DATE: 20061220
DOCKET: C44508

COURT OF APPEAL FOR ONTARIO

LASKIN, MacPHERSON AND LANG JJ.A.

B E T W E E N :	)	
	)	
MARY LOUISE PEPPER, MACK DAVID PEPPER and LINDA HASKELL	)	**Raymond G. Colautti, for the appellants**
	)	
(Plaintiffs/Appellants)	)	
	)	
- and -	)	
	)	
ZELLERS INC. carrying on business as ZELLERS PHARMACY	)	**No one appearing for the respondent Zellers Inc.**
	)	
	)	**Bernard C. LeBlanc, for the respondent 1520334 Ontario Limited**
	)	
	)	**Douglas A. Wallace, for the respondent Lee Aube**
	)	
(Defendant/Respondent)	)	
	)	
	)	**Heard: October 31, 2006**

On appeal from the order of Justice Gordon P. Killeen of the Superior Court of Justice, dated October 31, 2005.

LANG J.A.:

[1] The appellants appeal Killeen J.'s dismissal of their motion to add the respondents in this appeal, Lee Aube and 1520334 Ontario Limited (1520334), as parties to their claim.

Background

[2] The appellant, Mary Louise Pepper, alleges that, in August 2002, her pharmacy and pharmacist mislabelled her medication, as a result of which she suffered harm requiring hospital care. Within two days, the appellants, Ms. Pepper and her children, notified Zellers Pharmacy, the pharmacy named on the medication label. Zellers informed the pharmacists who operated the pharmacy, Emad Youssef and Baher Shenouda, who in turn notified Lee Aube, the dispensing pharmacist.

[3] In October 2002, the appellants sued Zellers, alleging negligence and breach of contract, both arising from the mislabelling. In November 2002, Zellers denied any involvement. It informed the appellants that the pharmacy was owned by Messrs. Youssef and Shenouda, both of whom had signed an agreement to indemnify Zellers for any claims, but did not disclose that the pharmacy was owned "in Trust for a Company to be Incorporated."

[4] The appellants did not ask for the name of the dispensing pharmacist. On August 20, 2004, almost two years after the incident, they commenced a second action, this time against Messrs. Youssef and Shenouda; however, the statement of claim did not name a dispensing pharmacist.

[5] In September 2004, Mr. Shenouda's lawyer told the appellants that the dispensing pharmacist was Lee Aube, who was a *locum tenens* at the pharmacy at the time of the incident. In November 2004, the appellants moved to add Ms. Aube to the 2004 action. Subsequently, Mr. Shenouda disclosed that, while "Zellers Pharmacy" operated in space leased from Zellers, it was owned and operated by 1520334, a company of which Mr. Shenouda was the sole shareholder, as he had acquired Mr. Youssef's interest prior to its incorporation. As a result of this disclosure, the appellants amended their motion to add both 1520334 and Lee Aube as parties to the 2002 action, an action that indisputably had been commenced within any applicable limitation period.

[6] The respondents, 1520334 and Lee Aube, opposed the motion, arguing that the appellants failed to show special circumstances that would justify their addition after the expiration of the limitation period. In response, the appellants argued that the limitation period had not expired. At the same time, Mr. Shenouda and Mr. Youssef, in motions for summary judgment, sought to have the proceedings against them dismissed.

The Limitation Period

[7] At the time, s. 4 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (*RHPA*) deemed the *Health Professions Procedural Code, Sch. 2*, to be part of the *RHPA*. The relevant provisions of the *Code*, since repealed (S.O. 2002, c. 24, Sch. B, s. 25), provided:

> 89(1) No person who is or was a member is liable to any action arising out of negligence or malpractice in respect of professional services requested of or rendered by the person unless the action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the negligence or malpractice is alleged.
>
> (3) A health profession corporation that holds or held a certificate of authorization is not liable to any action arising out of negligence or malpractice in respect of professional services requested of, or rendered by, the corporation unless the action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the alleged negligence or malpractice is based.

The Rule

[8] Rule 5.04(2) provides:

> At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

An order adding a party under rule 5.04(2) is discretionary: the judge "may" make the order, provided that there is no prejudice that could not be compensated by costs or an adjournment. Prejudice is not an issue in this case because both respondents knew about and investigated the incident within days of its occurrence.

