CITATION: Picov and Picov Farms Ltd. v. Generac Power Systems Inc. et al., 2020 ONSC 852
COURT FILE NO.: CV-15-94016-00
DATE: 20200207

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
BARRY PICOV AND PICOV FARMS LTD. Plaintiffs/Moving Parties	M. Forget, Counsel for the Plaintiffs/Moving Parties
– and –	
GENERAC POWER SYSTEMS INC., SONEPAR CANADA INC., OSSO ELECTRIC SUPPLIES INC., a division of SONEPAR CANADA INC., TOTAL POWER LTD., PLAN GROUP INC., GENSERVE LTD. and JOHN DOE Defendants/Respondents	S. Sud, Counsel for Generac Power Systems Ltd. R. Horst, Counsel for Sonepar Canada Inc. and Osso Electric Supplies Inc., a division of Sonepar Canada Inc. T. Lampropoulos and B. Mantynen, Counsel for Genserve Systems Inc.
	HEARD: January 9, 2020

DAWE J.

[1] The Plaintiffs Barry Picov and Picov Farms Ltd. ("Picov and Picov Farms") have brought a motion seeking two different forms of relief. First, they seek an order amending their Statement of Claim to remove them as the plaintiffs and substitute in their place a different legal entity, Robar Residence Corp. ("Robar"), as the new plaintiff. The defendants who appeared as respondents on the motion – Generac Power Systems Inc. ("Generac"), Sonepar Canada Inc. and its division Osso Electric Supplies Inc. ("Sonepar") and Genserve Ltd. ("Genserve") – all oppose this request.

[2] The Plaintiffs also seek to have a costs order that was made against them *ex parte* by O'Connell J. in September 2019 set aside. Genserve, who was the party awarded costs on this occasion, opposes this request. The other defendants are unaffected by this order and take no position in respect of it.

I. The motion to amend the Statement of Claim

A. Factual background

1. The issuance of Statement of Claim

[3] In December, 2015 an action was commenced in the name of Picov and Picov Farms[1] for damages resulting from a fire that broke out in a backup electrical generator located at 57 Fifth Concession Road East in Ajax. According to the Statement of Claim, Picov and Picov Farms "were the owners of a dwelling, outbuildings, land and premises" at this address. The Statement of Claim maintains that in 2012 they purchased a backup electrical generator that was manufactured by Generac, distributed by Sonepar through its division Osso Electric Supplies Inc., and installed at the Fifth Concession Road East premises by the defendant Total Power Ltd. After the generator was installed "the plaintiffs entered into a contract with Plan Group Inc. for regular maintenance service of the generator", who in turn subcontracted the maintenance work to Genserve.

[4] The generator caught fire on December 25, 2013, causing damage to the Fifth Concession Road East premises. The Statement of Claim alleges that this damage was "caused by the negligence, breach of duty and breach of contract" of the various Defendants.

2. Counsels' discovery that the named plaintiffs did not own the premises

[5] The affidavit evidence presented by the Plaintiffs in support of their motion explains that when the Statement of Claim was prepared and issued in December 2015 their counsel relied on "an insurance declaration page" that "indicated that the Property was owned by Barry Picov and Picov Farms Inc. at the date of loss". This led to Picov and Picov Farms being named in the Statement of Claim as the plaintiffs.

[6] Genserve, Sonepar and Generac delivered their Statements of Defence between July 2016 and June 2017. In its Statement of Defence, delivered in February 2017, Sonepar disputed that the named plaintiffs "were at the time of the alleged loss, owners of the premises in question". Sonepar's responding material on this motion explains that in January 2017 Sonepar's counsel arranged to have a land registry search conducted showing the history of the 57 Fifth Concession Road East property. This search showed that Picov Farms Inc. had been the registered owner of the property up to October 31, 2013, but that on this date title over the property had been transferred to one Norman Picov, who had in turn transferred title to Robar Residence Corp. Accordingly, when the generator fire broke out two months later on December 25, 2013 the property appears to have been wholly owned by Robar.

