CITATION: Sanei v. Debarros, 2022 ONSC 6758
COURT FILE NO.: CV-16-125816
DATE: November 30, 2022

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SIAVASH SANEI, Plaintiff / Respondent

AND:

MARCELAINE DEBARROS, Defendant / Applicant

BEFORE: H.K. O'Connell J.

COUNSEL: Martin Forget, for the Plaintiff / Respondent

Blair Nitchke, for the Defendant / Applicant

HEARD: January 13, 2022 by Zoom

JUDGMENT

[1] The parties were advised on September 30, 2022 that I was granting summary judgment as sought by the moving party / defendant.

[2] These are my full reasons. At the outset I would be remiss not to thank counsel for their excellent materials and oral presentation.

Overview

[3] The Court was called upon to consider whether i) there is a genuine issue requiring a trial as to whether the plaintiff's claim is statute barred by virtue of the *Limitations Act*; and ii) did the plaintiff act with due diligence to determine whether his injuries were serious and permanent within the limitation period.

[4] The issue on this motion was focused on the discoverability issue.

[5] As with all summary judgment motions, this case involves consideration of Rule 20 of the *Rules of Civil Procedure*, in particular Rule 20.04.

[6] The leading case of *Hryniak and Mauldin* looms large in the equation as it commands the court to consider when there is no genuine issue. This will be so when a judge is able to reach a fair and just determination on the merits of a summary judgment motion.

[7] To ascertain the fair and just determination factors, summary judgment will issue when the process allows the judge to make necessary findings of fact, allows the judge to apply the law to

the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.[1]

[8] Although the onus is on the moving party on a summary judgment motion to establish that there is no issue requiring a trial, the respondent on such a motion must lead trump or risk losing. The moving party referenced caselaw to support its position.

[9] Implicit in the assessment of the motion for summary judgment entitles the court to assume that if the case proceeds to trial, the respondent on the motion would present no additional evidence.[2]

[10] There is no issue as between the parties on this motion that the motor vehicle accident in this case occurred on February 2, 2013 in Richmond Hill. The plaintiff was hospitalized for four days.

[11] The plaintiff retained counsel on or before February 19, 2013. The same counsel remained on the file up until the time of service of the summary judgment motion.

[12] The action was commenced on March 2, 2016, which is three years and one month after the accident occurred.

[13] The total time passage from accident to commencement of the action is 37 months, 1 year and 1 month post the pertinent limitation period.

Position of the Applicant on the motion

[14] The moving party argued that summary judgment was required as the plaintiff did not bring its claim within the prescribed time period of the *Limitations Act*, namely two years, and that the claim was otherwise discoverable within that time period, such that the claim is statute barred.

[15] There was concern at first after the accident with cardiac issues. The plaintiff testified at examination for discovery on April 5, 2017 that he was admitted to hospital on February 2, 2013, due to pain in his neck, left shoulder and right leg.

[16] The areas of accident related injuries were pain in the neck, left shoulder, right leg, right knee and lower back.

[17] Furthermore, the plaintiff testified that his injuries after the accident had been serious and permanent.[3]

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[1] See *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) per Karakatsanis J. at page 49.
[2] *Rogers Cable T.V. Ltd. v. 373041*, 1884 CarswellOnt 166.
[3] Plaintiff's examination at discovery, and the affidavit of Tamara Zdravkovic. Counsel for the plaintiff on the motion noted that personal perception of serious and permanent injuries are not the end of the story on when those factors were discoverable.

[18] The plaintiff also testified that his ability to bend causes pain, a feature that arose from the accident and is permanent. His walking was compromised since the accident, which he described as an ability to walk only very little.

[19] The plaintiff alleges permanent and serious impairment in his claim, in other words that he meets the threshold to sustain his claim.

[20] Clinical notes of the plaintiff's family doctor confirm his consistent post accident complaints.[4]

[21] Three reports of doctors were referenced in oral submissions and are set out in the motion materials. There was no issue with their use on this motion.

[22] Dr. Moddel, a neurologist, conducted a neurological examination of the plaintiff dated September 13, 2013 and authored a report. It noted that from a neurological perspective there was no substantial inability to carry on a normal life, but that the plaintiff used a walker for pain issues.

[23] Dr. Fielden wrote a report dated November 8, 2013 and noted that the plaintiff's family doctor prescribed serious pain medications.

[24] Dr. Mandel, a psychologist, wrote a report dated November 15, 2013. It speaks to the difficulty of the plaintiff sleeping, having nightmares, poor appetite, agitation, sadness and worthlessness. Memory and concentration were also noted issues.

