

COURT OF APPEAL FOR ONTARIO

CITATION: C & C Nestco Corporation v. Starr, 2025 ONCA 792

DATE: 20251119

DOCKET: COA-25-CV-0282

Gillese, Pepall and Zarnett JJ.A.

BETWEEN

C & C Nestco Corporation

Plaintiff (Appellant)

and

David Timothy Starr

Defendant

Christopher G. Rogers, for the appellant

Tim Gleason and Megan Phyper, for the respondents Robert Wilfred Walter Dowhan, Francis Mario Valeriote and Smith Valeriote Law Firm LLP

Heard and rendered orally: November 18, 2025

On appeal from the order of Justice Michael R. Gibson of the Superior Court of Justice, dated November 29, 2024.

REASONS FOR DECISION

[1] The appellant, C & C Nestco Corporation, appeals the dismissal of its motion seeking to add the respondents, Robert Wilfred Walter Dowhan, Francis Mario Valeriote and Smith Valeriote Law Firm LLP, as defendants to an action for lawyer's negligence and breaches of fiduciary duty that it commenced in

September 2024, against David Timothy Starr. The motion judge refused leave to amend to add those parties on the basis that the claims against them were statute barred.

[2] The appellant does not contest the proposition that leave to add a party should be denied where the limitation period for pursuing the claim has expired: *Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36, at para. 7, leave to appeal refused, [2016] S.C.C.A. No. 522; *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at paras. 25-26. It argues that the motion judge should not have determined what it says was a “contested and fact-dependent limitations issue” about when the claim against those parties was discovered, that is, when the limitation period started to run, on a motion to amend in the context of a lawyer’s negligence claim.

[3] We disagree. There were no material contested facts. The appellant brought its motion, in November 2024, without any evidence to displace the statutory presumption in s.5(2) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, that a claim is discovered “on the day the act or omission on which the claim is based took place, unless the contrary is proved”. The appellant bore the evidentiary burden of overcoming the presumption: *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at paras. 31-32. It was insufficient to simply attach the proposed amended pleading to an affidavit of the appellant’s principal. The paragraphs in

the proposed amended pleading about when the claims were discovered were not evidence, nor did the affiant attest to the truth of those allegations. Further, the affidavit was silent on when the claim was discovered or why it could not have been discovered earlier.

[4] The proposed amended pleading alleged acts or omissions of the proposed added parties resulting in a writ of seizure and sale expiring on February 13, 2020, and in specific property being sold in February 2022. As the motion judge noted, “[t]he plaintiff has adduced no evidence of when it discovered its claim, or that it did not discover its claim against [the proposed added parties] on the date that it occurred, or in any event prior to the expiry of the writ of seizure and sale on February 13, 2020, or the date that the ... property was sold in February 2022.”

[5] Accordingly, we see no error in the motion judge’s conclusion that the motion to amend was brought more than two years after the claim was discovered according to the statutory presumption which was not rebutted. The motion was properly refused on this basis because the claim was statute barred.

[6] The appeal is therefore dismissed.

[7] The respondents Robert Wilfred Walter Dowhan, Francis Mario Valeriote and Smith Valeriote Law Firm LLP are entitled to costs of this appeal, payable by the appellant, in the amount of \$5,000 inclusive of disbursements and applicable taxes.

“E. E. Gillese J.A.”

“S. E. Pepall J.A.”

“B. Zarnett J.A.”