**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Jesty v. Vincent A. Gillis Inc.*, 2019 NSSC 320

**Date:** 20190925
**Docket:** Syd No. 474447
**Registry:** Sydney

**Between:**

Albert Jesty and Marlene Jesty

*Plaintiffs*

v.

Vincent A. Gillis Inc.

*Defendant*

| | |
|---|---|
| **Judge:** | The Honourable Justice Robin Gogan |
| **Heard:** | July 15, 2019, in Sydney, Nova Scotia |
| **Final Written Submissions:** | July 24, 2019 |
| **Counsel:** | Albert Jesty, in person, for the Plaintiffs/Respondents<br>Stephen Kingston, for the Defendant/Applicant |

By the Court:

**INTRODUCTION**

[1] On March 20, 2018, Albert and Marlene Jesty commenced an action against Vincent A. Gillis Inc. The Jestys allege that lawyer Vince Gillis ("**Gillis**") was negligent and fraudulent in the legal work carried out for them in November of 2006. They claim considerable damages. A defence to the claim was filed on March 28, 2018 relying, *inter alia*, on the provisions of the *Limitations of Actions Act,* S.N.S. 2014, c. 35.

[2] The defendant brought a Motion for Summary Judgement on Evidence pursuant to *Civil Procedure Rule 13.04*. Gillis filed an affidavit in support of the motion and Albert Jesty filed an affidavit in response. The motion was heard on July 15, 2019. Supplementary submissions were filed by the Jestys on July 19, 2019 and Gillis on July 24, 2019. The supplementary submissions focused on the issue of incapacity and its impact on the limitation period defence.

[3] What follows is a decision on the motion. Summary judgement is granted with costs to be assessed.

## BACKGROUND

[4] The series of events giving rise to this proceeding is concisely summarized by Wood, J. (as he then was) in a related foreclosure proceeding reported as ***Xceed Mortgage Corp. v. Jesty***, 2013 NSSC 385:

> 3. In the fall of 2006, Mr. Jesty was looking to refinance his home in Sydney Mines. Mr. Jesty was in the trucking business and had purchased two new trucks earlier that year on conditional sales contracts. He was in arrears under those contracts and wanted the refinancing to generate a surplus which could be applied to those debts.
>
> 4. Mr. Jesty applied for mortgage financing through a mortgage broker in Cape Breton. He provided information concerning his assets and liabilities and his home was appraised. Xceed ultimately approved a mortgage in the amount of $126,042.44. It was a condition of the financing that the first and second mortgage be paid out, as well as debts to Honda Finance Inc., Canadian Tire Mastercard, WFF Corp. Canada and two debts to Chrysler Financial.
>
> 5. Xceed required that the transaction include title insurance through a firm known as Titleplus. In order to do so, the transaction would have to be completed by a lawyer who had previously been approved by Titleplus. Mr. Jesty was given the names of three lawyers in Sydney who had this approval and he selected one to complete the transaction on his behalf.
>
> 6. As part of the process for the advance of funds under the mortgage, Xceed obtained an undertaking from the lawyer to pay out the specified debts of Mr. Jesty from the mortgage advance.
>
> 7. On November 17, 2006, Xceed wired the sum of $121, 922.30 to the lawyer's trust account. This represented the full amount of the mortgage advance after deduction of various fees and accrued interest.
>
> 8. From the amount advanced, the lawyer paid the debts which he had undertaken to satisfy, as well as outstanding amounts for water and taxes owed to the Municipality. He also satisfied two prior judgements, the largest of which was $11,554.32 in favour of the Minister of Finance representing a Worker's Compensation Board assessment. The lawyer paid his legal fees and some, but not all, of the disbursements incurred for the transaction. The net result of these

> payments was that there was no surplus for Mr. Jesty to apply to the arrears on his two trucks.
>
> 9. Mr. Jesty testified that he was not aware that there would be no surplus funds until the day of the closing. As a result of his lack of funds, the trucks were repossessed.

