CITATION: Fernandes v. Chartered Professional Accountants of Ontario, 2024 ONSC 6234
COURT FILE NO.: CV-23-00703547-0000
DATE: 20241112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Samuel Fernandes

AND:

Chartered Professional Accountants of Ontario

BEFORE: J.T. Akbarali J.

COUNSEL: *Andrew Ostrom*, for the plaintiff

Teagan Markin and Rebecca Lang, for the defendant

HEARD: November 5, 2024

ENDORSEMENT

Overview

[1] The defendant seeks summary judgment dismissing the plaintiff's claim on the basis of the expiry of a limitation period.

Background

[2] The plaintiff was an aspiring accountant. He was a candidate member of the Certified General Accountants Association of Ontario when the three separate accounting designations in Ontario (Chartered Accountants, or Cas; Certified General Accountants, or CGAs; and Certified Management Accountants, or CMAs) merged their designations and regulatory bodies.

[3] There is now a single designation in Ontario, that of Chartered Professional Accountant ("CPA"), that exists under a single regulator, the defendant Chartered Professional Accountants of Ontario ("CPAO").

[4] At the time of the merger, the plaintiff had completed most, but not all, of the steps to become a CGA. He was transitioned into the CPAOs accreditation process. He was required to complete certain additional courses and pass the common final examination ("CFE"). Candidates have three chances to pass the CFE. If they have not passed the CFE after three attempts, the Registrar of CPAO is mandated under s. 47.5 of CPAO Regulation 9-1 to deregister the student.

[5] The CFE is a three-day examination. Day 1 is evaluated on a stand-alone basis, while Days 2 and 3 are evaluated together. To successfully pass the CFE, a candidate must achieve an overall pass on Day 1 and an overall pass on Days 2-3.

[6] The first time the plaintiff wrote the CFE, in May 2016, he failed Day 1, and Days 2 and 3. He wrote the CFE a second time in September 2-17, and again failed Day 1, and Days 2 and 3.

[7] On a third attempt, in September 2019, the plaintiff passed Day 1, but failed Days 2 and 3. During that examination, there had been technical glitches, so the CPAO announced that it would not be counted as one of the three permissible attempts for candidates to pass the CFE.

[8] As a result, the plaintiff was eligible to write the CFE a fourth time. Because he had passed Day 1 in September 2019, he did not have to rewrite it. In September 2020, he wrote Days 2 and 3 of the CFE for the fourth time, his last permissible attempt.

[9] Days 2 and 3 of the CFE are structured under four levels. Level 1 is an aggregate score, based on overall sufficiency of competencies demonstrated through Day 2 and 3. Levels 2, 3, and 4 assess the competencies demonstrated based on depth and breadth.

[10] On November 27, 2020, the plaintiff received his results from Day 2 and 3. He failed level one with a decile ranking of 6, which meant that 50% of the students who failed Day 2 and 3 scored higher than he did.

[11] He passed level 2 overall, but failed the level 2 assessment of "Depth in Financial Reporting." He passed all the other competencies assessed in levels 2, 3 and 4.

[12] On the same day he received his results, the plaintiff received a letter entitled "information for Candidates," designed to assist students with interpreting their CFE results. The letter explained the process for requesting a remark of his exam, but noted that students with a decile ranking of three or higher were less likely to be successful on a remark.

[13] Notwithstanding that advice, the plaintiff requested a remark of his 2020 results on December 11, 2020. On the same day he made enquiries as to whether an appeal and a remark of his exam results were the same thing. He also asked if he could submit a letter in support of his remark.

[14] The response he received indicated that a remark, or appeal, of the CFE result, is a separate process from an appeal of the decision to deregister a student for failing the exam three times. The plaintiff was instructed to request a remark by December 14, 2020 if that is what he sought. He was advised to wait until he received confirmation of deregistration, and to appeal that, if he desired, within thirty days of its receipt.

[15] On February 1, 2021, CPAO provided the plaintiff with the results of his remark, indicating that no change in his grade was warranted.

[16] The following day, the plaintiff received an email from the Registrar confirming that he had been deregistered as a student effective that day in accordance with s. 47.5 of Regulation 9-1. It indicated that an appeal of the deregistration decision could be brought within thirty days.

[17] The plaintiff commenced an appeal of the deregistration decision, during which he was represented by counsel. On appeal he sought, among other things, a full pass for Days 2 and 3 of the CFE, arguing that his Level 1 score and decile ranking could not be reconciled with his performance on Levels 2, 3 and 4.

