Citation: Moskal v Costco Wholesale Corporation, 2015 MBCA 108

Date: 20151130
Docket: AI14-30-08305

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Barbara M. Hamilton
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

***BETWEEN:***

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|---|---|
| ***JOSEPH MOSKAL*** | ✓***M. G. Finlayson*** *for the Appellant* |
| *(Plaintiff) Respondent* | ***A. L. Guerra*** *and* ***D. C. Mazur*** *for the Respondent* |
| *- and -* | |
| ***COSTCO WHOLESALE CORPORATION*** | *Appeal heard:* ***April 28, 2015*** |
| *(Defendant) Appellant* | *Decision pronounced:* ***November 30, 2015*** |

## MONNIN JA

[1] Costco Wholesale Corporation, the defendant (Costco), appeals from the dismissal of its motion to amend its statement of defence to raise a defence under section 5(1) of *The Occupiers' Liability Act*, CCSM c O8 (the *Act*). For the reasons that follow, the appeal should be dismissed.

[2] On February 4, 2011, Joseph Moskal, the plaintiff (Moskal), was injured in a slip and fall in the parking lot of Costco. He filed his statement of claim on August 15, 2011. At its core, the claim submits that Costco, as occupier, had a duty of care to keep its parking lot free from ice and snow and failed to take all reasonable precautions to that end.

[3] Soon after Costco filed its statement of defence which pled, in part, that it had "implemented a reasonable maintenance regime with respect to its parking lot". It also pled and relied upon the provisions of the *Act*, but did not specify which sections.

[4] In the ensuing months, the parties exchanged documents. Those documents set out that Costco had retained a third-party contractor, Green Drop Lawns Ltd. (Green Drop), to clear the parking lot on the date of the accident and to apply an ice-treating chemical. At examinations for discovery held in April 2012, the role of Green Drop as the contractor hired to clean the parking lot was discussed.

[5] In the months after the examination for discovery, Moskal and his counsel, after discussions with individuals in the snow-clearing industry, found and retained an expert who provided them with an opinion to the effect that Green Drop had applied the wrong chemical.

[6] By the time the expert's report was obtained by Moskal's counsel in October 2013, the limitation period to bring an action against Green Drop had expired. Moskal therefore brought an application under subsections 14(1) and 14(6) of *The Limitation of Actions Act*, CCSM c L150 (the *LA Act*), to continue the action against Green Drop and to amend its pleading accordingly. This application was filed on December 13, 2013.

[7] Costco, a few months later and before the hearing of the application, filed a notice of motion to amend its statement of defence to allow it to plead and rely upon section 5(1) of the *Act*. Section 5(1) provides as follows:

> **Damage caused by independent contractor**
> **5(1)** Notwithstanding subsection 3(1), where damage is caused to persons or property on premises solely by the negligence of an independent contractor engaged by the occupier of the premises, the occupier is not on that account liable under this Act if, in all the circumstances,
>
> (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and
>
> (b) it was reasonable that the work that the independent contractor was engaged to do should have been done.

[8] It further sought to amend its statement of defence to set out the facts associated with pleading that defence. It purported to amend its pleadings under Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 26.01 and r 26.02(d), which provide as follows:

> **General power of court**
> **26.01** On motion at any stage of an action the court may 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.
>
> **When amendments may be made**
> **26.02** Generally, a party may amend a pleading,
>
> . . .
> (d) with leave of the court.

[9] Both motions were heard by the same motion judge at the same time. Green Drop opposed the application to add it as defendant. Costco took no position on that application.

[10] In a short endorsement, the motion judge dismissed Moskal's

application to add Green Drop as a defendant on the basis that Moskal knew by April 24, 2012, at the examination for discovery, that Green Drop had applied a chemical to Costco's parking lot. According to the motion judge, that was sufficient information for him to allege responsibility on the part of Green Drop for his injury. Moskal had not proceeded with the required due diligence and the application was dismissed. No appeal has been taken from that decision.

[11] As to Costco's motion to amend its pleadings to raise a section 5(1) defence, the motion judge, erroneously characterizing it as a motion to add Green Drop as a third party, dismissed it as well. Relying upon the decision of *Goodman v East St Paul (Rural Municipality)*, 2011 MBQB 111, 265 ManR (2d) 115, he concluded that Moskal, not being able to add Green Drop as a third party because of a limitation issue, was prejudiced in a manner that could not be overcome by an award of costs or adjournment. It is that decision which is presently before this Court.

Issue

[12] Costco correctly set out the issue as being whether the amendment sought by it would cause prejudice to Moskal. A subset of that issue is whether the ratio of the *Goodman* decision or any other principle or factor bar Costco's amendment to its statement of defence to plead section 5(1) of the *Act*.

