CITATION: Rahmouni v. Distinctive Wood Products Inc, 2024 ONSC 5738
COURT FILE NO.: CV-21-955
DATE: 2024/10/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Ammar Rahmouni Plaintiff	)	Georgiana Masgras for the Plaintiff / Responding Party
– and –	)	
Distinctive Wood Products Inc., Johnston Group Inc., and Desjardins Insurance Defendant	)	Suzanne Chandrakumar for the Defendant / Moving Party, Desjardins Insurance
	)	**HEARD:** February 28, 2024

THE HONOURABLE JUSTICE I.R. SMITH

REASONS FOR JUDGMENT

Introduction

[1] The plaintiff claims from the defendant Desjardins Security Financial Life Assurance Company ("DFS") damages and disability benefits. The plaintiff says that he became disabled and was, pursuant to a policy he had with DFS through his employment with Distinctive Wood Products Inc. ("DWP"), entitled to disability benefits which were not paid. DFS now moves for

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summary judgment, submitting that the claim is out of time and that the plaintiff cannot avail himself of the doctrine of relief from forfeiture.[1]

[2] For the reasons that follow, summary judgment is granted.

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Background

[3] The plaintiff worked for DWP from October 21, 2016, to May 9, 2017. From 2014 until June 1, 2017, DFS provided group insurance to employees of DWP under group policy #175 (the "policy"). Under the policy, DWP employees had coverage for disability benefits.

[4] The plaintiff had coverage under the policy from February 1, 2017, the date on which he was enrolled as an insured person under the policy, until May 9, 2017, when he left the employ of DWP due to severe back pain. Earlier, on February 27, 2017, after he complained of pain in his shoulder and numbness in his leg, the plaintiff's physician advised him that he was unable to do the repetitive work he had been doing at DWP.

[5] By way of statement of claim dated July 19, 2021, the plaintiff sued for entitlement to disability due to injuries caused by an automobile accident on October 5, 2020. On August 24, 2021, DFS served the plaintiff with a demand for particulars, but received no response. On May 24, 2022, DFS served the plaintiff with a request to admit. The plaintiff's response, dated May 31, 2022, advised as follows:

> The Plaintiff made an error drafting the Statement of Claim and set out the date of disability as October 5, 2020, in relation to a motor vehicle collision that the Plaintiff was involved in. This is not the material date of disability and the Plaintiff will amend his claim to reflect the proper date of disability, namely early 2017, when he began to experience back, shoulder, and neck pain because arising out his engaging in repetitive in the employ Distinctive Wood Products [all syntax errors in the original].

[6] In the response the plaintiff also admitted that he had never applied for disability benefits from DFS. As of the date of this motion, the plaintiff had not submitted a claim for benefits to

[1] The claims against the other defendants have already been discontinued.

DFS for either the claim arising in early 2017 or the claim arising from a car accident in 2020. The plaintiff did, however, move on February 12, 2024, for leave to amend his statement of claim to remove reference to the 2020 car accident and to claim instead that he is totally disabled because of injuries to his back, shoulders and neck, which injuries were sustained at work. I granted that relief – unopposed by DFS – on February 29, 2024.

[7] DFS gave notice of this motion for summary judgment on May 1, 2023, and provided a supporting affidavit from Mr. Gordon Brookes, Contested Matters Advisor for DFS, sworn April 20, 2023. The plaintiff's responding affidavit was sworn on September 29, 2023 and it attached medical information respecting his workplace injuries sustained in "early 2017." It was served on DFS on October 2, 2023.

[8] At his cross-examination for this motion, because the plaintiff's first language is not English, he testified with the assistance of an Arabic interpreter. On cross-examination, the plaintiff said that in February 2017 he was aware that he was enrolled under the policy, at which time he received from an officer of DWP (possibly a supervisor) a letter and a brochure describing his benefits and coverage, along with a membership card. Although the plaintiff said early in his cross-examination that he was aware he had disability coverage in February 2017, he later said that only some of the benefits available under the policy were explained to him then, and that he was advised that he should read the brochure at home, which he did not do because he had no-one at home who could read the English document to him. He said he was not told that he had disability benefits, although he testified that he became aware of those benefits when he consulted a lawyer – to whom he had given the brochure and letter which described his benefits – no later than July of 2017.

