ONTARIO

SUPERIOR COURT OF JUSTICE

COURT FILE NO.
CV-14-6029

CITATION:
Reynolds v. Harwood Plumbing, 2017 ONSC 4899

ENDORSEMENT

PLAINTIFF: TIMOTHY REYNOLDS

COUNSEL: *Ian McLean* for the Plaintiff

DEFENDANT: HARWOOD PLUMBING AND HEATING LTD.

COUNSEL: *Dawood Ahmad* for the Defendant

HEARD: AUGUST 7, 2017

[1] The Defendant brings a motion for summary judgment asking this Court to find that the Plaintiff's claim was commenced after the requisite limitation period expired and should be dismissed in its entirety on the basis that it is statute-barred.

[2] The moving party argues that the Plaintiff became aware of all of the material facts founding his claim by November 24, 2010, at the very latest. As such, the issuance of his Notice of Action and Statement of Claim, approximately four years later, was well outside the stipulated limitation period.

[3] The Plaintiff asks that the motion be dismissed with costs, and submits there is a paucity of evidence presented by the Defendant, as well as arguing the legal principles outlined in the Responding Party Factum as supported by the evidence in the Responding Party Motion Record.

[4] The Plaintiff's claims of negligence by the Defendant are as outlined in the Statement of Claim. I will begin with a brief history of events that led to this litigation.

[5] The Defendant provided a quote to the Plaintiff to install one fireplace wood insert at 231 West Peninsula Road in North Bay. The Plaintiff accepted the quote, and on or about November 20, 2006 the Defendant installed the fireplace wood insert. The installation passed a WETT Inspection on February 21, 2007, and the Plaintiff was provided with a WETT Certificate of Approval.

[6] On November 4, 2010, the Plaintiff was advised by Central Heating, upon their re-inspection, that the fireplace was not safe to use. On November 26, 2010 the Defendant provided a quotation to replace the stainless steel elbow and reinstall the insert.

[7] On December 9, 2010, the Plaintiff obtained an Inspection Report from Major Home Inspection Ltd. which concluded, for reasons outlined in the Report, that "This fireplace is an immediate hazard and should not be used until repaired. Insert should be made inoperable or removed from fireplace."

[8] On September 19, 2011 the Plaintiff further obtained a Review of Solid Fuel Insert from Don A. Desilets, P. Eng. BDS. This Review, for reasons outlined therein, recommended "its use be discontinued and openings sealed and be used for decorative purposes only". It also recommended that a replacement stove or fireplace be installed.

[9] The Affidavit filed for the Plaintiff identifies other efforts by the Plaintiff to have the Defendant remediate the situation, however the final written document from the Defendant was the unaccepted quotation dated November 26, 2010. The evidence indicates that this quotation was obviously unacceptable to the Plaintiff.

[10] The Plaintiff issued a Notice of Action on November 18, 2014, and then filed the Statement of Claim against the Defendant on December 10, 2014. The Statement of Claim refers to the Inspection Report and the Review by the engineer to substantiate the claim by the Plaintiff.

[11] During this motion, Counsel for both parties agree that the Plaintiff's action is governed by the basic two year limitation period; which begins to run on the day the claim was discovered. Counsel for the Defendant submits that the Plaintiff discovered its claim on November 24, 2010. Counsel for the Plaintiff takes the position that the limitation period should not begin to run until November 20, 2012 when the Plaintiff became aware that the Defendant would not remediate the situation.

[12] The present state of the applicable law to this fact situation for this motion is clearly and succinctly summarized by Justice Rasaiah of this Court in *Webb v. T.D. Waterhouse Canada Inc.* [2016] O.J. No. 5937, as follows:

> **" 8** Section 4 of the *Limitations Act*, 2002, S.O. 2002, Chapter 24, Schedule B, (*"Limitations Act")* sets out the basic limitation period. It states:
>
> > 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **9** Section 5 of the *Limitations Act* states:
>
> > Discovery
> >
> > 5. (1) A claim is discovered on the earlier of,

> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> Presumption
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

10 In *Fennell v. Deol*, 2016 ONCA 249 (CanLII) at paragraphs 20 and 21, the court summarized the following:

> The basic two-year limitation period begins to run on the day the claim was discovered. The date of discovery is the earlier of the two dates under s. 5(1) – when (a) the person with the claim had knowledge of, or (b) a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have had knowledge of, the matters referred to in s. 5(1)(a)(i) to (iv). If either of these dates is more than two years before the claim was issued, the claim is statute-barred.
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> Section 5(1)(a) considers when the person with the claim had actual knowledge of the material facts underlying the claim. Unless the contrary is proved, under s. 5(2), the person is presumed to have known of the matters in s. 5(1)(a)(i) through (iv) on the date of the events giving rise to the claim.