[18] On June 1, 2021, the Registrar filed submissions indicating that the deregistration decision was mandated by s. 47.5 of Regulation 9-1, and the relief sought by the plaintiff was beyond the Registrar's authority.

[19] The plaintiff's appeal was dismissed on August 16, 2021. The Admission and Registration Committee (the "ARC") found that the deregistration decision was reasonable because s. 47.5 mandated the Registrar to deregister the plaintiff after his third failure to pass the CFE.

[20] On July 23, 2023, the plaintiff commenced this action against CPAO, arguing misfeasance in public office and breach of fiduciary duty. He pleads that CPAO acted to falsify and manipulate the plaintiff's September 2020 CFE results by modifying his answers, deleting portions of his answers, assigning inaccurate marks, modifying CPAO's records to reflect a fail rather than a pass, and deliberately reducing the plaintiff's decile ranking to discourage him from appealing or investigating his results."

[21] He pleads that the 2020 results were "extremely anomalous" given that he passed Levels 2, 3, and 4, but failed Level 1 and at the 6th decile. In his affidavit he explains that he was puzzled, and mystified, and could not understand "how I could possibly have scored passing grades on levels 2, 3, and 4, and yet not only failed level 1, but also been outscored by 50% of the unsuccessful candidates."

[22] CPAO argues that all of the material facts the plaintiff pleads and on which he relies were known to him on November 27, 2020, the day he first got his results from his fourth attempt at the CFE, such that he commenced his action outside the applicable two-year limitation period. The plaintiff, in his affidavit, deposes that he had "no knowledge of any of [CPAO's alleged wrongdoing] prior to September 2021. He does not explain when he came to know of the alleged wrongdoing, but denies knowing about it more than two years prior to the date he commenced his action. He argues that he need do no more, because the burden rests on the defendant to prove the limitation period defence, and it has not done so.

Issues

[23] This motion raises the following issues:

a. Is summary judgment appropriate in this case?

b. If so, was the plaintiff's claim discoverable before July 27, 2021, two years before the plaintiff commenced his action?

c. Was the limitation period tolled while the plaintiff pursued the appeal of the deregistration decision?

Brief Conclusion

[24] For the reasons below, I find that the defendant has proven that the plaintiff's action is statute-barred and must be dismissed.

Analysis

Test for Summary Judgment

[25] The law with respect to summary judgment is set out in *Hryniak v. Mauldin*, 2014 SCC 7. There will be no genuine issue requiring a trial when the process allows the judge to make the necessary findings of fact, apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak*, at para. 49.

[26] A party must put its best foot forward on a summary judgment motion: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 33; *2212886 Ontario Inc. v. Obsidian Gorup Inc.*, 2018 ONCA 670 at para. 49.

[27] Summary judgment motions are often brought in connection with limitation period defences. As the court held in *Kamalanathan v. CAMH*, 2019 ONSC 56, at para. 42:

> Summary judgment motions may be brought by defendants in relation to the application of limitation period defences, even in cases where an issue is raised about the discoverability of the claim. When confronted by a motion for summary judgment, the plaintiffs cannot solely rely on their pleading of discoverability. Where a plaintiff relies on a date for either objective or subjective knowledge, they must establish that date on the evidence.

[28] I am entitled to assume that all the evidence the parties would adduce at trial on the question of the applicability of the limitation period has been placed before me: *Moshin v. Empire Communities (Mount Pleasant) Ltd.*, 2019 ONSC 852, at para. 37.

[29] I am satisfied that summary judgment is appropriate in this case. The record allows me to find the necessary fact and apply the law to those facts to achieve a just result in a process that will be more expeditious and less expensive.

The *Limitations Act*: Legal Framework

[30] Section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. (the "*Act*"), provides for a two-year basic limitation period.

[31] Section 5(1) of the *Act* prescribes when a claim is discovered. It provides:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[32] Section 5(2) of the *Act* creates a legislative presumption that a person with a claim knew of the matters referred to in s. 5(1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[33] "As a result of the presumption under s. 5(2), the limitation period begins to run on the date of the breach (being the date of the 'act or omission') unless it is proven that the person with the claim did not know of one or more of the matters set out in s. 5(1)(a), and that a reasonable person would not have known of those matters": *Apotex Inc. v. Nordion (Canada) Inc.*, 2019 ONCA 23, at para. 87.

[34] In *AssessNet Inc. v. Taylor Leibow Inc.*, 2023 ONCA 577, the Court of Appeal held that the expiry of a limitation period is raised by a defendant as an affirmative defence; it is the defendant who has the burden of proving that defence: *AssessNet*, at para. 34. When the issue is raised on a summary judgment motion, the defendant has the onus of establishing that there is no genuine issue requiring a trial with respect to the limitation period: *AssessNet*, at para. 34.

