SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHELLE VENDITTI, et al.

Plaintiffs

- and -

2041320 ONTARIO INC., et al.

Defendants

****

R E A S O N S   F O R   R U L I N G

BEFORE THE HONOURABLE JUSTICE R. REID
on July 30, 2014, at HAMILTON, Ontario

****

APPEARANCES:

J. Waxman — Counsel for the Plaintiffs

M. McQuade — Counsel for the Non-Party Stanvit Estates

SUPERIOR COURT OF JUSTICE

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Transcript Ordered: September 30, 2014

Transcript Completed: November 27, 2014

Date Counsel Notified: November 27, 2014

WEDNESDAY, JULY 30, 2014

REASONS FOR RULING

REID J. (Orally):

The plaintiffs seek to add Stanvit Estates Inc., c/o/b as Century Grove Homes, as a party defendant to this action. None of the existing defendants appeared in opposition to the motion. The proposed new defendant does oppose the motion.

By way of background, the plaintiff, Michelle Venditti, has sued the defendants as a result of injuries suffered in a slip and fall accident which allegedly occurred on September 10, 2010, at a construction site in Woodbridge, Ontario. The defendants include 2041320 Ontario Inc. as the owner of the premises, Century Grove Homes Design Studio Inc. as the builder, and 1403158 Ontario Ltd., operating as Construction Services, the agency that assigned the plaintiff to work for the builder.

The Statement of Claim was issued on September 7, 2012, within two years of the alleged accident. Shortly before the scheduled examinations for discovery of all parties in June 2014, the plaintiffs received information through the documentary production by the defendant owner that the actual identity of the builder was, in fact, Stanvit Estates Inc., c/o/b as Century

Grove Homes.

The parties do not disagree on the applicable principles to be applied by the court in this motion. Rule 26 of the Rules of Civil Procedure provides that,

> "On a 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 an adjournment."

That rule is subject to the provisions of the *Limitations Act, 2002*. It is obvious that the addition of the proposed new party is being requested after the expiry of the *prima facie* limitation period of two years found in the *Limitations Act*. Subsection 5(1) of the *Act,* in effect, bars the addition of a party to an existing proceeding if the limitation period has expired. However, that prohibition is subject to the discoverability rule set out in s.5(1) of the *Act* to the effect that a claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew that the injury, loss or damage had occurred; that the injury loss or damage was caused by or contributed to by an act or omission; that the act or omission was that

of the person against whom the claim is made; and 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).

Subsection 5(2) of the *Act* provides that a person with a claim shall be presumed to have known of the matters referred to in clause 5(1)(a) on the day the act or omission on which the claim is based took place unless the contrary is proved.

I agree with the comment of McCarthy J. of this court in *Thompson v. Mungham* 2013 ONSC 4996 at para. 21. He observes that,

> "The operative subparagraph in this case is s. 5(1)(a)(iii) of the *Limitations Act...*"

which I pause to indicate reads that the claim is discovered on the earlier of the day on which the person with the claim first knew that the act or omission was that of the person against whom the claim is made. He goes on to state that,

> "In my view, this is clearly designed

> to capture the situation where a potential tortfeasor's identity cannot be readily determined, or where a connection between the alleged act and a person or entity cannot reasonably be established."

In applying the law to the facts of this case, the main focus of the parties has been on the issue of whether the plaintiff has demonstrated the exercise of due diligence in attempting to discover the proper identity of the builder.

Returning to *Thompson v. Mungham*, the test is whether, by reasonable diligence, the requisite information was discoverable within the two year period. As set out in paragraph 25 of that case,

> "...some evidence of reasonable investigation or inquiry into the entire circumstances of the accident is required at the pleadings amendment stage. If those efforts are found to constitute due diligence, then the inquiry shifts to whether it was highly unlikely, if not impossible, for the Plaintiffs to discover the claim based upon the information derived from that due diligence."

In this case the plaintiffs advised their counsel that the builder was Century Grove Homes.

