COURT OF APPEAL FOR ONTARIO

CITATION: Saxberg v. Seargeant Picard Incorporated, 2024 ONCA 931
DATE: 20241220
DOCKET: COA-24-CV-0327

Brown, Huscroft and Miller JJ.A.

BETWEEN

Scott Saxberg and Rachel Saxberg

Plaintiffs (Respondents)

and

Seargeant Picard Incorporated

Defendant (Appellant)

Stephen Ross and Meryl Rodrigues, for the appellant

Robert J. Kennaley and Rachel Prestayko, for the respondents

Heard: December 11, 2024

On appeal from the order of Regional Senior Justice W. Danial Newton of the Superior Court of Justice, dated February 20, 2024, with reasons reported at 2024 ONSC 1079.

Brown J.A.:

OVERVIEW: APPEAL FROM A "BOOMERANG" SUMMARY JUDGMENT

[1] The appellant, Seargeant Picard Incorporated ("SPI", or "SP"), built a luxury, $5 million plus cottage in Northern Ontario for the respondents, Scott Saxberg and Rachel Saxberg. Construction was completed in 2011. Beginning in August 2011, the Saxbergs complained about leaks in and around some roof and chimney areas.

[2] In 2013, SPI performed some repair work. When the Saxbergs hired a different contractor in 2015 to perform further work, extensive water damage was discovered, necessitating expensive repairs.

[3] In 2016, the Saxbergs sued SPI for breach of the construction contract, seeking damages of approximately $750,000.

[4] In 2021, SPI moved for summary judgment to dismiss the action on the basis that it was statute-barred. SPI took the position that the Saxbergs knew, or ought to have known, about a breach of the construction contract in 2012. The Saxbergs took the position that time did not start to run until 2015 when the new contractor, Martti Granholm, uncovered the water damage.

[5] The motion judge dismissed SPI's summary judgment motion. Based on the agreement of the parties, the motion judge went further and granted a "boomerang" order that stated "the Plaintiffs' action has been commenced within the applicable limitation period and is not statute-barred by s. 4 of the *Limitations Act*."

[6] SPI appeals and seeks to set aside the motion judge's order. In its place it asks for an order dismissing the action as statute-barred or, alternatively, directing that all limitation issues be determined at trial.

[7] For the reasons that follow, I would dismiss the appeal.

FIRST ISSUE: DID THE MOTION JUDGE ERR IN HIS DISCOVERABILITY ANALYSIS?

[8] SPI argues that the motion judge made a number of reversible errors in the course of his discoverability analysis.

Failure to advert to the applicable test

[9] First, SPI argues that the motion judge failed to advert to or apply the governing standard for discoverability: a plausible inference of liability. I see no such error. At para. 75 and footnote 5 of his reasons the motion judge expressly referenced the standard and the governing case of *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] 2 S.C.R. 704.

Failure to recognize the nature of the dispute

[10] Second, SPI contends the motion judge erred by failing to examine the discoverability issue in the context of a breach of contract claim. A related submission is that the motion judge should have considered the possibility of different limitation periods applying to breaches that arose at different points of time: some in 2012; others in 2015.

[11] Again, I see no error. The reasons disclose the motion judge clearly understood the Saxbergs were advancing a breach of contract claim. At para. 3 of his reasons, the motion judge observed that "[o]n July 25, 2016, the Saxbergs commenced this action for damages alleging that 'the cost to rectify the breach of contract including repair of deficient chimneys and moisture damage is $750,000.'"

Moreover, the old regime under which limitation periods were tied to specific causes of action[1] gave way upon the coming into force of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Act*") to an approach focused on the discoverability of various elements of an "injury, loss or damage". The motion judge, properly, applied that discoverability regime to the facts of this case.

[12] In the course of his analysis, the motion judge drew a distinction between "repairs" (done in 2013 by SPI) and "upgrades" (for which Mr. Granholm was hired in 2015) in the context of work performed under the contract between the parties. The distinction formed part of the motion judge's context-based analysis of when the Saxbergs knew that the effects of work performed or not performed by SPI under the contract gave rise to an "injury, loss or damage" within the meaning of s. 5(1)(a) of the *Act*. I am not persuaded that the motion judge's use of the repair/upgrade distinction deflected him from the proper focus of the discoverability analysis – namely, when the Saxbergs, as claimants, first knew, or ought to have known, that the injury, loss or damage for which their action sought a remedy had occurred and the injury, loss or damage had been caused by an act or omission of SPI.

