

SUPREME COURT OF NOVA SCOTIA

Citation: Parsons v. S. Cunard & Company Ltd., 2011 NSSC 191

Date: 20110405

Docket: Hfx No. 281593

Registry: Halifax

Between:

Mary Lou Parsons, Kenneth Parsons and Nicole Parsons

Plaintiffs

v.

S. Cunard & Company Limited, a body corporate, and Julie Lyons

Defendants

Judge: The Honourable Justice C. Richard Coughlan

Heard: March 29, 2011 (in Chambers), in Halifax, Nova Scotia

Decision: April 5, 2011 (Orally)

**Written Release
of Decision:**

May 19, 2011

Counsel:

C. Scott Sterns, for the plaintiff
John T. Shanks, for the defendant, S. Cunard & Company
Limited
Michelle C. Awad, Q.C. and Ian R. Dunbar, for the
defendant, Julie Lyons

Coughlan, J.: (Orally)

[1] Mary Lou Parsons, Kenneth Parsons and Nicole Parsons commenced action against S. Cunard & Company Limited (S. Cunard) and Julie Lyons by issuing an originating notice (action) and statement of claim on May 31, 2007 for negligence for damages the Parsons suffered as a result of an oil spill which occurred in May, 2000. S. Cunard filed a defence August 23, 2007. Julie Lyons filed a defence August 30, 2007.

[2] At a date assignment conference held August 6, 2010, the trial was scheduled for six days, commencing May 2, 2011. At the date assignment conference, counsel stated no amendments to the pleadings were required. February 25, 2011 was set as the finish date and the trial readiness conference was set for March 25, 2011.

[3] The Parsons and S. Cunard, by agreement dated December 1, 2010, settled the Parsons' claim against S. Cunard by the payment of a sum by S. Cunard to the Parsons. The agreement provided:

Mary Lou Parsons, Kenneth Parsons, and Nicole E. Parsons (hereinafter collectively referred to as the "Plaintiffs") and the Defendant, S. Cunard & Company Limited agree to settle as follows:

1. The Plaintiffs shall receive from the Defendant, S. Cunard & Company Limited, a global amount of *omitted* inclusive of claim, interest and cost (the "Funds"); said Funds to be paid within thirty (30) days of execution of this Agreement. This settlement and payment is not to be taken as an admission of liability on the part of S. Cunard & Company Limited and is accepted in full satisfaction of the Plaintiffs' causes of action, claims or demands of any kind whatsoever in this and in any other claim the Plaintiffs may have against S. Cunard & Company Limited.
2. The Plaintiffs warrant, represent, understand and accept that they have agreed on how the settling global amount of *omitted* , shall be divided among them and authorize and direct that the Funds be paid to their solicitor, Scott Stearns (sic), in Trust.
3. The Plaintiffs and the settling Defendants agree and consent to the dismissal of this action without costs as against S. Cunard & Company Limited.

It is understood that the Plaintiffs may continue to pursue the non-settling Defendants.

4. The Plaintiffs will authorize their legal counsel to sign and take out a without costs Consent Dismissal Order in Nova Scotia Supreme Court action Hfx. No. 281593.

5. The Plaintiffs, their heirs, successors and assigns hereby fully and finally release and forever discharge S. Cunard & Company Limited and any predecessor, subsidiary, associated, affiliated company and any officer, director or employee and heirs, successors and assigns of and from any and all claims, demands, actions or cause of action which the Plaintiffs have had, now have or may hereafter have with respect to the claims made or which could have been made in Nova Scotia Supreme Court action Hfx. No. 281593.

6. The Plaintiffs agree to restrict their claim against the non-settling Defendants on the basis of several liability alone and as such, any non-settling Defendant cannot be jointly liable with S. Cunard & Company Limited. This clause means that the non-settling Defendants have no basis to seek contribution or indemnity relief over by way of equitable subrogation, declaratory relief or otherwise against S. Cunard & Company Limited.

7. In no event will S. Cunard & Company Limited be liable to the Plaintiffs for damages or claims in this action for any amount other than or in excess of the amount stipulated in paragraphs 1 and 2 herein.

8. Counsel for all parties and the Court will be advised of the terms of this Agreement, excepting the monetary sum of the settlement, subject to the Plaintiffs having the discretion to disclose the monetary amount to the Court and all parties with notice and subject to any direction or Order of the Court.

9. The terms of this Agreement shall enure to the benefit and are binding upon the parties hereto and their respective successors, assigns and insurers.

