A Caution on Misnomer

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The doctrine of misnomer seems, more often than not, to be quite generously applied to permit litigants to add (or, more accurately, "substitute") parties to an action, generally well after the expiry of the presumptive two year limitation period. The doctrine permits the amendment of a pleading to reflect that a person named in a claim is actually a different person, or to reflect that a person/corporation identified in a generic manner in the claim is actually a specific person/corporation.

It is reasonable to expect that claimants would take solace in the doctrine of misnomer, particularly when running up against a limitation period while not fully aware of the potential parties involved who should appropriately be named in the lawsuit.

However, the recent Superior Court decision in *Reimer v. Toronto (City)*[1] should give claimants pause before taking such comfort, as the case reflects that the burden to be met for the doctrine to apply is more onerous than may be appreciated.

Facts

Reimer involves a personal injury action arising out of two nearly contemporaneous slip and fall incidents that took place on City of Toronto premises on February 7, 2017. As the plaintiff was exiting a TTC bus at the intersection of Sheppard Avenue East and Kennedy Road, she reportedly slipped on the sidewalk. She seemingly picked herself up but fell again while crossing the roadway.

At the time of the incident, the City had retained Maple-Crete Inc. ("Maple") to perform winter maintenance of the sidewalk at the intersection. Maple sub-contracted the work to RoyalCrest Paving and Contracting Ltd. ("Royal"). The City had retained Crupi & Sons Limited ("Crupi") for winter maintenance of the roadway itself.

Prior to January 2019, nothing was done to identify any of the possible defendants, other than the City. Just prior to issuing the claim, plaintiff's counsel spoke to an adjuster on behalf of the City, but the adjuster, at the time, did not have any information as to the identity of other potential defendants.

The plaintiff issued her Statement of Claim on January 9, 2019, naming the City of Toronto and John Doe Maintenance Company as defendants.

In March 2019, counsel for the City advised plaintiff's counsel of the identity of Maple and Crupi as the relevant City contractors. The plaintiff subsequently served a Motion Record in September 2019 to name Maple and Crupi as defendants to the action, which was Maple's first notice of the subject incident. Maple subsequently advised Royal of the claim in October 2019.

While Crupi did not oppose the plaintiff's motion and was added as a defendant to the action, the motion was opposed by Maple and Royal.

On the motion, the plaintiff relied on the doctrine of misnomer to amend the Statement of Claim to substitute Maple and Royal as defendants in place of John Doe Maintenance Company.

Alternatively, the plaintiff relied on the principle of discoverability to add Maple and Royal as defendants pursuant to Rule 5.04 of the *Rules of Civil Procedure*, which allows the court to add parties to a proceeding on just terms, unless prejudice would result that cannot be compensated for by costs or an adjournment.

Legal Principles – Misnomer

Master Muir outlined a number of key principles applicable to the doctrine of misnomer, relying on the law summarized in *Loy-English v. Ottawa Hospital*[2]. He noted that it is not necessary to use multiple pseudonyms and to precisely guess how many defendants to implicate, providing the claim is drafted with sufficient clarity to identify what allegations are made against individuals or entities filling specific roles.

Additionally, unlike reliance on discoverability to add a party after the expiry of the limitation period, mere correction of a pseudonym is not subject to a due diligence requirement and will not be defeated simply by delay.

The ultimate test with respect to misnomer is whether the plaintiff clearly intended to sue the proposed defendant. The pleading must be drafted with sufficient particularity, such that, on an objective and generous reading, the "litigation finger" would be pointing at the proposed defendant.

That said, the decision is not to be made based on technicalities or vagaries of the pleadings. The question to be asked is "whether it is reasonable and just to allow the pleading amendment and whether it is permitted by the governing legislation."

Legal Principles – Discoverability

With respect to the plaintiff's alternative position relying on the principle of discoverability, Master Muir noted the relevant provisions of the *Limitations Act*, particularly section 21(1) which prohibits the addition of a party after the expiry of a limitation period.

Master Muir outlined the appropriate analysis to be undertaken with respect to adding a party after the expiry of the presumptive limitation period, as set out in *Morrison v. Barzo*[3].

