

Court House
75 Mulcaster Street
Barrie, Ontario L4M 3P2
Phone: 705-739-6155
Fax: (705) 739-6653

**SUPERIOR COURT OF
JUSTICE**

JUDGES' CHAMBERS

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Fax

To: Bernard P. Keating **From:** The Hon. Mr. Justice G.P. DiTomaso

Fax: (705) 792-0998 **Date:** April 7, 2011

To: Brendan M. Lanigan (Blouin, Dunn LLP)

Fax: (416) 365-7988

To: James B. Tausendfreund (Zuber & Company
LLP)

Fax: (416) 362-5289

Pages: 15

Re: Higgins v. Barrie (City) - Court file #08-0273 **CC:**

Operator: Hilda Wilson, Judges' Secretary

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SUPERIOR COURT OF JUSTICE



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COURT HOUSE
75 MULCASTER STREET
BARRIE, ONTARIO L4M 3P2TELEPHONE: (705) 739-6155
FACSIMILE: (705) 739-6653

April 7, 2011

Superior Court of Justice
Court House
75 Mulcaster Street
Barrie, Ontario
L4M 3P2

Dear Sir/Madam:

RE: Higgins v. Barrie (City) - Court file #08-0273

Enclosed please find Mr. Justice G.P. DiTomaso's Reasons for Decision in the above entitled matter for filing in your office.

Copies have been forwarded to counsel in this matter. The local trial co-ordinator has also been advised of the release of these Reasons.

Also enclosed is the file (or that part thereof) which Justice DiTomaso had in his possession. No part thereof remains in this office.

Yours truly,

A handwritten signature in cursive script, appearing to read 'H. Wilson'.

Hilda Wilson
Judges' Secretary

/hw

Enc's

cc: B. Keating
B. Lanigan
J. Tausenfreund

CITATION: Higgins v. Barrie (City), 2011 ONSC 2233

BARRIE COURT FILE NO.: 08-0273

DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
KEENAN HIGGINS)	
)	B. Keating, for the Plaintiff (Moving Party)
Plaintiff)	
)	
-- and --)	
)	
THE CORPORATION OF THE CITY OF)	
BARRIE)	
)	
Defendant)	
)	
)	
LAWLOR HAULAGE LTD. and DOL)	
TURF RESTORATION LTD.)	B. Lanigan for the Proposed Defendant
)	Lawlor Haulage Ltd.
Proposed Defendants)	
)	J. Tausendfreund for the Proposed
)	Defendant Dol Turf Restoration Ltd.
)	
)	
)	HEARD: April 5, 2011

REASONS FOR DECISION

DiTOMASO J.

THE MOTION

- [1] The Plaintiff Keenan Higgins (“Higgins”) seeks an order amending his Statement of Claim to add the Proposed Defendants Lawlor Haulage Ltd. (“Lawlor”) and Dol Turf Restoration Ltd. (“Dol”). The motion is opposed by both Lawlor and Dol. At issue is whether the amendment should be permitted after the expiry of a limitation period in accordance with the principles of discoverability.

