CITATION: Favretto-Post v. Fontana, 2019 ONSC 4487
COURT FILE NO.: CV-17-133314
DATE: 20190725

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Edda Marie Favretto-Post Plaintiff	Michael A. McKee, for the Plaintiff
– and –	
Anna Maria Fontana and Renato Fontana Defendants	Jonathan M. Friedman, for the Defendants
	HEARD: July 24, 2019

REASONS FOR DECISION

MCKELVEY J.:

[1] The plaintiff in this action loaned $150,000 to the defendant, Anna Maria Fontana, pursuant to a promissory note. The defendant, Ms. Fontana, defaulted on payment of the promissory note. She was subsequently charged criminally and was subsequently found guilty of fraud over $5,000 and fraud by conversion. Her convictions occurred on January 16, 2017.

[2] On November 3, 2017, the plaintiff commenced an action against both Ms. Fontana and her husband, Renato Fontana. Three different claims are asserted in the plaintiff's statement of claim. They are as follows:

1. Payment on the promissory note.

2. General, special, compensatory and consequential damages in the sum of $50,000 as well as punitive or exemplary damages in the sum of $50,000 which appear to be based on the claim of fraud.

3. An order pursuant to s. 2 of the *Fraudulent Conveyances Act*, setting aside a transfer of title from Ms. Fontana to her husband of a residence which is occupied by the couple as their matrimonial home.

[3] The plaintiff has brought a motion for summary judgment seeking judgment in accordance with the relief claimed in the amended statement of claim. In response, the defence has brought a cross-motion for summary judgment in favour of the defendants. The defendants assert that the plaintiff's action should be dismissed based on the expiry of the relevant limitation periods. The defence also asserts that the evidence does not support a conclusion that there was a fraudulent conveyance by Ms. Fontana of the matrimonial home to her husband.

[4] There appears to be general agreement with respect to some of the basic facts leading up to the plaintiff's claim. The following is a chronology for some of the key events leading up to the plaintiff's claim:

- September 21, 2010 –Ms. Fontana transferred the matrimonial home to her husband.
- September 27, 2010 – The plaintiff paid $150,000 to the defendant so that she could open a restaurant.
- September 28, 2010 – Ms. Fontana signed a promissory note with respect to the loan of $150,000.
- December 9, 2010 – On this date, the promissory note was amended. The note provided for payment of interest on the loan as well as monthly payments of $2,500.
- March, 2012 – Ms. Fontana defaulted on the payments required under the loan.
- August, 2012 – By this time, Ms. Fontana had declared bankruptcy. The plaintiff attended the initial creditors meeting.
- January 16, 2017 – Justice Edwards found Ms. Fontana guilty of fraud over $5,000 and fraud by conversion.
- May 24, 2017 – Justice Edwards delivered his sentence and his Reasons for Sentence which included a restitution order in favour of the plaintiff for the sum of $150,000.
- November 3, 2017 – The within action was commenced.
- January 25, 2019 – Ms. Fontana made her final payment in accordance with the restitution order of Justice Edwards

Rule 20 – Summary Judgment

[5] Both the plaintiff and defence motions are for summary judgment under Rule 20. In 2014, the Supreme Court of Canada released its decision *Hryniak v. Mauldin*, 2014 SCC

7, which considered when it is appropriate to grant summary judgment under Rule 20 of the Rules. Rule 20.04(2) provides that,

> 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;

[6] Rule 20.04(2.1) provides that,

> 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.

[7] In its decision in *Hryniak*, the Supreme Court of Canada notes that there will be no genuine issue requiring a trial when a judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result. The court notes as well that when a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial will generally not be proportionate, timely or cost effective. The question the court must consider is whether the judge has confidence that he or she can find the necessary facts and apply the relevant legal principles to thoroughly resolve the dispute.

[8] It is recognized in the *Hryniak* decision that there may be cases where given the nature of the issues and the evidence required, a judge cannot make the necessary findings of fact or apply the legal principles to reach a just and fair determination. At the Court of Appeal level in *Hryniak*, the court suggested that summary judgment would most often be appropriate when cases were document driven with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. The Supreme Court in its decision agreed that these are helpful observations, but should not be taken as delineating any firm categories of cases where a summary judgment is or is not appropriate.

[9] The Supreme Court also noted that if some of the claims against some of the parties would proceed to trial in any event, it may not be in the interest of justice to use the new fact findings powers to grant summary judgment against a single defendant. Such partial

summary judgment may run the risk of duplicative proceedings of inconsistent findings of fact and therefore, the use of the powers might not be in the interests of justice.