The court must first make a determination as to when the plaintiff knew the elements of the claim under section 5(1)(a) of the *Limitations Act*. If the date determined by the court falls within the limitation period but the proposed defendant relies on reasonable discoverability to contend the claim was late, the court must then make a determination as to when a reasonable person with the abilities and in the circumstances of the plaintiff first ought to have known of the elements of the claim under section 5(1)(b).

The evidentiary burden on the plaintiff relying on discoverability to add a defendant after the expiry of a limitation period is two-fold.

First, the plaintiff must overcome the section 5(2) presumption that the elements of the claim were known on the date of loss, by leading evidence as to when the claim was actually discovered.

Second, "the plaintiff must offer a 'reasonable explanation on proper evidence' as to why the claim could not have been discovered through the exercise of reasonable diligence", i.e. evidence of due diligence, the threshold for which is low.

Analysis

While Master Muir accepted that the situation presented on the motion was one in which the doctrine of misnomer could apply, he found that it did not assist the plaintiff in the circumstances of the case.

On a careful reading of the relevant paragraphs of the Statement of Claim, Master Muir concluded that the language of the pleading was not sufficiently clear such that one would conclude that the litigation finger was pointing at Maple and Royal.

John Doe Maintenance Company was not separately described in the initial Statement of Claim and the roles played by potential unidentified persons/entities were not particularized.

Further, allegations of negligence were not particularized for specific defendants, and none made specific reference to the sidewalk. Indeed, in describing the loss itself, the language did not make clear that the plaintiff was even injured in the initial fall on the sidewalk, suggesting only injuries from the fall on the roadway (responsibility for which fell to Crupi).

Master Muir concluded that the plaintiff failed to satisfy her onus in order to substitute Maple and Royal for John Doe Maintenance Company, as the lack of particularity in the pleading weighed against a finding of misnomer.

With respect to adding the proposed defendants subject to discoverability principles, Master Muir accepted that the plaintiff only learned of the identity of the proposed defendants well after the date of loss (March 2019 in the case of Maple; October 2019 in the case of Royal).

However, on the evidence before him, Master Muir concluded that the plaintiff failed to meet the low evidentiary burden of providing a reasonable explanation as to why the identity of Maple and Royal could not have been discovered earlier on the exercise of reasonable due diligence.

No evidence was adduced of attempts prior to January 2019 to contact the City to obtain the identities of any winter maintenance contractors. On the contrary, evidence adduced by the proposed defendants demonstrated that the identity of Maple could have easily been gleaned from straightforward internet or telephone inquiries.

On the evidence, therefore, Master Muir concluded that a reasonable person in the plaintiff's circumstances could have discovered the identity of Maple within 30 to 60 days of the incident, and of Royal within a similar time period after putting Maple on notice. Thus, the claim against Maple and Royal was statute-barred.

The plaintiff's motion was, accordingly, dismissed.

Conclusion

The decision in *Reimer* is one helpful to potential defendants sought to be added to (or substituted into) litigation, demonstrating that the threshold to be met – particularly with respect to the application of the misnomer doctrine – is not as superficial as claimants (or

their counsel) may have believed. The case may well give reason to doubt the ongoing seemingly liberal application of the doctrine.

Additionally, the decision is a reminder to all counsel about the value and importance of properly drafted pleadings. Sufficient particularity is required in describing the parties (known and unknown), the circumstances of the loss, and the allegations of negligence (or other causes of action) being advanced against the defendants.

It seems clear that the doctrine of misnomer will not provide a remedy to claimants in the face of a poorly drafted pleading that does not adequately point the litigating finger at the proposed new parties.

Finally, the case serves as a cautionary tale to claimants and their counsel to not forego early investigative steps to try to determine the identity of all potential parties involved and to be named in the litigation.

While the evidentiary threshold to demonstrate due diligence in that regard may be low, it is not trifling, particularly, it seems, where the proposed defendants can demonstrate simple measures that could have been taken to satisfy the burden of reasonable diligence.

Reimer is certainly a case for the defence to keep in mind on similar pleadings amendment motions.

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[1] 2020 ONSC 1661.
[2] 2016 ONSC 6075.
[3] 2018 ONCA 979.