BACKGROUND

- [2] This action arises out of alleged injuries Mr. Higgins sustained in a slip and fall accident which occurred on March 13, 2006.
- [3] Mr. Higgins slipped and fell on the north side of Livingstone Street near its intersection with Bayfield Street in the City of Barrie. As a result, he issued a Statement of Claim against the Corporation of the City of Barrie ("Barrie") on March 6, 2008. In his Statement of Claim, Mr. Higgins alleges that he suffered serious injuries due to the negligence or gross negligence of Barrie in failing to adequately maintain the site of the slip and fall.
- [4] Barrie denied all allegations of negligence in the Statement of Claim and issued a Statement of Defence dated May 13, 2008.
- [5] The matter progressed through Examination for Discovery of both Mr. Higgins and Barrie which took place on August 5, 2010 and September 13, 2010 respectively.
- [6] At the Examination for Discovery of a representative of Barrie on September 13, 2010, counsel for Barrie advised that Lawlor was contracted by Barrie to remove snow from the bus stop and crosswalk where Mr. Higgins fell. Lawlor, in turn, contracted out the snow removal at the bus stop and crosswalk where Mr. Higgins fell to another company, whose name counsel did not know. She advised that she would do her best to locate the name of the company.
- [7] On November 25, 2010 Mr. Higgins' counsel was advised by counsel for Barrie that Dol was contracted by Lawlor to remove snow at the bus stop and crosswalk where Mr. Higgins fell.
- [8] On November 30, 2010, a corporate search of Dol was conducted by Plaintiff's counsel.
- [9] As a result of the corporate search and the letter received from counsel for Barrie, this motion to add Lawlor and Dol was brought by Plaintiff's counsel returnable December 14, 2010 - some four years and eight months after the alleged slip and fall. After a number of adjournments, the motion was heard on April 5, 2011.

ISSUE

Should the court use its discretion to grant leave to the Plaintiff to amend his Statement of Claim to add two parties after expiry of the limitation period in accordance with the principles of discoverability?

- (a) Has the Plaintiff lead appropriate evidence of due diligence in determining the identities of potential tortfeasors?
- (b) Has the Plaintiff lead appropriate evidence as to why he or his counsel did not discover the identities of the proposed defendants prior to the expiry of the limitation period or prior to the Examinations for Discovery.

POSITIONS OF THE PARTIES

Position of the Proposed Defendants Lawlor and Dol

- [10] The Proposed Defendants share a common position. While the Plaintiff's Motion Record presents some evidence regarding the discovery of the identity of Lawlor and Dol, the Plaintiff has not provided an explanation of why these Proposed Defendants were not discovered prior to the expiration of the limitation period. Further, the Plaintiff has not provided evidence of reasonable steps taken to discover the identities of the Proposed Defendants prior to September 10, 2010 in the case of Lawlor and November 25, 2010 in the case of Dol.
- [11] The Proposed Defendants submit that the bar on such a motion is admittedly a low one. Nevertheless, the evidentiary onus rests upon the Plaintiff. The Proposed Defendants assert that the Plaintiff has not met the test necessary to amend a claim to add a party as a Defendant outside of the limitation period. They submit that the Plaintiff presents no evidence regarding his due diligence or discoverability of the identity of Lawlor and Dol as potential defendants. They submit that there is no triable issue as to the limitation period and, accordingly, the motion should be dismissed.

Position of the Plaintiff Higgins

- [12] The Plaintiff Higgins submits that he knew nothing of the identities of Lawlor and Dol until the Examination for Discovery of Barrie. On September 13, 2010 the identity of Lawlor was disclosed. On November 25, 2010, Mr. Higgins' counsel was advised by counsel for Barrie that Lawlor sub-contracted snow removal at the bus stop and crosswalk where Mr. Higgins allegedly fell to the Proposed Defendant Dol. The identities of Lawlor and Dol were not known to the Plaintiff Higgins prior to the Examination for Discovery of Barrie. At the first opportunity available to Plaintiff's counsel and in a timely fashion, he brought this motion returnable December 13, 2010.
- [13] The Plaintiff Higgins submits that he could not have known the internal contracting policy of Barrie with respect to winter maintenance, nor could he have discovered this policy or the identity of the Proposed Defendants, save and except by way of disclosure from Barrie itself. This did not occur until Plaintiff's counsel was so notified by counsel for Barrie at the Examination for Discovery and by correspondence afterwards dated November 25, 2010. The Plaintiff Higgins relies upon the principles of discoverability. The Plaintiff Higgins submits that he has met his onus to rebut the presumption set out in section 5 of the *Limitations Act* on the day of the slip and fall. The Plaintiff Higgins further relies on the decision of the Court of Appeal in *Safai v. Bruce N. Huntley Contracting Limited*, [2010] O.J. No. 3338 which he claims to be dispositive of this motion in his favour.