[10] This latter point was highlighted in the Ontario Court of Appeal decision in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450. That case involved promissory notes and a release which were part and parcel of the same series of transactions on the original summary judgment motion. The motion judge granted summary judgment dismissing the appellant's action on the basis that it was precluded by the terms of a release that he accepted as valid. The motion judge did not however grant summary judgment on the respondent's counter-claim on two promissory notes. The court in *Baywood Homes* found that both the claim and the counter-claim should proceed to trial. In reaching this conclusion, the court stated,

> In the complex situation in this case, it is therefore entirely possible that the trial judge who hears the trial of the issue on the validity of the promissory notes will develop a fuller appreciation of the relationships and the transactional context than the motions judge. That could force a trial decision on the promissory notes that would be implicitly inconsistent with the motions judge's finding that the Third Release is fully valid and effective, even though the parties would be bound by that finding. The process, in this context, risks inconsistent findings and substantive injustice.

[11] The *Baywood Homes* decision also highlights the limits of a motion for summary judgment where there are significant credibility issues. In that decision, the court comments,

> What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.

[12] It is apparent that in this case the issues in the action are complex and there are significant issues with respect to the credibility of Ms. Fontana. As in the *Baywood Homes* case, this case involves complex legal and factual issues and 3 different claims which overlap, and which in my view will benefit from the judge having a fuller appreciation of the relationships and the transactional context. This is required for a full and just determination on the merits of this case. I have concluded for the following reasons that the issues raised in both summary judgment motions do require a trial.

Analysis

[13] There is no issue about the fact that Ms. Fontana committed fraud in relation to the loan of $150,000 she took out from the plaintiff. In his decision at the criminal trial, Justice Edwards stated as follows,

> While I agree with the defence submission that this case involves a civil dispute arising out of a simple loan transaction between Edda and Fontana, the fact that it is a civil dispute does not mean that Fontana's actions were not also criminal. Her actions started out honestly. If she had spent the money in establishing a restaurant business that failed and then declared bankruptcy, this case would never have seen the inside of a criminal courtroom. Edda would have lost her hard-earned retirement nest egg, but she could have followed the advice of her advisors and obtained security for the loan. She chose not to do so, and as is so often in civil cases Edda would have been entitled to pursue a remedy in the civil courts. She may have obtained a judgement, but been left with no ability to recover on the judgement.
>
> The facts of this case are different however. Fontana's actions became criminal when she knew she was placing Edda's money at risk by first of all not using the money towards a restaurant business, and secondly when she began using the money to fuel her gambling habit. A conviction on count one of fraud over $5,000 shall be endorsed on the indictment.

[14] While there is no doubt about Ms. Fontana's fraudulent activity, there are, however, serious issues about the plaintiff's claim for damages. During the course of argument, counsel came to an agreement that if the plaintiff's claim is successful, the amount that remains owing on account of the loan after accounting for the $150,000 paid by Ms. Fontana as restitution is $69,500. It was agreed that this number is without prejudice to the defences raised by Ms. Fontana. One of these defences is a limitation period defence which I shall comment on later.

[15] There is, in addition, significant uncertainty over the other damages claimed by the plaintiff. In the motion record the plaintiff has filed, there is quite a short supporting affidavit of less than 4 pages in which she very briefly describes her alleged damages from the fraudulent activity of the defendant. She states as follows at paragraphs 15 to 19 of her affidavit,

> 15. My health has been deteriorating. As a result of having lent Anna most of my life savings, I was not able to pursue prescribed therapies in the U.S.A.
>
> 16. Without the American treatments and therapies, my health has deteriorated significantly. I am no longer able to walk, except for a few steps, without physical aid.

17. My lifestyle has been dramatically and severely impacted. I can no longer enjoy dining out, or visit art galleries, nor able to attend and enjoy other artistic activities. In my "golden years" (I am 77) I do not have the ability to afford and enjoy any vacations. I have not had the funds to update my wardrobe. This may seem trivial to come but I modeled in my younger years and have always sought to maintain my style consciousness.

18. I have not had the financial ability to continue regular physiotherapy, acupuncture, massage, chiropractic and hyperbaric treatments. Access to these treatments, not covered by OHIP, would have extended by (*sic*) ability to walk. I am not confined to a wheelchair and a scooter.

