COURT OF APPEAL FOR ONTARIO

CITATION: Carleton Condominium Corporation No. 476 v. Wong, 2020 ONCA 263
DATE: April 22, 2020
DOCKET: C67296

Paciocco, Zarnett and Thorburn JJ.A.

BETWEEN

Carleton Condominium Corporation No. 476

Plaintiff (Respondent)

and

Newton Wong

Defendant (Appellant)

Newton Wong, acting in person

Cheryll Wood, for the respondent

Heard: In writing

On appeal from the order/judgment of Justice Marc R. Labrosse of the Superior Court of Justice, dated July 10, 2019, with reasons reported at 2019 ONSC 4207.

REASONS FOR DECISION

[1] The motion judge granted summary judgment against the appellant, Newton Wong, in favour of the respondent, Carleton Condominium Corp. No. 476. He also dismissed the appellant's counterclaim against the respondent.

[2] The summary judgment secured by the respondent relates to common expense arrears that the motion judge found the appellant owed the respondent, pertaining to a residential condominium unit owned by the appellant. The motion judge found that the appellant received timely written notice that a certificate of lien would be registered relating to those arrears, and that the lien the respondent subsequently registered was valid, and he gave judgment accordingly.

[3] In the appellant's dismissed counterclaim, he claimed that the respondent was vicariously liable for damages caused by the negligence of its employee, Mr. Ben Laurin, relating to Mr. Laurin's management of the rental of the condominium unit on the appellant's behalf.

[4] The appellant's appeal from these decisions was ordered to be heard in writing. The appellant argues that the motion judge:

A. Erred in interpreting the legislative provisions that govern the relevant notice period relating to the registration of a lien; in finding that the notice period had been met; and in finding that the lien was valid;

B. Erred in finding that the counterclaim was statute barred; and in finding that there was no genuine issue requiring a trial on that issue; and

C. Erred in finding that in any event there was no genuine issue requiring a trial relating to the appellant's assertion that the respondent had vicarious liability for the activities of Mr. Laurin.

[5] In supplementary written argument, the appellant maintains that the lien ordered by the motion judge should not include costs incurred by the respondent in defending the counterclaim and argues that the legal costs included in the lien are excessive, particularly the rate of interest sought to be imposed.

[6] We do not accept any of the grounds of appeal raised.

ANALYSIS

A. THE LIEN NOTICE PERIOD

[7] The motion judge found that the written notice of lien was sent by registered mail on January 21, 2014, and that the certificate of lien was registered on January 31, 2014. We do not accept the appellant's contention that the motion judge misconstrued the respondent's evidence in finding that the notice of lien was sent on January 21, 2014. The motion judge committed no palpable and overriding error in accepting the respondent's evidence to that effect, notwithstanding that the respondent's affiant did not have personal knowledge of this fact. The affiant was entitled to rely on her information and

belief but, more importantly, her evidence was supported by an archived letter in the respondent's files, which was before the motion judge. Moreover, the appellant presented no evidence to the contrary.

[8] The appellant argues that the motion judge erred in applying legislation that defines the required notice period. Again, we disagree. The principal provision is found in *Condominium Act*, *1998,* S.O. 1998 c. 19, which provides:

> **85** (4) At least 10 days before the date a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

[9] The motion judge held that *Legislation Act*, *2006*, S.O. 2006, c. 21, s. 89(3), governed the calculation of the notice period, and he relied on this section in calculating the notice period. Section 89(3) provides:

> **89** (3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days.

[10] By applying only s. 89(3), the motion judge excluded from the notice period the day the notice was sent, and included the date the lien was registered, leaving ten days of notice, thereby satisfying s. 85(4) of the *Condominium Act*.

[11] The appellant now argues that this was wrong, and that both ss. 89(3) and 89(5) of the *Legislation Act* should have been applied. Section 89(5) provides:

> **89** (5) A period of time described as beginning before or after a specified day excludes that day.

[12] The appellant contends that had s. 89(5) also been applied along with s. 89(3), as it should have been, the motion judge would have been required to exclude, as well, the day the certificate of lien was registered, leaving an insufficient notice period of 9 days.

[13] We do not accept the appellant's position that both ss. 89(3) and 89(5) of the *Legislation Act* apply. That is impossible since s. 89(3) provides expressly that the day on which the second event happens, ostensibly in this case the registration of the certificate of lien, is to be included, and s. 89(5) provides that the "specified day", also ostensibly the registration of the certificate of lien, is to be excluded. It is therefore impossible for both sections to operate together.