The Motion

[9] On the return of the motion, the appellants argued that the *RHPA* one-year limitation period did not begin to run until the 2004 disclosure by Messrs. Youssef and Shenouda of the identities of Ms. Aube and 1520334. Alternatively, the appellants argued that 1520334 was not entitled to the protection of the *RHPA* one-year limitation period, but only to the general limitation period of six years set out in the *Limitations Act*, R.S.O. 1990, c. L.15, s. 45. Finally, the appellants argued that the *Limitations Act, 2002*, S.O. 2002, c. 24 Sch. B (*Limitations Act, 2002*), which came into force on January 1, 2004, applied to extend the limitation period.

[10] After considering the evidentiary record, the motion judge dismissed the appellants' motion, finding that the *RHPA* one-year limitation period applied and that it had expired. He concluded that the limitation period was not extended on the basis of discoverability because the appellants had failed to tender any evidence of their due diligence in ascertaining the respondents' identities. As well, the motion judge concluded that the *Limitations Act, 2002* did not extend the *RHPA* limitation period. The motion judge granted the motions for summary judgment brought by Messrs. Youssef and Shenouda and dismissed the 2004 action against them.

The issues

[11] The appellants argued that the motion judge erred in:

1. undertaking a fact-based inquiry into discoverability;

2. finding that the appellants failed to demonstrate due diligence in identifying the respondents;

3. concluding the limitation period was not extended by the *Limitations Act, 2002*; and

4. concluding that the appellants had no tenable cause of action against 1520334.

[12] For the reasons that follow, in my view, the motion judge was entitled to assess the evidentiary record in coming to his decision and was entitled to conclude on the record that the appellants had not demonstrated due diligence in ascertaining the identity of Ms. Aube. In my view, however, the motion judge erred in concluding that the *RHPA* limitation period applied to 1520334 and in refusing the appellants leave to add it as a party.

Analysis

[13] I will deal first with the issue of the fact-based inquiry because it pertains to both respondents. I will deal separately with respect to the relief sought against each respondent, addressing the issues of the commencement date for the limitation period (discoverability) and whether there is any basis for the extension of the limitation period (special circumstances).

1. The fact-based inquiry

[14] Contrary to the appellants' argument, the motion was not akin to a rule 26.01 motion to amend a pleading, which "shall" be granted absent compensable prejudice. Rather, a rule 5.04(2) motion to add parties and, in this case, to add parties after the

apparent expiration of a limitation period, is discretionary. While the threshold on such a motion is low, the motion judge is entitled to consider the evidentiary record to determine whether there is a live issue of fact or credibility about the commencement date of the limitation period.

[15] Recognizing that s. 89 of the *RHPA* specifically provided that the limitation period commenced "when the person commencing the action knew or ought to have known the facts upon which the negligence or malpractice is alleged", the motion judge noted that the appellants failed to provide any evidence about when they "ought to have known" the respondents' identities.

2. Ms. Aube

(i) Discoverability

[16] The first question in this case related to discoverability, a principle that provides that a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence. This principle ensures that a person is not unjustly precluded from litigation before he or she has the information to commence an action provided that the person can demonstrate he or she exercised reasonable or due diligence to discover the information. See *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. The obligation on a plaintiff to exercise reasonable diligence is a positive one: see *Soper v. Southcott*, [1998] O.J. No. 2799 (C.A.).

[17] This principle, codified in s. 89(1), applies both to the discoverability of facts and to the discoverability of the tortfeasor's identity. See *Aguonie v. Galion Solid Waste Material Inc* (1998), 38 O.R. (3d) 161 (C.A.); *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 (C.A.) at 405.

[18] The motion judge referred to the proper approach to discoverability on a motion to add a party, which was concisely and clearly set out by Master Dash in *Wong v. Adler*, (2004), 70 O.R. (3d) 460 (S.C.J.) at para. 45, aff'd [2005] O.J. No. 1400 (Div. Ct.):

> What is the approach a judge or master should take on a motion to add a defendant where the plaintiff wishes to plead that the limitation period has not yet expired because she did not know of and could not with due diligence have discovered the existence of that defendant? In my view, as is clearly implied in Zapfe, the motions court must examine the evidentiary record before it to determine if there is an issue of fact or of credibility on the discoverability allegation, which is a constituent element of the claim. If the court determines that there is such issue, the defendant should be added with

> leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused. If the issue is due diligence rather than actual knowledge, this is much more likely to involve issues of credibility requiring a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence. That is not to say that such motion could never be denied if the evidence is clear and uncontradicted that the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility.