[7] The Plaintiffs' counsel took no action after receiving Sonepar's pleadings in February 2017. However, a few months later, on June 30, 2017, another lawyer who had been retained by Barry Picov on a different matter advised the Plaintiffs' counsel that on the date of the fire the registered owner of the property had actually been Robar Residence Corp. This lawyer forwarded copies of "the declarations page referencing Robar as the

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[1] Picov and Picov Farms's materials note that they are only the nominal plaintiffs, and that their action is actually a subrogation action being pursued by their insurer.

named insured under Commonwell's policy as of the date of loss", as well as a land transfer document "indicating that Robar went on title as owner of this property prior to the date of loss".

[8] A few weeks later, on July 18, 2017, the Plaintiffs' counsel wrote to the Defendants' respective counsel to inform them:

> I have also been advised by my client that Barry Picov is not the correct plaintiff, as the property was owned by and the insurance policy issued to Robar Residence Corp. We will therefore be bringing a motion to amend the pleadings under Rule 26.01 shortly.
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> The plaintiffs subsequently brought this motion, which was originally made returnable on September 1, 2017. However, it was apparently then adjourned to January 19, 2018, at which time it was adjourned *sine die*. As discussed further below, it was not until the fall of 2019 that the motion was re-listed for hearing on January 9, 2020.

[9] The Plaintiffs' motion materials do not explain the relationship between the current plaintiffs Barry Picov and Picov Farms Inc. and the proposed new substitute plaintiff Robar Residence Corp., or between any of these persons and companies and Norman Picov. However, in correspondence with opposing counsel regarding scheduling examinations for discovery, counsel for the Plaintiffs indicated that if Robar was substituted as the plaintiff in place of Barry Picov and Picov Farms Inc., Barry Picov would still be produced as the person to be examined on behalf of Robar.

B. Analysis

[10] Although the plaintiffs originally framed their motion as a request for an order under Rule 26.01 of the *Rules of Civil Procedure,* they acknowledge in their factum that it is better cast in terms of Rule 5.04(2), which specifically deals with the substitution of parties. Rule 5.04(2) provides:

> **5.04**(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] In *Mazzuca v. Silvercreek Pharmacy Ltd.,* 2001 CanLII 8620 (Ont. C.A.), the Ontario Court of Appeal invoked Rule 5.04(2) to allow a plaintiff who had sued in her own name for damages to property resulting from a fire to substitute the name of her company, which was the actual owner of the damaged premises. As Cronk J.A. explained in her majority reasons (at para. 47-49):

> [S]ubrule 5.04(2) provides, in part:
>
> > At any stage of a proceeding the court may by order . . . correct the name of a party incorrectly named . . .

> This language addresses misnomer situations and, in the absence of non-compensable prejudice, permits an amendment where it was intended to commence proceedings in one name but, in error, the proceedings were commenced in another name. Similarly, this aspect of the subrule may apply in situations where the plaintiff intended to sue one person but, in error, sued the wrong person. Such cases reflect an irregularity in the nature of a misnomer, which may be relieved against in proper circumstances.
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> This is not a case of misnomer in the narrow sense of a misdescription of the person suing, but rather, is a case of mistake as to the identity of the person who should have brought suit. However, that does not end the matter. Properly characterized, the motion in this case sought to delete one party to the action and to substitute another. An amendment request for this purpose engages a different aspect of subrule 5.04(2) which need not depend for success on proof of a misnomer in the nature of a misdescription of a party. Stated differently, the power conferred under subrule 5.04(2) to amend a pleading to change parties is not confined to misnomers of the misdescription type. It extends to the power to substitute parties and, as well, to correct in proper cases the naming of a party by mistake.

[12] In *Mazzuca,* Cronk J.A. emphasized the "importance, as a base consideration, of the issue of actual prejudice in determining applications to amend pleadings, including those designed to add, delete or substitute parties, after the expiry of a limitation period." She held further that in this situation the court must also consider the presence or absence of "special circumstance". This latter aspect of Cronk J.A.'s decision has been overtaken by legislative changes that no longer allow courts to extend the time to commence an action after the expiry of a limitation period based on "special circumstances".[2]

[13] However, Rule 5.04(2) motions can still be brought after the expiry of a limitation period to substitute a new party in place of an existing party, if the substitution can be characterized as correcting a "misnomer". Section 21 of the *Limitations Act* provides:

> **21**(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.
>
> (2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

In *McDonald v. Hoopp Realty Inc.*, 2014 ONSC 6089, Ellies J. explained (at para. 10):

> Strictly speaking, subsection 21(2) is not necessary. In the case of misnomer, no limitation issues arise because the action has been commenced against the defendant within the limitation period, albeit incorrectly: *Spirito v. Trillium*

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[2] See *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 at para. 13ff.

