COURT OF APPEAL FOR ONTARIO

CITATION: Holley v. Northern Trust Company, Canada, 2014 ONCA 719
DATE: 20141021
DOCKET: C58493

Strathy C.J.O., Rouleau and Hourigan JJ.A.

BETWEEN

Jennifer Holley

Appellant (Plaintiff)

and

The Northern Trust Company, Canada
and the Royal Trust Company

Respondents (Defendants)

Proceeding under the *Class Proceedings Act, 1992*

Peter R. Jervis, Joel P. Rochon and Remissa Hirji, for the appellant

Jeff Galway and Nicole Henderson, for the respondent Northern Trust Company, Canada

Christine Lonsdale and Richard Lizius, for the respondent Royal Trust Company

Heard: October 6, 2014

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated February 11, 2014, with reasons reported at 2014 ONSC 889.

By the Court:

[1] This is an appeal from a Rule 21 motion that dismissed the appellant's claim in the context of a proposed class action. The motion judge found that a

court-approved settlement, granted in the course of Nortel's *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings, had released the respondents from all claims based on constructive fraud, and that the pleading did not disclose a cause of action for what he characterized as common law fraud. The motion judge also concluded that, in any event, any claims were statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[2] The appellant raises several grounds of appeal. Among these grounds is her submission that the motion judge erred in finding that her claims were statute-barred.

[3] For the reasons that follow, we would dismiss the appeal. On the facts found by the motion judge, the limitation period began to run at the latest in March of 2010, and the appellant was well beyond the two-year limitation when she filed her notice of action on August 27, 2012.[1]

[4] On February 18, 2010, the Monitor in Nortel's CCAA proceedings issued its 39th report. This report provided the appellant with all of the material facts she required to pursue her proposed cause of action against the respondents for their alleged mishandling of trust funds.

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[1] The motion judge transposes several dates by two years, such as referring to events which took place in 2010 as taking place in 2008. These reasons refer to the correct dates.

[5] Specifically, the Monitor's 39th report disclosed that the Health and Welfare Trust ("HWT") administered by the respondents was seriously underfunded and that some of the trust assets consisted of an amount owed to the trust by Nortel (the "Due").

[6] In March of 2010, a motion was brought in the Nortel CCAA proceeding to approve a settlement and release of claims against the trustees and others related to the management of the HWT. The appellant filed materials and appeared on the motion to oppose the granting of a release to Nortel, the respondents, and others, from potential claims respecting the HWT, including claims related to the administration and underfunding of the HWT.

[7] In the materials filed by the appellant in that proceeding, it is apparent that she understood that she had a potential cause of action against the respondents for their administration of the HWT. The appellant had received a copy of the Monitor's 39th report and had retained an expert to review it. From this review, the appellant considered that the respondents had breached their trust obligations and that she had a "viable claim" against them. In her factum opposing the settlement order, she argued that a release of potential claims against the HWT trustees should not be granted because the proposed release would have barred any breach of trust claim she might advance.

[8] Specifically, in the factum she filed for the March 2010 motion, the appellant asserted that the information disclosed in the Monitor's 39th report established that:

1. the HWT had been massively depleted;
2. the $37.1 million Due shown as a trust asset was an amount owing from Nortel;
3. the Due was likely created by Nortel borrowing money from the HWT to fund pay-as-incurred beneficiaries of the trust (the pay-as-incurred beneficiaries were paid their medical and dental plan claims by the HWT on an ongoing basis, and Nortel would, from time to time, reimburse the HWT for those payments);
4. the Due would be compromised during the Nortel CCAA process;
5. the HWT was underfunded by more than of $100 million; and
6. the information disclosed in the Monitor's 39th report evidenced a clear breach of trust during the period that the respondents were responsible for the administration of the trust.

[9] It is apparent, therefore, that as of March 2010, the appellant considered litigation to be an appropriate means to seek a remedy for the loss suffered as a result of the underfunding of the HWT and the respondents having allowed Nortel to fund the claims of pay-as-incurred beneficiaries out of HWT funds, causing the Due from Nortel to increase substantially.

[10] In this court, the appellant argues that it was only when the Monitor's 51st report was released on August 27, 2010, that she acquired the information needed to make a claim. This is precisely two years before she issued her notice of action on August 27, 2012. The appellant relies on the fact that the Monitor's 51st report disclosed, for the first time, that the significant increase in the size of the Due as compared to the previous years was a result of Nortel deciding to take a contribution holiday. It was based on this new information that the appellant claims she first became aware that the respondents had allowed improper payments to be made out of the HWT.

[11] We would not give effect to this submission. In our view, the appellant was clearly aware of the legal basis for her claim against the respondents as a result of the Monitor's 39th report. Based on the materials she submitted in reaction to this report, the appellant believed that she had suffered a loss, believed that this loss occurred "under one or more of the trustee(s)' watch," and her expert attributed the cause this loss to misconduct by the HWT trustees in allowing Nortel to underfund or improperly withdraw funds from the HWT. Her factum filed at the March 2010 hearing demonstrated that she believed litigation was the appropriate remedy. All of the requirements of the *Limitations Act, 2002*, s. 5(1) were satisfied. The information contained in the Monitor's 51st report was not necessary to discover the proposed cause of action. It simply provided additional detail as to the mechanism of the underfunding.

[12] Based on the information in the Monitor's 39th report, the appellant's expert attributed the increase in the Due to the trustees having made a loan to Nortel so that Nortel could pay the pay-as-incurred beneficiaries. The Monitor's 51st report revealed that the increase in the Due was the result of Nortel taking a one-year "contribution holiday" in 2005-2006, during which Nortel did not reimburse the HWT for the amounts paid directly out of the HWT to the pay-as-incurred beneficiaries.

[13] Thus, the information in the Monitor's 51st report did not provide the basis for a new or different claim. The claim alleged by the appellant in the March 2010 proceedings was a claim for breach of trust against the trustees for allowing Nortel to underfund or withdraw assets from the HWT. The appellant's understanding of the precise mechanism and amount of underfunding may have changed as a result of the Monitor's 51st report, but the nature of the claim remained the same.

[14] As a result, we agree with the motion judge's conclusion that the appellant "knew the factual basis for her constructive fraud and fraud claim against the [respondents]" and "it is plain and obvious that both her claim for constructive fraud and also her claim for common law fraud, if any, are statute-barred."

[15] In view of our conclusion on this point, we not need deal with the merits of the other grounds raised by the appellant. The appeal is dismissed.

[16] If the parties are unable to agree on costs, the respondents are to provide written submissions, not to exceed five pages (excluding the costs outline), within five days of the release of this decision. The appellant is to provide her written response, not exceeding five pages (again, excluding the costs outline), within five days thereafter.

Released: OCT 2 1 2014

G.R. Strathy C.J.O.

Paul Rouleau J.A.

J.A.