11 Based on the above, central to the application of the "discoverability rule" is when the Plaintiff acquired or ought to have reasonably acquired knowledge of the facts on which his claim is based.

12 The test under subsection 5(1)(a) of the *Limitations Act* is a subjective test. It requires a determination of when the claimant had actual knowledge of the material facts constituting the cause of action. The focus is on the Plaintiff's actual knowledge of the facts enumerated under the provision: *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 (CanLII), paragraph 33.

13 The test under subsection 5(1)(b) of the *Limitations Act* is an objective test. It requires a determination of when a reasonable person in the claimant's position would have been alerted to the elements of the claim: *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 (CanLII), paragraph 33. It requires considering the "abilities and... circumstances" of the person with the claim and then to decide whether that person "ought to have known of the matters" giving rise to that claim: *Ontario Flue-Cured Tobacco Growers Marketing Board v. Rothmans, Benson & Hedges, Inc.* 2016 CarswellOnt 10558, 2016 ONSC 3939 (CanLII), 269 A.C.W.S. (3d) 52, (Div. Ct.) paragraph 51.

14 In *Arcari v. Dawson*, 2016 ONCA 715 (CanLII) at paragraph 9, the court wrote:

> When a reasonable person with the abilities and in the circumstances of the person with the claim ought to have known of the matters described in clause 5(1)(a) is a question of fact: *Lima v. Moya*, 2015 ONSC 324 (CanLII), at para. 76, aff'd on appeal 2015 ONSC 3605 (CanLII), 2015 ONSC 3605 (Div. Ct.), at para. 19.

15 In *Fennell v. Deol*, 2016 ONCA 249 (CanLII) at paragraphs 23 and 24, the court stated:

> Due diligence is not referred to in the *Limitations Act, 2002*. It is, however, a principle that underlies and informs limitation periods, through s. 5(1)(b). As Hourigan J.A. noted in *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526 (CanLII), 323 O.A.C. 246, at para. 42, a plaintiff is required to act with due diligence in determining if he has a claim, and a limitation period is not tolled while a plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a).
>
> Due diligence is part of the evaluation of s. 5(1)(b). In deciding when a person in the plaintiff's circumstances and with his abilities ought reasonably to have discovered the elements of the claim, it is relevant to consider what reasonable steps the plaintiff ought to have taken. Again, whether a party acts with due diligence is a relevant consideration, but it is not a separate basis for determining whether a limitation period has expired.

16 In analyzing the extent of knowledge of the material facts, in *Brown v. Wahl*, 2015 ONCA 778 (CanLII), the Court of Appeal refers to *Lawless v. Anderson*, 2011 ONCA 102 (CanLII):

> … The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence

> against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run: see *Soper v. Southcott* (1998), 1998 CanLII 5359 (ON CA), 39 O.R. (3d) 737 (C.A.) and *McSween v. Louis* (2000), 2000 CanLII 5744 (ON CA), 132 O.A.C. 304 (C.A.).

17 The evidentiary burden is on the Plaintiff to rebut the presumption set by section 5(2) of the *Limitations Act*: *Unegbu v. WFG Securities of Canada Inc.*, 2015 ONSC 6408 (CanLII) aff'd 2016 ONCA 501 (CanLII).

18 In *Nicholas v. McCarthy Tétrault*, 2008 CanLII 54974 (ON SC), 2008 CanLII 54974 (ONSC) at para. 27 aff'd 2009 ONCA 692 (CanLII), the court set out:

> The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say the constitute elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Coutanche v. Napoleon Delicatessen* (2004), 2004 CanLII 10091 (ON CA), 72 O.R. (3d) 122 (C.A.); *Calgar v. Moore*, [2005] O.J. No. 4606 (S.C.J.); *Milbury v. Nova Scotia(Attorney General)* (2007), 2007 NSCA 52 (CanLII), 283 D.L.R. (4th) 449 (N.S.C.A.); *Hill v. South Alberta Land Registration District* (1993), 1993 ABCA 75 (CanLII), 100 D.L.R. (4th) 331 (Alta. C.A.).

