CITATION: 1365 California Ltd. v. Moss Property Management Inc., 2019 ONSC 5620
COURT FILE NO.: CV-11-441746
DATE: 20190930

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1365 California Limited, 333/555 California Limited, 2211 Parkedale Limited, 2400 Parkedale Limited, 2479-2495 Parkedale Limited and Jodaville Corporation, Plaintiffs

AND:

Moss Property Management Inc. and Roy Murad, Defendants

BEFORE: Nishikawa J.

COUNSEL: *Justin Robinson*, for the Plaintiffs/Respondents

Michael Simaan, for the Proposed Defendants/Appellants

HEARD: August 7, 2019

Additional written submission received September 26, 2019

ENDORSEMENT

Overview

[1] The Appellants appeal the decision of Master McGraw dated April 16, 2019 (the "Decision") granting the Plaintiffs leave to amend their Statement of Claim to add Mere Investments Inc., Media 2 Go International Inc., Monica Murad, Aaron Murad, Noah Murad, Moss Development Ltd., John Doe and John Doe Ltd. (together, the "Proposed Defendants") and adding claims for unjust enrichment, conversion, and tracing remedies (the "New Claims"): *1365 California Limited v. Moss Property Management Inc.*, 2019 ONSC 2411.

[2] The issue in this appeal is whether the Master erred in granting leave to amend to add the Proposed Defendants after the expiry of the applicable limitations period.

[3] For the reasons that follow, I allow the Appellants' appeal.

Procedural Background

[4] The factual and procedural background of this proceeding are described in detail in the Master's Decision and will be dealt with very briefly here. The Respondents are the owners of six retail commercial properties located in Belleville, Ontario (the "Properties"). The Defendant, Moss Property Management Inc. ("Moss") was the property manager for the Properties. The

Defendant, Roy Murad ("Roy"), is the sole director of Moss. In December 2011, the Respondents commenced an action against the Defendants alleging that, among other things, they misappropriated rents and withheld records while acting as property manager for the Properties.

[5] The Proposed Defendants are individuals or entities related to Moss or Roy. Monica Murad is Roy's spouse. Aaron and Noah Murad are Roy's sons. Mere Investments Inc. ("Mere"), Media 2 Go International Inc., and Moss Development Ltd. ("MDL") are entities owned and/or controlled by Roy.

[6] In November 12, 2014, the parties agreed to jointly retain a forensic accountant to conduct a forensic audit of monies received in relation to the Properties to ascertain all proper expenses paid for the benefit of the Properties in order to determine any monies that were unaccounted for.

[7] The forensic auditor, Smith Forensic Inc. ("SFI") delivered a draft initial report on October 9, 2015 (the "First Report") which stated that payments to related parties totaled $1,730,615, of which $1,624,560 was paid to Mere. SFI requested further documents and information, which the Defendants refused to produce.

[8] On September 30, 2016, Kristjanson J. ordered Moss, Roy, Mere and/or MDL to produce documents requested by SFI. HSBC Bank of Canada ("HSBC") was also ordered to produce copies of cheques and related documents from accounts held by Mere and MDL.

[9] On November 4, 2016, HSBC provided the Respondents' counsel with the requested documents, which were then provided to SFI and the Appellants' counsel. The documents reveal payments to the Proposed Defendants from accounts held by the Defendants to receive rental payments for the Properties.

[10] On December 5, 2017, SFI provided its second report (the "Second Report") which stated that $912,000 in disbursements were unaccounted for. The Second Report further stated that while $1,198,679 of the payments to Mere were referred to as relating to monthly budget charges, no supporting documentation was provided.

[11] The Respondents brought the motion for leave to amend the Statement of Claim on December 18, 2018.

The Master's Decision

[12] In granting leave to amend to add the Proposed Defendants, the Master found that the Respondents did not have actual knowledge of the claims against the Proposed Defendants until they received the Second Report in December 2018 (Decision, at para. 36).

[13] On the question of reasonable diligence, Master McGraw found that there was sufficient evidence to meet the low evidentiary threshold to explain why the Respondents could not have discovered the New Claims until after receiving the Second Report. (Decision, at para. 40). The

Master rejected the Proposed Defendants' arguments that the Respondents could have with reasonable diligence discovered the New Claims sooner, specifically, when they received the First Report or when they received the HSBC documents. (Decision, at para. 42).

