CITATION: Kaplan v. Casino Rama Services Inc. et al, 2017 ONSC 2671
COURT FILES NO.: Toronto CV-16-564080-CP
Oshawa 97892/16
DATE: 20170510

2017 ONSC 2671 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LEONID KAPLAN and CHERYL JANE MIZZI, Plaintiffs

AND

CASINO RAMA SERVICES INC., CHC CASINOS CANADA LIMITED, PENN NATIONAL GAMING, INC., and ONTARIO LOTTERY AND GAMING CORPORATION, Defendants

AND RE: RANDY HARMAN, Plaintiff

AND

ONTARIO LOTTERY AND GAMING CORPORATION and CHC CASINOS CANADA LTD., Defendants

Proceedings under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Ted Charney and David Robins* for the Plaintiffs in the Kaplan Action

Todd McCarthy, Sean Brown and Erin Vanderveer for the Plaintiff in the Harman Action

Catherine Beagan Flood and Ryder Gilliland for the Defendants (other than Penn National Gaming)

HEARD: April 20, 2017

CARRIAGE MOTION

[1] Last November, the Casino Rama computer system was hacked and a significant amount of confidential personal and financial information – relating to vendors,

employees and customers – was stolen. Several days later, the hacker uploaded some of the information to the internet and then days later uploaded some more and threatened that further "data dumps" would be forthcoming.

[2] Shortly after Casino Rama confirmed the privacy breach, two class actions were filed the same day, one by the Flaherty, McCarthy firm ("FM") and the other by the Charney and Strosberg, Sasso firms working in a consortium ("CS"). FM filed the Harman Action in Oshawa; CS filed the Kaplan Action in Toronto.

[3] It was my hope that a carriage motion could be avoided - that FM would join CS in their consortium and the three firms would proceed co-operatively and work together. I encouraged counsel to discuss this possibility. As it turned out, FM was prepared to join forces with CS but CS preferred to go it alone. A carriage motion was required. FM agreed that the carriage motion could proceed in Toronto.

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Deciding a carriage motion

[4] The applicable law is not in dispute. In deciding carriage of competing class proceedings, the court's objective under the *Class Proceedings Act*[1] is to make the selection that is in the best interests of the class, while being fair to the defendants and consistent with the objectives of a class proceeding.[2] The objectives of a class proceeding are access to justice, behaviour modification, and judicial economy for the parties and for the administration of justice.[3]

[5] Courts have generally considered seven non-exhaustive factors in determining which action should proceed: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced; (3) the state of each class action, including preparation; (4) the number, size and extent of involvement of the proposed representative plaintiffs; (5) the relative priority of the commencement of the class actions; (6) the resources and experience of counsel; and (7) the presence of any conflicts of interest.[4]

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[1] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] *Smith v. Sino-Forest,* [2012] O.J. No. 88, at para. 16, citing *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.), at para. 48; *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 373 (S.C.J.), at para. 13; *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.), at para. 14.

[3] *Smith*, *supra,* note 2, at para. 16.

[4] *Ibid.*, at para. 17.

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Analysis

[6] On paper, CS has the clear advantage. Not only do they have more class action experience, particularly in the area of privacy breaches, they have a more workable understanding of the theory of the case and the overall approach. The CS class definition in the Kaplan Action is more focused, the selection of representative plaintiffs and defendants is sounder and the causes of action being alleged are more sensible. Moreover, CS is better prepared – they have already filed their motion record for certification.

[7] There is no need for me to explain this in any more detail because FM agrees.

[8] FM candidly acknowledges each of these points but notes that it would forthwith amend the pleadings in the Harman Action to tighten the class definition, broaden the selection of representative plaintiffs and defendants and replace the "kitchen sink" approach to the causes of action with a more focused and refined listing. It would also file its motion record for certification in a matter of days. The carriage motion should not turn, says FM, on deficiencies that can be easily corrected by an amendment of the pleadings.

[9] Rather, FM argues that the carriage motion should turn on which firm is in a better position to provide speedier access to justice for the class members. This somewhat novel submission, in essence, goes something like this:

> *Your Honour, FM has filed in Oshawa. The Oshawa court can hear the certification motion in a matter of months - as early as July of this year. FM will pay more attention to this class action because we only have two other class actions on the go – CS together has some 67 class actions on the go. FM can move faster in a less crowded court house in Oshawa and can achieve faster and more effective access to justice for class members in a case where time is of the essence.*

[10] The comparative speed with which class counsel can move the class proceeding forward to resolution may well be a relevant factor in a carriage motion, given the right facts. But I am not persuaded on these facts that FM's submission should succeed. To begin with, FM has not shown that time is indeed of the essence. FM submits that "with each passing month, it becomes easier for the defendants to say that no harm has been done and ... the sky has not fallen." This may be so, but I am not persuaded that carriage should turn on whether the certification motion is in July (I frankly doubt that the defendants would ever agree to such a lightning-speed timetable) or December (the more

likely scenario). Either way, little will happen until the common issues, assuming the action is certified, are heard on the merits. And the required trial or summary judgment motion is many months away.

[11] Nor am I persuaded on the evidence before me that FM, a small but highly respected (and no doubt busy) insurance litigation boutique, would pay any more attention to the Harman Action than would CS, two larger and highly respected class action firms, to the Kaplan Action.

[12] In short, however much I admire FM's candid and original submission, based as it is on the important notion of speedy access to justice, I cannot conclude that speed alone, on the facts herein, should be the determinative criterion or that the Harman Action in the hands of FM would proceed any faster than the Kaplan Action in the hands of CS.

[13] FM has excellent litigation lawyers and would have done a fine job as class counsel. But applying the more applicable factors on the facts herein – the overall approach and theory of the case, the comparative state of preparation and the experience and resources of counsel – the carriage nod must go to CS and the Kaplan Action.[5]

Disposition

[14] Carriage of the proposed class action is granted to the plaintiffs in the Kaplan Action and CS is appointed class counsel. The Harman Action is stayed.

[15] I make no order as to costs, which is the usual course in carriage motions.

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Justice Edward P. Belobaba

Date: May 10, 2017

[5] As the hearing was concluding, FM suggested that I should direct that both actions proceed and be tried together in Oshawa. CS and counsel for the defendants quickly reminded the court that two class actions proceeding in parallel is not what is contemplated by the *Class Proceedings Act, supra,* note 1; would make little sense procedurally or substantively; and would not be fair to the defendants.

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