[9] Krisztina Bira, the controller of DWP submitted an affidavit. She said that, before receiving the statement of claim in 2021, DWP was never informed by the plaintiff that he wished to make a claim to DFS or any other insurer for disability benefits, and he ultimately made no such claim to the knowledge of DWP.

Positions of the parties

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[10] DFS submits that summary judgment ought to be granted because the plaintiff's claim is out of time both pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, and pursuant to the policy's contractual limitation period.

[11] The amended statement of claim also added a plea pursuant to s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, as am., and s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, for relief from forfeiture for imperfect compliance with the terms and conditions of the policy. With respect to this issue, DFS submits that the plaintiff cannot succeed because the evidence, which is uncontroversial, establishes that the plaintiff's conduct amounted to non-compliance with the policy, not imperfect compliance, and that in any case the plaintiff's conduct was not reasonable and cause prejudice to DFS. Accordingly, relief from forfeiture is unavailable in this case.

[12] DFS's further arguments relating to the plaintiff's motor vehicle accident in 2020 are now moot given that leave has been granted to amend the statement of claim so that reference to that part of the plaintiff's original claim is removed.

[13] The plaintiff submits that there are genuine issues for trial given that there is evidence that he did not know when and how his claim ought to be made and given that he has now supplied medical information respecting his disability to DFS.

Discussion

Is the plaintiff out of time?

[14] The plaintiff says that he became totally disabled sometime in "early 2017." For the purposes of this motion, DFS assumes that the injury was incurred while the plaintiff was insured under the policy, that is, between February 1, 2017 (the date of his enrollment under the policy) and May 9, 2017 (the date that he left the employ of DWP).

[15] Pursuant to s.4 of the *Limitations Act*, the plaintiff was required to commence his action within two years of the discovery of his claim. As of the last day of his employment with DWP, which was also the last day of his coverage under the policy, the plaintiff knew that he had been injured, knew that he was disabled and unable to work, knew that he had insurance benefits through his employment insurance policy, and knew that he was not receiving those benefits. The plaintiff

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gave inconsistent evidence about when he understood that he had disability benefits through the policy, but at the latest he had that understanding in July of 2017.[2]

[16] Therefore, DFS submits, by operation of s. 5 of the *Limitations Act*, the claim was "discovered" no later than May 9, 2017, but, in the alternative, the discovery was made no later than July 2017. The statutory limitation period, then, ended either on May 9, 2019, or in July 2019: *Thompson v. Sun Life Assurance Company of Canada*, 2015 ONCA 162, at paras. 13 – 15; *Kumarasamy v. Western Life Assurance Company*, 2021 ONCA 849, at para. 29; *Ferguson v. Halton*, 2018 ONSC 5675, at para. 136.

[17] The original statement of claim was dated July 19, 2021 (and cited a cause of disability that post-dated the plaintiff's coverage under the policy); the response to the request to admit (in which for the first time the plaintiff cited injuries sustained at work in "early 2017" as the cause of disability) was dated May 24, 2022; and the motion to amend the statement of claim was not brought until February 12, 2024. All of these dates post-date the end of the statutory limitation period by a substantial amount.

[18] The only significant resistance the plaintiff offers to the drawing of the conclusion that the limitation period was missed is that, because his claim for benefits was "late-filed," it was not considered and was never denied. There are two problems with this argument. The first is that there is no evidence in the record that the plaintiff ever made a claim for disability benefits. On the contrary, the records of DFS show that no claim was ever received, as the plaintiff admitted in his response to the request to admit. It was not until after this motion was launched that the plaintiff provided any medical information at all to DFS, which information was attached to the plaintiff's

[2] Although counsel for the plaintiff resists this conclusion, the evidence given by the plaintiff on cross-examination supports it, and no other evidence given by the plaintiff supports a conclusion that he came to understand that he had disability benefits on any later date. Moreover, as in *Kumarasamy* (see paras. 25 – 27), the fact that the plaintiff had engaged counsel, to whom he had given information about his benefits, and who had explained that disability benefits were available, is an important consideration in this respect. In the present case, in addition to showing that the plaintiff had knowledge of his benefits, it undercuts other arguments made by the plaintiff, including that DWP should have been providing him with information, or that the benefits application process was difficult, especially given that the plaintiff's first language is not English. Before leaving this issue, I note that at no point in the plaintiff's affidavit or during his cross-examination did he say that he was unable to navigate the application process because it was complicated, or because he is not fluent in English. At its highest for the plaintiff, his lack of fluency in English delayed his understanding of his entitlement to disability benefits to July of 2017.

