CITATION: *2461351 Ontario Inc. V. Andersen et. al.*
COURT FILE NO.: CV-18-031
DATE: 20190531

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2461351 Ontario Inc. Plaintiff	Sang Joon Bae, for the Plaintiff
- and -	
Andersen, Chief Building Official of Township of Brudnell, Lundoch and Raglan and The Corporation of Township of Brudnell, Lyndoch and Raglan Defendants	Sean Van Helden, for Defendants
	HEARD: Pembroke May 24, 2019

McNAMARA R.S.J.

DECISION ON MOTIONS

[1] This motion and cross-motion were argued before me in Pembroke on May 24, 2019.

[2] The motion, brought by the defendants, seeks an order that action CV-18-031 be stayed until Superior Court application CV-16-409 initiated by the plaintiff in 2016 against the same defendants be determined. They also seek an order that the application be set down for hearing at the earliest available date.

[3] The plaintiff, the respondent on this motion, brings a cross-motion seeking an order dismissing the defendants motion and seeking costs on the basis that the relief sought on the application, as a result of steps taken by the defendants, are moot.

[4] To avoid confusion with both the plaintiff and defendants being both applicants and respondents at this hearing, I will refer to them as the plaintiff and defendant.

Factual Background

[5] In the circumstances of these motions a brief factual outline is required.

[6] In May 2016 the plaintiff bought a "chip wagon" business and brought it onto an existing business property they owned and located in the defendant Township. The Township took the position that the structure was a "building" as defined in the *Building Code Act* and in consequence the plaintiff was required to apply for a building permit before operation could be permitted.

[7] The plaintiff did not apply for a permit and in consequence an Order to Comply was issued on May 6, 2016 requiring compliance by May 11, 2016. There was no compliance and on May 24, 2016 the defendant issued a "Stop Work Order" and an "Order to Uncover".

[8] On June 10, 2016 the plaintiff commenced an application seeking a declaration that the chip wagon was not a building within the *Act*, quashing the Compliance Orders, along with other relief.

[9] The defendant responded to the application, and in the Summer of 2016 the parties exchanged documentary evidence, attended cross-examination, and dealt with a refusals motion.

[10] The matter then went dormant until 2018.

[11] At some point modifications were made to the chip wagon, including adding four wheels and a trailer hitch effectively turning it into a mobile chip wagon.

[12] In early 2018 there were resolution discussions between the municipality and the plaintiff, but they did not result in a resolution of the issues.

[13] In due course the matter became a topic at Municipal Council and in view of the changes to the structure, and in an attempt to save ongoing legal expenses, the municipality agreed a transient trailer license could be issued to the plaintiff. This occurred in May 2018. In June of that

year council exercised its discretion under the *Act* and the Chief Building Official was directed to cancel the three earlier issued orders.

[14] Unbeknownst to the defendants in April 2018 the plaintiff had issued a Statement of Claim seeking all the same relief as in the application, but adding a claim for general damages, special damages, and an award for punitive, aggravated, and\or exemplary damages. The 14-page claim sets out more factual detail than did the application, much of it in support of the damages claim. The claim was not served until late August 2018.

Position of the parties

[15] In essence, the defendant takes the position that the application and action involve the same parties, claim relief out of the same occurrences, and have questions of law and fact in common. They submit it would be unjust and prejudicial to the defendant to deprive it of a ruling on the application. They argue the defendant has been prepared to meet the case brought by the plaintiff in the application for over two years, and allowing the plaintiff to proceed with the action first would deprive the defendants of the opportunity for a court, having been apprised of all matters relevant to the dispute, to hear the matter and render a decision.

[16] The plaintiff argues that the only issue on these motions is whether the issues raised in the application are now moot, save and except the issue of costs. They argue there are no live issues remaining from the application in consequence of the cancellation of the three compliance orders, and with no live issues between the parties, save and except costs, the application had been dealt with and ought to be declared moot and the plaintiff be allowed to continue with its action including the claims for monetary damages.

Decision

[17] I turn firstly to the relief sought by the defendant municipality on their motion.

