DCPI 990/2015

[2018] HKDC 57

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 990 OF 2015

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BETWEEN

WEI WEI Plaintiff

and

CHI CHIH TONG 1st Defendant

WONG YIN MUI 2nd Defendant

TSANG CHI HO Intended 3rd Defendant

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Before: Deputy District Judge C. Chow in Chambers

Date of Hearing: 15 January 2018

Date of Decision: 15 January 2018

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DECISION

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*Background*

1. The relevant factual background of this case has been set out in my earlier decision of even date (“First Decision”). I will not repeat it here. I also adopt all the abbreviations used in the First Decision in this decision relating to the First Summons.

*Addition of Tsang as the 3rd defendant*

1. In P First Affirmation, the plaintiff pointed to a memo from the Agriculture, Fisheries and Conservation Department (“AFCD”) to the DLA of 12 April 2016 which gave the name of Tsang as the previous recorded dog keeper of the Dog as at the date of the Accident.

1. According to Tsang Affirmation, he opposed the application on ground that any action against him is now time barred under the Limitation Ordinance (“LO”) which he says, provides for a 3 years’ time limit for the plaintiff to sue. He also stated that he had never been a *de facto* keeper of the Dog, giving an account as to how he became the previous dog keeper on record.
2. Tsang averred to his coming across the Dog when it was hit by a car in the evening of 7 February 2013. He took the Dog to The Society of the Prevention of Cruelty to Animals (“SPCA”) and got registered as its owner. The Dog was taken care of by SPCA and foster families until, through the introduction by some friends, Tsang managed to find someone, the 2nd defendant, who was prepared to adopt the Dog in May 2013. A blog of the adoption that was posted by Tsang on an internet social platform can be found in the exhibits. That blog referred to “領養家庭王小姐”. Tsang was under the impression, albeit incorrect, that all documentation for transfer of ownership was completed then.
3. Tsang further deposed to his becoming aware of the Accident when so informed by the 2nd defendant in November 2013. To avoid any misunderstanding as to the ownership of the Dog as at the date of the Accident, Tsang and the 2nd defendant immediately attended to the procedure for transfer of ownership of the Dog and the AFCD issued an “Amendment to Dog Licence” on 19 November 2013, showing the 2nd defendant as the keeper of the Dog.
4. As indicated in D1 Affirmation, the 1st defendant opposed the addition of Tsang as a defendant on two grounds, the first being the delay that will be caused. The 1st defendant complained about the application at this late stage, when the amendments could have been sought for much earlier, when the plaintiff was legally represented. The 1st defendant also referred to the inevitable lengthening of the trial.
5. The second ground relied on by the 1st defendant is the running of inconsistent claims by the plaintiff. Given that the basis for the plaintiff to seek to add Tsang is the claim that Tsang was the owner of the Dog as at the date of the Accident, the plaintiff cannot continue to maintain her claim against the 1st defendant which is also based on the allegation that the 1st defendant was the owner of the Dog as at the date of the Accident. The 1st defendant asked the plaintiff why her claim against him is not discontinued.
6. Section 27 of the LO sets out the applicable limitation period and is reproduced below:-

“27. Time limit for personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Section 4 shall not apply to an action to which this section applies.

(3) Subject to section 30, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5).

(4) Except where subsection (5) applies, the said period is 3 years from—

(a) the date on which the cause of action accrued; or

(b) the date (if later) of the plaintiff’s knowledge.

(5) If the person injured dies before the expiration of the period in subsection (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 20 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) shall be 3 years from—

(a) the date of death; or

(b) the date of the personal representative’s knowledge,

whichever is the later.

(6) In this section, and in section 28, references to a person’s date of knowledge are references to the date on which he first had knowledge of the following facts—

(a) that the injury in question was significant; and

(b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(7) For the purposes of this section an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) For the purposes of this section and section 28 a person’s knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(9) For the purposes of this section “***personal representative***” (***遺產代理人***) includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate); and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(10) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) shall be read as referring to the earliest of those dates.”

1. Although the time limit prescribed under section 27(4) of the LO is 3 years, the three years is to count from the date of the plaintiff’s knowledge, if later. What amounts to plaintiff’s knowledge is provided for in section 27(6). Judging from P First Affirmation, the plaintiff is not disputing that all the matters referred to in section 27(6) were within the knowledge of the plaintiff before the expiry of the limitation period, save for the fact that Tsang was on record the keeper of the Dog as at the date of the Accident.
2. The identity of Tsang as the previous recorded dog keeper is set out in the memo from AFCD dated 12 April 2016. The LAD had been corresponding with Tsang as early as 21 April 2016. The plaintiff said while making submissions at the hearing, and not in any of her affirmations, that she was not aware of such actions taken by the LAD on her behalf. What she said is only bare allegation and I should not regard it as evidence. I also find such allegation inherently improbable given that the letters of LAD referred specifically to their being instructed to act on the plaintiff’s behalf. Nevertheless, even if I were to accept that as true, there is no evidence that the plaintiff did not have the means to find out. Being her legal representatives, the knowledge of the LAD is imputed to the plaintiff. There can therefore be no dispute that the plaintiff had, by April 2016, knowledge that Tsang was the keeper of the Dog on record at the time of the Accident. The clock would not start to run again upon the plaintiff switching from being legally represented by the LAD to her acting in person.
3. By April 2016, the three years’ limitation period had not expired. The plaintiff was then legally represented and there is no explanation from her as to why an application to join Tsang as a defendant to this action had not been made before the expiry of the limitation period. I cannot see any ground to allow her to do so now.
4. The concern raised by the 1st defendant in D1 Affirmation about the plaintiff running inconsistent claims is another serious matter. Order 18 rule 12A of the Rules is relevant here. It provides as follows:-

