CITATION: Hopley v. Health One Physio Inc., 2018 ONSC 3527
COURT FILE NO.: CV-14-120670-00
DATE: 20180605

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
DEBORAH HOPLEY	Plaintiff	Jillian Van Allen, for the Plaintiff
– and –		
HEALTH ONE PHYSIO INC. and MOSHIN ABDULLAH PATEL	Defendants	Jessica DiFederico, for the Defendant, Moshin Abdullah Patel
		HEARD: March 16, 2018

DECISION ON SUMMARY JUDGMENT MOTIONS

SOSNA J.:

INTRODUCTION

[1] On March 25, 2011, the plaintiff, Deborah Hopley, was involved and injured in a motor vehicle accident with an unidentified driver.

[2] She later sought and received treatment from the defendant, Moshin Abdullah Patel ("Patel"). At that time, Patel was an independent physiotherapist with Health One Physio Inc. ("Health One"). These facts are detailed more below.

[3] In the underlying negligence action against Patel and Health One, Hopley claims that she was injured while Patel treated her on August 12, 2011. Hopley commenced the action on November 7, 2014, over three years after the treatment in question was provided.

[4] Patel moves for summary judgment, dismissing Hopley's claim as statute-barred. He argues that Hopley commenced her claim outside the basic two-year limitation period prescribed by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[5] Hopley argues that Patel's summary judgment motion should be dismissed; she submits that a genuine issue exists and requires a trial.

[6] Concerning the limitation period, Hopley argues that she only discovered Patel's identity that he was an independent contractor on September 13, 2013. Since she commenced the action against him on November 7, 2014, it falls well within the two-year limitation.

[7] Hopley requests partial summary judgment to dismiss Patel's limitation period defence. She also requests that her action be permitted to proceed to trial, where the only issues are whether Patel was negligent and, if so, what is the appropriate damages quantum.

FACTUAL AND PROCEDURAL BACKGROUND

[8] After her 2011 motor vehicle accident injury, Hopley sought and received both chiropractic and physiotherapy treatment at a clinic located at 298 John Street, Unit 2, Thornhill, Ontario (the "Clinic Premises"). An exterior sign above the door of the clinic identified both Toronto Poly Clinic ("Toronto Poly") and Health One. Later, the exterior signage was changed to Health Max rather than Health One.

[9] Billing for Hopley's treatment was forwarded to her insurers. Neither Toronto Poly nor Health One provided Hopley directly with any billing statements.

[10] Among other clinicians, an individual treated her, who Hopley believes was identified to her as "Molson" or "Dr. Molson". On August 12, 2011, when Molson treated Hopley, she alleges that she was injured.

[11] Hopley retained Grillo Barristers in 2011 to represent her for injuries sustained in both the motor vehicle accident and her subsequent treatment. She gave Grillo business cards—including cards for both Health One and Toronto Poly—with the names of her treatment providers.

[12] Daniela Cervini was then a lawyer with Grillo, but had no involvement with Hopley's file while at that firm. Navjot Bhatia was a paralegal with Grillo who handled Hopley's file.

[13] Cervini and Bhatia formed a new firm: Cervini Bhatia Professional Corporation. Hopley instructed that she wished to be represented by this new firm. Cervini Bhatia created a new file; the original file remained at Grillo. It is unclear if the new file at Cervini Bhatia included the business cards provided earlier to Grillo.

[14] On July 22, 2012, Bhatia sent a notice letter to Toronto Poly advising that she retained Cervini Bhatia for an incident occurring with a "Dr. Molson" on August 12, 2011.

[15] On July 25, 2012, Toronto Poly replied to Cervini in writing that none of its staff were named Dr. Molson or had contact with Hopley on August 12, 2011.

[16] On November 20, 2012, Hopley emailed Cervini's office advising that the physiotherapy clinic may have changed its name to "Health Max (no longer Health One)".

[17] On March 25, 2013, Cervini issued a statement of claim (in the "First Action") against the John Doe driver, and Toronto Poly and its John Doe employee. On March 28, 2013, Toronto Poly and its John Doe employee were served that statement of claim.

[18] On or about April 10, 2013, Toronto Poly's counsel, Mark Lerner, wrote Cervini advising that Toronto Poly leased space to Health One at the Clinic Premises, and that the treatment in question was provided by an employee of Health One—a separate legal entity from Toronto Poly.

[19] On or about August 20, 2013, Cervini wrote to Health One advising that she would move to add Health One as a defendant in the First Action.

