2019 ONCA 66
Ontario Court of Appeal

Presley v. Van Dusen

2019 CarswellOnt 1091, 2019 ONCA 66

Janice Presley and Robert Frederick (Plaintiffs / Appellants) and Jack Van Dusen a.k.a. Jack Van Dusen Excavating (Defendant / Respondent) and Leeds, Grenville and Lanark District Health Unit (Defendant / Respondent)

Robert J. Sharpe J.A., R.G. Juriansz J.A., and L.B. Roberts J.A.

Heard: January 14, 2019
Judgment: January 30, 2019
Docket: CA C65573

Counsel: Jonathan Chen, for Appellants
Michael D. Swindley, Zach Flemming-Giannotti, for Respondent, Jack Van Dusen a.k.a. Jack Van Dusen Excavating
Alex Robineau, for Respondent, Leeds, Grenville and Lanark District Health Unit

Subject: Civil Practice and Procedure; Torts
Headnote
Civil practice and procedure

On appeal from the order of Justice R. Ryan Bell of the Divisional Court, dated November 8, 2017, with reasons reported at 2017 ONSC 6681, 81 C.L.R. (4th) 214, affirming the order of Deputy Judge Harry R. Preston of the Superior Court of Justice, Small Claims Court, dated February 2, 2017.

***Robert J. Sharpe J.A.*:**

1 This is an appeal, with leave, from the dismissal of an appeal from the dismissal of a Small Claims Court action for negligent design, installation, approval and inspection of a septic system. The trial judge dismissed the action on the ground that it was statute barred under the *Limitations Act, 2002*. S.O. 2002, c. 24, Sched. B. The central issue is whether the trial judge and the Divisional Court judge on appeal to failed to conduct a proper analysis under s. 5(1)(a)(iv) of the *Limitations Act* of when, having regard to the nature of the injury, loss or damage, the appellants knew or should have known that a legal proceeding would be an appropriate means to seek to remedy it.

FACTS

2 The appellant homeowners, Janice Presley and Robert Frederick, retained the respondent Jack Van Dusen to install a septic system in 2010. The respondent Leeds, Grenville and Lanark District Health Unit approved the proposed septic system that same year. There were initial problems with the operation of the system. When smell began to emanate from the system in the spring of 2011, the appellants called Van Dusen and he appeared to fix the problem by replacing a failed sewage pump. The appellants encountered further problems with smell in the spring of 2012. Van Dusen advised the appellants that the cause was an unusually wet year and that many property owners were having the same problem. In the spring of 2013 there was both smell and effluent from the system although it was otherwise functioning without issue. Van Dusen inspected the system and advised the appellants that the problem could be remedied by applying a load of sand to a portion of the septic bed. He assured them that he would return to perform that work.

3 The appellants had on-going discussions with Van Dusen regarding the sand. These discussions led them to believe that he would come with the sand to fix the problem. Van Dusen came with sand in the fall of 2013 but the appellants were not at home and he was unable to access the property to deposit the sand. The appellant Frederick testified that Van Dusen "[kept] stating he will fix the issue". He failed to come again in the spring of 2014 because of excessive mud on the appellants' property that made depositing the sand difficult. He did not come during the winter of 2014 although the appellants had several discussions with him about coming and plowed the snow to give him access to the property.

4 In April 2015 the appellant Frederick called the respondent Health Unit. This led to an inspection by the supplier of the septic system and Van Dusen. Van Dusen took samples of the effluent. Ultimately, on June 1, 2015, the Health Unit condemned the system and issued an Order to Comply requiring the appellants to replace it.

THE TRIAL JUDGE'S DECISION

5 The appellants commenced this Small Claims Court action against Van Dusen in August 2015. The appellants added the Health Unit as a defendant in January 2016. At trial, both appellants testified, documentary evidence was introduced and, by agreement, the trial judge determined the limitations issue on the basis of the record as it stood at that point.

6 The issue to be determined was when the appellants discovered their claims against Van Dusen and the Health Unit within the meaning of the *Limitations Act*.

7 The *Limitations Act*, s. 5 provides:

> **Discovery**
>
> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**
>
> (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.

