

Waiting Too Long to Add Third Party Can Have Consequences

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November 2020**

In [Crawford v. Standard Building Contractors Limited](#), 2020 ONSC 7022, the Ontario Superior Court of Justice exercised its discretion under rule 29.02(1.2) of the *Rules of Civil Procedure* and denied the defendant leave to add a third party for the reason that doing so would cause prejudice to the plaintiff by delaying the start of trial.

Facts

In July 2019, the plaintiffs' home burned down. They hired Standard Building Contractors Limited ("Standard") to demolish the home and to build a new one. Standard demolished the remainder of the home but did not build a new one.

The plaintiffs brought a claim against Standard for recovery of \$137,690.50 that was advanced to the company, as well as injunctive relief for advances made by the plaintiffs for the construction of the new home by Standard. The plaintiffs terminated their contract with Standard before the start of the new property build on the basis that Mr. Ross, the operator of Standard, had forged the documents required to obtain a building permit for the plaintiffs' property.

Between 2019 and 2020, this litigation moved forward at an accelerated pace by all parties. Ultimately, an expedited summary trial was set to proceed on November 23 to 26, 2020.

Shortly before the scheduled commencement of trial, the defendant, Standard, brought a motion to add an additional third party, Horner Contracting Inc. o/a Horner Workx c/o Kyle Horner ("Horner"). The plaintiffs opposed the addition of Horner on the basis that addition of a third party at this stage would substantially delay the commencement of trial.

Standard does not deny that it was aware of Horner's potential involvement in the action for some time before the motion was brought. However, it is alleged that at the global examinations for discovery for the action, evidence was provided that gave Standard

reason to believe that Horner had more to do with the circumstances giving rise to this action than originally anticipated.

The decision by Justice Mew does not indicate the date on which the Statement of Claim was issued nor the date on which Standard was served with the claim. However, given that the plaintiffs' home burnt down in July 2019, which precipitated the alleged misconduct of the defendant, the Statement of Claim could not have been issued prior to July 2019. Accordingly, Standard would be within the two-year limitation period to bring a claim for contribution and indemnity at the time of the motion.

Issue

Would the plaintiffs suffer undue prejudice by the addition of the defendant's proposed third party to the action?

Disposition

The Court denied leave to commence third party proceedings against Horner. The Court refused an adjournment of trial.

This decision was without prejudice to Standard commencing a separate action against Horner by way of Statement of Claim for contribution and indemnity.

Reasons

Rule 29.02(1.2) of the *Rules of Civil Procedure*, directs that a Court shall grant leave for a defendant to issue a third party claim unless the plaintiff would be prejudiced as a result.

The relevant factors to consider with respect to the Court's application of Rule 29.02(1.2) as espoused in *Fisher v. Amherstburg* (2007 CanLII 16822) and *Farrell v. Costco Wholesale* (2015 ONSC 7783), are as follows:

1. There must be evidence that the plaintiff would suffer undue prejudice over and above the additional inconvenience and work involved when a third party is added; where the plaintiff fails to establish such prejudice, Rule 29.02(1.2) is mandatory and the Court is obligated to grant leave to issue a third party claim; and
2. The Court must also consider the avoidance of multiplicity of proceedings and the risk of conflicting decisions, and as a policy matter, all issues should be tried at one time even if that means some delay in proceeding to trial.

Justice Mew, citing the Court's decision in *Farrell*, accepted that delay can result in prejudice but delay is not determinative that prejudice will be suffered by the plaintiff on a motion for leave to issue a third party claim.

Rather, if there is reason to believe that granting leave would result in prejudice, the Court must exercise discretion and give regard to all circumstances. The Court must determine that the prejudice caused to the plaintiff by the addition of the third party and the subsequent delay would be "undue".

Justice Mew stated that, in this case, the plaintiffs were living with their young family in a small trailer awaiting the outcome of this action before building a new home.

Further, Standard had not provided a draft third party claim with its materials on this motion. Standard simply gave reason that the global discoveries essentially led to an epiphany regarding Horner's involvement in the circumstances giving rise to the action. Justice Mew was underwhelmed with Standard's argument in this regard and found that no insight was given with respect to the viability of the third party claim.

Ultimately, Justice Mew found that it would be unjust to further delay the plaintiffs' pursuit of justice. Refusing leave to add Horner as a third party may lead to a multiplicity in proceedings if Standard subsequently commences a separate action against Horner with respect of this matter. However, Standard is left with that consequence as a result of not having moved to add Horner as a third party earlier.

Justice Mew agreed with the plaintiffs that the proposed third party proceedings appear to be a tactic by the defendant to frustrate the expedited trial.

Conclusion

Justice Mew's decision in *Crawford* serves as a reminder that a defendant's right to bring a claim against a third party tortfeasor within the two-year limitation period for contribution and indemnity is not absolute.

A defendant may run a higher risk of being denied leave to add a proposed third party if a motion for same is delayed or left too close to the start of trial.