2016 ONSC 2069
Ontario Superior Court of Justice

Da Silva v. 2162095 Ontario Ltd.

2016 CarswellOnt 7324, 2016 ONSC 2069, [2016] O.J. No. 2397, 266 A.C.W.S. (3d) 304

Aires Whytton Da Silva, Plaintiff / Moving Party and 2162095 Ontario Ltd., Save and Secure Self Storage Inc., Allsecure Storage Inc., and Goldview Property Management Limited, Defendants / Responding Parties and City of Toronto, Third Party / Responding Party

Edward P. Belobaba J.

Heard: March 24, 2016
Judgment: May 9, 2016
Docket: CV-12-469445-CP

Counsel: Gary Will, Gordon Marsden, for Moving Party, Mr. Da Silva
Iain Peck, Brittany Deziel, for Responding Parties, Allsecure and Goldview
Tim Carre, for Responding Party, City of Toronto
No one for Responding Parties, 216 and Save and Secure

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
  V.2 Representative or class proceedings under class proceedings legislation
    V.2.b Certification
      V.2.b.i Plaintiff’s class proceeding
        V.2.b.i.C Common issue or interest

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff’s class proceeding — Common issue or interest
Fire destroyed self-storage facility and it was determined that sprinkler system was not working properly — Plaintiff sought to bring class proceeding against defendants, current and former owners, on behalf of those who rented storage lockers at facility and lost property as result of fire, seeking damages in contract and tort for property losses, replacement costs, mental distress and unjust enrichment — Plaintiff brought motion to certify proceeding as class action — Motion granted — Pleadings disclosed causes of action in negligence, breach of contract and unjust enrichment — There was identifiable class and proposed sub-classes were reasonable — Preferability requirement was satisfied, as class action was better then number of individual lawsuits that might not be brought given costs of litigation — Representative plaintiff and sub-class representatives were suitable and there was workable litigation plan — Negligence common issues were uncontested, there was some basis in fact for existence and commonality and answers to issues would significantly advance action — Proposed common issue dealing with interest was not certified as common issue, as it would not advance litigation and issue fell within inherent jurisdiction of trial judge — Proposed common issues dealing with whether defendants had protocol in place to direct customers to limitation of liability provisions in agreements and, if not, whether they could rely on those provisions, would not determine liability but would advance litigation and issues were certified — Proposed common issue of whether limitation of liability terms were unenforceable as being contrary to public policy had commonality and was certified — Proposed common issues dealing with assignment would significantly advance action and were certified — Proposed common issue of whether current owner retained any advance rental payments and was unjustly enriched was not common issue because it depended on individualized inquiry — Proposed common issue as to whether class members were entitled to

punitive damages had basis in fact and commonality and was certified as common issue.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

Dine v. Biomet Inc. (2015), 2015 ONSC 7050, 2015 CarswellOnt 19419 (Ont. S.C.J.) — considered

Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 101 O.A.C. 56, 148 D.L.R. (4th) 496, 34 O.R. (3d) 1, 1997 CarswellOnt 1894, 32 B.L.R. (2d) 1, 35 C.C.L.T. (2d) 298, 32 B.L.R. (2d) 2 (Ont. C.A.) — considered

Good v. Toronto Police Services Board (2016), 2016 ONCA 250, 2016 CarswellOnt 5047, 82 C.P.C. (7th) 1 (Ont. C.A.) — referred to

Lam v. University of British Columbia (2010), 2010 BCCA 325, 2010 CarswellBC 1572, 5 B.C.L.R. (5th) 328, 321 D.L.R. (4th) 150, 289 B.C.A.C. 193, 489 W.A.C. 193 (B.C. C.A.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — considered

Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400, 4 B.L.R. 50, 1978 CarswellOnt 125 (Ont. C.A.) — considered

Statutes considered:

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

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 8 — considered

MOTION by plaintiff to certify proceeding as class action.

***Edward P. Belobaba J.*:**

Section One

1 In January, 2012 a fire destroyed a self-storage facility in the Junction area of Toronto. The Fire Marshall found that neither the sprinkler system nor the stand-pipe water connection (used during a fire) was working. A further investigation by the Fire Department revealed that the sprinkler system had been removed on the first floor and was not connected on the second to fourth floors.

2 The defendant Allsecure had purchased the storage facility from the defendants 216 and Save and Secure in September, 2011, about four months before the fire. Allsecure was charged and pleaded guilty to failing to keep the sprinkler system in working order.

