Case Name:
Holder v. Wiazowski

Between
Sonia P. Holder, Plaintiff, and
Riszard Wiazowski and Jane Doe, Defendants

[2011] O.J. No. 4152

Court File No. CV-08-369067

Ontario Superior Court of Justice

Master J. Haberman

Heard: September 15, 2011.
Judgment: September 20, 2011.

(23 paras.)

Counsel:

Amanda E. Bafaro and Andrew S. Bergel, for the Plaintiff.

Hans C. Goddard, for the defendants, Sonia Holder and Auto Credit Acceptance Corp.

Martin P. Forget, for the Responding Party, Rizard Wiazowski.

ENDORSEMENT

1 **MASTER J. HABERMAN**:-- This motion was heard and dismissed today with brief reasons to follow. Here are my reasons.

2 It is unclear to me that this is actually a case of misnomer, as distinct from a motion to add a party defendant after the expiry of the limitation period. If the case is viewed in that way, the limitation period has expired and that therefore ends the matter, in view of the absence of solid evidence as to the exercise of reasonable diligence to identify Jane Doe until very recently.

3 Even if the matter was to be viewed as a case of misnomer, 1 remain concerned that this issue is only being raised now, almost 3 years after the expiry of the limitation period. There was an onus on the plaintiff to make some effort to identify the supposed female driver of this vehicle. They only did so recently and there is no explanation offered for that omission. Holder has claimed from the

start that a female was driving. This is what she told the police, as well as her counsel. That accounts for the wording of paragraph 4 of the statement of claim (... Richard Wiazowski may not have been operating the defendant vehicle at the time of the accident ...). Yet, though the claim was issued, suggesting a possible female driver, nothing further was done to explore the issue and bring it to a head until very recently and then, for reasons entirely unrelated to an attempt to pin liability on the alleged female driver.

4 The plaintiff led no evidence to suggest that inquiries were made by her or on her behalf of Richard Wiazowski, of his insurer or of his counsel as to the identity of the woman in the car. Though Richard may have stepped up to the plate and claimed to have been the driver, there is no suggestion that he would have refused to acknowledge that there was a female with him. In view of the accident report, he would have been hard pressed to do so. As this woman would have been, at the very least, a possible witness to the accident, Richard would have been bound to disclose her name and contact details but it appears that he was never asked for them. Had the identity of the woman in the car been established, Doe could have been substituted with the woman's actual name far earlier.

5 What is even more astonishing is the fact that Richard was never asked at discovery who was in the car with him that day. Even then, establishing Doe's identity was still not a priority for the plaintiff. Finally, the plaintiff sought to set the action down for trial without ever having identified or served Doe. The reasonable inference to be drawn from this ongoing lack of interest in Jane Doe is that the issue of her potential involvement in and liability for this accident was simply abandoned. The desire to identify and the substitute Mrs. Wiazowski for Jane Doe only arose in February 2011, after and solely as a result of the inability to set the action down for trial with the unidentified Jane Doe as a defendant.

6 The accident giving rise to the action and, hence this motion, took place in December 2006 - almost five years ago. The limitation period expired in December 2008. In December 2010, the plaintiff's trial record was rejected in view of the hanging "Doe" issue.

7 Instead of simply discontinuing against Doe, a relatively simple process which would have alleviated the problem, the plaintiff sought Wiazowski's consent to set the matter down for trial, He refused. That is what prompted this motion. The primary relief sought is leave to set the action down for trial. In fact, at paragraph 9 of her supporting affidavit, Amanda Bafaro states, in bold and underlined, that "our only objective is to set the action down for trial." Leave to amend the claim in order to substitute Richard's wife for Jane Doe was sought only as alternative relief, to facilitate the ultimate objective.

8 When asked, on the first attendance before me, how she planned to deal with the Doe issue after the action was set down for trial, counsel responded that it had been their intent to set the action down for trial and to then deal with the misnomer at trial. If the intent at that time was to seek a dismissal or discontinuance against Doe, that is one matter - but that was not what was stated.

9 The alternative is the motion to now substitute the proposed defendant for Jane Doe. To endeavour to do this at trial would have produced a nightmare scenario. At the very least, it would have led to an adjournment of the trial, costs thrown away all around and wasted court time. Further it may have resulted in both defendants losing their insurance coverage for this loss - certainly not in the plaintiff's best interests. I am at a total loss to comprehend the plaintiff's strategy is raising this issue in this way at this very late date.

