

CANADA / JUDGMENT

Kendall v. Bouchard

2020 BCSC 727

COURT

Supreme Court of British Columbia

DECIDED

3 March 2020

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2020 BCSC 727 Kendall v. Bouchard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kendall v. Bouchard,

2020 BCSC 727

Date: 20200303

Docket: S145569

Registry: Vancouver

Between:

Alan Kendall carrying on business as Al's Contracting

and Silver Creek Log Sort Ltd.

Plaintiffs

And

Michele Bouchard carrying on business as Bouchard & Company,

and Michele Bouchard Inc.

Defendants

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

Counsel for Plaintiffs:

B. Martyniuk

Counsel for Defendants:

J. Forsythe

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

- [1] THE COURT: These are my reasons for judgment on the defendants' summary trial application for dismissal of the plaintiffs' claim.
- [2] The defendants are seeking to have the claim dismissed on the basis that it is statute barred. In the alternative, the defendants seek to sever liability and damages, and ask the court to dismiss the claim on the basis that liability has not been proven by the plaintiffs.
- [3] In response, the plaintiffs argue that neither the limitation period nor the issue of liability can be dealt with summarily. In the alternative, they argue that the claim was brought in time and liability has been established.

Background

- [4] This is a claim for professional negligence and breach of contract regarding accounting work conducted by the defendants for the plaintiffs between the years 2000 and 2003. The notice of civil claim was filed June 18, 2014.
- [5] The plaintiff Silver Creek Log Sort Ltd. ("Silver Creek") is a log sorting operation that was incorporated in 1997 to provide logs for Watkins Sawmills Ltd. ("Watkins"). Alan Kendall is a principal of Silver Creek.
- [6] In the late 1990s the defendant Michele Bouchard was working as a Certified Management Accountant. She was hired to do the year end financial statements for Silver Creek in 1999.
- [7] The financial arrangements between Silver Creek and Watkins were complex. Under their arrangement, Watkins was responsible for invoicing and keeping the books with respect to the logs it purchased from Silver Creek.
- [8] In or about 2000, a dispute arose between Watkins and Silver Creek. Put simply, each party believed that they were owed money by the other.
- [9] As a result, Silver Creek hired Ms. Bouchard and her company to review Watkins' books and documents and to prepare a "reconstruction" that would assist in determining Silver Creek's financial position with respect to Watkins (the "Reconstruction").

[10] In September 2000, a retainer agreement was signed under which the defendants agreed to provide these accounting services to Silver Creek (the "Retainer Agreement").

[11] The Retainer Agreement stated that the defendants' work would not result in the expression of an audit opinion or any other form of assurance. The Retainer Agreement contained the following provision:

The reconstruction may either lack disclosure required by, or otherwise not be in accordance with, generally accepted accounting principles and may not be appropriate for general use.

[12] Ms. Bouchard completed an initial review of a sample of the log booms sold by Silver Creek to Watkins from 1997 to 1998 and prepared a document setting out the results of her review. Watkins then retained another accountant, Cary Eden, to review Ms. Bouchard's work. Mr. Eden agreed with the preliminary conclusions from Ms. Bouchard's sample review. Ms. Bouchard then proceeded to review all the transactions between Silver Creek and Watkins.

[13] In late 2003 Ms. Bouchard produced the Reconstruction in the form of a spreadsheet that summarized all the transactions she had reviewed. Based on her work it appeared that Watkins owed Silver Creek money. Silver Creek commenced a claim against Watkins by filing a writ in December 2003 (the "Watkins Action").

[14] On June 4, 2004, Ms. Bouchard wrote a letter to Watkins outlining the amount she said was owing by Watkins to Silver Creek on the basis of the Reconstruction.

[15] In June 2004, Silver Creek and Mr. Kendall decided to retain John Frank to act as counsel for the plaintiffs in the Watkins Action.

[16] Mr. Kendall, Mr. Rockwell (another principal of Silver Creek), and Silver Creek entered into a contingency fee agreement with Mr. Frank on June 10, 2004 (the "Contingency Fee Agreement").

[17] A statement of claim in the Watkins Action was served on Watkins in late June 2004.

[18] In the early stages of the engagement with Mr. Frank, Ms. Bouchard recommended that the plaintiffs retain an expert accountant to assist in the Watkins Action. She suggested that they retain someone independent to confirm the numbers used in the Reconstruction, and she advised the plaintiffs that she was not prepared to go to court.

[19] Ms. Bouchard did not cease working with the plaintiffs after the Reconstruction was complete. Rather, she provided litigation support to the plaintiffs in advancing the Watkins Action and she appears to have continued working with them well into 2008.

[20] After having carriage of the Watkins Action for approximately three years, Mr. Frank advised the plaintiffs that they were in breach of the Contingency Fee Agreement, and he terminated his retainer in January 2007.