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responding affidavit prepared for this motion. As such, it was understandably treated by DFS as evidence produced in the course of an action, not as an application for benefits as the plaintiff argues, especially given that the limitation periods (both statutory and, as will become clear, contractual), had long since passed.[3]

[19] This leads to the second point, which is well-summarized in the judgment of Petersen J. in *Ferguson*, at para. 136:

> In traditional insurance cases where no application for benefits has been submitted by the plaintiff, courts have found that the limitation period begins to run from the date the plaintiff became aware that they were totally disabled and had knowledge of the existence of their coverage: *Thompson* at paras. 13-15. If it were otherwise, a plaintiff could stall and control the triggering of the limitation period by holding back on filing an application indefinitely or until it suits them.

[20] Accordingly, then, the claim is statute-barred by expiry of the limitation period.

[21] However, the claim is also out of time pursuant to the contractual limitation period set out in the policy, the terms of which had the effect of providing even more time to the plaintiff to commence his action. Those terms provided for an "elimination period" of 120 days following the date of disability (in this case, for the purposes of this motion at least, the last day of the plaintiff's coverage (May 9, 2017)), during which time he was not eligible to receive payments for total disability.[4] The elimination period is then followed by another 60-day period by the end of which the plaintiff ought to have submitted his proof of claim.[5] The proof of claim deadline is

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[3] As Gordon Brookes, the representative of DFS, testified on cross-examination, a statement of claim is not a claim made for benefits, "It's just allegations." After receiving the statement of claim, he expected to receive "all evidence" from the plaintiff respecting his claim for benefits in the course of the litigation: "I think that is kind of normally the way, in my experience, things go." The medical evidence provided by the plaintiff in this case was well after the deadlines in the policy so it was considered "late-filed" in that respect and, in any case, he could not say whether the medical information provided by the plaintiff would have been sufficient to adjudicate on the plaintiff's entitlement to benefits. When confronted with the suggestion that DFS could ask for any missing medical information, Mr. Brookes responded that he understood that it would be the plaintiff's "obligation under the *Rules of Civil Procedure*" to supply that information."

[4] The policy defines the "elimination period" as follows: "Elimination Period means the period, as specified in the Benefit Schedule, of continuous Total Disability which must be completed by an Employee before Monthly Income Payments commence under this policy."

[5] The policy describes the proof of claim period as follows: "Initial written notice of a claim must be submitted to the Insurer within 30 days of the expiry of the Elimination Period and initial written proof, within 60 days of the expiry of the Elimination Period."

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then followed by a further 60-day period during which no action may be commenced against DFS.[6] A two-year limitation period follows thereafter.

[22] Accordingly, the effect of the terms of the policy was to extend the limitation period for commencing the plaintiff's action by 240 days. Using his last day of work at DWP as the starting point, that would extend the limitation period to January 4, 2020.[7] Again, the statement of claim was not issued until July 19, 2021, the response to the request to admit was dated May 24, 2022, and the motion to amend the statement of claim was dated February 12, 2024, all well after January 4, 2020.

[23] Accordingly, the action is also out of time pursuant to the contractual limitation period.

Relief from forfeiture

[24] As I have said, the plaintiff pleads relief from forfeiture for imperfect compliance with the terms of the policy. This issue was not raised until the plaintiff's motion to amend his statement of claim was filed in February 2024. In any case, DFS argues that the plaintiff cannot succeed on this argument in the circumstances of this case, having failed to lead evidence establishing that there is a genuine issue for trial: *Nguyen v. SSQ Life Insurance Co.*, 2014 ONSC 6405, at para. 32.

[25] The law respecting relief from forfeiture was neatly summarized by Taylor J. in *Wiles v. Sun Life Assurance Company of Canada*, 2018 ONSC 1090 (aff'd 2018 ONCA 766), at paras. 35 – 36, 40 – 41:

> Relief from forfeiture is available to the plaintiff pursuant to either section 129 of the *Insurance Act* or section 98 of the *Courts of Justice Act*. However, under either section, relief from forfeiture is only available for imperfect compliance with a term of the insurance policy but is not available for non-compliance with a term of the policy (*Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778 and *Kozel v. Personal Insurance Co.*, [2014] O.J. No. 753).