> *Health Centre*, 2008 ONCA 762, at para. 15; 970708 *Ontario Inc. v. PCS Security Systems Inc.*, 2014 ONSC 4433, at para. 57.

As McLeod J. noted in *Maxrelco Inc. v. Jim Pattison Industries Ltd.*, 2016 ONSC 5554 at para. 13, after *Mazzuca* "[t]he concept of misnomer covers both the 'narrow sense of a misdescription of the person suing' and the power to substitute parties 'to correct in proper cases the naming of a party by mistake'".

[14] It is common ground that the two-year limitation period applicable in the case at bar would preclude the Plaintiffs from amending their Statement of Claim to add additional plaintiffs. However, the Plaintiffs maintain that their proposed substitution of Robar as the plaintiff in their place can properly be characterized as correcting a "misnomer", in the broad sense of a "mistake as to the identity of the person who should have brought suit". They argue that it is clear from the Statement of Claim that the action was always meant to be brought on behalf of the property owner, and that it was only because of counsel's error that the owners of the property were mistakenly identified as Picov and Picov Farms rather than as Robar. The Plaintiffs maintain that substituting the true owner as the plaintiff would not prejudice the Defendants or change the basic nature of the claims against them.

[15] The Defendants acknowledge that if the proposal to substitute Robar as the plaintiff is properly viewed as correcting a misnomer, Robar's claim will not be statute-barred. For the most part they do not seriously suggest that the proposed amendment would cause them any material prejudice apart from not being able to raise a limitation-based defence against Robar. However, they dispute that the proposed amendment can properly be characterized as the correction of a misnomer.

[16] The Defendants place particular reliance on Cronk J.A.'s comments at para. 68 of her judgment in *Muzzaca,* where she stated:

> This action was commenced within the relevant limitation period involving [the defendant] Silvercreek in the same capacity as is now proposed and, as observed by the motions judge, "in respect of exactly the same claim". Further, there is no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings or of delaying in any material sense to seek the required amendment once the need to do so became apparent at the discovery stage. No deliberate and informed decision to refrain from naming [the substitute corporate plaintiff] La Gondola Ltd. was made, and the company has a cause of action against Silvercreek. Moreover, as some of the damaged inventory was allegedly purchased by Ms. Mazzuca in her personal capacity, it is not clear that the originally named plaintiff did not also enjoy a cause of action against Silvercreek. She is free, of course, not to seek relief in respect of that cause of action, if such exists. In these circumstances, a sufficient explanation has been advanced for the failure to name La Gondola Ltd. in the first instance.

[17] The Defendants argue that in the case at bar, in contrast, the Plaintiffs' counsel have not presented "a sufficient explanation" for their failure to name Robar as the original plaintiff,

and have not demonstrated that they did not make a "deliberate decision" to name Picov and Picov Farms as the original plaintiffs. The Defendants point to what they contend are a number of deficiencies in the evidential record put forward by the Plaintiffs' counsel, including:

(a) Their reliance on an "information and belief" affidavit from a law clerk, rather than on an affidavit from the lawyer who actually erroneously came to believe that Picov and Picov Farms owned the property at the time of the fire;

(b) Their failure to append a copy of the insurance declaration they say caused this erroneous belief; and

(c) Their failure to provide any evidence or clear explanation of the relationship between the original plaintiffs and the proposed substitute plaintiff Robar.

In addition, while the Defendants acknowledge that the Plaintiffs' counsel did not unduly delay bringing their motion to amend after they discovered the error, they criticize their delay in having the motion set down for hearing.

