COURT OF APPEAL FOR ONTARIO

CITATION: 1853491 Ontario Inc. v. Regional Waste North Inc., 2019 ONCA 37
DATE: 20190123
DOCKET: C65329

Rouleau, van Rensburg and Zarnett JJ.A.

BETWEEN

1853491 Ontario Inc. and 2278385 Ontario Limited,
operating as Kirby Waste Transfer Solutions

Plaintiffs (Respondents)

and

Regional Waste North Inc., and Alex Sivitelli

Defendants (Appellants)

AND BETWEEN

Regional Waste North Inc., Alex Sivitilli,
Regional Waste Transit Inc. and Snowpro Winter Services Ltd.

Plaintiffs by Counterclaim (Appellants)

and

1853491 Ontario Inc., 2278385 Ontario Inc. c.o.b. as
Kirby Waste Transfer Solutions, 1854488 Ontario Limited,
Vincenzo Ussia Senior, Vincenzo Ussia Junior, Michael Ussia,
Lucia Ussia, 1116941 Ontario Limited, Verde Excavating Ltd.,
A1A Demolition Inc., and Public Disposal and Recycling Inc.

Defendants by Counterclaim (Respondents)

Michael Kestenberg, for the appellants

Adam Marchioni and Mauro Marchioni, for the respondents

Heard: January 7, 2019

On appeal from the order of Justice John R. McCarthy of the Superior Court of Justice, dated April 6, 2018.

REASONS FOR DECISION

[1] The parties were involved in a waste disposal and waste transportation business from 2011 to early 2014, when the relationship broke down. By that point, the respondent Mr. Vincenzo Ussia, whose company 2278385 Ontario Limited carried on business as Kirby Waste Transfer Solutions (Kirby Waste), alleged that Mr. Alex Sivitilli's company Regional Waste North Inc. (Regional Waste) owed them in excess of $350,000. When Mr. Ussia threatened to sue, Mr. Sivitilli responded by alleging a beneficial interest in companies owned by members of the Ussia family, including Kirby Waste.

[2] On January 14, 2014, Mr. Ussia wrote to Mr. Sivitilli, denying that Mr. Sivitilli had any such beneficial interest in the Ussia companies.

[3] On March 20, 2014, Kirby Waste and 1853491 Ontario Inc. issued their claim for damages on various bases and for a declaration that the appellants Regional Waste and Mr. Sivitilli had no beneficial interest in the respondent companies. Those appellants defended, including by alleging they had such an interest. They did not, at that time, include any counterclaim.

[4] On March 3, 2016, the appellants Regional Waste and Mr. Sivitilli, together with two other parties, issued a counterclaim joining additional parties to the

counterclaim and claiming for payment of landscaping services allegedly provided and for a declaration that the plaintiffs by counterclaim held a beneficial interest in various Ussia companies.

[5] The defendants to the counterclaim (the respondents in this court) moved for summary judgment on the counterclaim on the basis that the claims advanced were time barred.

[6] The motion judge found that the counterclaim was a separate claim from the respondents' claim in the action and that the respondents to the counterclaim were seeking complete summary judgment on the counterclaim. Moreover, even if the motion could be defined as a partial summary judgment motion, there was a discrete issue in this case: whether the counterclaim was defeated by the passage of the limitation period. It was therefore an appropriate case for partial summary judgment.

[7] The motion judge then held that the landscaping services dated from 2012 and 2013 and, as a result, the limitation period for these claims had expired long before the counterclaim was issued. As for the beneficial interest claims, the motion judge found that the limitation period began to run on January 14, 2014 following the respondents' unequivocal denial of Mr. Sivitilli or his companies having any interest in the Ussia companies. The motion judge, however, went on to find that the parties had reached an informal agreement to refer the dispute to

a chartered accountant. This agreement, in the motion judge's view, suspended the running of the limitation period pursuant to s. 11 of the *Limitations Act 2002*, S.O. 2002, c. 24.

[8] The motion judge then determined that the agreement to attempt resolution was terminated by February 3, 2014 at the latest when Mr. Ussia made it clear that he withdrew from the agreement. As a result, the tolling of the limitation period ended on that date. Because the counterclaim was issued on March 3, 2016 – beyond the two-year limitation period as extended by the period of tolling – the motion judge dismissed the counterclaim as being statute barred.

[9] The appellants do not appeal the dismissal of their counterclaim for payment of the landscaping services. On appeal, they argue that the motion judge erred with respect to his decision on the motion for summary judgment of the claims for beneficial interest in the various Ussia companies. They contend that the motion judge erred by failing to consider and apply all of the principles from this court's decision in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, and in finding that the counterclaim involved an issue that was separate and discrete from those raised in the main action. The appellants also argue that the motion judge erred in finding that the counterclaim was statute barred. They argue that the tolling period continued until March 20, 2014, when the respondents signalled that discussions were clearly at an end by issuing their claim.