[35] In discharging the burden of proof, a defendant may rely on the presumption in s. 5(2) that the claim was discovered on the day the act or omission on which the claim is based took place. In that event, the plaintiff must rebut the presumption in s. 5(2). To do so, it "need only prove that its actual discovery of the claim within the meaning of s. 5(1)(a) was not on the date of the events giving rise to the claim": *AssessNet*, at para. 35, citing, among others, *Morrison v. Barzo*, 2018 ONCA 979, at para. 31.

[36] In *Barzo*, at para. 31, the Court of Appeal addressed a case where a plaintiff sought to add a defendant to its action after the apparent expiry of a limitation period. It identified the evidentiary

burden (as distinct from the legal burden) on a plaintiff as two-fold. It described the first of these evidentiary burdens as follows:

> [T]he plaintiff must overcome the presumption in s. 5(2) that he or she knew of the matters referred to in s. 5(1)(a) on the day the act or omission on which the claim is based took place, by leading evidence as to the date the claim was actually discovered (which evidence can be tested and contradicted by the proposed defendant). The presumption is displaced by the court's finding as to when the plaintiff subjectively knew he had a claim against the defendants: *Mancinelli*, at para. 18. To overcome the presumption, the plaintiff needs to prove only that the actual discovery of the claim was not on the date the events giving rise to the claim took place.

[37] The Court in *AssessNet* also cited the Court of Appeal's decision in *Ridel v. Goldberg*, 2019 ONCA 636, at para 28. There, the Court of Appeal noted that to rebut the presumption under s. 5(2), a claimant "may point to evidence to establish that the claim was 'discovered' on a date other than the date on which the 'act or omission' took place." The presumption is displaced by the court's finding as to when the plaintiff subjectively knew he had a claim against the defendants. The evidentiary threshold to rebut the presumption is relatively low.

[38] The Supreme Court of Canada considered the requisite degree of knowledge to have discovered a claim in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31. At para. 44, the Court held that, in assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. A plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise: *Grant Thornton*, at para. 44.

[39] The Court concluded that a plaintiff must be "able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known": *Grant Thornton*, at para. 45.

[40] The degree of knowledge needed to discover a claim is more than mere suspicion or speculation. At the same time, the standard does not rise so high as to require certainty of liability. A plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury for the limitation period to run: *Grant Thornton*, at para. 46.

Analysis

[41] The parties agree that the date on which the plaintiff is presumed to know the matters set out in s. 5(1)(a)(i)-(iv) — that is, the date on which the act or omission on which the claim is based occurred — is November 27, 2020, the day on which the plaintiff received his results from the fourth CFE and learned he had failed.

[42] In this case, the defendant relies on the presumption in s. 5(2). The first question to be answered is therefore whether the plaintiff has rebutted the presumption that he learned about the act or omission on the day on which it occurred. To rebut the presumption, the plaintiff must prove

that his actual discovery of the claim within the meaning of s. 5(1)(a) was not on November 27, 2020.

[43] The evidence on which the plaintiff relies to rebut the presumption is the following:

a. The plaintiff was not provided with his marked examination paper when his marks were released on November 27, 2020, or at any time.

b. He was puzzled by his CFE results for two reasons: he had studied carefully and applied the feedback he received, so was confident in his performance on the CFE; and, he "did not understand how [he] could possibly have scored passing grades on levels 2, 3, and 4, and yet not only failed level 1, but also been outscored by 50 percent of the unsuccessful candidates."

c. His mystification was heightened by the letter he received, which suggested that "candidates who did not demonstrate competence at Level 1 and are assigned an overall [decile ranking] of 3 or more and, candidates who did not demonstrate competence in more than one specific competency area at Level 2, Level 3 or Level 4, are less likely to see a change in status as a result of a remark." He deposes that the letter did not appear to have contemplated a candidate who received an overall sufficiency grouping of 3 or more and yet also demonstrated competence in each of levels 2, 3, and 4.

d. His statement in his affidavit that "[he] had no knowledge of any of [CPAO's] intentional wrongdoing at any time prior to September 2021.

