CITATION: Dobara Properties Limited et al. v. Arnone et al., 2014 ONSC 5418
COURT FILE NO.: CV-11-440420
DATE: 20140926

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DOBARA PROPERTIES LIMITED and EZZAT F. GINDI	)	*Ezzat Gindi*, Self-represented Plaintiff and Representative of Dobara Properties Limited
Plaintiffs	)	
	)	
– and –	)	
	)	*Peter Wardle and Julia Wilkes*, for the Defendants Gino Arnone and Erickson & Partners
GINO ARNONE, ERICKSON & PARTNERS, BARBARA HICKS, SELWYN HICKS and HICKS & HICKS PROFESSIONAL CORPORATION	)	*Arnie Herschorn* and *Sepideh Nassabi*, for the Defendants, Barbara Hicks, Selwyn Hicks and Hicks & Hicks Professional Corporation
Defendants	)	
	)	
	)	**HEARD:** September 16, 2014

LEDERMAN J.

INTRODUCTION

[1] This is an action brought by the plaintiffs for damages for solicitors' negligence on the part of Gino Arnone and Erickson & Partners (the "Arnone Defendants") and Barbara Hicks, Selwyn Hicks and Hicks & Hicks Professional Corporation (the "Hicks Defendants").

[2] A number of motions have been brought before the Court, namely:

(a) a motion for summary dismissal by the Arnone Defendants;

(b) a motion by the plaintiffs for summary judgment against the Arnone Defendants and the Hicks Defendants;

(c) a cross motion by the plaintiffs to set aside the Costs Order of D. Brown J. made on an earlier motion;

(d) a motion by the Hicks Defendants to strike out certain paragraphs in the Motion Record and Factum of the plaintiffs.

BACKGROUND FACTS

[3] In February, 2005, the Arnone Defendants acted as solicitors to the plaintiffs on the purchase of shares of a corporation for $575,000. The corporation's only asset was a retail plaza in Marathon, Ontario (the "Property").

[4] The Arnone Defendants (with knowledge of the plaintiffs) were acting for both parties in the share purchase transaction.

[5] The Property had been used as a gas station and required minor environmental remediation. It is admitted by the Arnone Defendants that they did not advise the plaintiffs of the prior use of the Property as a gas station before they purchased the property in February, 2005.

[6] The plaintiffs allege in this claim that they would never have closed the transaction if the Arnone Defendants had advised them that the Property had previously been used as a gas station.

[7] Six months after the transaction closed, in around August 2005, an insurance agent told the plaintiff, Ezzat Gindi ("Gindi"), that a previous owner had operated a gas station on the Property.

[8] On August 2, 2005, Gindi advised Gino Arnone ("Arnone") by e-mail that he was worried that the prior use of the Property as a gas station may have resulted in soil contamination.

[9] In September, 2005, Arnone acknowledged that his firm had discharged a lease that was registered to Shell Canada Limited ("Shell"). The lease showed that Shell had operated a gas station and kept five underground gasoline storage tanks on the Property. It is not in dispute that Arnone had not brought this lease to Gindi's attention earlier.

[10] On September 13, 2005, Gindi replied to Arnone, stating:

> "… **I am very worried about soil contamination**. It has come to my attention from the inspector of my insurance company that there was an Esso gas bar on the property and has been removed. This was not brought to my attention before I purchased and no due diligence could I have done would have uncovered this fact. My concern is soil contamination and I wonder if the vendor has an environmental assessment report made for the previous lender. Could you please check with the previous owner and get back to me. Thank you." [emphasis in original]

[11] Gindi asked Arnone to determine whether the previous owners had obtained an environmental assessment. There was no immediate response from Arnone.

[12] Between August, 2005 and October, 2008, Gindi did not take any steps to determine whether the gas station had contaminated the soil.

[13] In October, 2008, Gindi contacted Shell. Gindi learned that Shell had not obtained an environmental report. Shell also advised Gindi that there were five underground storage tanks on the Property and that Shell had no information about their removal.