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[6] This temporary bar against launching an action reads as follows in the policy: "No action or proceeding against the Insurer for the recovery of any claim will be commenced within 60 days or after 2 years following the expiration of the time in which proof of claim is required."

[7] The calculation of that date is as follows: May 9, 2017 + elimination period of 120 days = September 6, 2017 + proof of claim period of 60 days = November 5, 2017 + bar against commencing action of 60 days = January 4, 2018 + limitation period of 2 years = January 4, 2020.

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In *Falk Bros*. the difference between imperfect compliance and non-compliance was explained as follows at paragraphs 18 and 19:

> The case law has generally treated failure to give notice of claim in a timely fashion as imperfect compliance whereas failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent. Thus, courts have generally been willing to consider granting relief from forfeiture where notice of claim has been delayed.
>
> On the other hand, cases in which failure to meet a time requirement has been held to be non-compliance rather than imperfect compliance have largely been cases in which the time period was for the commencement of an action rather than for the giving of notice. [Authorities omitted]

[…]

In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at paragraph 32, the Supreme Court of Canada held that the power to relieve against forfeiture is entirely discretionary and is based on the consideration of three factors which are: a) the conduct of the applicant; b) the gravity of the breach; and, c) the disparity between the value of the property forfeited and the damage caused by the breach.

In *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, the Ontario Court of Appeal at paragraph 87 held that relief from forfeiture is to be granted sparingly and the party seeking that relief bears the onus of making the case for it.

[26] In this case, as noted above, the plaintiff has never filed a claim for benefits with DFS. Instead, he sued. As I have found, on both statutory and contractual terms, that action was out of time when it was launched and when it was launched it did not even advance a claim based on injuries sustained while the plaintiff was insured by DFS. On its face, this is a case of non-compliance, not imperfect compliance.

[27] However, the plaintiff takes the position that his affidavit filed on this motion (which attached as exhibits medical information respecting his injuries) constitutes a late-filed claim which DFS could and should have adjudicated upon. In the event that the plaintiff is correct on this point, I turn to consider the three factors listed in *Saskatchewan River Bungalows Ltd.*

<u>The conduct of the plaintiff</u>

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[28] The first of those factors is the conduct of the plaintiff. In *Ferguson*, Petersen J. describes this part of the inquiry as follows, at paras. 34 – 35:

> The first step in the relief from forfeiture analysis requires an examination of the reasonableness of Mr. Ferguson's conduct. This inquiry "relates to all facets of the contractual relationship, including the breach in issue and the aftermath of the breach": *8477 Darlington Crescent*, at para. 89; and *Kozel* at para. 61. In cases of breach involving a missed deadline, the Court ought not to grant relief from forfeiture where the breaching party has not acted in an expeditious manner after discovering the deadline or the party has not provided a compelling explanation for the failure to do so: *Pilotte v. Zurich North America Canada* (2006), 80 O.R. (3d) 62, at para. 66.
>
> The Ontario Court of Appeal has emphasized that the reasonableness inquiry entails a broad analysis: *Kozel* at para. 60. Per *Williams Estate v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161, at p. 175, in the insurance context (which is analogous to the case at hand):
>
> > The reasonableness test requires consideration of the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. All of the circumstances, including those that go to explain the act or omission that caused the [breach] should be taken into account. It is only by considering the relevant background that the reasonableness of the [breaching party's] conduct can be realistically considered.

[29] In this case, the plaintiff offers no explanation for either the change in the alleged cause of his injuries (from motor vehicle accident to injuries sustained at work) or for the delay in submitting an application for benefits. Although this allegation does not appear in his affidavit, at one point during his cross-examination the plaintiff blamed his lawyer (not Ms. Masgras) for failing to make a timely claim. There is no further evidence respecting that delay and certainly no affidavit from the plaintiff's former lawyer. There is no explanation for the failure to apply for benefits within the time frames set out in the policy, nor for the failure to apply outside those time frames, nor for the failure to sue within either the statutory or contractual limitation periods, nor for the failure to respond to the request for particulars, nor for the change to the cause of injury set out in the response to the request to admit, nor for the failure to provide any medical evidence before the plaintiff supplied his affidavit on this motion more than six years after his injuries were known to him.

