COURT OF APPEAL FOR ONTARIO

CITATION: Avedian v. Enbridge Gas Distribution Inc., 2023 ONCA 289
DATE: 20230425
DOCKET: C70844

Pepall, Trotter and Nordheimer JJ.A.

BETWEEN

Bedros (Peter) Avedian, Claudio Petti and Mario D'Orazio

Plaintiffs (Appellants)

and

Enbridge Gas Distribution Inc. operating as Enbridge Gas Distribution, Enbridge Solutions Inc. operating as Enbridge Energy Solutions, Enbridge Inc., Lakeside Performance Gas Services Ltd. operating as Lakeside Gas Services

Defendants (Respondents)

and

Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey

Third Parties (Respondents)

and

TQB Heating and Air Conditioning, Brentol Bishop a.k.a. Brent Bishop, Enbridge Solutions Inc. operating as Enbridge Energy Solutions and Enbridge Inc.

Fourth Parties (Respondents)

Christine G. Carter, for the appellants

C. Kirk Boggs and Jennifer O'Dell, for the respondents Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey, and as agent for counsel for the

respondents TQB Heating and Air Conditioning and Brentol Bishop, a.k.a. Brent Bishop

David Reiter and Brian Chung, for the respondents Enbridge Solutions Inc. operating as Enbridge Energy Solutions and Enbridge Inc.

James G. Norton, for the respondents Enbridge Gas Distribution Inc. operating as Enbridge Gas Distribution and Lakeside Performance Gas Services Ltd. operating as Lakeside Gas Services

Heard: April 24, 2023

On appeal from the order of Justice Darla A. Wilson of the Superior Court of Justice, dated June 3, 2022, with reasons reported at 2022 ONSC 3343.

REASONS FOR DECISION

[1] The plaintiffs, Bedros (Peter) Avedian, Claudio Petti, and Mario D'Orazio, appeal from the order of the motion judge who dismissed their motion to amend the statement of claim. At the conclusion of the hearing, we dismissed the appeal with reasons to follow. We now provide those reasons.

[2] The action and the corresponding third- and fourth-party actions arise out of an explosion that occurred in an apartment building in 2010. The apartment building was owned by a numbered company. The numbered company was, in turn, owned by the appellants, each through their own holding companies. The apartment building was sold in 2015. The appellants allege that they were forced to sell the building due to events surrounding the explosion. The claims of the numbered company that owned the building were assigned to the appellants as part of the sale transaction.

[3] The action has been ongoing for many years. The original statement of claim was issued in July 2012 with the numbered company that owned the building and the appellants as plaintiffs. An order to continue was obtained in July 2019 to remove the numbered company as a plaintiff due to the prior assignment of the claims. The action was set down for trial in 2017 with a trial date set for February 2020. As a result of a motion for summary judgment that was subsequently appealed to this court, the February 2020 trial did not proceed. An expedited trial date was to have been obtained as directed by this court on that appeal. Although an expedited trial date was requested, the trial management process resulted in this motion to amend the appellants' statement of claim being brought in late 2021. The motion judge has been case managing the action since August 2021.

[4] At its core, the appellants seek to amend their statement of claim to advance personal claims by the appellants for damages that they claim that they suffered arising from what they describe as the forced sale of the apartment building. They also seek to increase the prayer for relief from $7,500,000 to $57,500,000.

[5] The motion judge dismissed the motion to amend the appellants' statement of claim. She found that the motion was being brought late, after the action had been set down for trial, and without any request for leave to do so pursuant to r. 48.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge also concluded, contrary to the submissions of counsel for the appellants, that the claims sought to be advanced by way of the amendments were different than the

claims previously advanced in the action and materially altered the factual framework and the evidence that would have to be called. She found that prejudice to the defendants could be presumed from the delay in the amendments being sought given the current state of the action, that is, it being ostensibly ready for trial. Further, the motion judge questioned whether these new claims had a proper legal foundation.

[6] The appellants submit that the motion judge erred in reaching each of these conclusions. We do not agree. The motion judge properly considered all of the relevant factors in reaching her decision. Contrary to the position of the appellants, r. 26.01 of the *Rules of Civil Procedure* does not mandate that amendments must be allowed in all circumstances. A court may refuse to grant an amendment if the granting of the amendment would cause non-compensable prejudice to the other side: *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.,* 2017 ONCA 42, 135 O.R. (3d) 694, at para. 25. Further, the court has a residual right to deny amendments where appropriate: *Marks v. Ottawa (City),* 2011 ONCA 248, 280 O.A.C. 251, at para. 19.

[7] We agree with the motion judge's finding of presumed prejudice given that these amendments were sought for a case that was previously listed for trial and was to be again listed for trial with an expedited date. The addition of these new claims could change the nature of the evidence to be called and would, almost

certainly, require amendments to, or new, expert reports on damages. Those realities would cause further delay in a case that is already over a decade old.

[8] We also share the motion judge's scepticism about the legal basis for the claims advanced. It is difficult to see how the individual appellants would have a personal claim arising out of damages to an apartment building at a time when the building was owned by a company. The appellants contend that they have a claim in negligence, but it is difficult to see how any duty of care would arise between them and the defendants. The appellants rely heavily on the decision in *Tran v. Bloorston Farms Ltd.,* 2020 ONCA 440, 151 O.R. (3d) 563 but, in our view, that case does not support the appellants' position. This court made clear, in that decision, that a claim by a shareholder may only proceed if the shareholder has their own cause of action: *Tran*, at paras. 33, 68.

[9] In any event, the motion judge did not decide that issue, nor do we. That result does not change the fact that the questionable foundation for the claims was a proper matter for the motion judge to consider in terms of deciding whether the circumstances of the case as a whole justified allowing the amendments to be made: *Brookfield Financial Real Estate Group Ltd. v. Azorim Canada (Adelaide Street) Inc.,* 2012 ONSC 3818, 111 O.R. (3d) 580, at para. 24.

[10] It is for these reasons that the appeal was dismissed. We do so without prejudice to the appellants bringing a fresh motion to amend the amount of

damages claimed since that issue appears to arise separate and apart from the proposed amendments addressed above and thus, understandably, was not dealt with separately by the motion judge.

[11] The respondents are entitled collectively to their costs in the agreed amount of $10,000, inclusive of disbursements and HST.

"S.E. Pepall J.A."
"Gary Trotter J.A."
"I.V.B. Nordheimer J.A."