SUPREME COURT OF NOVA SCOTIA
Citation: *Andrews v. Duncan* , 2016 NSSC 103

Date: 20160415
Docket: Hfx No. 440260
Registry: Halifax

Between:

Martin Douglas Andrews, Estate of Sheila Rebecca Andrews, David Bateman, Sharleen Bateman, Estate of John Cameron, Estate of Linda Cameron, Charles Raymond Michael Crowell, Darlene Joyce Crowell, Jared Raymond Phillips, Becky Lynn Waterfield, Jeffrey H. Phillips, Denise Kowalski-Phillips, James Edward Maxwell Ramsay, Lisa Elayne Matheson, Estate of Ruth Shane, Wilma Lee Shane, Janice C. Verney, Estate of Robert Andrew Verney

Plaintiffs

v.

Gregory Duncan and James White

Defendants

Judge: The Honourable Justice Michael J. Wood

Heard: April 8, 2016, in Halifax, Nova Scotia

Counsel: Jamie MacGillivray, for the plaintiffs
Ronald R. Chisholm, for the defendants

By the Court:

[1] The plaintiffs in this proceeding are investors who were formerly clients of an investment advisor by the name of John Allen. Mr. Allen was a sales representative for Keybase Financial Group Inc. ("Keybase") until September 2007 when he was terminated from that position. Keybase appointed the defendants Gregory Duncan and James White to act as the new investment advisors for the plaintiffs after Mr. Allen's termination.

[2] Mr. Allen implemented a leveraged investment strategy that was unsuitable for the plaintiffs resulting in heavy financial losses. They sued Mr. Allen, Keybase and Global Maxfin Investments Inc. in separate actions commenced between 2008 and 2011. The trial of these claims took place before the Honourable Justice Robert W. Wright in November and December 2013 and a written decision was released in February 2014 (2014 NSSC 31).

[3] By the time the proceeding got to trial Keybase had admitted vicarious liability for the actions of Mr. Allen and as a result the trial was focussed on an assessment of damages. A significant issue was whether the plaintiffs had mitigated their losses because they did not liquidate their investments prior to the market crash in 2008. Justice Wright concluded that the defendants had not established a lack of mitigation on the part of the plaintiffs and assessed damages based upon the value of the investment portfolio at the time of trial.

[4] In the current proceeding the plaintiffs have sued Messers, Duncan and White alleging they had failed to advise them to divest themselves of the John Allen investment portfolio once they began advising them in or around September 2007. The statement of claim pleads three causes of action against the defendants, breach of contract, negligence, and breach of fiduciary duty. They claim the same damages awarded by Justice Wright in the previous litigation as well as aggravated damages.

[5] The defendants have made a motion for summary judgment requesting that the action against them be dismissed. There are two primary arguments in support of their position. The first is that the applicable limitation period has expired and the second is that this proceeding is barred as a result of *res judicata*. The defendants also argue that this proceeding is an abuse of process however this is based on the principles of *res judicata* and so I will not include a separate analysis on this issue.

[6] The defendants seek summary judgment on the pleadings pursuant to Rule 13.03 as well as summary judgment on evidence under Rule 13.04.

Summary Judgment on Pleadings

[7] With a motion for summary judgment on pleadings the Court must take as proven all of the allegations in the statement of claim. It must then determine whether the claims as pleaded are clearly unsustainable.

[8] In this case the defendants argue that the limitation period for the claim has expired. They say the limitation period for all claims is six years and started to run in September 2007. The notice of action and statement of claim were filed in June 2015.

[9] The statement of claim refers to three potential causes of action and these are breach of contract, negligence and breach of fiduciary duty. Breach of fiduciary duty is an equitable claim and not subject to the provisions of the *Limitation of Actions Act* (*Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52).

[10] The contract and tort claims are each subject to a six year limitation period however the commencement dates may be different. The limitation period starts to run when the cause of action arises. With a claim in contract it is when the breach of contact occurs. For tort claims the cause of action requires a breach of the standard of care as well as damages. The cause of action arises for purposes of limitations when the plaintiff discovers the facts giving rise to the claim.

[11] The statement of claim alleges that the defendants were negligent, in breach of contract and in breach of fiduciary duty when they failed to recommend the divestment of the plaintiffs' investment portfolios in or around September 2007. That date is when the cause of action for breach of contract arose which would mark commencement of the six year limitation for that claim. The cause of action in negligence arises when the plaintiffs discovered the defendants' negligence and resulting damage. There is nothing in the statement of claim which identifies that date. As a result, the start of the limitation period is not known.

[12] If I accept as true all of the allegations in the statement of claim I am unable to conclude that the plaintiff's claim for negligence and breach of fiduciary duty are barred because of the expiry of a limitation period.

[13] The contract claim may not be in the same category. Based upon the allegations in the statement of claim the limitation period would have started to run in or about September 2007 which means that it would have expired prior to commencement of this proceeding. Discoverability does not apply to a claim in contract. In his oral submissions at the hearing Mr. MacGillivray said that his clients wish to apply under s. 3 of the *Limitation of Actions Act* to set aside the limitation defence in the event that I determined that the period had expired. In my view it would have been preferable for him to have made such a motion prior to the hearing. If he had done so, the motion could have been heard at the same time as the summary judgment motion.

