IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Blumenfeld v. Coleman, 2005 NSSC 319

Date: 20051122
Docket: SH 152153
Registry: Halifax

Between:

Zeev Blumenfeld

Plaintiff

v.

John Lawrence Coleman, Halterm Limited Partnership
and Newfoundland Capital Corporation Limited

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	October 26th, 2005, in Halifax, Nova Scotia
Counsel:	David S. Green, for the plaintiff Wendy J. Johnston, for the defendant John A. Keith, for ZIM Integrated Shipping Svcs. Ltd.

By the Court:

[1] The defendants seek an extension of time to commence a third party proceeding against Zim Integrated Shipping Services Ltd., pursuant to Rules 3.03, 17.02 and 17.03(1)(a). They also seek leave to amend their defence, pursuant to Rule 15.01(c). The plaintiff and intended third party oppose the application.

Background

[2] On March 12, 1997, the container ship Zim Jamaica was docked in Halifax, unloading at Pier 42 at the Halterm Container Terminal. The plaintiff, who was third engineer on the ship, went ashore to take photographs of the bow of the ship. The plaintiff alleges that while ashore he sustained injuries as a result of being struck by a container-carrying Brute Tractor operated by the personal defendant, who was employed by either or both of the defendants Newfoundland Capital Corporation Ltd and Halterm Limited Partnership.

[3] An Originating Notice (Action) and Statement of Claim was issued December 1, 1998 and was served on the defendants. The plaintiff waived the requirement for the defendants to file a statement of defence within the prescribed time limits, as he wanted to carry out further investigation and obtain additional documents, some of which were in Israel and had to be translated. The Plaintiff filed a list of documents on November 14, 2001. A statement of defence was filed on January 28, 2002. The defendant stated, among other things, that the plaintiff failed to follow dockyard safety regulations of which he knew or ought to have known. The defendants filed a list of documents on June 4, 2002. The plaintiff

filed a supplementary list of documents on December 8, 2003. The parties consented to an order extending the time for filing a notice of trial to December 31, 2006, pursuant to rule 28.11(4).

[4] The plaintiff was discovered in 2003. At the discovery, the defendants' counsel informed the plaintiff that it might be necessary to commence a third party action against Zim, as it had failed to communicate the policy of restricted areas to its crew, a matter which they claim first came to light from the discovery of the plaintiff. The defendants' intentions were communicated later in writing. Upon it being determined that a settlement was not likely, the defendants notified the plaintiff that they intended to apply for leave to commence a third party action against Zim and to amend their defence accordingly.

[5] At the examination for discovery, representatives of Halterm, managers Murray Graves and Kingsley Brown, testified that they had, on several occasions, communicated to Zim's agent in Halifax their concerns about crew members and their families walking in dangerous areas on the container pier. Halterm's administrative manager, Mr. Graves, informed Bill Kelley, the agent for Zim, that safety on the pier was a major concern, crew members and their families were seen

taking a direct route from the ship to the gatehouse between the rows of containers. Halterm personnel reminded Mr. Kelley and others that this was a dangerous situation and that Halterm had established pedestrian walkways at specific locations. Mr. Kelley and others were requested to provide copies of the walkway locations to the captains of vessels calling at the port so that they could direct their crew members accordingly. Each shipping line was requested to notify their crews to use the designated walkways when leaving the ship and proceeding to and from the gate. The defendants now take the position that these warning were not passed on to the crews; that they were entitled to rely upon the shipowners and their agents to do so; and that this issue only came to their attention at the time of discoveries.

Law and Argument

[6] The Civil Procedure Rules relevant to this application are Rules 3.03, 17.02, 17.03(1)(a) and 15.01(c):

> 3.03. (1) The court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these Rules, or by any order, to do or abstain from doing any act in a proceeding.

(2) The court may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of the period.

(3) The period within which a person is required by these Rules or any order to serve, file or amend any pleading or other document may be extended by consent in writing of the parties.

