CITATION: Hughes v. Kennedy Automation Limited, 2008 ONCA 770
DATE: 20081117
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COURT OF APPEAL FOR ONTARIO

Doherty, Cronk and Juriansz JJ.A.

BETWEEN:

Tom Hughes and 1426924 Ontario Limited

Plaintiffs
(Appellants)

and

Kennedy Automation Limited, David J. Maxwell, Kennedy Electric Holdings Limited, and RKO Automated Solutions Ltd.

Defendants

and

Charles R. MacColl and Thompson, MacColl & Stacy and Max Automated Processing Limited

Proposed Defendants
(Respondents in Appeal)

Heather C. Devine, for the appellants

Liza C. Sheard, for the respondents

Heard and released orally: November 3, 2008

On appeal from the order of Regional Senior Justice C. Stephen Glithero of the Superior Court of Justice, dated March 5, 2008.

ENDORSEMENT

[1] The plaintiffs (appellants) sought leave to amend their statement of claim to add new parties. They sought to allege a breach of fiduciary duty and negligence against the respondent law firm and an individual former partner in that law firm who unfortunately has since died. The claim arose out of an agreement by the appellants to sell certain shares to the respondents. The appellants contended that they were not paid the promised purchase price and this gave rise to the initial law suit.

[2] The respondent lawyer acted for the purchaser of the shares. That corporation, now a defendant, purchased the shares from the appellants in July 2005. He was also the corporate solicitor of the company whose shares were being sold.

[3] The respondents resisted the amendment on the basis that the claims the appellants proposed to make against them as pleaded in the draft amended statement of claim were barred by the two year limitation period set out in the *Limitations Act, 2002* (the Act).

[4] With respect to counsel for the appellants' submissions, we do not think that either ss. 14 or 15 of the Act are engaged in this case. In our view, the amendment motion turned on the application of s. 5 of the Act to the claims against the respondents as articulated in the proposed amended statement of claim.

[5] The motion judge reviewed the material filed before him on the motion. The material included the affidavit of the wife of the appellant, Mr. Hughes, and the affidavit of a lawyer in the firm of counsel who acts in these proceedings for the appellants. After reviewing the material, the motion judge stated:

> If it was necessary that the plaintiffs obtain legal advice before appreciating that they had a potential claim as against Mr. MacColl, the evidence is that they did obtain counsel prior to the expiration of the limitation period. *The affidavit material is silent as to when that counsel was engaged. One must also be mindful that section 5 requires the exercise of reasonable diligence on the part of a claimant to become aware of the fact of a loss, the identity of the person who caused it, and the appropriateness of a legal proceeding to remedy the perceived wrong*.
>
> The evidentiary record before me indicates that a lawyer was contacted in November, 2006. *There is no explanation as to*

> *why a lawyer was not contacted between the date the plaintiffs became aware of the non-payment owning under the share purchase agreement, July 31,2005, and that November, 2006 unspecified date when counsel was consulted*.
> [Emphasis added.]

[6] The motion judge obviously placed some importance on the absence of any affidavit from Mr. Hughes in respect of what he did or did not know about any claim he might have against the respondents, and the absence of any evidence as to when counsel was consulted.

[7] The motion judge concluded:

> On the evidence before me, I am satisfied that the identity of the proposed defendants, Mr. MacColl and his law firm, and the facts surrounding Mr. MacColl's involvement were all known to the plaintiffs in July, 2005. The fact that the contract drafted by Mr. MacColl was breached by reason of non-payment by the defendants became known to the plaintiffs at the end of July, 2005. The fact that Mr. MacColl acted only for the defendants and not the plaintiffs and the fact that he did not recommend or insist on independent legal advice was known to the plaintiffs in July, 2005, *and due diligence would have led them to seek legal advice as to any potential liability arising from those alleged shortcomings within a time frame well within the limitation period*.
> [Emphasis added.]

[8] In this court, the argument focused on whether the appellants, by the exercise of due diligence, should have obtained by November 2005 (two years before the claim was issued) legal advice such as to put them on notice that a proceeding against the respondents would be an appropriate course of action: see s. 5(1)(a)(iv) of the Act. As indicated above, Mr. Hughes, who presumably was in the best position to provide the relevant information, did not file any affidavit. Neither the affidavit of the wife nor the affidavit of the lawyer speak to this factual question. Section 5(2) creates a presumption that in these circumstances operates against the appellants' position:

> 5. (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[9] Having regard to the presumption in the Act and the absence of any evidence from the appellants directed specifically to the factual questions arising out of the due diligence issue, we see no basis upon which we should interfere with the decision of the motion judge.

[10] The appeal is dismissed. Costs to the respondents in the amount of $10,000, inclusive of disbursements and GST.

"Doherty J.A."
"E.A. Cronk J.A."
"R.G. Juriansz J.A."