CITATION: Furney v. Robins Appleby LLP, 2025 ONSC 740
COURT FILE NO.: CV-23-00696858-0000
DATE: 20250203

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MARYAM FURNEY, AIDAN ALEX FITZGERALD FURNEY	)	Maryam Furney appearing in person
	)	
Plaintiffs/ Responding Parties	)	
	)	
	)	
– and –	)	*Michael R. Kestenberg*, for the Defendants/Moving Parties
	)	
ROBINS APPLEBY LLP, IRVING MARKS, ELLAD GERSH, JONATHAN PREECE, JOEY JAMIL	)	
	)	
Defendants/Moving Parties	)	
	)	
	)	
	)	
	)	**HEARD:** January 21, 2025

L. BROWNSTONE J.

Introduction

[1] In 2023, the Furneys initiated this claim against their former counsel, alleging negligence and conflict of interest. The claim alleges that Mr. Marks, senior counsel at the firm, wrongly delegated matters to junior lawyers, that the lawyers and the firm abandoned the Furneys, and that the defendants had a conflict of interest with a mortgagee on the Furneys' home.

[2] The defendants move for summary judgment dismissing the action. They argue that the claim must fail for three reasons: first, it is statute barred; second, there is no expert evidence supporting the plaintiffs' claim that the defendants breached the standard of care; and third, there is no evidence the plaintiffs have suffered any damages. The defendants argue that any one of these arguments is sufficient to dispose of the motion in their favour.

[3] The motion for summary judgment was scheduled by Akbarali J. on August 4th, 2023. At that time, the Furneys contemplated bringing a motion to remove Mr. Kestenberg from the record based on an alleged conflict. Akbarali J. scheduled a timetable for both motions to be heard at the same time. The Furneys did not file materials or proceed with their motion, so the defendants' summary judgment motion was the sole motion before the court.

[4] For the reasons that follow, I find that the case is suitable for summary judgment, and that the plaintiffs' claim should be dismissed.

The Furneys' request for an adjournment

[5] At the outset of the motion, Ms. Furney requested an adjournment on behalf of the plaintiffs. On the morning of the motion, Ms. Furney had uploaded to Case Center a notice of motion seeking an adjournment, indicating that she wished to retain counsel and to adduce fresh evidence. The notice of motion also raised allegations of judicial misconduct, bias in judicial proceedings, and judicial bias and systemic corruption. The judicial bias allegations seem to suggest some sort of collusion between Justices Dawe and Dineen in a separate action or actions.

[6] There was no affidavit with the notice of motion, and very little indication of the contents of the proposed fresh evidence.

[7] When Akbarali J. scheduled a full day of court time for the motions, which was almost 18 months before the motion date, she strongly urged the plaintiffs to seek legal advice. At the return of the motion, there was no evidence that the Furneys made any attempts to obtain legal advice after Akbarali J.'s endorsement. Rather, Ms. Furney advised me that they were retaining counsel. Ms. Furney did not name counsel and no counsel appeared on the Furneys' behalf to seek an adjournment.

[8] With respect to the request to adjourn to adduce fresh evidence, the description of the purported evidence in the notice of motion is vague and general. The notice of motion was of the same theme as that contained in the Furneys' motion materials and statement of claim, namely, that there was a conspiracy against the Furneys and that there had been concerted efforts to take their home away from them, which they wished to expose.

[9] There was only one specific piece of information that the materials and Ms. Furney referred to, not in affidavit form but in the notice of motion and submissions. This was an apparently recent revelation that the mortgagee in respect of whom the Furneys were alleging a conflict of interest, Ms. Walker, and Mr. Marks had attended each other's weddings. I will discuss that specific allegation later in these reasons. For purposes of the adjournment, I note that the motion to adduce fresh evidence was raised the morning of the hearing. It was not accompanied by any affidavit. There was no proposed fresh evidence to consider, only a request for an adjournment to get the evidence and put it before the court. There was no explanation of why this evidence was not made available to the court at the return of the motion or of what efforts had been made to pursue or discover the evidence sooner. This lack of evidence does not arise in the context of a case that has

been moving quickly. The defendants stopped acting for the Furneys in 2018. The summary judgment motion had been scheduled for close to 18 months.

