CITATION: Lamarche v. Pacific Telescope Corp., 2022 ONSC 2553
COURT FILE NO.: CV-20-84692-CP
DATE: April 26, 2022

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
LUC LAMARCHE Plaintiff/Responding Party	Jeff Orenstein for Plaintiff/Responding Party
– and –	
PACIFIC TELESCOPE CORP. Defendant/Moving Party	
SYNTA TECHNOLOGY CORPORATION OF TAIWAN, SYNTA CANADA INTERNATIONAL ENTERPRISES LTD., SUZHOU SYNTA OPTICAL TECHNOLOGY CO., LTD., NANTONG SCHMIDT OPTO-ELECTRICAL TECHNOLOGY CO., LTD., SW TECHNOLOGY CORPORATION, SKY-WATCHER USA, CELESTRON ACQUISITION, LLD, CELESTRON INTERNATIONAL, OLIVON MANUFACTURING CO., LTD., OLIVON INTERNATIONAL ENTERPRISE INC., OLIVON USA, LLC, AND NINGBO SUNNY ELECTRONIC CO., LTD. Defendants	Ian Matthews for Defendant/Moving Party Pacific Telescope Corp., and for all other Defendants except Ningbo Sunny Electronic Co., Ltd. No one appearing for Ningbo Sunny Electronic Co., Ltd.
	HEARD: February 22, 2022

REASONS FOR JUDGMENT ON MOTION TO DISMISS

Justice Sally Gomery

[1] The defendant, Pacific Telescope Corp. ("Pacific Telescope"), seeks the dismissal of this

action pursuant to s. 29.1 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "Act"). Section 29.1 provides that the court shall, on motion, dismiss a proposed class proceeding if, within a year of the action being commenced, a certification motion has not been served or a timetable agreed upon or ordered. Pacific Telescope contends that none of these events has occurred and that I therefore must grant the motion and dismiss the action, with costs.

[2] The plaintiff, Luc Lamarche, argues that the parties agreed to a timetable that fulfills the criteria in s. 29.1(b), or had the effect of suspending the running of time in s. 29.1. In the alternative, he contends that I have discretion to grant or refuse the dismissal, and that I should exercise it in his client's favour, based on the doctrine of promissory estoppel, or because to do otherwise would be unjust.

[3] For the reasons that follow, I am granting the motion to dismiss, and ordering the plaintiff to pay costs in the amount of $36,600 to Pacific Telescope on the motion and the action.

Background

[4] The plaintiff's statement of claim was issued on October 13, 2020. He alleges that the defendants conspired to fix the price of telescopes sold in Canada. He seeks to certify a class action on behalf of Canadian residents, outside Quebec, who purchased a telescope manufactured or sold by any of the defendants since January 1, 2005.

[5] On January 20, 2021, Ian Matthews, a lawyer at Borden Ladner Gervais LLP ("BLG"), contacted the plaintiffs' lawyers, Jeff Orenstein, and Andrea Grass, to let them know that his firm had been retained by all defendants except for Ningbo Sunny Electronic Co., Ltd. ("Ningbo Sunny"). In an email sent to Mr. Matthews the next day, Mr. Orenstein confirmed that, if BLG accepted service on behalf of his clients and filed notices of intent to defend, the plaintiff would not argue that this constituted a submission of jurisdiction to any Canadian court.

[6] On February 8, 2021, Mr. Matthews sent Mr. Orenstein an email accepting service of the claim on behalf of his clients subject to the jurisdictional issue. He added as follows:

> When we spoke, you indicated to me that you were in the midst of having the Claim translated into Mandarin as part of your efforts to serve the foreign defendants,

> including the defendant Ningbo Sunny (which we do not represent). You indicated that you would send me a copy of the pleading in Mandarin. I look forward to receiving it. I would also appreciate you keeping me and my colleague Graham Splawski (copied) informed about the status of service of the Claim on Ningbo Sunny. Once this occurs, and Ningbo Sunny has appeared, we presume you will be in touch with us further about jointly writing to the court requesting appointment of a case management judge. We think that it will be most efficient to wait until all parties have been served and are represented before seeking an initial case conference.

[7] No one from Mr. Orenstein's office responded immediately to this email. On February 24, 2021, Mr. Orenstein emailed Mr. Matthews that he had received the translated versions of the statement of claim and attached them. He added: "They are still working on service though and expect this to still take a couple of months".

[8] The parties did not have any discussion or correspondence about moving the action forward after their discussion and exchanges of email in January and February 2021. No case conference was convened. The plaintiff did not serve his motion record or any certification material prior to the one-year anniversary of the lawsuit, that is, October 13, 2021. This motion was served the next day.

