

CITATION: Sosnowski v. MacEwen Petroleum Inc., 2019 ONSC 1860
COURT FILE NO.: CV-15-328-00
DATE: 2019 April 11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
LESLIE SOSNOWSKI and THERESA)
SOSNOWSKI) Gustavo F. Camelino, for the Plaintiffs /
) Responding Parties
Plaintiffs)
)
– and –)
)
MacEWEN PETROLEUM INC. and)
RICHARD JOSEPH PAUL BOURDEAU) Porter Heffernan and Joel Rocque, for the
) Defendant / Moving Party, MacEwen
Defendants) Petroleum Inc.
)
) Defendant Richard Bourdeau not appearing
) on this motion
)
) **HEARD at Kingston:** March 21, 2019

MacLeod-Beliveau J.

REASONS FOR DECISION
(Motion for Summary Judgment)

[1] The defendant MacEwen Petroleum Inc., (hereinafter “MacEwen”) brings this motion for summary judgment in favour of MacEwen dismissing the plaintiffs’ claims against MacEwen on the basis of Rule 20.04 (2) (a) that there is no genuine issue for trial, and secondly, on the basis of Rule 20.04 (4) that the only genuine issue for trial is a question of law. The parties are agreed that this matter can be properly determined on a motion for summary judgment.

[2] The plaintiffs claim damages for Mr. Sosnowski’s wrongful dismissal by the defendant MacEwen. Mr. Sosnowski, now 59 years of age, worked as a truck driver for MacEwen and its predecessor Robert C. Hartley, Ltd. for 27 years, from 1982 to November 9, 2009, when he was terminated for cause based on the allegations of MacEwen that he was involved in fraud and theft of fuel belonging to MacEwen and its customers. The allegations were denied by Mr. Sosnowski. On July 7, 2010, Mr. Sosnowski was charged criminally for the alleged frauds and thefts of MacEwen’s fuel. MacEwen’s total estimated loss was approximately \$17,520.77 which MacEwen repaid to its customers.

[3] On August 15, 2011, Mr. Sosnowski was convicted by Mr. Justice Charles Anderson of the Ontario Court of Justice of three counts of theft and three counts of fraud. He was sentenced on October 26, 2011. Mr. Sosnowski appealed his convictions. The Ontario Court of Appeal substituted verdicts of acquittal on all counts on November 26, 2014, on the basis of errors of law made rendering the verdicts of conviction unsafe.

[4] Mr. Sosnowski's statement of claim for wrongful dismissal in the civil courts was issued on July 24, 2015.

The Issue:

[5] The issue is whether or not there is a genuine issue for trial with respect to the plaintiffs' claim as a result of the *Limitations Act, 2002*, and whether the action by the plaintiffs against MacEwen is statute-barred. In particular, the parties disagree on the application of section 5 (1) (iv) of the *Limitations Act, 2002* and whether or not the claim is considered "discovered" on the earlier of, the day on which the person first knew, that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it. (Emphasis added)

[6] Is the plaintiffs' action statute-barred having been commenced on July 24, 2015, more than two years after Mr. Sosnowski's termination from his employment by MacEwen on November 9, 2009? Alternatively, is the plaintiffs' action not statute-barred having been commenced on July 24, 2015, within two years of his criminal matters concluding in the Court of Appeal with his verdicts of acquittal on November 26, 2014?

[7] Simply put, when does the limitation time period start to run?

Result:

[8] The defendant MacEwen's motion for summary judgment is granted. There is no genuine issue for trial. A judgment shall issue that the plaintiffs' claims as against the defendant MacEwen are dismissed as being statute-barred by the *Limitations Act, 2002*. The triggering event for the commencement of the limitation period is the date upon which it would have been legally appropriate for the plaintiffs to commence legal proceedings to seek damages for Mr. Sosnowski's termination of employment, which in this case was November 9, 2009, being the date of his termination by MacEwen. Costs are reserved.

Position of the Parties:

[9] The statement of claim was issued on July 24, 2015.

[10] The defendant MacEwen's position is that for the purposes of a wrongful dismissal action, the limitation period starts to run when the employer notifies the employee of his dismissal which was November 9, 2009. In this case, MacEwen's position is that the limitation period starts on November 9, 2009, and the plaintiffs' action is statute-barred, having been issued more than two years from this date.

[11] The plaintiffs' position is that the limitation period starts to run when the related criminal matters are concluded which was November 26, 2014, and when the plaintiffs would know that a proceeding would be an appropriate means to seek a remedy for the alleged wrongful dismissal. The plaintiffs' position is that the limitation period starts to run when the criminal matters were concluded on November 26, 2014 with Mr. Sosnowski's acquittals by the Ontario Court of Appeal, and that the plaintiffs' action is not statute-barred having been issued within two years of that date on July 24, 2015.