ANALYSIS

- [14] This motion is brought pursuant to rule 26.01 of the *Rules of Civil Procedure* which governs the power of the court to amend a pleading.

- [15] However, rule 5.04(2) of the *Rules of Civil Procedure* is more specific as it deals with the addition of a party:

Adding, deleting or substituting parties

5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.¹

- [16] The Court of Appeal in *Pepper v. Zeller's* states:

Contrary to the appellants' argument the motion was not akin to a rule 26.01 motion to amend a pleading, which "shall" be granted absent compensable prejudice. Rather, a rule 5.04(2) motion to add parties and, in this case, to add parties after the apparent expiration of a limitation period, is discretionary.²

- [17] In considering whether or not to use its discretion, the court will look to the limitation period and the principles of discoverability, because the passing of a limitation period gives rise to a presumption of prejudice. The prejudice arises from three purposes of limitation periods:

- (a) A potential defendant has the right to expect that after the expiry of a limitation period, his or her obligations are put to rest;
- (b) A potential defendant should no longer be concerned about the preservation of evidence relevant to a claim after the expiry of the limitation period;
- (c) Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.³

- [18] In this case, the *Limitations Act*, 2002 applies, particularly sections 4 and 5 which state:

Basic limitation period

4. Unless this *Act* provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

¹ *Rules of Civil Procedure*, R.R.O. 1990, R194, Rule 5.04(2)

² *Pepper v. Zeller's Inc.* (2006), 83 O.R. (3d) 648, [2006] O.J. 5042 (C.A.) at para. 14

³ *Frohlick v. Pinkerton Canada Ltd.*, [2008] O.J. No. 17, 2008 ONCA 3, at paras. 17-18

Discovery

5.(1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Adding party

21.(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

Misdescription

(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.⁴

[19] The *Limitations Act* imposes a reverse onus and evidentiary burden on the Plaintiff. In *Parent v. Janandee Management Inc.* a limitation period had expired with regard to adding an additional party whose identity was only discovered during the discovery

⁴ *Limitations Act*, 2002, S.O. 2002, C.24, Sched. B

process. It was held that in accordance with section 5(2) of the *Limitations Act*, the Plaintiff is required to show it was highly unlikely, if not impossible, with due diligence, to have obtained the necessary information within the limitation period.⁵

[20] In *Dalianis v. Newmarket (Town)*⁶ Mulligan, J. usefully summarizes the authorities on motions to add a defendant where a limitation period is at issue:

10. In any motion to add non-party defendants based on discoverability principles in the *Limitations Act*, 2002 there are a number of tensions at play. These tensions were summarized in *Madrid v. Ivanho Cambridge Inc.*, 2010 Carswell Ont. 2799. As Lauwers J. stated at para. 13:

The dominant policy thrust of the system of justice is that cases should be heard on the merits. Another policy thrust, found in the *Limitations Act*, 2002, is to encourage a plaintiff to commence an action as soon as possible. But a third and tempering policy thrust is found in s.5 of the *Limitations*, 2002, which codifies discoverability. ... These policy thrusts are to be reasonably balanced.

11. As Lauwers J. further noted at para. 14:

It is not unusual for possible defendants to emerge as a result of information received during the opposite party's document production or during the discovery process in an action. ... In the absence of an unexpected or unusual trigger, there is little to be gained by imposing judicially a free-standing duty on plaintiffs to write pro forma letters to defendants inquiring about the identity of other possible defendants under the rubric of due diligence in s.5 of the *Limitations Act*, 2002.

