CITATION: Zhu v. Matadar, 2015 ONSC 178
COURT FILE NO.: CV-09-392336
DATE: 20150108

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
TIE HONG ZHU	)	*William G. Scott* for the Plaintiffs
Plaintiff	)	
– and –	)	
MOHMED ARIF MATADAR and MUSA VALI	)	*James Shafman* for the Defendants
Defendants	)	
	)	**HEARD**: January 5, 2015

PERELL, J.

REASONS FOR DECISION

[1] The Plaintiff, Tie Hong Zhu, was injured in a motor vehicle accident that occurred on November 10, 2007. She commenced her action against the Defendants, Mohmed Arif Matadar and Musa Vali, on December 1, 2009, two years and 21 days after the accident.

[2] Messrs. Matadar and Vali now bring a summary judgment motion to have Ms. Zhu's claim dismissed as barred by the *Limitations Act, 2002,* S.O. 2002, c. 24.

[3] Ms. Zhu brings a cross-motion for leave to amend her Statement of Claim or alternatively for leave to deliver a Reply; she wishes to plead that by applying the discoverability principle, her claim is timely and not statute barred.

[4] Given the very robust approach to summary judgment promoted by the Supreme Court of Canada's judgments in *Hryniak v. Mauldin*, 2014 SCC 7 and *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, it is not surprising that there is an uptick in summary judgment motions by defendants seeking to have claims dismissed as statute barred under s. 4 of the *Limitations Act, 2002,* S.O. 2002, c. 24.

[5] Under s. 4 of the *Limitations Act, 2002,* the basic limitation period is two years from the day the claim was discovered. Section 5 of the *Act* defines 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 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).
>
> (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.

[6] Not surprisingly, in bringing a summary judgment motion, a defendant advancing a limitation period defence will rely on the statutory presumption in s. 5 (2) of the *Limitations Act, 2002* that unless the contrary is proven, the claimant is presumed to have known the elements for his or her claim on the day the events of the claim occurred.

[7] Not surprisingly, on the summary judgment motion, a plaintiff will attempt to rebut the statutory presumption by tendering evidence that he or she both subjectively and objectively did not discover the claim until sometime after the day the events of the claim occurred.

[8] In order to rebut the presumption, the claimant must meet both a subjective and an objective standard because s. 5 (1) of the *Act* defines discovery by relation to "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)."

[9] Practically speaking, applying s. 5 (2) of the *Limitations Act, 2002* to any case and focussing on the commencement of the running of the limitation period means that for the claimant to prove that his or her claim is timely, the claimant must prove that he or she subjectively and objectively did not discover the claim in the period between the events giving rise to the claim and a date that is two years before an action was commenced; otherwise the two year period will begin at the date of the event and end at the second anniversary of the event.

[10] Thus, applying s. 5 (2) of the *Limitations Act, 2002* to the circumstances of the case at bar means that Ms. Zhu's claim is statute barred unless Ms. Zhu proves – and the onus is on her - that she did not subjectively or objectively know about her claim against Messrs. Matadar and Vali in the 21-day period between November 10, 2007 and December 1, 2007.

[11] In the case at bar, based on the evidence presented by both parties (and without the use of the powers provided by rules 20.04 (2.1) and (2.2) of the *Rules of Civil Procedure* to weigh the evidence and make findings of fact), I am satisfied that there is no genuine issue requiring a trial about whether Ms. Zhu's action is statute barred. In my opinion, it has been established that her claim is timely.

[12] Therefore, notwithstanding that she did not bring a cross-motion for a summary judgment, she is entitled to a partial summary judgment against the Defendants that her claim is

not statute barred. The court does not require a cross-motion for summary judgment when it can decide the issue that is the subject matter of the motion for summary judgment: *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, affirming 2013 ONSC 6113.

[13] These conclusions follow from my analysis about what Ms. Zhu knew or ought to have known in the 21-day period between November 10, 2007, the day of the accident, and December 1, 2007, the day that is two years before she commenced her action against Messrs. Matadar and Vali.