19 In *Unegbu v. WFG Securities of Canada Inc.*, 2015 ONSC 6408 (CanLII) aff'd 2016 ONCA 501 (CanLII), the plaintiff commenced a claim for negligence, misrepresentation, breach of fiduciary duty and deceit, with respect to an investment arrangement she entered into and that arrangement failing. In this case, the plaintiff argued that she was unaware that a proceeding would be an appropriate means to seek to remedy her losses. She also argued that her motivations and actions impacted the analysis and in particular that she attempted to limit her losses being incurred through the failing investment. The court at paras. 22 and 23, set out:

> The facts of this case could hardly be more different. On the plaintiff's own evidence, she believed the defendants had committed a wrong. There was no need for any advice of a technical nature to inform her that she had a cause of action. Even if I were to accept that the plaintiff did not realise that she could launch legal proceedings to recover her losses, the limitation period commences on the day upon which a reasonable person with the plaintiff's abilities and in her circumstances ought to have known of her remedy through a court action. I find that any reasonable person in the plaintiff's position ought to have known by May 2009, at the very latest, that a cause of action existed within the meaning of s. 5 of the Act. For the same reason, the plaintiff cannot rely on her ignorance of the law to postpone the

> commencement of the limitation period: see *Tétrault*, at paras. 27-28; and *Boyce v. Toronto (City) Police Services Board*, 2011 ONSC 53 (CanLII), at paras. 23, 37.
>
> The plaintiff further argued that her motivations and actions impact the analysis in identifying the start date of the limitation period. She asserts that, from the outset, she attempted to limit the losses being incurred through the failing investments rather than recover her money. A reasonable person in her position therefore would not have turned her mind to commencing an action to recover the monies. I reject this argument for three reasons. First, it is undermined by the plaintiff's own evidence at the discovery hearing that when she called Ashebiode, in late 2008, she did so because she wanted her money back. Secondly, there was no bar to the plaintiff from seeking to limit her losses and recover the lost funds by commencing a legal action, something that a reasonable person in her circumstances ought to have known and considered. Finally, the plaintiff's motivation for delaying the commencement of legal proceedings is irrelevant in the context of the limitation period.

20 The principle of discoverability is designed to avoid the injustice of precluding an action or claim before a Plaintiff is in a position to commence proceedings, a Plaintiff who through no lack of diligence is unaware of his cause of action prior to the natural expiry of the limitation period (*Peixeiro v. Haberman*, 1997 CanLII 325 (SCC), *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC) and *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC).

21 Rule 20.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ("Rules") provides that "[a] defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim."

22 Rule 20.02(2) of the Rules provides that in response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

23 Rule 20.04(2)(a) of the Rules states that the court shall grant summary judgment if "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

24 Rule 20.04(2.1) of the Rules states that in determining under clause (2) whether there is a genuine issue requiring a trial, the judge may exercise any of the following powers:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

25 The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), at para. 4 has held that a trial is not required where:

> A summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

26 In *Liu v. Silver*, 2010 ONSC 2218 (CanLII), the court reviewed the broader authority to weigh evidence, evaluate the credibility of witnesses, and/or draw any reasonable inference from the evidence in accordance with the Rules. The court at paragraph 13 stated:

> Where a defendant moves for summary judgment in relation to a statutory limitation period, to succeed in the motion, the plaintiff must, through an affidavit, adduce evidence of material facts that require a trial to assess credibility, weigh evidence and draw factual inferences. If the defendant satisfies the court there are no issues of fact required to be tried, the defendant will succeed in obtaining summary judgment. [*Soper v. Southcott*,1998 CanLII 5359 (ON CA), [1998] O.J. No. 2799 (Ont. C.A.) at para. 14]. So to avoid summary judgment, the plaintiff has the onus to satisfy the Court there are material facts to be tried as to when the cause of action arose and they must demonstrate there is a real chance of success at a trial of the issue.

27 Summary judgment is available on the limitation defence: *Home Savings & Loan Corp. v. Linton*, (1999) 1999 CanLII 1832 (ON CA), 120 OAC 316 (OCA) at para. 6; and *Soper v. Southcott*, 1998 CanLII 5359 (ON CA), [1998] O.J. No. 2799 (Ont. C.A.) at para. 14.

28 *Ferrara v. Lorenzetti*, 2012 ONCA 851 (CanLII) at paras. 29 and 30, confirms that with the court's expanded rights to assess evidence under Rule 20, the court can grant summary judgment when discoverability is a central issue. To successfully defend a motion for summary judgment, the responding party has to adduce evidence of material facts showing a genuine issue to be tried concerning the commencement of the limitation period. They have to put forward their best evidence capable of demonstrating that a trial is required in order to determine the discoverability date.

