2018 ONSC 5718
Ontario Superior Court of Justice

Sinclair v. Harris

2018 CarswellOnt 16149, 2018 ONSC 5718, 297 A.C.W.S. (3d) 644, 41 E.T.R. (4th) 295

NEIL SINCLAIR and LIEN CHAO Estate Trustee for the Estate of Virginia Jeanne Rock (Plaintiffs / Moving Parties) and MERILYN HARRIS and FREDERICK HARRIS (Defendants / Responding Parties)

S. Nakatsuru J.

Heard: June 28, 2018
Judgment: October 1, 2018
Docket: CV-17-570366

Counsel: M. Rintoul, A. Virani, for Plaintiffs / Moving Parties
W. Wiffen, for Defendants / Responding Parties

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence

Headnote

Civil practice and procedure --- Limitation of actions — Trusts — Action against trustee — Trust property or proceeds retained by trustee

Creditor was friend of debtors who loaned them $137,333.34 in 2000 so they could purchase home — Debtors sold home in 2003 and moved to Hawaii without repaying creditor, but creditor remained in contact with debtors — Creditor allegedly accepted shares in new company in lieu of repayment at some point before creditor passed away in 2015 — Creditor's estate trustees brought action against debtors seeking repayment of loan on basis of resulting trust — Debtors brought motion for summary judgment dismissing action as statute barred — Motion granted — Even if resulting trust was created, it was statute barred — Trustees' claim was action to recover land and as such was subject to 10-year limitation period in s. 4 of Real Property Limitations Act — It was clear from statement of claim and evidence that claim was about resulting trust in piece of real property — This was not case where creditor gave debtors sum of money unrelated to any real property — Connection between money and property was clear and direct, and claim for "money to be laid out in the purchase of land" fit within definition of "land" under Act — Creditor's right to bring action had accrued on date resulting trust was created, or at least by time debtors' home was sold.

MOTION by debtors for summary judgment dismissing action by estate trustees for repayment of debt.

***S. Nakatsuru J.*:**

1 No one likes to see a limitation period applied to dismiss a claim. That said, there are good reasons for limitation periods. This case is an example of why they exist.

2 The plaintiffs, Neil Sinclair and Lien Chao, are the Estate Trustees for the Estate of Virginia Jeanne Rock ("Ms. Rock"), who passed away in November 2015. The defendants, Merilyn and Fredrick Harris, a married couple, were close friends of Ms. Rock. Ms. Rock advanced $137,333.34 to the Harrises on July 12, 2000, so that they could purchase a house at 253 Centre Street, Beeton, Ontario (the "Beeton property"). The Estate Trustees are seeking re-payment of Ms. Rock's equitable interest in the Beeton property claiming that such funds were held by the Harrises on a resulting trust in favour of Ms. Rock's estate. The Harrises' position is that the monies advanced to buy the Beeton property were resolved by way of a distribution of shares to Ms. Rock in a start-up company. They further claim that the Estate Trustees' claim is statute barred. Both parties seek summary judgment in this motion.

A. SUMMARY OF THE FACTS

3 From all accounts, Virginia Rock was an intelligent, generous, and trusting woman. Some people deserved her trust, while others did not. It is not my intention to delve deeply into an inquiry about which category the Harrises fell. There are two very different pictures being painted of them. Given that this motion can be dispensed with on the basis of the limitation period, aside from a few final comments, it is not necessary or fair to say more.

4 Ms. Rock died on November 17, 2015. She had a will dated May 16, 2012. The Estate Trustees were appointed to be Trustees of her will on March 22, 2016. Ms. Rock was a professor at York University. She met Frederick Harris when he was an undergraduate student at Atkinson College. Mr. Harris did a Master's Program and became a teacher at York University. Over the ensuing years, Ms. Rock and Mr. Harris, along with his wife, Merilyn, became good friends. Mr. Harris viewed Ms. Rock as a mentor.

5 Merilyn Harris's mother passed away on January 24, 2000. Her mother had owned the Beeton property. This property was transferred to the Harrises on March 21, 2001, after they had bought out Merilyn Harris's siblings' interest in the Beeton property. The $137,333.34 used in the purchase of the Beeton property came from Ms. Rock, who paid it by cheque dated July 12, 2000. Ms. Rock obtained the funds by way of a mortgage secured against her Toronto home. It is the Harrises' position that they paid the remaining two-thirds of the purchase price. The Harrises were registered on title as joint tenants. They lived in the Beeton property. Ms. Rock visited them there.