[1] *Limitations Act*, R.S.O. 1990, c. L.15, section 45(1)(g) of which provided, in part, that an action for "simple contract or debt grounded upon any lending or contract without specialty" had to be commenced within and not after "six years after the cause of action arose".

Erroneous causation analysis

[13] Third, SPI argues the motion judge erred in engaging in a "determinative causation analysis".

[14] I see no error in principle to the motion judge's causation analysis. Causation is a critical element of the discoverability analysis. Section s. 5(1)(a) of the *Act* requires that any discoverability analysis address when the claimant "first knew … that the injury, loss or damage was caused by or contributed to by an act or omission" and, further, that "the act or omission was that of the person against whom the claim is made".

Error in the *Limitations Act, 2002* s. 5(1)(a)(iv) analysis

[15] Finally, I understand SPI's central ground of appeal regarding the motion judge's discoverability analysis to be that he erred in finding the Saxbergs did not know that certain contract-related acts or omissions of SPI caused the "injury, loss or damage" until 2015, not 2012 as argued by SPI. SPI's argument before us focused on what it styled as its obvious failure to build the saddle or cricket behind the main bedroom chimney as required by the design drawings. As well, SPI contends the motion judge erred in finding that in 2012 its representatives made certain "assurances" to the Saxbergs that led them to reasonably believe that a legal proceeding against SPI would not be appropriate at that time, within the

meaning of s. 5(1)(a)(iv) of the *Act*.[2] The motion judge addressed that issue at para. 93 of his reasons:

> Alternatively, if the absence of the chimney saddle on the master bedroom was an omission that contributed to the damages, I conclude that the assurances of SP that a chimney saddle was not required led the Saxbergs to have a reasonable belief that this was not an issue that required recourse to the courts. I accept and adopt the analysis as set out by the Court of Appeal in *Presley*. I conclude that the absence of a chimney saddle was not, in these circumstances, something that would lead the Saxbergs to conclude, given SP assurances that the saddle was not necessary or required by the Ontario Building Code, that a proceeding would be an appropriate means to seek to remedy it without yet having discovered the damage caused by the omission of the saddle. [Footnotes omitted; emphasis added.]

[16] SPI argues that the Saxbergs could not have reasonably relied on statements made to them by SPI about the significance of the lack of some chimney saddles for two reasons: (i) SPI clearly failed to construct the main bedroom chimney saddle called for by the design drawings; and (ii) the Saxbergs were receiving advice on the issue from their own construction expert, Pat Kok of PBK Architects. In those circumstances, SPI submits, the statements it made to the Saxbergs in October 2012 could not constitute assurances sufficient to allow the Saxbergs to reasonably conclude that a court proceeding would not be an

[2] Section 5(1)(a)(iv) of the *Limitations Act* provides, in part, that: "A claim is discovered on … the day on which the person with the claim first knew … that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it".

appropriate means to seek to remedy any injury, loss or damage that had become manifest at that time.

[17] I am not persuaded by SPI's submission. The issue of when a claimant possessed the knowledge specified by ss. 5(1)(a) and (b) of the *Act* is quintessentially a fact-based issue that is subject to the deferential standard of appellate review: *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, 142 O.R. (3d) 561; *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246. For the reasons that follow, I see no palpable and overriding error in this aspect of the motion judge's analysis.

[18] The critical events relating to the saddle issue took place roughly in the period between August 2011 and October 2012. They started with the Saxbergs' complaints about water leaks, which prompted them to have their consultant, Mr. Kok, prepare a report on the issue, and culminated in a conference call with SPI representatives in October. The motion judge's reasons disclose that he considered the evidence given by all relevant witnesses on this issue.

