COURT OF APPEAL FOR ONTARIO

CITATION: Studley v. Studley, 2022 ONCA 810
DATE: 20221122
DOCKET: C70587

Lauwers, Roberts and Trotter JJ.A.

BETWEEN

Anita Studley

Applicant (Appellant)

and

Scott Studley

Respondent (Respondent)

Elliot Birnboim, Michael Crampton and Hailey Corrigan, for the appellant

David Winnitoy, for the respondent

Heard: October 14, 2022

On appeal from the order of Justice Shaun O'Brien of the Superior Court of Justice dated April 21, 2022.

Trotter J.A.:

[1] The parties have been involved in matrimonial litigation since their separation in 2015.

[2] This is an appeal from an order granting the respondent leave to amend his Answer – seven years after filing – allowing him to advance constructive and resulting trust claims in three properties which were purchased during the

marriage. The properties were held in the appellant's name, but sold before the motion for leave to amend.

[3] The appellant submits that the motion judge erred in granting leave to amend because: (a) the appellant was prejudiced by the timing of the amendment; (b) the respondent's claims are statute-barred; and (c) with respect to the Florida property, the Ontario courts have no jurisdiction to make an *in rem* order in relation to land in a foreign jurisdiction.

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

Background

[5] The appellant and the respondent were married on May 13, 1995; they separated in August or September of 2015. The appellant commenced family law proceedings in October of 2015. After some procedural orders were made in October and November of 2015, the matter lay mostly dormant until the first case conference in 2019.

[6] The following three properties were acquired during the marriage:

> (a) the matrimonial home in Nobleton, Ontario, purchased in 1998, and sold in March 2021;
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> (b) a cottage in Burks Falls, Ontario, purchased in 2008, and sold in September 2017; and

> (c) a property in Florida, purchased in 2014, and sold in May 2016.

[7] Although the three properties were in the appellant's name, the funds to purchase each of them came from the respondent. The respondent was aware of the sale of each property at the time it was sold.

Analysis

(a) Leave to Amend

[8] I see no error in the motion judge's decision to permit the respondent to amend his Answer. Rule 11(3) of the *Family Law Rules*, O. Reg. 114/99, which governs this process, provides as follows:

> (3) On motion, the court shall give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate. [Emphasis added.]

[9] Before the motion judge, and repeated in this court, the appellant contends that permission to amend at this time will disadvantage her in a way that cannot be compensated by costs or an adjournment.

[10] First, the appellant submits that there is prejudice arising from her claimed inability to access documents that are essential to meet the respondent's constructive and resulting trust claims. In particular, she adverts to the evidentiary

burden that would be placed on her to rebut the legal presumption of a resulting trust: *Pecore v. Pecore*, 2017 SCC 17, [2017] 1 S.C.R. 795, at para. 24.

[11] The motion judge did not agree with this submission, nor do I. Though not determinative, she noted that there seemed to be no dispute that the properties were purchased with funds earned from the respondent's company. Moreover, the motion judge said, at para. 8: "[T]he Applicant has not pointed to any specific documents or other evidence related to the Respondent's proposed amendments that she will be unable to locate or recall because of the passage of time." At the hearing of the appeal, counsel for the appellant was unable to provide any further clarity.

[12] Second, the appellant contends that prejudice can be presumed by virtue of the unexplained delay alone. In rejecting this submission, the motion judge observed that the appellant had failed to promptly move the litigation forward. As already noted, the Application was issued in October 2015, but at the time the motion was heard, the appellant had done little to move the case forward in the meantime. Moreover, the respondent produced expert reports concerning his income and business interests on March 2, 2020. The appellant has yet to provide her responding reports.

[13] The motion judge also recognized that, unlike the situation in *Moghimi v. Dashti*, 2016 ONSC 216 (where leave to amend was denied), here the respondent

was not seeking to amend his Answer on the eve of the trial. When the motion was heard, the next scheduled event was a settlement/trial management conference on September 14, 2022. At the hearing of the appeal, the panel was advised that this conference went ahead. A two-week trial is now scheduled for October 2023. Thus, the appellant was not taken by surprise at the last minute.

[14] Finally, the appellant submits that she would be prejudiced by the fact that, if the respondent is allowed to assert his trust claims after the general two-year limitation period, she will be unable to make corresponding claims on his business interests. This submission has no merit. Had there been a basis for such claims, they presumably would have been made at the outset of this litigation. And as the motion judge said, any inability to now assert such claims is attributable to differing limitation periods which cannot alone create prejudice.

[15] In my view, the motion judge did not err in finding that the appellant failed to demonstrate prejudice that should preclude the respondent from amending his Answer. The test set out in r. 11(3) strongly favours permitting amendments unless prejudice is demonstrated. The assessment of prejudice is an inherently discretionary exercise: *Greenglass v. Greenglass*, 2010 ONCA 675, 99 R.F.L. (6th) 271, at paras. 17-19. Decisions made by motion judges under this rule are entitled to considerable deference on appeal.

[16] I would dismiss this ground of appeal.