[18] While I agree that it would have been better if the Plaintiffs' counsel had provided a more fulsome evidential record, I am nevertheless satisfied that they have adequately explained their error in naming the wrong plaintiffs. I attach no significance at all to counsels' reliance on a law clerk's "information and belief" affidavit rather than an affidavit personally sworn by the lawyer who actually prepared the pleadings and made the error. The Defendants declined to cross-examine the affiant who was put forward, and they have not mounted any substantive challenge to the facts she states on information and belief. Rule 39.01(4) specifically permits the use of "information and belief" affidavits on motions, and in the circumstances here I am not prepared to draw any adverse inference against the Plaintiffs for not instead providing an affidavit from counsel.

[19] I am equally unpersuaded that I should draw any adverse inference from the Plaintiffs' counsels' failure to append a copy of the insurance declaration document that apparently led to them naming the wrong plaintiffs. Counsel for Sonepar submitted in oral argument that "it would be an error on the basis of this conflicting evidence to find that this was misnomer in these circumstances", explaining that by "conflicting evidence" he meant the two different insurance declarations referred to in the Plaintiffs' affidavit, one that apparently named Picov and Picov Farms as the owners of the property and the second that named Robar as the owner as of the date of loss.[3] However, the accuracy of the second document is undisputed, since Sonepar's own title search confirms that title over the property was indeed transferred to Robar on October 31, 2013, several weeks before the fire. In this situation, the question of whether the first document was drafted in error or whether, as seems more likely, the Plaintiffs' counsel simply failed to notice that it was from an earlier time period is ultimately of no real consequence. Seeing the two documents

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[3] See paras. 5 and 7, *supra*.

might shed some light on why counsel made the mistake she did, but it would have no real bearing on the question of whether a mistake was made.

[20] Indeed, there is no serious dispute in this case that the Plaintiffs' counsel did make a mistake in naming Picov and Picov Farms as the owners of the property at the time of the fire. I am satisfied that they did not make a "deliberate and informed decision to refrain from naming" Robar for some tactical reason. Indeed, the Defendants' counsel were unable when pressed to come up with any reason, plausible or otherwise, why the Plaintiffs' counsel might have named the wrong parties as plaintiffs on purpose. Stripped to its essentials, the Defendants' real argument is not that the Plaintiffs' counsel did not make a mistake, but that they should be blamed for the mistake because it could have been avoided by proper diligence.

[21] The Defendants are very likely correct that the error could have been avoided if the Plaintiffs' counsel had made better inquiries about who actually owned the property before they commenced the action in Picov and Picov Farms's names. However, this is in my view largely beside the point when, as here, the Defendants have not shown that they would suffer any prejudice from the proposed amendment. In essence, the Defendants hope that pinning blame for the error on the Plaintiffs' counsel will give them a windfall of not having to defend the action on its merits. As I see it, this would run counter to the policy established by Rule 1.04(1), which states:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

As Cronk J.A. noted in *Mazzuca, supra* at para. 23:

> [T]he combined effect of rules 26.01, 5.04(2) and 1.04(1), generally, is to focus the analysis on the issue of non-compensable prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance the interests of timely and cost effective justice in civil disputes.

In the case at bar, there seems to be no dispute that the owner of the 57 Fifth Concession Road East property suffered a loss as a result of the December 2013 generator fire. Some or all of the Defendants may or may not be responsible for having caused that loss. However, it seems to me that the interests of "timely and cost effective justice in civil disputes" would be advanced by having the dispute over their liability determined on its merits, rather than by giving the Defendants a windfall as a result of the mistake made by the Plaintiffs' counsel.

[22] In my view, the situation in the case at bar cannot be meaningfully distinguished from that in *Mazzuca*. As in that case, there is no dispute that the action was commenced within the applicable limitation period, and "no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings or of delaying in any material sense to seek the required amendment once the need to do so became apparent". As discussed above, I am satisfied that the Plaintiffs' counsel named the wrong parties as the owners of

the property due to their own error rather than because they made a "deliberate and informed" decision not to name the actual owner, Robar. Finally, also as in *Mazzuca,* Picov and Picov Farms may well have had their own cause of action against the defendants even though they no longer owned the property at the time of the fire, since it appears to have been them rather than Robar who purchased the generator and entered into the service contract. As in *Mazzuca*, they are "free ... not to seek relief in respect of that cause of action, if such exits" by relinquishing their status as plaintiffs to Robar.