6 A document dated July 11, 2000, was prepared whereby it was said that a corporation was to be incorporated to manage the Beeton property and the Harrises and Ms. Rock would each have one-third of the shares, and be a director of the corporation. This corporation was never incorporated, shares were not issued, and no other aspect of the document was implemented.

7 On August 5, 2003, the Harrises sold the Beeton property for $225,000 and moved to Hawaii. No monies were paid to Ms. Rock from this sale. Mr. Harris averred that the move was for health and employment reasons. The Harrises then purchased a house in Hawaii and still reside there to this day. Currently the Harrises are in their 70s. Ms. Rock visited the Harrises a number of times in Hawaii. They remained in constant contact over the years. Mr. Harris said that he regarded her as a surrogate mother and he helped her with issues such as her computer.

8 After Ms. Rock passed away, the Estate Trustees, in reviewing her documents, came across records of the $137,333.34 that was advanced to the Harrises.

9 The Statement of Claim was issued on February 24, 2017.

10 It is the defendants' position that the monies advanced to buy the Beeton property was a loan. Ms. Rock signed an agreement to establish a new corporation to hold the Beeton property. That corporation was never established. However, this loan was resolved by the distribution of shares to Ms. Rock in a start-up company known as Idexis Inc. that Mr. Harris started years earlier. Mr. Harris purchased hundreds of domain names for the business and made a CRTC application. It is the defendants' position that Ms. Rock agreed that the funds loaned for the Beeton property would be applied to Ms. Rock's investment in the shares of Idexis and consequently, she released any further interest in the Beeton property. Mr. Harris claimed that since that time, Ms. Rock never made any comments or suggestions to the effect that she should receive any monies from the sale of the Beeton property or had an interest in the Hawaii home of the Harrises.

B. TEST ON SUMMARY JUGDMENT

11 Rule 20.04(2) (a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), held at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. 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.

12 A responding party may not rest solely on the allegations or denials in the party's pleadings. Under rule 20.0(2), they "must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial". Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. A court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial.

13 The court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers set out in rule 20.04(2.1) and (2.2). The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

14 If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under rule 20.04. Their use will not be against the interest of justice if their use 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.

C. ANALYSIS

15 The plaintiffs have claimed that a resulting trust in favour of Ms. Rock's estate as against the defendants has been established. It is submitted that Ms. Rock experienced a deprivation by the fact that she borrowed money to advance over $137,000 to the defendants to purchase the Beeton property and Ms. Rock received no benefit for it. The defendants were thus unjustly enriched in that they recovered $225,000 when they sold the Beeton property which had been bought using Ms. Rock's funds. These monies were reinvested into the Hawaii property. The plaintiffs submit that there is no juridical reason for the advance of monies by Ms. Rock to the defendants. They further submit that any suggestion by the defendants that it was agreed that the funds would be used to pay for Ms. Rock's shares in Idexis is a fiction.

16 On the other hand, the defendants submit that no such trust was formed and that there was a contractual relationship regarding the purchase of the Idexis shares. This contractual relationship resolved any debt owing to Ms. Rock or her estate.

17 In my opinion, there is no genuine issue requiring trial. I am able to grant a summary judgment on the record as there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure. The defendants have argued that there was a contractual relationship and that the claim is well outside of the limitation period. Alternatively, they submit that even if the plaintiffs are correct that a resulting trust was created, the claim is beyond the relevant limitation period. I find that on this record, even if a resulting trust was created, it is statute barred.

18 The first issue that needs to be resolved is what limitation period, if any, is applicable in this case. There is a stark difference in the position of the parties. The plaintiffs submit that no limitation is applicable to a resulting trust in equity. The defendants submit that a 10-year limitation period applies to this trust.

19 The definition of a resulting trust is succinctly stated in *Waters' Law of Trusts in Canada 4th Ed.*:

> Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it.

See *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.) at para. 20.

20 The responding parties argue that the plaintiffs' action should be dismissed because any resulting trust established on the evidence is statute barred. They rely upon the 10-year limitation period found in s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA")*:

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom

> the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

21 In *McConnell v. Huxtable*, 2014 ONCA 86 (Ont. C.A.), Rosenberg J.A. traced the history of the law of limitations in this province. With respect to s. 4, he held that it applied to constructive trusts where the claimant did not have any interest in the property until so declared by the court. In other words, it applied to an equitable interest in land through the imposition of a constructive trust.

