

THE GR COURT DOCKET

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Lawyer not added as a defendant to counterclaim in real estate dispute

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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In general, rules governing the amendment of pleadings in a civil action are generous. Courts are mandated to allow amendments. However in circumstances where an amendment does not disclose a reasonable or tenable cause of action, the courts can deny amendments.

Khan v. Ahmed

This is what happened in *Khan v. Ahmed*, Court File No. CV-19-4000-00, Justice André, October 14, 2021, where the court refused to grant leave to add the plaintiffs' former lawyer as a defendant to an unissued counterclaim.

The plaintiffs and the defendants were involved in a dispute over two properties owned in Brampton. On September 26, 2019, the plaintiffs started an action for the sale of the properties under the *Partition Act* and the payment of certain debts.

The plaintiffs were represented at the time by lawyer KK.

On February 18, 2020, the Brampton

properties were sold. At the time, the defendants were represented by their own lawyer, AK.

In December 2020, KK was replaced as the plaintiffs' lawyer in the litigation. However, the defendants in the action wanted to add KK as a party to the counterclaim on the ground that she was in a "conflict of interest" when she issued the plaintiffs' action and that she failed to "protest" a letter from the defendants' lawyer when the properties were sold.

KK's argument

KK argued that the proposed claims against her were untenable as a matter of law and were an abuse of process.

KK contended that, in general, she owed no duty of care to the defendants because she represented the plaintiffs and that a party could not sue an opposing lawyer, under the guise of any cause of action, for their conduct of a case. The latter proposition was supported by [*Royal Bank of Canada v. Tehrani*, 2009 CanLII 39055 \(ONSC\)](#).

KK also argued that she could not be in a “conflict of interest” and that the pleadings failed to disclose any material facts to support such a claim.

With respect to the allegation that she had failed to “protest” a condition in a letter related to the sale of the properties, the evidence showed that the defendants’ own lawyer, AK, had written the letter.

The decision to deny adding KK as a party to the action

In the circumstances, [rule 27.03 of the Rules of Civil Procedure](#) governed the proposed addition of KK as a defendant by counterclaim. Leave of the court was required to add KK.

The court noted, however, that it had a residual right to deny amendments to pleadings and that it was required to consider the following factors:

- (a) An amendment should be allowed unless it would cause an injustice not compensable in costs;
- (b) The personal amendment must be shown to be an issue worthy of trial and prima facie meritorious;
- (c) No amendment should be allowed which, if originally pleaded, would have been struck; and
- (d) The proposed amendment must contain sufficient particulars.

In this case, the law simply did not support a viable action against KK.

First, as determined in [Diamond Contracting Ltd. v. MacDearmid, 2006 CanLII 24444 \(ONCA\)](#), a

lawyer did not owe a duty of care to an opposing lawyer’s clients in litigation or commercial matters.

Second, the pleadings did not establish that KK was in a conflict of interest. At the time that the sale of the properties occurred, the defendants were represented by their own lawyer. Indeed, the pleadings clearly stated that AK was representing the defendants.

This case serves as a reminder that, in general, lawyers only owe a duty of care to their own clients. As well, this case shows that despite rules which permit pleadings to be easily amended, including the adding of new parties to an action, the courts retain a residual discretion when leave is required to disallow an amendment, particularly where the proposed pleading discloses no reasonable or tenable cause of action against either an existing defendant or a new, to be added, defendant.

Representation by Gardiner Roberts LLP

KK was represented by James Cook, a partner in Gardiner Roberts LLP’s dispute resolution group.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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