Analysis

The Standard of Review

[14] An appeal of a Master's decision is not a hearing *de novo.* The parties agree that the Decision will only be interfered with if the Master made an error of law, exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error: *Zeitoun v. Economical Insurance Group*, [2008] 236 O.A.C. 76 (Div. Ct.), [2008] O.J. No. 1771, at paras. 40-41, aff'd 2009 ONCA 415.

[15] The Appellants submit that the Master committed a palpable and overriding error in granting leave to amend to add the Proposed Defendants because the Respondents failed to rebut the presumption under s. 5(2) of the *Limitations Act, 2002*, S.O. 2002, C.24, Sched. B (the "*Limitations Act*") that, unless the contrary is proved, the facts underlying the proposed claim were known on the date the acts or omissions took place.

Actual Knowledge

[16] The Master conducted a thorough analysis of the applicable rules and principles, and correctly stated the law in respect of leave to amend to add a party or claim after the expiry of a limitation period. (Decision, at paras. 16-23). The Master recognized the statutory presumption created by s. 5(2) of the *Limitations Act.* (Decision, at paras. 24-25).

[17] In the context of a motion for leave to amend, plaintiffs bear the burden of demonstrating that they neither knew nor ought to have known that they had claims against the proposed defendants until a point in time less than two years before the motion was brought: *Sealed Air (Canada) Co. v. ABB Inc.*, 2012 ONSC 1746, at para. 12. In this case, that would be before December 16, 2016.

[18] Perhaps due in part to the manner in which the motion was framed by the parties, the Master identified the first issue on the motion as: "whether the Plaintiffs had actual knowledge of the New Claims as against Mere as of October 9, 2015" when they received the First Report. (Decision, at para. 32). After recognizing the statutory presumption under s. 5(2) of the *Limitations Act*, the Master found "no suggestion that the plaintiffs had actual knowledge of the New Claims when they occurred…." The Master concluded that the Plaintiffs did not have actual knowledge of the New Claims as against Mere as a result of receiving the First Report. He further concluded that "in rebutting the presumption of actual knowledge, the Plaintiffs have demonstrated that they did not have actual knowledge of the New Claims as against Mere until they received the Second Report on December 7, 2017…[.]" (Decision, at para. 36).

[19] With respect, the Master's finding that the Respondents did not have actual knowledge of the claims against the Proposed Defendants until they received the Second Report is not supported by the evidence.

[20] In support of their motion for leave to amend, the Respondents relied upon the affidavit of Mark Russell (the "Russell Affidavit"), an associate at the firm representing the Respondents in this litigation but who is not involved in the file. The Russell Affidavit gives a chronology of the steps in the proceeding, as described above. It does not state when the Respondents had actual knowledge of the facts underlying the New Claims against the Proposed Defendants. Nor does the Russell Affidavit state that the Respondents did not know that they had claims against the Proposed Defendants until the Second Report was received, or at any time before December 16, 2016. The affidavit is silent as to what the Respondents knew and when they knew it.

[21] On cross-examination, Mr. Russell admitted that he did not know what the Respondents knew, and that he did not know whether they knew more or less than he did. Mr. Russell stated that he had not spoken to the Respondents and repeatedly stated that he did not have carriage of the file.

[22] Since the Respondents bear the burden of showing that they lacked the requisite knowledge as of two years before the motion was brought, the "critical issue" is "what the plaintiff or its agents (chiefly its lawyers) knew or ought to have known about the facts underlying the [proposed claim.]" *Sealed Air*, at para. 18.

[23] In *Nicholson v. McDougall*, 2017 ONSC 7000, Matheson J. considered a similar issue on an appeal of a decision of a Deputy Judge of the Small Claims Court. Matheson J. held that the Deputy Judge erred in failing to consider the absence of any direct evidence from the respondent or his agents, which was key given his burden to prove that he did not know about the matters referred to in s. 5(1) of the *Limitations Act*. Similarly, in *Sealed Air*, Master Hawkins found that a lawyer's affidavit that stated "nothing about what the plaintiff knew as of [two years before this motion was brought]" was insufficient to rebut the statutory presumption.

[24] In determining whether the Respondents rebutted the statutory presumption, the issue was not, as the Master stated, whether the Respondents had actual knowledge as of the date of the First Report, but whether they had actual knowledge at any time before December 16, 2016. At no time did the Respondents state that they did not know facts underlying the New Claims when the acts took place. The Respondents adduced no evidence as to when they knew those facts. The lack of any "suggestion" that the Respondents knew of the claims when they occurred was not sufficient to rebut the presumption. In the absence of any evidence from the Respondents as to when they had actual knowledge, the Master committed a palpable and overriding error in finding that they had no knowledge until they received the Second Report.