[14] The motion judge was correct to apply only s. 89(3) of the *Legislation Act*. Section 85(4) of the *Condominium Act* describes the period between two events that must occur for a condominium corporation to obtain the full benefit of the lien contemplated in s. 85 of that Act. Section 85(4) of the *Condominium Act* contemplates that the corporation must (1) give notice of the lien, and (2) register a certificate of lien. It also describes the minimum number of days that must elapse between the two actions. As such, it is appropriate to interpret the notice provision in s. 85(4) of the *Condominium Act* as excluding the giving of notice and including the registration of the certificate of lien in accordance with s. 89(3) of the *Legislation Act*.

[15] The appellant argues that since s. 85(4) of the *Condominium Act* employs the phrase “before the day a certificate of lien is registered”, s. 85(4) of the *Condominium Act* is brought within s. 89(5) of the *Legislation Act*. We do not agree. The use of the word “before” in describing the period that must pass prior to the second event does not change the fact that s. 85(4) of the *Condominium Act* does not specify a date. It describes a number of days between two events, within the meaning of s. 89(3) of the *Legislation Act*. The word “before” is a common way of describing the correlation between two events separated by a period of time; providing that one of two described events must happen “before” the other cannot, on its own, oust the application of s. 89(3) of the *Legislation* Act, and require the application of s. 89(5) of the *Legislation Act*.

[16] In supplementary written argument, the appellant seeks to invoke the common law principle of construction that “the use of the words ‘at least’ in reference to a notice period should be interpreted as a reference to clear days”, in this case, requiring at least ten clear days between the giving of written notice and registration of the certificate of lien, respectively: *Universal Showcase Ltd. v. U.S.W.A.*, [2001] O.J. No. 2570 (S.C.), at para. 5; see also *Ashton v.* Powers (1922), 67 D.L.R. 222 (Ont. S.C.), at 224. This common law principle does not apply. It has been ousted by s. 89(3) of the *Legislation Act*, which states that this section applies “even if the reference is to ‘at least’ or ‘not less than’ a number of

days” (emphasis added). Indeed, language in r. 3.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that is virtually identical to s. 85(4) of the *Condominium Act* has been noted to be a “departure” from the common law principle: see *Universal Showcase*, at para. 6. Nor does the federal *Interpretation* Act, R.S.C., 1985, c. I-21, s. 27, assist in interpreting the provincial *Condominium Act*.

[17] Finally, the appellant argues that the trial judge erred in failing to apply r. 16.06(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides that service by mail is effective on the fifth day after the document is mailed. The appellant seeks to rely on this rule of civil procedure in support of his claim that the notice provided was inadequate. The *Rules of Civil Procedure* do not apply to the notice required by the *Condominium Act*, s. 85(4). Rule 1.02(1) makes clear that those rules apply in “civil proceedings”. The notice provided for in the *Condominium Act*, s. 85(4), is not part of a civil proceeding. Moreover, in this case, Carleton Condominium Corporation No. 476 By-Law 1 stipulates in Article IX(1) that notice is deemed to have been given when deposited in a post office or public letter box. The motion judge correctly rejected the appellant’s attempt to rely on r. 16.06(2) to extend the notice period.

[18] The motion judge did not err in granting summary judgment relating to the respondent’s action and in ordering the relief he did.

B. THE LIMITATION PERIOD

[19] The appellant argues that the motion judge erred in finding that the counterclaim was statute barred and that there was no genuine issue requiring a trial in respect of the limitation period. The essence of the appellant's arguments is his contention that the motion judge erred in relying on his fact-finding power under r. 20.04(2.1) to find that the applicable two-year limitation period had expired prior to the issuance of the counterclaim on May 27, 2016. In particular, he contends that the motion judge had no basis for finding that the affidavit of the appellant's assistant, Ms. Lum, did not credibly assert that Mr. Laurin's negligence occurred and was discovered in the fall of 2014, within the limitation period. He also argues that the motion judge should not have relied on the manifestly uncertain answers he provided during his own examination for discovery. Specifically, during his examination for discovery the appellant linked the timing of Mr. Laurin's negligence to the period prior to the death of Mr. Laurin's wife, which occurred in 2012; those answers, if true, would have rendered the counterclaim statute barred.