10 As a result of having received that response ("we'll deal with it at trial"), I ordered last day that the plaintiff could proceed to set her action down for trial, as she has now done, but that any motion to substitute a name for Doe had to be brought now, rather than at trial.

11 The generally accepted test still relied on to assess whether or not what is proposed qualifies as a real misnomer is found in Davies v. Elsby Brothers Ltd, [1960] 3 All ER 672, where Lord Devlin stated:

> The test must be; How would a reasonable person receiving the documents take it? If in all the circumstances of the case and looking at the document as a whole, he would say to himself. "Of course it must be me, but they have got my name wrong", then there is a case of mere misnomer, If on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries," then it seems to me that one is getting beyond the realm of misnomer.

12 There is no evidence to suggest that Mrs. Wiazowski even saw the statement of claim before she Was served with these motions materials earlier this year. It is conceivable that, if what the plaintiff thought she saw was accurate, and Mr. Wiazowski is prepared to accept responsibility for his wife's actions, perhaps he is also prepared to shield her from the allegation in the claim which might impliCate her in these events.

13 Though the proposed defendant swore a responding affidavit, she was not cross-examined on it so the plaintiff walked away from an opportunity to learn more about what this woman did; what she believe and what she knew.

14 Reading the claim. now, the proposed defendant would certainly be able to accept that she was a woman in the car, but would she necessarily identify with the assertion that she was also the driver of it? That is doubtful in light of her direct and unchallenged evidence to the effect that she was not diving at the time of loss.

15 Thus, while the proposed defendant may now be aware that the litigation finger is pointing at her, and though her husband and her insurer may have considered her involvement earlier, there is no evidence to suggest that she was aware that she was a target before the motion materials were served on her.

16 In the more recent ease of Urie v. Peterborough Regional Health Centre [2010] O.J. 3962, O'Connell J. considered this issue in the context of a medical malpractice case. There, he expressed concern that imitation periods should not be overridden under the guise of a misnomer unless the misnomer is clear and the delay in discovering it is explainable. Here, the misnomer is not clear and the delay is unaccounted for. The learned judge is critical of plaintiff's counsel for not having made any effort to seek out the identity of various defendant doctors earlier

17 In Dukoff et al. v. Toronto General Hospital et al. [1986] O.J. 188, Saunders J .discussed the use of "Doe" as a place keeper, pending identification of the intended defendant:

> If, as here, the technique of using fictitious names could be used with little indication of the persons referred to and no evidence of any effort to determine their identity, the protection afforded by the limitation period would be lost. That would he an undesirable result.

18 In Dukoff, the court found no evidence of any effort to identity the Doe parties before the expiry of the applicable limitation period.

19 The Court of Appeal has recently looked at these issues in O'Sullivan v. Hamilton Health Sciences Corp. [2011] O.J. 3161. In dealing with a motion to substitute in the context of a medical malpractice action, the court noted that the proposed party had had no notice of the claim for about five years after the date a the incident. They agreed that the motions judge had not erred when she considered the unexplained significant delay in moving to amend their pleading after learning of the proposed defendant's correct name.

20 While the plaintiff here did not have the correct name earlier, that is only because she failed to request it. As the proposed defendant was a person with information about a material issue (liability), the court would have ordered her name disclosed, even if the defendant had not been forthcoming with it when asked.

21 In O'Sullivan, the Court of Appeal also agreed that the motion judge was correct to concern herself with the public policy reasons for adhering to limitation periods. Finally, that court agreed that, even if the motions judge was prepared to accept that what she was dealing with was a misnomer, she retained residual discretion pursuant to Rule 5.04(2) to refuse the pleading amendment.

22 On the basis of the foregoing I find that:

* in the absence of any evidence as to efforts made to identify Jane Doe before February 2011;
* in the absence of any evidence as to why nothing was done before February 2011 to identify Jane Doe;
* in view of the fact that the limitations period expired almost 3 years ago;
* in view of the proximity to trial; and
* in the context of how and when this motion was made, the plaintiff having stated through counsel that the only objective was to set the action down for trial,

this motion must be dismissed.

23 The costs of the motion are to the responding party, fixed at $5800 and payable within 30 days.

MASTER J. HABERMAN

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