Case Name:

Blinn v. Burlington (City)

RE: Michael Blinn, Plaintiff, and
The Corporation of the City of Burlington, Defendant, and
Fidale Snow Service Inc. and ING Insurance Company of Canada,
Third Parties

[2010] O.J. No. 3063

2010 ONSC 3446

Court File No. 5075A/07

Ontario Superior Court of Justice

J.C. Murray J.

Heard: April 26, 2010.
Judgment: June 29, 2010.

(28 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Amendment of -- After expiry of limitation period -- Motion by defendant City to amend its third party claim by adding Dufferin Construction and its insurer as a third party dismissed -- Plaintiff commenced action against City in 2007 for injuries suffered in slip and fall accident -- Plaintiff alleged improper snow removal -- Based on expert report received in 2009, plaintiff, with City's consent, amended claim to allege faulty road construction -- In 2010, City moved to add construction company as third party defendant -- Amendment was statute barred -- No evidence that City made reasonable inquiry and investigation to ascertain all potentially liable parties during limitation period.

Motion by the defendant City to amend its third party claim by adding Dufferin Construction and its insurer as a third party. The plaintiff sued the City for injuries suffered in a slip and fall accident in 2007. The plaintiff alleged that a grader operator retained by the City to remove snow negligently blocked a catch basin with snow, thereby resulting in water pooling near the plaintiff's driveway which subsequently froze. The City then issued a third party claim against the snow removal company. In 2009, the plaintiff provided the City with an expert report indicating that the design or construction of the road was deficient and that these deficiencies created vulnerability for inadequate drainage to the catch basin. On consent, the plaintiff amended his statement of claim in 2009 to al-

lege defective road construction. In its amended defence, the City denied any liability as it was an unassumed road owned by the developer who had retained Dufferin to design and construct the road. Dufferin argued the amendment was statute barred.

HELD: Motion dismissed. There was no evidence as to what, if any, steps were taken by the City to ascertain all potentially liable parties. When the City consented in 2009 to the order permitting the plaintiff to further amend his statement of claim and to allege faulty design or construction of the roadway, the plaintiff was not required to provide a reasonable explanation as to why information about alleged faulty design or construction was not available within the limitation period on the exercise of reasonable diligence. The right of Dufferin and Zrich not to be sued outside the two-year limitation period ought not to be compromised by an order obtained on consent of the plaintiff and the City, and in the absence of evidence which supported a conclusion that reasonable inquiry and investigation was made by the City to ascertain all potentially liable parties.

Statutes, Regulations and Rules Cited:

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 4, s. 5, s. 18, s. 21

Rules of Civil Procedure, Rule 26.01

Counsel:

Avril Allen, Counsel, for the Defendant.

Martin Forget, Counsel, for the Responding Parties, Dufferin Construction and Zurich Insurance.

ENDORSEMENT

1 **J.C. MURRAY J.**:-- The Corporation of the City of Burlington is a defendant in an action brought by the plaintiff, Michael Blinn, who claims damages arising from a slip and fall accident that occurred on March 2, 2007.

2 The plaintiff alleges that he slipped and fell on ice on the roadway adjacent to his home located at 3287 Star Lane in the City of Burlington and that he sustained injuries that have resulted in permanent and serious impairment. In his claim, the plaintiff alleged that a grader operator working for or on behalf of the City was negligent when, after a heavy snowfall, the operator caused large piles of snow to completely block the catch basin adjacent to the plaintiff's driveway. Shortly thereafter, an increase in temperature. caused the snow to melt resulting in a large pond of water accumulating on the road immediately adjacent to the plaintiffs driveway. When the temperature fell to below freezing, the pool of water turned to ice causing the hazard on which the plaintiff slipped and fell. In its statement of defence, the City denied liability and asserted that the road in question was maintained in a reasonable and proper manner.

3 The original statement of claim was issued on August 27, 2007. On September 6, 2007, the City was served with the plaintiff's statement of claim.

