

CITATION: Lalani v. Reeves, 2016 ONSC 424
COURT FILE NO.: 07-CV-338183CP
DATE: 20160126

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nizarqali Lalani, Plaintiff / Moving Party

AND:

Edward Reeves, Defendant / Responding Party

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Samuel Marr and Nancy Tourgis* for the Plaintiff / Moving Party

Edward Reeves self-represented Defendant / Responding Party

HEARD: November 12, 2015 and January 15, 2016

Proceeding under the Class Proceedings Act, 1992

CERTIFICATION DECISION

[1] Fifteen years ago, several thousand Toronto-area investors were defrauded of more than \$75 million by an unscrupulous promoter named Salim Damji who spent the millions of dollars that had been given to him “in trust” on off-shore gambling and other personal indulgences. Mr. Damji was convicted of fraud and was sentenced to seven and a half years in prison. The bulk of the investment money has not been recovered.

[2] In an effort to recover some of their losses, the investors sued the secondary players - the financial institutions, cheque-cashing companies, wire-transfer agents and others that were involved in the receipt, deposit, purchase or off-shore transfer of the “in trust” investment funds. Alleging an array of claims, including knowing assistance and knowing receipt, six class actions were commenced.¹

¹ *Palsetta v. Suleman et al*, Court File No. 07-CV-341491CP; *Lalani v. Reeves*, Court File No. 07-CV-338183 CP; *Juma et al v. Western Union Financial Services Canada Inc., o/a Western Union*, Court File No. 08-CV-353663CP; *Pardhan v. Bank of Montreal*, Court File No. 08-CV-350772CP; *Kherani v. Bank of Montreal*, Court File No. 08-CV-353703CP; and *Mirshahi v. Suleman et al*, Court File No. 08-CV-353823CP.

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[3] Four of the class actions have been certified, the two against the Bank of Montreal after a hearing,² and two others on consent.³ Counsel have advised that the proposed class against Western Union is also close to being certified on consent.

[4] The remaining action is the one that is before me on this motion. The proposed class action herein is directed at Edward Reeves who, through a numbered company, owned and operated Cash Plus Services, a cheque-cashing facility that processed some \$54 million of the impugned investment monies and used its BMO bank account to transfer the monies at Damji's direction. The cheque-cashing business was sold in 2002 and the numbered company was dissolved in 2006. Hence, when the statement of claim was issued in 2007, it targeted Mr. Reeves in his personal capacity – alleging a level of knowledge and degree of conduct that would justify personal liability.

[5] The factual background describing the scope and content of the fraud has been set out in the two certification decisions involving BMO and will not be repeated.⁴ My purpose here is to explain, albeit briefly, why the proposed class action against Mr. Reeves satisfies the requirements set out in s. 5(1) of the *Class Proceedings Act*⁵ (“CPA”) and should be certified.

[6] In doing so, I acknowledge the obvious imbalance in legal expertise between the parties. The plaintiff was represented by experienced class action counsel. The defendant was self-represented. I was therefore particularly concerned to ensure that all of the issues before me, including the requirements for certification, were fully addressed, even if Mr. Reeves, an otherwise sophisticated business and financial professional, did not appreciate many of the legal nuances.

[7] There are three issues for determination: (1) the four-year delay in moving for certification; (2) the plaintiff's proposed amendments to the statement of claim; and (3) the certification itself.

[8] I will deal with each of these in turn.

² *Kherani v. Bank of Montreal*, [2012] O.J. No. 1623 and [2012] O.J. No. 3843 and *Pardhan v. Bank of Montreal*, [2012] O.J. No. 1629 and [2012] O.J. No. 3823. Leave to appeal motions dismissed [2013] O.J. No. 329 (Div. Ct).

³ *Palsetia v. Suleman et al.*, Court File No. 07-CV-341491CP; *Mirshahi v. Suleman et al.*, Court File No. 08-CV-353823CP.

⁴ *Ibid.*

⁵ *Class Proceedings Act 1992*, S.O. 1992, c. 6.