[25] A referral was made to a psychiatrist, Dr. Azadian, who authored a report dated December 19, 2013. This doctor noted that the plaintiff met the DSM-IV diagnostic criteria for Major Depressive Disorder and Pain Disorder Associated with both Psychological Factors and a General Medical condition. Psychotherapy and medication were recommended.

[26] In his oral submissions, Mr. Steinman advised that the most important part of his argument is that counsel for the plaintiff had completely overlooked the report of Dr. Azadian. Instead counsel for the plaintiff referenced a psychologist's report, a Dr. Sedighdeilami.[5]

[27] Furthermore, Dr. Azadian's report was procured by plaintiff'scounsel, but former counsel for the plaintiff never referenced it in his affidavit. This material is clearly relevant to the issue of discoverability, argued counsel, and belies any triable issue arising from former counsel's affidavit.

[28] Counsel referred to the excerpts of Dr. Sedighdeilami's report, dated September 12, 2014, in which reference was made to serious and permanent injuries of both a physical and psychological nature.

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[4] Affidavit of Tamara Zdravkovi and examination for discovery of the plaintiff. Clinical notes of Dr. Boozaray dated February 13, 2013 to January 28, 2015.

[5] In this respect, I concur as both doctors provided information that relates to this motion. Dr. Azadian's findings and that of Dr. Sedighdeilami's reports are remarkably similar.

[29] Even on this evidence, this date was well within the two-year presumptive limitation period, and was otherwise discoverable.

[30] Counsel submitted that the plaintiff's injuries were obviously considered permanent and serious. This is buttressed by the evidence of the plaintiff at discovery.

[31] The plaintiff's injuries remained consistent since the accident. Reasonable discoverability before the two-year limitation period expired is therefore clear in relation to the issue of serious and permanent injuries.

[32] Simply put, there was no significant or material change in the plaintiff's condition between the time of the accident and the expiry of the two-year limitation period. The limitation period was missed.

Position of Respondent's counsel [6]

[33] Mr. Pickard argued three issues: the complexity of the medical evidence required a trial and the conflicts within this case required the fullness of a trial with a full record; there is no expert evidence from the defence when determinability of a serious and permanent injury occurred; and finally there is no evidence that the plaintiff could have known earlier that his injuries met the threshold and were thus discoverable.

[34] In his factum, Mr. Pickard highlighted the following: fairness is important and the law impacting on limitations issue is not merely a mechanical exercise; that the threshold is exclusively a medical issue; that discoverability has to be considered to avoid an injustice such that the requirement is reasonably discoverable and that there is a substantial chance to succeed in recovering in damages; that a claim is a motor vehicle case and the limitations period does not begin to run until the necessary elements as set out in the legislation can be satisfied on the evidence, such that the statutory deductible is exceeded; amongst other issues raised in his factum.

[35] No doctor gave an opinion of a serious and permanent injury.

[36] Mr. Pickard offered that, if anything, the claim was issued too early.

[37] The category of serious and permanent injury are a medical determination that drives the issue of discoverability. Both types of injury are required. Furthermore, a finding of serious and permanent injury cannot be predicated on a simple opinion of such.

[38] The threshold determination is very complex based on the body of medical evidence to evince a serious and permanent injury. The evidentiary record of the defence in this case is not sufficient to drive a serious and permanent injury determination within the limitations period.

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[6] It was not necessary to reference each of the parties' evidentiary records in summing up their positions on the motions. I had the complete record of evidence from both sides, as well as well-structured facta and direct and succinct submissions.

[39] Counsel drew from the caselaw that a full evidentiary record is required. In the case at bar, no such record exists and as such, summary judgment is not the forum to deal with this case. There is a genuine issue that must be reserved for a trial.

[40] In *Wakelin v. Ghourlay*, the court sets out the threshold of discoverability, which is not a high threshold. If an explanation is provided, it raises a triable issue, especially in the case at bar where there is conflicting evidence.

[41] No evidence exists to show a serious and permanent injury from either the plaintiff or his former lawyer on the record on this motion. Counsel cited several cases for the Court to consider. Although the accident benefits reports do not opine on serious and permanent impairment, they "clearly suggest such impairment."

[42] Due diligence is also alluded to in the affidavit of prior counsel. Clearly counsel is investigating the claim, which is "very important here," argued Mr. Pickard.