[19] To briefly summarize those events, in August 2012 the Saxbergs retained PBK Architects to investigate moisture infiltration at the house. Mr. Kok was the PBK representative. Mr. Kok and Neil Sproule, at the time an employee of SPI, inspected the house and ran some water leak tests.

[20] Mr. Kok wrote an October 12, 2012 field inspection report that he sent to the Saxbergs. SPI was provided with a copy. The report recommended three different types of action for the various matters observed: repair; upgrade; or further review. The report listed three “priority repairs”, none of which involved the roof saddles or crickets at the base of chimneys or the stone cladding at wall/roof and wall/grade intersections.

[21] Regarding the lack of a saddle at the base of the master bedroom chimney, the PBK report stated:

> *Consider* constructing roof saddle (cricket) at the base of the chimney as typically indicated for chimneys on all buildings, noting the saddle width should match the finished width of the chimney. [Emphasis added.]

[22] Earlier in his report, Mr. Kok noted that saddles were not required by the Ontario Building Code when chimneys were less than 30” wide. He further observed:

> Long term performance of the roof and chimneys should not be affected by the narrow saddles, provided the saddles are flashed properly. Long term performance of the stone veneer could be affected by these details. We suggest that SP have DDH review photos and comment on the as-built chimney details.

[23] A conference call was held during the week of October 15, 2012 amongst the Saxbergs, Mr. Kok, Mr. Sproule, Brian Seargeant, SPI’s principal, and Katy Murdoch, the Saxbergs’ property and asset manager. The Saxbergs took the position that SPI should undertake, at its own cost, the three “priority repairs”

identified in the PBK report, as well as the further upgrades PBK recommended regarding the chimney saddles. SPI agreed to perform the "priority repairs" but refused to perform the saddle upgrades unless the Saxbergs paid them for that upgrade work. SPI took the position that since the Ontario Building Code did not require the saddles in the specific circumstances, SPI was not obliged to install them without further payment.

[24] The motion judge's reasons set out the material facts contained in the evidence filed by the parties, including the only expert evidence, which was filed by the Saxbergs.[3] The motion judge understood that on a few matters the evidence pointed in different directions. He assessed that evidence, drew inferences, and made findings of fact. The motion judge was entitled to do so on SPI's motion for summary judgment: *Rules of Civil Procedure*, r. 20.04(2.1). Indeed, that was his job as a summary judgment motion judge.

[25] At paras. 83 and 84 of his reasons, the motion judge made specific findings of fact as to whether the chimney saddles were upgrades and not repairs needed to remedy construction defects or deficiencies stating:

> I am satisfied that what SP describes as required repairs are properly characterized as upgrades even though one saddle was missing.

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[3] The motion judge extensively reviewed this evidence in his reasons at paras. 12-17, 22-23, 27, 39, 42-45, and 60-64.

I base this finding on the following:

a. I accept Mr. Kok's evidence that saddles were not required under the Ontario Building Code and that he advised the Saxbergs to "consider" the addition of a saddle to the master bedroom chimney;

b. I accept Mr. Kok's evidence that "long-term performance of the roof in chimneys should not be affected by the narrow saddles, provided that saddles are flashed properly";

c. Stone cladding on the shingles was an issue for future shingle replacement and not related to any water infiltration issue;

d. By refusing to do this work including the construction of a saddle at the master bedroom chimney, at SP's cost, SP regarded this work as an "upgrade" and not required;

e. The Saxbergs accepted SP assurances that this work was not required. There was no reference to saddles or stone on the shingles in Ms. Murdoch's recap of the October 2012 conference call.

[26] I am not satisfied that those findings are the product of any misapprehension of the evidence or tainted by palpable and overriding error.

[27] SPI contends the motion judge failed to take into account the fact that the design drawings for the house had called for the construction of a saddle behind the main bedroom chimney.

[28] Before this court SPI argues that its failure to ensure the installation of such a saddle constituted a patent defect in its construction of the house and an obvious

breach by it of the construction contract that should have been known to the Saxbergs in October 2012.