- [21] On December 17, 2007, Mr. Frank filed an action against the plaintiffs, Mr. Rockwell, Michele Bouchard and Bouchard & Company (the "Frank Action"). In the Frank Action, Mr. Frank sought damages against the plaintiffs and Mr. Rockwell for breaches of their fee agreement with Mr. Frank. Mr. Frank claimed that he relied on Ms. Bouchard's accounting work and other representations in deciding to take on the plaintiffs' claim against Watkins. The Frank Action was ultimately settled and a consent dismissal order was filed.
- [22] In 2008, new counsel for Silver Creek retained an accounting expert, Geoffrey Sultan. Mr. Sultan identified a number of problems with the accounting work done by Ms. Bouchard in the Reconstruction.
- [23] The plaintiffs take the position that it was only in September 2008 when Mr. Sultan wrote a reporting letter to his clients that they knew that there were significant problems with the work Ms. Bouchard had performed for Silver Creek with respect to the Reconstruction.
- [24] In this action, the plaintiffs sue Ms. Bouchard and her company for professional negligence, a claim brought in both contract and tort, on the basis of her failure to do accounting work for the plaintiffs that was accurate, complete, verifiable and reconcilable. They seek damages in the amount of all legal and accounting fees they have paid out in reliance on the Reconstruction as well as the return of all fees paid to Ms. Bouchard and her company.

Suitability for Summary Determination: Limitation Issue

- [25] The defendants seek to have the claim dismissed summarily. They argue that the claim is statute barred and alternatively, if the claim is not statute barred, they ask me to determine liability on the merits.
- [26] The plaintiffs argue that neither the limitation period nor the merits should be determined on the basis of a summary trial.
- [27] Relevant considerations on an application to determine a limitation issue by summary trial include whether the summary determination of the limitation issue will result in "litigating in slices" and whether it will enhance or reduce complexity in the resolution of the dispute: *Bell v. Ries and Wigmore*, 2016 BCSC 309 at para. 38.
- [28] Further, in determining suitability for summary trial, the Court may consider whether the limitation issue is intertwined with other issues or is a discrete issue: *Langley (Township) v. Witschel*, 2015 BCSC 123 at para. 19.
- [29] The plaintiffs argue that there are conflicting affidavits, and in order to determine any of the matters in issue, including the limitations issue, the court will have to resolve conflicts in the sworn evidence of witnesses and ultimately make credibility findings.

- [30] I disagree. I fail to see any conflicting evidence with respect to the facts that I need to find in order to determine the limitations issue. In their response to the application, written argument and oral submissions, the plaintiffs pointed to no specific conflicts in the evidence at all and certainly no conflicts relating to limitation issues.
- [31] I am satisfied that the limitation issue can be dealt with on a summary trial insofar as I have sufficient material before me to make the necessary findings of fact, and in my view it is just to determine the limitation issue summarily. The limitation issue in this case is not intertwined with other issues and its resolution will efficiently resolve an issue that must be determined.
- [32] Because of my findings on the limitations issue set out below, it is not necessary to consider whether the application to determine the claim on its merits is suitable for summary trial.

Is the Plaintiffs' Claim Statute Barred?

- [33] The defendants argue that the plaintiffs' claim expired in December 2009, six years after the Reconstruction was provided by Ms. Bouchard to Silver Creek. The plaintiffs argue that the limitation period was postponed as a result of the defendants' ongoing involvement in providing litigation support to Silver Creek in the Watkins Claim. They argue that it was only in September 2008, when Mr. Sultan wrote them a letter describing the shortcomings of the Reconstruction, that they reasonably could have known that they had a claim against the defendants.
- [34] The parties are in agreement that the pre-2013 Limitation Act, R.S.B.C. 1996, c. 266 [Act] applies in this case. Pursuant to the Act, an action may not be brought after the expiration of six years after the date on which the right to do so arose.
- [35] In order to determine the date of expiry of the limitation period, it is necessary to first characterize the claim the plaintiffs are making against the defendants in this action.
- [36] In the notice of civil claim, the plaintiffs allege that the defendants breached a duty of care to the plaintiffs. Specifically, the plaintiffs allege that the defendants negligently prepared an analysis of Watkins' financial records that was inaccurate, incomplete, unverifiable and irreconcilable and was not prepared with the reasonable skill and care that could be expected of a competent and prudent certified management accountant.
- [37] The plaintiffs also make an alternative claim for breach of contract, alleging that the defendants breached the terms of the Retainer Agreement by:
- a) failing to provide the plaintiffs with an accurate, complete, verifiable and reconcilable analysis of Watkins' financial records and the amounts owed by Watkins to the plaintiffs;

- b) failing to provide accurate, complete, verifiable and reconcilable information concerning the financial records and the accounting methodology used to determine the obligations owed by Watkins to the plaintiffs (or vice versa) to lawyers and other professionals retained by and acting on behalf of the plaintiffs to enforce those obligations against Watkins' analysis of Watkins' financial records in an accurate, complete, verifiable and reconcilable manner; and
- c) failing to assist legal counsel in preparing and using the summary, the financial analysis and the financial records for use in litigation.