[14] By way of describing the analysis, there is no genuine issue for trial that on November 10, 2007, Ms. Zhu was a passenger in a vehicle driven by her husband, Bao Yin Jiang. That day, Mr. Jiang's vehicle, a Toyota, was the middle or second vehicle involved in a three-car collision. The front or first vehicle in the collision was owned and driven by Chen Lung Chen, who was insured by Primmum Insurance, and the rear or third vehicle was owned by Mr. Matadar, who was insured by State Farm. The rear vehicle was driven by Mr. Vali. At the scene of the accident, Mr. Jiang made a handwritten note with the names and addresses of Mr. Matadar and Mr. Vali. His note also recorded their respective driver's licence numbers, insurance policy numbers and vehicle information.

[15] On November 10, 2007, Ms. Zhu knew or ought to have known who the potential defendants were, but the question then becomes did Ms. Zhu, on November 10, 2007, know or ought she to have known that she had a claim against any of these potential defendants; namely: Messrs. Jiang, Chen, Matadar, or Vali.

[16] For Ms. Zhu to have a claim, she would have had to have not only injuries, which she did have, but because of the circumstance that her injuries came from a car accident, for her to have a claim, she would have also had to have injuries that satisfied the statutory threshold imposed by s. 267.5(5) of the *Insurance Act,* R.S.O. 1990, c. I.8, which states:

> (5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important physical, mental or psychological function.

[17] Based on the evidence proffered by both parties, there is no genuine issue for trial that between November 10, 2007 and December 1, 2007 Ms. Zhu did not subjectively or objectively know that she had sustained a permanent serious disfigurement (there was no disfigurement at all) and during this period she did not subjectively or objectively know that she had sustained a permanent serious impairment of an important physical, mental or psychological function.

[18] Based on the evidence proffered by both parties, between November 10, 2007 and December 1, 2007, she may have known subjectively or objectively that she had sustained a serious impairment of an important physical, mental, or psychological function but there is no genuine issue for trial that she did not know nor ought she to have known that her impairment

was permanent. Indeed, there is rather a genuine issue for trial about the seriousness and permanence of her injuries, which has not been conceded by the Defendants and which remains to be determined.

[19] What is known subjectively and objectively is that after the accident, Ms. Zhu felt pain and stiffness in her neck, back and shoulders. She immediately was unable to perform housework or to care for her children. She did not return to work. Within days of the accident, Ms. Zhu attended her family doctor, Dr. K.K. Leung, and when he was not available, she went to Optimum Health, a physiotherapy clinic. The clinic began rehabilitative treatment, and treatment continued thereafter on a regular basis.

[20] The evidence tendered by both parties establishes the potential of Ms. Zhu having sustained a serious and permanent impairment but the evidence also establishes that neither subjectively nor objectively did she know that her injuries were permanent. (Today, it appears that her chronic pain may be permanent but, as noted above, whether her injuries satisfy the threshold remains a live issue.)

[21] Under s. 5 of the *Limitations Act, 2002* and under the common law principle of discoverability, a claim for damages arising out of a motor vehicle accident that is subject to a statutory threshold is not discovered until there is a sufficient body of medical evidence to satisfy a Court on the balance of probabilities that the plaintiff has sustained an injury that will meet the requirements of s. 267.5(5) of the *Insurance Act*.

[22] In *Everding v. Skrijel*, 2010 ONCA 437, approving *Vosin v. Hartin*, [2000] O.T.C. 931 (S.C.J.), the Court of Appeal held that in applying the discoverability principle of the *Limitations Act, 2002*, the Court should consider the threshold requirements of the *Insurance Act,* and the Court held that a plaintiff will not have discovered his or her claim before the plaintiff knows that he or she has a substantial chance to succeed in recovering a judgment for damages. A person cannot be expected to commence an action before he or she knows that the necessary elements as set out in the legislation can be established on the evidence: *Hoffman v. Jekel*, 2011 ONSC 1324 at para. 9.

[23] In the case at bar, there is no genuine issue for trial that between November 10, 2007 and December 1, 2007, Ms. Zhu did not know nor ought she have to known that she had a legally viable claim against any of Messrs. Jiang, Chen, Matadar, or Vali. In that 21-day period, it was simply too early to say subjectively or objectively that she had a threshold-worthy claim.