[19] I agree with Master Dash that the motion judge was entitled to assess the record to determine, as a question of fact, whether there was "a reasonable explanation" on the evidence demonstrating why Ms. Aube's identity could not have been determined through the exercise of reasonable diligence. See also *Zapfe, supra* at para. 31.

[20] An examination of the evidentiary record in this case shows that the appellants' material failed entirely to address whether they ought to have known Ms. Aube's identity and what, if any, steps they took to determine that identity. Indeed, the appellants offer no explanation other than to say that no one gave them the information.

[21] Importantly, there was no affidavit from the appellants' lawyer, only one from the lawyer's law clerk, which provided no particulars of any steps taken to obtain information and did not explain why no steps were taken. For example, there was no reference to any inquiry of Zellers or of Messrs. Yassouf or Shenouda about the name of the dispensing pharmacist and no explanation about why the two pharmacy operators were not sued until long after the expiration of the limitation period. As this court said in *Zapfe, supra*, at para. 35: "In most cases one would expect to find, as part of a solicitor's affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent."

[22] The motion judge's reasons reflect the absence of this critical evidence:

> As it seems to me, the grave weakness in all this affidavit evidence proffered by the plaintiffs is that there is <u>no</u>

> evidence at all from the solicitor or solicitors who handled Ms. Pepper's case from the outset about the inquiries and investigation, if any, that were made to ascertain all potentially liable parties for Ms. Pepper's illness. [Emphasis in original.]

[23] It appears from the absence of any evidence on this issue, and from their statement of claim, that the appellants were unaware of the need to claim against the dispensing pharmacist and believed they only needed to claim against the pharmacy or pharmacy owners. However, ignorance of the liability of the individual pharmacist, even if that ignorance had been raised by the appellants, would not advance their position. See *Coutanche* v. *Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.) at paras. 17-19.

[24] Accordingly, I agree with the motion judge that the appellants raised no credibility issue or issue of fact that would merit consideration at a summary judgment motion or a trial.

[25] Alternatively, the appellants argued that the *Limitations Act, 2002*, effective January 1, 2004, extended the one-year limitation period against Ms. Aube. I do not agree for two reasons.

[26] First, s. 24(2) restricts the application of the new regime "to claims… in respect of which no proceeding has been commenced before January 1, 2004." Since a proceeding with respect to this incident was commenced in 2002, long before January 1, 2004, the 2002 Act does not apply.

[27] Second, s. 24(3) provides that "[i]f the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim." Since the former limitation period had expired with respect to Ms. Aube before January 1, 2004, the new regime offers no assistance.

[28] Finally, the appellants argued that the limitation period applies only to negligence or malpractice actions and not to their action against Ms. Aube in breach of contract, which would otherwise have attracted a six-year limitation period at the time of the incident. I do not agree.

[29] Limitation periods with respect to negligence or malpractice apply to all causes of action arising out of that negligence or malpractice. In this case, as in most similar actions, the same facts that gave rise to the negligence claim also gave rise to the breach of contract claim. Section 89(1) of the *RHPA* specifically provided that the limitation applies "to any action arising out of negligence or malpractice." A claim for breach of contract based on the mislabelling is a claim "arising out of" Ms. Aube's alleged

negligence or malpractice. Accordingly, in the absence of a distinct basis for the breach of contract claim, the appellants are precluded from bringing that action.

2. Special Circumstances – whether to extend the limitation period

[30] While the appellants could have submitted that special circumstances justified an extension of the limitation period, they presented no argument on this issue. See *Adler v. Wong*, *supra*; *Mazzuca v. Silvercreek Pharmacy* (2001), 56 O.R. (3d) 768 (C.A.) at para. 42.

[31] Accordingly, the motion judge was correct in dismissing the appellants' motion to add Ms. Aube.

The claim against 1520334

[32] The limitation period issue differs regarding 1520334. In my view, 1520334 is not entitled to the benefit of the *RHPA* limitation period. Rather, the claim against 1520334 is governed by the general six-year limitation period that applied at the time of the incident, since modified by the *Limitations Act, 2002*, s. 5.

[33] I turn first to a consideration of the relevant provision of the *RHPA*, which I repeat for ease of reference:

> s. 89(3) A **health profession corporation that holds or held a certificate of authorization** is not liable to any action arising out of negligence or malpractice in respect of professional services requested of, or rendered by, the corporation unless the action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the alleged negligence or malpractice is based. [Emphasis added.]

