COURT OF APPEAL FOR ONTARIO

CITATION: Bell v. Long, 2023 ONCA 563
DATE: 20230829
DOCKET: C70602

Lauwers, Zarnett and Thorburn JJ.A.

BETWEEN

Melissa Bell

Plaintiff (Appellant)

and

Corinne Elizabeth Long

Defendant (Respondent)

Melissa Bell, acting in person

Jane E. Sirdevan, for the respondent

Heard: August 23, 2023

On appeal from the order of Justice Susan Vella of the Superior Court of Justice, dated March 31, 2022, with reasons reported at 2022 ONSC 1929.

REASONS FOR DECISION

[1] The respondent is a lawyer who represented the appellant in a family law motion in April, 2015. The appellant was unsuccessful in the motion, and the appellant terminated the solicitor-client relationship. In 2016, the appellant brought a motion to change the 2015 order. This motion resulted in a further order dated June 1, 2017, which was more favourable to the appellant.

[2] On July 9, 2020, the appellant commenced the present action for solicitor's negligence in relation to the 2015 motion, which was more than four years after she terminated the respondent's retainer and retrieved her file from the respondent's office.

[3] The respondent brought a motion for summary judgment on the basis that the claim was barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, because it was started more than two years after the appellant knew or ought to have known of the respondent's alleged negligence.

[4] The appellant presented two responses to the limitations argument: (1) the claim was not discoverable until less than two years before she commenced it; and (2) the limitation period was suspended by s. 7(1) of the Act, as the appellant was incapable of commencing a proceeding by reason of mental disability.

[5] With respect to discoverability, the appellant argued that she could not have known that a claim was appropriate until after each of the following:

1. the June 1, 2017 order;
2. a complaint the appellant filed with the Law Society of Ontario was dismissed in 2020; or
3. the date the appellant received the respondent's productions, which was on July 23, 2021.

[6] The motion judge found that the more favourable June 1, 2017 order, which might have served to identify the respondent's negligence, was more than two years before the appellant commenced her action, so it was of no assistance to the appellant in extending the limitations period.

[7] The motion judge found that the LSO complaint had no effect on whether a civil proceeding was appropriate. The LSO complaint was for professional misconduct and served an entirely different purpose than a negligence action.

[8] Finally, the motion judge found that the discovery of new facts as a result of the respondent's document production did not affect the limitation period. The appellant had sufficient material facts to commence the claim before she received production from the respondent. As the motion judge noted: "Bell clearly discovered her negligence claim prior to receiving Long's productions as evidenced by the fact that she started her action in January 2020. As reflected in Bell's factum at para. 35, the limitation period ceases to run once the claim has been issued."

[9] Because the appellant had sufficient material facts to commence the action, the motion judge made no error of law or palpable and overriding error of fact in reaching these conclusions. We dismiss this ground of appeal.

[10] With respect to capacity, the appellant presented evidence that she had a diagnosed learning disability and cognitive deficits, first identified in 2014 but which

she characterizes as permanent and ongoing, as well as post-traumatic stress disorder and a generalized anxiety disorder since at least 2004. Lack of capacity can extend the limitation period under s. 7 of the *Limitations Act*.

[11] The motion judge relied on *Deck International Inc. v. The Manufacturers Life Insurance Company*, 2012 ONCA 309, at para. 6, for the proposition that a mere diagnosis is insufficient to show incapacity. The existence of a disability is not usually a sufficient basis, in itself, to establish a person's incapacity. There must also be specific medical evidence that the party claiming incapacity was unable to conduct litigation at the relevant time.

[12] The motion judge noted that the appellant presented no such evidence. There were no affidavits from any healthcare practitioners attesting to the truth of the documents purporting to be diagnoses and medical records. Further, there was no evidence that the appellant was unable to manage her personal or financial affairs or that she required a litigation guardian for her other proceedings. In fact, she did carry on litigation in family court during the time that she claimed to be incapable. While there was a letter from her psychiatrist in support of a legal aid application stating that the appellant would struggle without counsel, the fact remained that she was able to retain and instruct counsel throughout the family law proceedings.

[13] The motion judge found that the appellant was capable within the meaning of s. 7(1) of the Act, and that the limitation period had expired. The motion judge identified and applied the correct legal principles. The factual finding that the appellant was capable throughout was open to the motion judge, to whom we owe deference. We dismiss this second ground of appeal.

[14] The appeal is dismissed with costs. If the parties are unable to agree on costs, then the respondent may file a written submission no more than three pages in length within ten days of the date of the release of these reasons, and the appellant may file a written submission no more than three pages in length within ten days of the date the appellant's submission is due.

[15] During argument, the appellant stated that she had asked for a sealing order below to protect her confidential medical records, but it was not addressed by the motion judge. Respondent's counsel stated that she had no difficulty with certain portions of the file being sealed. If the parties can agree on the terms of a sealing order, they are granted leave to request one from the panel in writing. The parties are reminded of the court's practice of providing notice to the media of such requests, as described on the court's website.

"P. Lauwers J.A."
"B. Zarnett J.A."
"Thorburn J.A."