Standard of Review

[13] Costco's position is that the applicable standard of review is correctness, relying upon *Winnipeg (City) v Columbus Centennial Centre*

*Inc et al*, 2013 MBCA 2, 288 ManR (2d) 133. That case, also dealing with amendment of pleadings and limitation issues, does not support Costco's position. Beard JA, for the Court, stated as follows (at para 21):

> This ground of appeal involves the motion judge's conclusion regarding the legal effect of the facts, in other words, the legal effect of the amendments being proposed by the City, so it appears to be a question of mixed fact and law, which would ordinarily be determined on the standard of palpable and overriding error. However, I have concluded, for the reasons that follow, that this ground of appeal raises an extricable question of law and is, therefore, to be determined on the standard of correctness.

[14] In my view, we are not dealing here with a question of law, but the motion judge's discretionary view of whether there would be prejudice to Moskal by allowing Costco to amend its pleadings. A discretionary order must be reviewed according to the highly deferential standard as described in *Elsom v Elsom*, [1989] 1 SCR 1367, that is, an appellate court will not interfere unless the trial judge misdirected himself or the decision is so clearly wrong as to amount to an injustice.

Position of the Parties

[15] On appeal, Costco's position is that the motion judge misconstrued the nature of the motion before him. In its submission, the amendments sought are simply an elaboration to the defence already set out in the original pleading that it had "implemented a reasonable maintenance regime with respect to its parking lot". That maintenance regime included the attendance by Green Drop to apply chemicals, which it did in its discretion.

[16] According to Costco, it was only when Moskal obtained a report to the effect that the chemical applied was inappropriate or inappropriately applied, that an issue arose. In its view, it is entitled to respond to this assertion and to argue that someone else is responsible for the inappropriate use of the chemical. It also argues that if the amendments sought were not allowed, it would still be permitted to adduce evidence surrounding Green Drop's contract, its performance and whether it was negligent or not. In Costco's submission, neither the issues nor the scope of evidence adduced would be different if the amendment was allowed.

[17] Costco also argues that *Goodman* is distinguishable, because, in that case, the plaintiff could not have known of the potential defendant or its identity until a number of years after the limitation period had passed. In this case, Costco argues that Moskal was aware of the participation of Green Drop, or a contractor, more than one year before the limitation period expired.

[18] Costco also raises the issue of the effect of failing to allow an amendment at this juncture. In its submission, it embarked on a valid litigation strategy, namely, focussing the defence upon the issue which was raised by Moskal and which was known at the time. If it were to have involved Green Drop at the outset on a third-party claim, it would have unnecessarily broadened the scope of the litigation without facts to support it. It was only when the expert report was presented that there were facts which suggested that Green Drop should become a party to the litigation.

[19] Moskal's position on appeal is that the motion judge properly applied the principles surrounding r 26 dealing with the amendment of

pleadings and correctly found prejudice which was not compensable in costs or which could be dealt with by an adjournment. He further says that the motion judge properly relied upon *Goodman* and the cases referred to therein. He also notes that the material facts upon which Costco would need to rely to raise the independent contractor defence are not in the original defence and, as such, it is not a defence which would be available to Costco absent the amendments to its pleading.

[20] Finally, he says that the facts concerning the independent contractor and the role it played in the maintenance of the premises were known to Costco from the start. As well, the motion judge noted that Costco could still issue a third-party claim against Green Drop if it wished to do so and would suffer comparably less prejudice than would Moskal if the motion was allowed.

## Analysis

[21] While the motion judge incorrectly referred to the motion brought by Costco as one to add Green Drop as a third party, he correctly referred to the rule concerning amendments to pleadings, r 26, and the requirement that he consider prejudice to the other parties before granting the amendment. The leading case on r 26 is *Ranjoy Sales and Leasing Ltd et al v Deloitte, Haskins & Sells* (1989), 62 ManR (2d) 65 (QB), aff'd (1990), 63 ManR (2d) 248 (CA). That case concerned an application to amend a statement of defence, and the following four factors were identified for consideration:

1. The seriousness of the prejudice to the other party;

2. Whether the prejudice that would result could be compensated for by costs or an adjournment;

3. Whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained; and

4. The nature of the proposed amendment and whether it raises a valid, arguable point that has merit.

[22] The motion judge, relying upon *Goodman*, essentially considered the first two factors set out in *Ranjoy* for the purposes of reaching his decision, namely, that Moskal would suffer serious prejudice which could not be compensated for by costs or an adjournment.

