CITATION: David Sugar et al v. MCAP Financial Corp. et al, 2015 ONSC 6360

COURT FILE NO.: CV-15-10854-00CL

DATE: 20151016

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: DAVID SUGAR and PHYLLIS SUGAR,

Plaintiffs

AND:

MCAP FINANCIAL CORPORATION and RESMORE TRUST COMPANY,

Defendants

BEFORE: Newbould J.

COUNSEL: *Gary Sugar*, for the plaintiffs

Mark A. Freake, for the defendant ResMor Trust Company

Carlo DiCarlo, for the defendant MCAP Financial Corporation

HEARD: October 14, 2015

ENDORSEMENT

[1] The defendants move to dismiss this action on the basis that it is statute barred under the *Limitations Act, 2002*. In my view they are correct for the following reasons.

Relevant history

[2] This action is in relation to a retirement home property located in Kitchener, Ontario. The mortgagor of the property was 1711060 Ontario Ltd. and its various predecessor companies.

[3] In or about 1994, the mortgagor granted a first mortgage on the property to the predecessor in interest of the co-defendant, ResMor Trust Company. In or about 2007, the mortgagor granted a second mortgage in the property to a group of investors, two of whom included Sugars, the plaintiffs in this action. The second mortgage was administered by C&K Mortgage Services Inc., operating as Rescom Capital.

[4] On May 10, 2011, the mortgagor defaulted on the first mortgage by failing to make a monthly interest payment. On September 27, 2011, ResMor served a notice of sale on the mortgagor and several related parties. The notice of sale was not served on the Sugars as required by section 31(1) of the *Mortgages Act*. After serving the notice of sale, ResMor took no further steps to enforce its mortgage security.

[5] On September 5, 2012, ResMor transferred the first mortgage to MCAP Financial Corporation. On September 7, 2012 MCAP issued a statement claim in the Ontario Superior Court in which judgment on the first mortgage and other relief was claimed. The statement of claim pleaded that the first mortgagor had defaulted in payment of interest on May 10, 2011 and had defaulted in paying the principal balance due at maturity on May 21, 2011. It also pleaded that realty taxes had not been paid. The plaintiffs in this action, the Sugars, were named as defendants and priority over their second mortgage was claimed by MCAP.

[6] The plaintiffs acknowledge that they were served with the statement of claim on September 10, 2012 and that as of that date they knew of the default of the first mortgage which in turn caused their second mortgage to be in default. They also knew as of that date that ResMor had failed to serve the notice of sale on them back in September, 2011.

[7] On September 12, 2012, the mortgagor and its related companies filed a Notice of Intention to Make a Proposal under the BIA. Sometime after, the mortgagor and its related

companies brought an application seeking protection under the CCAA. On October 17, 2012 the application under the CCAA was dismissed and an order was issued appointing a receiver to take control over the assets of the mortgagor and its related companies including the property in question in Kitchener, Ontario.

[8] On April 15, 2013, with the consent of both the Sugars and MCAP, the receiver entered into an agreement to sell the property. On May 29, 2103, the Court approved of the sale and the transaction closed on June 4, 2013. After closing costs and adjustments, the net proceeds of the sale were $1,385,688.69.

[9] Pursuant to court order dated June 11, 2013, the receiver paid $791,000 to MCAP and $130,000 to the Sugars. Pursuant to court order dated December 2, 2013, the receiver paid $142,055.92 to MCAP and $120,000 to the Sugars. As a result of these distributions, MCAP recovered all of the money owing to it under the first mortgage and the Sugars were left with a shortfall under the second mortgage of $352,108.43, including the legal fees that they incurred of $42,730.96.

[10] On January 23, 2015, the plaintiffs issued their statement of claim in this action. They allege that ResMor and MCAP breached duties owed to them by negligently failing to advise them of the mortgagor's default and failing to serve the notice of sale on them. They seek damages in the amount of $352,108.43. They plead that had ResMor served the notice of sale on them, they would have made full recovery on their mortgage and that by failing to give them the notice of sale, they lost their right to redeem the first mortgage.

Analysis

[11] Sections 4 and 5 of the *Limitations Act, 2002* provide:

> 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.

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).

[12] MCAP and ResMor take the position that by September 10, 2012 when the plaintiffs were served with the statement of claim, they knew of the default of the first mortgage that occurred in May, 2011 and that they had not been served with the notice of sale in May, 2011. Thus they knew by that date what they say gave rise to their cause of action as pleaded. The plaintiffs say that they did not know of any damage suffered until they learned in April, 2013 and thereafter that their mortgage would not be paid in full.

