

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Reliable Life Insurance Company

v

Muriel Helena Ingle et al

Motion heard June 25, 2009

BEFORE: Mater Hawkins

COUNSEL: Jillian Van Allen for moving plaintiff Fax: (416) 869-0271

Gary A. Hoftzyer for responding defendants Fax: (905) 640-8161

John D. Ingle Agent for responding defendant

Muriel Helena Ingle Fax: 1(519) 856-4215

ENDORSEMENT

[1] This is a motion by the plaintiff under rule 26.01 for leave to amend the amended statement of claim in terms of the draft amended amended statement of claim found at tab 1A of the motion record, with one qualification. The plaintiff now seeks to add to paragraph 24 of the amended amended statement of claim so that it now reads as follows.

“The plaintiff pleads and relies upon section 12 of the Assignments and References Act, R.S.O. 1990 c.A33”.

[2] Over the objections of counsel for the plaintiff I permitted John D. Ingle, a non-lawyer, to make submissions on behalf of his mother, the defendant Muriel Helena Ingle.

[3] Rule 26.01 contains a reverse onus in favour of granting leave to amend pleadings. Leave to amend is to be granted unless prejudice would result that could not be compensated for by costs for an adjournment.

[4] The responding defendants advance several grounds for resisting this motion. First, they submit that this motion should be dismissed on the basis of delay. The motion is brought several years after the action was commenced and relatively close to trial. I reject this argument. Rule 26.01 expressly provides that a motion for leave to amend a pleading may be brought “at any

stage of an action". The defendants will still have time to deliver a defence in response to the amended amended statement of claim.

[5] Next, the responding defendants submit that leave to amend should be denied because the proposed amendments raise a new cause of action which is barred by the Limitations Act, R.S.O. 1990 c.L. 15 or the Limitations Act, 2002 S.O. 2002, c.24 Schedule B.

[6] I disagree. The proposed amendments do not allege any new facts. They simply seek new remedies based on a new legal theory arising from facts already pleaded. Such an amendment does not raise a new cause of action. See *Maxwell v Challenger Motor Freight*, [2006] O.J. No. 4496 per Sproat M. at paragraphs 15 and 16.

[7] Because the proposed amendments do not raise any new cause of action those proposed amendments are not barred by any statute of limitations. In any event, as a term of granting the plaintiff leave to amend the amended statement of claim, I grant the responding defendants leave to raise in their amended statements of defence any limitation of action defence they may be advised to raise. That term will address any prejudice to the responding defendants arising from the new cause of action/limitation of action issue.

[8] I recognize that I should not give leave to amend if a proposed amendment amounts to an untenable plea. See *Vaiman v Yates* (1987) 60 O.R. (2d) 696 per Rosenberg J. at page 698 (H.C.J.). The power to deny leave to amend on this ground should be exercised with caution and only in clear situations. In the present case, the proposed amendments are far from untenable. That being so, the issue of their tenability should be left to the trial judge.

[9] I reject the defence argument that the proposed amendments are untenable because the plaintiff has failed to allege that the transferors under the impugned conveyances and charge were insolvent or knew they were on the eve of insolvency at the time of such transactions. Proof of such insolvency is a necessary element of a claim based on subsection 4(1) of the Assignments and Preferences Act. The plaintiff does not attack these transactions on the basis of subsection 4(1). Rather, the plaintiff's attack is based on section 12 of the same Act and the provisions of the Fraudulent Conveyances Act, R.S.O. 1990 c.F29. This claim is found in paragraph 23 of the amended statement of claim. The tracing remedy found in section 12 of the Assignments and Preferences Act is not limited to situations where a transaction is rendered void under other provisions of the same Act. A plaintiff may seek that tracing remedy by relying on the provisions of another statute, as this plaintiff seeks to do.

[10] I also reject the defence argument that the proposed amendments should not be permitted because they will be severely prejudicial to the defendants. Under rule 26.01 the prejudice that bars a motion for leave to amend a pleading does not include the prejudice that results from the success of the amended plea on its merits. See *Hanlan v Sernesky*, [1996] O.J. No. 4049 at paragraph 2.

[11] Mr. Ingle submitted that leave to amend should be denied because the defendant Muriel Helena Ingle will be prejudiced owing to her advanced years. I reject this argument. I have no

evidence as to the state of her health. Trial is imminent. I am not aware that any party sought leave to take her evidence before trial pursuant to Rule 36.

[12] Mr. Ingle also submitted that if leave to amend be granted I should impose a term that the plaintiff should pay for a lawyer to defend Muriel Helena Ingle from this point forward. I reject this argument as well. I have almost no evidence as to her financial circumstances. There is no evidence that she is impecunious in the sense that she has no relatives or friends willing to assist her financially in retaining a lawyer.

[13] Mr. Ingle further submitted that I should order the plaintiff to post security for costs on the ground that the plaintiff has failed to pay the costs of its unsuccessful motion for an interim injunction before A. Mandel J. The evidence before me on this issue takes the form of the reasons for judgment of A. Mandel J. on that motion, which reasons were released on October 31, 2000. In those reasons A. Mandel J. proposed that the costs of that motion be awarded to some of the defendants including the defendant Muriel Helena Ingle, and that such costs be assessed. There is no evidence before me that his final decision on costs was to that effect, that such costs were ever assessed, or that the plaintiff has failed to pay the defendants any costs as assessed. I therefore reject this argument and decline to order that the plaintiff post security for costs as a term for granting leave to amend.

[14] The responding defendants also submitted that leave to amend should be denied because the plaintiff has failed to sue one or more necessary parties. I reject this argument as well. Subrule 5.04(1) provides that no proceeding shall be defeated by reason of the non-joinder of any party. The same subrule gives the court the discretion to determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties. The issue of non-joinder is therefore a matter for the trial judge. It is not a basis for denying leave to amend.

[15] Counsel for the defendants Ingle Manor Farms Inc. and Janja Maria Ingle submitted that this motion was barred by subsection 21(1) of the Limitations Act, 2002. I disagree. This subsection does not apply. It provides that if a limitation period in respect of a claim against a person has expired the claim shall not be pursued by adding the person as a party to any existing proceeding. In the present motion the plaintiff does not seek to add any party to this action.

[16] For all these reasons, the plaintiff is given leave to amend the amended amended statement of claim as asked with proposed paragraph 24 reading as set out in paragraph [1] of this decision above, and subject to the term set out in paragraph [7].

[17] The plaintiff has been successful on this motion. However the plaintiff could have advanced the allegations in the proposed amendments in the original statement of claim. The responding defendants did not serve and bring costs outlines (Form 57B) to the hearing of the motion as required by subrule 57.01(6). In these circumstances there will be no costs of this motion.

Master Thomas R. Hawkins

Released: August 14, 2009