19. I am shocked at how this person I trusted could have abused that trust and friendship. Anna was so selfish, thinking only of herself. I still have difficulty accepting the fact that because I was defrauded of my savings I have been prevented from maintaining my independence and my lifestyle.

[16] In support of her claim for damages, Ms. Favretto-Post has also attached a report from her family doctor, Dr. Janet Tesler. She outlines that the plaintiff has suffered from the following medical conditions, all of which appear to be unrelated to the issues in the litigation:

1. Traumatic brain injury in 1966 with resulting right sided weakness, foot drop and neurogenic overactive bladder

2. Back injury in 2010 resulting in further deterioration in mobility and function. As a result she requires a wheelchair or scooter for mobility

3. Mixed osteo and rheumatoid arthritis affecting multiple joints including hands, shoulders, feet and spine

4. Facial basal cell cancers

5. Iron deficiency anemia

6. Osteoporosis

[17] Dr. Tesler comments at the end of her report as follows,

> In my opinion, the ongoing treatment with strength training and physiotherapy help to maintain Ms. Favretto-Post's current functional status. If she were to stop these treatments, I am concerned that her functional status could deteriorate more rapidly. It is unclear to me how

> long Ms. Favretto-Post stopped these therapies in the past due to financial constraint and therefore I cannot definitely state the effect that this cessation in therapy may have had on her current state of health and well being. If the cessation was prolonged, i.e. several months, it may have contributed to her overall functional decline.

[18] It is apparent from the report of Dr. Tesler that the plaintiff has significant pre-existing conditions and that causation is an important factor in making an assessment of any damages that may have been suffered as a result of the fraudulent activity of Ms. Fontana. The plaintiff's lawyer refers to the fact that they have also filed reports from the plaintiff's massage therapist and personal trainer. However, these reports are not particularly helpful in assessing the claim for general damages and there are issues about the admissibility for some of the opinions contained in the reports.

[19] Similarly, there is a scarcity of any information with respect to the claim for punitive damages. It is recognized that the claim for punitive damages represents a difficult claim to assess given the general reluctance for a court to award punitive damages in a case where there has been a criminal sanction imposed on the defendant.

[20] During submissions, I asked the plaintiff's counsel how this court could properly make an assessment of damages. Plaintiff's counsel candidly responded, "it's a mystery to me".

[21] There is also the plaintiff's claim under the Fraudulent Conveyances Act which I will discuss in more detail in these reasons. At this point I will simply comment that there is a significant credibility issue about Ms. Fontana's assertion that the transfer of the matrimonial home was in no way related to an attempt to defraud creditors.

[22] All of this leads me to the conclusion that the plaintiff has failed to put before the court sufficient evidence which would allow for a fair determination on the merits of her claims. As a result, I have concluded that the plaintiff's motion for summary judgment must be dismissed.

[23] This leaves the defendants' motion for summary judgment. The defence argues that all of the plaintiff's claims are statute barred. It is apparent that the appropriate limitation period is found in the *Limitations Act,* 2002. However, it is possible that the limitation period may apply differently to the 3 different claims which have been alleged.

[24] With respect to the payment on the promissory note, the evidence indicates that the initial default of the plaintiff occurred in March, 2012 and that the action was not commenced until over 5 years later. Section 13(1) of the *Limitations Act, 2002*, provides however, that if a person acknowledged liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a change on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.

[25] The plaintiff argues that the restitution payments made by the plaintiff in accordance with the sentence of Justice Edwards constitute an acknowledgment of the debt, such that the limitation period does not apply. There is clearly an issue as to whether a payment made pursuant to a restitution order is sufficient to restart the limitation period in accordance with Section 13(1). Neither the plaintiff nor defendant had any authority on this issue. They describe this issue as a novel one where there are no relevant authorities. Given the lack of any relevant authority, I am reluctant to dismiss the plaintiff's claim at this stage, especially when there are other limitation period issues. As with the *Baywood* decision, it is possible the trial judge who hears this case will develop a fuller appreciation of all of the issues. There are clearly factual connections between the claim with the promissory note and the other claims being asserted. I have also considered the possibility that there may have been some evidence given at the criminal trial which is relevant to this issue.