[23] The situation in the case at bar is also similar to that in several of the other cases relied on by the Plaintiffs, including *Maxrelco, supra, Greater Toronto Airports Authority Association Inc. v. Foster Wheeler,* 2010 ONSC 5891, and *Callow v. Zollinger* et al., 2017 ONSC 5992. In all of these cases judges of this court applied the doctrine of misnomer to permit the substitution of one plaintiff for another after the expiry of a limitation period. I am not persuaded that these cases are wrongly decided, as Genserve submits.

[24] Moreover, a number of the cases on which Genserve and the other defendants rely are in my view distinguishable. In particular, in *Roni Excavating Ltd. v. Paccar*, 2013 ONSC 5192 and in *Streamline Foods Ltd. v. Jantz Canada Corporation*, 2011 ONSC 1630 (Div. Ct.), *aff'd* 2012 ONCA 174 the original plaintiff was seeking to add additional plaintiffs with different causes of action and pursue both sets of claims simultaneously. The doctrine of misnomer has no application in this situation.

[25] The Defendants also rely on *Veerella v. Khan*, [2009] O.J. No. 6347, which is seemingly closer on its facts insofar as it involved a request to substitute a plaintiff rather than to add additional plaintiffs with their own causes of action. Master Sproat declined to order the substitution, and her decision was upheld by Jennings J., sitting as a single-judge panel of the Divisional Court. This latter decision is unreported,[4] but in *Streamline Foods Ltd., supra* (Div. Ct.) Herman J. explained (at para. 30):

> On appeal to the Divisional Court, Jennings J. upheld the Master's decision [in *Veerella*], indicating that her finding that the motion did not involve a misnomer was a finding of fact and was therefore entitled to deference.

This has led some subsequent cases to treat *Veerella* as turning on its particular facts,[5] and *Veerella* is arguably distinguishable on the basis that the original plaintiff – unlike the original named plaintiffs in *Mazzuca* and in the case at bar – had no apparent cause of action against the defendants. My principal difficulty with *Veerella* is that Master Sproat appears to have treated the Ontario Court of Appeal's decision in *Mazzuca* as having been entirely overtaken by the subsequent changes to the *Limitations Act* that eliminated the common law doctrine of special circumstances. While I agree that Cronk J.A.'s discussion in *Mazzuca* about using Rule 5.04(2) to add plaintiffs whose claims would otherwise be statute-barred has indeed been superseded by the new legislation, I do not think the statutory amendments go so far as to overturn her holdings concerning the expanded scope

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[4] The judgment of the Divisional Court in *Veerella* that is reported at [2009] O.J. No. 4111 is a decision on costs.
[5] See, *e.g., Callow, supra* at paras. 23-24; *Asset Strategy Corp. v. Rodinia Lithium Inc.,* 2016 ONSC 5337 at para. 9.

of the doctrine of misnomer. As discussed above, a number of subsequent decisions of this court have treated this latter aspect of *Mazzuca* as still good law and as still binding, and I agree with this interpretation.

[26] Generac argues that most of the cases relied on by the Plaintiffs are distinguishable on the basis that it was well-established in those cases that the proposed new plaintiff was very closely related to the original plaintiff.[6] Generac's counsel argues that in the absence of any clear explanation as to the exact relationship between the original plaintiffs, Picov and Picov Farms and the proposed substitute plaintiff, Robar, it would be unsafe to conclude that this is a true case of misnomer rather than an attempt to substitute a plaintiff with an entirely unrelated cause of action that would otherwise be statute-barred.

[27] While I agree that it would have been better for the Plaintiffs to have provided a better explanation of the relationship between the originally named individual plaintiff Barry Picov and both the original and proposed substitute corporate plaintiffs, Picov Farms and Robar, I am not persuaded that this gap in the evidence should be treated as a fatal defect, for two reasons. First, the limited evidence that is before me suggests that a close relationship probably does exist. It does not appear to be controversial that the property in question contains a dwelling-house that is used as a residence by members of the Picov family. In correspondence between counsel that forms part of the evidentiary record on this motion, counsel for the Plaintiffs indicated that if the proposed substitution of Robar Residence Corp. were permitted, Barry Picov would still be produced for discovery on behalf of Robar. As a matter of common sense, it seems likely that Robar is simply a corporate vehicle created and controlled by the Picov family. I do not think it would be in the interests of justice to deny the Plaintiffs' motion solely on the basis of Generac's speculative concern that Robar might actually be an unrelated entity.