[29] On the motion below, SPI advanced the argument in a slightly different fashion, contending the lack of a saddle at the main bedroom chimney reflected a lack of due diligence by the Saxbergs to review the building drawings, thereby precluding them from relying on any assurances given by SPI. On the summary judgment motion SPI framed the argument in the following manner at para. 45 of its factum:

> The original construction drawings should have been reviewed when the October 2012 report was written or shortly thereafter. They were not reviewed until 2015. The drawings had specified a saddle and roofing paper under the shingles for the Master Bedroom Chimney. Neither was done – no due diligence by Plaintiffs.

[30] I am not persuaded by this submission. For purposes of the s. 5(1)(a) analysis, the relevant knowledge of an injury, loss or damage is that of the claimants, the Saxbergs. From one side, the Saxbergs were receiving advice from their consultant, PBK, about the water infiltration experienced in 2012. PBK did not list the construction of a missing saddle as a “priority repair” in its October 2012 report. From the other side, SPI pushed back on the Saxbergs’ request that it foot the bill for the construction of a saddle on the basis that it was not required by the Ontario Building Code. Those circumstances provided the motion judge with an ample evidentiary basis to conclude, in para. 93 of his reasons, that “the

assurances of SP that a chimney saddle was not required led the Saxbergs to have a reasonable belief that this was not an issue that required recourse to the courts." I see no palpable and overriding error in that finding.

[31] Nor am I persuaded by the legal argument made by SPI that the decision of this court in *Presley v. Van Dusen*, 2019 ONCA 66, 144 O.R. (3d) 305, is distinguishable and therefore the motion judge erred in applying it to the different facts of this case. While the facts of *Presley* differ from those of the present case, the motion judge was bound to follow the interpretation of s. 5(1)(a)(iv) of the *Act* made in *Presley*. As this court set out in *Presley* at paras. 17 to 22, a legal proceeding against an expert professional may not be appropriate if the claim arose out of the professional's alleged wrongdoing but may be resolved by the professional without recourse to the courts. As well, resort to legal action may be "inappropriate" in cases where the plaintiff is relying on the superior knowledge and expertise of the defendant, who need not fall into a traditional professional class.

[32] The motion judge did not err in applying the principles set out in *Presley*. Nor did he commit a palpable and overriding error in finding that SPI made statements to the Saxbergs in 2012 that they could reasonably regard as assurances. Moreover, in assessing the reasonableness of the Saxbergs' reliance on the statements made by SPI in 2012, it is important to step back, as the motion judge did, and assess the evidence about what happened between (i) 2011/2013, when

roof leaks were detected and SPI performed some, but not all, of the work requested by the Saxbergs, and (ii) 2015 when the Saxbergs engaged Mr. Granholm's construction firm to perform further roof work. The motion judge wrote, at paras. 89 to 91:

> Both Mr. Sproule and Mr. Seargeant of SP stated that they were not aware of any outstanding issues that needed to be addressed after [SP completed their repairs in May 2013.
>
> When Mr. Kok re-attended the premises after these repairs, he found no indication of any water penetration into or water damage to the interior of the roof/building at that time.
>
> When Mr. Granholm first attended [in 2015], he did not believe that he was told there was a leak, and he confirmed that it was only when he went to the site that he realized there might be a water problem when he saw the cracks and moss. On that visit he saw no water leak. He described what he subsequently discovered as a "surprise for all of us". The damaged areas work he had to repair were all behind walls and beneath the roof and was not visible from the ground and not discernible until the walls and roof were opened up.

[33] Given that evidence, as well as the additional evidence of the state of the Saxbergs' knowledge in 2012 and 2013, it was open to the motion judge to make the finding he did that litigation was not an appropriate means to remedy the loss, injury or damage until 2015, when Mr. Granholm discovered water seepage problems that were latent in the structure.

Conclusion

[34] For these reasons, I see no reversible error in the motion judge's discoverability analysis.

SECOND ISSUE: DID THE MOTION JUDGE ERR IN GRANTING A "BOOMERANG" ORDER?

