COURT OF APPEAL FOR ONTARIO

CITATION: Fockler v. Speigel, 2023 ONCA 148
DATE: 20230306
DOCKET: C70560

Zarnett, Thorburn and Copeland JJ.A.

BETWEEN

Rhys Fockler and Lyn Cartwright

Plaintiffs (Appellants)

and

Jonathan Speigel, Lawyers' Professional Indemnity Company (LawPRO), and Garen Kassabian

Defendants (Respondents)

Rhys Fockler and Lyn Cartwright, acting in person

Kelli Preston, for the respondents Jonathan Speigel and Lawyers' Professional Indemnity Company

Bronwyn Martin, for the respondent Garen Kassabian

Heard: in writing

On appeal from the order of Justice Alexander Sosna of the Superior Court of Justice, dated May 18, 2021, and the order of Justice Jill C. Cameron of the Superior Court of Justice, dated February 7, 2022, with reasons at 2022 ONSC 864.

REASONS FOR DECISION

[1] The respondents brought motions for summary judgment to dismiss the appellants' action against them. The hearing was conducted virtually, by Zoom.

The appellants did not connect to the Zoom hearing or participate in it. Summary judgment was granted dismissing the action.

[2] After they learned the result of the summary judgment motions, the appellants moved, unsuccessfully, to set it aside.

[3] The appellants appeal both the summary judgment and the order refusing to set it aside. They seek leave to introduce fresh evidence in support of their appeal.

[4] For the reasons that follow, we dismiss the motion for leave to introduce fresh evidence and the appeal.

Background

[5] In August 2015, the appellants retained the respondent, Garen Kassabian, to act for them on the sale of their house in Toronto. There were a number of writs of execution that affected the property and that needed to be removed to complete the sale. On October 27, 2015, the appellant Rhys Fockler signed an undertaking in favour of the house purchaser and its lawyers to pay off and discharge any executions affecting the property.

[6] Mr. Kassabian gave evidence that he encouraged Mr. Fockler, from the outset of the retainer, to deal with the executions. When Mr. Fockler failed to do so, he reached out to the execution creditors to obtain pay out statements so that the executions could be discharged prior to closing.

[7] Three of the executions affecting the property were in favour of the respondent, Lawyers' Professional Indemnity Company ("LawPRO"). On October 23, 2015, Mr. Kassabian wrote to the lawyers for LawPRO, Speigel Nichols Fox LLP, to obtain a pay out figure. By correspondence from that firm, dated November 3, 2015, Mr. Kassabian was advised that the required payment to obtain a release of the LawPRO writs as of November 6, 2015 would be $13,386.97, made up of $5,959.58 for principal and interest and an additional $7,427.39 representing legal fees and disbursements.

[8] On the closing of the sale on November 5, 2015, Mr. Kassabian caused $13,386.97 to be paid out of the closing proceeds to LawPRO's lawyers to obtain a release of the LawPRO writs of execution. He reported in writing to the appellants by letter, dated November 5, 2015, concerning the disposition of the funds received on closing including the pay out of the executions.

[9] On April 12, 2018, the appellants commenced an action against the respondents. Their action alleges that Mr. Kassabian did not make them aware before closing that LawPRO was demanding payment of legal costs on top of principal and interest and claims that, in paying $7,427.39 for legal costs and disbursements to obtain the release of the LawPRO writs, he acted without instruction or authority and was professionally negligent. The action also claims that LawPRO and its lawyer, the respondent Jonathan Speigel, engaged in extortion to obtain that payment and have been unjustly enriched by it. All the

respondents are alleged to have intentionally inflicted mental and emotional distress on the appellants. Damages, including aggravated and punitive damages, of $100,000 are claimed.

[10] In December 2020, the respondents moved for summary judgment dismissing the action. A ground they relied on was that the action was commenced after the expiry of the limitation period.

[11] The summary judgment motions were heard by Sosna J. on May 18, 2021, by Zoom. Three affidavits that had been filed by the respondents were before the summary judgment motion judge. Respondents' counsel made submissions, including that the limitation period had expired before the action was commenced. The appellants did not participate in the Zoom hearing and material they served and filed the day prior was not before the judge.

[12] The summary judgment motion judge dismissed the action. He gave reasons only to the extent of indicating his agreement with the submissions made by respondents' counsel.

[13] In June 2021, the appellants launched a motion to set aside the summary judgment dismissing their action. They relied on rr. 37.14 and 59.06 of the *Rules of Civil Procedure*. Rule 37.14(1)(b) permits a party who "fails to appear on a motion through accident, mistake or insufficient notice" to move to set an order

aside on such terms as are just. Rule 59.06(2)(a) permits a party to move to set aside an order on the basis of fraud or facts arising or discovered after it was made.

[14] The set aside motion was supported by an affidavit of Mr. Fockler, sworn September 27, 2021, which provided an explanation for why the appellants had not participated in the hearing on May 18, 2021. It stated: “On May 18 we waited the entire day for the Court to telephone us when our item came up. There was no call. There was no email”. The affidavit attached correspondence Mr. Fockler had sent to the Regional Senior Justice in June 2021 that addressed the same matter. It stated that the appellants were not “Zoom ready” in May 2018, and that the appellants had explained this to court staff prior to the hearing. Because they had provided their phone number to the court, the appellants expected to be called on May 18 so they could participate by telephone, but no call came.

