CITATION: Di Giannantonio v. Blue Mountain Resorts Limited, 2018 ONSC 3026
NEWMARKET COURT FILE NO.: CV-15-123645-00
DATE: 20180514

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lisa Di Giannantonio, Moving Party/Plaintiff

AND:

Blue Mountain Resorts Limited, Intrawest ULC and Weigand Sports, LLC
Defendants

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: J. Van Allen, Counsel for the Plaintiff

R.P. Kiddey, Counsel for the Proposed Defendant, Kristen McLean

HEARD: May 9, 2018

ENDORSEMENT

[1] The plaintiff, Lisa Di Giannantonio (the plaintiff) brings a motion to add Kristen McLean (McLean) as a defendant to this action. The named defendants, Blue Mountain Resorts Limited, Intrawest ULC and Weigand Sports, LLC take no position with respect to this motion. McLean opposes the relief sought on the basis that it has been brought outside of the limitation period set out in the *Limitations Act,* 2002, S.O. 2002. The following facts not in dispute will provide context for the discussion that follows.

[2] The plaintiff alleges that she was injured as a result of an incident that occurred on August 11, 2013 at a slide ride at Blue Mountain Resort. As a result of her injuries, she was taken to the hospital for treatment. On August 10, 2015, within the two-year limitation period, she issued a Statement of Claim and an Amended Statement of Claim against the named defendants. The proposed defendant McLean was not named in the Statement of Claim.

[3] Shortly after the accident, the plaintiff herself, wrote to Blue Mountain to request a copy of the Occurrence Report. A copy of a Report form, with certain information redacted, was mailed to her by letter dated August 12, 2015. That report stated in part, "Patient's Description: Coming down coaster, slowed down a bit, due to my son's crying and was hit from behind."

[4] The name and contact information of a witness was redacted on the left-hand side of the page. A box on the right-hand side adjacent, had a place for "witness" and "collision with", but that section was stroked out.

[5] Previous counsel for the plaintiff wrote to Blue Mountain on August 23, 2013 to request an unredacted copy of the report. It was not provided. He wrote a follow-up letter on February 22, 2014 with no reply. His letter of May 4, 2015 was responded to by Blue Mountain on May 25, 2015. That letter, authored by Blue Mountain's general counsel included the unredacted Report form and provided in part:

> The individual who struck your client, contrary to the rule set out in the Ridge Runner Mountain Coaster Responsibility Code, was a woman named Kristen McLean. The only contact information that we have for Ms. McLean is (905) 553-3749. Ms. McLean is a proper defendant in your client's proceedings.

[6] Although the unredacted form showed Ms. McLean as witness, it was not plain and obvious that she was the driver of the ride car that rear-ended the plaintiff's ride car.

[7] By letter dated July 31, 2015, the Intrawest Blue Mountain Defendants served a Statement of Defence on the plaintiff's counsel. Nowhere in the Statement of Defence does this defendant make reference to McLean as the driver causing the impact with the plaintiff, nor did the defendant seek to bring a third party action against McLean.

The *Limitations Act*, 2002

[8] It may be useful to set out the applicable sections of the *Limitations Act:*

> **Basic Limitation Period**
> 4 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.
>
> **Discovery**
> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)
>
> (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Analysis

[9] The issue before the court is neatly summarized in the plaintiff's Factum at para. 43:

> The issue is therefore, whether the plaintiff's claim against McLean was discovered or discoverable with due diligence between August 11, 2013 (the date of the incident) and March 23, 2015 (two years prior to the date McLean received the Motion Record on March 23, 2017).

[10] It is the position of the plaintiff that the identity of Kristen McLean was not discoverable until May 25, 2015 when Blue Mountain provided Ms. McLean's name. Because the motion to add McLean was brought within the two-year period, it complies with the discoverability portion of the *Limitations Act,* 2002.

Position of the Responding Party

[11] It is the responding party's position that the limitation period started to run upon the date of the accident, and the two-year limitation period had expired by the time the proposed defendant was served with the Notice of Motion to add her to the claim. As McLean sets out in her Factum at para. 29:

> The circumstances that a potential claimant may not appreciate the legal significance of the facts did not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the constituent factual elements of his or her cause of action. Error or ignorance of the law, or legal consequences of the facts does not postpone the running of the limitation period.

[12] McLean submits that the plaintiff's former counsel did not exercise due diligence in attempting to find the name of the rider that struck his client. Plaintiff's former counsel's paralegal took a note shortly after the accident indicating that the plaintiff told the paralegal "She didn't see the sled behind her at any time before it crashed into her, slammed into her at full speed, 42 kph. The driver said afterwards that she couldn't stop."

[13] Former counsel for the plaintiff was cross-examined on his affidavit for the purpose of this motion. Counsel for McLean submits that former counsel decided that there was no liability on the part of the driver in the rear. As he stated in his cross-examination at question 135:

> Because that would be on the incident report, you would think, so I asked for the incident report. But I was looking at the person on the ride behind her not as a potential defendant, but as a witness.