(b) The Limitations Issue

[17] As part of her resistance to the respondent's motion to amend, the appellant submits that the constructive and resulting trust claims are statute-barred. The appellant contends that, because the respondent's claims are essentially in the nature of equalization claims, the applicable limitation period is two years, as prescribed by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.[1]

[18] The respondent submits that, because his amended Answer claims a trust interest in land, the governing limitation period is 10 years, pursuant to s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA*").

[19] The motion judge concluded that the relevant limitation period is 10 years.

[20] The appellant also contends that the motion judge should not have determined the limitations issue on a final basis because it prematurely extinguished her substantive defence to the respondent's new claims.

[21] The appellant makes a further argument in relation to the Florida property. She submits that Ontario courts have no jurisdiction to make *in rem* orders relating to real property situated in a foreign jurisdiction.

[22] I would not accept any of these submissions.

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[1] I note that the relevant limitation period for an equalization claim is prescribed by s. 7(3) of the *Family Law Act*, RSO 1990, c F.3, not by the *Limitations Act.* However, nothing in this appeal turns on this point.

(i) A Final Determination

[23] The motion judge did not err by proceeding in the manner that she did. It was the appellant who sought to resist the motion to amend by raising and seeking a ruling on the limitations issue. The motion judge explained why she was prepared to decide the issue on the motion, at para. 16: “I am not aware of any facts in dispute that would affect a determination of the applicable limitation period. In addition, neither party suggested the question of the limitation period should be left for the trial judge” (emphasis added).

[24] The appellant cannot now complain about the process because she did not like the outcome. She does not identify any “facts in dispute” that prevented the motion judge from determining the limitations issue. Moreover, it was desirable for the motion judge to resolve this issue sooner rather than later, especially given the slow pace of litigation and the importance of efficiency. In fact, the *Family Law Rules* require the court to actively manage cases, including, “disposing of those that do not need full investigation and trial”: r. 2(5)(a). There is little point in leaving this important issue hanging until trial.

(ii) The Applicable Limitation Period

[25] I agree with the motion judge that the applicable limitation period is determined by s. 4 of the *RPLA* – 10 years.

[26] In language that is challenging, s. 4 of the *RPLA* prevents an action to "recover any land" that is not brought within ten years:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it. [Emphasis added.]

[27] The appellant submits that the respondent's amended Answer does not involve an action to "recover any land" because the lands in this case have already been sold. Consequently, the claim is essentially a proceeding for an *in personam* remedy – damages, or more specifically, an equalization claim.

[28] The motion judge rejected this submission, as would I. The motion judge referred to the leading decision of *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561. That case involved a family law dispute in which Ms. McConnell brought an action for unjust enrichment and sought a remedial constructive trust in the property owned by Mr. Huxtable. Though the property had not been sold, the timing of the claim engaged the same issue as in this case – does the more generous limitation period in the *RPLA* apply?

[29] The resolution of this issue turned on the meaning of the words "an action to recover any land." Writing for the court, Rosenberg J.A. adopted the legal

conclusions of the motion judge that: (a) the ten-year limitation period under s. 4 of the *RPLA* applies in circumstances where an ownership interest in land is asserted; and (b) an alternative claim in damages in respect of the same land is also protected under s. 4:

> [39] In sum, I agree with the motion judge's conclusion, at para. 80 of his reasons:
>
> > From the plain meaning of the words "action to recover any land" in section 4 of the *Real Property Limitations Act*, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the *Real Property Limitations Act.* It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.
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> [40] I also agree with the motion judge that her alternative claim for a monetary award can shelter under s. 4 for the reasons he gave at para. 88:
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> > My analysis of the question begins with the words of the section: ". . . bring an action to recover any land . . .". In contrast to the *Limitations Act, 2002*, which deals with individual "claims", this provision deals with an "action" (extended by section 1 of the *Real Property Limitations Act* to include "any civil proceeding"). An action or application can and frequently does include a principal claim with an alternative claim, as in this case. Here the damages claim is an alternative or fallback position to the first

> claim advanced by the applicant, which is for an ownership interest. The statute does not say "action to recover *only* land". Further, it would not make sense to interpret section 4 of the *Real Property Limitations Act* as a sort of all or nothing proposition, forcing the court either to award a proprietary interest on what it finds to be a meritorious claim, when a monetary award would otherwise be an adequate and appropriate remedy, or to award nothing at all, because a shorter limitation period for a damage award bars that kind of remedy… [Emphasis added.]

[30] Applying this holding, the motion judge in this case characterized the respondent's claim in the following way, at para. 20: "In other words, he is seeking a resulting trust interest in property that is enforceable by a monetary award. Although this is not an alternative claim, since the properties have been sold, in my view, it falls within the scope of a claim for damages sheltered under a trust claim."

[31] I agree with the motion judge's conclusion, which is bolstered by this court's recent decision in *Bakhsh v. Merdad*, 2022 ONCA 130. That case involved a dispute over a condominium property in Ontario. The question was whether Ms. Bakhsh's claim was an equalization claim under s. 5(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), or a constructive trust claim. If it was the former, the two-year limitation period under s. 7(3)(a) of the *FLA* would apply; if it was a constructive trust claim in relation to real property, the *RPLA* would apply.