[15] The material filed by the appellants for the set aside motion included the affidavit material they had delivered the day before the summary judgment motion. It contained their position as to why the limitation period had not expired before they started their action. It explained that Mr. Kassabian’s reporting letter had been picked up from his office on November 6, 2015, placed by them in a box with other items from the house they had sold, and not been opened or reviewed until May 4, 2016. The appellants argued that they had only discovered the existence of the impugned payment to LawPRO on that date, and this was when the limitation period commenced.

[16] The set aside motion was dismissed by Cameron J.

[17] The motion judge approached the test under r. 37.14(1)(b) as involving three enquiries: (i) whether the appellants had moved promptly after learning of the summary judgment; (ii) whether the appellants had reasonably explained their failure to appear on May 18 or had failed to appear “deliberately”; and (iii) whether they had an arguable claim. She was satisfied the appellants had moved promptly. However, she was not satisfied that the appellants had fulfilled the other two requirements.

[18] First, she was not satisfied that the appellants had reasonably explained their absence from the May 18 hearing. She was skeptical of the reasons proffered by the appellants, concluding that their failure to inquire about how to connect to the May 18 hearing contradicted their claim that they desired to participate. She ultimately found that the appellants “did not want to participate in the motion for summary judgment for whatever reason, perhaps thinking that the matter would not proceed if they did not appear”.

[19] Second, she found that the appellants’ claim lacked arguable merit because it was barred by the limitation period. She noted that Mr. Kassabian had, by correspondence the appellants picked up the day after closing, reported to the appellants about the pay out of the executions. She acknowledged that the appellants said they did not review the reporting letter until May 2016, but

concluded that the appellants ought to have been aware before or shortly after closing on November 5, 2015 that the costs and disbursements payment had been made to LawPRO. The action was subject to a two year limitation period from the date their claim ought to have been discovered by a reasonable person, and it was therefore out of time when it was commenced in April 2018.

[20] As for the relief claimed under r. 59.06, the motion judge considered there to be no basis to find the summary judgment had been obtained by fraud.

Analysis

[21] The appellants argue that the motion judge erred in finding that they had not reasonably explained their failure to participate in the summary judgment motion, and in finding that their action was barred by the expiry of the limitation period.

[22] It is unnecessary to consider the appellants' first argument since, in our view, their second argument must be rejected. When considering whether to exercise her discretion under r. 37.14(1) to set aside the summary judgment, the motion judge was required to consider whether the position the appellants would have advanced at the prior hearing had arguable merit: *Waite v. Gershuny* (2005), 194 O.A.C. 326 (Div. Ct.), at para. 11. In other words, the appellants were required to show that they had an arguable claim to avoid summary judgment dismissing their action. In our view, there is no reversible error in the motion judge's finding that they did not have an arguable claim because the action was statute-barred.

[23] The evidence before the motion judge (and the summary judgment motion judge) included an affidavit of Mr. Kassabian, which exhibited the reporting letter that the appellants received on November 6, 2015. It included specific information as to the funds received on closing and how they were paid out. It expressly stated the amount paid to LawPRO's lawyers to obtain the release of the LawPRO writs. It enclosed the pay out statements for the writs of execution. The reporting letter disclosed the very facts that the appellants rely on for their claim.

[24] The motion judge acknowledged the appellants' position that they did not review the letter until May 2016. But she properly noted that the test for when a limitation period begins to run is when the claim was discovered, which is the earlier of when the appellants actually discovered the claim or when a reasonable person with the abilities and circumstances of the appellants ought to have discovered it: *Limitations Act, 200*2, S.O. 2002, c. 24, Sched. B, ss. 4-5. She found that such a reasonable person would have discovered the claim before or within a few days of closing on November 5, 2015.

[25] A finding that a limitation period applies is one of mixed fact and law, entitled to deference on appeal: *Dass v. Kay*, 2021 ONCA 565, at para. 29. It was open to the motion judge on the record to find that a reasonable person engaged in a real estate sale would have promptly reviewed the information about how the closing funds had been deployed to pay off executions. This finding was bolstered by the fact that, as the motion judge noted, Mr. Fockler was repeatedly informed by

Mr. Kassabian in the weeks preceding the closing about the importance of dealing with the outstanding writs of execution. There is no basis to interfere with the motion judge's finding.

[26] We also reject the motion to introduce fresh evidence. We are not satisfied that it meets the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775.

[27] Specifically, the evidence fails to satisfy the first and fourth elements of the *Palmer* test. The first element is a due diligence requirement. If, by due diligence, the evidence could have been adduced at the hearing below, the evidence should not generally be admitted. The proposed fresh evidence is an affidavit from Mr. Fockler, and no explanation was provided as to why it could not have been furnished to the motion judge. Nor does the evidence meet the fourth part of the test − that the evidence could be expected to have affected the result. On the limitations issue, the fresh evidence largely repeats (and says it is repeating) what the appellants had previously said about the reporting letter having been placed in a box and not reviewed until May 2016. The motion judge was aware of the appellants' position − the proposed fresh evidence's repetition of it cannot have been expected to have affected the result.

[28] Given that the appeal of the refusal to set aside the summary judgment fails, the appeal of the summary judgment itself necessarily fails.

Conclusion

[29] The motion to introduce fresh evidence is dismissed, and the appeal is dismissed.

[30] If the parties are unable to agree on costs of the appeal, they may make written submissions. The submissions of the respondents shall be delivered within 15 days of the release of these reasons and shall be limited to two pages each. The submissions of the appellants shall be delivered within 15 days of the later of the respondents' submissions. The appellants' submissions shall not exceed four pages in total.

"B. Zarnett J.A."
"J.A. Thorburn J.A."
"J. Copeland J.A."