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Simple misnomer or new claim? How pointing a finger at the wrong defendant could cost you your case

Lawyers are continually reminded of the importance of pleadings—and, perhaps not surprisingly, of naming the correct corporate entity as defendant. So what if a party name is slightly off? What may look like a simple misnomer could in fact end your lawsuit. Justice Daley of the Ontario Superior Court of Justice addressed this issue in *Anderson-Munroe v. Sheraton Hotels.*

The plaintiff was a guest at a Toronto airport hotel in February 2013 when she slipped and fell on black ice. She brought a claim for damages against the Sheraton Hotel and Resorts located at 801 Dixon Road in Toronto. However, when discoveries were conducted in October 2015, the plaintiff's lawyer learned (for the first time) that the slip-and-fall did *not* occur at the named defendant's hotel. Rather, the fall occurred at the Four Points by Sheraton Toronto Airport, which is located at 6257 Airport Road, Mississauga.

The plaintiff brought a motion to amend her statement of claim by removing the named defendant and replacing it with the proposed defendant, Four Points by Sheraton Toronto Airport. The plaintiff argued this was a simple misnomer.

The proposed defendant argued that this was more than a simple misnomer—the plaintiff was attempting to add a new party to the lawsuit after the expiry of the limitation period. The proposed defendant provided evidence to show that there was no relationship between it and the named defendant, including:

- The named defendant was not a parent company of the proposed defendant;
- The hotel premises were located 3.7 km apart and in different municipalities;
- The named and proposed defendants were owned and operated by separate companies under separate management structures;
- The named and proposed defendants had no business

relationship with each other whatsoever; and

- The proposed defendant never received notice of the slip-and-fall from the named defendant, nor would it have expected to.

Justice Daley noted that under Rules 26.01 and 5.04(2) of the *Rules of Civil Procedure* the court may grant leave to amend pleadings or to substitute the name of a party if it is fair to do so and there is no risk of non-compensable prejudice. However, the court has the right to deny an amendment where such an amendment seeks to *change* the parties to a proceeding.

To determine whether the mistaken name was a simple misnomer, Justice Daley applied the “litigating finger” test adopted and developed by the Ontario Court of Appeal: would the proposed defendant know, on reading the Statement of Claim, that they were the intended defendant? If so, the plaintiff is not required name the correct defendant within the limitation period. However, even in the case of a misnomer, the court has residual discretion to deny the amendment on the basis of prejudice.

In this case, the Statement of Claim set out exactly where the slip-and-fall had allegedly occurred—at the named defendant’s hotel at 801 Dixon Road. There was no suggestion in the claim that the accident may have occurred at the Sheraton Four Points hotel instead. The proposed defendant could not have reasonably concluded that they should have been named in the claim. Further, the knowledge of the named defendant could not be imputed to the proposed defendant because there was no business or legal relationship between the two entities. Finally, the proposed defendant would face considerable prejudice if the pleadings were amended; it had been nearly four years since the accident, and important evidence may have been lost.

In the result, Justice Daley dismissed the plaintiff’s motion to amend. Because the plaintiff was outside the limitation period to start a new claim against the proposed defendant, her case was over.

While not an entirely surprising decision considering the nature of facts and the considerable difference between the named defendant and the proposed defendant, this case serves as yet another reminder to take care when drafting pleadings. If you erroneously sue a corporate entity that has little relation to the correct entity, your case could be over.