8 The Small Claims Court trial judge found that by the spring of 2013 when there was smell and effluent coming from the septic system "any reasonable thinking individual or homeowner" would know from the smells and the "lack of additional work by . . . Van Dusen" that (i) the injury, loss or damage had occurred; (ii) the injury, loss or damage was caused or contributed to by an act or omission; and (iii) the act or omission was that of Van Dusen and perhaps the Health Unit. The trial judge accordingly made a finding under s. 5(1)(b) that a reasonable person would have discovered the claim by spring 2013.

9 The trial judge did not consider the s. 5(1)(a)(iv) criterion as to when the appellants did know or should have known that a proceeding would be an appropriate means to remedy their claim. He gave the following reason for not considering s. 5(1)(a)(iv): "It is not necessary for me to make any determination under that subsection and I do not do so as I only have to find the earliest date and I have no difficulty, as I have said, in finding that that date was the spring of 2013."

10 The trial judge also found that there was insufficient evidence to rebut the presumption under s. 5(2) that the plaintiff knew all the matters referred to in s. 5(1)(a), again without any consideration of s. 5(1)(a)(iv).

THE DIVISIONAL COURT'S DECISION

11 The Divisional Court judge upheld the trial judge's decision. She rejected the contention that the trial judge erred by failing to consider s. 5(1)(a)(iv). In her view, having made the determination under s. 5(1)(b) that a reasonable person ought to have known the matters set out in s. 5(1)(a) in the spring of 2013, "there was no requirement for the [trial judge] to make an explicit finding as to what [the appellants] actually knew in relation to subsection 5(1)(a)(iv)." The Divisional Court judge also concluded that the trial judge had correctly determined that the appellants had not rebutted the statutory presumption in s. 5(2).

ANALYSIS

(1) Did the trial judge and the Divisional Court judge err in law by failing to conduct a proper analysis under s. 5(1)(a)(iv)?

12 The appellants do not appeal the trial judge's findings that the elements of s. 5(1)(a)(i), (ii) and (iii) were satisfied. Their appeal rests on the submission that both the trial judge and the Divisional Court judge erred in law by failing to conduct a proper analysis as required by s. 5(1)(a)(iv).

13 I agree with that submission.

14 The analysis of both the trial judge and the Divisional Court judge of ss. 5(1)(a)(iv), 5(1)(b) and s. 5(2) of the *Limitations Act* is flawed. The trial judge explicitly stated that he was not considering s. 5(1)(a)(iv). A determination under s. 5(1)(b) as to the date a reasonable person would have discovered the claim requires consideration of all four "matters referred to in clause (a)". Similarly, the finding that there was insufficient evidence to rebut the presumption under s. 5(2) that the plaintiff knew all the matters referred to in s. 5(1)(a) cannot stand as there was no consideration of s. 5(1)(a)(iv).

15 This court has repeatedly held that consideration of when a proceeding was an appropriate means to remedy a claim is an essential element in the discoverability analysis and that failure to consider s. 5(1)(a)(iv) is an error of law: *Gillham v. Lake of Bays (Township)*, 2018 ONCA 667, 425 D.L.R. (4th) 178, at paras. 33-34; *Kudwah v. Centennial Apartments*, 2012 ONCA 777, at paras. 1-2; *Har Jo Management Services Canada Ltd. v. York (Regional Municipality)*, 2018 ONCA 469, 91 R.P.R. (5th) 1, at paras. 21 and 35.

16 As neither the trial judge nor the Divisional Court judge considered the application of s. 5(1)(a)(iv), it is appropriate for this court to do so.

(2) Was it appropriate for the appellants to delay bringing an action against the respondent Van Dusen?

17 Subsection 5(1)(a)(iv) serves to deter needless litigation: *407 ETR Concession Co. v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762, at para. 48, leave to appeal refused, [2016] S.C.C.A. No. 509. If a legal proceeding is inappropriate, the start date for the commencement of the limitation period is postponed beyond the date on which the constitutive elements of the claim are discovered: *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, at paras. 17-18.

18 In *Presidential MSH*, which I note, in fairness to the trial judge, was decided after the trial in this case, Pardu J.A. reviewed the jurisprudence and distilled and extracted two guiding principles on the effect of assistance by a defendant to eliminate the loss.

19 First, at para. 20:

> [A] legal proceeding against an expert professional may not be appropriate if the claim arose out of the professional's alleged wrongdoing but may be resolved by the professional himself or herself without recourse to the courts, rendering the proceeding unnecessary.