[35] SPI's May 2021 notice of motion sought summary judgment dismissing the Saxbergs' claim as statute-barred. The Saxbergs did not bring a cross-motion for any relief. However, in their factum on the motion below the Saxbergs submitted that "a 'boomerang order' declaring the plaintiffs' claims to have been made within time is in fact appropriate".[4]

[36] Although SPI did not file a reply factum below responding to that of the Saxbergs, and although a transcript of the motion hearing is not before us, it is evident that the issue of the appropriateness of a "boomerang" order was canvassed before the motion judge. After determining in his reasons that the Saxbergs' action was not barred by s. 4 of the *Act* and dismissing SPI's motion for summary judgment, the motion judge went on to state, at para. 96:

> I agree with counsel for both parties that a "boomerang" order is appropriate in this case. Both parties were required to "put the best foot forward" and have done so. Accordingly, I find that the action was commenced within the applicable limitation period.

[4] Appeal Book and Compendium, Vol. 5, p. 141, para. 1(2), and p. 160, para. 47.

[37] On this appeal, SPI's counsel – who was not trial counsel – does not suggest the motion judge misapprehended the positions taken by the parties below. As put in its factum, SPI acknowledges an "apparent agreement of the parties" to a "boomerang" order. However, SPI submits that notwithstanding that agreement, the motion judge erred in granting such an order. His error, according to SPI, was one of failing to undertake an assessment of "further steps" that might be required before granting a "boomerang" order.

[38] I am not prepared to interfere with the "boomerang" aspect of the motion judge's order.

[39] In support of its position, SPI relies on some observations made by this court in *Gordashevskiy v. Aharon*, 2019 ONCA 297, about the appropriateness of "boomerang" orders. Those comments were made in a very different context than the present one. *Gordashevskiy* dealt with an unfortunate practice employed by some motion judges of deciding, on their own initiative and without consultation with the parties, to grant a boomerang order notwithstanding the absence of a cross-motion by the respondent to the summary judgment motion. Paragraph 6 of the brief reasons in *Gordashevskiy* explains this court's disapproval of such a practice:

> The endorsement contains what appears to have become boiler-plate language that we often see in summary judgment decisions:

> In this case, the parties have agreed that all of the evidence that I need to make the necessary findings of fact, to apply the law to the facts, and to achieve a fair and just adjudication of the case on the merits, is before me. Therefore, inferentially, neither party suggests that any additional steps are necessary.
>
> With respect, the assessment of whether other steps are required must be undertaken by the motion judge. Accepting the assurance of the parties is not the end of the inquiry. It is not open to a motion judge to simply prefer one affidavit over another in the absence of explanatory reasons for the preference that permit appellate review. That is not this case.

[40] The present case is quite different. It is evident the motion judge canvassed the issue of a "boomerang" order with the parties given the Saxbergs' request for one in their factum. SPI's counsel agreed that one could be made if his client's summary judgment motion was dismissed. The motion judge canvassed all of the evidence and determined that the parties had put their "best foot forward": at para. 96. The motion judge explained the basis for all his findings. In those circumstances, I see no basis for this court to interfere with his decision to dispose of the motion in a manner the parties represented was open to him to do.

[41] As a practical matter, were this court to accede to SPI's new position raised on appeal that a boomerang order should not have been granted, we would be sanctioning a kind of tactical delay.

[42] This action was started in July 2016. SPI launched its summary judgment motion in May 2021. The motion was heard and disposed of almost three years later. This appeal has consumed the better part of another year.

[43] SPI's summary judgment motion has added over three and one-half years to the already far too long life of this action – the parties most likely could have had the action tried by now but for SPI's single-issue or partial summary judgment motion. For SPI to now seek to resile from its position before the motion judge on the appropriateness of a boomerang order would enable it to put back on the litigation table an issue that over three years ago SPI represented to the court could be taken off. The days that a party might expect an appellate court to buy into a tactic that would pile on more delay to an already old action and result in the waste of a significant amount of judicial time should be over and gone.

DISPOSITION

[44] For the reasons set out above, I would dismiss the appeal.

[45] The parties agree that the costs of the appeal should be fixed in the amount of $35,000, all inclusive, in favour of the successful party. Accordingly, I would grant the Saxbergs costs of this appeal fixed in that amount.

Released: December 20, 2024 "D.B."

"David Brown J.A."
"I agree. Grant Huscroft J.A."
"I agree. B.W. Miller J.A."