[13] Section 5(1)(2) of the *Limitations Act* provides:

(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.

[14] Thus when a limitation period is raised, the onus is on the plaintiff to show that its claim is not statute barred. See *Farhat v. Monteanu* (2015), 125 O.R. (3d) 267 at para. 34.

[15] A cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the

exercise of reasonable diligence. Discoverability is a fact-based analysis. See *Lawless v. Anderson,* 2011 ONCA 102, a negligence case, in which Rouleau J.A. stated:

> 22. The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term 'cause of action' - the fact or facts which give a person a right to judicial redress or relief against another": *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), at p. 170.
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> 23. Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run: see *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.) and *McSween v. Louis* (2000), 132 O.A.C. 304 (C.A.).

[16] In *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.,* 2012 ONCA 156, the City of Hamilton purchased asset backed commercial paper notes from Metcalfe & Mansfield. It thought it was buying conventional commercial paper secured by conventional credit assets whereas it later learned that the notes were secured by credit default swaps. It sued in tort for alleged misrepresentation by Metcalfe & Mansfield of what was being sold, claiming that it would not have purchased the notes had the misrepresentation not been made. The maturity date for the notes was September 26, 2007. Before the notes matured, the Canadian market for them collapsed. On August 23, 2007, the City, as well as many other investors, entered into the Montreal Accord. This agreement bound signatories to a 60-day standstill period, which was extended until January 10, 2008, when the Accord collapsed.

[17] The City commenced its action on September 25, 2009, just less than two years before the maturity date of the notes but more than two years after it had signed the Montreal accord. It claimed that the limitation period commenced on the date of the maturity date of the notes. It was held that the civil wrong was complete when the City purchased the notes and that the limitation period began to run when the City discovered that it had allegedly been misled about the notes, sometime before it signed the Montreal Accord on August 23, 2007. The City incurred a loss

sufficient to give rise to its causes of action in tort and equity when it entered into the transaction to purchase the notes, and not later when the notes became payable.

[18] In the Court of Appeal, LaForme J.A. stated that generally speaking, the character of the damage required for a cause of action to accrue depends on the nature of the claim and that broadly described, damage is any measurable detriment, liability or loss.

[19] In dealing with the claim for misrepresentation, LaForme J.A. stated:

> 32....for the purpose of negligent misrepresentation claims, damage is the condition of being worse off than if the defendant had not made the misrepresentation. In cases where a plaintiff is induced to enter into a transaction in reliance on a misrepresentation and fails to get what he was entitled to (the context relevant to the City's case), the plaintiff suffers damage sufficient to complete the cause of action when he enters into the transaction, not when the loss is monetized into a specific amount.
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> 42. ...Damage occurs as soon as the plaintiff's actual position is worse than its position had it not entered into the transaction, provided that at least some of that loss is attributable to the defendant's misrepresentation. (Underlining added).

[20] LaForme J.A. also noted the distinction between "damage', the word used in section 5 of the *Limitations Act,* and "damages". He stated:

> 54. The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. *Damage* is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage*.

[21] The plaintiffs' claim is based not on a negligent misrepresentation but on negligence in failing to serve the plaintiffs with the notice of sale and thus failing to advise them that the first mortgage was in arrears. I see no difference in substance however in dealing with a negligence claim of failing to advise and the applicability to such a claim of the notion that damage is the condition of being worse off if the negligence had not occurred.

[22] In my view, the plaintiffs were aware of the fact that "damage" had occurred by the time (i) they were served with the statement of claim in the MCAP action on September 10, 2012, (ii) the commencement of the NOI proceeding under the BIA that occurred two days later and (iii) the receivership order of October 17, 2012.

[23] Mr. Gary Gruneir was the president of Rescom and administrator of the second mortgage on behalf of the plaintiffs. He acknowledged on his cross-examination that at the time the MCAP statement of claim was served on September 10, 2012, he believed that he could exercise the right of redemption to redeem the first mortgage. It is the alleged loss of that right that is the basis of the plaintiffs' action. Thus through Mr. Gruneir the plaintiffs knew the basis of their action by September 10, 2012.

[24] Mr. Gruneir also acknowledged that when learning of a default, he would want to act as expediently as possible to protect the property and investment and that there were steps that were necessary to recover the plaintiffs' investment. He acknowledged that it is common knowledge that a second mortgage is more vulnerable than a first mortgage with a greater likelihood of remaining unpaid. He acknowledged there was a risk in this case that the second mortgage might go unpaid. In his affidavit he said that had he been aware of the default on the first mortgage at the time it happened, he would have quickly taken steps to enforce the second mortgage security. He said in his affidavit that as a result of the NOI and the receivership order, the plaintiffs were unable to exercise their right of redemption or otherwise protect their interests. One conclusion that one can draw from that is that Mr. Gruneir believed by then that the plaintiffs were worse off than before the default of the mortgagor on the first mortgage.

