

Court of Queen's Bench of Alberta

Citation: Stack v. Hildebrand, 2008 ABQB 668

Date: 20081031
Docket: 0603 02171
Registry: Edmonton

Between:

Suesette Stack

Plaintiff

- and -

Patrick Hildebrand, Cheryl Hildebrand, Gary Emo and PRG Financial Inc.

Defendants

**Reasons for Judgment
of
J.B. Hanebury, Master in Chambers**

[1] Suesette Stack has sued her financial advisor and his company alleging they misrepresented the security of two investments she made in 1998. On the advisor's recommendation, she purchased an interest in life insurance policies on two people. She says that her advisor told her that the two people were virtually guaranteed to die; the first in 24 months and the second in 36 months. They failed to do so and apparently are still alive today. This is an application to dismiss Ms. Stack's claim on the basis that it is barred by the passage of time; it is without merit; the plaintiff has suffered no loss; and there is no genuine issue to be tried. The facts are somewhat unusual.

Facts

[2] Through the defendant, Patrick Hildebrand, who was allegedly the controlling mind of the defendant PRG Financial Inc., Ms. Stack purchased certain viatical settlement units. A viatical settlement occurs when terminally ill people, "viators," require income and sell their life

insurance policies in order to obtain a portion of the proceeds. A company then purchases the policies and sells fractionalized interests in them to investors.

[3] Ms. Stack says that Mr. Hildebrand advised that there was no risk to these investments as the viators had “one foot in the grave” and were “on their deathbed.” She says she was also advised that only two people had ever lived past their estimated life expectancy and that most people died “way before” their estimated life expectancy. She states that, relying on Mr. Hildebrand’s advice, in March, 1998, she provided a cheque for \$61,000.00. She received an interest through Mutual Benefits Corporation in the life insurance proceeds of K.R., whose life expectancy was 36 months, and R.F., whose life expectancy was 24 months. Their life expectancies were described as at July, 1998, in reports signed by a Dr. Escobar, an alleged independent medical practitioner. He advised in each report that “with a reasonable degree of medical certainty that this individual presents a terminally ill condition.”

[4] In November, 2001, both viators had exceeded their life expectancies and Ms. Stack wrote to Mutual Benefits Corporation asking if it was very common for viators to do so. It responded advising that the policies remained in full force and effect and all premiums due had been paid. On June 10th, 2003, Ms. Stack again wrote for an update. She asked if she could get an estimate of the viators’ life expectancy. She received a response advising that “we cannot put a guarantee on a life expectancy, it is simply a projection [and] no one can guarantee how long a person will live.”

[5] The response received from Mutual Benefits Corporation also listed the medical conditions of K.R. and noted that the life expectancy that had originally been provided was only an estimate. Attached to the response was a brief description of each of the listed conditions which included earache, menopause, sinusitis and hypertension. It is unclear if the descriptions were provided by the corporation or done by Ms. Stack. None of the conditions appeared to be obviously terminal.

[6] In July, 2005, Ms. Stack learned that Mutual Benefits Corporation had been put into receivership. From the Receiver’s report she learned that a substantial percentage of viators had lived past their life expectancies; sufficient funds had not been set aside to pay their life insurance premiums; reserves had not been established to protect investors from having to pay those premiums; and the company had set up a Ponzi type scheme. In short, the investment was a house of cards. She says that until she got the Receiver’s report she had no reason to doubt Mutual Benefit Corporation’s representations that the insureds were, in fact, terminally ill.

[7] On examination, Ms. Stack advised that, to the best of her knowledge, the premiums were still being paid on the life insurance policies and the viators had not died. She was paying administration fees only. She confirmed that although the money was invested in her name it was, at least in part, her husband’s money as well. She has not received any money back on her investment and says that she has suffered damages, in particular the loss of her investment opportunity and the ongoing administration costs she has had to pay. She said that she and her husband didn’t know if they could bring an action against Mutual Benefits Corporation and didn’t think of suing it before the receipt of the Receiver’s report.

[8] Her husband was also examined and acknowledged that they had been advised by Mr. Hildebrand that the insureds would not make it past their life expectancy. By November, 2001, he was aware that both of them had exceeded their life expectancies, one by a year and a half. His evidence bears repeating verbatim:

Q: And so this was of concern to you?

A: Absolutely...and as the time went on it became more of a concern.

Q: And when had you first begun to be concerned about the fact that --

A: As soon as they went past their life expectancy.

Q: So in, I guess we'd have to work that out, but it would be 2000 in the case of Mr. F. and 2001 in the case of Ms. Kay?

A: That would be accurate, yeah. Spring, springtime of those years, yeah.

Q: And so as soon as the clock ticked over you were -- you and your wife both were concerned about the fact that these life expectancies had been exceeded?

A: We were.

Q: Did you and your wife in 2000 and 2001 once those time periods had gone by discussed [*sic*] what steps might be taken?

