COURT OF APPEAL FOR ONTARIO

CITATION: Van Halteren v. Deboer Tool Inc., 2016 ONCA 559
DATE: 20160711
DOCKET: C60941

MacPherson, Cronk and Benotto JJ.A.

BETWEEN

Jacob Van Halteren

Plaintiff (Appellant)

and

Deboer Tool Inc.

Defendant (Respondent)

John W. Findlay, for the appellant

Tyler H. McLean, for the respondent

Heard: July 8, 2016

On appeal from the order of Justice Dale Parayeski of the Superior Court of Justice, dated August 5, 2015.

By the Court:

[1] The appellant appeals from the August 5, 2015 order of Parayeski J. of the Superior Court of Justice dismissing: i) the appellant's motion for summary judgment for repayment of a loan made to the respondent in the sum of $500,000, plus interest; and ii) the appellant's claim against the respondent, "to

the extent that it is based on the Original Promissory Note and a Loan", on the ground that it is statute-barred.

Background

[2] There is no dispute that, in late 2002, the appellant lent to or invested the sum of $500,000 in the respondent company. The loan was secured by a promissory note dated November 20, 2003 that the parties "resigned", on the same terms, on November 21, 2005 (the "2003/2005 Notes"). These are the "Original Promissory Note" and "Loan" referred to in the motion judge's order.

[3] The appellant maintained that the respondent signed a new, replacement promissory note, for the same loan, on November 21, 2008 (the "2008 Note"). The respondent denied signing the 2008 Note and led expert handwriting evidence on the summary judgment motion that the 2008 Note contained a "simulation" or forged version of his signature.

[4] The motion judge held that any claim based on the 2003/2005 Notes was statute-barred by the expiry of the applicable two-year limitation period because demand was made under the 2003/2005 Notes, at the latest, by February 20, 2006. Accordingly, the applicable limitation period expired on February 21, 2008. However, the appellant did not commence his action until October 2012, well after the expiry of the limitation period.

[5] The motion judge, relying on the expert evidence proffered by the respondent, also held that the 2008 Note was a forgery. Consequently, no sustainable claim against the respondent could be advanced on the 2008 Note, in equity or in contract.

[6] The motion judge therefore dismissed the appellant's motion.

Issues

[7] The appellant argues that the motion judge erred in two respects. First, he submits that the motion judge erred in law by finding that the 2008 Note was a forgery, when: i) neither party had requested a determination of this issue; ii) the appellant had not admitted that it was a forgery and proffered no evidence on the issue; and iii) the issue whether the note was a forgery required a trial. Second, the appellant maintains that the motion judge further erred by determining the availability of equitable relief, when this, too, was a genuine issue requiring a trial.

[8] For the reasons that follow, we reject these arguments.

Contract Claim

[9] The appellant's claim, in respect of which he sought summary judgment, was not specific to any of the 2003/2005 or 2008 Notes. In his notice of motion, the appellant said that he sought an order compelling the respondent to pay him the principal amount of $500,000, plus interest, on account of monies lent to the

respondent as of December 31, 2002, which was secured by "a series of promissory notes confirming the indebtedness".

[10] Thus, the relief claimed by the appellant on the motion centred on the $500,000 loan advanced on December 31, 2002, rather than one or more of the promissory notes. In these circumstances, all the promissory notes were relevant on the motion and it was necessary for the motion judge to consider and assess the validity of the appellant's repayment claim based on each note.

[11] The motion judge first addressed the 2003/2005 Notes. Before this court, the appellant does not dispute the motion judge's holding that any contract-based claim for repayment of the loan based on the 2003/2005 Notes is statute-barred.

[12] Moreover, the appellant himself testified on cross-examination that the 2008 Note was given to replace the 2003/2005 Notes. Accordingly, on the appellant's own testimony, no viable repayment claim could be advanced on the 2003/2005 Notes.

[13] However, the appellant argues that the respondent acknowledged its indebtedness to the appellant on two separate occasions (February 11, 2011 and August 22, 2011) and that these acknowledgements give rise to promissory estoppel.

[14] The motion judge disagreed. He held that the acknowledgments relied upon did not assist the appellant because they were not made prior to the expiry

of the limitation period, that is, before February 21, 2008. Consequently, they did not operate to toll the limitation period.

[15] Nonetheless, relying on *Montcap Financial Corp. v. Schyven*, 2011 ONSC 4030, the appellant says that the acknowledgements give rise to a genuine issue requiring a trial concerning whether promissory estoppel precludes the respondent from denying the debt owed, even if the limitation period had expired.

[16] We do not accept these submissions. To the extent that the appellant's repayment claim was based on the 2003/2005 Notes, the expiry of the limitation period is dispositive of the appellant's claim. Alleged after-the-fact acknowledgments do not operate to revive the 2003/2005 Notes or trigger the commencement of a new limitation period.

[17] The only remaining potential basis for the appellant's claim for repayment of the same loan, together with accumulated interest, was the respondent's alleged promise to pay set out in the 2008 Note. And, contrary to the appellant's submission, the respondent put the validity of the 2008 Note squarely in issue on the summary judgment motion, both in its counsel's argument on the motion and by reason of the expert opinion evidence tendered by it concerning the authenticity of the 2008 Note. Further, the appellant also gave evidence, on cross-examination, regarding the 2008 Note.

[18] The appellant was obliged to put all relevant evidence upon which he would rely at trial before the motion judge in support of his claim, including in response to the respondent's challenge to the validity of the 2008 Note. In turn, it was incumbent on the motion judge to determine whether summary judgment should be granted based on the whole of the record before him. He concluded, as he was entitled to do on the evidence on the motion, that the 2008 Note was a forgery. This finding was firmly rooted in the uncontradicted expert evidence before the motion judge.

[19] These findings, collectively, were dispositive of the appellant's contract-based claim to summary judgment.

Claim in Equity

[20] Finally, the appellant's claim that the motion judge erred by determining the availability of equitable relief cannot succeed.

[21] First, the appellant's pleading does not advance any claim in equity. Nor did the appellant's notice of motion on the summary judgment motion.

[22] Second, as we have said, no sustainable claim could be grounded on the 2003/2005 Notes – in contract or in equity – due to the expiry of the applicable limitation period.

[23] Finally, no claim for equitable relief could be anchored on a forged promissory note purportedly entered into in 2008. As the motion judge put it, at

para. 14: “The tendering of the forged note by the [appellant] disentitles him to any of the alternate equitable relief he advances. He does not come to court with … “clean hands”.

[24] In any event, not every claim of promissory estoppel that arguably tolls a limitation period requires a determination at trial. Here, the motion judge’s finding that the appellant did not come to court with “clean hands” was reasonably available on the record. That finding foreclosed any equitable relief.

Disposition

[25] For these reasons, the appeal is dismissed. The respondent is entitled to its costs of the appeal, fixed in the agreed amount of $10,000, inclusive of disbursements and HST.

“J.C. MacPherson J.A.”
“E.A. Cronk J.A.”
“M.L. Benotto J.A.”