Background:

[12] Mr. Sosnowski was hired as a fuel delivery truck driver by MacEwen when it purchased the business of Robert C. Hartley, Ltd. in 1996. Mr. Sosnowski had worked for Hartley Fuels since 1982. On or about November 1, 2009, MacEwen received an anonymous telephone tip that one of its drivers was involved in theft of its fuel. MacEwen began an internal investigation that ultimately found that Mr. Sosnowski had committed several counts of theft from MacEwen effectively defrauding MacEwen and its customers. MacEwen's statement of defence pleads that Mr. Sosnowski was stealing fuel by pumping it out of the truck into plastic containers at a specific property (the "theft location"). MacEwen contacted the O.P.P. who commenced a criminal investigation. The allegations were based on the records of the Fleet Complete G.P.S. system associated with Mr. Sosnowski's assigned truck #100 which was tracked. The records reviewed were from September 2, 2009 to November 5, 2009.

[13] The allegations are that the truck is additionally equipped with a ticketing system which produced purchase tickets recording delivery of fuel which recorded the time of delivery, the name of the customer receiving the fuel, and the amount of fuel delivered. MacEwen alleges that they identified a number of instances when MacEwen's products were recorded as being delivered to its customers through its ticketing system, while Mr. Sosnowski's truck was parked at the "theft location".

[14] The allegations in MacEwen's statement of defence, are that seven such fraudulent deliveries were made, one to a commercial bus line, and six to various locations of a large construction company, all while Mr. Sosnowski's truck was parked at the "theft location". The same customers would have genuine fuel deliveries made on the same days and would be presented with bills for the fuel never delivered as well as the fuel actually delivered to that customer. Customers did not check the total fuel physically delivered and accepted the tickets for both the fraudulent delivery and the genuine delivery as being actually delivered, and made payment for both tickets to MacEwen.

[15] On November 9, 2009, MacEwen terminated Mr. Sosnowski for cause. Mr. Sosnowski retained counsel, the co-defendant Mr. Richard Bourdeau, that same day. On November 12, 2009, MacEwen received a letter from Mr. Bourdeau, requesting further details of the causes for Mr. Sosnowski's termination. Counsel for MacEwen phoned Mr. Bourdeau and provided the clarifications and details sought on November 27, 2009.

[16] On May 6, 2010, Mr. Sosnowski retained a second lawyer, Mr. Bryan Laushway. Mr. Laushway wrote to MacEwen in May and June of 2010, alleging that Mr. Sosnowski had been wrongfully dismissed and was entitled to damages in respect of the termination of his

employment. MacEwen responded by counsel calling Mr. Laushway on June 27, 2010. Mr. Laushway advised Mr. Sosnowski not to pursue a wrongful dismissal law suit. Plaintiffs' counsel confirmed that the plaintiffs make no claim against Mr. Laushway who is not a party to this litigation on the basis that they have no cause of action against him, as he was not retained to bring a wrongful dismissal claim.

[17] Mr. Sosnowski was criminally charged on July 7, 2010. As have said earlier, Mr. Sosnowski denies the allegations. Mr. Sosnowski was convicted on August 15, 2011. Mr. Sosnowski appealed his convictions. Mr. Sosnowski was acquitted on all counts by the Ontario Court of Appeal on November 26, 2014. Mr. Sosnowski commenced his statement of claim for wrongful dismissal against MacEwen and Bourdeau on July 24, 2015. Mr. Sosnowski claims as against MacEwen for wrongful dismissal, infliction of economic harm, deliberate or negligent infliction of emotional or psychological harm, and Mrs. Sosnowski claims under the *Family Law Act* for loss of companionship and guidance.

[18] This court was advised that the co-defendant Richard Bourdeau brought a motion for summary judgment which was heard on February 22, 2019 before Mr. Justice B. Abrams. The decision is under reserve and has not been released. Counsel for Mr. Bourdeau did not appear on the motion before me, although duly served. There was nothing before me involving the plaintiffs' claims as against the co-defendant Mr. Bourdeau.

Analysis:

[19] Counsel agree that this is a proper case for determination by way of a motion for summary judgment. The facts are not materially in dispute.

[20] The *Limitations Act, 2002*, specifies that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. The *Act* creates a presumption that the claim is discovered on the day the act or omission occurred, that caused or contributed to the injury, unless the contrary is proved.

[21] Section 5 (1) (a) of the *Limitations Act, 2002* require that all of the elements in that provision are required to be met to determine the discoverability date under that section. The word "appropriate" in Section 5 (1) (a) (iv) has been held to be legally appropriate. When an action is "appropriate" depends on the specific factual or statutory setting of each individual case". (See *Brown v. Baum*, 2016 ONCA 325, 407 *ETR Concession Company Limited v. Day*, ONCA 2016, para 34.)

