

NOVA SCOTIA COURT OF APPEAL

Citation: *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52

Date: 20170614

Docket: CA 455507

Registry: Halifax

Between:

Automattic, Inc.,
a Delaware Corporation

Appellant

v.

Trout Point Lodge, Limited, a
Nova Scotia Limited Company,
Vaughn Perret, and Charles Leary

Respondents

Judges: Farrar, Bryson and Van den Eynden, JJ.A.

Appeal Heard: January 27, 2017, in Halifax, Nova Scotia

Held: Leave to appeal granted, appeal allowed, in part without costs to any party per reasons for judgment of Farrar, J.A.; Bryson and Van den Eynden, JJ.A. concurring.

Counsel: Karen N. Bennett-Clayton and Sarah Walsh (Articled Clerk),
for the appellant
Laura Veniot, for the respondent

Reasons for judgment:

Overview

[1] The appellant seeks leave to appeal and, if granted, appeals the oral decision of Justice Mona Lynch dated July 26, 2016 and an order dated September 9, 2016.

[2] In her decision, the motions judge allowed the respondents to amend their Statement of Claim to add four causes of action and a defendant, Ryan Markel.

[3] Automattic appeals, arguing that the motions judge had an obligation to determine the applicable limitations period before deciding to allow the respondents' motion, including whether the substantive law of California or Nova Scotia applied to the action.

[4] At the oral hearing of this matter, the panel requested that the parties provide additional submissions (assuming that the motions judge was required to determine the applicable limitation period) on the following:

- (i) Was the record sufficient for her to make that decision?
- (ii) If so, what was the applicable limitation period?
- (iii) Whether discoverability has any application to the determination of the applicable limitation period?

[5] Supplemental submissions were received.

[6] For the reasons that follow, I would grant leave to appeal, allow the appeal, in part and set aside the motions judge's decision to add Ryan Markel as a defendant. I would not interfere with the motions judge's decision allowing the additional causes of action. I would not award costs to either party.

Background

[7] Automattic is a Delaware corporation based in San Francisco that owns and operates WordPress.com, an internet service that gives users a free blog on which to post content.

[8] The respondent, Trout Point Lodge, is a Nova Scotia corporation which carries on business in Yarmouth County, Nova Scotia. Respondents Leary and Parrett are managing directors, officers, and shareholders of Trout Point Lodge, and reside in East Kemptville, Nova Scotia.

[9] This action is based on events that occurred in 2011 and 2012. The respondents filed an action against Automattic and Douglas K. Handshoe, on November 28, 2012 alleging defamation, civil extortion, contempt, intentional infliction of emotional distress, promissory estoppel, breach of agreement, misappropriation of likeness, and violation of the right to one's image as a result of posts that appeared on a WordPress blog.

[10] The respondents amended their Notice of Action and Statement of Claim for the first time on January 15, 2013 to remove Mr. Handshoe as a defendant.

[11] On May 23, 2013, they again amended the Notice of Action to remove all causes of action except defamation and breach of agreement, and added allegations of malice and bad faith.

[12] Automattic filed its defence on May 9, 2014, pleading the substantive law of California applied to all the causes of action.

[13] From 2012 to June, 2014 the respondents were self-represented. In June, 2014 they retained the firm, Pressé Mason to represent them and, in particular, Barry Mason, Q.C.

[14] A little more than a year after retaining counsel, the respondents sought consent from Automattic to amend their pleadings for a third time to add allegations of promissory estoppel, copyright infringement, breach of honesty in contractual dealings and fraudulent misrepresentation. They also sought to add Ryan Markel, an employee of Automattic as a defendant to the action.

[15] Automattic did not consent to the proposed amendments and the respondents brought a motion to amend on February 17, 2016.

[16] When the parties appeared before the motions judge on August 26, 2016, Automattic argued that, because the substantive law that would govern the dispute was uncertain, the limitations questions could not be determined and so the motion should have been adjourned until such determination could be made. In the alternative, Automattic argued that discoverability was not made out on the facts as

pled and made submissions regarding the applicability of Nova Scotia's new *Limitation of Actions Act* should the law of this Province be applied for the purposes of the motion.

[17] The respondents argued that, although they had communicated with Automattic solely via emails from a "Ryan M" since 2011, they were unable to discover his name until reading a book about Automattic which mentioned an employee named Ryan Markel in August of 2014.