The proposed class action

3 The plaintiff seeks to bring a class proceeding on behalf of the 128 or so "tenants" that rented (leased) storage lockers at this facility and lost their property as a result of the fire. The putative class members claim damages in contract and tort for property losses and replacement costs, mental distress arising out of the loss of family heirlooms and photo albums, and in unjust enrichment for the recovery of deposits and advance rental payments.

4 The named defendants are the previous owners or operators, 216 and Save and Secure, and the current owners or operators, Allsecure and Goldview.

5 Much of this motion for certification is proceeding on consent or unopposed. The previous owners, 216 and Save and Secure, and the third party City of Toronto have filed no material and have advised that they are taking no position. The current owners, Allsecure and Goldview, to their credit, have agreed to narrow the issues in dispute. Of the five requirements for certification set out in s. 5(1) of the *Class Proceedings Act*,[1] only the common issues requirement under s. 5(1)(c) is being contested, and then only with respect to the proposed common issues that relate primarily to the breach of contract and unjust enrichment claims.

6 For ease of reference, I have set out the proposed common issues in the Appendix.

7 Allsecure and Goldview consent to the certification of proposed common issues (a) to (f), all of which deal with the negligence claim. They also do not oppose common issue (q) which asks about pre-judgment and post-judgment interest. They dispute common issues (g) to (p) which pose questions about the limitation of liability provisions in the rental agreement, whether the rental agreements have been properly assigned, the unjust retention of any advance rental payments and the availability of punitive damages.

Analysis

8 I will deal first with the certification requirements set out in s. 5(1)(a), (b), (d) and (e) of the CPA. I will then consider the common issues under s. 5(1)(c) in two steps — first the uncontested common issues (a) to (f) and (q) and then the contested common issues (g) to (p).

(1) Four of the five certification requirements are satisfied

9 Counsel for the defendants and the third party were right to consent to or not oppose the certification requirements set out in ss. 5(1)(a), (b), (d) and (e) of the CPA. Assuming the facts as pleaded are true, the pleadings disclose causes of action in negligence, breach of contract and unjust enrichment.

10 There is an identifiable class that is defined, in essence, as all persons who were tenants of the storage facility and whose stored property was damaged in the fire. The three proposed sub-classes - tenants who signed a rental agreement with the previous owner; tenants who signed a rental agreement with the current owner; and tenants who did not sign an agreement — are reasonable.

11 The preferability requirement is satisfied - better a class action than 128 individual lawsuits that probably would not have been brought given the costs of litigation. And, there is no suggestion that the overall representative plaintiff, Mr. Da Silva, or the three newly added sub-class representatives, Ms. Silva, Mr. Gibbens and Mr. Papadatos, are not suitable or lack a workable litigation plan.

12 In short, ss. 5(1)(a), (b), (d) and (e) of the CPA are satisfied.

(2) The uncontested common issues (a) to (f) and (q)

13 As already noted, the proposed common issues are set out in the Appendix. The first six proposed issues, common issues (a) to (f), deal with negligence and are not contested. There is some basis in fact for both the existence and commonality[2] of these six proposed issues. The answers to each of these issues will also advance the litigation in a significant fashion.

14 *Proposed common issue (q)* asks whether the defendants should pay prejudgment interest and post-judgment interest and, if so, at what annual interest rate. I know that the defendants do not oppose this issue. But, in my view, the certification judge should not clutter up the common issues list with issues that (1) do not advance the litigation, and (2) obviously fall within the inherent jurisdiction of the trial judge whether certified or not. There is no good reason to certify a question dealing with the payment of interest on some future damages award or the applicable interest rate. I will leave this in the good hands of the trial judge.

15 Proposed common issue (q) is not certified.

(3) The contested common issues (g) to (p)

16 This is the only area of dispute.

17 Proposed common issues (g) to (j) ask primarily about the enforceability of the fine-print limitation of liability provisions in the lease agreements that purport to limit the defendants' liability for any and all loss caused by negligence or even deliberate action. Proposed common issues (k) to (n) ask, on behalf of Subclass One, whether the 216 and Save and Secure lease agreements were validly assigned to current owners Allsecure and Goldview and whether the latter can rely on the limitation of liability provisions contained therein. Proposed common issue (o) asks if any advance rental payments were returned after the fire and if not whether Allsecure and/or Goldview were unjustly enriched. Proposed common issue (p) asks about punitive damages.