4 The statement of claim, was amended on consent on March 17, 2008. The amendments contained in the first amended statement of claim are not relevant to the issues raised in this motion.

5 On July 3, 2008, the City of Burlington issued a third party claim against Fidale Snow Services Inc. (hereinafter "Fidale") and ING Company of Canada claiming contribution and indemnity with respect to any amounts found owing to the plaintiff. Fidale is the contractor responsible for snow removal. The City asserted in its third party claim that Fidale was negligent because it piled snow on top of a catch basin Causing snow and ice to block the catch basin and water and ice to accumulate. Fidale and ING Insurance Company filed a third party defence and an amended third party defence in which they denied liability.

6 Examinations for discovery took place and the trial of the main action and the third party action were scheduled for the November 2009 sittings in Milton, Ontario. Less than 60 days prior to the scheduled commencement of the trial, the plaintiffs solicitor provided to the defendant City an expert report, dated September 17, 2009, from Walters Forensic Engineering Inc. in which it was asserted, that the design and/or construction of the road was deficient and that these deficiencies created vulnerability for inadequate drainage to the catch basin.

7 A review of the Walters Forensic Engineering Inc, report indicates that the first visit to the site of the accident by representatives of Walters was on April 23, 2009, almost two years and two months after the accident. There is no evidence from the plaintiff as to why this investigation took place so long after the incident.

8 It is apparent from the affidavit material filed in this motion that upon receipt of the expert report, the City took the position that at the upcoming trial it would object to the plaintiff calling any representative of Walters Forensic Engineering Inc. to give expert evidence relating to alleged deficient road design and/or construction unless the plaintiff first brought a motion to amend his statement of claim.

9 The plaintiff and the City agreed to adjourn the trial scheduled for the November 2009 sittings and, at the request of the City, the plaintiff brought a motion to further amend his statement of claim to allege that the roadway in question did not meet municipal design standards and that this affected the drainage of the roadway. By order of this Court dated November 6, 2009, obtained on consent, the trial of the main action and third-party action were adjourned from the November 2009 sittings to the November 2010 sittings. The consent order granted leave to the plaintiff to further amend the amended statement of claim to make additional allegations regarding deficient design and/or construction of the road in question. Pursuant to the consent order, the plaintiff issued an amended amended statement of claim, dated November 23, 2009, adding allegations that the design and construction of the roadway were deficient and that these deficiencies of design and construction caused or contributed to the accident.

10 An amended statement of defence, dated November 30, 2007, was issued on January 22, 2010. In the amended statement of defence, the City of Burlington denied it had any obligation to maintain the road in question because it was an unassumed road owned by the developers who were responsible for the condition of the road at the time of the accident. The defendant City further alleged that the developer had retained A.J. Clarke & Associates Ltd, and Dufferin Construction Company, respectively, to design and construct the road. In its amended statement of defence, in addition to maintaining its allegation against Fidele Snow Services lnc., the City pleaded that the developer was the owner of the road at the time of the accident and that A.J. Clarke & Associates Ltd,, who designed the road, and Dufferin Construction Company, who constructed the road, were also responsible.

This Motion

11 On January 19, 2010, the City of Burlington moved for an order to amend its third party claim against Fidale by adding other third parties including Dufferin Construction Company and Zürich Insurance Company the insurer of Dufferin Construction (hereinafter referred to as "Dufferin" and "Zürich").

12 Dufferin Construction and Zürich Insurance Company oppose the motion.

The Position of the Parties

13 In its motion to add third parties, the City of Burlington argues that it had no reason to believe that deficient grading or drainage caused or contributed to the accident prior to receiving the plaintiff's expert report from Walters Forensic Engineering on. September 17, 2009, and therefore had no reason to commence third party proceedings against Dufferin and Zurich until it received the amended amended statement of claim on or about November 23, 2009.