[5] Xceed subsequently brought a foreclosure proceeding which Jesty defended. Justice Wood concluded that no evidentiary or legal basis existed to ground the defence and granted summary judgement. That decision was unanimously upheld on appeal at ***Xceed Mortgage Corp. v. Jesty***, 2014 NSCA 107.

[6] The Jestys' present claim against Gillis relates to the same mortgage transaction that gave rise to the foreclosure proceeding. It is undisputed that the Jestys executed the mortgage on November 17, 2006. The net proceeds in the amount of $121,922.30 were applied to various debts to the Jestys' benefit, including a Wells Fargo mortgage.

[7] On or about November 17, 2006 Albert Jesty learned that the mortgage proceeds would not be sufficient to pay the arrears relating to his truck financing. In the months thereafter, Albert Jesty himself was involved in the payout of several other consumer debts from the Xceed mortgage proceeds.

[8] On May of 2007, Gillis sent a letter and Release of Mortgage to Wells Fargo and received no reply. In November of 2008, Gillis was contacted by Albert Jesty

about an issue with the Wells Fargo mortgage payout. On November 16, 2008, Jesty asked Gillis to contact Wells Fargo. On November 24, 2008, Gillis received correspondence from Wells Fargo legal counsel, referencing his direct communication with Albert Jesty, and confirming the position that its mortgage remained outstanding. Albert Jesty met with Gillis on December 9, 2008. Gillis then contacted Lawyers' Insurance Association of Nova Scotia ("**LIANS**"). Jesty was aware of Gillis' contact with LIANS.

[9] In October of 2009, Albert and Marlene Jesty received a letter from Wells Fargo legal counsel confirming that their mortgage remained outstanding. In the meantime, Xceed Mortgage Corp. began foreclosure proceedings.

[10] The Wells Fargo mortgage was released on November 6, 2012 but issues remained over an outstanding account balance. The Jestys had ongoing contact with Wells Fargo including correspondence about the mortgage balance on February 27, 2014. The Jestys retained another lawyer to deal with the matter who made inquiries and received a letter from Wells Fargo on July 24, 2014.

[11] Albert Jesty wrote a letter of complaint about Gillis to the Nova Scotia Barristers' Society ("**NSBS**") on October 1, 2012. Jesty's letter referenced a November 2009 letter from Gillis to the NSBS about the Xceed mortgage transaction. This reference was an error as the contact was between Gillis and

LIANS took place in December of 2008. Gillis' counsel responded to Jesty denying any liability on October 11, 2012.

[12] In July of 2015, Albert Jesty made a claim against Gillis to LIANS. Gillis' counsel responded on July 21, 2015 referencing his October 11, 2012 denial of liability.

[13] On June 16, 2017, Albert Jesty was admitted to hospital in Cape Breton with chest pain. He was transferred to Halifax on June 20, 2017. He had heart surgery on June 27, 2017. He was released from hospital on July 3, 2017. Medical records indicate that he was pain free, ambulating well, and his "recovery was uneventful" at discharge. He was advised not to drive for one month and no commercial driving for three months.

[14] The Jestys brought the present action on March 20, 2018.

**ISSUE**

[15] Is Summary Judgement appropriate? Is the present action statue barred under the *Limitations of Actions Act*? What impact does Albert Jesty's ill health have on the limitation period?

**POSITION OF THE PARTIES**

*Vincent A. Gillis Inc.*

[16] Gillis says that he is entitled to Summary Judgement. He submits that there are no material facts in dispute, that the Jesty action is out of time under the *Limitations of Actions Act*, and has no real chance of success on the basis of discoverability or incapacity.