[43] In summary, there was too much conflict in the evidentiary tableau for this case to admit to summary judgment and as well, there are lacunas in the record which should compel a trial.

[44] On the basis of prior counsel's affidavit standing alone, there is no basis to have concluded within the two-year limitation period that the plaintiff had a serious and permanent injury.

[45] Reference was made to the need for an objective opinion that a lawsuit is appropriate, not what a plaintiff believes or what a lawyer may think about the elements of a serious and permanent injury. Cases involving threshold issues are not easily reconcilable on a summary judgment motion.

[46] It was incumbent on the moving party / defendant, to have produced evidence of a serious and permanent impairment, and without such production this motion must fail.

[47] Mr. Pickard, as did plaintiff's counsel, went through the reports of various doctors to attempt to illustrate the need for a trial.

Reply of Defendant

[48] Counsel described the submissions of Mr. Pickard as a "filibuster".

[49] There is no need for an "opinion" about permanent and serious injury before a claim is issued. The consideration of what amounts to permanent and serious injury can be clearly drawn by the evidence before the court.

Decision

[50] As noted, this case is predicated on the application of the *Limitations Act*, inclusive of the presumptive two-year period in which to commence a claim and the requirement to consider the discoverability issue. As counsel for the moving party noted, the court was tasked with answering the following two issues:

1. Is there a genuine issue requiring a trial as to whether the plaintiff's claim is statute barred by virtue of the *Limitations Act*, 2002?

2. Did the plaintiff act with due diligence to determine whether his injuries were serious and permanent within the limitation period?

[51] Juxtaposed against this is the test for considering summary judgment under Rule 20 and the caselaw that has spun out of it, in particular, *Hryniak v. Mauldin*.

[52] The *Hyrniak* case compels the court to consider whether there is a genuine issue requiring a trial. In *Hryniak* the Supreme Court said,

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[53] Section 4 of the *Limitations Act*, 2002, notes that a party is precluded from bringing a claim outside the two-year limitation period, but this is subject to section 5 of the *Act*, which defines the time period as starting to run from the date the claim was first discovered.

[54] Section 5(2) of the *Act* presumes that the person knew of the claim on the day the act or omission on which the claim is based took place, unless the contrary is proven.

[55] Discoverability is discussed in the case of *Peixeiro v, Haberman*, [1997] 3 SCR 549, where the court noted that in the MVA context, time does not run under the *Limitations Act* until it is reasonably discoverable that an injury meets the threshold within the *Insurance Act*.

[56] Discoverability is defined as when a person first knew a claim was the appropriate remedy for a loss and where a reasonable person with the abilities and in the circumstances of the person with the loss ought to have known that the claim would be an appropriate remedy for the loss.

[57] A simple raising of a discoverability issue does not result in an automatic finding of there being a genuine issue requiring a trial. Where a *Limitations Act* defence is raised, the onus then shifts to the plaintiff to rebut the presumption.

[58] To meet the threshold, the plaintiff must have a permanent and serious impairment. In this respect I reject the argument that an expert was required to opine on such. There is much medical evidence, referenced earlier, which I accept to compel the conclusion that the plaintiff had serious and permanent injuries discoverable well within the two-year limitation period.

[59] It is also worthy of note that counsel for the plaintiff handled the accidents benefit claim which shows a serious and permanent injury.[7]

[60] The evidence establishes, I find, that it is plain that the injuries suffered by the plaintiff as a result of the motor vehicle accident in February 2013, and the reports of the various doctors in the latter part of 2013, and Dr. Sedighdeilami, in September 2014, clearly meet the *threshold* of both permanent and serious injuries, and were discoverable within the two-year period post date of the accident.[8]

[61] This is also the view of the plaintiff who testified to such at his discovery.[9]

[62] As a consequence, I ordered that summary judgment shall issue. There is no genuine issue requiring a trial, given that the claim was discoverable within the two-year time period, and as such the action is barred by the *Limitations Act*.

The Honourable Mr. Justice H.K. O'Connell

Date: November 30, 2022

[7] It is conceded that the seeking of accident benefits is not dependent on a serious and permanent injury scenario, however, it informs the nature of the injuries sustained. As counsel stated during oral argument: Although the accident benefits reports were not to opine on serious and permanent impairment they "clearly suggest such impairment."
[8] See the Statement of Claim.
[9] This is not to suggest that the plaintiff would be able to ascertain a medical definition of serious and permanent injury but within the context of his own evidence there is a clear indication that his maladies from the accident in February 2013 were such. His evidence does not, as noted stand alone on this issue.