Date: 20221216
Docket: CI 22-01-35253
(Winnipeg Centre)
Indexed as: Currie v. Currie
Cited as: 2022 MBKB 241

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

SHARON CURRIE, as Executrix of the ESTATE OF STEVEN CURRIE	)	
applicant,	)	Richard D. Buchwald, K.C.
	)	Jessica M. Hersey
- and -	)	for the applicant
	)	
MYRA CURRIE,	)	
respondent.	)	Sharyne M. Hamm
	)	Keira Hasenack
	)	for the respondent
	)	
	)	Judgment Delivered:
	)	December 16, 2022

PERLMUTTER A.C.J.K.B.

INTRODUCTION

[1] The applicant Sharon Currie[1] as Executrix of the Estate of Steven Currie applies for an order pursuant to Part II of ***The Limitation of Actions Act***, C.C.S.M. c. L150, granting her leave to begin an action against the respondent

[1] Given that the parties have the same last name, their first names are used. No disrespect is intended.

Myra Currie for breach of an oral agreement that Myra and Myra's now deceased husband James Douglas Currie ("Doug") entered into with their son, Sharon's deceased husband Steven. The parties agree that the six-year limitation date to begin an action expired on November 22, 2000.

BACKGROUND

[2] Around 1985, Doug and Myra purchased property. Around this same time, a verbal agreement was entered into by them with their sons Steven, Bruce, and Tim concerning the property. Sharon was not party to the agreement. It is Sharon's evidence that the terms of this agreement included:

- Steven, Bruce and Tim would each pay to Myra and Doug $10,000, being the purchase price;
- The $10,000 purchase price was to be paid by each of Steven, Bruce, and Tim in annual instalments of $1,000, over 10 years;
- Immediately upon entering into the agreement, each of Steven, Bruce, and Tim would be entitled to a one-third share of the hay production on the property; and
- Upon payment of the final instalment, Myra and Doug were to transfer to each of Steven, Bruce and Tim an undivided one-third interest in the property, which would be registered in the Land Titles Office, and each would become responsible for paying one-third of the property taxes.

[3] It is Sharon's position that the agreement would only come to an end once each of Steven, Bruce and Tim paid their full purchase price of $10,000, to Doug

and Myra and each of Steven, Bruce and Tim were transferred an undivided one-third interest in the property.

[4] Myra deposed that at no time was it her intention that the property be transferred into her sons' names. She further deposed that the agreement would end when her sons either no longer needed the extra hay land or when Doug passed away. After Doug passed, the property would be in Myra's sole name.

[5] On November 22, 1994, Steven and Sharon completed their payment of $10,000 to Myra and Doug, which Sharon deposed was the purchase price, while Myra deposed it was paid by Steven for his use of the property. Thereafter, until October 2021, Steven and Sharon, and after Steven's death, Sharon alone paid one-third of the property taxes each year and received a one-third share of the hay production from the property and later payment in lieu thereof. Sharon deposed to her belief that the transfer of a one-third interest in the property was being deferred to a later date and it was only in October 2021, that she was first advised by Myra that the agreement did not exist and as such no such transfer would be made.

[6] The parties agree that the applicable limitation period of six years for breach of contract expired on November 22, 2000, being six years following Steven's completion of payment of the $10,000 sum.

[7] Steven died on April 10, 2010. Doug died on April 15, 2019.

[8] On May 6, 2022, Sharon filed this application.

ISSUES

1. For the purpose of s. 15(2) of the ***Act***, has Sharon established that the cause of action has a reasonable chance of success?
2. When did Steven and Sharon first know, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based?

ANALYSIS

1. For the purpose of s. 15(2) of the Act, has Sharon established that the cause of action has a reasonable chance of success?