12. The plaintiff and the responding party, Roto-Mill, refer the court to the often cited case of *Wong v. Adler*, [2004] O.J. No. 1575, aff'd. 76 O.R. (3d) 237 (Ont. Div. Ct.). Master Dash outlined his view as to the proper approach for a motions judge on matters such as this at para. 45:

What is the approach a judge or master should take on a motion to add a defendant where the plaintiff

⁵ *Parent v. Janandee Management Inc.*, [2009] O.J. No. 3763 (SCJ) at para. 22-23

⁶ *Dalianis v. Newmarket (Town)*, [2010] O.J. No. 4065 (S.C.J.) at paras. 10-14

wishes to plead that the limitation period has not yet expired because she did not know of, and could not with due diligence, have discovered the existence of that defendant? In my view, as is clearly implied in *Zapfe*, the motions court must examine the evidentiary record before it determines if there is an issue of fact or if [sic] credibility on the discoverability allegation, which is a constituent element of the claim. If the court determines that there is such an issue, the defendant should be added with leave to plead a limitations defence.

13. In *Wakelin v. Gourley*, 2005 CanLii 23123, Master Dash referred again to his decision in *Wong v. Adler*, and went on to indicate at para. 9: “It will be rare that the applicability of the discoverability principle based on due diligence will be determined on a motion to add a party.”

14. As to the amount of evidence required by a plaintiff on such a motion, Master Dash stated at para. 14:

The question is how much evidence must the plaintiff put in at the pleadings amendment stage to establish that the proposed defendants could not have been indemnified with due diligence within the limitation period? The short answer is: not very much. As stated by the Court of Appeal in *Zapfe*: In most cases, one would expect to find, as part of a solicitor’s affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably “diligent” and to provide “an explanation for why she was unable to determine the facts”.

[21] In *Wakelin v. Gourley*, at para. 15, Master Dash further comments:

Therefore, as long as the plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. This is not a high threshold. If the plaintiff fails to provide any reasonable explanation that could on a

generous reading amount to due diligence the motion will be denied.⁷

- [22] I further cite the reasons of Master Dash in *Wong v. Adler* at para. 45 in addition to what was cited by Mulligan J.:

If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused. If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence. That is not to say that such motion could never be denied if the evidence is clear and uncontradicted that the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility. [emphasis mine]

- [23] In *Pepper v. Zeller's*, the Ontario Court of Appeal considered a motion to add a defendant in a limitation period context. The Court stated:

[19] I agree ... that the motion judge was entitled to assess the record to determine, as a question of fact, whether there was “a reasonable explanation” on the evidence demonstrating why Ms. Aube’s identity could not have been determined through the exercise of reasonable diligence.

[20] An examination of the evidentiary record in this case shows that the appellants’ material failed entirely to address whether they ought to have known Ms. Aube’s identity and what, if any, steps they took to determine that identity. Indeed, the appellants offer no explanation other than to say that no one gave them the information.⁸

- [24] In *Hamilton (City) v. Svedas Koyanagi Architects*⁹ Taylor J. denied the motion brought by Hamilton to add a defendant for the following reasons:

13. In my view, the approach of the City on this motion appears to be that, upon the mere mention of the issue of “discoverability”, the motion to add a defendant must be allowed with leave to plead

⁷ *Wakelin v. Gourley*, [2005] O.J. No. 2746 (S.C.); affirmed, [2006] O.J. No. 1442 (Ont.Div.Ct.)

⁸ *Pepper v. Zeller's*, supra, at paras. 18-20

⁹ *Hamilton (City) v. Svedas Koyanagi Architects*, [2009] O.J. No. 1039 (S.C.J.), at paras. 13-15.

a limitation defence and then refer the matter to the trial judge or judge hearing a motion for summary judgment to determine the issue of when the plaintiff might reasonably have been aware of the possibility that the proposed defendant could potentially be held responsible. This point was considered and rejected by Master Dash in *Wong v. Adler* (2004), 70 O.R. (3d) 460. *Wong v. Adler* was cited with approval by the Ontario Court of appeal in *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648.

...