[14] In August, 2008, Gindi attempted to sell the Property and entered into an Agreement of Purchase and Sale with Plaza 2 Inc., conditional on financing. The parties agreed to a purchase price of $695,000. Plaza 2 Inc.'s lender required it to conduct environmental tests. Accordingly, Plaza 2 Inc. paid for and obtained a Phase I Environmental Report. When it became clear that the prospective lender required it to conduct soil testing and obtain a more extensive Phase II report, Plaza 2 Inc. decided not to proceed with the transaction, and on December 11, 2008, it terminated the transaction and executed a release. In cross-examination, Gindi acknowledged that Plaza 2 Inc. aborted the transaction only because of the possibility of environmental contamination and the uncertainty of the outcome of a possible Phase II report.

[15] At an earlier time, the plaintiff consulted with the Hicks Defendants and was advised by Barbara Hicks that Arnone was negligent in failing to advise the plaintiffs with respect to potential environmental contamination on the property. She dealt with Arnone and his counsel to resolve the matter and while discussions were taking place, the lawyers entered into a Tolling Agreement on October 4, 2010. This served to suspend the limitation period (if it had not already run) until the agreement was terminated on July 31, 2011.

[16] In January, 2011, the plaintiffs obtained a Phase II report. The report indicated that there was no evidence of severe oil contamination and that no immediate remedial action was required. The results did show 1 of the 15 sampling locations had evidence of petroleum, hydro carbons at levels in excess of provincial standards.

[17] The plaintiffs commenced their action on November 25, 2011, against the Arnone Defendants alleging they were negligent in failing to advise them with respect to potential environmental contamination on the Property. The Arnone Defendants defended the action by alleging, *inter alia*, that the Plaintiffs had brought the action out of time because the limitation period had expired and that the plaintiffs had not established any loss. The plaintiffs then added the Hicks Defendants as party defendants.

[18] In 2012, the plaintiffs had the Property remediated at a total cost of $56,714.01 and sold the Property for $685,000.

[19] Additionally, each year from 2005 until the Property was sold in 2012, the plaintiffs profited as owners of the Property which was rented to multiple tenants.

THE ARNONE MOTION FOR SUMMARY DISMISSAL

[20] The Arnone Defendants accept that they owed a duty of care to the plaintiffs and failed to meet the requisite duty of care. They seek summary dismissal on the basis of an expired limitation period and that the Arnone Defendants' error caused no damages to the plaintiffs.

[21] The Arnone Defendants submit that the plaintiffs, through the exercise of reasonable diligence, ought to have discovered their claim shortly after learning in August, 2005 of the prior use of the Property as a gas station. Alternatively, they submit that the plaintiffs had actual knowledge of the material facts on which their claim is based by no later than December 11, 2008. Accordingly, they argue that, taking into account the suspension of time during the period covered by the Tolling Agreement, the limitation period to commence the claim expired, at latest, on October 8, 2011.

[22] The Ontario Court of Appeal, in *Van Allen v. Bos,* 2014 ONCA 552 re-iterated at para. 34:

> "It is reasonable discoverability – rather than the mere possibility of discovery – that triggers a limitation period."

[23] It is clear that as of August, 2005, when the plaintiffs learned for the first time that the prior use of the Property had been for a gas station, it raised only the mere possibility of soil contamination. Accordingly, I find that the limitation period did not commence to run at that date.

[24] However, as of December 11, 2008, when the plaintiffs' prospective buyer, Plaza 2 Inc., had aborted the transaction because of the possibility of environmental contamination, Gindi lost a sale in which he stood to realize $120,000 profit above his purchase price paid three years earlier. He knew, at that time, that the prospective purchaser had asked for and obtained, a Phase I assessment which recommended that a Phase II assessment be undertaken. At about the same time, he learned that Shell had sold the equipment pertaining to the gas station, including the underground tanks, and that Shell had no information as to whether those tanks had been removed. Plaza 2 Inc. had aborted the sale because of its concerns about contamination. All of these facts more or less amount to reasonable discoverability at that juncture. The two year limitation period therefore began to run as of that date and even taking into account the period covered by the Tolling Agreement, the limitation period had expired by the time this action was commenced on November 25, 2011.

[25] For this reason alone, the plaintiffs' action as against the Arnone Defendants cannot stand and must be dismissed.