[9] The plaintiff served an amended statement of claim on the other defendants by sending it to BLG on January 24, 2022. He has still not served the statement of claim on Ningbo Sunny. The Chinese central authority has been provided with the amended statement of claim consistent with the Hague Convention's rules of service on foreign defendants.

Analysis

[10] Section 29.1 was enacted on October 1st, 2020. It states as follows:

> ***Mandatory dismissal for delay***
>
> 29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,
>
> > (a) the representative plaintiff has filed a final and complete motion record in the motion for certification;

> (b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;
>
> (c) the court has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or
>
> (d) any other steps, occurrences or circumstances specified by the regulations have taken place.

[11] No regulations specifying "any other steps, occurrences or circumstances" have been enacted pursuant to s. 29.1(d).

Did the parties comply with s. 29.1(b)?

[12] The plaintiff contends that, through counsel's exchange of emails in February 2021, the parties agreed in writing to a timetable. The Act does not define a timetable. Pursuant to s. 35, however, the Act is subject to the rules of the court. According to s. 1.03(1) of the *Rules of Civil Procedure*, a timetable is "a schedule for the completion of one or more steps required to advance a proceeding . . ., established by order of the court or by written agreement of the parties that is not contrary to an order". The plaintiff argues that the parties agreed to jointly seek a case conference only after the defendant Ningbo Sunny had been served and its counsel had appeared on the record. As a result, the criteria in s. 29.1(b) are met.

[13] The short answer to this argument is that s. 29.1(b) not only requires that the parties agree to a timetable in writing, but that it be filed with the court. Nothing was filed with the court, and so the criteria in this section were not met.

[14] There are other problems with this argument. Mr. Matthews' February 8, 2021 email contemplated a sequence of events: service of Ningbo Sunny, followed by an appearance by its counsel on the record, and then a joint request for a case conference. He did not propose a timeline for any of these steps. In Mr. Orenstein's February 24, 2021, email, he stated that service might still take "a couple months". He did not commit to any deadline for service or for completion of any other step.

[15] A timetable requires an undertaking to do something within a specified deadline. Merely considering, or even committing to, a sequence of events is not enough. This issue was addressed in *Bourque v. Insight Productions*, 2022 ONSC 174, the only published decision to date interpreting s. 29.1 of the Act. The plaintiff, Bourque, asserted that, at a case management conference, the presiding judge had deferred any discussion of next steps until Bourque had served a motion for certification at some unspecified future date. At paras. 13 and 14, Belobaba J. held that this did not mean that the court had "established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding", per s. 29.1(c).

> Telling the plaintiff that she can file her motion record "*when she can*" is not a "timetable". It is the antithesis of a timetable. It is the court saying, in essence, "ignore the mandatory requirements in s. 29.1 and the statutory objective to 'advance the proceeding', go ahead and do whatever you want, whenever you can."
>
> Not only would such a direction be contrary to the mandatory dismissal provision, this is not a direction that the court could even make. There is nothing in s. 29.1 that says "unless the court orders or directs otherwise" or "unless there is good reason not to dismiss for delay." The statutory language and legislative intent could not be plainer. It cannot be said that a "timetable" had been established by the court as required by s. 29.1(1)(c).

[16] This reasoning applies equally to a timetable agreed upon by the parties under s. 29.1(1)(b).

[17] Finally, I do not find that the parties reached any agreement as a result of the emails exchanged by counsel in February 2021. Even if I were to accept that Mr. Matthews' email constituted an offer to comply with a timetable, Mr. Orenstein did not explicitly confirm that he accepted this offer. His only response was an email two weeks later that he had still not served Ningbo Sunny.

Did the parties agree to suspend the running of s. 29.1?

[18] The plaintiff argues that there is nothing in the Act that prohibits the parties from agreeing to vary, suspend, or extend the limitation period in s. 29.1, and that this is what the parties did

through the exchange of emails in February 2021. I have already found that the parties did not reach any agreement. I therefore do not need to consider this argument further.

Should the motion nonetheless be dismissed?

[19] Relying on Alberta caselaw dealing with mandatory dismissal provisions in various legislation, the plaintiff argues that the court retains discretion to refuse to grant a dismissal on a motion like this. He further argues that I should exercise this discretion in his favour, because to do otherwise would be unjust.

[20] I do not need to consider whether there could be circumstances where a court could deny a motion under s. 29.1, even though a certification motion had not been filed or a timetable filed or ordered. *Bourque* suggests otherwise. But, in any event, the plaintiff has not established that Pacific Telescope is estopped from seeking a dismissal, or that the equities argue against granting the motion.

[21] Promissory estoppel is not made out. Promissory estoppel is an equitable defence which requires a party to establish that (1) the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on; and (2) the party arguing promissory estoppel relied on the promise or assurance by taking some action or in some way changing its position: *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 SCR 50, at p. 57.