15. On the present motion, there was no evidence presented as to the attempts, if any, made by the City or its lawyers to obtain information pointing to the possible liability of Honeywell in order to support the assertion that the City had been reasonably diligent in its efforts. As there was no attempt made on the motion to lead evidence as to the attempts made by the City to discover the identity of Honeywell, I draw the inference that nothing was done. This therefore means there is no triable issue with respect to discoverability to leave to the trial judge or a judge hearing a motion for summary judgment.

- [25] In *Blink v. Burlington (City)*, the action arose out of a slip and fall incident. The Plaintiff sued Burlington and Burlington issued a third party claim against the sub-contractor snow plough company. Later, Burlington moved to amend its third party claim to name a road designer and road construction company as third parties. Murray J. cited *Wong v. Adler*, *Pepper v. Zeller's Inc.* and *Hamilton (City) v. Svedas Koyanagi Architects* with approval before denying Hamilton's motion. Murray J. stated as follows:

24. In this case, ... there is no evidence before this Court as to what, if any, steps were taken by the City of Burlington to ascertain all potentially liable parties.

...

26. The right of Dufferin and Zurich not to be sued outside the two-year limitation period ought not to be compromised ... in the absence of evidence which supports a conclusion that reasonable inquiry and investigation was made by the City to ascertain all potentially liable parties. In this case, such evidence does not exist.¹⁰

- [26] In *Mbobi v. Zurich Canada*, O'Connell J. denied the Plaintiff's motion to amend the Statement of Claim to add two additional Defendants where he states:

[10] The evidentiary record on this motion does not lead me with any concern that the issue of discoverability raises an issue of credibility that should proceed to trial. Put simply the only real

¹⁰ *Blink v. Burlington (City)*, [2010] O.J. No. 3063 (S.C.J.)

issue is whether a reasonable explanation as to due diligence was provided such as to raise a triable issue. No reasonable explanation has been advanced. The plaintiff very well could have obtained the information it now says it has to add the third parties within the limitation period. Diligence rests at the feet of the plaintiff. It is not a sword at this stage for the plaintiff. Were it otherwise the two year limitation period would be a mere fiction.¹¹

- [27] In *Pooran v. 2029301 Ontario Ltd.*, the Plaintiff who was injured in a slip and fall that occurred in a parking lot sought leave to amend the Statement of Claim to add as a Defendant the parking lot maintenance contractor. In *Pooran*, one year passed between the expiry of the limitation period and the bringing of the motion to add the defendant. The motion was dismissed by Master Haberman who stated:

Here, we are not told about any investigations whatsoever that were done. It makes it extremely difficult for the court to state there is a genuine discoverability issue when no evidence at all is presented to show that the Plaintiff neither knew nor could have known the identity of the proposed parties at an earlier date. As in *Leighton*, I am of the view that there is no genuine issue as to discoverability, at least, not on the record before the court.¹²

- [28] The Proposed Defendants also cite the case of *Leighton v. Goodyear Canada Inc.*, [2008] O.J. No. 1870 in support of the proposition that our courts have held a consideration of due diligence is central in a motion of this kind. In the absence of any proper explanation or evidence of same by a Plaintiff, such a motion should be refused. This approach was followed by Allan J. in *Sloan v. Sauve Heating Limited* where the evidentiary record was found to be deficient, no issue of fact or credibility on the record was raised and the Plaintiff failed to demonstrate any steps taken during the critical presumptive limitation period or during the period before discovery. Allan J. overturned the order of a Master granting the Plaintiff leave to add a party in the absence of evidence showing (a) a reason why the Plaintiff failed to discover the identity of the Proposed Defendant or (b) that due diligence steps taken by the Plaintiff or the Plaintiff's lawyer.¹³
- [29] In *Dalianis*, Mulligan J. allowed the Plaintiffs' motion to amend their Statement of Claim to add several defendants because he found that the Plaintiffs' counsel "provided a fulsome affidavit as to the steps taken to ascertain possible defendants". Mulligan J. concluded that, based on the evidentiary record before him, the case was not one "where the plaintiffs made no effort to ascertain possible defendants".¹⁴
- [30] In the case at bar, the Plaintiff's counsel submits that the Court of Appeal decision in *Safai* is dispositive of this motion in favour of the Plaintiff. I disagree. In *Safai*, the

