COURT OF APPEAL FOR ONTARIO

CITATION: Collins v. Cortez, 2014 ONCA 685
DATE: 20141007
DOCKET: C58279

Weiler, Laskin and van Rensburg JJ.A.

BETWEEN

Judy Collins

Plaintiff/Appellant

and

Gerry Cortez and
State Farm Mutual Automobile Insurance Company

Defendant/Respondent

William G. Scott, for the appellant

Arthur Camporese, for the respondent

Heard: September 5, 2014

On appeal from the order of Justice Donald J. Gordon of the Superior Court of Justice, dated July 29, 2013.

van Rensburg J.A.:

[1] The appellant appeals from an order granting summary judgment and dismissing her action for damages following injuries sustained in a motor vehicle accident.

[2] The respondent asserted that the action had been commenced more than two years after the accident, and was statute-barred under the *Limitations Act, 2002* S.O. 2002, c. 24, Sched. B.

[3] The motion was determined on the basis that there was no genuine issue requiring a trial because the appellant had not pleaded the facts relevant to discoverability of her cause of action in her statement of claim. No motion for leave to amend having been served, an amendment to the pleading was denied.

[4] For the reasons that follow, I would allow the appeal, set aside the order granting summary judgment, extend the time to file a reply and grant leave to the appellant to deliver a reply with respect to when the cause of action was discovered.

[5] The motion was brought by the respondent after discoveries and, as the motion judge observed, when the action was “close to being set down for trial”. The respondent filed an affidavit relying upon the timing of the issuance of the statement of claim on September 9, 2011, more than two years after the motor vehicle accident in which he and the appellant were involved. He noted that the statement of claim failed to plead when the plaintiff discovered the cause of action. The respondent relied on the expiry of the two year limitation period under the *Limitations Act, 2002*.

[6] The appellant, in her affidavit responding to the motion, stated that, while the accident in which she had been injured took place on August 17, 2009, she had only become aware of the severity of her injuries on September 21, 2009, after an X-ray of her cervical and lumbar spine. The appellant would have a claim against the respondent for non-pecuniary loss in respect of injuries from the accident only if she met the threshold requirement that the injuries she sustained were serious and permanent as set out in s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8. Her evidence was that she had realized her injuries would be permanent after her X-ray on September 21, 2009.

[7] Instead of determining the motion based on the evidence, the motion judge granted summary judgment dismissing the claim because the appellant had not pleaded the discoverability facts in her statement of claim. He then gave effect to the presumptive limitation period of two years from the date of the accident, in accordance with s. 5(2) of the *Limitations Act, 2002*.

[8] The cases relied upon by the motion judge in arriving at that conclusion and again by the respondent in this appeal deal with motions to add third parties as defendants to the action and to amend a statement of claim, after the alleged expiry of a limitation period: see *Wong v. Adler* (2004), 70 O.R. (3d) 460 (S.C.), aff'd (2005), 76 O.R. (3d) 237 (Div. Ct.), *R.S v. A.W.T., No. 3 Corp.*, [2002] O.J. No. 5053 (S.C.), C*hesnie v. Snider* (2004), 73 O.R. (3d) 426 (S.C.) and *Parsons v. Deutscher Estate*, [2008] O.J. No. 3014 (Div. Ct.). These cases arose out of

pleadings motions. For the most part, they stand for the principle that a motion to add a new party after the alleged expiry of a limitation period should in the normal course be considered based on the allegations in the proposed amended pleading, without the need to consider an evidentiary record on the limitation issue. They do not apply here.

[9] This motion was for summary judgment dismissing a claim against an existing defendant, and not a motion to amend a claim after the expiry of a limitation period. It was a motion for judgment, not a pleadings motion.

[10] In the normal course, if a limitations defence is raised, as here, in a statement of defence, and the plaintiff relies on the discoverability principle, the material facts relevant to discoverability should be pleaded in reply. I disagree with the conclusion of the motion judge that the appellant was required to plead the facts relevant to discoverability in her statement of claim. The expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence: see *Beardsley v. Ontario*, [2001] O.J. No. 4574 (C.A.), at para. 21 and *S.(W.E.) v. P.(M.M.)* (2000), 50 O.R. (3d) 70 (C.A.), at paras. 37-38. As such, discoverability, which is relevant to the limitations defence, need not be anticipated by a plaintiff and addressed in her statement of claim: see *Huang v. Mai,* 2014 ONSC 1156, 119 O.R. (3d) 117, at para 27 and *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc*., [2012] O.J. No. 5682, at para. 116.

[11] The proper course for a summary judgment court in determining a motion based on a limitations defence is set out in *Huang*, following the approach mandated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. The court must consider the evidence in the motion record to determine whether there is a genuine issue requiring a trial, and, if so, determine whether it is in the interest of justice to use the enhanced powers under rules 20.04(2.1) and (2.2) to determine the issue without a trial.

[12] In the present case, the motion judge erred in failing to base his decision on the evidence on the motion and instead relying upon the failure of the plaintiff to plead discoverability facts in her statement of claim, which the judge described as a "fatal mistake." Again, this was a summary judgment motion, the resolution of which depended on a consideration of the evidence adduced by the parties, and not their pleadings.

[13] The respondent asserts that, even if the evidence on the motion were considered, it is insufficient to meet the requirements of s. 5(1) of the *Limitations Act, 2002.* However, at this stage the question is whether there is a genuine issue respecting discoverability requiring a trial, and not whether the limitations defence is sure to fail. In my view, the evidence of the appellant, which was not contradicted, reveals such an issue. Indeed, the motion judge observed that the date when the appellant's claim was discovered was "less than clear".

[14] I would therefore allow the appeal and set aside the order of the motion judge.

[15] The appellant's counsel sought an order from this court permitting an amendment to the statement of claim to plead the facts relevant to discoverability. As I indicated earlier, until the limitations issue is raised in defence, the plaintiff is not obliged to address discoverability. While a plaintiff may well decide to plead facts relevant to discoverability in her statement of claim, in the present case the issue is best joined through the delivery of a reply. No reply having been delivered, the appellant will have ten days from the date of this decision to deliver a reply setting out the material facts relied upon on the issue of discoverability.

[16] The parties agreed on the disposition of costs depending on the outcome of this appeal. In accordance with their agreement, the appellant is entitled to costs of the appeal fixed at $5,000 inclusive of disbursements and applicable taxes, and there will be no costs of the motion before the motion judge.

Released: OCT 7, 2014
"JL"

"K. van Rensburg J.A."
"I agree K.M. Weiler J.A."
"I agree John Laskin J.A."