CITATION: Sven Lindhe v. Wodryelesh Chalte et al, 2015 ONSC 2821
COURT FILE NO.: CV-13-494803
DATE: 20150501

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SVEN LINDHE, Plaintiff

AND:

WODERYELESH CHALTE or CHALTE WODERYELESH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants

BEFORE: STEWART, J.

COUNSEL: *Andrew Stein*, for the Plaintiff

Aaron S. Murray and *Loretta De Thomasis*, for the Defendants

HEARD: January 15, 2015

ENDORSEMENT

Nature of the Motion

[1] The Defendant, Woderyelesh Chalte ("Chalte"), brings this motion pursuant to Rule 20 of the *Rules of Civil Procedure* for summary judgment dismissing this action as against him on the grounds that the action has been brought after the expiry of the limitation period prescribed by the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B.

[2] The Plaintiff, Sven Lindhe ("Lindhe"), argues that the applicability of the limitation period raises a genuine issue that will require a trial to determine.

Background

[3] This action arises out of a motor vehicle accident that occurred on January 5, 2011. Lindhe claims that he was walking eastbound on Victoria Park Avenue in Toronto when he was struck by Chalte's vehicle.

[4] On January 13, 2011, Lindhe visited Dr. Sophia Mobilos, his family doctor. He reported pain in his left arm, shoulder and upper back. Dr. Mobilos prescribed physiotherapy.

[5] On January 21, 2011, Lindhe visited the PhysioMed clinic for the prescribed physiotherapy. While there, he complained of left shoulder pain, among other complaints.

[6] Lindhe was approached by a representative of a paralegal office, Blake and Associates. He completed and signed an Activities of Normal Life (OCF-12) Form as part of an application for accident benefits from State Farm Insurance which indicated that he was unable to complete many of his pre-accident activities of daily living due to ongoing pain complaints and that he had difficulty with prolonged driving, prolonged standing, and working his 12 hour shifts.

[7] Lindhe has stated that, although he consulted Blake and Associates, he was unaware that they were paralegals and not lawyers. There is no indication that he was advised by them of his right to launch a civil action for damages or the existence of a limitation period.

[8] On January 25, 2011, Lindhe returned to see Dr. Mobilos. He reported improvement in his neck and shoulder, but said that he continued to have severe pain in his lower back. He reported he had been off work as of January 17, 2011.

[9] On January 25, 2011, Lindhe underwent x-rays of his lumbosacral spine, cervical spine, pelvis and both hips ordered by Dr. Mobilos. The lumbosacral spine x-ray indicated scoliosis with lower lumbar degenerative change. The cervical spine x-ray indicated lower cervical degenerative changes with decreased caliber of the neural foramina, with moderate disc space loss at C5-6 and C6-7 and decreased caliber of the neural foramina bilaterally at C5-6 and C6-7 on the basis of osteophyte formation. The pelvis and hips x-rays indicated a normal exam, with no abnormalities. No fracture was seen.

[10] Throughout 2011, Lindhe says he believed that the injuries to his shoulder, back and knee would improve and eventually heal.

[11] At the time of the accident, the Plaintiff was employed as a security guard at G4S. He says he ultimately stopped working in February 2012 because he felt he was no longer able to perform his job due to injuries caused by the accident. In May, 2012 he began working at Gardaworld, at a job performing less demanding duties.

[12] On June 1, 2012, Lindhe complained of continuing left shoulder pain to Dr. Loukides who advised him to take Advil and apply ice to the affected area.

[13] On November 30, 2012, Lindhe had an ultrasound scan on his right knee. The scan revealed a small knee joint effusion and Baker's cyst.

[14] Lindhe has stated it was not until 2012 that he first discovered his injuries were not going to get better, when Dr. Loukides told him that his injury might not heal and could be permanent.

[15] Lindhe says he first consulted a lawyer with respect to bringing this action in 2013.

[16] Prior to this date, he says he did not know his legal obligations regarding any limitation period for commencing a tort action.

[17] A Statement of Claim was issued on December 13, 2013.

[18] At present, Lindhe claims his left shoulder and knee injuries are permanent and serious and substantially interfere with both his work and activities of daily living. He is unable to perform the physical duties of his previous position at G4S. Lindhe says he cannot drive a car, shovel snow, take out the garbage or do any physical work that requires the use of his left arm. He has also stopped his hobby of restoring furniture because operating a saw is too painful for him.

Law and Discussion

[19] Rule 20 is to be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims (see: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87).

[20] On a motion for summary judgment the judge should first determine if there is a genuine issue requiring trial based only on the evidence before the Court. There will be no genuine issue requiring a trial if the summary judgment process provides the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure.

[21] The use of powers under Rule 20 will not be against the interest of justice if it will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[22] Under s. 4 of the *Limitations Act, 2002*, to meet the basic limitation period a proceeding must be commenced on or before the second anniversary of the day on which the claim was discovered.

[23] S. 5 of the *Limitations Act, 2002* addresses "discovery" as follows:

> 5.(1) 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 who 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). 2002, c. 24, Sched. B, s. 5 (1).
>
> **Presumption**
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

[24] Under s. 5(2) of the *Limitations Act, 2002*, Lindhe must overcome the presumption of discovering the claim on the day the act or omission took place by proving otherwise.

[25] Can the limitation period issue in this case be fairly decided on the basis of the record before the Court and without a trial?

[26] The test on a summary judgment motion in a case such as this which raises the limitation period is whether there is a genuine issue respecting discoverability requiring a trial. If the motion judge finds that the evidence is "less than clear", even where one party's evidence is not contradicted, the judge should refuse summary judgment (see: *Collins v. Cortez*, 2014 ONCA 685).

[27] In motor vehicle cases governed by the *Insurance Act*, the test on a summary judgment motion is not when the plaintiff subjectively believed the injury was permanent and serious, but when the plaintiff had enough information to form an objective appreciation that commencing an action would be an appropriate remedy (see: *Huang v. Mai*, 2014 ONSC 1156).

[28] The question therefore is: at what point was there a sufficient body of objective evidence before the court to demonstrate that the plaintiff's injuries met the threshold test of "permanent and serious" under the *Insurance Act*? Objective evidence would necessarily include the plaintiff's symptoms and available medical evidence as to cause and severity.

[29] At what point the plaintiff discovers that the injury is permanent and serious must be founded in objective knowledge and on a sufficient body of evidence. Since such decision can be quite complicated and particular, the court should give the plaintiff a degree of latitude in making the decision (see *Huang v. Mai, supra*).

[30] In this case, Lindhe states that it was not until June 2012 that he had objective evidence, or a sufficient body of evidence that his injuries would be permanent and serious. He also submits that he has rebutted any presumption that the commencement date of the limitation period occurred on the date of the motor vehicle accident.

[31] In this case, the discoverability issue is inevitably caught up in the evidence as to his actual level of pain and dysfunction and what Lindhe's treating physicians and others observed and told him, in addition to what Lindhe himself has said about those issues, in order to fairly

determine when a reasonable person ought to have known a tort claim should be pursued against Chalte. That final determination, in my view, cannot be made on this paper record.

Conclusion

[32] As a result, I am of the view that it would be neither just nor fair to dispose of this action summarily on the basis of the statutory limitation period. The discoverability requirement in the legislation that triggers the running of the limitation period is an issue that will require a trial to determine.

Costs

[33] If the subject of costs cannot be resolved by the parties, brief written submissions may be delivered by Lindhe within 20 days of the date of this decision, and by Chalte within 20 days thereafter.

STEWART J.

Date: May 1, 2015