[20] We do not accept this ground of appeal. The enhanced fact-finding powers available under r. 20.04(.2.1) are presumptively available and may be used unless it is in the interest of justice for the fact-finding power to be exercised only at trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 45. We see

no palpable and overriding error in the motion judge's decision to use his enhanced fact-finding powers in granting summary judgment. The motion judge called the relevant factual findings "unmistakable", and with good reason. The Lum affidavit, which was devoid of detail and which offered an estimate that the meeting with Mr. Laurin was in or about the Fall of 2014, was contradicted by the appellant's examination for discovery, in which he: (1) linked Mr. Laurin's alleged negligence and his discovery of it to a time when Mr. Laurin's wife was alive; (2) relied on her illness to explain his delay in pursuing Mr. Laurin, and (3) acknowledged that the unit had not been rented since 2012, apart from a woman who stayed in the unit for about a year. The appellant then took no steps to correct his examination in discovery evidence.

[21] The fact that the motion judge found the balance of the appellant's evidence lacked credibility did not require him to reject admissions made by the appellant against his interest.

[22] The motion judge was entitled to exercise discretion to use his enhanced fact-finding powers, to refuse to credit the timing offered by Ms. Lum, and to rely upon the appellant's own admissions to conclude that the counterclaim was statute-barred.

C. THE VICARIOUS LIABLITY CLAIM

[23] The appellant contends that, if the motion judge was wrong to find the counterclaim to be statute barred, the counterclaim should have been allowed to continue to trial because the motion judge erred in evaluating whether Mr. Laurin was the respondent's agent when assisting the appellant in renting the condominium unit. The appellant argues that since Mr. Laurin was employed by the respondent, the motion judge should instead have applied the test in *Straus Estate v. Decaire*, 2012 ONCA 918, 300 OAC 171, for assessing the vicarious liability of employees. He further argues that the motion judge should have applied the enhanced fact-finding powers conferred by r. 20.04(2.1) to assess whether a nexus existed between the wrongful acts of Mr. Laurin and the risk created by the respondent, his employer.

[24] The premise on which the appellant pursues this ground of appeal is flawed, since even if the appellant's vicarious liability argument were correct, the appeal relating to the counterclaim would have to be dismissed because the motion judge correctly determined that the limitation period had expired. In any event, we would dismiss this ground of appeal as well.

[25] As the motion judge pointed out, the appellant led no evidence that Mr. Laurin's employment duties as business manager extended to acting as a leasing agent for unit holders, or that the respondent was aware that Mr. Laurin

performed this service for the appellants or anyone else. There was no evidentiary basis possible for a finding of vicarious liability, or to provoke the exercise of the motion judge's enhanced fact-finding power. Quite simply, the appellant failed to show that there was a genuine issue requiring a trial relating to the counterclaim, even if the counterclaim had been timely commenced.

D. THE LIEN AND THE REASONABLENESS OF THE LEGAL COSTS CLAIMED UNDER THE LIEN

[26] In supplemental argument, the appellant appears to take issue with inclusion in the lien of legal costs associated with the appellant's counterclaim, the reasonableness of those legal fees, and the interest rate being claimed. It is not at all clear from the formal order, particularly when read in concert with the costs endorsement of April 6, 2020, that the motion judge included the legal costs relating to the counterclaim in the lien amount. He also remained seized of any further issues relating to the proper accounting of amounts owing. More importantly, neither of these issues is properly before us. They were not raised in the notice of appeal, nor in the appellant's factum. It is not in the interests of justice for us to consider these issues now.

CONCLUSION

[27] The appeal of the summary judgment granting the respondent's claim and dismissing the appellant's counterclaim is dismissed.

[28] If costs in this appeal are being claimed, the respondent's costs submissions, confined to 3 pages plus a supporting bill of costs, shall be served and filed by May 1, 2020. The appellant's costs submissions, also confined to 3 pages, shall be served and filed by May 8, 2020. In the event the appellant is seeking costs, a supporting bill of costs may be appended.

[29] The service and filing of the costs submissions may be accomplished by a single email addressed jointly to the opposing party and to the court, with relevant attachments. No further proof of service is required.

"David M. Paciocco J.A."

"B. Zarnett J.A."

"Thorburn J.A."