[18] There can be no issue that where two or more proceedings are pending involving the same parties, that claim relief out of the same occurrences, and have common questions of law or fact, a court may order that any of the proceedings be stayed until after the determination of the other

proceeding (Section 107 *Courts of Justice Act*). There can also be no doubt that there is a significant commonality between the application and the action. The real issue on this motion is which of the two proceedings ought to be stayed.

[19] The defendant argues that the action ought to be the one stayed because the application has already proceeded through evidentiary production, cross-examination, and the only remaining step is a hearing. Counsel argues that allowing the plaintiff to proceed with the action first would deprive the defendant of the opportunity for a court, having been apprised of all the matters relevant to the dispute as articulated in 2016, to conduct a hearing and render a decision. Counsel submits that that decision would also be relevant to the companion action commenced in 2018.

[20] I disagree that going with the application first is the most efficient way forward. Basically, the effect of that would have a court conduct a full hearing, render a decision on the issues before it, and then have to proceed with a second hearing that deals with the balance of the issues. The action, unlike the application, contains claims for monetary damages which are not permitted to be dealt with on an application (see *Hefford v Charpentier*). It must also be remembered that it is suggested in the action that certain of the facts in support of the damage claims are based on information that surfaced after the application was issued.

[21] Rule 1.04 of the *Rules of Civil Procedure* provide that they are to be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits. Principles of proportionality are also to apply. In my view proceeding with an application through a full hearing with even the possibility it may then require a second hearing is not the most expeditious, least expensive, or proportional way to deal with this case. Proceeding with the action first would allow all necessary evidence and argument to be heard at one time, in one proceeding, and fully decided at that time.

[22] It is also relevant, on the expense issue, and I so order, that all productions and cross examinations done as part of the application all to form part of the record in the action.

[23] I turn now to the cross-motion brought by the plaintiff.

[24] As mentioned earlier, it is the position of the plaintiff that as a result of the defendant municipality withdrawing its three orders issued under the *Building Code Act*, the issues on the application became hypothetical.

[25] That submission is simply incorrect.

[26] I agree with the submission of plaintiff's counsel that the law does indeed provide that a court may decline to decide a case which raises merely hypothetical or abstract questions. In essence, if there are no issues of substance remaining on a case, the case should be considered over. The difficulty with that argument in this case is that significant issues of substance raised in the application are not resolved.

[27] It is accurate to say that in June 2018 the three compliance orders were cancelled by the defendant. Some of the relief sought on the application was for a court order rescinding those orders. However, the court has not ruled on the relief sought in paragraphs (b) or paragraph (f) of the application. Paragraph (b) sought a declaration that the chip wagon, as it then existed, was not a building within the meaning of the act, and subparagraph (f) sought a declaration that the defendant was estopped from alleging or defining a number of things recited in the claim. As indicated there has been no ruling on these issues, nor has there been any concession by the municipality on them.

[28] The issues in the application are not moot and are recited verbatim in the statement of claim, along with the other relief sought in that action. I should also add that the plaintiff has not abandoned any of the relief sought in the original application. All there has been is the purported voluntary withdrawal of the compliance orders because changes were made, and the municipality concluded it was time to try and save the taxpayers some money.

[29] In summary, there will be an order staying Superior Court application file number CV-16-409 and that Superior Court action number CV-18-031 will be allowed to proceed. There will also be an order dismissing the cross-motion for the reasons outlined above.

[30] As both the motion and cross-motion have been dismissed I make no order as to costs and leave them to be dealt with as part of the ongoing litigation.

Mr. Justice James E. McNamara

Released: May 31, 2019

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SUPERIOR COURT OF JUSTICE

BETWEEN:

2461351 ONTARIO INC.

Plaintiff

- and -

Andersen, Chief Building Official of Township of Brudnell, Lundoch and Raglan and The Corporation of Township of Brudnell, Lyndoch and Raglan

Defendants

DECISION ON MOTIONS

McNAMARA R.S.J.

Released: May 31, 2019