

COURT OF APPEAL FOR ONTARIO

CITATION: Cipponeri Construction Services Inc. v. Orsi, 2023 ONCA 296

DATE: 20230501

DOCKET: COA-22-CV-0153

Doherty, Zarnett and Sossin JJ.A.

BETWEEN

Cipponeri Construction Services Inc.

Plaintiff (Appellant)

and

Michael Orsi and Westin Homes Ltd.

Defendants (Respondents)

Warren Rapoport, for the appellant

Colin Pendrith and Robert Sniderman, for the respondents

Heard: April 19, 2023

On appeal from the order of Justice J. Christopher Corkery of the Superior Court of Justice, dated June 20, 2022.

REASONS FOR DECISION

[1] In 2018, the respondent Michael Orsi and his corporation, Bearus Holdings ULC (“Bearus”), commenced an action (the “2018 Action”) against Vito Cipponeri, his corporation 2599109 Ontario Inc. (“259”), and Westin Homes Ltd. (“Westin”). Westin is owned equally by Bearus and 259. The 2018 Action is on the Toronto Commercial List.

[2] Mr. Cipponeri and 259 counterclaimed in the 2018 Action against Mr. Orsi, Bearus, and Westin. One of the claims made by counterclaim was for payment of money allegedly owed by Westin to the appellant, Cipponeri Construction Services Inc. ("CCSI"), another corporation owned by Mr. Cipponeri.

[3] CCSI is not a party to the 2018 Action. When the counterclaim was defended, it was asserted that neither Mr. Cipponeri nor 259 has standing to assert the claim for money owing by Westin to CCSI.

[4] Concerned that CCSI's claim had not properly been made and that the limitation period was about to expire, CCSI commenced the within action on March 16, 2020 (the "2020 Action"). This action made the same claim against Westin that had been ineffectively asserted on its behalf as part of the counterclaim in the 2018 Action. The claim was for \$375,000.

[5] On a motion by Mr. Orsi, the motion judge dismissed the 2020 Action. Pursuant to r. 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, he held it was an abuse of process for CCSI to commence a separate action which created a multiplicity of proceedings; the correct process was to seek leave to add CCSI as a plaintiff by counterclaim in the 2018 Action. He indicated in his reasons that the dismissal of the 2020 Action was without prejudice to CCSI, Mr. Cipponeri, or 259 seeking leave under r. 26.02(c) to add CCSI as a party in the 2018 Action. The motion judge also dismissed the 2020 Action against Mr. Orsi personally on

the basis that the statement of claim did not disclose a cause of action against him, as the claim was for money allegedly owed by Westin.

[6] On appeal, CCSI argues that the motion judge erred in finding the 2020 Action was, as against Westin, an abuse of process.¹ It asserts that the action was commenced to preserve a limitation period, which is not an abuse of process: *Abarca v. Vargas*, 2015 ONCA 4, at paras. 20-23. It adds that the process followed – starting a new action rather than amending the counterclaim – was in part a function of what counsel thought could be done expeditiously in the early stages of the COVID-19 pandemic. And even though the 2020 Action created overlap with an aspect of the counterclaim in the 2018 Action, it submits it made it clear when the 2020 Action was commenced that it sought to avoid a multiplicity of proceedings issue. CCSI’s counsel wrote to the respondents’ counsel stating: “We will of course not be pursuing the paragraphs in the present counterclaim dealing with this same issue and will agree to have them removed when we reconvene. It seems to me once you get your head around it, all [the] actions should be consolidated or heard together”.

[7] CCSI submits that although it is agreeable in principle to being added to the counterclaim in the 2018 Action, the motion judge’s preservation of an ability to

¹ CCSI does not challenge the motion judge’s conclusion that there is no claim against Mr. Orsi personally for the money allegedly owed by Westin. It states that it added Mr. Orsi so he could defend Westin, which is a deadlocked corporation. We do not disturb the order of the motion judge dismissing the 2020 Action against Mr. Orsi for the absence of a cause of action against him. A corporate director, officer, or shareholder need not be made a party to an action in order to defend the corporation.

add CCSI as a plaintiff by counterclaim in the 2018 Action is not adequate because the limitation period has continued to run and the benefit of having started the 2020 Action would be lost.

[8] The respondents argue that the motion judge was correct to dismiss the 2020 Action as an abuse of process and give CCSI the opportunity to seek leave to be added to the counterclaim in the 2018 Action. The respondents state that they will not contest the amendment to add CCSI to the counterclaim. They also submit that CCSI's concerns about the expiry of a limitation period after the 2020 Action was started are illusory, as they are prepared to agree that the addition of CCSI to the counterclaim in the 2018 Action will be as of the date that the 2020 Action was commenced. This would only leave arguments that the limitation period expired before that date, which the respondents will advance at trial. They take the position that they told this to CCSI before the motion below was heard, and that CCSI refused to agree because the respondents wanted to be paid costs consequent on the amendment.

[9] While the motion judge understandably viewed amending the counterclaim as preferable, in our view he erred in dismissing the 2020 Action against Westin as an abuse of process. It was common ground that there was no valid claim for money owing to CCSI by Westin in the counterclaim in the 2018 Action, as CCSI was not a party. A consequence of this was that the limitation period for CCSI's claim continued to run. The 2020 Action was commenced to preserve that

limitation period. And it did not necessarily create a multiplicity of proceedings if appropriate steps were taken to ensure the claim was not advanced in two proceedings.

[10] Given what really separates the parties – which frankly is not much in light of their submissions in this court – it is in the interests of justice to vary the motion judge's order as follows:

- (a) the 2020 Action shall be stayed as against Westin pending the determination of the motion to amend referred to below;
- (b) a motion shall be brought promptly to amend the counterclaim in the 2018 Action to add CCSI as a plaintiff by counterclaim so that it advances the claim against Westin for payment of the \$375,000 instead of that claim being made on CCSI's behalf by Mr. Cipponeri and 259;
- (c) the respondents shall agree to the amendment;
- (d) no limitation period defence to the claim by CCSI as a plaintiff by counterclaim in the 2018 Action shall be asserted other than a defence that the limitation period expired before March 16, 2020;
- (e) the costs related to the amendment shall be determined by the judge dealing with the amendment motion; and
- (f) upon completion of the amendment, the 2020 Action shall be dismissed against Westin.

[11] The parties will bear their own costs of the appeal.

“Doherty J.A.”
“B. Zarnett J.A.”
“L. Sossin J.A.”