[26] With respect to the claim in fraud, there is also some reason to question the expiry of the limitation period. In the Ontario Court of Appeal decision in *Winmill v. Woodstock (Police Services Board),* 2017 ONCA 962, the Court of Appeal dealt with the applicability of a limitation period. The plaintiff in that case had an altercation with police officers. He was charged with assaulting and resisting arrest. He was subsequently acquitted on both charges and then filed a notice of action against the police seeking damages for negligent investigation and assault. The action was commenced just slightly beyond two years after the original battery had taken place. The issue on the appeal was whether the motion judge erred by concluding that the plaintiff's claim in battery was not made inside the two year limitation period prescribed by Section 4 of the *Limitations Act*. In that case, the court found that the verdict in the plaintiff's criminal trial, especially on the assault charge, was crucial in the plaintiff's calculation of whether to proceed with a civil action grounded in battery. The Court of Appeal found that the criminal charges of assault and resisting arrest against the plaintiff and his tort claim of battery against the defendants were close to being two sides of the same coin or mere images of each other. Accordingly, the court found that it made sense for the plaintiff to focus on his criminal charges and deal with those before making a final decision about a civil action against the respondents. Similarly, it could be argued in this case that it was reasonable for the plaintiff to await the outcome of the criminal charges against Ms. Fontana before asserting a claim against her based on fraud. As noted in the *Winmill* decision there is something of a logical inconsistency in asking a civil court to rule on the subject matter of a criminal prosecution before the criminal court has had the opportunity to assess the merits of the underlying charge.

[27] For these reasons, I conclude that there is a triable issue and it is preferable to leave the determination about the applicability of the limitation period on the fraud claim to the trial judge.

[28] The third claim relates to the alleged fraudulent conveyance. With respect to this claim, the plaintiff relies on an article written by Jonathan Speigel in a legal blog dated August 19, 2018. In this article, the author refers to a B.C. Supreme Court decision which suggests that the limitation period for a fraudulent conveyance action may not commence until the claimant obtains a judgment in the underlying action. In the B.C. decision,

Prima Technology, Inc. v. Yang, 2018 BCSC 94, the court notes that if the fraudulent conveyance action succeeds but the underlying tort claim does not, it will be obvious that the fraudulent conveyance action should never have been brought and the plaintiff will face liability in costs. The court suggests that it would not be reasonable for the plaintiff to commence a fraudulent conveyance action until she had obtained judgment in the underlying action. It is not entirely clear that the reasoning in this B.C. case would be applicable under the Ontario limitation statute. Nevertheless, it is preferable in my view to leave that issue to be decided on a full evidentiary record, together with the other limitation period defences as there is a triable issue.

[29] With respect to the fraudulent conveyance, the defence also argues that Ms. Fontana has given an adequate explanation to refute the suggestion that the transfer of the matrimonial home to her husband was an attempt to defraud creditors. In her affidavit, Ms. Fontana states that the transfer of title was necessitated by a refinancing of the home. In the cross-motion record she has included a letter from Scotiabank which states that the bank was unable to approve the loan application in Ms. Fontana's name because Ms. Fontana's credit rating was such that the bank could not approve the proposed loan.

[30] There are, however, a number of circumstances which call into question the bona fides of the transfer of the home to the husband. These were summarized by Justice Edwards who described the transaction as "highly suspicious" given the proximity in time to when Ms. Fontana received the money from the plaintiff. Some of the suspicious circumstances in this case include the fact that there was no consideration apparently paid for the transfer, Ms. Fontana continued to live in the house with her husband following the transfer and she never spent any of the money on the stated plan to open a restaurant. It is also interesting to note that the plaintiff has a history of previous criminal convictions including a conviction for theft, fraud over $5,000 and possession of stolen property.

[31] It is apparent that Ms. Fontana's explanation for the transfer will be carefully scrutinized at trial and her credibility may be a significant factor in a court's conclusion about her motives for the transfer of the matrimonial home. Given the suspicious circumstances surrounding the transfer, I have concluded that this issue is better left to the trial judge.

[32] In summary, there are a number of significant issues raised by the defence. In the context of these complex issues, I have concluded that it is preferable to have these issues decided by the trial judge as opposed to considering whether partial judgments dismissing certain portions of the claim should be made. Instead, I believe it is preferable for the judge hearing the case at trial to rule on all of these issues based on a full evidentiary record. It is significant to note that all of the defences raised by the defence were part of the same series of transactions. As with the *Baywood* decision, it is entirely possible that the trial judge who hears the trial on the issues of the limitation periods as well as the explanation given by Ms. Fontana will develop a fuller appreciation of the relationships and the transactional context than I would as the motions judge. It is therefore preferable in this context to leave these issues to the trial judge. The cross-motion for dismissal of the plaintiff's claims is therefore dismissed as well as the plaintiff's motion for summary judgment.

Justice M. McKelvey

Released: July 25, 2019

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