¹¹ *Mbobi v. Zurich Canada*, [2010] O.J. No. 4705 (S.C.J.) at para. 10

¹² *Pooran v. 2029301 Ontario Ltd.*, [2008] O.J. No. 281, 169 A.C.W.S. (3d) 424 at para. 13

¹³ *Sloan v. Sauve Heating Limited*, [2010] O.J. No. 3002, 2010 ONSC 3871 at para. 36

¹⁴ *Dalianis* (supra) at paras. 16-17

Court of Appeal did not hold that reasonable diligence was no longer a consideration where the discoverability rule was invoked in a limitation period expiry context. Rather, the approach taken by the court in respect of the company responsible for winter maintenance services was case specific based on the record before the motion judge. The Court distinguished the application of the discoverability rule as between the owner of the property and the winter maintenance company. The Court held that regarding the company there was a genuine issue for trial concerning the running of the limitation period and the application of the discoverability rule that should be left to the trial judge. I find that *Safai* is distinguishable from the case at bar on an examination of the evidentiary record in this case.

- [31] I have carefully reviewed the affidavit of Tonya O'Brien who is a law clerk employed by the Plaintiff's counsel. The affidavit consists of eight paragraphs contained within two pages. It speaks to the date and place of the alleged slip and fall. At paragraph 4 it speaks to the examination for discovery of a representative of Barrie held September 13, 2010 where counsel for Barrie advised that Lawlor was contracted by Barrie to remove snow from the bus stop and crosswalk where Mr. Higgins fell. She also disclosed that Lawlor in turn contracted out the snow removal at the bus stop and crosswalk to another company whose name she did not know. She advised that she would do her best to locate the name of the company and she did. On November 25, 2010 she advised the Plaintiff's counsel of the identity of Dol which was contracted by Lawlor to remove snow at the bus stop and crosswalk where Mr. Higgins fell. Thereafter, she conducted a corporate search of Dol and as a result of the corporate search conducted and the letter received from counsel for Barrie, it became apparent that the Statement of Claim should be amended to add Lawlor and Dol. This is the sum total of the affidavit in support of Mr. Higgins' motion to add Lawlor and Dol outside the expiry of the limitation period.
- [32] I find that the Plaintiff's motion materials fail to disclose any evidence of pre-discovery diligence on the part of the Plaintiff or his counsel. In fact, in oral submissions, Plaintiff's counsel conceded that he made no inquiries as to the identity of these Proposed Defendants prior to examination for discovery. Further, the Plaintiff's motion materials fail to disclose any evidence of any reason why the Plaintiff could not have taken any steps to discover the identity of the Proposed Defendants prior to the examination for discovery held September 13, 2010.
- [33] Not only has the limitation period expired for a period of more than two years, but more than two years have passed since the issuing of the Statement of Claim and more than two years have passed since the issuing of the Statement of Defence. The evidence further indicates that the first inquiry the Plaintiff apparently made to attempt to identify Dol as a potential Defendant was on September 13, 2010 some four and a half years after the alleged slip and fall gave rise to this action.
- [34] I find that waiting four and a half years until the examination for discovery of a representative of Barrie on September 13, 2010 to make inquiries about potential additional defendants does not amount to due diligent or reasonable efforts. The affidavit of Tonya O'Brien is totally deficient providing no evidence in respect of due diligence or reasonable efforts undertaken on the part of the Plaintiff or his counsel to ascertain the

