Court File No. SC-13-241

ONTARIO
SUPERIOR COURT OF JUSTICE
BRACEBRIDGE SMALL CLAIMS COURT

BETWEEN:

LINDA DANBY

Plaintiff

And

MICHAEL MICHAUD

Defendant

Representation:

J. Farr, paralegal for the Plaintiff
T. Johnston, paralegal for the Defendant

Heard: January 14, 2014
Judgment: February 6, 2014

REASONS FOR DECISION

The defendant brings a motion to strike out the plaintiff's statement of claim on the basis that the two year limitation period has expired under section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as amended. The plaintiff hired the defendant to install a geothermal system in her home. The contract was entered into in March 2010 and the installation was completed on May 11, 2010. The plaintiff launched her lawsuit on July 2, 2013 and is claiming damages in the amount of $25,000.00.

The defendant characterized the motion as a motion for summary judgment in written submissions after the hearing of the motion. However, the Court of Appeal has

2014 CanLII 12060 (ON SCSM)

determined that a motion for summary judgment is not available in the Small Claims Court. See *Van de Vrande v. Butkowsky* (2010), 99 O.R. (3d) 641 (C.A.). I am, thus, governed by Rule 12.02 and Section 25 of the *Courts of Justice Act* which states:

> "**Summary Hearings** – The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience."

The defendant filed affidavit evidence in support of his motion. He testifies that the plaintiff knew of her damages right after the installation but did not sue him within the two year limitation period. He particularly draws attention to paragraph 7 of the plaintiff's statement of claim where she pleads that "[t]he installation was defective from day one" and paragraph 2 of her reply affidavit where she states that she observed geothermal pipes floating on the lake immediately after the installation. The defendant relies upon the principle that a plaintiff does not need to know the full extent of the plaintiff's damages before the limitation period starts to run. See, for example, [2012] *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, [2012] O.J. No. (C.A.) at par. 7; *Jagosky v. Huntsville (Town)*, [2010] O.J. No. 3562 (S.C.J.) at par. 26. The installation was completed on May 11, 2010 and the plaintiff should have sued by May 10, 2012 according to the defendant. She only sued on July 2, 2013.

The plaintiff filed a reply affidavit to the motion. The essence of her evidence is that the defendant continually promised to perform repairs to the geothermal system which suspended the running of the limitation period. The floating loops or geothermal pipes in the lake were a major concern. In her affidavit, she states that the defendant attended at her property on November 28, 2010 and performed some repairs but "[h]e said it was too late in the year [2010] to address the floating loops. He promised to return

2014 CanLII 12060 (ON SCSM)

in the spring [2011]." She refers to many promises to perform repair work made by the defendant. These promises are in email exchanges between the plaintiff and the manufacturer of the heat pump for the geothermal system and between the plaintiff and the defendant. The emails are from December 2010 onwards and are referred to in the plaintiff's reply affidavit. I quote some of the exchanges:

Plaintiff/Manufacturer

"Mike Michaud assures me he will sort this out." (Book #1, p. 56, Dec 9/10)

"The two Mikes will sort out the logic board function and get that running properly." (Book #1, p. 58, Dec 9/10)

"Mike Michaud assures me he will stop by your place tomorrow." (Book #1, p. 65, Jan 6/11)

"I am sure Mike Michaud will do his bit and I shall keep in touch with him." (Book #1, p. 67, Jan 7/11)

"As agreed last year Enertran [manufacturer] will pay for George's digging costs . . .Enertran will certainly work with Mike to resolve the matter." (Book #1, p. 71, Sept 6/11)

"The loops are floating and have always been floating. I have had Gravenhurst plumbing and heating physically inspect the system. They are willing to do the repairs if Mike will not. I will give Mike the opportunity to make amends as a courtesy (against my better judgement)." (Book #1, p. 72, Sept 7/11)

"Mike has until September 15th to inform me either way of his decision, at which time I will take 'no reply' as he is unwilling to do the work. If he is to do the work I require an exact date in October which he is planning on completing the job." (Book #1, p. 72, Sept 7/11)

"I shall pass this suggestion on to Mike Michaud and he can discuss it with my contact people if he wishes." (Book #1, p. 74, Sept 19/11)

Plaintiff/Defendant

"I will be there to position the pipes once the trench is dug." (Book #1, p. 78, Sept 21/11)

2014 CanLII 12060 (ON SCSM)

> "Don [manufacturer] is paying George to dig the trench . . . I am not paying any repair costs." (Book #1, p. 79, Sept 21/11)
>
> "Ok, I think we agree that I deal with the pipes, george digs the trench." (Book #1, p. 80, Sept 21/11)
>
> "Requesting confirmation on repair date of October 3rd?" (Book #1, p. 82, Sept 26/11)
>
> "I'm not available next week but the week after will work. Let's do Monday October 17th." (Book #1, p. 91, Oct 7/11)

A most significant email from the plaintiff to the defendant is one dated September 16, 2011 (Book #1, p. 73). I quote the email in full:

> "As noted below the 15th of September was the day in which a reply was expected. I will allow until next Wednesday the 21st to receive a reply in writing or I will proceed to hire an alternate installer to repair the deficiencies. Time is running out and frost is here and this time as agreed is the optimum time for the work to be done. I would not have delayed this long had I known that your agreement with me to carry out the repairs would not be fulfilled. At no time prior did you indicate in any past discussions or e-mails the fact that costs would be involved at all or that you expected me to absorb any costs related to damage which may occur. This is my 2nd attempt to a response and now you refuse to proceed with our agreement in the settlement discussions. I am very disappointed and I will allow one last opportunity for you to respond. As mentioned before [,] work is to be done inclusive of parts and labour and at no cost to the home owner. If I had of foreseen that you planned to back out I would have already made arrangements for an alternate installer back in the winter when the original agreement was made between our parties." (Book #1, p. 73, Sept 16/11)