22 In *Waterstone Properties Corporation v. Caledon (Town)*, 2017 ONCA 623 (Ont. C.A.), the court made it clear that the 10-year limitation period in s. 4 did not just apply to claims for the possession of land but would encompass claims of ownership of land advanced by way of a resulting trust (at para. 32):

> The words "action to recover any land" in s. 4 of the *RPLA* are not limited to claims for possession of land or to regain something a plaintiff has lost. Rather, "to recover any land" means simply "to obtain any land by judgment of the Court" and thus these words also encompass claims for a declaration in respect of land and claims to the ownership of land advanced by way of resulting or constructive trust: *Hartman Estate v. Hartfam Holdings Ltd.*, [2006] O.J. No. 69, at para. 56; *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, at paras. 38 - 39.

23 The plaintiffs rely on the case of *Drakoulakos v. Stirpe*, 2017 ONCA 957 (Ont. C.A.). This was an appeal of a summary judgment motion whereby the motions judge granted summary judgment on the basis that the claim was statute barred based on the basic limitation period of the *Limitations Act 2002.* In that case, more than 15 years had passed since the plaintiff had known or ought to have known he had an action arising from a resulting trust. The Court of Appeal overturned the decision because there was no limitation period for a claim based upon the transitional provisions of the *Limitations Act 2002*, where there was no limitation period for the claim against the trustee of a resulting trust or property still in the possession of the trustee under the former Act and the claim was discovered before January 1, 2004.

24 These comments, which are relied upon by the plaintiffs to support their position that there are no limitations for any resulting trust, must be read with care. The Ontario Court of Appeal was dealing with the application of the transitional provisions when it came to a resulting trust. They were not making broad statements that are applicable to the facts before me. I further see *Drakoulakos* as distinguishable. In that case, the court was dealing with taxi licenses and shares in a company. It was unconnected to any real property. Thus, the *Real Property Limitations Act* would have no application to it. Similarly, in *McConnell v. Huxtable*, (at para. 41) Rosenberg J.A. held that s. 4 did not apply where the claimant was seeking an interest in a pension or a business. See also *Equitable Trust Co. v. 2062277 Ontario Inc.*, 2012 ONCA 235 (Ont. C.A.) at para. 19. I see no conflict in these authorities.

25 Likewise, comments made in *McCracken v. Kossar*, [2007] O.J. No. 664 (Ont. S.C.J.) at para. 36, relied upon by the plaintiff, that queries whether equitable trusts are subject to the *RPLA* have now been overtaken by the appellate authorities noted above, and must be viewed in that light.

26 The plaintiffs submit that the limitation period does not apply since the claim is not about land but it is about the monies that Ms. Rock gave the defendants. I cannot agree. First of all, it is clear from the statement of claim and the evidence that this claim is about a resulting trust in a piece of real property. The monies were expressly given to the defendants so that they could purchase the home and land. This is not a case where Ms. Rock gave a sum of money which was unrelated to any real property to the defendants. Here the connection is clear and direct. Further, to try and distinguish the defendants' authorities on this basis is futile. In most real property transactions, money is involved. The *RPLA* cannot simply be avoided by an attempt to characterize the transaction as being about money and not land. The fact that the plaintiffs are not actually seeking the return of the Beeton property or any other piece of real property, does not avoid the application of s. 4 given what they are seeking is "money to be laid out in the purchase of land" which fits within the definition of "land" under the *RPLA*: *Harvey v. Talon International Inc.*, 2017 ONCA 267 (Ont. C.A.) at paras. 50 to 54 (dealing with a return of a deposit on the purchase of land); *Scicluna v. Solstice*

Two Limited, 2018 ONCA 176 (Ont. C.A.) at para. 25 (dealing with relief from forfeiture of a deposit for the purchase of land); *Goldhar Estate v. Mann*, [2016] O.J. No. 6872 (Ont. S.C.J.) (holding that the Act applied to equitable mortgage).

27 In short, the plaintiffs' claim is an action to recover land and as such falls within s. 4 of the *RPLA.*

28 The next issue is when the plaintiffs' right to recover the land first accrued. Here, it is the estate of Ms. Rock that is suing on the basis of the resulting trust. I find that there is no juridical reason to treat this distinction as a meaningful one in this context. In my view, the plaintiffs' right to bring an action accrued on the date that the resulting trust was created. In other words, on the date that Ms. Rock gave the defendants the monies to purchase the Beeton property, she could have brought an action for her interest in the property. The fact that she chose not to exercise it did not mean she did not have the right to bring an action for the return of her interest in the land on the day the resulting trust was created: *McVan General Contracting Ltd. v. Arthur*, [2002] O.J. No. 3336 (Ont. C.A.) at paras. 18-19.