[24] The above analysis is dispositive of Messrs. Matadar's and Vali's summary judgment motion, and, therefore, their motion should be dismissed, and the Court should rather grant a partial summary judgment to Ms. Zhu dismissing their limitation period defence.

[25] Although a considerable amount of evidence was led on the subject, based on the above analysis, it is not necessary to make a finding of when precisely Ms. Zhu knew or when she ought to have known that she had a viable claim against any of Messrs. Jiang, Chen, Matadar, or Vali. For present purposes, it is sufficient to say that she discovered a potentially viable claim after December 1, 2007 and, therefore, commencing an action by December 1, 2009 would be timely.

[26] Although it is not necessary to determine when she knew or ought to have known that she had a claim against Messrs. Matadar and Vali, in order to address their argument on this

summary judgment motion, it is necessary to say something more about what Ms. Zhu knew or ought to have known in the two-year period between November 20, 2007, the date of the accident, and November 20, 2009, the second anniversary of the accident, which was 21 days shy of the commencement of an action by Ms. Zhu.

[27] The evidence on the summary judgment motion revealed that on December 20, 2007, 30 days after the accident, Ms. Zhu was assessed by Dr. Michael Gadon, a Clinical Psychologist, who was retained by the no-fault statutory accident benefits insurer. Dr. Gadon concluded that Ms. Zhu suffered from psychological impairments involving depression with suicidal thinking, general anxiety, motor vehicle anxiety and irritability/temper control problems, as a direct result of injuries sustained in the motor vehicle accident. Dr. Gadon diagnosed Ms. Zhu as suffering from moderate-severe Adjustment Disorder with Mixed Anxiety and Depressed Mood, Acute, and Specific Phobia as a direct result of the subject motor vehicle accident. Ms. Zhu, however, was not told about Dr. Gadon's opinion until she received a copy of his report in and around January of 2008. She says that this is when she first realized that she might have a serious injury from this accident.

[28] This evidence, however, says little about the permanence of her injury.

[29] On February 23, 2008, Ms. Zhu attended a psychologist, Dr. Godwin Lau. Dr. Lau agreed with Dr. Gadon's opinion about the severity of the psychological impact the accident had on Ms. Zhu and his diagnosis was that she suffered from Post-Traumatic Stress Disorder, Depressive Disorder, and Driving Phobia. Dr. Lau told Ms. Zhu about his opinion at an appointment in March of 2008.

[30] Ms. Zhu, however, says that it was not until April 3, 2008 that she knew how very serious her symptoms had become. At the advice of Dr. Lau, she went to the Emergency Department at North York General Hospital. Ms. Zhu was examined at the hospital by Dr. Franklin Wong. He diagnosed her with Major Depression and Post-Traumatic Stress Disorder, and he prescribed Lorazepam 2 mg.

[31] The next day, on April 4, 2008, Ms. Zhu and Mr. Jiang attended the law firm known as Sue Chen Law Professional Corporation. At the retainer meeting, Ms. Chen was provided with Mr. Jiang's handwritten note about the persons involved in the car accident. Ms. Chen was also given an incomplete copy of the Self-Reporting Collision Report from the Collision Centre. Ms. Zhu told Ms. Chen - mistakenly as it is now known - that Mr. Matadar was the owner and Mr. Vali the driver of the first vehicle. The complete Self-Reporting Collision Report, which was obtained much later, indicates, however, as noted above, that the first vehicle was owned and driven by Mr. Chen, the second vehicle was owned and driven by Mr. Jiang, and the third vehicle was owned by Mr. Matadar and driven by Mr. Vali.

[32] Pausing here, based on the above evidence, it is arguable that on April 4, 2008, Ms. Zhu and her lawyer subjectively knew or believed that Ms. Zhu only had a viable claim against Mr. Jiang and Mr. Chen.

[33] However, based on the above evidence, it is arguable that their subjective knowledge was mistaken and exercising due diligence, they ought to have known that Ms. Zhu had a viable claim against Messrs. Matadar and Vali. In other words, it is arguable that with due diligence

Ms. Zhu knew or ought to have known by April 4, 2008 that she had a viable claim against Messrs. Matadar and Vali.