14 Dufferin and Zürich say leave should not be granted because the City's proposed claim for contribution and indemnity is statute-barred not having been commenced within two years of September 6, 2007, the date on which the City was served with the plaintiff's statement of claim.

15 Dufferin and Zürich rely, inter alfa, on sections 18 and 21 of the Limitations Act, 2002, S.O. 2002, ch. 24 (hereinafter referred to as the "Limitations Act"), which state as follows:

> 18.(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with a claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place. 2002, c. 24, Sched. B, s. 18(1).
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> 21.(1) 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 preceding. 2002, c. 24, Sched, B, s. 21(1).

16 Section 4 of the Limitations Act states that, unless otherwise provided in the legislation, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. Section 5(1) of the Limitations Act sets out when a claim is discovered. Section 5(2) states that a person with a claim is presumed to have discovered the claim. (within the meaning of s. 5(1)) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

17 Section 18 provides that for purposes of a claim by an alleged wrongdoer against another wrongdoer for contribution and indemnity, the day on which the first alleged wrongdoer was served with a claim in respect of which contribution and indemnity is sought is deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place. For purposes of a claim for contribution and indemnity by a defendant, the limitation clock starts ticking on the date that defendant was served with the plaintiff's statement of claim.

18 The City asserts that the limitation period for adding the proposed third party did not begin to run until November 23, 2009, the date of the delivery of the amended amended statement of claim

or in the alternative, it did not start to run until September 17, 2009, the date on which the plaintiff's expert report was received by the City.

19 Dufferin and Zürich argue that pursuant to s. 5(2) of the Limitations Act, the onus is on the City of Burlington to establish that it did not know or could not have known with reasonable diligence before November 23, 2009 or, in the alternative, before September 17, 2009, that the injury, loss or damage to the plaintiff was caused by or contributed to by an act or omission of Dufferin. Dufferin and Zürich say that the City has not met this onus and therefore its motion to add Dufferin and Zurich as a third party defendants should be dismissed.

Analysis

20 In Pepper v. Zellers Inc., [2006] O.J. No. 5042, the Court of Appeal made the following observations regarding discoverability:

> The first question in this case related to discoverability, a principle that provides that the limitation period commences when the plaintiff discovers the underlying material filets or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence. This principle ensures that a person is not unjustly precluded from litigation before he or she has the information to commence an action provided that the person can demonstrate he or she exercised reasonable or due diligence to discover the information. See Peixeiro v. Haberman, [1997] 3 S.C.R. 549.

The Court of Appeal, in para. 17 of the Pepper decision, made it clear that the principle stated above applies both to the discoverability of facts and the discoverability of the tortfeasor's identity.

21 In Pepper, the Court of Appeal approved the approach concisely and clearly set out in Wong v. Adler, (2004), 70 O.R. (3d) 460. According to Wong, the motions court must examine the evidentiary record before it to determine if there is an issue of fact or of credibility on the discoverability allegation which is a constituent element of the claim. If the Court determines that there is such an issue, the defendant should be added with leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor were actually known to the plaintiff or her solicitor more than, two years before the motion to amend, the motion should be refused. If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided, of course, that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not available with a due diligence. Wang also makes it plain that if the evidence is clear and uncontradictory that the plaintiff could have obtained the requisite information with due diligence and that there is no issue of fact or credibility that a motion to add a defendant may be denied.

22 The plaintiff's expert report indicates that the first visit to the site of the accident by representatives of Walter's Forensic Engineering Inc. occurred on April 23, 2009, almost two years and two months after the accident. The report does not indicate when Walter's Forensic Engineering Inc. was retained by the plaintiff, It is probable, given the date of the attendance by representatives of Walter's Forensic Engineering Inc. at the site of the accident, that the expert was not retained by the plaintiff to investigate and report until after the expiration of the limitation period. In any event, there is no evidence from the plaintiff as to why this investigation took place so long after the inci-

dent. Neither is there evidence of what, if any, representations the plaintiff may have made to the defendant City to explain the delay in obtaining an expert report. The record before the Court on this motion points to a finding that the plaintiff could have obtained the requisite information with the exercise of due diligence prior to the expiration of the two-year period.