[25] In this case I think it obvious that assuming there was a duty on the part of the first mortgagee to give notice to the second mortgagee of a default by the mortgagor on the first mortgage (which is contested), the cause of action accrued when the failure to give the notice of sale took place in May, 2011. That is when the alleged damage occurred. The second mortgagee was worse off once there was a default on the first mortgage.

[26] The evidence of Mr. Gruneir establishes that he on behalf of the plaintiffs had knowledge that they were worse off by the time the MCAP statement of claim was served on September 10,

2012 and by the time of the NOI proceedings and the receivership order. The fact that the plaintiffs may not have known of the extent of their damages until the property was later sold does not assist them.

[27] It would also seem that as the first mortgage by its terms expired on May 21, 2011, Mr. Gruneir as a very experienced mortgage administrator should have known of the term of the first mortgage, the fact that it had expired and the fact that it had not been renewed. That would have been a matter of record. In the language of section 5 of the *Limitations Act*, he ought to have known of a default in the first mortgage at the time the first mortgage expired and went unpaid.

[28] It is argued on behalf of the plaintiffs that once the NOI proceedings under the BIA were taken two days after the MCAP statement of claim was served, there was a stay of proceedings that continued through to the receivership order and thereafter. Thus it is said that the chance to redeem was lost by that stay of proceedings. I do not see that argument as assisting the plaintiffs. First, it would have been open to the plaintiffs to have taken steps such as negotiating with the first mortgagee to redeem the first mortgage and then move to take the property out of receivership. Second, even if the argument were correct, the plaintiffs could have immediately sued MCAP and ResMor. The stay of proceedings was against taking action against the first mortgagor or the property. It did not prevent any action for damages against MCAP or ResMor.

[29] The plaintiffs also contend that there was no reason for them to sue MCAP or ResMor at that time as they had a valuation dated April 12, 2012 that the property was worth $5 million. I do not see how that assists the plaintiffs. The "valuation" was a one page letter from a real estate broker without any explanation whatsoever how he arrived at that figure and there is no evidence from the plaintiffs or Mr. Gruneir that they believed the property to be worth that much. In any event, the plaintiffs may have decided not to sue MCAP or ResMor when they learned of the default on the first mortgage because they thought, or hoped, that the property would fetch enough to pay all of the costs and pay them out on their second mortgage, but that was a choice they made. It could not stop a limitation period from running.

[30] The plaintiffs also say that a prerequisite under section 5(1)(a)(iv) of the *Limitations Act* is that having regard to the nature of the injury, loss or damage, knowledge that a proceeding

would be an appropriate means to seek to remedy it is required, and that it would not have been appropriate to start this action until it was known what the actual damages were after the property was sold in the receivership. I do not agree. Whether an action is appropriate under section5(1)(a)(iv) of the *Limitations Act* is whether it is legally appropriate. In *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada,* 2012 ONCA 218, Sharpe J.A. stated:

> **34** This brings me to the question of when it would be "appropriate" to bring a proceeding within the meaning of s. 5(1)(a)(iv) of the *Limitations Act*. Here as well, I fully accept that parties should be discouraged from rushing to litigation or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1)(a)(iv) states that a claim is "discovered" only when "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it", the word "appropriate" must mean *legally appropriate*. To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

[31] This is not a case in which it would have been inappropriate to commence the claim against MCAP or ResMor because it would have affected some other proceeding that was underway, such as in *Kadiri v. Southlake Regional Health Centre* 2015 ONSC 621. An action against MCAP or ResMor would not have affected the sales process at all. It cannot be said that such an action would not be legally appropriate within the meaning of section 5(1)(a)(iv) of the *Limitations Act*.

Conclusion

[32] The action against MCAP and ResMor is barred by the *Limitations Act* and is dismissed.

[33] MCAP and ResMor are entitled to their costs. The costs outlines provided by the parties are remarkably similar. The cost outline of the plaintiffs claims costs of $19,816.18 all in. The cost outline of MCAP claims costs of $19,401.96 all in. The cost outline of ResMor claims costs of $16,789.40 all in. All of these cost claims are reasonable taking into account the factors in rule 57.01. In the circumstances, the plaintiffs are ordered to pay costs to MCAP of $19,401.96 all in and to ResMor of $16,789.40 all in, to be paid within 30 days.

Newbould J.

Date: October 16, 2015