[22] Mr. Matthews in no way indicated, in his February 8 email, that his clients were willing to wait past the one-year anniversary of the commencement of the action for the plaintiff to serve its certification motion or to take other steps that would foreclose a s. 29.1 motion. Waiver of a limitation period "must be clear and unambiguous to have effect": *Aletkina v. Hospital for Sick Children*, 2014 ONSC 6263 (Div Ct.), at para. 16. Detrimental reliance must also be established. The plaintiff did not file an affidavit in response to this motion. An affidavit from a senior associate in Mr. Orenstein's office does not allege that he, or anyone else in the firm, relied on Mr. Matthews' email when it failed to take any steps to forestall a s. 29.1 motion.

[23] In oral argument, Mr. Orenstein suggested that defence counsel engaged in sharp practice, saying he had been "played". There is absolutely no merit to this argument. Mr. Matthews' February 8 email showed that he recognized the delay in serving a Chinese defendant. It in no way suggested that his clients were willing to wait indefinitely for the plaintiff to move the proceeding forward. Mr. Matthews received no response from Mr. Orenstein, save a note in late February indicating that service on Ningbo Sunny might be delayed to April or May. In these circumstances, Mr. Matthews was not obliged to give Mr. Orenstein notice of a potential s. 29.1 motion almost eight months later.

[24] The plaintiff argues, based on the outcome of parallel proceedings in the United States, that the proposed class action has merit. The merits of the case are irrelevant on a s. 29.1 motion.

[25] The plaintiff also argues that s. 29.1 is fundamentally ill-conceived. He contends that s. 29.1 creates hardship for plaintiffs in class proceedings involving foreign defendants, and reproduces submissions by the Toronto Lawyers' Association, when the provision was being debated at Queen's Park, which argued for a two-year limitation period. It goes without saying that these submissions were rejected, and that class counsel and the court must live with the section as enacted. This may involve modifying past practices. As noted in *Bourque*, at paras. 19 and 20:

> If s. 29.1 of the amended CPA is to achieve its intended purpose — to help advance class action proceedings that otherwise tend to move at glacial speed — then it's to everyone's advantage (both putative class members and defendants) that the mandatory dismissal provision be interpreted and applied as written. Particularly when compliance is easy and the consequence of non-compliance (dismissal of the action) although inconvenient is not particularly onerous — in the vast majority of cases, the dismissed proceeding can be refiled against the same defendants with just a change in the proposed representative plaintiff.
>
> Most class action lawyers already understand this and have factored the s. 29.1 one-year dismissal date into their tickler systems. For those who have not yet done so, this decision may be a helpful reminder.

[26] Finally, the plaintiff argues that dismissing the action is pointless, because he will simply find another class representative and start another class action against the same defendants, as suggested the above passage in *Bourque*. Defence counsel noted that Belobaba J.'s comment on

this issue was *obiter*, and that the defendants reserved the right to argue otherwise, if and when another action was commenced against them after dismissal of this one. I agree.

Disposition

[27] The motion is granted. The action is dismissed. In accordance with s. 29.1(2) of the Act, counsel for the plaintiff, Consumer Law Group P.C., shall forthwith:

a. publish a notice indicating that this proceeding has been dismissed, together with a copy of the dismissal order to be issued, on its website at https://clg.org/Class-Action; and

b. send a copy of a notice indicating that this proceeding has been dismissed, together with a copy of the order, to every putative class member who has contacted the firm to express an interest in the proceeding.

[28] The costs of this notice shall be borne by the plaintiff's counsel, pursuant to s. 29.1(3).

[29] Pacific Telescope seeks partial indemnity costs of $36,611.90 on the motion and the action combined. The plaintiff's counsel argues that the costs claimed are excessive. Mr. Orenstein has filed a bill of costs reflecting fees of $13,618.75 on the motion. He has not provided any information on costs incurred in the action. I assume these are not insignificant.

[30] I find the costs sought by Pacific Telescope are reasonable, taking into account the novelty of the issues raised on this motion, the importance of the action and the motion to the parties, and Mr. Orenstein's unfounded accusations about Mr. Matthews' professional integrity. I do not find the time spent on responding to the action, or in bringing and presenting the motion, or the hourly rates of the lawyers involved, to be excessive.

[31] I accordingly order the plaintiff to pay costs of $36,600 to Pacific Telescope within 30 days.

Sally Gomery J.

Justice Sally Gomery

Released: April 26, 2022

CITATION: Lamarche v. Pacific Telescope Corp., 2022 ONSC 2553
COURT FILE NO.: CV-20-84692-CP
DATE: April 26, 2022

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LUC LAMARCHE

Plaintiff/Responding Party

– and –

PACIFIC TELESCOPE CORP. *et al.*

Defendant/Moving Party

REASONS FOR JUDGMENT

Justice Sally Gomery

Released: April 26, 2022