[44] I find that this evidence is not sufficient to rebut the presumption in the *Act*. I reach this conclusion for the following reasons:

a. I attach no weight to the fact that the plaintiff did not receive his exam paper on November 27, 2020. He has never received his exam paper. Since he has commenced his action, he must be taken to have drawn a plausible inference of liability on or before the day he commenced it. Having never received his exam paper indicates that nothing in the exam paper impacted when he discovered his claim.

b. His evidence about being puzzled by his marks given the anomaly of having passed levels 2 (overall), 3 and 4, but failed level 1 by a margin greater than 50% of the students who had also failed was apparent on the face of his CFE results. He knew of what he describes as the anomaly in his results on November 27, 2020.

c. I do not accept that the letter that accompanied the CFE results was at all confusing. It clearly says that students who fail level 1 at a decile ranking of three or above are not likely to see any change on a remarking. It also says that students who failed more than one specific competency in levels 2, 3, and 4 are unlikely to see any change on a remarking. Even if plaintiff did not subjectively understand the letter,

or thought it did not contemplate his situation, the confusion it caused him was the same confusion that he had on reviewing his CFE results, that is, the alleged anomaly in his results in levels 2, 3, and 4, while simultaneously failing level 1 with a decile ranking of 6. This was information he had on November 27, 2020.

d. The plaintiff's evidence, on which he was not cross-examined, that he did not know of CPAO's intentional wrongdoing before September 2021 is an unexplained statement. There is no evidence in the record that indicates anything transpired after September 2021 that could possibly have led to the plaintiff drawing a plausible inference of liability that was not available before. There are no material facts pleaded that support the allegations of intentional wrongdoing beyond the anomaly in the plaintiff's grades.

e. The plaintiff's evidence is thus nothing more than a bald denial of knowledge without any context. In effect, the plaintiff's statement amounts to the assertion of a legal conclusion and not a statement of fact.

f. The onus is on the defendant to prove the limitation defence, but given that the defendant relies on the presumption, the plaintiff bears the burden to displace it. The burden to displace the presumption may be relatively low, but it requires more than a single sentence invoking magic words. If simply saying "I did not know about the claim on the date two years before the date I commenced my claim" were enough, the presumption of knowledge in the statute would be meaningless.

[45] The plaintiff has failed to discharge his burden to displace the presumption. There is no reason to go further to determine when he discovered his claim. By reason of the presumption in the legislation, he discovered it on November 27, 2020. Thus, his action, commenced more than two years thereafter, was commenced out of time unless the limitation period was tolled by virtue of s. 5(a)(iv) to which I now turn.

[46] The question that arises is whether the appeal from the deregistration decision offered an adequate alternative remedy such that it would have been premature for the plaintiff to commence an action until the appeal process had been exhausted. As the Court of Appeal held in *Presidential MSH Corporation v. Marr Foster & Co LLP*, 2017 ONCA 325, at para. 29, "it is premature for a party to bring a court proceeding to seek a remedy if a statutory dispute resolution process offers an adequate alternative remedy and that process has not fully run its course or been exhausted." Similarly, in *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709, at para. 40, the Court of Appeal held that "in fixing the appropriate date, it may not be enough that the loss exists and the claim is actionable. If the claim is the kind of claim that can be remedied by another and more effective method provided for in the statute, then a civil action will not be appropriate until that other method has been used."

[47] The problem here is that the deregistration appeal was never an adequate alternative remedy.

[48] The letter to candidates that the plaintiff received on the same day as his CFE results clearly set out how to request a remark of the exam results. When the plaintiff enquired as to whether a remark and an appeal were the same thing, he was advised that there was a difference between the potential to remark the CFE to change the results, and the potential to appeal from the decision of the Registrar to deregister a student for having failed the CFE three times.

[49] After receiving the results of the remark, which did not change his grades, the following day the plaintiff received "Confirmation of Student Deregistration." This letter informed him that "as a result of [his] third unsuccessful attempt at the [CFE], that [he had] been deregistered as a student with [CPAO]." The letter referenced s. 47.5 of Regulation 9-1, and summarized it as requiring that "a student shall be deregistered forty-five days following the release of the result of the student's third unsuccessful attempt of any module/exam of the CPA Professional Education Program or [CFE]." Section 47.5 also clearly indicates that the timing for deregistration is 45 days following release of the third unsuccessful attempt on the CFE or "if an appeal of the student's CFE result has been filed, immediately upon the denial of the appeal."

[50] The letter set out the consequences of deregistration, and explained the plaintiff's appeal rights. The appeal referred to is the appeal of the deregistration decision.

[51] The plaintiff appealed the deregistration decision. At the time he did so, he was aware that the remarking of his exam had not resulted in any change. The remarking results did not suggest there was any further step that could be taken to challenge the CFE results.