[10] I dismissed the Furneys' request for an adjournment. As indicated, there was simply no evidence that the Furneys sought counsel, and they had more than 17 months to do so. The fresh evidence referred to in the notice of motion was vague and repeated the themes in the existing material. The evidence itself was nonexistent.

[11] In considering the factors in favor of granting and denying an adjournment request, I must have regard to the administration of justice as a whole. Court dates are a collective resource, to be shared among all Ontarians who require access to the courts. When a full day of court time is scheduled, especially more than 17 months in advance, parties must be prepared to proceed on the scheduled dates. When they fail to do so, and request last-minute adjournments, the domino effect on the administration of justice is significant. The litigants have tied up a date that cannot be used, and then request a date in the future that cannot then be used by other litigants. Of course, there are circumstances where an adjournment is required, even a last-minute adjournment. Life happens. But there must be a reason for an adjournment beyond a party not retaining counsel in a timely way and then indicating they would like to retain counsel. Or there must be evidence of a party making diligent efforts to adduce evidence and being unable to do so until the eve of a hearing. Those (or other) circumstances might happen. However, those are not the circumstances that happened here. There is no basis on which to grant an adjournment. The prejudice to the moving parties who have been waiting for close to 18 months for their court date and who have prepared for today, as well as the prejudice to the administration of justice and other litigants, is real and significant. The factors weigh heavily against granting the adjournment and I declined to do so.

The test for summary judgment

[12] Under r. 20.04 of the *Rules of Civil Procedure*, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary judgment and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[13] In accordance with *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 57, in order to be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she can fairly resolve the dispute.

[14] The court must first determine if there is a genuine issue requiring trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring trial if the evidence allows the court to fairly and justly adjudicate the dispute through this proportionate procedure: *Hryniak*, at para. 66.

[15] If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2). These powers may be used if it would not be against the interests of justice to do so: *Hryniak*, at para. 66.

[16] The moving party bears the evidentiary burden of showing there is no genuine issue requiring a trial. Parties are required to put their best foot forward: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11.

[17] I am confident that I am able to find the facts on the materials before me, and that I am able to fairly and justly adjudicate this dispute using this proportionate procedure.

Is the plaintiffs' claim statute-barred?

[18] The defendants argue the action is statute-barred under s. 4 of the *Limitations Act 2002*, S.O. 2002, c. 24, Sched. B. They argue that the Furneys suggested the defendants had been negligent several times in 2018 and 2019, yet only brought their claim in 2023. The defendants suggest the claim was brought in response to their attempt to claim outstanding fees, a suggestion Ms. Furney vehemently denies.

[19] The Furneys argue that the claim is not statute-barred under the doctrine of discoverability. The Furneys claim they only discovered the conflict between Mr. Marks and Ms. Walker in 2022 and commenced the litigation within two years thereafter. While the Furneys acknowledge raising claims of negligence in the past, they argue that the discovery of the conflict is what led them to begin the claim. Therefore, the limitation period did not begin until they discovered the conflict.

[20] The factual background with respect to the defendants' retainer and Ms. Walker's connection to the defendants is important to an assessment of the limitations period argument.

i) The Furneys' retainer of the defendants

[21] Prior to retaining the defendants, the plaintiffs were involved in litigation regarding the sale of their property at 27 Sunset Drive. In August 2017, the plaintiffs, still represented by former counsel, brought a motion before then Associate Justice Sugunasiri to remove a CPL from title on that property. The motion was unsuccessful.

[22] The plaintiffs were unhappy with former counsel and sought to retain new counsel for an appeal. Ms. Walker, one of their mortgagees, gave them the defendant Mr. Marks's name. More than two months after contacting Mr. Marks, the plaintiffs retained Mr. Marks and the Robins Appleby firm to appeal the order of Associate Justice Sugunasiri. The Furneys gave the defendants a $25,000 deposit for legal fees. The scope of the retainer was to file a notice of appeal regarding the CPL and to defend the action.