[38] The defendants' accounting work for the plaintiffs, namely the Reconstruction, was completed in late 2003. The limitation period with respect to any claims arising from the Reconstruction would begin to run in late 2003 and would have expired in late 2009. The plaintiffs are therefore only in time to bring a claim against the defendants with respect to the negligent preparation of the Reconstruction if the litigation period is postponed pursuant to s. 6 of the Act.

[39] The same is true with respect to any claims relating to the failure of the defendants to provide proper litigation support to Mr. Frank. The limitation period with respect to that would start to run, at the latest, at the time of the termination of the Frank retainer, which was January 2007, and would have expired prior to the commencement of this claim on June 18, 2014.

[40] Section 6(4) of the Act describes circumstances where the running of the limitation period is postponed for certain causes of action, including professional negligence:

- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[41] Section 6(5) of the Act provides:

For the purpose of subsection (4),

- (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
- (b) "facts" include

- (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
- (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant .

[42] The plaintiffs argue that the limitation period in this case did not start to run until September 28, 2008, when Mr. Sultan wrote a reporting letter to the plaintiffs describing the defects in Ms. Bouchard's work. The defendants argue that there can be no postponement of the limitation period because even if the plaintiffs did not know that there were problems with Ms. Bouchard's work until Mr. Sultan wrote his September 2008 reporting letter, the plaintiffs' actual knowledge is not relevant. The question is whether a reasonable person knowing the reasonably ascertainable facts would regard the plaintiff as having a cause of action that has a reasonable prospect of success.

[43] In *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, Mr. Justice Tysoe set out four factors to determine the point at which time begins running under s. 6. These are:

1. the identity of the defendant is known to the plaintiff;
2. the plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge;
3. a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success; and
4. a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

[44] All four of these elements must be satisfied before the running of time with respect to the limitation period begins. Thus, if a plaintiff is able to demonstrate that one of the four components had not been satisfied before six years prior to the commencement of the action, the action will not be statute barred.

[45] In *Lewis v. Fraser-Fort George*, 2018 BCCA 285, our Court of Appeal adopted a partly subjective and partly objective approach in considering whether the facts known to the plaintiffs or within their means of knowledge were such that having taken the appropriate advice they ought, in their own interest and circumstances, to have been able to bring an action against the defendants in an earlier time.

[46] I do not agree with the defendants that a reasonable person knowing the reasonably ascertainable facts would regard the plaintiffs as having a cause of action with a reasonable prospect of success at the end of 2003 when Ms. Bouchard completed the Reconstruction.

- [47] Ms. Bouchard is an accountant. She has professional expertise that the plaintiffs lack. She used her professional expertise to perform services for the plaintiffs and she was paid for those services. The plaintiffs did not have any reasonable basis in 2003 to question the work that she did. Indeed, Mr. Eden had separately reviewed a sample of Ms. Bouchard's work and advised the plaintiffs that he agreed with her conclusions. In the face of this, a claim against the defendants for professional negligence would not be in the mind of a reasonable person at the time the accounting work was completed. I cannot find that the limitation period started to run at the end of 2003.
- [48] The primary question on which postponement of the limitation period turns in this case is when did the plaintiffs have "within their means of knowledge" facts which would cause a reasonable person to conclude that they had suffered injury, loss or damage as a result of the defendants' breach of a duty of care to the plaintiffs? In other words, when did the plaintiffs have the means to know that the accounting work done by Ms. Bouchard was not "accurate, complete, verifiable and reconcilable" and that she failed to assist legal counsel, the two primary claims alleged against her in the notice of civil claim?
- [49] It is the acquisition of means of knowledge which starts the running of the limitation period. In order for me to find that the limitation period has been postponed, and that the case is not statute barred, I must be persuaded that the plaintiffs did not have the critical facts about Ms. Bouchard's breach of her duty of care and the consequent injury, loss or damage suffered by the plaintiffs within their means of knowledge before July 18, 2008, which is six years before the notice of civil claim was filed.
- [50] When were the critical facts within the means of knowledge of the plaintiffs?
- [51] I find that by the time Mr. Frank filed his statement of claim against the plaintiffs in the Frank Action, they knew or ought to have known that there were serious issues with the Reconstruction and Ms. Bouchard's accounting work more generally. The statement of claim in the Frank Action, filed December 17, 2007, raised the same concerns that form the basis of the plaintiffs' professional negligence action herein. The statement of claim makes the following allegations:
27. The Plaintiff [Mr. Frank] attempted to identify the individual transactions in the Bouchard accounting that form part of these aggregate claims to identify the underlying documentary or other evidence presumably relied on by Bouchard. With the exception of interest expense, the plaintiff unable to identify any underlying entries in the Bouchard accounting that would assist him in locating underlying evidence and verifying these claims, either in whole or in part. More particularly, the plaintiff was unable to trace accounting information either back from the summary or forward from the original entries to assist in verifying these claims.