And further:

> The difference [from an automobile accident] being that this isn't a car. This is a ride at Blue Mountain on which children are allowed to ride independently, without any training, without a driver's license.

[14] Rule 5.04(2) provides the court with discretion to add a party on such terms as are just, unless prejudice would result that they could not be compensated for by costs or an adjournment. As the Court of Appeal stated in *Pepper v. Zellers,* 2006 CanLII 42355 (ONCA) para. 14, "A rule 5.04(2) motion to add parties and, in this case, to add parties after the apparent expiration of a limitation period, is discretionary."

[15] In any motion to add non-party defendants based on discoverability principles in the *Limitations Act,* 2002 there are a number of tensions at play. These tensions were summarized in *Madrid v. Ivanho Cambridge Inc.,* 2010 Carswell Ont. 2799. As Lauwers J. stated at para. 13:

> The dominant policy thrust of the system of justice is that cases should be heard on the merits. Another policy thrust, found in the *Limitations Act,* 2002, is to encourage a plaintiff to commence an action as soon as possible. But a third and tempering policy thrust is found in s.5 of the *Limitations,* 2002, which codifies discoverability. …These policy thrusts are to be reasonably balanced.

[16] As Lauwers J. further noted at para. 14:

> It is not unusual for possible defendants to emerge as a result of information received during the opposite party's document production or during the discovery process in an action. … In the absence of an unexpected or unusual trigger, there is little to be gained by imposing judicially a free-standing duty on plaintiffs to write pro forma letters to defendants inquiring about the identity of other possible defendants under the rubric of due diligence in s.5 of the *Limitations Act,* 2002.

[17] In *Wong v. Adler,* [2004] O.J. No. 1575, aff'd. 76 O.R. (3d) 237 (Ont. Div. Ct.). Master Dash outlined his view as to the proper approach for a motions judge on matters such as this at para. 45:

> What is the approach a judge or master should take on a motion to add a defendant where the plaintiff wishes to plead that the limitation period has not yet expired because she did not know of, and could not with due diligence, have discovered the existence of that defendant? In my view, as is clearly implied in *Zapfe,* the motions court must examine the evidentiary record before it determines if there is an issue of fact or if credibility on the discoverability allegation, which is a constituent element of the claim. If the court determines that there is such an issue, the defendant should be added with leave to plead a limitations defence.

[18] In *Wakelin v. Gourley,* 2005 CanLII 23123, Master Dash referred again to his decision in *Wong v. Adler,* and went on to indicate at para. 9: "It will be rare that the applicability of the discoverability principle based on due diligence will be determined on a motion to add a party."

[19] As to the amount of evidence required by a plaintiff on such a motion, Master Dash stated at para. 14:

> The question is how much evidence must the plaintiff put in at the pleadings amendment stage to establish that the proposed defendants could not have been indemnified with due diligence within the limitation period? The short answer is: not very much. As stated by the Court of Appeal in *Zapfe:* In most cases, one would expect to find, as part of a solicitor's affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably "diligent" and to provide "an explanation for why she was unable to determine the facts".

[20] The plaintiff also relies on the unreported decision of Master Graham in *Brisbane v. Blue Mountain Resorts et al,* June 2, 2016. In that decision Master Graham, in very similar circumstances, added a defendant who was in the ride car which collided with the rear of the plaintiff's ride car at the very same ride. As he stated:

> On the facts of this case, even accepting that it would have been reasonable for the plaintiff's counsel to request the name of the operator of the "ride car" that struck the plaintiff, I cannot conclude that such enquiry would likely have elicited Lee's given the refusal of Blue Mountain staff to provide a copy of the report containing Lee's name to the plaintiff's husband and the fact that

no one on behalf of Blue Mountain replied to the plaintiff's counsel's letter of September 18, 2013.

[21] On the facts of this case, I am satisfied that I ought to exercise my discretion to add McLean as a defendant to this action. The following points assist me in making this finding:

- The incident report form provided to the plaintiff redacted the name of the "witness". The form also struck out a section where name and address could have been completed following a box stating "collision with".
- Plaintiff's counsel received no reply to his letter of August 23, 2013, requesting the report, nor did he receive reply to his letter of February 22, 2014.
- When he received a reply from counsel for Blue Mountain, he received the unredacted form, but again the box for "information following collision with" was still stroked out. Former counsel for the plaintiff was invited in that letter to bring proceedings against McLean. These proceedings were begun within two years of that invitation.
- In responding to the plaintiff's claim, the Blue Mountain defendant made no reference to McLean as the driver striking the plaintiff's ride car in its Statement of Defence, nor did it commence third party proceedings against her.

[22] The plaintiff's motion to amend the Statement of Claim by adding Kristen McLean as a defendant is granted without prejudice to her right to plead a limitation defence.

Costs

[23] Counsel for the plaintiff submitted that in the event of its success on the motion it would not be seeking costs. Therefore, no order as to costs.

MULLIGAN J.

Date: May 14, 2018