

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rui Ying Lin, Plaintiff

AND:

Pasquale Gallo, Antonietta Gallo and Karol Kostyk, Defendants

BEFORE: Master Jolley

COUNSEL: Jillian Van Allen, Counsel for the Moving Party Plaintiff

M. El Rashidy, Counsel for the Proposed Defendant Ewelina Wankiewicz

HEARD: 29 June 2017

REASONS FOR DECISION

- [1] The plaintiff brings this motion to add Ewelina Wankiewicz (“Wankiewicz”) as a defendant to this action. Wankiewicz takes the position that the claim against her falls outside the two year limitation period and, as a result, the motion to add her should be denied.
- [2] For the reasons noted below, the plaintiff’s motion for leave to amend the statement of claim to add Wankiewicz is granted.

Background

- [3] The plaintiff alleges that on 16 August 2014 she suffered injuries when an unattended, off leash dog leapt at her causing her to fall. The plaintiff, through her lawyers, conducted an investigation which included contacting the property owners, whom they identified after conducting a property search. They also obtained a statement from a witness to the incident who advised that the dog was on the front property where a man (now believed to be the defendant Karol Kostyk (“Kostyk”) was loading a vehicle in the driveway, that the man was in charge of the dog and, after the incident and on the insistence of the witness, put the dog in the house and continued to load boxes from the house into his car. The witness also advised that the man was renting the home.
- [4] In October 2014 the landlords/owners of the property advised the plaintiff that Kostyk was a tenant living at the premises and was associated with the dog. A claim was issued on 21 July 2015 against the landlords and John Doe who was identified by the insurance adjuster on 14 August 2015 as Kostyk. As a result, the “John Doe” claim was

discontinued and a new action commenced in September 2015 naming the landlords and Kostyk as defendants. (It appears that Wankiewicz was aware of this claim as she deposed in an affidavit filed on this motion that she did not think anything serious of the incident until Kostyk was served “with court papers several months later”.)

- [5] On 16 October 2015 Kostyk filed a defence in which he admitted that he was the owner of the dog. It was not until 18 February 2016 that Kostyk served an amended defence denying that he was the owner of the dog.
- [6] The plaintiff’s lawyers immediately contacted Kostyk’s lawyers, first informally and then by demand for particulars, to obtain the name of the dog owner. Kostyk’s counsel advised his client would not disclose the name until examinations for discovery. Plaintiff’s counsel then attempted to arrange those discoveries with Kostyk’s lawyer in April and May 2016 but received no response. In June Kostyk changed lawyers.
- [7] On 9 September 2016, almost 7 months after the plaintiff’s first request for the name of the owner, Kostyk advised that the dog was owned by Wankiewicz, his girlfriend at the time.
- [8] The plaintiff seeks to add Wankiewicz as a defendant and she takes the position that the plaintiff’s claim against her is out of time. She contends that the plaintiff, with reasonable due diligence, could have discovered that she was the owner of the dog within two years of the incident.
- [9] The plaintiff takes the position that the claim against Wankiewicz was discoverable no earlier than 9 September 2016 when Kostyk advised that Wankiewicz was, in fact, the owner of the dog. The plaintiff served her motion to add Wankiewicz on 7 April 2017 which she argues is well within the limitation period.
- [10] Until February 2016 the plaintiff had no reason to believe that the dog owner was anyone other than Kostyk and until September 2016 had no information as to who owned the dog once Kostyk amended his defence to deny that he was the owner of the dog.

The Law

- [11] Rule 5.04(2) provides that at any stage of a proceeding the court may by order add a party on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment.
- [12] Rule 26.01 provides that on motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment.
- [13] Superimposed on these Rules concerning adding parties is the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The two year limitation period and the principle of discoverability are codified in sections 4 and 5 of that Act, as follows:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary on the day on which the claim was discovered.

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).

Issue: What is the date which a reasonable person with the abilities and in the circumstances of the plaintiff would have come to know that the act was that of Wankiewicz?