[4] By letter dated November 25, 2011, the Parsons' counsel asked whether Ms. Lyons would consent to the amendments to the statement of claim to provide for claims based on *Rylands v. Fletcher* and nuisance. Ms. Lyons' counsel responded by letter dated December 8, 2010. Ms. Lyons would not consent to the proposed amendment. In the same letter, Ms. Lyons' counsel notified the Parsons' counsel, with a copy to S. Cunard's counsel, that Ms. Lyons would be commencing a third

party claim against S. Cunard seeking contribution and indemnity for any damages Ms. Lyons is ordered to pay to the plaintiffs.

[5] On December 1, 2010, S. Cunard's counsel notified Ms. Lyons' counsel of the settlement agreement reached by the Parsons and S. Cunard. By letter dated December 2, 2010, S. Cunard's counsel notified the Court, with copies to other counsel, that settlement had been reached between the Parsons and S. Cunard, and pursuant to the terms of the settlement agreement a consent dismissal order would be issued dismissing the Parsons' claim against S. Cunard. Although clause 8 of the agreement contemplated counsel for all parties and the Court being provided with terms of the agreement, counsel for Ms. Lyons did not obtain a copy of the agreement until March 15, 2011.

[6] An order dismissing the Parsons' claim against S. Cunard was issued by a deputy prothonotary on January 28, 2011. The order was consented to by counsel for the Parsons and S. Cunard. Counsel for Ms. Lyons was not made aware of the dismissal order and a copy of the order was not provided to Ms. Lyons' counsel to obtain her consent to the order prior to the order being issued.

[7] The Parsons move, pursuant to Civil Procedure Rules 83.02 and 83.11(3), to amend their statement of claim.

[8] Ms. Lyons moves for an order:

(a) setting aside the dismissal order granted by the deputy prothonotary on January 28, 2011, pursuant to Rule 30.04;

(b) permitting Ms. Lyons to amend her defence to include a cross claim against S. Cunard, pursuant to Rule 83;

or, if the dismissal order is not set aside, an extension of time for Ms. Lyons to commence a third party claim against S. Cunard.

[9] Section 2(1)(e) of the *Limitation of Actions Act* provides:

2 (1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

....

(e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

[10] The limitation period for claims by the Parsons against Ms. Lyons expired in May, 2006.

[11] Section 3 of the *Limitation of Actions Act* gives the court discretion to excuse non-compliance with a limitation period. However, the court cannot exercise that discretion where a claim is commenced more than four years after the limitation period expired. Section 3(6) of the *Limitation of Actions Act* states:

3 (6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired.

[12] The extended limitation period expired in May, 2010.

[13] Civil Procedure Rule 83.11 provides:

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

(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.

(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.

[14] In order to permit an amendment after the expiry of a limitation period, I must be satisfied first the material facts supporting the cause are pleaded. In reviewing the statement of claim issued May 31, 2007, I find material facts supporting claims based on *Rylands v. Fletcher* and nuisance were pleaded. I also find the amendments concerning the claims pursuant to *Rylands v. Fletcher* and nuisance identifies or better describes the cause of action. The proposed causes of action arise out of essentially the same facts as those originally pleaded. As Cromwell, J.A., as he then was, stated in *Garth v. Halifax (Regional Municipality)* 2006 NSCA 89 at para. 29:

... The question is not whether the expiry of the limitation period trumps the power to amend, but whether it is just to grant the amendment even though the limitation period has expired.

The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs. ... However, the expiry of the limitation period is a strong signal of the risk of injustice to the defendant if the amendment is granted. The court must consider all relevant matters which may include, but are not limited to, the length of the delay in asserting the claim and the reasons for it, how closely the new claim is connected to the claim originally pleaded and the nature and extent of any prejudice resulting from the claim being asserted now as opposed to before the limitation period expired.

[15] I find I have discretion to allow the amendments to the statement of claim if appropriate.

[16] Normally amendments to pleadings are allowed unless the party opposing the motion demonstrates the applicant is acting in bad faith or that, should the

amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs.

[17] There is no bad faith here, so the issue is the prejudice Ms. Lyons will suffer.

[18] At the date assignment conference, the Parsons' counsel took the position no amendments were required. The trial is set to commence May 2, 2011 - just a month away. The incident giving rise to the action occurred almost eleven years ago. The action was commenced almost four years ago. The first time the amendments were proposed was November, 2010 - less than six months before trial. The amendment will probably cause an adjournment of the trial dates. In response to notification of the proposed amendment, Ms. Lyons' counsel stated Ms. Lyons would be commencing a third party claim against S. Cunard.