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[30] In these circumstances, there is no basis upon which to conclude that the plaintiff's conduct was reasonable or that it justifies granting relief from forfeiture. On the contrary, bearing in mind that the onus lies on the plaintiff on this issue, and bearing in mind that I am to assume that he has put his best foot forward on this summary judgment motion, like Taylor J. in *Wiles* (at para. 42), I am left to conclude that the plaintiff has offered no explanation because there is no viable explanation for his delay in claiming benefits from DFS.

[31] The present facts are to be contrasted with the facts in *Nguyen*, the case upon which the plaintiff places greatest reliance. In that case, Mr. Nguyen was disabled by a motor vehicle accident. He was unaware that he was entitled to disability benefits through his employment, but very promptly engaged counsel to pursue statutory accident benefits and a claim in tort against the other driver in the accident. In the course of the tort claim, Mr. Nguyen was examined for discovery on January 9, 2013. At that examination he undertook to make inquiries about the availability of disability benefits. Thereafter, through his counsel, he did discover that he had a group insurance policy through his former employer, which policy provided for disability benefits. On April 10, 2013, with the assistance of his counsel, Mr. Nguyen applied to his insurer for access to those benefits. His application was denied on July 31, 2013, and by August 16, 2013 Mr. Nguyen had sued the insurer.

[32] In those circumstances (something less than 7 months from discovery of his coverage to a launched claim and moving in a timely way at every stage), Perell J. found that Mr. Nguyen had acted reasonably (see paras. 14 – 22, 46). The plaintiff in this case, by contrast, discovered his coverage in July 2017, launched his suit four years later in July 2021, did not identify the cause of his injuries until almost five years later when he responded to the request to admit on May 31, 2022, did not provide any medical information to DFS until more than six years later when he served his affidavit for this motion on October 2, 2023, did not seek to amend his claim to include reference to injuries sustained while he was employed at DWP until over six and a half years later, on February 12, 2024, and never applied to DFS for benefits. Quite apart from the obvious lack of timeliness, as I have said, none of these delays after July 2017 is explained. This conduct is not, in my view, reasonable.

<u>The gravity of the breach</u>

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[33] The second factor is the gravity of the breach of the policy. As I have said, the plaintiff did not advise DFS of his work-related injuries until he responded to the request to admit on May 31, 2022 and provided no medical evidence to DFS until he filed his affidavit for this motion, which affidavit was sworn on September 29, 2023 and was supplied to DFS on October 2, 2023 – some six and one half years after the plaintiff's last day of work at DWP. None of the evidence provided has supplied a specific date of disability. DFS submits that the delay in making the claim and in supplying medical evidence has resulted in significant prejudice to DFS because its ability to complete a timely investigation into the plaintiff's alleged injuries has been lost entirely, as has its opportunity to work with the plaintiff to ensure that his rehabilitation was as effective as possible so as to limit the plaintiff's reliance on disability benefits. DFS also points to more specific evidence of prejudice. At his cross-examination, the plaintiff undertook to provide certain documents to DFS but has since advised, without explanation, that those documents cannot be located. In argument, counsel for the plaintiff conceded that DFS's opportunity to investigate independently has been lost.

[34] These circumstances mirror those in *Wiles*, where Taylor J. found (at paras. 45 – 47) that if the application for benefits had been filed in timely way, the insurer would have taken steps to clarify the date of disability and would have investigated the applicant's injuries and their cause.

[35] The plaintiff argues, however, that in other cases the courts have excused this kind of prejudice including in cases where the insurers have been supplied with extensive medical records that allow an *ex post facto* examination of the claimants' condition at the relevant times: see, for example, *Nguyen*, at paras. 48 – 49; *Ferguson*, at para. 115; *Dube v. RBC Life Insurance Co.*, 2015 ONSC 77 at para. 61 – 76. The plaintiff says that his affidavit, which summarizes the various medical appointments he attended in 2017, as well as an ODSP medical report dated April 18, 2018, limit any prejudice DFS might have suffered.[8]

[8] I note that the copy of the affidavit filed by the plaintiff for use on this motion does not attach the exhibits to that affidavit. Accordingly, although reference is made to various medical records and to the ODSP report, I have not read those documents.