[26] It therefore becomes unnecessary to consider the alternative argument of the Arnone Defendants that there has been a failure to establish any damages on the part of the plaintiffs.

IS THERE ANY GENUINE ISSUE RELATING TO THE HICKS DEFENDANTS REQUIRING A TRIAL ?

[27] The position of the Hicks Defendants is that:

(1) They warned the plaintiffs of a potential limitations problem early on; and

(2) It was never part of their retainer to commence an action against the Arnone Defendants.

[28] Affidavits have been exchanged by both the plaintiffs and the Hicks Defendants relating to these issues but no cross-examinations thereon took place.

[29] There are letters and e-mails passing between the Hicks Defendants and Gindi which would support each of their positions.

[30] For example, in support of the Hicks Defendants' position, the following letters and e-mails would seem to indicate that they did provide a timely warning to Gindi of a pending limitation period and that they themselves were not litigation counsel and would not be able to bring the law suit on the plaintiffs' behalf:

(a) in a letter dated February 12, 2010 to Mr. Arnone, Barbara Hicks wrote

"If I don't hear from you by mid-March, I shall refer my client to litigation counsel."

(b) in an e-mail dated March 11, 2010 to Mr. Gindi, Barbara Hicks wrote

"Still no reply from Gino. What are your thoughts? Are you prepared to sit with a malpractice lawyer to see what kind of case you might have against him?"

(c) in an e-mail dated March 16, 2010 to Mr. Gindi, Barbara Hicks wrote.

"If settlement discussions do not begin by mid-April, as you have suggested, I could refer you to a lawyer who specializes in negligence claims."

(d) in a letter dated March 27, 2010 to Arnone, Barbara Hicks wrote "As indicated previously, if this matter does not resolve itself outside of court, I will refer Mr. Gindi to litigation counsel.";

(e) in an e-mail dated May 20, 2010 to Mr. Gindi, Barbara Hicks wrote "I also want to include reference to the fact that if we don't hear from him shortly, I will refer you to litigation counsel.";

(f) in an e-mail dated June 3, 2010 to Mr. Gindi, Barbara Hicks wrote "My feeling is that you would be better represented by a lawyer who is willing to litigate this if they don't settle with you. The LawPro lawyer would take the negotiations more seriously with a litigator on the other side, …";

(g) in an e-mail dated September 15, 2010 to Mr. Gindi, Barbara Hicks wrote "The Limitations Act was substantially changed in 2002. You have two years to

commence a claim from the date you became aware of your potential for a claim… I'm glad you are consulting with a litigator because I absolutely cannot deal with your matter in a timely fashion.";

(h) in an e-mail dated September 23, 2010, Mr. Gindi wrote

"I have decided to consult with a litigation lawyer after I have received the report…";

(i) in an e-mail dated October 17, 2010, Mr. Gindi wrote to Peter Wardle, counsel to the Arnone Defendants

"After receiving good Phase 2 report, if no settlement is reached and you do not want to file this claim I will ask you to do me a favor and explain it and refer it to Dave. You know the entire story. Of course if the report is bad, which I don't expect, please refer it to Dave as you previously promised."

"Dave" is David Donnelly, a lawyer in Hanover who handles a variety of litigation matters.";

(j) in an e-mail dated February 20, 2011 to Mr. Gindi, Barbara Hicks wrote

"…you are going to have to retain someone else to commence the claim as I just won't be able to do it."

[31] The following e-mails would seem to support the position of the plaintiffs that in fact by 2011, they were relying on the Hicks Defendants to commence the action and take carriage of the proceeding and that their mandate was not just limited to reviewing a draft statement of claim prepared by Gindi :

At 09:29 PM 27/07/2011, Mrs. Hicks wrote:

Izzy Are you available Friday at 1pm to meet with me to go over your settlement offer and court documents? We are getting down to the wire and I have been working on things but won't have them done until the last minute. I don't like to work this way but I have been extremely busy. I really didn't want to be in this position however Dobara cannot represent itself it must have a lawyer and its too late to refer the matter to someone else. I intend to have the claim issued in Walkerton on Friday afternoon. In order to expedite things, I am going to incorporate some of the things you have drafted but I will use my own wording and my own precedent. I intend to work on your paperwork tomorrow evening and I will send you a draft then by email if I have one for you to look at. I will not be able to make many amendments so I will ask you to keep your revisions to a minimum. What's important is that we set out the cause of action and the damages you

are seeking. The rest will be spelled out in detail during the discovery process. It costs $181 to have the claim issued.