[14] Wankiewicz takes the position that, had the plaintiff acted with reasonable due diligence, she would have known that she had a claim against Wankiewicz within two years of the date of the incident, i.e. no later than 15 August 2016. She argues that it was not reasonable for the plaintiff to rely on information from the landlord that Kostyk was a tenant and associated with the dog when there were multiple tenants in the building. Wankiewicz argues that it would have been prudent for the plaintiff to find out all the tenants in the residence and name them all and then discontinue until the true owner was discovered.

[15] The difficulty with this argument is that all the plaintiff's efforts confirmed that Kostyk was associated with the dog and appeared to own the dog – the landlord, the neighbor and the eye witness. While ownership was not established by these parties, in August 2015 Kostyk's insurance adjuster confirmed that he was "John Doe", whom it was alleged was the owner of the dog, and in October 2015 Kostyk admitted he owned the dog in his statement of defence.

[16] Until that admission of ownership was withdrawn in February 2016 (and there is some question about whether it has been legitimately withdrawn in light of the obligations under Rule 26.03(1)(b) and Rule 51.05 on a party attempting to withdraw an admission), it was reasonable for the plaintiff to believe that it had named the dog owner.

- [17] Following the reasoning in *Madrid v Ivanhoe Cambridge*, 2010 ONSC 2235 at paragraph 17, if Kostyk had taken the position that he was not liable because another party owned the dog, then the plaintiff would have been on inquiry to locate that other person. Here, not only did Kostyk not take the position that someone else owned the dog, he pleaded that he owned the dog. This is even stronger than the *Madrid* facts where the court held that even a “naked denial of liability” did not trigger an obligation on the plaintiff to make further inquiries. Not only was there no “naked denial” from Kostyk, there was an admission from him that he was the owner.
- [18] The plaintiff takes the position that the claim against Wankiewicz was not discoverable until 9 September 2016 when Kostyk finally disclosed her name. Whether the period runs from 9 September 2016 or from 19 February 2016 when Kostyk amending his pleading to withdraw his admission that he owned the dog is not material for the purposes of this motion as the motion was served within two years of either of those dates.
- [19] I find the plaintiff acted with reasonable diligence to discover the identity of the dog’s owner. As noted in *Wakelin v. Gourley*, 2005 CanLII 23123 (ON SC) at paragraph 14, the plaintiff’s lawyers provided a list of attempts made to obtain information to substantiate their assertion that they were reasonably diligent in their efforts to discover the identity of the owner of the dog. The solicitors obtained information from the landlord and from a witness who was on the scene at the time. They had confirmation from Kostyk’s adjuster that Kostyk was the party identified as the “John Doe owner” in the statement of claim and then also had an admission from Kostyk that he owned the dog.
- [20] Even if there were an issue of fact or of credibility on the discoverability allegation, the appropriate result is to grant the plaintiff leave to amend her claim to add Wankiewicz as a defendant and grant Wankiewicz leave to plead a limitations defence (*Madrid v. Ivanhoe Cambridge*, above at paragraph 6).
- [21] I find Wankiewicz will suffer no prejudice in being added as a defendant. The mere fact that she will be involved in litigation is not prejudice. She filed an affidavit confirming that she opened the front door and witnessed the incident and has a recollection of seeing the plaintiff trip and fall, a recollection that the dog was tied up and a recollection of seeing a witness go to help the plaintiff.
- [22] I find that this motion to add Wankiewicz as a defendant to this action is brought within the limitation period, which expires no earlier than 18 February 2018 and I grant the plaintiff leave to amend the statement of claim to add Wankiewicz as a defendant. This is without prejudice to Wankiewicz raising a limitations defence in her defence.
- [23] I further grant the ancillary relief requested by the plaintiff, namely an order that the amended statement of claim and a copy of the issued and entered order be served (a) on Kostyk by regular mail to his counsel as set out in the notice of motion and (b) on Wankiewicz personally within 30 day from the date of entry of this order.

[24] If the parties are unable to reach agreement on costs, they may file submissions with me no more than 2 pages in length and a bill of costs by 7 July 2017.

Master Jolley

Date: 29 June 2017