[18] It follows the respondents say, that since they did not know his name until August of 2014 no possible limitations period could have expired against Mr. Markel in Nova Scotia or California.

[19] The respondents also argued in the alternative that the old *Limitation of Actions Act* applied and in the further alternative, that if any limitations period had expired, Rule 83.11(3) would allow the amendments in any event.

[20] The motions judge delivered an oral decision allowing the amendments to the causes of action and allowing Mr. Markel to be added as a party.

[21] Automattic appeals.

Issues

[22] I would reword and reorder the issues as follows:

1. Whether leave to appeal should be granted;
2. If leave to appeal is granted:
 - i. Did the motions judge err in granting the amendments to the causes of action?
 - ii. Did the motions judge err by adding Ryan Markel as a defendant to the action?

Standard of Review

[23] The first issue is not subject to a standard of review. The question of leave to appeal is one of first instance. Accordingly, there is no standard of review. The standard was recently articulated by this Court in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38:

[18] As to the first issue, the question of granting leave to appeal is one of first instance. Accordingly, there is no applicable standard of review. The test for leave to appeal is well-known. It requires an appellant to raise an “arguable issue”. An arguable issue must do more than simply identify a matter of pure academic interest. It must be an issue that actually arises on the facts and merits this Court’s attention. It must be “an issue that could result in the appeal being allowed”. See for example, *Nova Scotia v. Roué*, 2013 NSCA 94, and *Burton Canada Co. v. Coady*, 2013 NSCA 95.

[24] With respect to the other issues on this appeal, Automattic alleges errors in the interpretation of the *Civil Procedure Rules*. They will be reviewed on a correctness standard.

Issue #1 Should leave to appeal be granted

[25] As I have already indicated, it is my view the appeal should be allowed, in part. Therefore, I am satisfied that there are arguable issues raised on this appeal.

Issue #2(i) Did the motions judge err in granting the amendments to the causes of action?

[26] The respondents sought to add additional causes of action in promissory estoppel, copyright infringement, breach of honesty in contractual dealings and fraudulent misrepresentations

[27] Amendments to causes of actions are governed by Rule 83.11. It provides:

(1) A judge may give permission to amend a court document at any time.

...

(3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action;

(a) the material facts supporting the cause are pleaded;

(b) the amendment merely identifies or better describes the cause.

[28] Rule 83.11(3) is not complicated. A motions judge may allow amendments to the pleadings to allow additional causes of action after the expiry of a limitation period if the judge is satisfied that the facts material to the new cause of action are pleaded and the amendment merely identifies or better describes the cause.

[29] In her decision, the motions judge addresses these criteria. She said:

The grounds that they are looking to add are as outlined in the submissions already contained in the Statement of Claim, the second amended Statement of Claim. They're just not named. The grounds for them is in there for promissory estoppels, for copyright infringement, for the breach of honesty in contractual dealings, and fraudulent misrepresentations, but they're not enumerated as such. And as pointed out, the Defence, particularly for fraudulent misrepresentation, actually defends against that.

[Emphasis added]

[30] The portion of the defence referred to by the motions judge is the following:

[15] ...Specifically, the Defendant pleads that California law will apply with regard to the claim of defamation, "breach of agreement including promissory estoppel or estoppel by representation", and fraudulent and negligent misrepresentation.

[31] Two of the causes of action that the respondents sought to add, promissory estoppel and fraudulent misrepresentation are actually referred to in Automatic's defence. Clearly they were of the view that the pleadings were sufficient to raise these two causes of action. Similarly, I am satisfied, as was the motions judge, that the pleadings, including the Response to Demands for Particulars which were filed, are broad enough to include the claims of copyright infringement and breach of honesty in contractual dealings.

[32] As a result, it did not matter what law governed the causes of action or if the limitation period had expired. The motions judge was satisfied that the material facts for the causes of action were already pleaded and the sought after amendments merely better described the causes of action. Therefore, she exercised her discretion in allowing the amendment. In doing so she correctly interpreted the *Civil Procedure Rules*.

[33] I would dismiss this ground of appeal.

Issue 2(ii) Did the motions judge err by adding Ryan Markel as a defendant to the action?