A: Basically we decided that there was nothing we could do. Mr. Hildebrand had told us that once the money was placed you could not get your money back, there were no refunds on your money in this type of investment, there was no getting it back, so you would have to wait until they terminated....

...

A:... But as far as being concerned about it, there wasn't much point in panicking over it. We decided we'd be patient and wait and hoping it would work itself out, that's what we decided; but at that time we didn't know that MBC was a giant fraud down there either.

Q: But, of course, the longer it went, I mean, the -- the return on your investment according to what you thought was going to happen depended on these people dying on their life expectancy date or before --

A: That's right. That's right.

Q: So every day, every month that went by it meant the return on your investment was --

A: Less.

Q: -- was decreasing and you understood that at the time?

A: We did, and we decided we would eat that loss and just be patient and hoped and hoped against hope that this thing was going to work itself out like he said it was supposed to.

[9] Mr. Hildebrand argues that Ms. Stack should have known as early as 2001 that the life insureds had exceeded their life expectancy, which she alleges is the basis of her claim for damages. As a result, he says that the claim is barred by the passage of time as her statement of claim was only filed on February 13, 2006.

Analysis

[10] The test to be met on an application for summary judgment has been set out in a number of cases. The purpose of summary judgment was noted by Gill J. in *The City of Edmonton v. Transalta Energy Marketing Corporation* 2008 ABQB 426 :

66 The Supreme Court of Canada addressed the purpose of the summary judgment rule in *Canada (Attorney General) v. Lameman* 2008 SCC 14, at paragraph 10:

10. This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[11] The test to be applied in an application under rule 159(2) to dismiss a statement of claim was discussed by the court in *Dechant v. The Law Society of Alberta* 2006 ABQB 908:

52 In *Murphy Oil Co. [v. Predator* 2006 ABCA 69] the Alberta Court of Appeal considered *Guarantee Co.* but concluded that the law in Alberta does not involve a shifting of the onus to the respondent to establish that it has a reasonable prospect of success, instead the test is whether there is a triable issue (*Murphy* at para 28). The onus in a Summary Judgment application in Alberta remains at all times upon the applicant. That onus is to establish that the respondent's case is bound to fail and has no reasonable prospect of success. Practically, speaking, the applicant must put forward a set of

undisputed facts which lead to the legal conclusion that the respondent's case will fail. As long as there are some legally relevant facts which are disputed, and as long as there are legal issues that require a trial to be determined, the applicant cannot be successful.

[12] This is the test to be applied in considering the application for summary dismissal of Ms. Stack's claim. The court must be satisfied that the claim has no reasonable prospect of success. As the provisions of the *Limitations Act* RSA 2000, c. L-15 are at issue, the court must be of the view that there is no triable issue in relation to those provisions; that it is plain and obvious that the limitations defence will succeed.

[13] At issue is s. 3(1)(a) of the *Act*, which states:

Subject to section 11, if a claimant does not seek a remedial order within:

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding...

... the defendant on pleading this Act ... is entitled to immunity from liability ...

The claim must be filed within two years of the date when these three criteria are met.

[14] Briefs were not filed by the parties. The applicant provided three cases for consideration: *De Shazo v. Nations Energy Company Ltd.*, 2005 ABCA 241, *Saxton v. Credit Union Deposit Guarantee Corporation*, 2006 ABCA 175, and *Condominium Plan No. 942 1549 v. Edmonton (City)*, 2006 ABCA 194.

[15] In *De Shazo* the central issue was whether De Shazo knew or in the circumstances ought to have known that he had a claim against the defendants within the meaning of paragraph 3(1)(a) and whether his level of knowledge could be ascertained on a motion for summary judgment or if a trial was required.

[16] The court determined the matter summarily. It held that the principle of discoverability does not require perfect knowledge. The court found that De Shazo had more than a suspicion of his claim; he had support for his suspicions when he received a written report. The court found that at that time he had nearly all of the information about his alleged injury and the participation of other parties in causing that injury that he had when he ultimately filed his statement of claim.

As he had sufficient knowledge of the material facts to engage the discovery principle found in paragraph 3(1)(a) of the *Act*, summary judgment was granted.

[17] In *Saxton* the court also considered an application for summary judgment based, in part, on a limitations argument pursuant to the test under the former *Limitation of Actions Act*. The plaintiff, Saxton, argued that a material fact to his cause of action in conspiracy was the intention of the defendant to cause him injury. He said that he did not have certain facts material to that issue, and that until he discovered those facts he was not aware he had a cause of action in conspiracy. Therefore, the limitation period could not commence.

[18] The court agreed that an arguable issue existed in relation to the commencement of the limitation period. It commented that a suspicion was not knowledge. It was not enough to amount to the discovery of a material fact sufficient to ground a limitation defence for the purposes of summary judgment. It held that it was not plain and obvious that the limitations defence would be successful. The application for summary judgment was dismissed.