29 In *Ferrara v. Lorenzetti*, 2012 ONCA 851 (CanLII) at paras. 49 to 51, the court wrote:

> In Combined Air, at para. 56, this court reinforced the warning previously expressed in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Gen. Div.), at p. 434 O.R., that a party is not entitled to sit back and rely on the

> possibility that more favourable facts may develop at trial. Each side must advance their best case and put forward the evidence on which they rely with respect to the material issues to be tried. The court is entitled to assume that the parties have met this obligation: 1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 1995 CanLII 1686 (ON CA), 21 O.R. (3d) 547, [1995] O.J. No. 132 (C.A.) and Dawson v. Rexcraft Storage and Warehouse Inc., 1998 CanLII 4831 (ON CA), [1998] O.J. No. 3240, 164 D.L.R. (4th) 257 (C.A.), at p. 265 D.L.R.
>
> In my view, a bald assertion, even one that remains unchallenged, made in circumstances such as this where supporting evidence must be presumed to be readily available, cannot defeat a motion for summary judgment. The parties must lead evidence that the court can weigh and from which it can draw inferences.
>
> Here, the respondents had the burden of "leading trump or risk losing". They failed to "lead trump" -- evidence from their lawyers -- and lost. [page 413]

30 In the case of *Mahoney v. Sokoloff*, 2015 ONCA 390 (CanLII), an appeal before the Ontario Court of Appeal, the appellants complained that, in the summary judgment materials, the respondents failed to challenge specifically the appellants' *FLA*-based claims for damages. The appellants submitted that in those circumstances, they were not obliged to lead evidence of these damages on the summary judgment motion. The Court disagreed and stated at paragraph 5:

> [5] The appellants' submission, in our view, misses the point. Apart from the matter of the respondents' explanation for not advancing these *FLA* claims from the outset, the appellants were obliged in responding to the motion for summary judgment to put their best foot forward in respect of all their claims and to lead some evidence of the foundation for the brothers' claimed losses under the *FLA*. They did not do so. As a result, on this record, the motion judge did not err in concluding that no genuine issue for trial arose regarding these claims. **"**

[13] I now turn to this motion for summary judgment pursuant to Rule 20 and my determination as to whether there is a genuine issue requiring trial. I turn first to the limitation issue.

[14] The central question is when did the Plaintiff acquire or ought to have reasonably acquired knowledge of the facts on which the claim is based?

[15] Firstly, it is clear that I can grant summary judgment when discoverability is the central issue. Has the Plaintiff adduced evidence of material facts showing a genuine issue to be tried regarding the proper commencement of the limitation period? Of course the Plaintiff must "put forward their best evidence capable of demonstrating that a trial is required in order to determine the discoverability date".

[16] Once the Plaintiff was advised by Central Heating on November 24, 2010 that the fireplace was not safe to use, it appears that the Plaintiff acted with the due diligence required by obtaining the Inspection Report on December 9, 2010. Upon my consideration of that Report, certainly the Plaintiff then knew enough facts on which to base an allegation of negligence against the Defendant. In my view, I find that the limitation period begins to run as of that date. The Plaintiff also obtained the engineer's Review subsequently confirming that there were enough facts for the claim; however even with these additional supportive facts the Plaintiff would also have been out of time to commence the claim after September 19, 2013.

[17] The bottom line is that the Plaintiff knew full well after receiving the Inspection Report, and then again more certainly after receiving the engineer's Review, of the facts required for its claim against the Defendant. That is absolutely clear from the material provided to this Court on this motion. The fact that the Plaintiff now maintains that the Defendant indicates somehow that it would remediate the situation does not extend discoverability, nor delay the commencement of the limitation period. Specifically, Exhibit M of the Affidavit for the Plaintiff does not do so.

[18] Further, I have not been satisfied from the legal authorities presented by Counsel for the Plaintiff in its Factum that any of these are helpful to the position submitted by the Plaintiff. In fact, each of the four cases presented are clearly distinguishable from this particular fact situation for this summary judgment motion of this limitation issue.

[19] I fully understand that the Plaintiff wanted to, and attempted strenuously, to have the fireplace remediated to its satisfaction. However, this desire to seek remediation does not extend the limitation period. There was clearly no agreement by the Defendant to extend the limitation period, and the Defendant obviously need not advise the Plaintiff of its right to bring a claim against them. After December 9, 2010, I do not view any of the correspondence or actions of the Plaintiff in addressing its concern being relevant to this limitation issue determination. They are not facts needed to make out its claim against the Defendant.

[20] I have been satisfied that there is no genuine issue requiring a trial on this limitation issue, and that I am in a position to make fair findings and grant summary judgment on this issue having regard to the evidence filed on this motion, the Rules and the applicable case authorities. I have not been satisfied that there are material facts arising that require a trial to assess credibility, weigh evidence or draw inferences on this limitations defence. The Plaintiff did not establish, on any of the evidence filed for this motion, specific facts demonstrating that there is a genuine issue requiring a trial here. I find therefore that the Plaintiff's action was commenced outside of the limitation period.

[21] The Defendant's motion is granted, and the Plaintiff's action is dismissed.

[22] If these parties are unable to agree on the issue of costs, they may file brief written submissions within 15 days.

Released: August 30, 2017

The Honourable Mr. Justice David J. Nadeau