[34] On a plain reading of s. 89(3), only a health profession corporation is entitled to the benefit of the one-year limitation period. A "health profession corporation" is defined by the *RHPA*, s. 1(1) as meaning "a corporation incorporated under the *Business Corporations Act* that holds a valid certificate of authorization issued under this Act or the Code."

[35] The government enacted this legislation in 2001, which established authorized health profession corporations as vehicles for professional practice. Pharmacists, who had historically been able to practise through their own corporations, as did 1520334, were entitled to fulfill the requirements to become authorized as a health profession

corporation. Since 1520334 did not take the necessary steps to do so, it does not hold a valid certificate of authorization and is not a health profession corporation.

[36] Nonetheless, 1520334 argues that it should be entitled to the same limitation period as a health care corporation because it performs the same function as a health profession corporation. Alternatively, it argues that since 1520334 operates as a pharmacist, it should be entitled to the benefit of the same limitation period as a pharmacist.

[37] On this issue, 1520334 relies on *Goff v. Barker* (1978), 22 O.R. (2d) 43 (H.C.J.) which, contrary to the result I reach in this case, held that a pharmacy is entitled to the same limitation period as an individual pharmacist. In coming to that conclusion, Callon J. reviewed the scheme of the legislation then in place and explained:

> It is, therefore, clear that the whole scheme of the Pharmacy Act is to restrict the dispensing of drugs to pharmaceutical chemists but to allow the operation of a pharmacy by a corporation so long as the majority of its directors are registered as pharmaceutical chemists and so long as the pharmacy is under the personal supervision of and is managed by a pharmaceutical chemist.

[38] While the *Drug and Pharmacies Regulation Act*, R.S.O. 1990, c. H.4, s. 142(1), continues to provide that a corporation cannot "own or operate a pharmacy unless the majority of the directors or the corporation are pharmacists", the relevant limitation period was governed by the *RHPA* and the *Code*. That legislation provided a limitation period specific to health profession corporations, in addition to the one previously in place for pharmacists. By providing a specific limitation period, the legislature determined that only certain corporations – authorized health profession corporations – were entitled to the protection of the *RHPA*'s one-year limitation period. Presumably, it did so to encourage corporations operating in health care to apply for the requisite certificate of authorization and deliberately chose not to extend limitation protection to corporations that chose not to do so.

[39] In my view, since 1520334 is not a health profession corporation, it did not have the benefit of s. 89(3)'s one-year limitation period.

[40] However, even if 1520334 is not entitled to the benefits of a limitations defence, it argues that it should not be added as a party for another reason: the appellants cannot have a tenable cause of action against 1520334 if they have no tenable cause of action against Lee Aube. This is so, it argues, because the only tenable cause of action against 1520334 would be based on its vicarious liability for Ms. Aube and, since all parties

acknowledge Ms. Aube's role as an independent contractor, vicarious liability cannot be an issue. See *671122 Ontario Ltd. v. Sagaz Industries Inc.* [2001] S.C.R. 983.

[41] On this point, the motion judge agreed that 1520334's liability could only be based on vicarious liability. Referring to *Goff v. Barker*, the motion judge said at para. 105:

> Under Callon J.'s holding, if the pharmacist is not liable for dispensing the drug because of the intervening limitation period, the company operating the pharmacy must also be necessarily immunized because its liability could only be based on the doctrine of vicarious liability.

[42] I disagree. On the basis of the materials before this court, the appellants have a triable issue on other causes of action against 1520334 that are unrelated to their cause of action against the pharmacist. The statement of claim alleges multiple causes of action and independent acts of negligence against the pharmacy, including a pleading that 1520334 was negligent in its hiring, training, and supervision of pharmacists. As well, the appellants' material raises a possible cause of action against 1520334 in fraudulent concealment. The viability of these causes of action is best determined on the record once 1520334 is added as a party to the proceedings and pleadings are complete.

[43] For this reason, I would dismiss the appeal with respect to Lee Aube and allow the appeal granting the appellants leave to add 1520334 as a party to the 2002 proceedings.

Costs

[44] The appellants are entitled to their costs of this appeal payable by 1520334 fixed in the agreed upon amount of $5,000, all inclusive and to their costs of the motion below fixed in the amount of $3,520, all inclusive. Ms. Aube is entitled to her costs of the appeal against the appellants also fixed in the agreed upon amount of $5,000, all inclusive.

RELEASED: December 20, 2006

JL

"Susan Lang J.A."

"I agree John Laskin J.A."

"I agree J.C. MacPherson J.A."