CITATION: Allott v. Panasonic Corporation, 2020 ONSC 705
COURT FILE NO.: 1899-2015
DATE: 20200131

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sean Allott (Plaintiff)

AND:

Panasonic Corporation, Panasonic Corporation of North America, Panasonic Industrial Devices Sales Company of America, Panasonic Canada Inc., KOA Corporation, KOA Speer Electronics Inc. Murata Manufacturing Co. Ltd., Murata Electronics North America, Inc., ROHM Co. Ltd., ROHM Semiconductor U.S.A., LLC, Vishay Intertechnology, Inc., Yageo Corporation and Yageo America Corporation (Defendants)

RE: **COURT FILE NO:** 989/17CP

Sean Allott (Plaintiff)

AND:

Hokuriku Electric Industry Co., HDK America Inc., Kamaya Electric Co., Ltd., Kamya, Inc., Alps Electric Co., Ltd., Alps Electric (North America), Inc., Midori Precisions Co., Ltd., Midori America Corporation, Susumu Co., Ltd., Susumu International (USA) Inc., Tokyo Cosmos Electric Co., and Tocos America, Inc. (Defendants)

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman and Jean-Marc Metrailler - Counsel for the Plaintiff

Katherine Kay - Counsel for the KOA Defendants

Maura O'Sullivan – Counsel for the Kamaya Defendants

Scott Kugler and Alex Zavaglia – Counsel for the Yageo Defendants

Ian Thompson – Counsel for the Panasonic Defendants

Jim Sullivan and Nicole Henderson – Counsel for the Murata Defendants

Don Houston and Gillian Kerr – Counsel for the Vishay Defendants

Todd Shikaze and Kevin Wright – Counsel for the Susumu Defendants

Paul Martin – Counsel for the Rohm Defendants

Samantha Gordon – Counsel for the Tokyo Cosmos and Tocos Defendants

Robert Tighe – Counsel for the Hokuriku and HDK Defendants

Annie Tayyab – Counsel for the Alps Defendants

HEARD: January 27, 2020

ENDORSEMENT

[1] The plaintiff brings two motions. The first is brought in Court file number 1899 – 2015 CP. The plaintiff seeks the following:

a. Approval of the discontinuance of the proceeding, without prejudice and without costs, against the defendants, Yageo Corporation and Yageo America Corporation ("the Yageo defendants"), and Murata Manufacturing Co., Ltd. and Murata Electronics North America, Inc. ("the Murata defendants") in accordance with the tolling and standstill agreements reached between the plaintiff and the said defendants pursuant to section 29 of the *Class Proceedings Act, 1992*;

b. Approval of the deletion of Panasonic Industrial Devices Sales Company of America ("PIDSA);

c. Leave to file an Amended Amended Statement of Claim removing the Yageo and Murata defendants and PIDSA; and

d. Dispensing with notice under section 19 and/or section 29 of the *Class Proceedings Act, 1992.*

[2] The second motion is brought in both actions seeking an order that the two actions be consolidated into one proceeding, and the plaintiff be granted leave to issue a Fresh as Amended Statement of Claim in the form attached as Schedule A to the notice of motion.

[3] Plaintiff's counsel asked that the motions be heard in the same order as indicated so that upon consolidation, the consolidated pleading would contain no reference to the Yageo/Murata defendants or PIDSA.

[4] I will deal with the motions in the same order as requested.

Discontinuance Motion – Yageo and Murata Defendants

[5] The plaintiff has entered into Tolling and Standstill Agreements with the Yageo and Murata defendants. In support of the motion, plaintiff's counsel filed an affidavit sworn by an associate lawyer. The agreements were described in general terms in the affidavit but were

not attached as exhibits. Instead, plaintiff's counsel forwarded same to me via email so that I might review them in advance of the motion.

[6] I indicated to counsel during submissions and reiterate here that the agreements should have been made exhibits to the affidavit filed. Absent doing so, they are not evidence on the motion and cannot be considered by me. Without the agreements, the motions would fail, a point I made clear to counsel during oral submissions. They agreed that the two documents should be marked as Exhibits 1 and 2 on the motion which they were.

[7] I observe that the affidavit filed in support of the motion provides some description of the two agreements, but the devil lies in the details. There are significant terms that terminate the tolling of limitation periods automatically upon certain events happening or upon election by the defendants. The details of those significant terms are not found in the affidavit.

[8] The plaintiff seeks to discontinue the action as against the Yageo and Murata defendants, each of whom were parties named in related US litigation and/or regulatory proceedings in the US. Settlements have now been concluded in the US litigation. The claims against these defendants were discontinued and they were let out of the actions there. Thus, the defendants have not contributed to any settlement of the related litigation and appear to have been let out of that action presumably on the basis that there is no viable claim against them.

[9] Counsel for each set of defendants separately approached plaintiff's counsel to advise that their clients did not participate in any alleged price-fixing conspiracy. They are not and have not been subject to any regulatory investigation for same. Although named in the US litigation initially, they have been let out.