[9] In ***Laing v. Sekundiak***, 2015 MBCA 72, Hamilton J.A. explained the test under s. 15(2) of the ***Act***, as follows (para. 66):

> In my view, these different articulations of the test created under s. 15(2) really say the same thing. Therefore, to be successful, an applicant seeking leave must adduce sufficient evidence to establish a *prima facie* case and that means demonstrating a case that has a reasonable chance of success. …

[10] In considering the burden under s. 15(2) of the ***Act***, in ***Justice v. Cairnie Estate*** (1993), 88 Man.R. (2d) 43, Scott C.J.M. wrote as follows (para. 45):

> …In this context, a "reasonable chance of success" means more than simply disclosing a cause of action sufficient to successfully resist an application to strike out the statement of claim. The applicant must, in an application under Part II of the Act, "establish the cause of action in which the action is to be or was founded apart from any defence based on a provision of this Act" [sec. 15(2)]. It must be shown that there is something to the case so that if sent on to trial there is some realistic prospect that the action will succeed…

[11] It is Myra's position that Sharon's evidence regarding the agreement does not meet even the admittedly low threshold under s. 15(2) of the ***Act***. Myra points

out that Sharon was not party to the agreement and was not present at the time the agreement was made. Myra also points out that Sharon has not put forward any evidence from Bruce or Tim as other parties to the agreement. Sharon relies on her 1984 conversation with Steven (who is deceased) about the agreement terms. As well, in support of Sharon's belief that the transfer of a one-third interest in the property was simply being deferred from 1994, to a later date, she relies, in part, on a 1994 conversation between Doug and Steven, at which she was not present. Sharon gave evidence that in late 1994, Doug told Steven and Steven relayed to Sharon that Myra and Doug did not want to transfer title of the property into Steven, Bruce and Tim's names at that time as Bruce was in a poor financial position. Myra takes issue with the admissibility of this hearsay evidence, and, if admitted, argues that it be given little weight.

[12] In the context of evidence given by affidavit for use on an application under King's Bench Rule 39.01(5), in ***Fawley et al. v. Moslenko***, 2017 MBCA 47, Mainella J.A. helpfully summarized the following principles that are engaged with respect to the question of admissibility (para. 76):

> The principles that I take from this jurisprudence lead me to summarize the purpose and scope of QB r 39.01(5) in the following manner:
>
> 1. The purpose of r 39.01(5) is to admit evidence on an application that is otherwise inadmissible under r 4.07(2); it is not a free-standing exclusionary rule to challenge otherwise admissible evidence.
>
> 2. The pre-conditions to admissibility on information and belief under r 39.01(5) are that the source of the information must be specified in the affidavit and that the facts deposed to are not contentious.
>
> 3. A fact is contentious only if the evidence makes it likely to cause an argument, be disputed or raise a controversy. The mere objection of

> counsel to a fact does not make it contentious. Unless a fact is obviously contentious from the affidavit material filed by the party wishing to rely on the fact, the other side will have to establish the fact is contentious through either cross-examination on the affidavit or filing his or her own affidavit if the particular application permits such practice.
>
> 4. If the affidavit evidence in question does not meet the requirements of r 39.01(5), before disregarding it, the judge must also be satisfied that the evidence is not otherwise admissible, based on the law of evidence, if it was given by a witness in court.
>
> 5. Where the judge is not weighing the evidence in order to decide the merits of the dispute between the parties, the question for the judge to decide is the potential admissibility of the evidence, not its actual admissibility. In such cases, if the evidence is potentially capable of being admitted, it may be received and relied upon even if the facts are contentious.

[13] On the basis of the affidavits and related cross-examinations of Sharon and Myra, wherein Sharon is adamant that the agreement includes this term regarding a transfer of the property and Myra is adamant it does not, these 1984 and 1994 conversations pertain to contentious facts. At this stage, this disputed evidence relates to a procedural question that will not determine the substantive rights of the parties (***Fawley et al.***, para. 90). As such, my role as evidentiary gate-keeper is to consider the potential admissibility of this evidence at any ensuing civil trial, which the parties argued, and I agree, would be on the basis of the principled exception to the hearsay rule: necessity and reliability (***Fawley et al.***, paras. 90, 93).