18 I will consider each of the proposed issues in turn.

19 *Proposed common issues (g) and (h)* ask whether the previous or current owners had a protocol in place to direct customer attention to the limitation of liability provisions in the storage agreements when they came in to rent a storage locker. The plaintiff points to the decision of the Court of Appeal in *Clendenning*[3] that stands for the proposition that fine-print or "very small type"[4] limitation of liability terms may in certain circumstances be rendered unenforceable if they are "stringent or onerous" and were not brought to the attention of the signing party.[5]

20 It is apparent from the face of the lease agreements that the limitation of liability provisions are in small type and difficult to read. There is also some evidence in the plaintiff's affidavit material that no customer-wide protocol was in place either at Save and Secure or Allsecure. Whether or not there was such a protocol is a factual inquiry that focuses on the defendants' conduct and thus has a class-wide and common impact.

21 If there was a protocol directing the customers' attention to the limitation of liability provisions, then the *Clendenning* argument would not be available. But equally, the absence of a protocol would not necessarily mean that the impugned terms are automatically rendered unenforceable — the defendants may still be able to show, even absent a protocol, that prospective tenants individually understood and accepted the "no liability" lease agreement.

22 In other words, proposed common issues (g) and (h) will only decide whether there was a protocol in place to direct customer attention to the limitation of liability provisions in the storage agreements when they came in to rent a storage locker. The answer to (g) and (h) will not determine liability but it will advance the litigation.

23 Proposed common issues (g) and (h) are certified.

24 *Proposed common issue (i)* asks this: if there was no protocol and there were no specific agreements by the tenants to be bound by the terms purporting to limit liability, can the defendants rely on the limitation of liability provisions?

25 This common issue asks the trial judge to decide whether the limitation of liability provisions are not only difficult to read (they are) but are "stringent or onerous" as discussed in *Clendenning*. The determination of common issue (i) will not necessarily decide liability (one would still have to consider what was said or done in each individual case) but it will definitely advance the litigation for Subclasses One and Two.

26 Proposed common issue (i) is certified.

27 *Proposed common issue (j)* asks whether the liability limiting terms are unenforceable by reason of being contrary to public policy as a result of the defendants' (i) failure to comply with applicable *Ontario Building Code*, *Ontario Fire Code* or fire safety standards prescribed by law; (ii) failure to properly maintain and repair the premises and its components to ensure

that the possessions of the class were safe and secure at the premises, including having a functioning standpipe, fire alarm system, and fire sprinkler system as well as other fire safety apparatus; and, (iii) storing, or permitting to be stored, any combustible or flammable liquids and gases on the premises?

28 The Supreme Court made clear in *Tercon*[6] that a limitation of liability clause may be voided in two situations: (i) if the clause is unconscionable, for example because of an inequality in bargaining power[7] , or (ii) if there is some "overriding public policy" that outweighs the "very strong" public interest in the enforcement of contracts.[8]

29 Proposed common issue (j) focuses specifically on the "public policy" category of unenforceability that is set out in *Tercon*.[9] There is certainly some basis in fact for the various "failures" alleged in this question. And, because the focus is on the defendants' conduct and the impact of the alleged failures obviously affects the two subclasses that signed lease agreements, there is commonality for at least these two subclasses.

30 Proposed common issue (j) is certified.[10]

31 *Proposed common issues (k) to (n)* deal with assignment. There is evidence that Subclass One entered into storage leases with Save and Secure, not 216. The agreement of purchase and sale between 216 and Goldview ("in trust for a company to be incorporated") provided that 216 "will assign" its lease agreements to the purchaser but, as the plaintiff notes, there is no direct evidence that this actually happened, and if it did, 216 had no legal right to assign the Subclass One agreements. Allsecure says it forwarded a notice of assignment to every Subclass One tenant but there is evidence that not everyone received such a notice and some further evidence that the notice in question actually said nothing about assignment.

32 Proposed common issues (k) to (n) set out four (mainly legal) questions about the lease agreements entered into between Sub-class One and the previous owner and whether they were properly assigned to the current owner:

- Were the leases that Subclass One entered into with 216 and/or Save and Secure capable of assignment?

- If the leases which Subclass One entered into with 216 and/or Save and Secure were capable of assignment, did any assignment require the consent of the tenants?