[22] Mr. Sosnowski was clearly aware that he was dismissed by his employer on November 9, 2009. He immediately retained counsel, Mr. Bourdeau, the very same day that he was dismissed. Mr. Sosnowski deposed that he saw Mr. Bourdeau about his concerns that he would be criminally charged, and "not to assist me with any wrongful dismissal claim". The evidentiary record, however, is that Mr. Bourdeau did pursue the issue of Mr. Sosnowski's wrongful dismissal with MacEwen. I find that Mr. Sosnowski knew, or with reasonable diligence, ought to have known, that he had a cause of action against MacEwen at the time of his dismissal on November 9, 2009. Ignorance of the limitation period is not a factor that can be used to extend the time for the purpose of discoverability. Mr. Sosnowski knew that a legal proceeding was the appropriate

means to seek a remedy. Mr. Sosnowski admitted that he met with Richard Bourdeau and discussed the time to file a wrongful dismissal claim. Mr. Sosnowski discussed when he could file a claim, and advised that Mr. Bourdeau recommended he wait six months to see if charges would be laid and that is what Mr. Sosnowski did. He did not follow up with Mr. Bourdeau. Nonetheless, I find Mr. Sosnowski was still aware of his need to file a civil claim for his alleged wrongful dismissal and that a civil claim was the appropriate remedy.

[23] Mr. Sosnowski then saw a different lawyer, Mr. Bryan Laushway on May 6, 2010. Mr. Sosnowski by then would have had further knowledge of his cause of action against MacEwen for his wrongful dismissal. He did not follow up with Mr. Laushway between May 6, 2010 and July 7, 2010 when he was criminally charged. He then just waited for the criminal process to be over, and when he was ultimately acquitted, Mr. Sosnowski at that point decided to commence his civil action for wrongful dismissal.

[24] There are limited and narrow circumstances where the Court of Appeal of Ontario has recognized that it is not legally “appropriate” for a plaintiff to start a civil claim. I agree with the submissions of MacEwen that these cases are very fact specific and have been mostly restricted to claims against the Crown arising from the same incident in respect of which the Crown is pursuing criminal proceedings. (See *Chimienti v. Windsor (City)*, 2011 ONCA 16; *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962, *Brown v. Becks*, 2017 ONCA 4218; *Brown v. Woodstock (Police Services Board)*, 2018 ONCA 275.

[25] These exceptional cases involve an extension of the limitation period for plaintiffs with claims such as negligent and malicious investigations by a police officer or force, or assault by a police officer in relation to an arrest or to resisting an arrest. These cases involve actions of alleged police battery and negligent investigations which are “two sides of the same coin or mirror images of each other” in relation to the criminal charges the accused was facing and the civil claims against the police. In those limited circumstances, the Ontario Court of Appeal has said it is open to the individual to await the outcome of the criminal proceedings against them before deciding whether to bring their civil action, regardless of when they first formed the intent to sue. The discoverability date for a claim such as this has been held to be the date of acquittal.

[26] At the heart of the plaintiffs’ argument before me is the argument that I should expand the limited and narrow circumstances provided for by that line of Ontario Court of Appeal cases involving agents of the state and government, usually police officers, to the facts and circumstances of Mr. Sosnowski’s case, because there are both criminal and civil proceedings in his case.

[27] I cannot find, as plaintiffs’ counsel submit, that Mr. Sosnowski’s facts and circumstances, fall within the same umbrella or category of cases where it is open to Mr. Sosnowski to await until the outcome of the criminal charges and to toll the limitation period to be two years from the date the criminal proceedings are concluded on the date of his acquittals. While there are some common facts and circumstances of the claims of theft and fraud in the criminal proceedings and in the civil claim for wrongful dismissal, the claims in the plaintiff’s criminal case are not the “mirror image” of the plaintiffs’ claims in the civil case, and are not

“two sides of the same coin”. I cannot find that Mr. Sosnowski’s case is on all fours with the *Windmill* case.

[28] The exceptions to the general two year rule from discoverability of the claim and when a proceeding is “appropriate” where there are criminal proceedings have been limited to very narrow and exceptional factual circumstances of those particular cases. In those cases where exceptional factual circumstances have been found, the limitation period has been held to start to run from the date the criminal proceedings end. This does not mean that in every situation of a case that has both criminal and civil aspects to the claims, that a plaintiff can simply await the results of the criminal case before commencing a civil claim. The decisions allowing the tolling of the limitation period are exceptions to the general rule providing for a presumptive two year limitation period and are based on the specific facts of those cases.

