COURT OF APPEAL FOR ONTARIO

CITATION: Frenchmen's Creek Estates Inc. v. Tuckernuck Mortgage Administration Inc., 2012 ONCA 579
DATE: 20120907
DOCKET: C54698

Goudge, Cronk and Epstein JJ.A.

BETWEEN

Frenchmen's Creek Estates Inc.,
550075 Ontario Inc. and Joseph Zawadzki

Applicants (Appellants)

and

Tuckernuck Mortgage Administration Inc.,
Tuckernuck Mortgage Administration Inc., In Trust,
Mathews Southwest Developments Limited,
MSW Dallas Limited and Bruce Bent

Respondents (Respondents)

William P. Dermody and Angela L. Papalia, for the appellants

Mark A. Klaiman, for the respondents

Heard: May 8, 2012

On appeal from the order of Justice Dale Parayeski of the Superior Court of Justice dated October 28, 2011.

By the Court:

[1] The appellants appeal from that part of the order of the motion judge dismissing their motion to add four defendants to their application in which they claim damages allegedly arising from the registration of improper foreclosure orders against their property. The respondents, Tuckernuck Mortgage Administration Inc., in Trust, and Tuckernuck Mortgage Administration Inc., are

respectively the trust that held the mortgage upon which the foreclosure orders were obtained and the trustee of the trust. Two of the proposed defendants, Ruth Kerbel and the estate of Michael Finkelstein, are the beneficiaries of the trust. The motion judge held that the other two proposed defendants, Martin Bernholtz and Jeffrey Kerbel, are the trustees of the trust.

[2] At the conclusion of the hearing of the appeal, the appeal was dismissed with reasons to follow. These are those reasons.

FACTS

[3] In 2001, first and second mortgages were registered against property owned by the appellants. Tuckernuck Mortgage Administration Inc., in trust, (the "Trust") was the mortgagee of both mortgages. In 2006, the Trust obtained two *ex parte* foreclosure orders on the affidavit evidence of Martin Bernholtz. These orders were subsequently set aside by this court as the first mortgages, under which the foreclosure orders had been obtained, had previously been paid in full.

[4] On January 22, 2007, by notice of application, the appellants commenced this proceeding claiming damages arising out of the foreclosure orders, arguing that the orders, allegedly based on improper affidavit evidence of Mr. Bernholtz, prevented the sale of the property to a third party.

[5] On August 4, 2011, the appellants moved in the Superior Court of Justice for an order converting their application to an action and adding four new proposed defendants.

[6] On consent, the appellants obtained an order permitting them to convert the application into an action and file a statement of claim. However, the motion judge accepted the respondents' position that the claim against the four individuals was statute-barred and therefore dismissed the request to add them as defendants to the newly-constituted proceeding.

[7] It was common ground that the applicable limitation period is two years. The primary contentious issue before the motion judge and before this court is discoverability – the date when it could be said that the appellants knew or reasonably ought to have known of their claim against the proposed defendants.

[8] The appellants argued that they only became aware of the true identities of the trustees and beneficiaries of the trust in August 2009. On that basis, the proposed amendment, notice of which was provided on April 4, 2011, was in time.

[9] However, the motion judge, on the evidence before him, found as a fact that the appellants were aware as of February 19, 2007 that Ruth Kerbel and Michael Finkelstein were the sources of the mortgage funds and the beneficiaries of the trust, as they were identified as such in Martin Bernholtz's affidavit of that

date. The motion judge also found that the appellants were aware of Martin Bernholtz's role as a trustee throughout, as the foreclosure orders were obtained on his affidavit.

[10] While Jeffrey Kerbel was not named in Martin Bernholtz's affidavit, the motion judge held that the claim against him was statute-barred. The motion judge found as a fact that the appellants knew, or with little effort could have known, of Jeffrey Kerbel's involvement "well before" cross-examining him in August 2009. In oral argument, the appellants did not dispute this finding.

[11] The findings of fact made by the motion judge are adequately supported by the record. It follows that his conclusions concerning the operation of the limitation period to prevent the addition of the proposed defendants are unassailable.

[12] As an alternative argument, the appellants now seek to resile from their concession before the motion judge that the applicable limitation period is two years. The appellants submit that, given that the statement of claim in the newly-formatted action seeks only declaratory relief against the proposed defendants, the limitation period is actually ten years. This submission is based on s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15, which provides that an action to recover land must be brought within ten years.

[13] The appellants argue that they seek a return of their equity of redemption and the removal of the mortgages registered against the land. According to the appellants, this is an action to recover land.

[14] This argument is based on a narrow interpretation of the relief sought against the proposed defendants in para. 1 (d)(i-x) of the statement of claim. While each aspect of the claim against the proposed defendants involves a request for a declaration, as noted by the motion judge at para. 22 of his reasons, the nature of the requested declarations is inextricably combined with claims for compensatory relief. Looking at the context of the dispute from a practical perspective, as did the motion judge, and in the light of the agreement between the parties that the relevant limitation period was two years, there is no merit to the argument that the applicable limitation period is ten years.

[15] As previously noted, the appellants also argue that the proposed defendants are necessary parties to the action and therefore, in the interests of having a full determination of all issues in one proceeding, their addition is warranted.

[16] The basis upon which the appellants contend that the proposed defendants are “necessary” parties is that their interests are engaged and they therefore should be bound by any judgment. The appellants offer no applicable authority to support the proposition that this should override the expiry of the

limitation period. To the extent that this argument relies on there being special circumstances that justify the addition of the proposed defendants outside the limitation period, it fails for a number of reasons. It is necessary only to point out that this court in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 294 D.L.R. (4th) 141, held that the doctrine of special circumstances did not survive the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[17] Finally, while not pressed in oral argument, we agree with the motion judge's finding that this is not a case of misnomer. A reading of the notice of application would not make clear to those having knowledge of the facts that the appellants were claiming against any party other than those specifically named. The appellants are not seeking to correct the name of a party; rather, they are seeking to add parties.

[18] In summary, the appellants knew or reasonably ought to have known the identity and involvement of the proposed defendants well within the prescribed period and took no steps to add them. As a result, their claim is statute-barred. There is no other basis upon which their addition is warranted.

[19] It is for these reasons that the appeal has been dismissed, with costs to the respondents as agreed-upon in the amount of $7,500, inclusive of disbursements and applicable taxes.

“S.T. Goudge J.A.”
"E.A. Cronk J.A.”
“Gloria J. Epstein J.A.”