[23] Ms. Furney complains that a junior lawyer worked on their case without their consent. Mr. Mark's evidence, which was not challenged by cross-examination, was that Ms. Furney asked if Mr. Marks would be acting personally on all matters. Mr. Marks specifically advised Ms. Furney

that he would be the lawyer responsible for the action and would work with associates on the file. He confirmed that he would personally attend any crucial court appearances, including the appeal of the CPL and the trial of the action, and that his associates would attend on scheduled hearings, motions or examinations that were not determinative of the result.

[24] On January 30, 2018, Monahan J. (as he then was) heard and dismissed the CPL appeal.

[25] Again, Mr. Mark's uncontested evidence is that he and his associate, Mr. Preece, had a call with Ms. Furney to discuss the outcome of the appeal. On that call, Ms. Furney accused the defendants of failing to follow her instructions. After the telephone call, Mr. Marks and Mr. Preece sent an e-mail to Ms. Furney reiterating the instructions the Furneys had provided before the appeal. They also proposed an additional appearance before Monahan J. to seek to vary his January 30, 2018 order.

[26] Ms. Furney sent emails in response, alleging that the lawyers were not telling the truth about the appeal, questioning Mr. Marks's loyalty, indicating that the outcome of the appeal was the result of corruption, and insisting that the defendants had failed to follow her instructions by not advancing certain arguments.

[27] Mr. Marks responded by e-mail indicating there had been a breakdown in the relationship and providing the plaintiffs with a notice of withdrawal of representation on behalf of the defendants. Ms. Furney refused to accept the withdrawal. On February 1, 2018, Mr. Preece and Mr. Marks met with Mr. Furney. Mr. Furney advised, and confirmed in an email of February 2, 2018, that Ms. Furney's statements had been made "in the heat of the moment under a stressful situation and are completely unfounded and were unintended." Ms. Furney then wrote an email to the defendants as follows: "This is my confirmation that neither your name nor Mr. Marks' name will be copied or associated with any collateral complaint or claim made against the Plaintiff's lawyers, any Judge or court staff, or any other individual involved with these proceedings without your prior consent. I am also in agreement with the content of the email my husband Alex sent to you this afternoon @ 3.06 pm in which i was c/c."

[28] The defendants continued with the retainer and brought a motion before Monahan J. to vary his first order. That motion was also unsuccessful.

[29] The defendants were not able to negotiate payment arrangements with the plaintiffs. On April 23, 2018, the defendants delivered a notice of motion to be removed as the plaintiffs' lawyer of record. A few days before the motion was returnable, on May 24, 2018, the defendants were served with a notice of change, removing them from the record and appointing Daniel Naymark of Naymark Law as new counsel. On June 5, 2018, the defendants sent a complete copy of their file to Naymark Law.

[30] In 2019, Ms. Furney sent the defendants further emails alleging the defendants had been negligent in their 2017 and 2018 handling of the Furneys' file.

ii) Ms. Walker's involvement with the defendants

[31] Ms. Walker was a mortgagee on the Furneys' property. She gave Mr. Marks's name to Ms. Furney when Ms. Furney was looking for a new lawyer. Ms. Walker had worked as a legal assistant at Mr. Marks's firm, or predecessor firms, from 1982 to 1996, when she left Robins Appleby. For some of that time, she worked for Mr. Marks, among other lawyers. Ms. Furney indicates she did not know of this employment connection until she looked at Ms. Walker's LinkedIn profile in 2022. Ms. Furney states, without evidence before the court, that she now knows that the two attended each other's weddings.

[32] Mr. Marks' uncontested evidence is that he had no ongoing personal or business relationship with Ms. Walker since she left the firm. He had no direct contact or discussions with Ms. Walker with respect to his retainer on behalf of the plaintiffs at any time after he was contacted by the plaintiffs. His dockets, which were produced on the motion, disclose no reference to communications with Ms. Walker. The only evidence about communications with Ms. Walker is that Ms. Furney copied Ms. Walker on various emails to the defendants. There are no direct emails between Mr. Marks and Ms. Walker. The Furneys identified 16 potential conflicts to the defendants at the time of the retainer. Ms. Walker was not one of them.