[14] In light of the deaths of Steven and Doug, clearly there is a strong necessity component to this evidence, such that less reliability is required (***Fawley et al.***, para. 120). There is the potential for the reliability aspect of this hearsay evidence

to be met with evidence from Bruce and Tim (albeit, neither filed affidavits), who were also parties to the agreement. With respect to Bruce, it was his financial situation which was the stated reason for not transferring the property. As well, the evidence (discussed further below) of the parties' conduct indicates that other non-contentious terms of the agreement were being followed. In these circumstances, I am satisfied that Sharon has demonstrated this hearsay evidence is potentially capable of being admitted at a civil trial as being both necessary and reliable under the principled exception to the hearsay rule. As such, although contentious, this evidence may be relied upon in this application.

[15] For the following reasons, I find that Sharon has established that the proposed action has a reasonable chance of success. In addition to Sharon's evidence that the agreement included a term that a one-third interest in the property would be transferred upon payment of the $10,000 sum by Steven, the parties' compliance with the other relatively non-contentious terms of the agreement, which also included the future of the property, could reasonably support that this term too was part of the agreement. This includes Steven completing payment of the $10,000 sum on November 22, 1994, Steven paying one-third of the property taxes from October 1995, and Steven receiving one-third of the hay crop. Taken as a whole, it is my view the evidence adduced by Sharon is "of substance" (***Fawley et al.***, para. 26) and sufficient to establish that if the case is sent to trial, there is some realistic prospect the action will succeed.

2. When did Steven and Sharon first know, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based?

[16] The statutory discoverability rule, which is the other aspect of the onus to be met under the ***Act*** to obtain leave to commence an action after the expiry of a limitation period, was explained in ***Fawley et al.***, as follows (paras. 21-24, with some case law references omitted):

> The first part of the test is a statutory discoverability rule. The judge considers the evidence adduced by the applicant, in light of the legal principles set out in sections 14(1) and 20 of the *LAA*, and decides whether the applicant knew, or ought to have known, all material facts of a decisive character upon which the action is based not more than 12 months before the date on which the application was filed. Twaddle JA summarized the applicant's onus this way in *Einarsson et al v Adi's Video Shop et al* (1992), 76 Man. R. (2d) 218 (CA) (at para 13):
>
> > Thus, an applicant must prove, at the very least, that he first learned of a fact material to his cause of action within the twelve months next before the application was filed. **The fact, first learned within that period, must be "material" within the sense defined in s. 20(2); it must be of "a decisive character" as that phrase is defined in s. 20(3); and it must not be one which the applicant ought to have known about earlier.**
> >
> > …
>
> The statutory discoverability rule has both a subjective and an objective component. The applicant must demonstrate both that she was unaware of the decisive material facts earlier than 12 months before the application was filed and that, in the circumstances, her lack of awareness was objectively reasonable ... Awareness of having a possible cause of action is not to be confused with a party having a complete understanding of the particulars of the cause of action; whether it would, as opposed to could, succeed; or the amount of damages likely…
>
> The *LAA* recognizes that the nature of the given material facts in a particular case may require a party to seek appropriate advice from a third party as to whether the facts are of a decisive character, for purposes of advancing a claim, before filing his or her application for relief from the limitation period. Hamilton JA explained the relevant principles in the following way in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at paras 57-58):

> Sections 20(3) and (4) of the *Act* impose an "objective/subjective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience. This assessment contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts…
>
> …
>
> Assuming there is no issue that the applicant did not actually know all of the material facts of a decisive character earlier than 12 months before the application is filed, **the discoverability determination the judge is tasked to make under the *LAA* is as follows: on what date, given the nature and character of the facts and the proposed cause of action, would it have been evident to a reasonable person, standing in the shoes of the applicant, that she could have a cause of action with a reasonable prospect of success?**…
>
> [Emphasis added]

[17] Subsection 20(2)(e) of the ***Act*** provides as follows:

> 20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:
>
> …
>
> (e)The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

[18] As indicated, Sharon asserts that she did not know of all material facts of a decisive character until the fall of 2021. More specifically, Sharon gave evidence that:

- It was only in October 2021 that she was first advised by Myra that she was taking the position that the agreement did not exist and as such, no transfer of title would be made;
- From 1994 to October 2021, she understood that the transfer of this interest was simply deferred to a later date; and

- It was only in the fall of 2021, that payments in respect of Steven's one-third share of hay production (that was paid by a third party through Tim) ceased and the one-third share of the property taxes ceased being accepted by Myra.