[17] On the issue of incapacity, Gillis submits that s.19 of the *Limitations of Actions Act* places the burden on the party seeking its benefit. In order to discharge the burden, Jesty must adduce evidence to establish incapacity. Mere assertions of incapacity are not sufficient. On this point, Gillis relies upon ***Cameron v. Nova Scotia Association of Health Organization's Long Term Disability Plan,*** 2018 NSSC 90 and ***Richards Estate v. Industrial Alliance and Financial Services***, 2019 NSSC 3.

*Albert and Marlene Jesty*

[18] The Jesty's say that their action is not out of time. They submit that Albert Jesty's health issues resulted in a period of incapacity under s.19 of the *Limitations of Actions Act*. They take the view that Albert Jesty's health issues incapacitated him until the commencement of the present action on March 20, 2018. It is the

Jestys' position that the limitation period did not expire until September 21, 2018. On this basis, they seek dismissal of the motion.

## ANALYSIS

### *Civil Procedure Rule 13.04*

[19] This is a motion for summary judgement on evidence under *Rule 13.04*:

> **Summary judgment on evidence in an action**
>
> 13.04(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgement must be granted without a distinction between a claim and a defence and without further inquiry into the chance of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

*The Law*

[20] The law applicable to this type of motion is well settled. Reference is made to the reasons of Fichaud, J.A. in ***Shannex Inc. v. Dora Construction Ltd.***, 2016 NSCA 89, and Saunders, J.A. in ***Coady v. Burton Canada Company***, 2013 NSCA 106.

[21] Parties to this kind of motion must put their "best foot forward": ***Canada (Attorney General) v. Lameman***, 2008 SCC 14 at para. 11. If it is determined that there is no genuine issue or material fact requiring trial, then the question becomes whether a legal determination is required and if so, an assessment of whether the responding party has established a real chance of success.

[22] Justice Saunders articulated the analysis in ***Burton***, *supra*, at para 42:

> At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with important factual matters that anchor the cause of action or defence. At this stage the relative merits of either

> party's position are irrelevant. It is only if the judge is satisfied that the moving party has met the evidentiary burden of showing there are no material factual matters in dispute that the judge will enter into the second stage of the inquiry. The focus of that stage is not – as the judge put it here – to see if the "undisputed facts … give rise to a genuine issue for trial". This is a misstatement of the test established in *Guarantee.* Instead the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects of success of the respondent's position be gauged other than by examining it along with the strengths of the opposite's party's position … the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success.

[23] In ***Milbury v. Nova Scotia (Attorney General)***, 2007 NSCA 52, our court of appeal considered a motion for summary judgment in the context of a limitation period defence and articulated the approach:

> 20. Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired…
>
> 23. When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discovery rule.
>
> 24. In the context of a summary judgment application where a limitation defence is pleaded, the defendant application must first establish that there is no genuine issue of fact for trial. In this case, the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[24] The analysis in ***Milbury,*** has been employed consistently (See: ***Fendley v. Omura***, 2015 NSSC 260, ***Cameron,*** *supra,* and ***Richards Estate,*** *supra).*

[25] Returning to the present motion, there are no material acts in dispute. On this basis, I am of the view that there is no genuine issue of fact requiring trial. There remains then the following questions: (a) Was the Jesty claim limitation barred when it was commenced on March 20, 2018? (b) Have the Jestys presented evidence that the limitation defence does not bar their action on the basis of discoverability or incapacity? (c) Does the evidence support a real chance of establishing that the limitation period not expire before they commenced their claim?

*The Limitation Defence*

[26] The *Limitations of Actions Act*, contains a transitional provision which applies on this motion. Section 23 says:

> **Transitional**
>
> 23(1) In this section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.

> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.

[27] There is no dispute that the effective date is September 1, 2015. The Jesty claim pleads acts or omissions well before the effective date (dating back to November, 2006). However, no proceeding was commenced until well after the effective date (March 20, 2018).

[28] As a result, s.23(3) of the *Limitations of Actions Act* establishes the limitation date for the Jestys' claims. However, the applicability of this section depends on discoverability. If the Jestys' claims were "discovered" before September 1, 2015, then the limitation date is September 1, 2017, subject to the operation of s.19 dealing with incapacity.