involvement of the Proposed Defendants or any other Defendants for that matter. There was no evidence of the Plaintiff himself which puts his credibility regarding the discoverability of this claim at issue. The affidavit is silent on this point. The motion record does not speak to the issue of the Plaintiff's circumstances or efforts pre-discovery at all. I find there is no triable issue as to discoverability in this action. The cases cited by the Proposed Defendants are persuasive and consistently hold that where the evidentiary record does not provide any evidence to support that a party was reasonably diligent and to provide an explanation as to why that party was unable to determine the identity of potential defendants then the motion will be denied. The threshold is not high and the Plaintiff bears the onus. If the Plaintiff fails to provide any reasonable explanation that could on a generous reading amount to due diligence the motion will be denied.

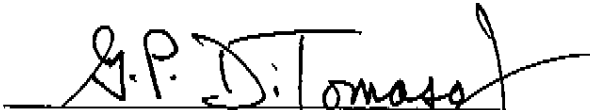
- [35] The Plaintiff relies upon the comments of Lauwers J. in *Madrid* at paragraph 14 previously cited herein at paragraph 20. I find the comments are of little assistance to Mr. Higgins where there is no evidence that either he or his counsel undertook any due diligence or reasonable steps to identify the Proposed Defendants at any time prior to the Examination for Discovery of Barrie's representative held September 13, 2010 – well past the expiry of the limitation period. To the contrary, Mr. Higgins and his counsel took no steps in this regard.
- [36] Further, the decision of Mulligan, J. in *Dalianis* is distinguishable from our case as there was fulsome affidavit evidence which addressed the critical issue of due diligence.
- [37] The Plaintiff's motion material fails entirely to address the critical issues of whether the Plaintiff has lead appropriate evidence of due diligence in determining the identities of Lawlor and Dol and whether the Plaintiff has lead appropriate evidence as to why he or his counsel did not discover the Proposed Defendants prior to the expiration of the limitation period or prior the examinations for discovery. It is reasonable to infer that no steps were taken upon a plain reading of the affidavit. Such an inference is only supported by the admission of Plaintiff's counsel that he made no inquiries or took no steps to determine the identities of any Proposed Defendants. The only explanation given is that the Plaintiff could not possibly have ascertained the identity of Lawlor and Dol until Examinations for Discovery. The courts have held that waiting until discovery to ask questions about prospective parties falls short of reasonable diligence.¹⁵ I find that waiting until discovery to ask questions about prospective Defendants in the case at bar also falls short of reasonable diligence. I find that the Plaintiff has not established that he could not have known the identity of Lawlor and Dol through due diligence before September 13, 2010 and November 25, 2010 because there was no due diligence of any kind. He has not met his onus and he has not presented evidence to establish that there is a triable issue as to discoverability in this action. The evidentiary record is devoid of any due diligence, reasonable efforts or steps undertaken by the Plaintiff or his counsel to identify these Proposed Defendants or any other potential Defendants.

¹⁵ *Parent v. Janandee* (supra) at para. 23; *Sloan v. Sauve Heating Ltd.* (supra) at paras. 20-21

- [38] The limitation period set out in the *Limitations Act* is not to be ignored. The statutory rights of Lawlor and Dol not be sued outside the two year limitation period should not be compromised in the absence of evidence of the Plaintiff's reasonable efforts and due diligence (of which there is none) to identify these Proposed Defendants.
- [39] I find that pursuant to sections 4 and 21 of the *Limitations Act*, 2002, the Plaintiff is barred from adding Lawlor and Dol as defendants in this action. The motion is dismissed.

DISPOSITION

- [40] For the foregoing reasons, this motion is dismissed. If the parties cannot agree, costs are to be determined by way of written submissions. Counsel will exchange written submissions on costs including a concise statement not to exceed two pages in length together with a draft Bill of Costs and Costs Outline. Said written submissions are to be served and filed with the Trial Co-ordinator at Barrie within the next 14 days.


DITOMASO J.

Released: April 7, 2011