[20] On September 12, 2013, McCague Borlack LLP ("McCague") emailed Cervini advising her that Health One had retained them, and informing her that the individual who treated Hopley was an independent contractor—a physiotherapist—named Moshin Patel. McCague advised her that Patel's contact information could be obtained from the College of Physiotherapists of Ontario and provided his physiotherapy number, 14312. Lastly, McCague advised Cervini of Patel's address: Achieva Health, 4th Floor, 355 Eglinton Avenue East, Toronto, according to the College of Physiotherapists' website.

[21] On October 24, 2013, Cervini wrote McCague to advise them that a motion was scheduled, returnable November 19, 2013, to add Health One as a defendant to the First Action.

[22] On October 29, 2013, Cervini wrote Patel advising him that she was moving to add him as a defendant to the First Action. On November 11, 2013, Stieber Berlach LLP ("Stieber") advised Cervini that Patel had retained them for that motion. The motion was originally scheduled for June 13, 2014, but later adjourned to October 23, 2014.

[23] On LawPro's advice, Cervini withdrew her motion to add Patel and Health One as parties to the First Action. On November 7, 2014, Cervini issued a new statement of claim (in the "Second Action") against Patel and Health One.

[24] On March 30, 2015, McCague served a statement of defence and crossclaim on Health One's behalf. In it, Health One pleaded that Patel was an independent contractor, and not its employee or agent.

[25] On May 12, 2015, Stieber served a statement of defence and crossclaim on Patel's behalf. In it, Patel pleaded that "... he provided physiotherapy services to [Hopley] out of Health One." Patel crossclaimed against Health One for contribution and indemnity and denied any liability to Hopley in this matter.

[26] On May 25, 2015, Cervini served a reply to Patel's statement of defence and crossclaim.

[27] In July of 2015, Hopley retained new counsel—Barry S. Greenberg—to represent her in the negligence claim.

THE RESPONDING PARTY/PLAINTIFF'S POSITION

[28] Hopley submits that Patel's identity was not known or knowable with reasonable diligence until September 12, 2013, when McCague—acting for Health One—wrote Cervini advising her that Patel was an independent contractor and not a Health One employee.

[29] Hopley further contends that she had no reason to seek out Patel's identity because she and her lawyer held a reasonable belief that Patel was employed by Toronto Poly, who would be vicariously liable for his negligence. There was no reason to think that Patel was an independent contractor.

THE MOVING PARTY/DEFENDANT'S POSITION

[30] Patel submits that Hopley and her lawyer did not act reasonably and did not make reasonable inquiries of Health One to determine Patel's identity. The evidence falls short of establishing that Hopley acted with due diligence. The claim is beyond the limitation period and statute-barred.

THE ISSUES TO DETERMINE

[31] As reviewed above, the Second Action was issued on November 7, 2014. The issue in this motion is twofold:

1. Was Patel's identity discoverable through exercise of reasonable diligence by or before November 7, 2012, within the statutory two-year period set by the *Limitations Act*; and

2. Whether this court should grant summary judgment to either party, satisfied that no genuine issue requires a trial as provided by rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*").

[32] Both parties have agreed that Patel does not require leave to bring this motion after Hopley has set the matter down for trial.

ANALYSIS AND FINDINGS

[33] The relevant *Rules* provisions follow:

> **DISPOSITION OF MOTION**
>
> ***General***
>
> 20.04 (2) the court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

CONSEQUENCES OF SETTING DOWN OR CONSENT

48.04 (1) Subject to subrule (3), any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

[34] The relevant *Limitations Act* provisions follow:

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

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 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).

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.

[35] The basic two-year limitation period in the *Limitations Act* begins to run on the day the claim was discovered. The date of the discovery is the earlier of (1) when the plaintiff had knowledge of the matters listed in s. 5(1)(a)(i)-(v) above, and (2) when a reasonable person in the plaintiff's circumstances ought to have had knowledge of those matters: *Fennell v. Deol*, 2016 ONCA 249, [2016] O.J. No. 1745 at para. 20.

[36] As for the matters listed in s. 5(1)(a), the only item relevant to this motion is item (iii): when Hopley knew or ought to have known that Patel was the person who treated her on August 12, 2011. The following facts necessitate review.

[37] As of July 2012, Hopley had advised Cervini that treatment was provided at Toronto Poly by a "Molson" or "Dr. Molson". On July 22, 2012, Cervini advised Toronto Poly that Hopley retained her regarding an incident occurring on August 12, 2011, with a "Dr. Molson". On July 25, 2012, Toronto Poly advised Cervini in writing that it did not staff a "Dr. Molson" and no other Toronto Poly staff saw Hopley on that date.

[38] Cervini then took no steps to determine from Hopley or any other source what clinic—other than Toronto Poly—provided treatment, or whether Hopley correctly identified "Dr. Molson".