[10] The central issue in this appeal is a narrow one, the duration of the tolling period. The parties agree that the appellants' claims contained in the counterclaim were discovered on January 14, 2014 and that the counterclaim advancing those claims was issued March 20, 2016. They also agree that the limitation period's running was tolled on January 14 when an agreement to have a third party, Mr. Genua, assist in resolving the claim as contemplated by s. 11 of the *Limitations Act* was reached. The only issue is whether the motion judge erred in finding that the tolling agreement ended on February 3, 2014 at the latest.

[11] In that regard, the appellants submit that, in reaching the conclusion that the agreement to have Mr. Genua involved in resolving the dispute ended on February 3 at the latest, the motion judge did not consider all of the correspondence and e-mails between the parties.

[12] We disagree. In his reasons, the motion judge focused on two e-mails that, in his assessment, made it clear that the resolution process had terminated by February 3 at the latest. He quoted from the February 3, 2014 e-mail sent by the respondents' solicitor to the appellants' solicitor, stating as follows:

> I have recently received information from Joe Genua, confirming that your client never held an interest in Kirby. Based on that, can we please meet and work out the accounting as between the two separate parties?

[13] The motion judge also referred to a February 10, 2014 e-mail from the respondents' solicitor to the appellants' solicitor that served to confirm that, as far

as the respondents were concerned, the discussions had ended. That e-mail stated:

> Ari your client does not own 50% of Kirby and please stop making these self serving statements. The issue is one that the parties obviously disagree upon…. Perhaps we can agree on the wording of a joint application and move on.

[14] The motion judge's assessment of the exchanges between the parties, including his finding that he was "unable to find that any emails or actions by [Sivitilli] throughout February or March of 2014, served to reinvigorate the section 11 resolution window. Indeed by February the 22nd, 2014, [Sivitilli] was threatening to lodge a complaint to the Institute of Chartered Accountants about Genua" are entitled to deference and we find no basis to interfere.

[15] On appeal, the appellants referred the court to several e-mails which they submit show that the discussions were not at an end until the claim was issued on March 20, 2014. We disagree. These e-mails do no more than suggest that the appellants were not prepared to accept that the resolution attempts were at an end. This, however, is irrelevant. Subsection 11(1) of the *Limitations Act* provides that when an agreement to have an independent third party resolve the claim is entered into it tolls the running of the limitation period, but only until:

> (a) the date the claim is resolved;
>
> (b) the date the attempted resolution process is terminated; or

> (c) the date a party terminates or withdraws from the agreement.

The motion judge's finding that the respondents terminated the agreement and that the termination was clearly and unequivocally communicated to the appellants by February 3 is well supported by the record.

[16] The appellants then argue that, in any event, the motion judge erred in that he ought to have left the issue of when the tolling period ended to be determined at trial. This, they submit, is because the motion judge must have rejected Mr. Sivitilli's affidavit evidence to find that the tolling only extended to February 3. Specifically, the application judge must have rejected Mr. Sivitilli's assertion that correspondence with Mr. Genua and between the lawyers regarding attempts to resolve continued into early March and all discussions broke down on or around March 20, when the claim was issued. The assessment of Mr. Sivitilli's credibility was better left to trial when there would be a complete record and there would be no risk of the trial judge making an assessment of Mr. Sivitilli's credibility that conflicted with the motion judge's assessment.

[17] We disagree. In reaching his conclusion that the tolling period ended on February 3, the motion judge relied on the record of exchanges between the parties. He did not make a finding as to Mr. Sivitilli's credibility, nor was any such finding necessary. The fact that Mr. Sivitilli may have believed that discussions were not at an end cannot operate so as to keep the tolling agreement in place in

the face of the respondents' clear decision to terminate the agreement, which they communicated unequivocally to the appellants.

[18] Given that the motion judge's finding on the limitation issue completely resolved the counterclaim, we also reject the appellants' submission that this was not an appropriate case for summary judgment, partial or otherwise.

[19] We acknowledge that striking the counterclaim does not resolve the main action and also acknowledge that many of the issues the appellants sought to raise in the counterclaim will nonetheless have to be litigated as part of the appellants' defence of that action. Striking the counterclaim does, however, finally resolve issues raised in the counterclaim that are not raised in the defence and will thereby result in a saving of legal costs and trial time.

[20] The decision should not be taken to prejudice in any way the ability of the appellants who are defendants to the main action to raise defences in the main action nor does it limit the remedies the trial judge may order in that proceeding.

[21] For these reasons, the appeal is dismissed. Costs to the respondents are fixed in the amount of $12,500 inclusive of disbursements and applicable taxes.

"Paul Rouleau J.A."
"K. van Rensburg J.A."
"B. Zarnett J.A."