The promises to perform by the defendant came to an end when the defendant drafted an agreement which he required the plaintiff to sign before he would proceed with the repair work. On October 16, 2011, the defendant emailed the plaintiff the following:

> "Attached is the agreement I need signed. If you want to change anything I will need to agree to it first. I will need this signed before anything starts. Sorry for sending it so late." (Book #1, p. 92)

2014 CanLII 12060 (ON SCSM)

On October 17, 2011, the defendant further emailed the plaintiff that "I will be there around 9:30. If you're not willing to sign that [the agreement] then I will be leaving." (Book #1, p. 94) The agreement (Book #4, Tab #1, p. 3) is dated October 15, 2011 and involves work to be performed by the defendant to weigh down geothermal piping (the floating loops) to the bottom of a new trench. The agreement contains exculpatory clauses in favour of the defendant and makes the plaintiff responsible for any damage to the piping caused during the repair work. The plaintiff received legal advice about the agreement and was advised that she should not sign it. She did not sign it. The defendant did not attend to perform the repair work. After the defendant's failure to perform the repair work, the plaintiff states in her affidavit that "I tried to have other contractors repair the system unsuccessfully. In January 2013 the heat exchanger in the heat pump blew up." The plaintiff commenced her lawsuit against the defendant on July 2, 2013.

In my view, the limitation period issue may be considered under the doctrine of promissory estoppel. This doctrine was not argued on the motion or stated in the pleadings but the material facts of the case support a consideration of the doctrine. A leading statement on promissory estoppel is found in the Supreme Court of Canada decision in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641. McIntyre J., for the court, referred to a definition of promissory estoppel from Lord Denning:

> Cases dealing with the question [of promissory estoppel] in this Court include Conwest Exploration Company Limited v. Letain, [1964] S.C.R. 20, and John Burrows Ltd. v. Subsurface Surveys Ltd., [1968] S.C.R. 607, in which Ritchie J., at p. 615, speaking for the Court, cited the judgment of Lord Denning in Combe v. Combe, [1951] 1 All E.R. 767:
>
> > In the case of Combe v. Combe, Lord Denning recognized the fact that some people had treated his decision in the High Trees case as having extended the principle stated by

2014 CanLII 12060 (ON SCSM)

> Lord Cairns and he was careful to restate the matter in the following terms:
>
> > The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.
>
> It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

Another leading statement on promissory estoppel is found in the Supreme Court of Canada decision in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] S.C.J. No. 43 at par. 13. Sopinka J., for the court, stated:

> "[13] The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position."

In Ontario, promissory estoppel can operate as an answer to a limitation defence. See, for example, *Whorpole Estate v. Echelon General Insurance Co.*, [2011] O.J. No. 1644 at par. 14.

In my view, the requirements of promissory estoppel have been met in this case. The emails disclose that the plaintiff and the defendant entered into negotiations in the

2014 CanLII 12060 (ON SCSM)

fall of 2010 and the winter of 2011 and concluded a verbal agreement in the winter of 2011 as described by the plaintiff in her September 16 email quoted previously. The negotiations and agreement occurred before the limitation period had expired. Pursuant to the agreement, the defendant led the plaintiff to believe that he would perform repair work on the geothermal system without costs to the plaintiff. As late as the September 16 email, the plaintiff stated: "At no time prior did you indicate in any past discussions or e-mails the fact that costs would be involved at all or that you expected me to absorb any costs related to damage which may occur" and "As mentioned before [,] work is to be done inclusive of parts and labour and at no cost to the home owner." The defendant did not file a reply affidavit disputing these negotiations and the agreement made and nothing about them is addressed in the defendant's initial supporting affidavit on the motion. In my respectful opinion, the documentary evidence establishes that the defendant by his words and conduct made a promise to perform repair work on the geothermal system without costs. This led the plaintiff to forego seeking out other contractors, as stated in the September 16 email, to perform the repair work, pay for the repair work, and then sue the defendant for reimbursement of the costs of the repair work. The legal relations between the defendant and the plaintiff had been altered by the defendant's promises. In my view, the running of the limitation period was suspended until the defendant refused to perform the repair work on October 17, 2011. The statement of claim was issued July 2, 2013 within two years of the defendant's refusal to perform the repair work. I remark that the plaintiff's affidavit evidence does not make it clear why she waited so long to launch her lawsuit. She notes that she attempted to have other contractors do the repairs afterwards without success. However, she also states in her affidavit that she had

2014 CanLII 12060 (ON SCSM)

Gravenhurst Plumbing and Heating attend at her property on or before November 11, 2011 and they suggested the installation of a new loop for the geothermal system. Nevertheless, this lack of explanation does not affect the result. The action was launched within the two year period from October 17, 2011. The defendant's motion is, therefore, dismissed with costs to the plaintiff.

If the parties cannot agree upon costs of the motion, the plaintiff may address the costs of the motion, in writing, within 21 days of receiving this judgment from the Clerk of the Small Claims Court. The defendant will have 21 days to respond to the plaintiff's costs submissions. All costs submissions are to be sent to each party and filed with the Clerk of the Small Claims Court with proof of service.

I thank counsel for their legal research and written submissions delivered after the hearing of the motion.

February 6, 2014

DONALD J. LANGE, DEPUTY JUDGE

2014 CanLII 12060 (ON SCSM)