[28] Second, and perhaps more important, I am not persuaded that it should make any difference even if this were the case. Even if the October 2013 sale of the property to Robar was in fact an arms-length transaction to an unrelated corporation, it seems clear that the purpose of this action was always to claim subrogated damages on behalf of the owner of the property who suffered the insured losses as a result of the fire, whoever the owner happened to be. In my view, the doctrine of misnomer extends to this latter situation. Accordingly, I do not think it matters for the purpose of this motion exactly what relationship may or may not exist between Picov and Picov Farms and Robar.

[29] It follows that this aspect of the Plaintiffs' motion is granted.

II. The motion to set aside the costs Order

A. Factual background

[30] As noted above, the Plaintiffs originally made their motion to substitute Robar as the plaintiff returnable in September 2017. However, the motion was then adjourned to January

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[6] For instance, in *Mazzuca, supra, Callow, supra*, and *Maxrelco, supra* the substitute plaintiff was a corporation wholly controlled by the original plaintiff. However, in *GTAAA Inc., supra* the relationship between the two corporate plaintiffs is not discussed in the judgment.

2018, at which point it was adjourned *sine die*. On a number of different occasions later that year counsel for Genserve sent correspondence to the Plaintiffs' counsel inquiring as to when the amendment motion would be heard.

[31] In the summer of 2019, counsel began corresponding about finding dates on which to conduct examinations for discovery. Counsel for Genserve took the position that the Plaintiffs' motion to substitute Robar should be scheduled and heard first. Counsel for the Plaintiffs disagreed, taking the position that it did not matter what order the examinations and the amendment motion proceeded.

[32] In September 2019, Genserve brought a motion, returnable on September 27, 2019, to dismiss the action for delay. Further correspondence ensued in which counsel for the Plaintiffs, Mr. Forget, continued to take the position that the issue of scheduling the amendment motion was a "red herring". However, he eventually relented and in an email sent in the late afternoon of September 26, 2019 agreed to have the amendment motion set down to be heard during the November 2019 trial sittings, and proposed a schedule for examinations for discovery and subsequent steps in the litigation commencing in January 2020. He concluded his email by setting out his understanding that Genserve's motion "is otherwise to be dismissed without costs".

[33] Genserve's counsel, Mr. Lampropoulos, sent a reply email in which he agreed to the Plaintiffs' proposed timetable. However, he added:

> In addition, we are not prepared to abandon our costs of this motion. We have been pressing the plaintiffs for over a year to provide their position on this amendment motion, and until just now we have been ignored. This motion was clearly necessary to ensure that this long-outstanding issue gets dealt with, and that this action can finally proceed.

Mr. Forget then sent a reply email stating:

> Your motion seeks a dismissal of the action for delay in the face of a plaintiff who has been seeking to schedule examinations. The motion is not necessary for the examination to take place. The examinations will be required regardless of the plaintiff and the same person is being produced.
>
> I don't accept the logic but my client wants to move forward and therefore we will have the motion first, [before] the discoveries.

His email did not address the issue of costs.

[34] There was a further exchange of email correspondence later that afternoon that addressed minor changes to the proposed timetable but did not address the issue of costs. In a final email that afternoon, Mr. Lampropoulos sent his Bill of Costs. Mr. Forget did not respond to this latter email.

[35] The next day, Mr. Lampropoulos appeared before Mr. Justice O'Connell to address Genserve's motion. Mr. Forget did not attend. Mr. Lampropoulos advised the court that he

had expected Mr. Forget to be there to address the contested costs issue, and did not know why he was not present. He proceeded to make submissions about costs and O'Connell J. awarded Genserve its costs in the amount it was seeking, on a partial indemnity basis.