“12A. A party may in any pleading make an allegation of fact which is inconsistent with another allegation of fact in the same pleading if –

1. The party has reasonable grounds for so doing; and
2. The allegations are made in the alternative.
3. To maintain a claim against Tsang on the basis that he was the owner or keeper of the Dog as at the date of the Accident, the plaintiff can only base her claim against the 1st and 2nd defendants in the alternative. However, not only has the plaintiff not indicated her attempt to plead her case against the two defendants and Tsang in the alternative, by entering judgment against the 2nd defendant on the basis of her allegation that the 2nd defendant was the owner or keeper of the Dog at the time of the Accident, the plaintiff has barred herself from so pleading in the alternative. I do not see how the plaintiff could introduce an alternative plea against Tsang now without first having set aside the default judgment obtained against the 2nd defendant.
4. For the above reasons, I dismiss the application of the plaintiff under paragraph 1 of the First Summons. There is therefore no need for me to deal with the points raised in relation to the circumstances of Tsang being registered as the owner or keeper of the Dog as at the date of the Accident, including those made by the plaintiff in paragraphs 1-3 of Part 2 of P Third Affirmation.
5. I wish to add though that even if I were to take into account the provisions of the Dogs and Cats Ordinance, the Rabies Regulation and the Rabies Ordinance referred to in P Third Affirmation, it would not have made any difference to the outcome of the application in paragraph 1 of the First Summons.
6. When seeking to rely on the definition of “keeper” in the Dogs and Cats Ordinance, the plaintiff stated that Tsang comes within the definition of paragraph (a) of that definition, that is, “a person who owns the dog or cat or has it in his possession or custody” in relation to the Dog. The plaintiff then stated that the 1st defendant and the 2nd defendant come within paragraph (b) and (c) respectively of that definition when the Dog was kept at the flat of the Building where the two defendants lived together. It is important to note that the definition applies to the interpretation of the provisions of the Dogs and Cats Ordinance, but the plaintiff is not seeking to rely on any such provisions. The plaintiff has not drawn my attention to any judicial authority to show that the application of that definition goes beyond the Dogs and Cats Ordinance. The relevance of that definition has not therefore been demonstrated.

1. As regards section 20A of the Rabies Regulation, it provides that it is an offence for any person to whom a licence in respect of a dog has been granted under that Part of the Regulation to fail to notify the Director of AFCD of his ceasing to be the keeper of the dog as soon as reasonably practicable and in any case not later than 5 days. Whether to prosecute for a criminal offence is a matter for the Secretary for Justice and until a person is convicted, he or she is presumed to be innocent. There is no evidence of any prosecution or conviction of such offence in respect of any of the Other Parties before me. I do not therefore see how section 20A of the Rabies Regulation can bring the case of the plaintiff forward.
2. As for section 32 of the Rabies Ordinance, the plaintiff’s reliance on the provisions is misconceived. That section refers to a “place prohibited to animals” which is a term defined in section 2 of that Ordinance as “a place declared by the Chief Executive under section 31 to be a place prohibited to animals”. The notice of prohibition issued by the IO that the plaintiff referred to in P Third Affirmation is not within the coverage of that provision.

*Abrogation of right of 2nd defendant to defence during trial*

1. There is only one reason given for the request to abrogate the right of defence of the 2nd defendant in P First Affirmation, that is, the 2nd defendant has never filed any documents as statement for trial. The plaintiff has not indicated under which statutory provisions her application was made. Without such critical information, I do not know where such power of abrogation comes from.
2. As noted in the above, as a result of the default of the 2nd defendant in filing any notice of intention to defend, interlocutory judgment has already been entered against her on 28 July 2015, with damages to be assessed. There is no application from the 2nd defendant to set aside such default judgment, and unless and until she applies to do so, she is prohibited from putting in a defence by the rules of procedure. Not only therefore do I not see the ground for the request of the plaintiff, nor do I see any need for it.
3. I note that in P First Affirmation, the plaintiff specifically referred to the lapse of over 6 months from the hearing in February 2017. The Order of Master D To dated 17 February 2017 did require the 2nd defendant to inform the court at the next checklist review hearing whether she would continue with her defence of the present action. I do not find any record of the 2nd defendant having done so.
4. Hence, even if the 2nd defendant intends to put in a defence, she will have to not only satisfy the court that the default judgment should be set aside, but also to explain why the said Order of Master D To have not been complied with. It would be a considerable hurdle, but I cannot rule out the possibility of the 2nd defendant being able to do so; and if she does succeed to do so, she will be allowed to come in even at a very late stage. Those are the rights of the 2nd defendant under the rules of procedure and without the plaintiff identifying the relevant provisions under which her request can be entertained, I am at a loss as to how I can do so.
5. For the reasons stated above, I dismiss the application of the plaintiff under paragraph 2 of the First Summons.