[23] As to the delay in seeking the amendment, Costco has explained that the need for the amendment, in its view, only arose once it had obtained a copy of the expert report suggesting that its independent contractor had used an inappropriate chemical, and that, therefore, the raising of the section 5(1) defence at this stage was an arguable point that had merit.

[24] In my view, this case should be decided on the question of whether there will be serious prejudice to Moskal. I note, however, that the material facts which the motion judge used as a basis for denying the application to extend time for the application under section 14 of the *LA Act* were known to Costco well before Moskal became aware of them. Costco was aware that a third-party contractor had performed clearing services on the morning in question. While I have some sympathy for Costco's position that it was only when the expert report emerged that a defence under section 5 of the *Act*

came into focus, the same reasoning used by the motion judge to deny an application under section 14 of the *LA Act* has some bearing on the question of whether Costco itself acted with due diligence in raising a defence at this stage when the facts it avers in its amendment were known to it some time ago.

[25] In any event, turning to the issue of prejudice, the motion judge relied upon *Goodman.* In that case, the plaintiff was injured while a spectator at a hockey game in the defendant Municipality's arena, when the puck travelled through the area adjacent to the player's bench where protective netting was not fully installed. Almost three years after filing its statement of defence, the Municipality sought an amendment to plead section 5(1) of the *Act* to include the independent contractor who had installed the netting. Following upon that, plaintiff's counsel sought to add the contractor as a party to the action.

[26] Dewar J, as in this case, denied the application to extend the limitation period on the grounds that the plaintiff had not exercised sufficient diligence in obtaining material facts of a decisive nature concerning the net installer. However, as in this case, he denied the application to raise the section 5(1) defence under the *Act*, on the basis that the inability of the plaintiff to pursue the independent contractor was a prejudice which was not compensable by costs or adjournment.

[27] In *Goodman*, Dewar J relied on the often referred to case of *Steward v North Metropolitan Tramways Company* (1886), 16 QBD 556 (CA). In that case, an action was brought against the defendant tramway company for personal injuries resulting from the defendant not properly

maintaining a road. After the close of pleadings, the defendant sought to amend its statement of defence by asserting that there was a contract between it and the vestry (the road authority in the district) to maintain the road. By this time, however, the limitation period to sue the vestry had expired.

[28] The most frequently cited reasons are those of Lord Esher, where he phrased the question as whether "if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance". In considering that question, he wrote the following oft-quoted comments on prejudice (at p 558):

> The Rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

[29] This reasoning has been followed in a number of cases where defendants have sought to amend their pleadings in order to raise defences which would be prejudicial to the plaintiff from a limitation standpoint. See *Frobisher Ltd v Canadian Pipelines & Petroleums Ltd et al*, [1960] SCR 126; *Visx Inc v Nidek Co et al* (1998), 234 NR 94 (FCA); *Langret Investments SA et al v McDonnell* (1996), 72 BCAC 252; *Sperry Inc v Canadian Imperial Bank of Commerce et al* (1985), 8 OAC 79; *Meyer v Canada* (1985), 62 NR 70 (FCA); and *Monchalin v H Woodgate & Son Ltd*, [1969] 1 OR 745 (CA).

[30] Costco argues that the amendment is not prejudicial as it will still be entitled at trial to present evidence and make submissions raising the very issue which it seeks to elaborate in the pleadings. Therefore, there is no prejudice as the matter will be canvassed at trial. I disagree.

[31] Section 2 of the *Act* is clear that it replaces the common-law rules respecting occupiers' liability developed previously in the case law, save to a limited extent. That section reads:

> **Common law rules abolished**
> **2** The common law rules respecting
>
> (a) the duty of care owed by an occupier of premises to persons entering on the premises or to persons, whether on or off the premises, whose property is on the premises; and
>
> (b) the liability of an occupier of premises for the breach of that duty;
>
> are no longer the law of Manitoba except for the purposes of determining who is or is not an occupier for the purposes of this Act and the provisions of this Act apply in place of those common law rules.

[32] In a similar vein, section 5(1) of the *Act* replaces the common-law rules with respect to independent contractors. Unless section 5(1) is pleaded and considered by the trial judge, at trial Costco will be limited in its defence to arguing that it implemented a reasonable maintenance regime with respect to its parking lot. If it convinces the trial judge of that, notwithstanding that its contractor may have used an inappropriate chemical, then it will be successful. However, it will not be able to deflect the responsibility to its independent contractor.

[33] For this reason, I am of the view that the motion judge was correct when he concluded that there will be significant prejudice to Moskal by allowing the amendment at this stage of the proceedings as Costco will be able to deflect its liability onto a third party against whom Moskal will not be able to seek compensation.

Conclusion

[34] I would, therefore, dismiss the appeal with costs to Moskal.

JA

I agree: JA

I agree: JA