23 In the case of Hamilton (City) v. Svedas Koyanagi Architects, [2009] O.J. No. 1039, the plaintiff municipality claimed damages against an architect and the general contractor regarding the construction of an arena. The municipality brought a motion seeking to add Honeywell Ltd. and Honeywell Controls Ltd. as defendants. The proposed defendants argued that the limitation period for initiating an action against them had expired. The plaintiff municipality argued that the limitation period for initiating an action against the Honeywell defendants did not commence until December 2006, when the municipality received a report indicating that the Honeywell control was improperly calibrated. There was no evidence before the Court as to what, if any, steps were taken between 1994 and 2006 to ascertain the identity of any other individual or corporation who might bear sonic responsibility for the problems at the arena. In the absence of evidence of efforts to obtain information pointing to the possible liability of the proposed Honeywell defendants, the Court found that there was no evidentiary foundation upon which to conclude that the municipality had been reasonably diligent. The motion to add the Honeywell companies as defendants was dismissed.

24 In this case, in addition to there being no evidence as to what representations were made to the City by the plaintiff about the plaintiff's due diligence, there is no evidence before this Court as to what, if any, steps were taken by the City of Burlington to ascertain all potentially liable parties.

25 The City of Burlington, on November 23, 2009, consented to an order permitting the plaintiff to further amend his statement of claim and to allege faulty design and/or construction of the roadway. As a result of the consent order, the plaintiff was not required to provide a reasonable explanation on proper evidence as to why information about alleged faulty design and/or construction was not available within the limitation period -- that being two years from March 2, 2007 -- on the exercise of reasonable diligence. The City's consent to the plaintiff's amendment to the statement of claim, as a practical matter, negated any independent inquiry by the Court into whether the plaintiff could have obtained the requisite information with due diligence prior to the expiry of the limitation period. Furthermore, the consent order negated any inquiry pursuant to Rule 26.01 as to whether the proposed amendment would result in prejudice to the defendant City that could not be compensated by costs. On the record before the Court, it is likely that the defendant City would have been successful in defending against the plaintiff's amendment alleging faulty construction and/or design because the loss of the right to seek contribution from Dufferin and Zurich could not be compensated for by costs or an adjournment See Scott Morris Architects Inc. v. Blu Skye Medical, [2010] O.J. No. 625 and 11911226 Ontario Ltd v. Niagara College of Applied Arts and Technology, [2008] O.J. No. 973.

26 The right of Dufferin and Zürich not to be sued outside the two-year limitation period ought not to be compromised by an order obtained on consent of the plaintiff and the defendant City, and in the absence of evidence which supports a conclusion that reasonable inquiry and investigation was made by the City to ascertain all potentially liable parties. In this case, such evidence does not exist. Consenting to an order by a plaintiff to amend the statement of claim does not alleviate the onus on the defendant to show that it has been reasonably diligent in investigating whether there are any other parties who might be liable. If it were otherwise, a plaintiff and defendant could, by the device of a consent amendment to the statement of claim, circumvent any obligation to show due

diligence in ascertaining the potential liability of third parties. This would effectively render s. 5(2) of the Limitations Act nugatory and eliminate the burden imposed by that section on a defendant to establish that it did not know or could not have known with reasonable diligence before the expiry of the limitation period that the injury loss or damage to the plaintiff was caused by or contributed to by an act or omission of another party.

27 The motion to add Dufferin and Zürich as third paries is therefore dismissed.

Costs

28 If the parties are unable to agree on costs, I will entertain brief written submissions from the successful parties within three weeks of the release of this decision. Brief written reply submissions from the City of Burlington should be provided within three weeks of receiving the costs submissions of Dufferin and Zürich.

J.C. MURRAY J.

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