[52] He was also aware that, as a result of his third failure of the CFE, he was deregistered, and of the consequences of deregistration. He was aware that his appeal rights were in respect of the deregistration decision.

[53] The plaintiff argues that someone in his circumstances and with his abilities would not find it readily apparent that the ARC did not have the power to change the CFE result. I pause here to note that someone in the plaintiff's circumstances is someone who was represented by counsel, as the plaintiff was during the appeal. In any event, the confusion the plaintiff points to is confusion he has created. There is nothing in the communications from the CPAO nor the regulations that lead to any confusion. Rather, the communications from the CPAO as early as December 14, 2020 made the two different processes clear.

[54] A successful appeal of the Registrar's decision to deregister can restore a student's registration, but the decision that the plaintiff failed the CFE was not the Registrar's decision. It is plain that an appeal of the Registrar's decision is not the appeal of the student's grade, especially when the student has already been through the remarking process unsuccessfully.

[55] Put plainly, when the plaintiff failed the CFE, he was entitled to seek a remark. The remark attempt did not yield the result the plaintiff wanted. He had failed the CFE three times; the Registrar was mandated by the Regulations to deregister him. He was entitled to appeal the deregistration decision, which could be corrected if there were some kind of error (for example, in calculating how many attempts he had made at passing the CFE) but the ARC was never empowered to do more than the Registrar could have done. It could never have changed the

plaintiff's grade. There was nothing unclear about the process as set out in the Regulation and in the correspondence from the CPAO.

[56] Even if I am wrong, and the limits of ARC's jurisdiction were unclear to the plaintiff or his lawyer, then it should have been clarified by June 1, 2021, when the Registrar's submissions made clear that the Registrar had no authority to change a candidate's CFE grade, or grant the other relief sought by the plaintiff. In any event, if the plaintiff wrongly believed the appeal to the ARC could resolve his claim, his error does not change the operation of the limitation period. As the Court of Appeal held in *Beniuk v. Leamington (Municipality)*, 2020 ONCA 238, at para. 70, "it has always been a principle of limitations law that a plaintiff knows, or could by the exercise of reasonable diligence, determine what legal principles apply."

[57] For these reasons, the appeal of the deregistration decision was not a legally appropriate means to address the plaintiff's claim. The appeal to the ARC did not toll the limitation period.

Conclusion

[58] Because the limitation period is not tolled by reason of the appeal to the ARC, and the presumption under s. 5(2) has not been displaced, it follows that the plaintiff did not commence his claim within the limitation period set out in s. 4 of the *Act*. The claim is out of time and must be dismissed.

Costs

[59] The parties uploaded their bills of costs and costs outlines to Case Center prior to the hearing of the motion. At the motion, the parties agreed that I would write my reasons on the merits of this motion and then review their costs materials and make a determination of costs without any further submissions. This is the process I have followed.

[60] The defendant is the successful party on the motion and is presumptively entitled to its costs of the motion, and the action. Its bill of costs supports costs on a partial indemnity scale in the amount of $90,984.53 all inclusive. Of this amount, just over $12,000 in fees relates to the action, while almost $66,000 in fees relates to the summary judgment motion.

[61] The plaintiff filed his costs outline on the motion. It supports partial indemnity fees in the amount of $6,278.28 on the motion. A separate bill of costs filed by the plaintiff supports partial indemnity fees in the amount of $10,820.88 relating to the action.

[62] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[63] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and

the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[64] With respect to quantum of costs to which the defendant is entitled, I note the following:

a. The defendant's motion was not particularly complex.

b. The motion materials were relatively compact, and no cross-examinations were conducted.

c. The action progressed through to the close of pleadings, and delivery of the plaintiff's affidavit of documents.

d. The plaintiff had one counsel with ten years' experience, while the defendant had three counsel, two of which attended the motion, with between two and six years' experience, plus a clerk.

e. The time spent by defence counsel is, in my view, excessive.

f. The fees incurred by the defendant are out of all proportion to the fees incurred by the plaintiff, and well outside the plaintiff's reasonable expectations.

g. The issues were important to the parties and to the litigation.

[65] In these circumstances, I am prepared to fix the defendant's costs of the action and the motion at $15,000 all inclusive, which the plaintiff shall pay to the defendant within thirty days.

Summary of Orders

[66] For the reasons above, I make the following orders:

a. The defendant's motion for summary judgment is granted. The plaintiff's action is dismissed.

b. The plaintiff shall pay the defendant's costs of the action and the motion fixed at $15,000 all inclusive within thirty days.

J.T. Akbarali J.

Date: November 12, 2024