[32] The motion judge found that Ms. Bakhsh had advanced a constructive trust claim in real property. This court agreed, holding that Ms. Bakhsh's claim was "not a thinly veiled attempt to dress up an equalization claim as an equitable trust claim": at para. 13. As the court helpfully explained, at paras. 14-16:

> We disagree with Mr. Merdad's submission that all property claims between spouses or former spouses must necessarily be equalization claims. And it does not follow that the expiration of time to bring an equalization claim entails the expiration of a constructive or remedial trust claim. Equalization claims and equitable trust claims remain distinct.
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> The *FLA* equalization provisions do not deal with property, *per se*, but, rather, with the equitable calculation, division, and distribution of the value of net family property. Here, Ms. Bakhsh brings forward an equitable trust claim and not a claim for equalization of the value of the parties' net family property. A claim of ownership is distinct from a claim for a share in property value; an equitable trust claim addresses the former and the equalization regime of the *FLA* covers only the latter: *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 59.
>
> The equalization provisions of the *FLA* also do not preclude an equitable trust claim respecting property. Section 10(1) of the *FLA* expressly permits a court application for a determination between spouses or former spouses "as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties" and the court may "declare the ownership or right to possession", as the respondent has claimed, among other remedies. Importantly, the two-year limitation period in s. 7(3)(a) of the *FLA* applies only to an application based on subsections 5(1) or (2) and not to the determination of a question of ownership between spouses set out in s. 10(1) of that Act. [Emphasis added.]

[33] The court found that the 10-year limitation period under the *RPLA* applied: “This court’s decision in *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, supports the application of the ten-year limitation period under the *Real Property Limitations Act* to family law constructive trust claims”: at para. 12.

[34] I would adopt this analysis.

[35] I acknowledge that this case differs somewhat from *McConnell and Bakhsh*. In those cases, the properties had yet to be sold; here, they were sold by the appellant after the date of separation. Nonetheless, I agree with the motion judge that an otherwise tenable trust claim in land, one that would be sheltered by s. 4 of the *RPLA*, cannot be defeated by the sale of that land. This conclusion is supported by both *McConnell and Bakhsh.* Moreover, a contrary interpretation might incentivize strategic, covert sales designed to reduce the limitation period from 10 years to two, extinguishing an otherwise viable claim. I do not suggest that this happened here. However, it is a foreseeable consequence of the appellant’s position on the operation of s. 4 of the *RPLA*.

[36] Finally, I find further support in *1250140 Ontario Inc. v. Bader*, 2022 ONCA 197, which considered s. 23 of the *RPLA*. In that case, a mortgagee brought an action to recover funds secured by a mortgage in circumstances where the property had already been sold. Ms. Bader submitted that s. 23, which is triggered by an action brought to “recover out of any land or rent any sum of money secured

by any mortgage or lien", had no application once she, as mortgagor, was dispossessed of the land.

[37] This court rejected this contention: the action was rooted in a claim to real property. As the court explained: "[T]he claim for debt was based on a covenant in the mortgage, and land, as security for the debt, was critical to that claim": at para. 16. There was no basis to conclude that the mortgagee became disentitled to the longer limitation period in the *RPLA* because the property had already been sold. The court held that, "The prospect of a shifting limitation period, tied to the disposition of the property in issue, would only foster uncertainty in the application of the *RPLA*": at para. 17.

[38] In conclusion, the motion judge did not err in finding that the claims asserted in the respondent's amended Answer were not time-barred.

(iii) *In Rem vs. In Personam*

[39] Lastly, the appellant submits that the motion judge made a further error in relation to the Florida property because the Ontario courts have no *in rem* jurisdiction over the Florida property. Counsel advised that this issue was raised before the motion judge but not addressed in her reasons; although, it appears that the issue was not pressed strongly before the motion judge.

[40] In any case, it was not necessary for the motion judge to address this issue as it was not relevant to the respondent's request for leave to amend his Answer.

It may turn out to be relevant to the viability of the constructive and resulting trust claims and the monetary award that is sought. But these are matters for later.

[41] I would dismiss this ground of appeal.

Disposition and Costs

[42] I would dismiss the appeal. I would uphold the motion judge's order granting the respondent leave to amend his Answer, and her conclusion that his constructive and resulting trust claims related to real property are not statute-barred.

[43] The appellant submits that we should make no order as to costs, essentially reserving the costs of this appeal to the trial judge. I disagree. This is an appropriate case for costs. This appeal was an unnecessary procedural step in this litigation. It was not necessary for this court to call on the respondent to make submissions on any of the grounds of appeal. I would order costs to the respondent, on a partial recovery basis, in the amount of $4,350, inclusive.

Released: November 22, 2022 "P.D.L."

"G.T. Trotter J.A."
"I agree. P. Lauwers J.A."
"I agree. L.B. Roberts J.A."