[39] Four months later, Hopley emailed Cervini and advised her that the physiotherapy clinic at which she was treated had a new name. Apprised that another clinic with a different name operated at the same Clinic Premises as Toronto Poly, Cervini again took no steps to follow up or make further inquiries. Four months later, after no further inquiry or investigation, Cervini issued a statement of claim—against the John Doe driver, and Toronto Poly and its John Doe employee—

on March 25, 2013, coming just within the statutory two-year limitation period arising from the 2011 car accident.

[40] Although due diligence is not a separate basis for determining if a limitation period expired, it is nevertheless relevant. Due diligence is part of the evaluation of s. 5(1)(b): to decide if a person in the plaintiff's circumstances and with their abilities ought reasonably to have discovered the elements of the claim: *Fennell* at para. 24.

[41] Further, a plaintiff must not wait for someone to inform them of a tortfeasor's identity; that does not satisfy the due diligence requirement: *Lockett v. Boutin*, 2011 ONSC 2098, [2011] O.J. No. 1530 (rev'd on other grounds, 2011 ONCA 809, [2011] O.J. No. 5844) at para. 36.

[42] Contrary to Hopley's submission, I find that the elements of the claim were discoverable with reasonable inquiry well before September 12, 2013, when Health One's counsel advised her of Patel's identity and that he was an independent contractor.

[43] As early as July 2012, Hopley was advised that she was neither treated at Toronto Poly nor by any "Dr. Molson". In November 2012, Hopley subsequently learned that the clinic may have been operating under another name, Health Max. In April 2013, Hopley was again advised that she was not treated at Toronto Poly but Health One, a separate legal entity. By that date, Hopley had still not taken reasonable steps to discover the elements of her claim. For unexplained reasons, Hopley waited a further four months until August 2013 to advise Health One that she would move to add it as a defendant to the First Action.

[44] When advised in October 2013 of Patel's name and that he was an independent contractor, Cervini scheduled a motion returnable June 13, 2014 and later adjourned it at her request to October 23, 2014 to add Health One as a defendant to the First Action, and to substitute the defendant, John Doe, employee for Patel.

[45] The affidavit in support of the motion set out no steps taken by Hopley or Cervini to ascertain the identity of the individual providing treatment on August 12, 2011. Hopley abandoned that motion and, on November 7, 2014—over three years after the treatment in question was provided—issued a new statement of claim in the Second Action against Patel and Health One.

[46] When a limitation period defence is raised, the plaintiff has the onus to show that her claim is not statute-barred and that she acted as a reasonable person in the same or similar circumstances using reasonable diligence to discover the facts relating to the limitation period issue: *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, [2015] O.J. No. 1208 (rev'd on other grounds, 2015 ONCA 758, [2015] O.J. No. 5817) at para. 69.

[47] The present matter is not a situation where the plaintiff did not know that an additional potential defendant existed. Hopley knew as early as July 2012 when Toronto Poly advised her that neither it nor any staff named "Molson" treated her in August 2011. From July 2012, Hopley and Cervini knew that the individual who provided treatment remained unidentified, yet took no steps to conduct further inquiries or investigation, thus allowing the limitation period to pass.

[48] I find that Hopley failed to act with reasonable diligence in identifying both Health One as the site of her treatment and Patel as her treating clinician, by or before November 7, 2012—within the statutory two-year *Limitations Act* period. Hopley has not satisfied her burden of showing that her claim is not statute-barred.

CONCLUSION ON THE SUMMARY JUDGMENT MOTIONS

[49] The test for granting summary judgment is provided in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126 at para 22:

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

[50] Having made the necessary fact findings, and applying the law to those facts by holding that Hopley's action is statute-barred, I dismiss Hopley's motion for partial summary judgment.

[51] Applying the same test and finding no genuine issue requiring a trial, because the discoverability issue has been determined, Patel's motion for summary judgment is granted.

[52] If the parties cannot agree on costs, they may make written submissions. First, Patel's counsel shall deliver submissions by June 29, 2018. Then within fifteen (15) days of receipt of those submissions, Hopley's counsel shall deliver submissions. Within five (5) days of receipt of those submissions, Patel's counsel may deliver a brief reply. All submissions, with proof of service, must be filed with the trial coordinator at Oshawa. The trial coordinator may accept a party's submissions, if not on time, with the consent of the other party. When the filing of submissions is complete, the trial coordinator shall forward all of them to me, as one package, for consideration.

The Honourable Mr. Justice Alexander Sosna

DATE RELEASED: June 5, 2018

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DECISION ON SUMMARY JUDGMENT MOTIONS

The Honourable Mr. Justice Alexander Sosna

Released: June 5, 2018