20 Second, at para. 26:

> Resort to legal action may be "inappropriate" in cases where the plaintiff is relying on the superior knowledge and expertise of the defendant, which often, although not exclusively, occurs in a professional relationship. Conversely, the mere existence of such a relationship may not be enough to render legal proceedings inappropriate, particularly where the defendant, to the knowledge of the plaintiff, is not engaged in good faith efforts to right the wrong it caused. The defendant's ameliorative efforts and the plaintiff's reasonable reliance on such efforts to remedy its loss are what may render the proceeding premature.

21 These principles are applicable to the facts of this case. Van Dusen is licenced to install septic systems. The appellants contracted with him because of his special training and expertise. While the respondents argue he may not qualify as "an expert professional", there can be no question he did have expertise upon which the appellants reasonably relied.

22 Moreover, reliance on superior knowledge and expertise sufficient to delay commencing proceedings is not restricted to strictly professional relationships: *Presidential*, at para. 26. I acknowledge that the previous cases where this court has made a finding that it was reasonable for the plaintiff to rely on the defendant's superior knowledge and expertise have concerned defendants belonging to traditional expert professions. For instance, *Brown v. Baum*, 2016 ONCA 325, 397 D.L.R. (4th) 161, involved a physician, *Chelli-Greco v. Rizk*, 2016 ONCA 489, involved a dentist, and *Presidential MSH* involved an accountant. However, recent Superior Court decisions have applied the superior knowledge and expertise prong of *Presidential MSH* to persons who are members of non-traditional professions or who are not professionals at all. For instance, in *YESCO Franchising LLC v. 2261116 Ontario Inc.*, 2017 ONSC 4273, the court found that s. 5(1)(a)(iv) applied in a franchisor-franchisee relationship where the franchisees relied on the franchisor's superior knowledge and expertise, even though the franchisor was not a member of an expert profession. Similarly, in *Barrs v. Trapeze Capital Corp.*, 2017 ONSC 5466, aff'd 2019 ONSC 67 (Div. Ct.), the Superior Court and the Divisional Court found that s. 5(1)(a)(iv) applied to investors who relied on the superior knowledge and expertise of their investment portfolio managers.

23 Van Dusen initially attempted to fix the problem with the appellants' septic system by replacing a pump. He then assured the appellants that the problem could be remedied with a load of sand. He also assured them that he would attend at their property to fix the problem. While the appellants might be criticized for not being more insistent that Van Dusen fulfill this assurance more promptly, the evidence establishes that they were engaged in ongoing discussions with him and took actions to enable him to access the property. He continued to assure them that the problem could be readily fixed and that he would fix it. The appellants reasonably relied on Van Dusen's assurances. These assurances led the appellants to the reasonable belief that the problem could and would be remedied without cost and without any need to have recourse to the courts. Section 5(1)(b) is satisfied.

24 I do not agree with the contention that there was no evidence to rebut the presumption under s. 5(2). The threshold to displace the presumption in s. 5(2) is relatively low: *Miaskowski v. Persaud*, 2015 ONCA 758, 393 D.L.R. (4th) 237, at para. 28. The appellant Frederick testified as to what Van Dusen told him and that he relied on Van Dusen's assurance that the problem with the septic system was readily fixable and that Van Dusen would fix it. The trial judge did not consider this evidence and did not consider the s. 5(1)(a)(iv) factor when applying the s. 5(2) presumption. As the evidence of the appellant Frederick was uncontradicted, I consider that it is sufficient to rebut the presumption under s. 5(2).

25 The situation here is distinguishable from that in *Sampson v. Empire (Binbrook Estates) Ltd*, 2016 ONSC 5730, where the court held that ongoing communications, investigations or negotiations do not postpone the commencement of the limitation period. That principle applies where it is known that legal proceedings are appropriate and the issue is whether or not the claim can be settled. In cases like this one that fall under s. 5(1)(a)(iv), the plaintiffs were making efforts not to settle a known claim but rather to remedy the problem so as to make a claim and litigation unnecessary. Moreover, I agree with the appellants that the statement in *Sampson*, at para. 44, that "[t]he fact that a defendant assists in attempting to rectify a problem does not postpone the running of the limitation period" must now be read in the light of *Presidential MSH* and the other cases I have discussed dealing with s. 5(1)(a)(iv).