[19] In *Condominium Plan* the applicability of s. 3(1)(a) of the *Limitations Act* was again at issue in a summary judgment application. The limitations argument in that case involved a consideration of complex factual issues and was fact driven. The city argued that as the plaintiff was aware of the absence of ventilation and a vapour barrier in the crawl space of the condominiums at the end of February, 1999, he was also aware that the condominium buildings were not compliant with the building code. The court found, however, that the cause of damage may have been lack of drainage and that may not have been ascertained until 2000. Therefore, the discovery of the drainage problem might lead to a new and separate claim. The court found that the record before the court was not adequate to determine all of the issues relative to the limitations defence. It held that it was not satisfied that it was plain and obvious that the claim against the city was statute-barred and dismissed the application for summary judgment.

[20] To dismiss this claim the court must find on undisputed facts that there is no triable issue on the question of whether the three criteria of s. 3(1)(a) have been met: that Ms. Stack knew or ought to have known that she had been injured; that the injury resulted from Mr. Hildebrand's conduct; and, that it warranted bringing a proceeding, all of which must have occurred more than two years prior to filing her claim.

When did Ms. Stack know or ought to have known of her injury?

[21] In *Sun Gro Horticulture Canada Ltd. v. Alberta Metal Building Sales Inc.* 2006 ABCA 243, the Court of Appeal considered what was required to start a limitation period running under s. 3(1)(a). It noted the importance of the word "injury":

11 I agree with the Respondent that the Appellant confuses the concept of a cause of action with that of an injury...Section 3(1)(a), however, links immunity with the discoverability of the injury, not the discoverability of a cause of action for any injury. This accords with a plain and purposive reading of the enactment reflecting as it does the legislative choice for discoverability of the injury.

[22] From this case law it is clear that what must first be ascertained is the nature of the injury as alleged in the pleadings. A review of the statement of claim indicates that the injury claimed is economic loss. The economic losses claimed are the loss of principal, loss of interest and the loss of opportunity for return and growth on Ms. Stack's investment. When did she know of these injuries?

[23] The evidence before the court indicates that, in 2001, when the time had passed for the 36 month contract to pay out and both viators continued alive, the plaintiff became concerned. In 2003, she received the letter from the Mutual Benefits Company which listed the medical conditions of the 36 month viator, K.A. and she, or someone else provided a description of those conditions, none of which appeared to be imminently terminal. At that time she knew or ought to have known of her injury. Both viators had well exceeded their life expectancies and the medical condition of K.A. was known. All of this was contrary to the representations of Mr. Hildebrand. If she had been merely suspicious before, she now had substantiation of her concerns. She knew that she was not going to obtain the funds in the time frame she anticipated from the allegedly very safe investment.

[24] The evidence of her husband bears this out. He admitted that they just hoped against hope that things were going to work out.

When did Ms. Stack know or ought to have known that her injury resulted from Mr. Hildebrand's conduct?

[25] The statement of claim alleges that her injury resulted from the false representations of Mr. Hildebrand including: that the investment was perfectly safe; that only two persons had ever lived past their life expectancy; that most people passed away "way before" their life expectancy; and that the promised returns were not subject to stock market volatility. The economic loss is also alleged to result from the negligence and negligent representations of both Mr. Hildebrand and the investment company he utilized, PRG Financial Inc., including the failure to advise of the risky and often fraudulent nature of the viatical investments.

[26] Ms. Stack says that it was the representations of Mr. Hildebrand that they relied upon when making the investment. Her dealings were with him; not with the company holding the contract. That company was only contacted once a decision had been made to make the investment. Therefore, when she knew she had suffered an injury, she knew or ought to have known that it resulted from the conduct of Mr. Hildebrand in convincing her to invest in the viatical contracts.

When did Ms. Stack know or ought to have known that the injury warranted bringing a proceeding?

[27] Again, the evidence of Ms. Stack's husband indicates they knew their investment was in trouble but they chose to do nothing at that time. However, that did not stop the clock from ticking. In 2003, when 5 years had passed since their investment, the viators were both still alive and written information on the medical condition of one had been provided, they knew or ought

to have known that the injury warranted bringing a proceeding. The promised guaranteed return had not happened and there was no indication it was imminent.

[28] With this undisputed evidence the three criteria have been met, it is clear that the limitations defence will be successful, the claim is statute barred and there is no issue to go to trial.

[29] If the parties wish to speak to costs they must make arrangements to do so within 30 days of this decision.

Heard in the City of Edmonton, Alberta on the 25th day of August, 2008.

Dated at the City of Calgary, Alberta this 29th day of October, 2008.

J.B. Hanebury
M.C.C.Q.B.A.

Appearances:

W. Paul Sharek, Q.C.
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(Miller Thomson LLP)
for the Plaintiff