[19] Considering all the facts of the case, I find there is no prejudice to Ms. Lyons in allowing the amendments which could not be compensated by costs. I allow the Parsons' motion to amend the statement of claim, adding the claims in *Ryland v. Fletcher* and nuisance.

[20] Ms. Lyons moves to set aside the dismissal order granted by a deputy prothonotary on January 28, 2011.

[21] Civil Procedure Rule 30.04(1) and (6) provide:

30.04 (1) A person affected by an order made by the prothonotary may make a motion to a judge under Rule 23 - Chambers Motion for a review of the prothonotary's order.

....

(6) A judge who grants the motion may make any of the following kinds of orders:

- (a) an order the prothonotary could have made;
- (b) an order providing relief from the order of the prothonotary or the consequences of it;

- (c) an order referring the subject back to the prothonotary with directions.

[22] Rule 31.14 and 31.15 provide:

31.14 A party is entitled to notice of everything done in a proceeding, every written communication with a judge or the court, and every document filed, unless one of the following applies:

- (a) the party is disentitled to notice;
- (b) a motion is made *ex parte*;
- (c) the parties agree, or a judge orders, that notice is not required.

31.15 (1) A party who files a document must deliver a copy of the document to each other party immediately before or immediately after it is filed, unless one of the following applies:

- (a) the other party is disentitled to notice;
- (b) a motion is made *ex parte*;
- (c) the parties agree, or a judge orders, that notice is not required.

[23] Ms. Lyons was entitled to notice of everything done in the proceeding, and the Parsons and S. Cunard were required to deliver a copy of the order to Ms. Lyons immediately before or after it was filed.

[24] Ms. Lyons was not aware of the filing of the dismissal order. Ms. Lyons' counsel did not consent to the order. Ms. Lyons is a person affected by the order.

[25] Civil Procedure Rule 82.20(2)(e) states:

82.20 (2) The prothonotary may, with the written consent of each party entitled to notice, make an order that does any of the following:

....

- (e) dismisses a proceeding, unless a party is represented by a guardian;

[26] The deputy prothonotary did not have authority to issue the dismissal order as not all parties entitled to notice had consented to the order.

[27] S. Cunard submits, on the facts of this case, I should excuse compliance with the rules stating at the time the dismissal order was issued no claims had been commenced by Ms. Lyons against S. Cunard, and counsel for Ms. Lyons indicated at the date assignment conference no amendments of her pleadings were contemplated. S. Cunard says the issuing of the order by the deputy prothonotary was an irregularity and should be excused pursuant to Rule 2.

[28] However, the order issued by the deputy prothonotary on January 28, 2011 was not an irregularity to be excused. The deputy prothonotary did not have authority to issue the order, as all parties entitled to notice did not consent to the order.

[29] In dealing with an appeal from an application to set aside a default judgment granted by a prothonotary is a situation where the prothonotary had no authority to grant the default judgment, Flinn, J.A., in giving the Court's judgment in *National Utility Service (Canada) Limited v. Pick O'Sea Fisheries Limited* (1995), 146 N.S.R. (2d) 203, stated at para. 60:

In this case the failure to comply with r. 12.03 is much more serious than an error, or irregularity, in the process leading to the ultimate determination of the real issues in dispute between the appellant and the respondent. The granting of the order for judgment by the prothonotary - which the prothonotary had no authority to grant (and to which the respondent was not, at that time, otherwise entitled) - was *determinative* of the proceeding.

[30] The dismissal order of January 28, 2011 is not an irregularity - it is a nullity. (See: *King v. Brookins* (1980), 40 N.S.R. (2d) 278 (N.S.S.C. - A.D.)

[31] The dismissal order of January 28, 2011 being a nullity, S. Cunard is still a party to the action. It is open to any party to move for an order dismissing the action against S. Cunard.

[32] Ms. Lyons wishes to amend her defence to include a cross claim against S. Cunard. I am prepared to allow Ms. Lyons to amend her defence to include a cross claim against S. Cunard as there is no evidence before me to show any prejudice that could not be compensated by costs.

[33] I will hear counsel on the issue of whether an adjournment of the trial dates is required.

[34] I will schedule a time for counsel to address the issue of costs.

Coughlan, J.