[14] With the plaintiffs' stated intention to make a motion under s. 3 of the *Limitation of Actions Act* I cannot conclude that their contract claim is absolutely unsustainable at this point in time because the motion might be successful. I must therefore deny the defendants' request for summary judgment on the contract claim based upon the expiry of this limitation period.

[15] For the above reasons I will dismiss the motion for summary judgment on pleadings.

Summary Judgment on Evidence

[16] The defendants have made a motion for summary judgment on evidence. They did not file any evidence, however, in argument Mr. Chisholm said the motion was based on the pleadings in the two actions, the decision of Justice Wright and the affidavit of one of the plaintiffs, Denise Kowalski Phillips, which was filed on March 4, 2016.

[17] The argument made by the defendants is that the principle of *res judicata* prevents the plaintiffs from starting this proceeding in light of the earlier action which resulted in the decision of Justice Wright. They say the law of *res judicata* is stated by the Nova Scotia Court of Appeal in *Kameka v. Williams*, 2009 NSCA 107. In that case the Court confirmed the well-recognized principle that estoppel by *res judicata* will not arise unless the following three elements are proven:

1. There was a final decision pronounced by a Court of competent jurisdiction.
2. The prior decision involved the determination of the same issue or cause of action which is advanced in the current litigation.

3. The parties to the earlier decision are the same persons as the persons to the present action or are privies of those parties.

[18] The position of the defendants is that the earlier lawsuit involves the same cause of action as that advanced in this case.

[19] The question of whether the same cause of action arises in two proceedings requires an examination of the underlying facts. It is not enough that they share some facts in common or that they request identical relief. The court must consider the facts relied upon to support the two claims in order to decide whether they represent the same cause of action.

[20] An illustration of the applicable principles is found in the Alberta Court of Appeal decision in *Sherwood Steel Limited v. Odyssey Construction Inc*., 2014 ABCA 320. In that case Sherwood supplied materials to a sub-contractor on a construction project. It was not paid, sued the sub-contractor and obtained judgment for the outstanding balance of their account. Subsequently Sherwood started a new action against the general contractor claiming an oral agreement to pay its account in return for Sherwood not filing a builders lien. The general contractor argued that *res judicata* prevented Sherwood from seeking the same amount that it had previously obtained judgment for against the sub-contractor. The Court of Appeal held that the two claims involved different underlying facts and therefore *res judicata* did not apply. The first action required proof of the account while the second related to the contractual promise to pay if no lien was filed.

[21] The original action against Keybase was based on the negligence and breach of fiduciary duty by John Allen. Keybase was vicariously liable for his actions. The advice provided by Messers, Duncan and White was part of the evidence presented in support of Keybase's argument that the plaintiffs did not mitigate their damages. That advice was not an element of the plaintiff's cause of action and Justice Wright made no decision on whether it was negligent or not.

[22] In the current proceeding the plaintiffs allege that Messers, Duncan and White were negligent in the advice which they gave after they took over from John Allen. The issues of Mr. Allen's prior negligence and breach of fiduciary duty or Keybase's vicarious liability for it do not arise in this case. The fact that the same damages are sought is not enough to conclude that the causes of action are the same.

[23] Since the defendants have not satisfied me that the two proceedings relate to the same cause of action this criteria for *res judicata* has not been met and I will therefore dismiss the motion for summary judgment on evidence.

Conclusion

[24] I have determined that I should dismiss the defendants' motion for summary judgment on both pleadings and evidence for the reasons set out above. In doing so I do not intend to limit the arguments which might be advanced by either party at trial concerning the effect of the earlier decision. Justice Wright's findings may or may not be binding on the parties in this litigation.

[25] There is another aspect of *res judicata* which may arise even if the two proceedings involve different causes of action. This is mentioned in para. 22 of the *Kameka* decision where the Court says as follows:

> 22 How and if the doctrine of estoppel by res judicata might apply to prevent the respondent from again suing the appellant Kameka depends on whether the present suit is in relation to the same or a different cause of action (there is certainly no suggestion it is an entirely new cause of action). If it is a different cause of action, consideration would have to be given to whether the party should have raised it in the earlier proceeding. However, if the suit is based on the same cause of action, it has become merged into the judgment the respondent obtained in the Small Claims Court.

[26] I did not consider this question because it was not argued by the defendants however that does not preclude them from raising it at trial if they believe it is applicable.

[27] I should also point out that the defendants introduced a new issue in their reply brief related to the effect of releases signed by the plaintiffs in favour of Keybase following the decision of Justice Wright. This was not mentioned in their notice of motion nor their initial brief and the plaintiffs did not have sufficient opportunity to respond to the issue. I advised counsel at the hearing that I was not prepared to consider that argument on this motion. That is another matter which will have to be left to another day for resolution.

[28] If the parties are unable to agree on costs they may make written submissions to me.

Wood, J.