(1) The four-year delay

[9] Section 2(3) of the CPA requires that the motion for certification must be brought within 90 days after the statement of defence is delivered. Otherwise, the plaintiff needs leave from the court. Judges have long recognized that the 90-day rule is “more frequently honoured in the breach than in the observance.”⁶ Most certification motions are brought within a year or so after the statement of defence is delivered and leave from the court under s. 2(3) is rarely sought or required. Nonetheless, there will be cases where the delay in bringing the certification motion is so unreasonable that leave under s. 2(3) should be denied.⁷

[10] Here there was an almost a four year delay between the statement of defence and the certification motion. No defendant and especially no individual defendant should have a putative class action hanging over his or her head for four years absent a reasonable and persuasive explanation. Here, however, I am satisfied that a reasonable explanation has been provided.

[11] The uncontroverted affidavit material filed by the plaintiff documented the procedural steps, case conferences and judicial directions that taken together explained the delay – in particular, the initial settlement discussions, the time needed to allow BMO to commence third party actions, the court’s preference that the two BMO certifications proceed first and the mediation before former Chief Justice Winkler. More importantly, the affidavit material filed by the plaintiff made clear that each of these steps or “delays” were explicitly agreed to by Mr. Reeves, either through his legal counsel and more recently as a *pro se* litigant. In short, I am persuaded on the record before me that the almost four-year delay in the context of this multi-party and multi-action litigation has been satisfactorily explained. I therefore have no difficulty granting leave under s. 2(3) of the CPA.

(2) The proposed amendments to the statement of claim

[12] The plaintiff’s motion to amend his statement of claim to add further particulars about the negligence claim (new paras. 31 to 35) and the need to pierce the corporate veil and sue the defendant personally (new paras. 36 to 41) is granted. There is no prejudice to the defendant if these amendments are allowed. The causes of action and underlying facts

⁶ *Pardhan, supra*, note 2, at para. 11.

⁷ Leave under s. 2(3) of the CPA was denied in *Defazio v. Ontario (Ministry of Labour)*, 2005 O.J. No. 5829 (S.C.J.) The four-year delay in *Defazio* was described in *Pardhan, supra*, note 2, at para. 14, as “egregious.”

were pleaded in the original claim. No new causes of action are being added. There are no limitation issues.

(3) The motion for certification

[13] I reassured Mr. Reeves repeatedly during the course of the hearing that certification is a procedural decision that has nothing to do with the merits of the case. As Strathy J. noted in *Ramdath v. George Brown College*:

Certification is decidedly not a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?", but rather "can it *work* as a class action?"⁸

[14] Mr. Reeves may well prevail at trial, if there is a trial. My concern here is whether the action should be certified as a class proceeding.

[15] It is important to note that all of the class actions referenced herein have at their core, with only minor variation, the same evidence, the same complaint, the same causes of action and the same proposed common issues. Two of the more substantial actions, those directed at BMO, have been certified by this court and affirmed on appeal.⁹ It is therefore unlikely that the result in this remaining certification would be any different.

[16] In my view, each of the five requirements set out in s. 5(1) of the CPA are satisfied. Assuming the facts as pleaded are true (as I must), I find that the pleading discloses causes of action in knowing assistance and knowing receipt (relating to fraud and breach of trust), constructive trust and negligence.

[17] I am satisfied that there is an identifiable class of two or more persons that would be represented by the plaintiff. The names of the class members can be found in the BMO records, the Receiver's files and the defendant's own records. The proposed class consists of:

All victims of the Damji Fraud whose monies were deposited into the bank accounts of 1096166 Ontario Ltd., o/a Cash Plus Services ("Cash Plus") located at the Bank of Montreal's Brown's Line and Evans bank branch, in the City of Toronto, between January 1, 2000, and March 31, 2002.

⁸ *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 (S.C.J.) at para. 40

⁹ *Supra*, note 2.

[18] I am further satisfied on the basis of the material before me and the factual findings that have already been made in the BMO certifications,¹⁰ that there is some basis in fact for the existence and commonality of each of the proposed common issues. The ten certified common issues are set out in the Appendix.

[19] Common issues (a) to (h) are self-explanatory, and as I have already noted, have been certified in the two BMO proceedings.¹¹

[20] Common issue (i) relating to aggregate damages is certified because the out-of-pocket losses sustained by the class members can reasonably be determined without requiring individual proof.¹² According to the defendant's evidence, damages can be determined by reviewing the cheques which the defendant deposited into the Cash Plus BMO account and which he still has in his possession.