*(a) Discoverability*

[29] The *Limitations of Actions Act* sets out the test for discoverability at s.8(2):

> 8(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) That the injury, loss or damage had occurred;
>
> (b) That the injury, loss or damage was caused or contributed to by an act or omission;
>
> (c) That the act or omission was that of the defendant; and
>
> (d) That the injury, loss or damage is sufficiently serious to warrant a proceeding.

[30] This test was applied by Justice Ann Smith in ***Barry v. Halifax (Regional Municipality)***, 2017 NSSC 180, who adopted the analysis of the Supreme Court of Canada in ***Ryan v. Moore***, 2005 SCC 38.

[31] In ***Smith v. Parkland Developments Limited***, 2019 NSSC 74, the discoverability of claim was defined in the following way at para. 64:

> Discoverability means the knowledge of the facts that may give rise to the action. The knowledge required to start the limitation period running is more than a mere suspicion but less than exacting knowledge. The discovery of the claim does not require that Dr. Smith knew her claim against the Town was likely to succeed. The limitation period runs from when Dr. Smith had or ought to have knowledge of a potential claim. The discovery of additional facts at a later date does not postpone the discovery of the claim.

[32] And in ***Milbury***, *supra*, the issue of discoverability in the context of a summary judgment motion was canvassed at para 26:

> 26 The comments on discoverability in the context of a summary judgment application in *Jack v. Canada (Attorney General)*, [2004] O.J. No. 3294 (Ont. S.C.J.) are instructive:
>
> …
>
> 87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period.
>
> 88 In order to establish that there is a genuine issue for trial with respect to Jack's claim that she did not have the requisite material facts available to her until "in and around 1994", Jack must adduce evidence to support her claim that the necessary information was not discoverable until that time. In my opinion, she failed to do so. Further, Jack must provide evidence demonstrating that there is a factual issue surrounding her failure to discover the alleged negligence before 1994 that requires resolution at trial…

[33] On this point, I have no evidence from Marlene Jesty. It was Albert Jesty's evidence that he discovered his claim against Gillis in June of 2013 after receiving information from the NSBS. In his view, only at that point did he have the knowledge to support potential claims. Although this seems a generous view on the whole of the evidence, it means that for the purpose of s.23(3), the claims were discovered before the effective date of September 1, 2015.

[34] On this basis, the limitation date for the Jesty claims is September 1, 2017. As I say this, I note that Gillis did not take the position that the former limitation period had expired at some earlier point in time.

[35] As the Jesty action was not started until March 20, 2018, it is out of time unless the limitation period was suspended by virtue of incapacity. Before moving to consideration of the issue of incapacity, I note that Marlene Jesty makes no claim of incapacity. She filed no evidence on the motion. For this reason, I conclude that her claims have no real chance of success and summary judgment is an appropriate disposition.

*(b) Incapacity*

[36] Albert Jesty's evidence disclosed that he had health issues in June of 2017. The evidence supports that he had chest pain while doing yard work on June 16, 2017. He was subsequently admitted to hospital and had surgery on June 27, 2017. He was discharged from hospital on July 3, 2017.

[37] Jesty invokes s.19 of the *Limitations of Actions Act* which suspends a limitation period in certain circumstances:

> **Incapacity**
>
> 19 (1) The limitation periods established by the Act do not run while a claimant is incapable of bringing a claim because of the claimant's physical, mental or psychological condition.
>
> (2) Where the running of the limitation period is suspended under subsection (1) and the limitation period has less than six months to run as of the day on which the suspension ends, the limitation period is extended to include the day that is six months after the day on which the suspension ends.

[38] The central question under s.19(1) of the *Act* is what constitutes incapacity.

