SUPREME COURT OF NOVA SCOTIA
Citation: *White v. BP's Main Stop Variety*, 2024 NSSC 86

Date: 20240322
Docket: 500336
Registry: Sydney

Between:

Deborah White

Plaintiff

and

BP's Main Stop Variety, Judy Priscak, Sylvia Barrett

Defendants

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: March 4, 2024, in Sydney, Nova Scotia

Counsel: Robert Carter K.C., for the Plaintiff
Sarah Flanagan, for the Defendants

By the Court:

[1] This case is about how wide a scope of errors can be that fit within the concept of "inadvertence". It may be limited to not turning one's mind to something or forgetting it altogether. But it might also mean just making a mistake or assuming something to be the case when it is not.

[2] The issue arises in the context of the plaintiff's motion to renew a Notice of Action. A Notice of Action expires one year after it is filed and can be renewed for another year by filing a motion within fourteen months after the Notice of Action was filed. *Civil Procedure Rule* 4.04 permits a judge to renew a Notice of Action more than fourteen months after it is filed, under two circumstances. The first is if the plaintiff shows either that reasonable efforts were made to serve the defendant. The second is that "inadvertence led to the expiry", the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated through an award of costs. The defendants say that the wrong person was served and that is not a reasonable attempt to serve the notice. They argue that inadvertence is limited to circumstances in which serving or renewing the Notice of Action has slipped the person's mind or just been forgot. The plaintiff argues that the scope of inadvertence is broader than that. Inadvertence should be interpreted purposefully, within the context of a rule that is intended to weigh the prejudice to the parties of failing to serve the documents.

Mistaken Service

[3] The claim arises from an accident that was alleged to have happened at BP's Main Stop Variety in Reserve Mines on September 10, 2018. On November 29, 2018, the plaintiff, Ms. White, told the defendants that she had retained Ms. Emma Adlakha of Crosby Burke and McRury to represent her. The Defendants' insurer Intact, within a month or so, told Ms. Adlakha that they were denying liability and closing their file. They provided Ms. Adlakha with the proper names of the insured parties, Judy Priscak and Sylvia Barrett carrying on business as BP's Main Stop Variety. There was no further contact between Ms. Adlakha and Intact.

[4] In the meantime, Judy Priscak and Sylvia Barrett sold the business name, BP's Main Stop Variety, to a numbered company of which Colleen McNeil was president and recognized agent. The change of ownership was filed at the Registry of Joint Stock Companies on January 20, 2020. The numbered company bought the business name, BP's Main Stop from the partners, Judy Priscak and Sylvia Barrett.

The numbered company however had nothing to do with the allegations contained in the Notice of Action.

[5] Plaintiff's counsel started the action on September 10, 2020, which was the day before the limitation period expired. Ms. Adlakha served the representative for BP's Main Stop Variety, Colleen McNeil, on September 8, 2021. Ms. McNeil was the recognized agent of the numbered company that had bought the business name. The individual defendants, Judy Priscak and Sylvia Barrett, who were carrying on business as BP's Main Stop Variety when the loss was alleged to have occurred, were not served before the deadline of September 10, 2021. Ms. Adlakha provided an affidavit which says that it was due to inadvertence on her part. "I later found out the ownership structure of the Defendant store had changed and by then it was under new ownership. I had not realized that and assumed all the Defendants were properly served." Ms. Adlakha's mistake was in assuming that BP's Main Stop Variety was a corporation rather than a business name owned by a partnership. The business name was served, but not on the partnership.

[6] On November 9, 2022, Intact was contacted by Jason Pyke, who was then representing Ms. White. Intact told Mr. Pyke that liability had been denied and that after telling Ms. Adlakha that they had heard nothing further. Intact informed Mr. Pyke that neither Ms. Priscak nor Ms. Barrett had been served. Mr. Pyke responded that Colleen McNeil had been served. Intact then told him that BP's Main Stop Variety had been sold to the numbered company of which Ms. McNeil was the president and registered agent, in December 2019.

[7] By this time the 14-month time for the renewal of the Notice of Action had long passed.

Inadvertence

[8] The plaintiff served Colleen McNeil and thought that was all that was required. But the Plaintiff made no attempt to serve the actual defendants, Ms. Priscak and Ms. Barrett. The error was in assuming the BP's Main Stop Variety was a company, not just a business name.

[9] The defendants argue that service of the Notice of Action on Colleen McNeil on September 8, 2021, shows that the plaintiff was aware of the need to serve the Notice of Action before the September 10, 2021, expiry. Serving the wrong person was not a reasonable attempt to serve the documents. There were no attempts at all to serve Judy Priscak or Sylvia Barrett. They say that the

information provided to Ms. Adlakha by Intact, and the information available at the Registry of Joint Stock Companies should have alerted the plaintiff to the fact that the partnership and the business name, BP's Main Stop Variety were different things. Serving Ms. McNeil was not a reasonable attempt to serve the defendants. The defendants also argue that by serving the documents on Ms. McNeil, Ms. Adlakha showed that she had not forgot about the expiry or forgot to serve the documents. She knew that the Notice of Action had to be serve but served it on the wrong person.

[10] To determine whether attempts to serve the documents were reasonable it is necessary to assess the reasonableness of the lawyer's assumption that service on Ms. McNeil was sufficient. But to determine whether inattentiveness led to the expiry, there is no assessment of reasonableness. The rule does not require that the inadvertence that led to the expiry be somehow considered "reasonable inadvertence".

[11] The word "inadvertence" as it is used in Rule 4.04 has been defined as an accidental oversight or something that is the result of carelessness or heedlessness. Justice McDougall in *Grosse v. White*, 2010 NSSC 10, para. 29, described it as a "lack of attention". It may be something that was "forgotten, misplaced, slipped the mind or was not brought forward when it should have been." *Langdale v. Register.com Inc*., 2016 NSSC 171, para. 17. Inadvertence suggests that something has not been done because a person has failed to pay adequate attention. The purpose of the rule is to offer protection against oversights and mistakes. It is not intended as way to extend the time for filing.

[12] Serving the documents on Ms. McNeil was a mistake. It was a result of not paying enough attention to the information provided by Intact, and available from the Registry of Joint Stock Companies, that BP's Main Stop Variety was a business name owned by a partnership and not a company. It does not matter whether that was a reasonable mistake. It was an honest one. It was not done intentionally to try to extend the time for service on the real defendants. It would be the kind of mistake that when brought to a lawyer's attention they would quickly acknowledge and instantly regret. Serving Ms. McNeil and assuming that was enough was a result of inadvertence as to the legal status of BP's Main Stop Variety.

Prejudice

[13] If the Notice of Action is not renewed the prejudice to Ms. White would be substantial. Her claim would be dismissed. The prejudice to the defendants is less significant. Memories of the incident since September 2018 will have faded. But the defendants' insurer promptly investigated the claim and had gathered enough information to deny it. This is not a situation in which the defendants would be left scrambling to identify witnesses and pull together evidence, years after the incident is alleged to have happened. The prejudice to the defendants is not so serious that it could not be compensated for in an award of costs.

Costs

[14] The plaintiff has been successful on the motion. But the motion was only required because of the plaintiff's failure to serve the documents properly. I will hear the parties on the matter of costs, in writing, within 30 days of this decision, if they wish.

Campbell, J.