* * *

17.02. (1) A defendant may commence a third party proceeding against any person who is not a party to the main proceeding and who,

> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
>
> (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
>
> > (i) a transaction or occurrence or a series of transactions or occurrences involved in the main proceeding, or
> >
> > (ii) a related transaction or occurrence or series of transactions or occurrences; or
>
> (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

17.03. (1) A defendant may commence a third party proceeding by originating notice (third party) in form 17.02A, filed and issued within the following times:

> (a) where the main proceeding was commenced by originating notice (action), before the expiration of the time for filing a defence as prescribed by rule 11.02 or as extended by agreement or order....
>
> * * *

15.01. A party may amend any document filed by him in a proceeding, other than an order [...]

> (c) at any time with the leave of the court.

[7] In *Hardy v. Prince George Hotel* (2004), 226 N.S.R. (2d) 1 (S.C.) Murphy J. stated that it was necessary to consider "the potential prejudice to all parties and the explanations given, and the implications involved in adding third parties..." (para. 26). In order to determine whether the application should be granted, I must consider whether the parties will suffer prejudice, with particular emphasis on the costs, complexity and time involved. I must also consider whether the defendant has a reasonable excuse for the delay in making an application. The burden is on the applicant to establish a reasonable excuse for the delay. On an application of this kind, I note that the court is exercising its discretion.

[8] Under Rule 9.07 this court has consistently applied several factors when determining prejudice. These include increased costs, loss of evidence, or the likelihood of a party leaving the jurisdiction. In *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (S.C.A.D.) the Appeal Division held that "long delay of itself gives rise to an inference of prejudice. The strength of the inference depends ... on all the circumstances" (para. 23). This case involved an appeal of the dismissal of an application to renew an originating notice pursuant to Rule 9.07(1). In allowing the appeal, the Court of Appeal stated that the respondents had failed to adduce any evidence to support their claim that they had been prejudiced (para. 34). The

respondent must show actual prejudice, even when there has been inordinate delay. *Minkoff* was followed by Hood J. in *Turner v. Belitsky et al.* (2003), 216 N.S.R. (2d) 64 (S.C.), another case involving the renewal of an originating notice. She stated that there must be evidence of prejudice beyond the inference alone in order to outweigh the prejudice to the plaintiff that would result from not renewing the originating notice (para. 3). Delay, in and of itself, is not a stand-alone consideration when balancing prejudices.

[9] Similarly, when considering an extension of a limitation period under the *Limitation of Actions Act*, the court must address the issue of prejudice, taking into account the delay and actual prejudice.

[10] While this is not a Rule 9.07 application or a Limitation of Actions Act issue, I am satisfied that similar principles apply in an application of this kind. I conclude that the length of the delay is not an independent consideration. The passage of time alone is not a complete answer to an application of this kind. While delay creates an inference of prejudice, some evidence must be adduced to demonstrate actual prejudice.

[11] The defendants submit that the plaintiff's injury is the basis for the claim. Given that the plaintiff said on discovery that Zim had failed to inform him of Halterm's safety directives, some liability may rest with Zim. The defendants claim that this evidence was not available to them when they filed their defence and therefore they had no basis to name Zim as a third-party at that time. They maintain that it was the policy of Halterm to meet with and provide safety regulations and updates to the various shipping agents for shipping lines that used their facility. The defendants argue that there is a commonality of issues, that the delay in commencing the third party proceeding was not their fault, and in any event the plaintiff would not be unduly prejudiced.

[12] The plaintiff claims that he will be greatly prejudiced if the application is granted, by delay, increased costs and increased risk. Counsel argues that the discovery and disclosure process is complete and the plaintiff is set to file a Notice of Trial, which could be delayed by the need for additional disclosure and discovery if a third party is added. Counsel asserts that the defendants were aware of the situation of crew members disembarking and crossing the container storage area years before the events related to this proceeding. In fact on several occasions they met with the ship's agents to remind them of the need to exercise caution and

to walk in designated areas on the pier. The plaintiff takes the position that the defendants ought not be taken by surprise by the failure of Zim to notify their crew members.

[13] The plaintiff's counsel states that they have completed their discoveries and are now collecting psychological material to satisfy the defendants' request for additional documents following discovery. He claims that the discovery evidence discloses that the defendants' representative knew five years prior to the accident that Zim crew members were walking in dangerous areas outside marked walkways. As such there was a history of noncompliance with safety regulations and the conduct of Zim should have been addressed in the defence.