Counsel for the plaintiffs conducted a name search which revealed the existence of the defendant Century Grove Homes Designs Studio Inc. No other names related to Century Grove were revealed. A corporate profile report was requested from the Ministry of Government Services which showed that Century Grove Homes Design Studio Inc. had a registered office at 30 Moyal Court in Concord, Ontario. The directors were shown as Vince Vitullo, Goffredo Vitullo, Robert Vitullo, and Albert Vitullo. A website was found under the name Century Grove Homes with the address of 30 Moyal Court, Concord, Ontario. On the basis of that information the claim was issued.

The documentary disclosure received from the defendant 2041320 Ontario Inc., revealed that the vendor of at least one of the properties on which the accident is alleged to have happened was Stanvit Estates Inc., c/o/b as Century Grove Homes. Counsel for the plaintiffs subsequently performed a corporate search which disclosed that Stanvit Estates Inc. had a corporate address of 147 Blackburn Boulevard, Woodbridge, Ontario, and that the directors were Goffredo Vitullo and Robert Vitullo.

In the pleadings, the defendant Century Grove did not admit that it was the builder of premises in question, although that fact was admitted by the defendant 140315 Ontario Ltd., operating as

Construction Services. The defendant Century Grove did indicate in the Statement of Defence that it was in compliance with all required safety measures, maintained the property in a safe manner, and that all reasonable precautions were taken to prevent accidents. It further stated in the Statement of Defence that adequate warning was given to all works regarding the inherent danger associated with the project.

The effort made by the plaintiff following the disclosure of the apparent involvement of Stanvit Estates are not directly relevant to the due diligent issue in this motion since they come after the expiry of the initial two year limitation. However, the results of the plaintiff's inquiries do disclose that there is an apparent connection between the defendant Century Grove and the proposed new party through their common directors.

Counsel for the plaintiffs submits that it made diligent efforts to discover the correct name of the builder. It received information from the plaintiff, followed up with the name and corporate search, and a website review, leading it to believe that Century Grove was in the building business in the geographical vicinity of the property where the accident is said to have occurred. Counsel submits that no further efforts were reasonably required at the time.

Counsel for the defendant submits that the plaintiffs should have known that Stanvit Estates was the builder within the two year limitation period and named that entity in the claim accordingly. The basis for this submission is that a building permit was issued as regards each of the three premises said to be the location of the alleged accident. Those building permits are required to be posted and were posted at the sites when the construction was being done. Even if they were not visible at the sites, an inquiry by the plaintiff to the relevant municipal offices would have provided that information. Copies of the three building permits were provided to the court. Under the heading "Owner" is identified Robert Vitullo, (Stanvit Estates), 30 Moyal Court, Maple, Ontario. No information is contained under the heading "Builder", although in the affidavit of Goffredo Vitullo, filed by the proposed party, he deposes that the space for builder is left blank, which is the standard practice when the owner is also the builder.

I note that as part of its due diligence, prior to the issuing of the Statement of Claim, the plaintiffs conducted a title search of the relevant properties and discovered that the registered owner was, in fact, the defendant 2041320 Ontario Inc. I also note that although the alleged accident happened when the premises were under construction, the retainer of counsel

for the plaintiff occurred after the properties were sold and there is no reason to believe that the building permits were posted on the sites at that time.

Returning to the applicable test and applying it to the facts, I am satisfied that the searches and inquiries made by counsel for the plaintiff constituted due diligence. They took the information received from the plaintiff and checked it through corporate name search. That led to the defendant Century Grove and it was confirmed by the applicable website that Century Grove was in the building business in the vicinity of the subject premises. In my view, failure to contact the municipal offices to ascertain the name shown on a building permit does not demonstrate a failure of due diligence. As well, based on the facts that have been outlined in court, even if that inquiry had been made there would have been no certainty as to the identity of the builder, and nowhere, except in the documents subsequently received by the plaintiff, was Stanvit Estates shown as c/o/b in the name of Century Grove Homes.

Following the test set out in *Thompson v. Mungham*, my next inquiry is as to whether it was highly unlikely, if not impossible, for the plaintiffs to discover the claim based on the information derived from that due diligence. Again, I am satisfied for the same reasons I've

already indicated that the plaintiffs could not have reasonably identified Stanvit Estates from the information received through the exercise of their due diligence.