[36] When Mr. Forget received a copy of O'Connell J.'s Order several days later, he immediately wrote to Mr. Lampropoulos to express dismay that he had sought costs *ex parte*, stating that he had understood that Mr. Lampropoulos would merely be attending to obtain a consent order setting out the agreed-on timetable, and would not be seeking costs. He asked Mr. Lampropoulos to consent to have the costs order set aside, advising that he would otherwise bring a motion to do so and would seek his own costs.

[37] Mr. Lampropoulos did not agree to this proposal, and Genserve continues to take the position that the costs award was appropriate and justified.

B. Analysis

[38] Rule 37.14(1)(*b*) provides that a person or party who "fails to appear on a motion through accident, mistake or insufficient notice" may move to have the order obtained by the opposing party set aside or varied "on such terms as are just".

[39] In the case at bar, I am satisfied that Mr. Forget's failure to attend before O'Connell J. arose because of an honest misunderstanding on his part that Mr. Lampropoulos would not be seeking costs. I am also satisfied that Mr. Lampropoulos also believed, with good reason, that he had made his intention to seek costs clear to Mr. Forget. To the extent that blame for the miscommunication is relevant, I am satisfied that the fault lies primarily with Mr. Forget for not reading his emails more carefully.

[40] In my view, however, this type of misunderstanding between counsel qualifies as an "accident" or "mistake" for the purpose of Rule 37.14(1)(*b*). I am satisfied that Mr. Forget did not deliberately decide not to attend before O'Connell J. to oppose Genserve's request for costs, but instead chose not to attend because he honestly believed that Mr. Lampropoulos would not be seeking costs and that there was accordingly no need for him to be there.

[41] Genserve relies on an Alberta case, *Hammond v. Hammond,* 2019 ABQB 522, for the proposition that an "accident" or "mistake" requires there to be "an interfering or preventing factor" that is not the result of the non-attending party's lack of diligence. Genserve argues that to the extent that Mr. Forget's misunderstanding and resulting non-attendance at the motion arose from his own failure to read his emails more carefully, it is not an "accident" or "mistake" for the purposes of Rule 37.14(1)(*b*).

[42] I disagree with this narrow interpretation of the terms "accident" and "mistake", which Genserve frankly acknowledges has no apparent support in the Ontario jurisprudence. In my view, this approach would fly in the face of the objective of the rule, which Strathy J. (as he then was) noted in *Ontario (Attorney General) v. 15 Johnswood Crescent,* 2009 CanLII 50751 at para. 30 is "simply intended to give a party an opportunity to litigate a matter that was, through inadvertence, never dealt with by the court as a true *lis*". He explained further (at para. 29):

> The purpose of Rule 37.14(1)(b) is to prevent unfairness or, worse, a miscarriage of justice, where a party's inadvertence or the absence of sufficient notice has resulted in an order being obtained without that party being afforded an opportunity to present his or her case. A party who does not appear in these circumstances will usually be given a chance to present evidence and to argue the motion on its merits, assuming he or she moves promptly and provided there are no countervailing considerations.

In my view, treating a party's or counsel's inadvertence as the equivalent of a deliberate decision not to participate in the proceedings would run counter to this purpose.

[43] Accordingly, I am satisfied that the Plaintiffs have satisfied the threshold condition for obtaining relief under Rule 37.14(1)(*b*), and that it is appropriate for me to consider the other relevant factors discussed by Strathy J. in *Ontario v. 15 Johnswood Cres., supra* at para. 34. In this regard, there is no dispute that the Plaintiffs' counsel acted with reasonable dispatch once he learned about the costs order, and that Genserve would suffer no prejudice by having the issue of the costs of its September 2019 motion litigated *inter partes* on its merits.

[44] The question of whether I should uphold or vary O'Connell J.'s costs order therefore hinges on the merits of Genserve's claim that it deserves its costs in relation to its September 2019 motion. In this regard, I agree that Genserve had a legitimate reason for wanting the Plaintiffs' amendment motion to be heard before the examinations for discovery were conducted. Although Mr. Forget had made it clear that the same person – namely, Barry Picov – would be produced for discovery in any event, the questions Genserve chose to ask of Mr. Picov might well be different if he was now appearing as a representative of Robar rather than on behalf of himself and Picov Farms. I also accept that Mr. Lampropoulos may have been frustrated by the Plaintiffs' delay in scheduling their amendment motion, and agree that it was not without reason that he thought that he had to do something to spur the Plaintiffs into action.