[14] The proposed third party also points out that the defendants knew that their safety guidelines were not being followed by Zim crew members, and, as such, they could have raised the issue of the involvement of Zim at the time of the issuance of the defence. Zim states that there has been an inordinate delay in bringing a third-party application. As a result the proposed third party would be seriously prejudiced by not being able to prepare an adequate defence. Although Zim would be entitled to initiate its own discoveries and production of documents,

the defendants have agreed to share their discovery evidence so as to avoid a repetition of discoveries.

[15] It is therefore necessary to assess the respective prejudices and determine whether the applicant has a reasonable excuse for the delay.

[16] The defendants argue that they did not know that Zim was not communicating safety policies to crew members until this fact came out in discoveries in December 2003. Moreover, they claim, it was reasonable for them to assume that Zim was passing on safety information, both on the basis of their business relationship and on the basis that Zim would be acting in the best interests of their crew.

[17] The plaintiff's counsel claims that the applicant's justification for the delay lacks a "ring of reality". The plaintiff relies on the discovery evidence, which confirms that the defendants knew of problems with Zim crew members and their families leaving ships and moving through the dockyard in an unsafe manner long before these events took place. Furthermore, the defendants specifically plead in para. 3(c) of their Statement of Defence that the plaintiff knew or ought to have

known of the safety policies. The plaintiff submits that the safety policies were a live issue and therefore the possible involvement of Zim was there to be seen when the defence was filed.

[18] The proposed third party states that the defendants' documents demonstrate that the defendants, when faced with a crew member leaving the designated walking area, would take up the matter with shipping lines.

[19] On the question of prejudice, Murphy J., in *Hardy v. Prince George Hotel*, stated that prejudice to all parties must be considered. He did not consider prejudice to third parties, but only prejudice as between the defendants and the plaintiff.

[20] If I conclude that prejudice to the third party is conclusive, such a finding would preclude the defendants from maintaining an action against the proposed third party, or at least weaken the defendant's ability to maintain an independent action. It is my view that only prejudice to the plaintiff and defendants should be considered in this application.

[21] The plaintiff, it must be remembered, waived the requirement of filing a statement of defence for about three years. The plaintiff cannot rely on this time period as a basis upon which to claim and that he has been prejudiced on account of delay. I also take into account the fact that either at the discovery stage, or shortly thereafter, the defendants' counsel verbally communicated to the plaintiff that they intended to seek leave of the court to add Zim as a third party. In fact the plaintiff's counsel does not dispute that he became aware of their intention in the time frame suggested by the defendants. Consequently, the plaintiff cannot rely on either the pre- or post-discovery passage of time for potential prejudice caused by the delay.

[22] Although it is not mentioned in his brief, Mr. Green suggested at the hearing that there was no commonality of issues to suggest that this would be a proper subject matter for third-party proceedings. He adds that this accident did not occur within the area where the defendants' safety policies applied, and therefore whether or not the proposed third-party communicated to its crew is not material. I do not accept this argument because to do so would be to straitjacket the defence.

[23] The fact of adding a third party will likely cause additional delay on account of additional document production, discoveries, and perhaps an additional independent medical examination. This would be the first instance that time would we be counted against the defendants.

[24] I take into account the fact that plaintiff and defendants have agreed not to file a Notice of Trial prior to December 31, 2006. Depending on the amount of time required to try the matter, and the schedules of counsel and of the court, it is unlikely that it would get to trial before late 2007 or 2008. This differs from the situation in *Prince George Hotel*, where a Notice of Trial had been issued. In this case the steps taking place after a Notice of trial is filed will not be affected.

[25] As there is no reasonable excuse for the delay, and no prejudice accruing to the plaintiff, the remaining issue is whether there is prejudice to the defendants if the application is denied.

[26] The defendants maintain that denying the motion would mean a multiplicity of actions with the possibility of inconsistent findings. Although important in this instance, I do not believe that such factors would be critical if the plaintiff had not

waived the filing of the Defence for such an extended period or that or that it had not been given ample notice of the proposed application.

[27] Consequently, I grant the defendants' application for leave to commence third-party proceedings against Zim and to amend their statement of defence.

[28] With respect to costs, I indicated to counsel that I would hear them on this issue unless they can agree. Should the parties fail to reach agreement on the issue of costs of the application and costs incurred to completely adjudicate the issues, they can arrange a mutually agreeable date within 30 days of the release of this decision.

J.