleged slip and fall occurred.

[2] Wirring was an independent contractor who drove commercial vehicles for The Buffalo Group Developments Ltd. ("Buffalo Group"). On November 29, 2007, Wirring was directed by Jessie Athwal, the Buffalo Group's dispatcher, to make a delivery and to return the truck afterwards to a parking lot.

[3] Wirring slipped and fell, allegedly in the lot to which he returned the truck. He contacted his wife by telephone and told her where he had fallen and she drove herself to the parking lot to assist him.

[4] On November 30, 2009, Wirring issued a statement of claim alleging negligence against the Buffalo Group, the occupier of the parking lot at 160 Derry Road East in Mississauga, where Wirring alleged he had fallen. On December 20, 2011, Wirring brought a motion to amend the statement of claim to change the location of his slip and fall to a different parking lot, allegedly also occupied by the Buffalo Group, namely, 7500 Danbro Crescent East in Brampton. This parking lot was more than 10 km away from the Derry Road parking lot. Wirring also moved to add 2132226 Ontario Inc., the owner of the Danbro Crescent East parking lot, as a defendant. Both the Buffalo Group and 2132226 Ontario Inc. are owned by the same individual, Lakhvir Athwal. Mr. Athwal is the brother of the dispatcher for the Buffalo Group.

[5] The motions judge dismissed Wirring's motion and refused to permit him to add the proposed defendant 2132226 Ontario Inc. or to amend the location in

which the slip and fall occurred to 7500 East Danbro Crescent. In doing so, the motions judge held: (i) Wirring's attempt to bring an action against the proposed defendant was statute-barred because he failed to rebut the presumption that he discovered his claim on the date of the occurrence under s. 5(2) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B and the basic two-year limitation period in the Act had run; (ii) the doctrine of special circumstances and extension of the two-year limitation period could not be applied: see *Joseph v. Paramount Canada's Wonderland,* 2008 ONCA 469 at paras. 23-27; and (iii) the requirements for the doctrine of misnomer, which authorizes the correction of a misnaming or misdescription of a party, were impossible to fulfill because Wirring changed a material underlying fact, namely, where the accident took place. Therefore s. 21(2) of the Act could not be applied.

[6] Wirring appealed the dismissal of his motion. The argument on appeal was primarily directed to the first and third grounds for dismissal.

[7] In our opinion the motions judge made no error in concluding that Wirring failed to rebut the presumption of discoverability and therefore failed to meet the burden of proof under s. 5(2) of the Act. We agree that there is no evidence that Wirring exercised reasonable due diligence to discover the proposed defendant, nor is there any evidence that Wirring made attempts to ascertain all potential liable parties within the limitation period.

[8] We are also of the opinion that the motions judge correctly held that the Act overruled the doctrine of special circumstances.

[9] Although counsel for Wirrings alleged that the motions judge did not deal with the misnomer issue, as indicated above, he clearly dealt with the issue and held that the requirements for misnomer were not fulfilled.

[10] The doctrine of misnomer requires that: (1) the plaintiff intended to name the defendant; and (2) the intended defendant knew it was the intended defendant in relation to the plaintiff's claim. Despite the very spirited argument put forward before us by counsel in relation to this issue, the requirements of misnomer have not been met. The location of the fall is in dispute. On Wirring's theory, the proposed defendant numbered company would have known it was the intended defendant only if it knew the fall took place on its property. Wirring has failed to meet the second requirement, namely, to show that Mr. Athwal, in his capacity as the directing mind of the proposed defendant, knew that the numbered company was the intended target of the suit. For example, the appellant does not say in his affidavit that he was told by the dispatcher of the Buffalo Group to park at the location owned by the numbered company. Accordingly, the appeal respecting the adding of a party is dismissed.

[11] We would, however, grant leave to amend the statement of claim to allege directly or in the alternative, that as against the Buffalo Group, the accident

occurred at the location proposed by the appellant. Leave is also granted to the Buffalo Group to plead a discoverability defence and the limitation period in this regard.

[12] The appeal is otherwise dismissed.

[13] The proposed defendant is entitled to its costs of this appeal. Having received the submissions of counsel in writing and considered them, we hereby fix these costs at $7,500, inclusive of any applicable taxes and disbursements.

"K.M. Weiler J.A."
"R.A. Blair J.A."
"Alexandra Hoy J.A."