COURT OF APPEAL FOR ONTARIO

CITATION: Stechyshyn v. Domljanovic, 2015 ONCA 889
DATE: 20151214
DOCKET: C60544

Weiler, Pardu and Benotto JJ.A.

BETWEEN

Vladimir Stechyshyn

Plaintiff/Appellant

and

~~John Doe~~, Dusan Domljanovic and the Guarantee Company of North America

Defendants/Respondent

William G. Scott and Jillian van Allen, for the appellant

Philip Pollack and Sebastian Schmoranz, for the respondent

Heard: December 9, 2015

On appeal from the order of Justice Kelly P. Wright of the Superior Court of Justice, dated May 26, 2015.

By the Court:

A. OVERVIEW

[1] On a motion to correct the name of a defendant on the basis of misnomer, as long as the true defendant would know on reading the statement of claim he was the intended defendant, a plaintiff need not establish due diligence in identifying the true defendant within the limitation period: *Kitcher v. Queensway*

General Hospital (1997), 44 O.R. (3d) 589 (C.A.), at paras 1 and 4; *Lloyd v. Clark*, 2008 ONCA 343, 44 M.P.L.R. (4th) 159, at para. 4.

[2] In this case, after the appellant's successful misnomer motion substituting the name of the respondent for John Doe, the respondent successfully brought a motion for summary judgment on the grounds that he was not sued until after the expiry of the limitation period and that the appellant plaintiff did not exercise due diligence in identifying the true defendant.

[3] We held that the jurisprudence governing misnomer governed and that in the circumstances, summary judgment ought not to have been granted. Accordingly, we allowed the appeal and indicated reasons would follow. These are those reasons.

B. FACTS

[4] On June 8, 2006, the appellant was a pedestrian struck by a motor vehicle operated by the respondent. The appellant wrote down the respondent's license plate number, insurance policy and driver's license information on a single page in a notebook.

[5] The appellant then went to the hospital and, while there, gave the page in his notebook to the police officer investigating the accident, believing it would be returned to him or that he would receive a copy of the accident report containing the respondent's information.

[6] Before leaving the hospital, the appellant searched for the police officer but could not find him. He thought the officer had identified himself as Officer “Olson”.

[7] The appellant spoke to the owner of a garage near the accident and inquired with the Toronto Police Service (“TPS”) but his attempts to ascertain the identity of the respondent were unsuccessful.

[8] On June 20, 2008, the appellant filed a Statement of Claim identifying the defendant as “John Doe” because he had no independent recollection of the driver.

[9] On January 5, 2010, the appellant’s counsel requested a copy of the accident investigation file from TPS, referencing Sgt. Olson, the location, and the appellant. TPS replied on March 30, 2010, advising that there was no record of the accident and that Sgt. Olson had indicated that he did not attend any calls pertaining to the accident.

[10] On March 30, 2011, the defendant’s insurer Guarantee Company of North America (“Guarantee Company”) obtained an order for production of the TPS file on the accident.

[11] On July 22, 2011, the appellant received a copy of the police file, which indicated that Dusan Domljanovic was the driver. The investigating officer’s name was Officer Ollos.

[12] On November 25, 2011, Master Muir made an Order granting the appellant leave to amend his Statement of Claim to substitute the respondent for “John Doe”. The respondent did not attend on the motion.

[13] Subsequently, the respondent brought a motion for an order dismissing the appellant’s claim on the grounds that it was brought after the expiry of the two-year limitation period.

C. DECISION BELOW

[14] The motion judge granted the respondent’s motion on the basis that the appellant did not exercise due diligence and did not take all reasonable steps to identify the respondent within the two-year limitation period.

[15] The motion judge found that the information and the identity of the respondent were both available and discoverable to the appellant since the date of the accident: June 8, 2006. While the appellant had taken some steps to ascertain the respondent’s identity, it did not amount to the due diligence required of him. For example, one and a half years after being retained, the appellant’s counsel sent an “urgent” request to TPS for information regarding the accident and respondent driver. When none was forthcoming, it would have been open to the appellant to bring the same motion to compel production of the TPS file as the respondent’s insurer did. The motion judge rejected the appellant’s

argument that the motion amounted to a re-litigation of his unopposed motion before Master Muir, since they were “fundamentally different issues”.

[16] Accordingly she granted summary judgment and dismissed the action.

D. ANALYSIS

[17] The respondent submits that this is not a true case of misnomer because the actual name of the respondent had been ascertained by the appellant on the day of the accident.

[18] This submission ought to have been made by the respondent before Master Muir on the misnomer motion. Generally, a litigant is prevented from raising a matter that should have been the subject of a previous proceeding between the same parties.

[19] If the respondents on the motion for misnomer had raised the issue of due diligence, they would not have succeeded. The respondent Domljanovic would have known on reading the statement of claim that he was the intended defendant. The jurisprudence is clear that, in such circumstances, due diligence does not apply. In *Kitcher,* the name of the correct defendant was in the plaintiff’s solicitor’s file. In *Lloyd*, the name of the correct defendant municipality was readily ascertainable by typing in the location of the road in issue. The law that governs the addition of a party after the expiry of a limitation period does not apply.

[20] The respondent's motion for summary judgment was an indirect attack on the motion for misnomer. It would be a waste of money, time, energy and judicial resources to allow the correct defendant to be added on a motion for misnomer and then to allow a motion for summary judgment on the basis that the correction was made after the expiry of the limitation period. The law does not countenance such impracticality. The law treats the naming of the correctly named defendant as a substitution for the incorrectly named defendant and not the addition of a new party or the initiation of the action against the correctly named defendant.

[21] Accordingly, for these reasons the appeal was allowed, the order granting summary judgment set aside and the action allowed to proceed.

E. COSTS

[22] Costs of the appeal are to the appellant and are fixed in the amount of $7500, inclusive of disbursements and all applicable taxes. Costs of the motion for summary judgment to the defendants are set aside and in their place, costs of that motion are awarded to the appellant fixed in the amount of $5000 all inclusive.

Released: (KMW) December 14, 2015

"K.M. Weiler J.A."
"G. Pardu J.A."
"M.L. Benotto J.A."