- Were the leases that Subclass One entered into with 216 and/or Save and Secure actually or effectively assigned to Allsecure and/or Goldview so as to afford protection from liability?

- Are Allsecure and/or Goldview who are not named in the leases that Subclass One entered into with 216 and/or Save and Secure entitled to rely upon any liability limiting clauses in those leases?

33 In essence, the questions ask whether Allsecure and/or Goldview can rely on the limitation of liability provisions in the lease agreements signed by the class members in Subclass One. The answers will significantly advance the litigation for this group.

34 Proposed common issues (k) to (n) are certified.

35 *Proposed common issue (o)* asks whether Allsecure or Goldview retained any advance rental payments and was thus unjustly enriched. This is not a common issue because the answer depends on individualized inquiry.

36 This proposed issue is not certified.

37 *Proposed common issue (p)* asks whether the class members are entitled to punitive damages. There is some basis in fact for this question because there is some evidence of the various safety failures or statutory breaches that were listed above in common issue (j). There is commonality because the focus is on the defendants' misconduct and the impact of such misconduct (if indeed there was misconduct) is obviously class-wide.

38 Note that the plaintiff is only asking about entitlement not amount. As the Court of Appeal recently confirmed in the G-20 class action,[11] "[i]t is undisputed that whether a defendant's conduct merits an award of punitive damages can be certified as a common issue."[12]

39 Proposed common issue (p) is certified.

Disposition

40 The action is certified as a class proceeding. All of the proposed common issues as set out in the Appendix are also certified, except for (o) and (q).

41 Counsel shall prepare an Order in the form contemplated by s. 8 of the CPA. Please be sure that the draft Order refers to the class definition, the class period, the three added sub-classes and their respective representative plaintiffs. Counsel should also indicate which of the common issues apply to which class or subclass.

42 In my view, this is not a case for costs. Four of the five certification requirements and all of the proposed common issues relating to the defendants' alleged negligence were agreed to or not opposed. The remaining common issues were substantially revised by the plaintiff as this matter progressed because of the submissions and suggestions of the defendants (and the court). Success on this motion cannot be fairly or reasonably determined and thus no costs will be awarded to either side.

43 I thank counsel for their co-operation and assistance.

Motion granted in part.

Appendix — The Proposed Common Issues

[Note: All proposed issues certified except (o) and (q)]

(a) Did the defendants owe a duty of care to the class and, if so, what is the standard of care to which the defendants were required to adhere?

(b) Were the defendants negligent in failing to comply with any required *Ontario Building Code* or *Ontario Fire Code* or fire safety standard prescribed by law at the premises?

(c) Were the defendants negligent in failing to properly maintain and repair the premises and its components to ensure that the possessions of the class were safe and secure at the premises, including having a functioning standpipe, fire alarm system, and fire sprinkler system as well as other fire safety apparatus?

(d) Did the defendants store, or permit to be stored, any combustible or flammable liquids and gases on the premises and, if so, were the defendants negligent in storing or permitting the storage of combustible or flammable liquids and gases on the premises?

(e) If the defendants are found to have been negligent in any manner described in sub-paragraphs (a) through (d), did the defendants' negligence cause or contribute to the origin or the spread of the fire which occurred on January 9, 2012?

(f) If the defendants are found to have been negligent in any manner described in sub-paragraphs (a) through (d), did the defendants' negligence cause or contribute to the damages claimed by the class?

(g) Did 216 and/or Save and Secure have a protocol in place to direct the attention of tenants in Subclass One to the terms purporting to limit liability at the time of entering into the lease?

(h) Did Allsecure and/or Goldview have a protocol in place to direct the attention of tenants in Subclass Two to the terms purporting to limit liability at the time of entering into the lease?

(i) If such a protocol was not in place, and in the absence of a specific agreement made by a tenant to be bound by the terms purporting to limit liability, can the defendants rely on such terms limiting the liability of the defendants?

(j) Are the liability limiting terms unenforceable by reason of being contrary to public policy as a result of the defendants': (i) failure to comply with any applicable *Ontario Building Code*, *Ontario Fire Code* or fire safety standards prescribed by law for the premises; (ii) failure to properly maintain and repair the premises and its components to ensure that the possessions of the class were safe and secure at the premises, including having a functioning standpipe, fire alarm system, and fire sprinkler system as well as other fire safety apparatus; and, (iii) storing, or permitting to be stored, any combustible or flammable liquids and gases on the premises?