I am satisfied that the plaintiffs have provided a reasonable explanation as to why the proposed defendant was not identified and not named as a party prior to the expiration of the initial two year limitation period.

The plaintiff argued that the addition of the new party will not create prejudice in that no discoveries have occurred to date. All evidence continues to be available. No argument was made to the contrary on behalf of Stanvit.

I am satisfied that there will be no prejudice to Stanvit by virtue of the amendment requested. I particularly note that there is an apparently close relationship between the defendant Century Grove and Stanvit such that it is highly likely that Stanvit has been fully aware of the claim since it was initially served on the defendants.

As a result there will be an order granting leave to the plaintiff to amend the Statement of Claim as requested in paragraph 1 of the Notice of Motion, and an order amending the title of proceedings as requested in paragraph 2, and allowing 2 months from today's date to serve the amended Statement of Claim. The amendment will

be without prejudice to the new party's right to plead the limitations defence.

The request in the Notice of Motion for costs arising out of the cancellation of examinations for discovery was apparently settled in advance of the motion and therefore no order need be made in that regard.

The plaintiff made a submission that the amendment should also be allowed on the basis of a misnomer since, in fact, the named defendant is apparently related to the proposed new party by way of at least shared corporate directors. Based on my decision as to the addition of the new party, it is not necessary for me to make a determination on the misnomer issue.

THE COURT: Gentlemen, that is my decision on the matter and I'm prepared to hear your submissions as to costs. Turning first to you, Mr. Waxman.

...SUBMISSIONS BY MR. WAXMAN AND MR. MCQUADE

R E A S O N S F O R R U L I N G

REID J. (Orally):

Well, thank you for your submissions on costs. My discretion as to the granting of costs is obviously found in s. 131 of the *Courts of Justice Act*, and I then defer to the provisions of the Rules for the factors that guide the

exercise of my decision.

The presumptive factor, or at least perhaps the first named one, is success, followed by a variety of other issues, including complexity and the importance of the matter to the parties.

In this case the plaintiff has been successful. The matter was not unduly complex but obviously there was significance to both parties in the outcome.

I've heard of no offers to settle so there's no reason for me to consider a costs order other than at the partial indemnity rate. Counsel for the proposed new party has suggested that this order reflects, in effect, an indulgence. I don't entirely agree with that because, in fact, this is not a situation where the plaintiff has come to court asking for, in effect, forgiveness for delay or some other failure on its part to behave appropriately in the prosecution of the action.

In fact, what the plaintiff has said is that it did perform due diligence, and I have confirmed that to be the case in my reasons, and although the limitation issue remains to be litigated, that does not mean that the request for the addition of a new party under these circumstances necessarily needed to be litigated.

So I am going to make an order of costs in favour of the plaintiff, at a partial indemnity rate, in the amount of $2,500 inclusive of HST and disbursements, and I see no reason why that payment shouldn't be made within 30 days. Just give me a moment.

I've endorsed the motion record as follows:

For oral reasons given today the motion is granted as to the relief set out in paragraph 1 and 2 of the notice of motion, with the amended claim to be served by no later than September 30, 2014. The amendment is without prejudice to the new party's right to plead a limitations defence. Costs are payable by the new party to the plaintiff fixed in the amount of $2,500, inclusive of HST and disbursements, payable within 30 days.

Does that conclude the matter?

MR. MCQUADE: Yes. Thank you, Your Honour.

MR. WAXMAN: Thank you, Your Honour.

THE COURT: Thank you very much.

...DISCUSSION RE COPY OF ENDORSEMENT DULY RECORDED NOT TRANSCRIBED

...WHEREUPON THIS MATTER WAS CONCLUDED

FORM 2

Certificate of Transcript

Evidence Act, Subsection 5(2)

5 I, Janet M. Gautier, certify that this document is a true and accurate transcript of the recording of the proceedings in *Venditti, et al v. 2041320 Ontario Inc., et al*, in the Superior Court of Justice held at 45 Main Street, East, Hamilton, Ontario, taken from Recording No.

10 4799 704 20140730 095341 10 REIDROBE, which has been certified in Form by Kathleen Chernets.

November 27, 2014
(Date)

(signature of authorized person)
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