[19] For the following reasons, I find that before May 2021, given the nature and character of the facts and the proposed cause of action, it would have been evident to a reasonable person, standing in the shoes of Steven and Sharon, that Steven and later his estate could have a cause of action with a reasonable prospect of success.

[20] To begin, it is important to note that to the extent Sharon has given evidence that from 1994 to October 2021, she expected that the transfer of this interest was simply deferred to a later date, there is no suggestion that the oral agreement at issue was ever amended to provide for this deferral. As well, Sharon advanced no argument based on novation or estoppel.

[21] It is my view that the material facts relating to the cause of action are that the agreement was entered into by Doug and Myra with Steven which included as a term that upon payment of the final instalment, Doug and Myra were to transfer to Steven a one-third interest in the property and that Doug and Myra "omitted to perform" that "act" or "obligation" upon his payment of the full $10,000 sum, as a result of which Steven and now his estate suffered damage (see s. 20(2)(e) of the ***Act***). I agree with Myra's counsel that Sharon's evidence that she believed, expected or understood that the agreement would be honoured or was first

advised by Myra in October 2021, of her position that the agreement did not exist, in the circumstances, are not material facts under s. 20(2) of the ***Act***. Since these are not material facts that form part of the cause of action, in my view, they are not relevant to whether there could be a cause of action with a reasonable prospect of success.

[22] The evidence reflects that Steven, and then Sharon, engaged in repeated communications about a transfer of a one-third interest in the property, beginning in 1994. Sharon's counsel argued that when these communications are considered in the context of the parties otherwise conducting themselves in accordance with the terms of the agreement (in the manner discussed above), Sharon's lack of awareness until the fall of 2021, of all material facts of a decisive nature upon which her proposed action is based, is reasonable.

[23] As previously referenced, Sharon gave evidence that in late 1994, Doug told Steven, and Steven relayed to Sharon, that Myra and Doug did not want to transfer title of the property into Steven, Bruce and Tim's names at that time as Bruce was in a poor financial position. While Sharon also deposed that she believed that the transfer was simply being deferred to a later date, in my view, the failure to transfer the property at that time, even if understood to be a deferral, would have made known to Steven and Sharon that Myra and Doug were not performing this act or obligation required by the agreement. Sharon deposed that in May or June 2010, she spoke with Doug about transferring Steven's one-third interest in the property into her name. At that time, Doug advised Sharon that given the recent

passing of Steven and the associated grief, it was not the right time to effect the transfer. As such, on this occasion, the fact that Sharon spoke with Doug about transferring the one-third interest and Doug expressing an unwillingness to do so, even if because of Doug's grief, in my view, would have again made known to Sharon that Myra and Doug were not performing this act or obligation under the agreement. In January 2021, Sharon instructed counsel Doug Treble to approach Myra to discuss the transfer of Steven's one-third interest in the property into Sharon's name. Sharon was advised by Mr. Treble that Myra did not agree to the transfer at that time. Again, in my view, the fact that Sharon would instruct a lawyer to approach Myra regarding this transfer followed by Myra's disagreement reflect that she knew that Myra was omitting to perform this act or obligation under the agreement. In each case, Steven and later his estate suffered the damage of not being transferred a one-third interest in the property.

[24] In my view, given the failure to transfer a one-third interest in the property along with the three occasions (late 1994, May or June 2010, and January 2021) on which it was made known to Steven and Sharon, and later Sharon alone, that Doug and Myra, and later Myra alone, were omitting to do so, before May 2021, it would have been evident to Steven and Sharon, or at least to a reasonable person standing in their shoes, that Steven and then his estate could have a cause of action for breaching the agreement with a reasonable prospect of success. Simply, to suggest otherwise is incongruous.

CONCLUSION

[25] In conclusion, I find that Sharon has established that the proposed cause of action has a reasonable chance of success. However, I also find that prior to May 2021, Steven and Sharon first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based. Given that the application was filed on May 6, 2022, I am denying leave to begin the proposed action.

[26] If costs cannot be agreed upon, I will receive written submissions.

_____ A.C.J.