[39] This issue was recently considered in ***Cameron***, *supra*. In that case, the plaintiff was denied long term disability benefits and argued that the running of the limitation period was suspended during her period of incapacity. Justice Rosinski considered what was meant by "incapable of bringing a claim because of the claimant's physical, mental or psychological condition". A variety of authorities were considered. Rosinski, J. reasoned:

> 48 Regarding the plaintiff's suggested "incapacity", there is *no evidence* that on or about May 13, 2016, she did not understand the key factual trigger to the running of the limitation period here…There is no evidence that she was incapable of understanding the information contained in the May 4, 2016 letter on that date or during the ensuing year, and appreciate the reasonably foreseeable consequences of making her decision, or not, in relation thereto.
>
> 49 If Section 19 of the new Act is applicable, and: the running of the limitation period is suspended as a result of Ms. Cameron having been "incapable", that suspension ends as of a day that is within six months of the end of the one year limitation period; then the limitation period is deemed by law to be extended "to include the day that is six months after the day on which the suspension ends".
>
> 50 The limitation period here cannot be extended by any claimed "incapacity". Ms. Cameron has not met the evidentiary standard.

[40] In coming to his conclusion in ***Cameron***, Justice Rosinski adopted the reasoning of Perell, J. in ***Landrie v. Congregation of the Most Holy Redeemer***, 2014 ONSC 4008, a case which considered the meaning of "incapable" under s.7

of the *Ontario Limitations Act* and reflected upon the onus on the party so claiming. At para 32, Perell, J. observed:

> … section 7 requires only that the plaintiff be incapable of commencing a proceeding in respect of the claim because of a physical, mental or psychological condition… The evidentiary onus to show incapacity is on the party relying on section 7, and in other cases, plaintiffs have failed to toll the running of the limitation period when they have failed to provide evidence, particularly medical evidence, to establish incapacity.

[41] A lack of capacity to commence proceedings was also raised in ***Richards Estate***, *supra*. There the deceased had suffered from a long history of diabetes and ultimately died of a heart attack. A large volume of medical evidence was presented, most of which was struck as irrelevant to the capacity question and otherwise inadmissible. Smith, J. concluded that there was insufficient evidence that the deceased had been incapable of bringing the claim under s.19. A request to file additional medical evidence was denied at para. 172:

> … A party responding to a motion for summary judgment on evidence must put there best foot forward. Even if this Court had ruled that all of the medical information … was properly in evidence , that would be insufficient evidence to show that Mr. Richards lacked the capacity to bring a claim.

[42] In the present case, it is argued that Jesty has not met the evidentiary burden to establish incapacity and invoke the suspension available under s.19 of the *Act*. In large measure, I agree with that submission. It seems a reasonable inference on

the evidence that Jesty was incapacitated in the immediate period surrounding his heart surgery. He was discharged from hospital on July 3, 2017 with driving limitations. There is no evidence of any other limitations placed upon Jesty and no evidence establishing any incapacity to bring his claim. Even if I were to conclude that a period of incapacity was established, I have no basis on the evidence presented to say how long it extended or when it concluded.

[43] In the end, I agree with the submission made on behalf of Gillis that there is no basis in evidence to say that such an incapacity existed up to or including September 20, 2017 (being six months prior to the commencement of the present action on March 20, 2018). The most favourable interpretation of the evidence (for Jesty) is that Jesty was incapacitated until discharge from hospital on July 3, 2017. If that were the case, the suspension in s.19 would only operate to extend the limitation period to January 3, 2018.

**CONCLUSION**

[44] There are no facts in dispute on this motion. The defendant seeks summary judgment on evidence and relies upon the limitation period in the *Limitations of Actions Act*. The defendant established that a limitation period applied to the claims advanced and that the present action was commenced outside that period. I

conclude that the Jestys have no real chance of advancing their claims in the face of the limitation defence. Summary judgment is appropriate.

[45] The motion is granted. The defendant is the successful party and entitled to costs. If the parties cannot agree on costs, written submissions may be made no later than October 14, 2019.

Gogan, J.