[33] The Furneys allege Mr. Marks advised them not to fight power of sale proceedings that would benefit Ms. Walker.

iii) Law and analysis

[34] Section 4 of the *Limitations Act, 2002* provides that, unless the act provides otherwise, a claim shall not be commenced after the second anniversary of the day on which it was discovered. Section 5 provides in relevant part as follows:

> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[35] The Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] 2 SCR 704 considered the degree of knowledge required to discover a claim. The Court

held that “a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence.” (para. 44). The plaintiff must be able “to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known.” (para. 45). That is, “[w]hat is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently.” (para. 46).

[36] It is not controversial that the defendants, having raised the limitation period as a defence, bear the burden of proving that defence. As this is a motion for summary judgment, the defendants bear the burden of establishing that there is no genuine issue requiring a trial with respect to the limitation period.

[37] There is no doubt that the basis of the claims of negligence against the defendants were known to and raised by the Furneys in 2018, five years before the statement of claim was issued. The Furneys acknowledge this, but assert those claims are revived by their recent discovery of the alleged conflict with Ms. Walker.

[38] The Furneys claim that the defendants had divided loyalties between themselves and Ms. Walker, putting them in a position of conflict of interest. The Furneys assert that the “interest of the client and the interest of the lawyer diverged and the lawyer's professional obligation of undivided loyalty to the client's cause was compromised.” They allege the defendants concealed the relationship with Ms. Walker from the Furneys. In their statement of claim, the Furneys assert that Mr. Marks and Mr. Furney had a conversation on February 1, 2018, regarding Ms. Walker’s notice of sale. There is no affidavit from Mr. Furney about this conversation.

[39] There is no doubt that lawyers and law firms owe a duty of loyalty to their clients, a duty to avoid conflicting interests, and a duty of candour. However, the uncontested evidence in this case is that there was no ongoing relationship, let alone conflicting relationship, between Mr. Marks and Ms. Walker. The undisputed evidence is that there had been no relationship between them for over 20 years by the time the Furneys retained the defendants. Nor was there any direct contact after the Furneys retained Ms. Walker. The Furneys’ “discovery” of the LinkedIn profile in 2022 cannot extend the limitation period for the negligence claim because the evidence is that there was no conflict.

[40] As noted, on a motion for summary judgment, parties are required to put their best foot forward. The LinkedIn profile, or even the fact that Mr. Marks and Ms. Walker had attended each other’s weddings when they worked together (if that were properly in evidence), is not evidence of any conflicting duty or conflict of interest on the part of the defendants. The Furneys allege collusion between Mr. Marks and Ms. Walker. These allegations are unsupported by any facts. As there is no conflict or collusion demonstrated with respect to Ms. Walker, there is no actionable wrong that has been “discovered” within the limitation period.

[41] I find that the defendants have established that there is no genuine issue requiring a trial with respect to the limitations defence. I find that the defendants have met their burden of

establishing that the Furneys' claim against the defendants is statute-barred. This is a sufficient basis to dispose of the motion in the defendants' favour. However, in my view, the second argument raised by the defendants would also be dispositive of the motion.

Issue Two: Does the claim fail for want of evidence that the defendants breached the standard of care?

[42] I repeat again that parties must put their best foot forward on a motion for summary judgment. A motion judge is entitled to assume that the respondent has led all the evidence it would lead at trial. That is not to say that perfection is required from self-represented litigants. It is not. But if allegations are made, evidence must be marshalled to substantiate them. The Furneys have had 17 months to marshal their evidence. They have failed to do so.

[43] Here, Mr. Marks deposed that the defendants acted within the standard of care. Once that evidence was before the court, the Furneys had to adduce expert evidence to the contrary: *Formosa v. Persaud*, 2020 ONCA 368 at para. 10. They did not do so. There is no evidence to support their claim that the defendants fell below the standard of care. I find the plaintiffs' claim for negligence does not raise a genuine issue requiring a trial. On this basis, too, I would dismiss their claim.

[44] Given the strength of the first two arguments in support of the motion for summary judgment, I do not need to address the defendants' third argument that the claim fails for lack of evidence about damages.

Disposition

[45] The motion for summary judgment is granted. The plaintiffs' claim is dismissed.

[46] The defendants may make costs submissions of no more than three pages double spaced, within 7 days. The plaintiffs shall have 7 days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Released: February 3, 2025

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REASONS FOR JUDGMENT

L. Brownstone J.

Released: February 3, 2025