[34] It is helpful, at the outset, to outline the Rules that govern this question. I will start with Rule 35.08(5) which provides:

Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[35] Rule 83.11 works in concert with Rule 35.08 and provides:

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

[36] The motions judge was of the view that the Rules, if interpreted in the manner suggested by the appellant, would have created a procedural “Catch 22” which, she said, could not have been intended:

So the position of the Defendant is I cannot add a party under Rule 35 unless it is shown that it’s not expired and you can’t add statements of claim or grounds under 83.11(03) unless you show that it has. That just can’t be the case. That’s a Catch 22.

...With regard to Mr. Markel, as I indicated, it cannot be both ways, that you can’t add under one unless you show that the limitation period hasn’t expired, and you can’t add under another unless you can show that it has ...

So the decision that would allow everything ... everybody to claim all of their defences and allow the plaintiff who was self represented up until 2014 to put forward their case is to allow the addition of Mr. Markel.

[37] With respect to the motions judge, her approach to the interpretation of Rule 35.08(1) in conjunction with Rule 83.11(2) was flawed.

[38] The Rules are clear and do not require elaboration – simply put, you cannot add a person as a party to the proceeding when a limitation period or extended limitation period has expired. It follows that a motions judge must determine the applicable limitation period before adding a party.

[39] I agree with the comments of Bourgeois, J. (as she was then) in *Sweeney-Cummingham v. I.B.G. Canada Ltd.*, 2013 NSSC 415, where she held that the new Rules specifically direct motions judges to consider limitation issues on motions to add parties :

[44] In her oral submission, counsel for the Plaintiffs submit that even if the Court finds that a limitation period and extended limitation has passed, the Court still retains a general discretion to amend the pleadings. With respect, I disagree.

The new Rules specifically direct the Court to consider limitation issues on motions to add a party. The wording in Rules 35.08(5) and 83.04(2) are clear and in my view constitute a mandatory direction to the Court. Pursuant to Rule 2.03(3), the Court's general discretion cannot be used to override such a provision.

[Emphasis added]

[40] Although Bourgeois, J. was referring to Rule 83.04(2) which requires that a judge must set aside an amendment or part of an amendment against a new party where a limitation period has expired, her analysis applies equally to Rule 83.11(2) which prevents a judge from adding a party to a proceeding where the limitation period has expired.

[41] Wood, J. following *Sweeney* in *Thornton v. RBC General Insurance Company*, 2014 NSSC 215 puts it succinctly:

[59] ... With a motion to amend the proceeding to add a new defendant under Civil Procedure Rule 35.08, the Court must consider whether the limitation period has expired as of the date of the motion. ...

[42] The motions judge failed to ascertain the applicable limitation period and by failing to do so, she erred in allowing Ryan Markel to be added as a party. The Rules are mandatory and do not leave any residual discretion in a motions judge to add defendants without making that inquiry.

[43] I would allow this ground of appeal.

[44] **Supplemental Submissions**

[45] When the panel requested the parties to address the supplemental issues it was with a view to trying to resolve the issue of whether Mr. Markel should be added as a defendant. However, upon further reflection, to do so on this record and without the benefit of a decision of a motions judge would be improvident.

[46] There are too many issues that remain contested by the parties that should not be decided by this Court in the first instance including (but not intended to be an exhaustive list):

- which law applies;
- if the law of California applies, what is the limitation period;

- if the law of Nova Scotia applies whether the transitional provisions in the new *Limitations of Actions Act* are triggered; and
- whether discoverability is in issue.

[47] Therefore, I would decline to decide whether any limitation period with respect to Mr. Markel has expired.

[48] Before concluding, I would comment on one other issue.

[49] In allowing this appeal, in part, we should not be taken as in any way agreeing with the submissions of Automattic's counsel that once it has pleaded that the law of California applies and the plaintiff then seeks to add a defendant; it is incumbent upon the defendant to disprove that the law of California applies, (or alternatively prove the law of California). Once that occurs the plaintiff would have to then show that the limitation period has not expired. I make no comment on those submissions other than to say that those are issues for the motions judge. It should not be inferred that the decision on this appeal addresses that issue.

Costs

[50] As success has been divided on this appeal there will be no order as to costs.

Conclusion

[51] Leave to appeal is granted and the appeal is allowed, in part. The order adding Ryan Markel as a party is set aside without costs to any party.

[52] This decision is without prejudice to the respondents to resubmit their motion and have it determined in accordance with a proper consideration of the *Civil Procedure Rules* as outlined in this decision.

Farrar, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.