*Disclosure by CCTV or guard*

1. According to P First Affirmation, the plaintiff sought discovery of CCTV and the report of the guard by the IO. The IO is not a party to the present proceedings. Disclosure of documents can be sought against a third party under section 47B of the District Court Ordinance. The relevant procedure is set out in Order 24 rules 7A and 8 of the Rules. The relevant parts of rules 7A and 8 are extracted below:-

“7A. – (1)…

(2) An application after the commencement of proceedings for an order under section 47B(1) of the Ordinance for the disclosure of documents by a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings other than the applicant.

(3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must –

(a) …

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

…

(4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.

…

8.(1)…

(2) No order for the disclosure of documents shall be made under section 47A or 47B of the Ordinance, unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.”

1. It is plain that the plaintiff has not complied with the requirements of Order 24 rule 7A. There is no evidence before me of the service of the First Summons and P First Affirmation on the IO. P First Affirmation has not specified which issue arising in the proceedings are the documents sought relevant to, why it is likely that the IO is likely to have or have had those documents in their possession, custody or power. There is also no explanation why disclosure is necessary as required under Order 24 rule 8. For these reasons alone, the application under paragraph 3 of the First Summons should be dismissed.
2. Although not entirely clear, it may be the case that the plaintiff seeks discovery to show that the 1st defendant has not told the truth in his witness statement and in his reply to the letter issued by the LAD on 26 January 2017, which should be the Answer to the Request for Further and Better Particulars filed on 15 September 2017 (“Supplemental FBP”). In the Supplemental FBP, in answer to the question of the LAD “*whether D1 allowed, permitted or acquiesced D2 to take the dogs to the roof when D1 went up to the roof with D2?*” (“FBP Question”), the 1st defendant stated that he did not have any dog. As far as I can surmise, the basis of the plaintiff’s complaint is her having found the 1st defendant to have a habit of walking dogs every morning around 8 am. In support of this alleged discovery, the plaintiff has attached four photographs to P First Affirmation.
3. In the first place, the photographs are equivocal and do not amount to proof that the 1st defendant is keeping dogs. The plaintiff describes the photographs as showing the 1st defendant taking two dogs back to his apartment after he finished walking them. I have difficulty in accepting them as such.
4. One photograph shows the 1st defendant entering an elevator with a dog on leash. I can only see one dog in that photograph. The dog can be the 1st defendant’s own dog or it can be the dog of someone else. Ownership of a dog cannot be assumed by the mere fact that one is walking it. The position is the same with the so-called admission mentioned in paragraph 7 of Part 2 of P Third Affirmation, that is, the reference by the 1st defendant in D1 Affirmation to his encounter with the plaintiff inside the elevator of the Building, alleging that the plaintiff was deliberating causing annoyance to the dog he had with him then.
5. The quality of the second photograph is so poor that I cannot accept it as showing anything at all. With some speculation, that may be a photograph of the interior of an elevator, but to say that it shows anything else would be beyond even speculation.
6. The last two photographs are those of the Dog taken by the AFCD on 18 November 2013. I fail to see how the plaintiff can rely on these two photographs for the purpose of the discovery that she now seeks.
7. In any event, having reviewed the witness statement of the 1st defendant made on 11 October 2016 and the Supplemental FBP, I do not see how the plaintiff can make out a case of the photographs as being relevant to the question of whether the 1st defendant was telling the truth. In that witness statement, the 1st defendant said he was not the owner of the two dogs that were on the roof of the Building at the time the plaintiff was bit by the Dog and he himself did not have any dogs. What the plaintiff said in P First Affirmation was the position as at the date of P First Affirmation, and not as at the date when the 1st defendant made his witness statement.
8. Similarly, what the 1st defendant said in the Supplemental FBP about him not having any dogs was in answer to the FBP Question. So what he said was the position as at the date of the Accident. Even if the 1st defendant is indeed keeping dogs now, this fact has no relevance at all to what he said in his pleadings or witness statements about the situation at the time of the Accident.
9. For the aforesaid reasons, even if the plaintiff had complied with the procedural requirements in seeking discovery, her application would have to be dismissed anyway.

COSTS

1. What remains is for me to hear the parties on costs in respect of both the First Summons and the Second Summons

( C. Chow )

Deputy District Judge

The plaintiff was not represented and appearing in person

The 1st defendant, the 2nd defendants and the intended 3rd defendant were not represented and appearing in person