29 If I am wrong about this, then the right must have accrued at the time the Beeton property was sold and Ms. Rock's interest was not paid back to her. At this point, she would have been alive to the fact that she would have to bring an action for the return of her monies. At this time, she knew that she had a cause of action. The evidence looked at in its totality demonstrates that she knew the defendants had sold the property and moved to Hawaii to reside in a house they later purchased. It is contended that this house was bought with the funds from the sale of the Beeton property. Ms. Rock visited and stayed at this home. The evidence presented by the plaintiffs in the affidavit material shows that Ms. Rock knew that monies were owed to her from the sale of the Beeton property. These monies were never paid back to her. However, she did nothing to advance her rights. While it may be too harsh to say she slept on her rights, a better characterization may be that she chose not to enforce them. It may well be this was due to her generous and forgiving nature. However, that does not stop the running of the limitation period. In short, even if the discoverability principle is applied to s. 4, the claim would still be statute barred: *Chopra v. Vincent*, 2015 ONSC 3203 (Ont. S.C.J.) at para. 10; *McCracken v. Kossar*, [2007] O.J. No. 664 (Ont. S.C.J.) at paras. 54-56.

30 Thus, it is not without some regret that I find this to be the inevitable result on the facts of this case. The defendants are entitled to summary judgment on the basis that the claims advanced are statute barred. This determination can be made fairly and justly on the record. Summary judgment is a timely, affordable and proportionate procedure in this case. There are good reasons why there are limitation periods. Some of the evidence in this case highlights these reasons. The defendants have moved away to a far-away foreign jurisdiction, have lived a settled and quiet life there for years, and are themselves advancing in their years. They now find themselves litigants in Ontario. They argue their ability to properly defend this action is impaired by the loss of corroborative evidence and fading memories. Ms. Rock, who would have been a key source of evidence as to what happened in this case, has passed away.

31 Given my conclusion, it is not necessary to deal with the defendants' arguments about laches.

32 The plaintiffs' summary judgment motion is dismissed. If I were required to consider this motion on the merits, I would have been reluctant to grant summary judgment in favour of the plaintiffs. I appreciate that there is a strong presumption in favour of the finding of a resulting trust. Further, the plaintiffs argued that this case is basically a documents case. I do not see it that way. There were serious credibility issues that, in the interests of justice, required resolution at trial. These were the key issues of whether the original transfer of the monies was a contractual arrangement, albeit unwritten, and whether Ms. Rock later agreed to have the monies she gave the defendants for the purchase of the Beeton property subsequently used as funds for the earlier purchase of shares in Idexis. I agree with the plaintiffs that much of the defendants' evidence about this is self-serving, undocumented, and potentially implausible. On the other hand, despite events occurring during the lengthy passage of time which one would have expected this issue of monies/interest in the property owing to Ms. Rock to have come up, Ms. Rock did not say anything about it, ask for an accounting of her interest, or demand her monies back. This silence, say the defendants, corroborates their account.

33 Furthermore, in terms of procedural fairness, given the unsatisfactory nature of the cross-examination of the defendants done on Skype, due to the technological flaws and limitations of the medium, I find it would be unfair to make an adverse credibility finding against the defendants on the written transcripts of such cross-examinations. Some serious allegations are

being made by both sides. Against Mr. Harris, the allegations are essentially of fraud by a breach of trust. There are serious consequences for the making of an adverse credibility finding.

34 In addition to this, both sides rely on hearsay statements made by Ms. Rock. In particular, there are hearsay statements made by Ms. Rock to Mr. Sinclair and Ms. Chao that strongly supports the inference that monies continued to be owed to Ms. Rock. The admissibility of such hearsay statements are challenged by the defendants. The defendants have raised credibility and reliability concerns about the recipients' evidence regarding the deceased's hearsay statements. That is a matter that should properly be addressed at a trial. While the principled approach to the admissibility of hearsay evidence can be applied on a summary judgment motion, (as for instance in *Dawson v. Halpenny Insurance Brokers. Ltd.*, 2017 ONSC 4487 (Ont. S.C.J.) at paras. 25-32; *Children's Aid Society of Ottawa v. B. (J.)*, 2016 ONSC 2757 (Ont. S.C.J.)), I find that to do so here would be unjust given the lack of notice, the procedures that were adopted by the parties, and the state of the evidentiary record already noted above.

35 In conclusion, I grant the defendants summary judgment. The action by the plaintiffs is hereby dismissed.

36 If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). The defendants shall file within 20 days of the release of these reasons. The plaintiffs shall file within 10 days thereafter. There will be no reply submissions without leave of the court.

Motion granted.

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