[21] Common issue (j) asks about punitive damages. A similar question was certified by this court in the two BMO actions. I pause here to note that in some cases I bifurcated the *prima facie* entitlement and actual amount sub-questions because the latter could only be determined after the individual damage assessments had been completed and the compensatory amount determined.¹³ Here there will be no need for individual assessments because the compensatory amount, if any, will be determined in the aggregate at the common issues trial. There is thus no need for bifurcation. Also because punitive damage award depends on the conduct of the defendant and does not require individualized proof, it can be determined in the aggregate. The punitive damages questions about entitlement, quantum and aggregation are therefore certified as proposed.

[22] The two remaining requirements under ss. 5(1)(d) and (e) of the CPA, preferability and suitable representative, are also satisfied. There is no suggestion that a class proceeding is not preferable or that Mr. Lalani is not a suitable representative plaintiff.

Disposition

[23] The action against the defendant Reeves is certified as a class action. The certified common issues are set out in the attached Appendix.

¹⁰ *Supra*, note 2.

¹¹ *Ibid.*

¹² See s. 24(1)(c) of the CPA.

¹³ Discussed in *Dine v. Biomet*, 2015 ONSC 7050 at paras. 54-61.

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[24] This is not a case for costs. No costs can be sought for the plaintiff's motion for leave under s. 2(3) of the CPA or for his motion to amend the statement of claim. As for the certification motion, the plaintiff was required to bring this motion and satisfy the requirements set out in s. 5(1) of the CPA even if the motion was unopposed. And, in my view, this motion was essentially unopposed. Mr. Reeves filed some responding material and voiced a range of objections but all of his submissions were directed to the merits of the claims against him and not to the certification requirements under the CPA - understandable given that he was self-represented. To repeat, this certification was in essence unopposed and thus this is not a case for costs.

[25] Counsel for the plaintiff should draft the required Certification Order under s. 8 of the CPA.



Belobaba J.

Date: January 26, 2016

Appendix: Certified Common Issues

- (a) Did the Defendant engage in conduct between January 1, 2000, and March 31, 2002 which amounted to a knowing assistance of Salim Damji with respect to his defrauding of the Class Members?
- (b) Did the Defendant engage in conduct between January 1, 2000, and March 31, 2002 which amounted to a knowing assistance of Salim Damji with respect to a breach of trust owed to the Class Members?
- (c) Did the Defendant engage in conduct between January 1, 2000, and March 31, 2002 which amounted to a knowing receipt of monies being defrauded by Salim Damji from the Class Members including trust monies?
- (d) Did the Defendant owe a duty of care to the Class Members with respect
 - (i) to monies deposited into the bank accounts of 1096166 Ontario Ltd. o/a Cash Plus Services ("Cash Plus") at the Bank of Montreal's bank branch located at Brown's Line and Evans, in the City of Toronto, between

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January 1, 2000, and March 31, 2002 and (ii) to the Defendant's dealings with those bank accounts and/or Salim Damji?

- (e) If the answer to issue (d) above is yes, did the Defendant breach the said duty of care owed to the Class Members?
- (f) With respect to issues (b) and (c) above, were the monies deposited into the aforesaid bank accounts of Cash Plus with the Bank of Montreal between January 1, 2000, and March 31, 2002 subject to an express trust, a resulting trust or a constructive trust? If yes, should the Defendant be declared a constructive trustee for the Class Members of all monies deposited into the aforesaid bank accounts of Cash Plus with the Bank of Montreal between January 1, 2000, and March 31, 2002?
- (g) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues (a), (b), (c) and (d) above? If so, what is the appropriate measure or amount of such loss or damage?
- (h) Were the monies deposited into the bank accounts of Cash Plus at the Bank of Montreal's Brown's Line and Evans bank branch between January 1, 2000, and March 31, 2002, monies which were defrauded from the Class Members and, if yes, is the Defendant obliged to repay those monies to the Class Members?
- (i) Should the Court award an aggregate assessment of monetary relief on behalf of some or all Class Members? If yes, what is the amount of the aggregate assessment and how should the Class Members share in the award?
- (j) Should the Defendant pay punitive damages to the Class Members? If yes, should such damages be assessed in the aggregate? If so, what is the amount of such damages including Pre-Judgment and Post-Judgment interest thereon?
