Citation: Gringmuth v. The Corp. of the Dist. of North Vancouver 2000 BCSC 807

Date: 20000524
Docket: C995402
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AXEL GRINGMUTH

PLAINTIFF

AND:

THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HARVEY

(IN CHAMBERS)

Counsel for the Plaintiff: M.W. Sager

Counsel for the Defendant: E.E. Vanderburgh

Date and Place of Hearing: April 28, 2000
Vancouver, B.C.

[1] In this action, the plaintiff and owner of lands and premises situate in the District of North Vancouver since July 1984 claims damages against the defendant for negligence, arising from the inspection, and approval of the construction of a residence built in contravention of building codes and minimum standards. The plaintiff alleges he suffered damages, including damages to his residence and lands and for loss to his property.

[2] The plaintiff provided notice in writing of the claims advanced in this action on June 10, 1998. The defendant accepts, for the purposes of this application, that this may serve as the date at which the cause of action arose.

[3] The plaintiff's action against the defendant was commenced by Writ of Summons some 16 months later, on October 19, 1999.

[4] The defendant applies under Rule 18A for judgment dismissing the plaintiff's action against the defendant on the grounds that the action is barred by reason of the failure of the plaintiff to commence the action within six months of the cause of action arising, in accordance with s.285 of the *Municipal Act*, R.S.B.C. 1996, c.223 and amendments thereto.

[5] The plaintiff submits that s.285 does not apply in this case, as the cause of action falls outside the ambit of that provision. He submits the appropriate section for deciding this case is s.286 which covers when notice needs to be given to the municipality. In this regard, the plaintiff submits he still has not determined the full extent of the damage. In the alternative, if s.285 does apply, the District is either estopped from raising the limitation defence in virtue of its conduct or has waived its right to rely on the limitation defence.

WHETHER THE ACTION IS ENCOMPASSED BY S.285

[6] Section 285 reads as follows:

> 285 All actions against a municipality for the unlawful doing of anything that
>
> (a) is purported to have been done by the municipality under the powers conferred by an Act, and
>
> (b) might have been lawfully done by the municipality if acting in the manner established by law,
>
> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.

[7] The District also makes reference to Section 286, which reads:

> 286(1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action.
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[8] Counsel for the District takes the position that the action is encompassed by s.285. Counsel for the plaintiff alleges the claims are not covered by s.285, and submits that s.285 was designed to encompass cases where the municipal corporation in question acts with bad faith. In this case, the plaintiff is not alleging any unlawful conduct on the part of the District of North Vancouver.

[9] The law in this area is well-established. Section 285 is intended to apply to actions of the municipality that purport to be done pursuant to the enactment but that fail to comply with the requirements of the enactment (***Grewal v. Saanich (Dist.)*** (1989), 38 B.C.L.R. (2d) 250 (C.A.) at 254).

[10] In ***Reid v. Corporation of the District of North Vancouver*** (October 1, 1993) Vancouver Registry No. C924091, (B.C.S.C.), Wilkinson J. had this to say when considering the subject of limitation in an action coincidently in which the defendant was the Corporation of the District of North Vancouver (at p.21):

> The legislature has, in my opinion, provided a legislative scheme between the *Limitation Act* and the *Municipal Act* by which the latter governs causes of action arising out of its own provisions and the *Limitation Act* governs actions generally whether taken against a municipality or not.
>
> The intended approach in my view is to have actions which strictly arise out of breach of statute (if such exists following ***Canada v. Saskatchewan Wheat Pool*** (1983), 1 S.C.R. 205), or more commonly actions for breach of a common law duty arising under a statute governed by the *Municipal Act* and all other general claims governed by the *Limitation Act* whether against a municipality or not.

[11] What is alleged here amounts to a breach of a common law duty arising under a statute. The Statement of Claim alleges negligent inspection by the District, including approval of the foundation for the buildings, and allowing construction of the residence which did not meet certain codes. An allegation of failure to inspect on the part of a municipal inspector with a statutory duty to inspect will fall under s.285 (***Grewal v. Saanich (Dist.)***, *supra*. Likewise, an allegation of negligence in inspecting a building project as to conformity

with building codes will fall under that section (***Mulholland v. Zwietering,*** [1998] B.C.J. No. 2698). The limitation provisions of the *Municipal Act* apply here.