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[36] I cannot accept this argument. First, the delays in the cases upon which the plaintiff relies are much shorter than in this case, and the conduct of the claimants more reasonable. Second, in each case the insurer or the employer bore some responsibility for the delay and/or did not take up an early opportunity to investigate or examine the injured claimant. In this case, even if it could be said that DWP failed to explain fully the benefits available to the plaintiff, his knowledge of those benefits was cured within two months of his departure from DWP. Moreover, as the plaintiff conceded in argument, DFS had no opportunity to investigate or examine the plaintiff. By the time it had knowledge that the plaintiff was complaining of back, neck and shoulder injuries, more than five years had passed from the date that the plaintiff says he incurred those injuries. Any opportunity for DFS to participate in the mitigation of those injuries was lost.

[37] In my view, therefore, in this case the gravity of the breach – that is, the prejudice to the position of DFS – was significant. The evidence on this point raises no genuine issue for trial.

Disparity

[38] The third factor is the disparity between the value of the property forfeited and the damage caused by the breach. With respect to this factor, again, the present circumstances mirror those in *Wiles*. Taylor J. wrote as follows in that case, at paras. 48 and 49:

> Finally, the plaintiff has presented no evidence about her efforts to overcome her disability or her efforts to secure alternate employment. I accept that by refusing to grant relief from forfeiture the plaintiff will lose her long-term disability benefits to which she might be entitled. However, there is no evidence from which I could even roughly estimate the amount of the plaintiff's loss, if any.
>
> Therefore, I am unable to conclude that there is any significant disparity between the value of the long-term disability benefits forfeited and the damage caused by the breach.

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[39] Here, as the plaintiff has presented almost no evidence of efforts to recover,[9] and none of any effort to return to work,[10] he cannot establish the value of his entitlement to relief, if any. Moreover, as noted above, by failing to make a timely claim he prevented DFS from assisting his in his rehabilitation or in an effort to return to work. There is, therefore, a complete dearth of evidence upon which the court could calculate his loss, if any. Like Taylor J., then, I am unable to conclude that there is any significant disparity between the value of the benefits forfeited and the damage caused by the breach, which I have already found to be significant.

[40] Accordingly, all three factors enumerated in *Saskatchewan River Bungalows Ltd.* weigh against relief from forfeiture. This is especially so of the first factor, the conduct of the plaintiff and the resulting prejudice to DFS. There could, therefore, be no circumstance in which the court would exercise its discretion to grant relief from forfeiture, which discretion is rarely exercised in any event.

Conclusions

[41] On a motion for summary judgment the issue is whether there is a genuine issue for trial. The responding party, in this case the plaintiff, is required to submit affidavit evidence demonstrating that there is such an issue which does require resolution at a trial. Here, no such evidence has been presented by the plaintiff. On the basis of the uncontroversial record before me, it is plain that the plaintiff missed both the statutory and contractual limitation periods. But even if I am wrong about those conclusions, there is no evidence in the record before me which could support a claim even on a *prima facie* basis that the plaintiff should be entitled to relief from forfeiture, an issue on which he bears the burden of proof. There is, therefore, no genuine issue for trial.

[42] Accordingly, summary judgment in favour of DFS is granted.

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[9] The plaintiff's affidavit says that he attended for physiotherapy in 2017 but does not expand on the details of the treatment, other than to say it did not produce results. There is no evidence of treatment post-2017.

[10] The plaintiff's affidavit says that the ODSP medical report says that he is "unable to do any physical job," but nowhere is it asserted that he is not employable in any capacity. While the conditions complained of by the plaintiff may have that effect, the evidence is not clear on this point. The record before me does not allow me to say whether the plaintiff is receiving ODSP benefits.

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[43] If the parties are unable to agree on costs, DFS may serve and file brief written submissions respecting costs with 10 days of the release of these reasons. The plaintiff may serve and file brief responding submissions within seven days of the service of DFS's submissions. DFS may serve and file reply submissions, if any, within three days of the service of the plaintiff's submissions.

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Ammar Rahmouni

Plaintiff

– and –

Distinctive Wood Products Inc., Johnston Group Inc., and Desjardins Insurance

Defendant

REASONS FOR JUDGMENT

I.R. Smith J.

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