[10] Under the agreements, the action as against each set of defendants is discontinued on a without prejudice basis. Neither side is giving up anything vis-à-vis claims or defences. In return, the defendants agree to toll the running of the limitation period from the date the action was commenced in 2015 to the earlier of certain specified events and/or the defendants' election to terminate. If information comes to light that implicates any of these defendants in the alleged price-fixing conspiracy, the plaintiff may move to add them as a party to the litigation. The defendants are free to oppose that request.

[11] There is an ongoing obligation on the defendants to advise of any regulatory investigation for price fixing although the regulators enumerated are not exactly the same in each agreement.

[12] If the defendants choose to terminate the agreement before the specified events, it is open to the plaintiff to move at that time to add them back as parties into the action.

[13] The defined events that will automatically terminate the tolling of the limitation period are found at paragraph three in each agreement. There are differences between the two agreements. Plaintiff's counsel advises that the different language used reflects the

approach taken by defence counsel or the defendants. In any event, both agreements were the product of arm's length negotiations.

[14] Court approval of a discontinuance is required under section 29 of the *Class Proceedings Act, 1992.* The test is whether the interests of the class will not be prejudiced by the discontinuance. Prejudice to the remaining defendants is not a valid consideration:

[15] Both sets of defendants have very low shares of the global resistor marketplace. Neither sells much product directly in Canada. Among the many companies named in both actions, they are relatively bit players.

[16] I gather from the evidence filed and the submissions made by plaintiff's counsel that the decision to include these defendants in the proceeding when commenced was simply because they had been similarly named in the US litigation. It is not the case that plaintiff's counsel had actual evidence implicating these defendants in the alleged price-fixing conspiracy. I find this odd because I would expect that counsel would normally have some factual basis for naming someone as a defendant beyond mere allegations in a foreign pleading.

[17] I have no evidence that indicates any facts specific to these defendants with respect to their involvement in the alleged price-fixing conspiracy. The same considerations that led to their being named in the action appear to have led to the decision and agreement to discontinue; namely, they were let out of the US litigation.

[18] When pressed, plaintiff's counsel indicated that they possess no evidence that these defendants were parties to the price-fixing conspiracy alleged in this action. It is difficult to find prejudice to the class by the discontinuance of the action when class counsel has virtually nothing on which to base the claim against these defendants in the first place.

[19] In the circumstances, I am satisfied that there is no prejudice to the class by the discontinuance of the proceeding as against of these defendants. Should information come to light in future, the plaintiff may bring a motion to amend the pleading to add the defendants or any of them as parties to the litigation. The tolling of the limitation period provides a temporary salve of limited value but, as the saying goes, it is better than nothing.

[20] I see no reason to incur the expense of giving notice to the class of the discontinuance as against these defendants in the circumstances. It appears that the class never really had a basis for a claim against them or, at the very least, plaintiff's counsel has not satisfied me otherwise. The order and this decision shall be posted on the website of plaintiff's counsel for putative class members to read.

Deletion of PIDSA

[21] Subsequent to commencement of the action, plaintiff's counsel learned that PIDSA is an unincorporated division of the named defendant, Panasonic Corporation of North America, who remains a defendant in this action. PIDSA should not have been separately named as

a defendant. It is simply a business name used by Panasonic Corporation of North America. Leave is given to delete PIDSA as a defendant in the action.

[22] Leave is given as requested to issue an Amended Amended Statement of Claim that removes the Yageo and Murata defendants and PIDSA.

Consolidation Motion

[23] After the first action was commenced in 2015, plaintiff's counsel learned of additional parties who were the subject of regulatory proceedings and/or named as parties in the related US price-fixing litigation. A second action was commenced in 2017 with the intent that the two actions be consolidated.

[24] As counsel explained in the affidavit filed on the motion, they perceived an advantage to initiating a second action as opposed to simply bringing a motion to amend the existing statement of claim to add parties. They anticipated that the motion to add would be opposed and the time necessary to bring the motion could work against the class as the limitation period continued to run.

[25] I have previously expressed concern with respect to this approach. It seems to me that if these defendants were not known to be participating in the alleged price-fixing conspiracy, the discoverability rule would apply and the concern about the limitation period is diminished if not eliminated.

[26] In any event, the defendants do not oppose the requested consolidation and amendment of pleading. They take no position.

[27] The two actions arise from the same alleged price-fixing conspiracy. The parties in both actions are alleged to have conspired together. The allegations are the same. The plaintiff is the same. The motion is brought before pleadings have been filed. Consolidation of the two actions is appropriate. Leave to amend to issue a Fresh as Amended Statement of Claim in the form attached as Schedule A to the notice of motion is granted.

Case Conference

[28] I expressed concern to counsel about the sub-glacial pace of the litigation to date. The first action was commenced in 2015, four and one-half years ago. No motion for certification has been brought nor is there even a timetable for same. The explanations offered by counsel to my inquiry as to why the action has not proceeded more promptly were underwhelming.

[29] The parties are directed to schedule a case conference by telephone through the trial coordinator, Ms. Doupe, within 30 days of the date of release of this decision. The primary focus of that call will be the scheduling of a certification motion and the timetable for same. If there are other motions contemplated including jurisdiction motions, the timing and scheduling of same are for discussion at the case conference.

[30] I trust that counsel will engage in discussions ahead of that case conference to address these concerns.

Justice R. Raikes

Date: January 31, 2020