[34] For the reasons expressed above, it is not necessary for me to decide the correctness of this argument, but assuming it to be correct, all it means is that Ms. Zhu could have commenced an action before the second anniversary of the accident, but it does not prove that she did not have more time to assert her claim.

[35] Assuming the correctness of the argument that she knew all she needed to know by April 4, 2008 begs the question of whether she needed to commence an action by the second anniversary of the accident to avoid her claim being barred and rather suggests that she may have had until April 4, 2010 to commence an action.

[36] There was evidence on the summary judgment motion, however, that Ms. Zhu's lawyers thought that the deadline for bringing an action was the second anniversary of the car accident; i.e. November 20, 2009, and, therefore, based on this evidence, Messrs. Matadar and Vali argue that the deadline for an action against them was November 20, 2009. They argue, therefore, that Ms. Zhu's lawyers commenced her action against them 21 days after the deadline. I disagree with this argument, because, once again, Ms. Zhu's lawyers' belief that November 20, 2009 was the deadline simply begs the question of whether November 20, 2009 was - in law - the deadline.

[37] Put somewhat differently, it will always be prudent to commence a motor vehicle personal injury action within two years of the date of the accident but prudence begs the question of what is the actual deadline.

[38] In any event, on March 17, 2009, Ms. Zhu's lawyers wrote Mr. Chen and Mr. Jiang respectively and advised them that Ms. Zhu intended to commence an action against them with respect to the motor vehicle accident.

[39] Oddly, on April 29, 2009, Ms. Zhu's lawyers also wrote to Mr. Matadar to advise that Ms. Zhu intended to commence an action against him and, on the same day, the firm wrote to State Farm notifying it that Ms. Zhu sustained serious and permanent injuries in the accident and intended to commence a civil action against its insured.

[40] This correspondence is odd in hindsight because based on what Ms. Zhu's lawyers knew or ought to have known, it might have been expected that before November 10, 2009, they would have sued all of Messrs. Jiang, Chen, Matadar, and Vali, but that's not what happened. On November 9, 2009, Ms. Zhu commenced an action by Statement of Claim (CV-09-390804) against only Mr. Chen, Mr. Jiang, and Jane Doe. The pleading identified Mr. Chen as the driver of the rear or third vehicle. Ms. Zhu did not join Messrs. Matadar and Vali in her initial action.

[41] Later in November, 2009, Primmum Insurance contacted Ms. Zhu's lawyers and advised that Mr. Chen was not the driver of the third vehicle but rather was the driver of the first vehicle. The same day, Primmum Insurance forwarded a copy of its insured's Self-Reporting Accident Report, which identified Mr. Matadar and Mr. Vali as responsible for the third vehicle.

[42] What followed was that on consent, on March 1, 2011, the action against Messrs. Chen and Jiang was dismissed without costs, and on June 14, 2011, Messrs. Matadar and Vali served their Statement of Defence and, among other defences, they pleaded that Ms. Zhu's claim was statute barred.

[43] I do not need to make a finding about the quality of the legal services provided to Ms. Zhu because based on the above analysis, Ms. Zhu's claim was timely and is not statue barred. It was possible and it would have been prudent to sue Messrs. Matadar and Vali before November 10, 2009 but there is no genuine issue for trial that Ms. Zhu had not discovered her claim by December 1, 2007 and probably did not discover her claim until sometime in 2008, which would mean that she had until sometime in 2010 to commence an action. Her action in December 2009 was timely.

[44] For these reasons, I grant Ms. Zhu a partial summary judgment dismissing the limitation period defence. Her action should continue in the normal course to determine whether she has a claim that satisfies the threshold and whether the Defendants are liable to pay damages.

[45] Order accordingly. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Zhu's submissions within 20 days of the release of these Reasons for Decision, followed by Messrs. Matadar's and Vali's submissions within a further 20 days.

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Perell, J.

Released: January 8, 2015

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TIE HONG ZHU

Plaintiff

– and –

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