[45] At the same time, I agree with Mr. Forget that the method Mr. Lampropoulos ultimately settled on – namely, bringing a motion to dismiss the entire action for delay – was unwarranted and ill-conceived in the circumstances here. As discussed above, even if Picov and Picov Farms were not the actual owners of the property as of the date of the fire, it is not clear that they had no cause of action whatsoever based on their contracts with some of the various defendants. Accordingly, it was not absolutely necessary that the Plaintiffs apply to have Robar substituted in as the new plaintiff before the litigation could move forward, even if this was how Genserve preferred to proceed. In these circumstances, the remedy Genserve was ostensibly seeking as its primary form of relief – having the entire action dismissed for delay – was in my view entirely unjustified. Indeed, I think it is very likely that Mr. Lampropoulos never had any intention of seriously pursuing this aspect of his motion, and instead viewed it as a means of pressuring Mr. Forget into agreeing to conduct the litigation in the manner that Mr. Lampropoulos preferred.

[46] If that was indeed Mr. Lampropoulos's gambit, it was largely successful. However, in my view his decision to frame his motion as a request for relief he had no legitimate grounds

to actually obtain severely undermines his argument that Genserve should have its costs of the motion. If the motion to dismiss the action for delay had proceeded to a hearing on its merits, Genserve would in my view almost certainly have lost. In these circumstances, I do not think Genserve is in a position to ask for its costs when the motion settled on terms that fell well short of what Genserve was ostensibly seeking.

[47] I would accordingly vary O'Connell J.'s September 27, 2019 Order by setting aside term 2, which awards costs to Genserve in the amount of $2,389.26.

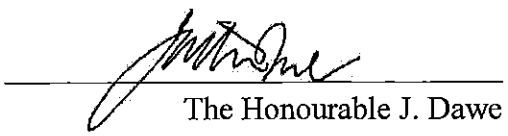
[48] The Plaintiffs ask me to go further and award costs against Genserve in this same amount in their favour. I do not think this would be appropriate, since the Plaintiffs' actual costs arising out of Genserve's September 2019 motion were minimal: Mr. Forget filed no materials and did not appear on the motion. In these circumstances, a costs award against Genserve in connection with its original September 2019 motion would be wholly punitive and not compensatory. If Genserve's conduct in the *ex parte* proceedings and afterwards warrant some sanction, this can in my view be better addressed through a costs award in the context of the Plaintiffs' Rule 37.14 motion.

III. Disposition

[49] In the result, both parts of the Plaintiffs' motion are granted. An order will go pursuant to Rule 5.04(2) amending their Statement of Claim to substitute Robar Residence Corporation as plaintiff in place of Barry Picov and Picov Farms Ltd. The September 27, 2019 Order of O'Connell J. is also varied pursuant to Rule 37.14(2) to delete term 2, which awarded costs to Genserve in the amount of $2,389.26.

[50] If the parties cannot agree on the costs of this motion, they may make written submissions to me, which may be served electronically and sent to me by email through my judicial assistant. I would ask that Mr. Forget provide his submissions by Friday, February 28, 2020, and that counsel for the Defendants then provide their submissions in response by Friday, March 13. Mr. Forget may then serve and file reply submissions by Friday, March 21.

[51] Each parties' costs submissions should be no more than two pages in length. However, Mr. Forget and Mr. Lampropoulos and Ms. Mantynen may each make separate submissions of this length addressing the issue of costs in relation the Rule 37.14 motion.



The Honourable J. Dawe

Released: February 7, 2020

CITATION: Picov and Picov Farms Ltd. v. Generac Power Systems Inc. et al., 2020 ONSC 852

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BARRY PICOV AND PICOV FARMS LTD.

AND

GENERAC POWER SYSTEMS INC., SONEPAR CANADA INC., OSSO ELECTRIC SUPPLIES INC., a division of SONEPAR CANADA INC., TOTAL POWER LTD., PLAN GROUP INC., GENSERVE LTD. and JOHN DOE.

REASONS FOR JUDGMENT

The Honourable J. Dawe

Released: February 7, 2020