DISCOVERY OF THE DAMAGES

[12] In April 1998 the plaintiff came to have concerns over the foundation of his home. He hired experts to investigate, who advised him that there were serious structural problems, arising from settlement of soils beneath the foundation. On June 10, 1998, through legal counsel, he sent notice to the District of North Vancouver that there was a possible claim arising from the deficiency in the foundation of the property.

[13] Mr. Gringmuth then proceeded to hire specialists to complete more extensive investigations, and to have structural repairs made to the home. The repairs are not yet completed and so Mr. Gringmuth does not yet know the full costs of the repairs.

[14] However, the fact remains that notice concerning deficiency in the foundations of the property was given on June 10, 1998. For the limitation time to commence to run a plaintiff must have suffered damages, and also, under s.286, be in a position to give particulars of the time, place, and manner of the damages and be in a position to know that the

municipality has committed an act or omission by which it may be liable (***Grewal v. Saanich (Dist.)***). Any claims against the district that Mr. Gringmuth may have had have been in relation to the foundations and soil on the property - possible legal problems concerning which he both was in a position to, and did, give notice.

[15] ***Middlemiss et al v. Muller et al*** (June 23, 1998), Kelowna Registry No. 33229 (B.C.S.C.) concerned facts very similar those in this case. The case concerned an application to dismiss a plaintiff homeowner's action against a defendant municipality on the grounds of improper inspection at the time of construction of the home. The homeowner, in the summer and fall of 1993, found settling of floor slab, gaps in the vinyl siding, mouldings and trim, and that the foundation walls had not been damp-proofed. A notice letter to the municipality (Regional District of Central Okanagan) alleging substantial defects to the construction of the home and mentioning a possible action arising out of the improper inspection of the construction of the project was sent in May 1996. One and a half years later the plaintiffs discovered further and more extensive slab damage. Brenner J. (as he then was) concluded that the new problems did not give rise to a separate cause of action and so rejected the plaintiff’s submission that an

extension of the limitation period was owing. Brenner J. stated at para.17:

> By February 1994, because of the two and one half to three inch settlement in the living room floor slab Middlemiss was aware of a settlement problem.

[16] Later in the judgment, referring to that date he stated:

> That was the point at which the limitation period commenced to run. By then he was aware of the nature of the damage, and the action against the municipality ought to have been commenced within the six months from that date.

[17] Mr. Gringmuth has not discovered any new underlying problems with his property since June of 1998 which may give rise to a new cause of action against the District.

WHETHER THE DEFENDANT IS ESTOPPED BY ITS CONDUCT FROM RAISING THE LIMITATION DEFENCE

[18] Between June 10, 1999 and December 10, 1999, being six months after the plaintiff gave notice, the affidavit evidence shows that the District did investigate the complaint, and told the plaintiff, through the lawyer he had at the time, that it was handling the case. A number of times the Engineer representing the adjuster for the District went to the plaintiff's property. In December the plaintiff asked to meet with the Municipal Insurance Adjuster and this was put off

until February 3, 1999 at which time the plaintiff met with Blue Schindler, the insurance adjuster, regarding the claim. The plaintiff says he left that meeting with the impression that the matter would be settled without the need for litigation.

[19] Counsel for the plaintiff submits that the District is guilty of lulling the plaintiff into a sense of security and thereby giving him cause to believe that notice of his claim for damages was accepted as sufficient by it. Plaintiff's counsel relies on ***Archer v. Powell River (District)***, (April 8, 1982), Vancouver Registry No. C800505, for the proposition that a party is estopped from relying on the limitation defence where they have lulled a person into a false sense of security.