[29] I cannot find that there should be a general expansion of the law of limitation periods in this area that determines that in cases where there are both criminal and civil claims that the limitation period starts to run from the date the criminal proceedings end. The appellate authorities do not support this position. It depends on the particular assessment of the facts of each case, and the very particular nature of the criminal charges and the civil claims made, together with the evidence to support the plaintiff’s reason for any delay in issuing the civil claim. As held by the Court of Appeal, the issue of when a proceeding would be an “appropriate” means to seek to remedy a loss or damage by way of a claim turns on the specific factual or statutory setting of each case. (See *407 ETR Concession Company Limited v. Day, ibid*)

[30] The plaintiffs’ case, I find, does not fall within those narrow and exceptional circumstances of police misconduct resulting in a civil tort claim. The facts and circumstances of the plaintiffs’ case are clearly distinguishable from those cases. Further, I find that there are no other facts or other exceptional factual circumstances in the plaintiffs’ case on the record before me that warrant the start of the limitation period from the date of the acquittals.

[31] Mr. Sosnowski immediately sought the advice of legal counsel and discussed the issue of his termination and when he should get a lawyer to file a wrongful dismissal claim. The fact that Mr. Sosnowski was criminally charged with theft and fraud on July 7, 2010, and the plaintiffs’ personal circumstances after the termination as deposed to of shock, disbelief and depression after his dismissal are not, in my view, sufficient reasons in this case to support a delay of the start of the presumptive limitation period. I agree with the submissions of MacEwen that Mr. Sosnowski is not entitled to wait for tactical reasons until he can assess the probability of the success of his claim, being the outcome of the criminal proceedings, before deciding to issue his claim. The triggering event here, I find, was the date of his termination. Mr. Sosnowski knew on that date he had incurred a loss or damage because of MacEwen’s termination of his employment.

[32] Mr. Sosnowski knew or ought to have known on the date of his termination that a proceeding in the civil courts was an appropriate way of redressing his termination of employment. He waited until July 24, 2015 to start his civil claim. This was 5 years, 8 months after the termination of his employment, and 3 years, 8 months after the limitation period had expired. His decision to wait does not, I find, extend the limitation period. In my view, on the

facts of this case, he was not entitled to sit on his claim for wrongful dismissal until he thought he has a better chance of success because of his acquittals on the criminal charges. An acquittal is a finding that the case against Mr. Sosnowski was not proven beyond a reasonable doubt. It is not a finding that nothing happened for purposes of the wrongful dismissal claim in the civil courts which require the civil burden of proof of the claims on the lesser standard of proof on the balance of probabilities.

[33] While not determinative of the issues between the parties, I note as well that there is some actual prejudice to MacEwen if this claim were allowed to proceed. Firstly, a potential counter-claim against Mr. Sosnowski for recovery of the costs of the fuel repaid to its customers is statute-barred and cannot now be asserted. Secondly, critical witnesses for MacEwen have retired and/or have died.

[34] I find in this case that Mr. Sosnowski was well aware of his need to bring a civil action for wrongful dismissal against MacEwen as at the date of his dismissal from his employment on November 9, 2009 and he chose, for whatever reasons, not to commence his civil claim until July 24, 2015. Mr. Sosnowski saw a lawyer, Mr. Bourdeau, the very same day as his termination from his employment for the purposes of legal advice, which included advice about his termination of employment by MacEwen. I find that Mr. Sosnowski's claim was clearly discoverable upon his termination of employment on November 9, 2009. There are no exceptional facts or special factual circumstances in this case sufficient to warrant an extension of the presumptive two year limitation period. Mr. Sosnowski should have commenced his civil claims against MacEwen within two years of November 9, 2009, despite the criminal charges.

[35] I find in this case there is no genuine issue for trial. I find the triggering event for the commencement of the limitation period in this case is the date upon which it would have been legally appropriate for the plaintiffs to commence legal proceedings to seek damages for Mr. Sosnowski's termination of employment, which was November 9, 2009, being the date of his termination by MacEwen.

[36] Based on all the facts and circumstances of this case, I find that the plaintiffs' claims for Mr. Sosnowski's wrongful dismissal as against MacEwen, are statute-barred.

Conclusion:

[37] A judgment shall issue that the plaintiffs' claims as against the defendant MacEwen are statute-barred and are therefore dismissed.

Costs:

[38] Both counsel presented very able, thorough, well-reasoned and succinct arguments on the issues before the court, which were appreciated.

[39] If counsel are unable to agree on the issue of costs on or before May 3, 2019, I will receive written submissions on costs from the parties on or before May 31, 2019, after which time I will decide the issue of costs based upon the materials filed.

Honourable Madam Justice Helen MacLeod-Beliveau

Released: April 11, 2019

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BETWEEN:

LESLIE SOSNOWSKI and THERESA SOSNOWSKI

Plaintiffs

– and –

MacEWEN PETROLEUM INC. and RICHARD
JOSEPH PAUL BOURDEAU

Defendants

REASONS FOR DECISION
(Motion for Summary Judgment)

MacLeod-Beliveau, J.

Released: April 11, 2019