[25] Without any evidence on the Respondents' knowledge, it could not be inferred that the Respondents did not have actual knowledge until they received the Second Report. A chronology of steps taken in the litigation, without more, is insufficient to draw any inference as to the state of the Respondents' knowledge in this case.

[26] The Respondents' failure to rebut the statutory presumption of knowledge under s. 5(2), means that, pursuant to s. 5(1)(a), the claim was discoverable when the act or omission took place. The two-year limitation period would run from that date. The allegations in the Statement of Claim end in November 2011. Other than to give the chronology leading up to the delivery of the Second Report, the Amended Statement of Claim does not allege specific acts or dates in relation to the Proposed Defendants. Accordingly, the limitation period expired in November 2013. Pursuant to s. 21(1) of *the Limitations* Act, if a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

Objective Knowledge

[27] Based on my conclusion above, I need not consider the issue of whether the Master erred in finding that the Respondents provided a reasonable explanation as to why they could not have, with reasonable diligence, discovered the New Claims until they received the Second Report.

[28] I note that on this issue as well, the Respondents provided no evidence. As the Master recognized, the Russell Affidavit contained no explanation as to why the Respondents provided the HSBC documents to SFI and waited for the Second Report. No further evidence to support an explanation was provided on cross-examination. The "only explanation as to why the Plaintiffs waited for the Second Report is set out in their Factum… where they state that until the forensic audit could trace the unaccounted for funds, the Plaintiffs could not ascertain if it was appropriate to bring the New Claims or whether the funds had been used to pay legitimate expenses related to the Properties." (Decision, at para. 39).

[29] Notwithstanding the low evidentiary threshold and the generous, contextual reading to be given to an explanation as to why a claim could not be discovered (*Mancinelli v. Royal Bank of Canada*, 2018 ONCA 544, at para. 24), a finding of reasonable diligence cannot be made in the absence of evidence. In *Mancinelli*, the Court of Appeal stated that "when a person opposes a plaintiff's motion to add it as a defendant on the basis of the apparent expiry of a limitation period, the motion judge is entitled to assess the record to determine whether, as a question of fact, there is a reasonable explanation **on proper evidence** as to why the plaintiff could not have discovered its claim through the exercise of reasonable diligence." (*Mancinelli*, at para. 31, emphasis added). The Respondents' factum on the motion does not fill the evidentiary gap.

[30] The Respondents failed to meet even the low evidentiary threshold. The Respondents offered no explanation as to why New Claims could not have been discovered despite the steps taken. Some explanation was required when on their face, the HSBC documents showed payments to the Proposed Defendants and the First Report, received in 2014, stated that over $1.6 million had been paid to Mere.

[31] Accordingly, the Master's finding that the Respondents provided a reasonable explanation as to why they could not have, with reasonable diligence, discovered the New Claims until they received the Second Report is not supported by the evidence, and constitutes a palpable and overriding error.

Leave to Bring a Motion

[32] The Appellants further argued that the Master erred in granting the motion where the Respondents failed to seek leave to bring a motion after the matter had been set down for trial, as required by r. 48.04(1).

[33] It is not necessary for me to consider this ground for appeal, since I have found that the appeal should be allowed. It appears from the Decision that while the Appellants raised this issue in their factum, the Master did not understand the Appellants to be relying upon this ground to oppose the motion, and in any event, considered it appropriate to grant leave. (Decision, at para. 30). Needless to say, the requirement for leave is not a mere technicality.

Conclusion

[34] Based on the foregoing, I grant the Appellants' appeal. The Respondents' motion for leave to amend the Statement of Claim is dismissed without prejudice to bring a motion on a fresh record by December 6, 2019.

[35] The parties requested an opportunity to make submissions on costs depending upon the outcome of this appeal and because costs of the motion had not yet been determined.

[36] If the parties do not reach an agreement on costs of this appeal, I will receive costs submissions from the Appellant, including a costs outline, within two weeks of the release of these reasons. The Respondents' responding cost submission are due one week later. Costs submissions are not to exceed five pages in length. If costs submissions are not received within this three-week time frame, they will be presumed to have been resolved between the parties.

Nishikawa J.

Date: September 30, 2019