[20] The provision of the statute under consideration in ***Archer***, *supra,* was s.755, which now corresponds to s.286. There is established case law dealing with possible reasonable excuses persons may have for failing to give notice in a timely manner, and being lulled into a false sense of security by the opposing party is one of those reasons (***Montreal v. Bradley*** (1927), 2 D.L.R. 1023 at 1024). There are, however, no similar exceptions provided in s.285, and counsel has

provided no authorities to support the proposition the courts should read such exceptions into s.285.

[21] Nor do I believe that through its actions the defendant has waived its right to rely on the limitation defence in virtue of any agreement. The decision in ***Marchischuk v. Dominion Industrial Supplies Ltd.,*** [1991] 2 S.C.R. 61 is instructive here. In that case, the appellant was injured in a motor vehicle accident, and the respondent's insurer admitted liability and made an offer of settlement, which was not accepted. A Statement of Claim was issued against the respondent after the limitation period had expired. At issue was whether the insurer, in admitting liability and continuing to negotiate damages, had waived their right to rely on the limitation period. The trial judge accepted that the claim was statute barred. The Supreme Court of Canada dismissed the appeal and upheld the judgment. Sopinka J.'s judgment establishes that when a party knowingly acts in a manner where he or she foregoes reliance upon a known right he can be said to have waived that right. At p.65 Sopinka J. accepts the trial judge's statement (at 58 Man.R. (2d) 56 at 58):

> In determining whether waiver applies, the defendant must take steps n the proceedings knowingly and to its prejudice, which amount to foregoing a reliance upon some right or defect. In order to waive a right it must be a known right. In this case, even if the

> defendant's conduct subsequent to the limitation date, amounted to taking steps in the proceedings, I do not believe the defendant ever addressed the issue of whether or not a statement of claim had been filed, and the evidence certainly supports the fact that it was never discussed directly between plaintiff's counsel and the insurance adjuster.
>
> The conduct of the defendant in asking for the plaintiff's position four days before the limitation date, and gain in early march by telephone, along with a letter of March 18th, clearly do not amount to steps being taken in the furtherance of negotiations aimed at settling, so as to amount to a waiver of the plaintiff's obligation to file a claim. For all the insurance adjuster knew a claim had been filed.

[22] In ***Hrynenko v. Hrynenko*** (1998), B.C.J. No. 2945 (C.A.) Esson J.A. writing for the court, comments on the ***Marchischuk*** case, starting at para.28:

> It involved the all too familiar situation of a plaintiff's lawyer "letting the date go by" and then scrambling, likely with the assistance of his liability insurers, to find some way to avoid the consequences of having overlooked something which every lawyer is required to know—the limitation law of the jurisdiction in which he practices….
>
> The fact that the defendant continued negotiations up to and after the limitation date would not avail the plaintiff because, as Kennedy J. [the trial judge] pointed out, the defendants' adjuster was entitled to assume, without raising the matter, that an action had been commenced. In a case which is no different form hundreds or thousands of other personal injury claims made each year, it is reasonable to leave with the plaintiff's lawyer the obligation to commence the action…
>
> It is understood that the plaintiff has the responsibility to bring action before the end of the

> [the limitation period]. The defendant … has no obligation to warn of that.

[23] In ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490, Major said at para.20:

> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them.

[24] And at para.24:

> The nature of waiver is such that hard and fast rules for what and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[25] Clearly, mere discussion, or allowing the plaintiff to conclude that defendant was in some way addressing the issue, does not amount to a waiver. I do not understand that here the District had communicated an intention to waive the right to the limitation period, either before or after December 10, 1996. There is no evidence of discussion between the parties concerning the limitation period. While the actions of the District related to investigation of the problems complained of by the plaintiff following notice may have led him to believe he need do no more, there were no legal duties on the District to inform the plaintiff about the limitation period

and his need to commence an action within that period. The District may well have assumed the plaintiff had legal help at the relevant times, given that the notice was sent through a solicitor. It cannot be said in the case that the District waived its right to rely on the limitation in question.

[26] For the reasons stated, *supra*, I find the plaintiff's action is statute barred pursuant to the limitation period applicable.

[27] The defendant is entitled to its costs on Scale 3.

"R.B. HARVEY, J."
The Honourable Mr. Justice R.B. Harvey