26 In my view, the facts of this case bring it within the category of cases contemplated by s. 5(1)(a)(iv). I am satisfied that in the circumstances of this case, the appellants did not know, and that, as required under s. 5(1)(b), a person in their situation would not reasonably have known, that a proceeding would be an appropriate means to seek a remedy until, at the earliest, the winter of 2014. There is evidence they still reasonably expected Van Dusen to come up to this point. There were discussions in the spring of 2014 regarding excessive mud that prevented Van Dusen from doing the remedial work, and in the winter of 2014 the appellants ploughed snow to give Van Dusen access.

27 As the action against Van Dusen was commenced in August 2015, it was well within the prescribed two-year period and was not statute barred.

(3) Was it appropriate for the appellants to delay bringing an action against the respondent Health Unit?

28 The Heath Unit submits that, as the appellants had no communications with the Health Unit until the spring of 2015 and the Health Unit was not engaging in any ameliorative efforts, the s. 5(1)(a)(iv) analysis of the timing of a claim against Van Dusen has no application to the appellants' claim against it. The Health Unit argues that *Presidential MSH* makes it clear that ameliorative efforts only delay the running of the limitation period against the potential wrongdoer who is performing them, not against other potential wrongdoers.

29 I disagree. Under the *Limitations Act*, the discoverability issue is decided on the basis of what the plaintiff knew or ought to have known. It is not decided on the basis of fault or who is responsible for any gap in the plaintiff's knowledge. I have found that the appellants did not know that a proceeding against Van Dusen was an appropriate remedy until the spring. If a proceeding against Van Dusen was not appropriate until the appellants realized that the problem with their septic system was more serious than Van Dusen had led them to believe and that he was unwilling or unable to fix it, I fail to see how they could have known that a proceeding was appropriate against the Health Unit at an earlier date. *Presidential MSH* does not assist the Health Unit because it concerned only a single potential wrongdoer who was performing ameliorative efforts. Pardu J.A. did not make any pronouncement about a situation involving multiple potential wrongdoers where only one of them was performing ameliorative efforts, as this situation was not before her.

30 This interpretation is consistent with the purpose of s. 5(1)(a)(iv) this court identified in *407 ETR*, at para. 48, namely to deter needless litigation. The interpretation the respondent Health Unit urges upon us would encourage needless litigation. On the Health Unit's interpretation, in order to avoid having their claim be limitations-barred, the appellants would have had to commence a claim against the Health Unit at a time when they reasonably believed that the problem was readily fixable and Van Dusen was going to fix it.

31 The situation in this case is distinguishable from the case in which a plaintiff argues that an ongoing legal proceeding against one defendant for a particular wrong makes it inappropriate to commence a legal proceeding against another defendant for the same wrong. In *Tapak v. Non-Marine Underwriters, Lloyd's of London*, 2018 ONCA 168, 76 C.C.L.I. (5th) 197, leave to appeal refused, [2018] S.C.C.A. No. 157, this court held that "s. 5(1)(a)(iv) is not intended to be used to parse claims as between different defendants and thus permit one defendant to be pursued before turning to another defendant": para. 13. In my view, the principle in *Tapak* does not apply here because the appellants do not assert that it was appropriate for them to delay an action against the respondent Health Unit until they pursued legal claims against

the respondent Van Dusen. Instead, the appellants argue that it was appropriate for them to delay bringing a claim against the Health Unit until it became clear that Van Dusen would not fix a problem he described as readily fixable. Once it became clear that Van Dusen could not or would not fix the problem, it was appropriate for the appellants to bring a claim against both Van Dusen and the Health Unit. The appellants added the respondent Health Unit within the two-year period that I have found commenced in winter 2014. Accordingly, the claim against the Health Unit is not limitations barred.

CONCLUSION

32 Accordingly, I would allow the appeal and remit the matter to the Small Claims Court for determination on the merits against both respondents.

33 The appellants are entitled to their costs of the appeal fixed at $15,000 inclusive of disbursements and taxes. The Divisional Court's costs order in favour of the respondents should be set aside and the appellants are entitled to costs of that appeal in the same amount. The costs of the Small Claims Court trial should be reserved to the Small Claims Court on the new trial.

***R.G. Juriansz J.A.*:**

I agree.

***L.B. Roberts J.A.*:**

I agree.

End of Document