Ill be in touch again tomorrow.

At 07:56 PM 28/07/2011, Mrs. Hicks wrote:

Hi Izzy My babysitter cancelled on me today so I haven't been able to get very far with the materials. I will see how tomorrow morning goes but, for now, let's cancel the 1 pm meeting tomorrow. I don't think I will be far enough along. Please confirm that you've received this email.

At 08:08 AM 29/07/2011, Mrs. Hicks wrote:

Izzy – I'm not in the office right now & I already have clients at 930. Timing doesn't work. Want to come at 1?

At 11:15 AM 29/07/2011, Mrs. Hicks wrote:

I will aim to be back at the office at 1 pm sharp but may be a few minutes late.

At 01:09 PM 30/07/2011, Mrs. Hicks wrote:

Can you still check email while you are away? I will be finalizing the paperwork tomorrow so will be sending it to you for approval sometime tomorrow. We will definitely file on Tuesday.

At 10:02 AM 02/08/2011, Mrs. Hicks wrote:

Sorry Izzy nbsp; I got busy with the kids on the weekend. I am still finalizing things! nbsp; I will be in touch towards the end of the day.

At 07:21 AM 03/08/2011, Mrs. Hicks wrote:

Izzy – I apologize. I have been coping with a bad migraine for the last 24 hours. I have a number of client meetings today but will continue to try to get the paperwork finished today.

At 03:34 PM 04/08/2011, Mrs. Hicks wrote:

Hi Izzy I am sorry to hear about the market nbsp: I hope it will bounce back once the international community starts buying USA bonds.

I have not been putting other clients ahead of you these appointments I am dealing with have been booked for weeks already and I cannot avoid them nbsp: I am working very hard and your case is important to me nbsp: I will get the claim finished asap nbsp: I do apologize!

> At 09:20 AM 09/08/2011, Mrs. Hicks wrote:
>
> Do not write to Wardle nbsp: Things are well in hand and will be finalized in the next couple of days nbsp:
>
> At 08:03 AM 25/08/2011, Mrs. Hicks wrote:
>
> Hi Izzy I have been away at a conference the last 3 days. I am back in the office for the balance of the week. I am sorry that I haven't been in touch I have not had good internet access. Carrie does not work for me anymore she has started her own business. I have asked my husband to help me with your claim and he has been working on it. I will give you an update tomorrow.
>
> At 02:31PM 01/09/2011, Mrs. Hicks wrote:
>
> Thanks Izzy! Im sorry you haven't heard from me I've been swamped. I am getting my husband to help me with your claim it is being worked on!

[32] There is a triable issue as to whether the Hicks Defendants undertook to commence an action against the Arnone Defendants and as to whether they warned the plaintiffs appropriately about the potential limitations problem.

[33] This is a classic circumstance where a trier fact requires *viva voce* evidence on the part of the parties involved to resolve these issues. They are genuine issues requiring a trial and it would not be more expeditious, affordable or timely to utilize other methods of fact finding.

[34] For that reason alone, the plaintiffs' motion for summary judgment must be dismissed.

THE OTHER MOTIONS

[35] In view of the way the argument unfolded at the hearing, it became unnecessary to deal with the cross motion of the Hicks Defendants to strike out portions of the plaintiffs' Motion Record and Factum.

[36] As for the plaintiffs' cross motion relating to the Costs Order made by Justice Brown, this order was never appealed and is not properly before this Court at this time.

CONCLUSION

[37] The motion for summary judgment by the Arnone Defendants is granted and the action as against the Arnone Defendants is dismissed.

[38] The motion for summary judgment by the plaintiffs is dismissed.

[39] If the parties cannot agree upon costs of these motions, they may make brief written submissions within 30 days.

Lederman J.

Released:

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REASONS FOR JUDGMENT

Lederman J.

Released: September 26, 2014