28. In addition, the plaintiff was unable to itemize by way of a reconciliation, the difference between the balances shown as owing on Watkins records as at September 2001, the date of the Bouchard accounting, and the claims of Silver Creek and Kendall as shown on the Bouchard summary. This unaccounted for difference was approximately \$200,000.00.
- [52] Additionally, Mr. Frank makes a number of allegations about Ms. Bouchard's failure to cooperate with him in pursuing the Watkins Claim on behalf of the plaintiffs.
- [53] I find that upon receipt of the statement of claim in the Frank Action, a reasonable person would have been aware that there was a problem with Ms. Bouchard's work, and that the shortcomings in her work, namely, its inability to be reconstructed or traced to source documents, meant that it likely could not be relied upon to ground a claim against Watkins in the Watkins Action.
- [54] The facts known to the plaintiffs or within their means of knowledge were such that, having taken the appropriate advice, they were in a position at that point to have started a claim against Ms. Bouchard and her company for the losses they suffered in pursuing what reasonably looked to be a fruitless claim in reliance on her work.
- [55] The plaintiffs argue that the running of the limitation period should be further postponed beyond the filing of the statement of claim in the Frank Action on the basis that Ms. Bouchard was actively assisting the plaintiffs in pursuing their claim against Watkins even after the Frank Action was commenced and after Mr. Katzalay, the plaintiffs' new solicitor, had been retained. There is evidence that Ms. Bouchard met with Mr. Sultan and that they were working together in some capacity for a period of time.
- [56] The plaintiffs rely on the decision of the Ontario Court of Appeal in *Presidential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325, [Presidential] for the proposition that the running of a limitation period will be postponed where the defendant is engaged in good faith efforts to ameliorate the damage it has caused.
- [57] The Presidential case turns almost entirely on the meaning of s. 5(1)(a)(iv) of the Ontario Limitations Act, 2002, S.O. 2002, c. 24 [Ontario Act]. This is a provision that is similar to one in our post-2013 Limitation Act, S.B.C. 2012, c. 13 [New Act], which postpones a limitation period until, among other things, the date the plaintiff knew that a court proceeding would be an appropriate means to seek to remedy a wrong. This language is not contained in the pre-2013 Act in issue, which both parties agree is the legislation that governs the limitation period in this case.
- [58] In support of the Presidential case being binding authority in British Columbia for how I must interpret the Act, counsel has put before me the decision of Mr. Justice Punnett in *The Owners, Strata Plan VIS 4686 v. Craig*, 2019 BCSC 2228. That case interprets the New Act, which I have noted contains almost identical language to the Ontario Act. The Act at issue in this proceeding contains no such provision.

[59] In any case, even if I am incorrect that Presidential is not applicable to the interpretation of the Act, I do not find that the case is persuasive authority for the proposition that the limitation period should be extended because Ms. Bouchard was continuing to work with the plaintiffs in pursuing their claim against Watkins through 2008.

[60] The plaintiffs rely on para. 26 of that decision wherein the Ontario Court of Appeal said:

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.

[61] I find the second sentence of this paragraph instructive. In this case, while there is considerable evidence that Ms. Bouchard and the plaintiffs continued to work together until late 2008, there is no evidence that in doing so, Ms. Bouchard was engaged in good faith efforts to right the wrong she caused. On the contrary, the plaintiffs' whole argument about the tolling of the limitation period is based on their assertion that they had no idea that Ms. Bouchard had done anything wrong until they got Mr. Sultan's letter in September 2008 enumerating the various deficiencies in her work.

[62] There is no evidence that Ms. Bouchard was engaged in good faith efforts to correct errors she had made in such a way that the limitation period would be postponed, even if the language of the New Act applied.

[63] I therefore find that the limitation period started to run on December 17, 2007, and it expired six years later, on December 17, 2013. The plaintiffs' claim against the defendant is therefore statute barred.

[64] In light of my findings with respect to the limitation period, it is unnecessary for me to consider the parties' submissions on the merits of the claim.

[65] The claim is dismissed. Subject to any submissions with respect to offers to settle, the defendant shall have costs of the action at scale B.

"Francis, J."

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