IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Von Wiegen* v. *Hobe Estate*, 2007 YKSC 10

Date: 20070213
S.C. No. 05-B0056
Registry: Whitehorse

BETWEEN:

MARTINA VON WIEGEN

PLAINTIFF

AND

JUDITH L. SULEY A/PUBLIC GUARDIAN AND TRUSTEE FOR THE YUKON TERRITORY, PERSONAL REPRESENTATIVE OF ALL THE ESTATE OF ERWIN WERNER HOBE

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

Robert Dick	Appearing for the Plaintiff
Kim Sova	Appearing for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendant Public Guardian and Trustee (the "PGT"), as representative of the estate of Erwin Hobe, to dismiss the action commenced by the plaintiff, Ms. Von Wiegen, on the grounds that the plaintiff failed to commence her action within the appropriate limitation period. In the alternative, the PGT says the plaintiff should be barred from bringing the action on the basis of the doctrine of laches. Two general issues arise:

1. Is the applicable limitation period in s. 2(1)(h) or in s. 17 of the *Limitation of Actions Act*, RSY 2002, c.139?

2. With respect to the doctrine of laches, does the plaintiff's delay in commencing the within action constitute acquiescence on her part, or has it resulted in circumstances that would make continued prosecution of the action unreasonable?

BACKGROUND

[2] Ms. Von Wiegen and the deceased, Mr. Hobe, lived together in a common-law relationship from 1987 until July 1997.

[3] On September 3, 1997, Ms. Von Wiegen commenced an action against Mr. Hobe claiming that he had failed to repay her a loan of $12,500. That debt action was defended by Mr. Hobe and no further steps have been taken by Ms. Von Wiegen to prosecute it.

[4] Mr. Hobe married Christina Hobe on September 18, 1997 and the couple lived together until Mr. Hobe's death on August 9, 2001. They worked together operating a guest house at McClintock Place on Marsh Lake, Yukon, which business was officially declared to be a partnership in 1999. Mr. Hobe also assisted Christina Hobe with her business in Whitehorse called the "Naturopath Centre". Before he died, Mr. Hobe wrote a note to Christina Hobe indicating that the real property he owned at McClintock Place was to go to Ms. Hobe.

[5] In 2001, Christina Hobe attempted to obtain Letters of Administration for Mr. Hobe's estate, but was unable to do so because Mr. Hobe's children would not

consent to her acting as administrator. In 2001 and 2002, there was contact between Christina Hobe, Ms. Von Wiegen and the deceased's two children at Mr. Hobe's home at McClintock Place. This contact gave rise to certain hostilities and unpleasantness between Christina Hobe and the deceased's children, some of which was witnessed by Ms. Von Wiegen.

[6] On June 22, 2005, the PGT obtained Letters of Administration for Mr. Hobe's estate.

[7] On September 23, 2005, Ms. Von Wiegen commenced the within action by filing an endorsed writ of summons. In her subsequent statement of claim, she pled that she and the deceased jointly built a cabin on land registered in Mr. Hobe's name at McClintock Place. She alleges that the majority of the materials and construction costs were paid out of an account in the deceased's name, but to which she had contributed about $107,000 by May 1994. Ms. Von Wiegen also alleges that she provided certain services and other monies to Mr. Hobe, which assisted in the building of the cabin and improvements on two other lots at McClintock Place. She claims to be entitled to share in the benefit of any increase in value of the deceased's real property at McClintock Place by way of the related equitable doctrines of constructive trust and unjust enrichment. In particular, she seeks a declaration that she has an equitable one-half interest, or such other interest as may be determined by this Court, in all the property accumulated in Mr. Hobe's name during the period of their common-law relationship. Ms. Von Wiegen also seeks an order declaring that she has an interest "in ownership

and possession” of the accumulated assets of the deceased, although frankly this seems redundant, unless she intended to distinguish his “assets” from his “lands”.

[8] Upon commencing the action, she also obtained a certificate of *lis pendens*, which I understand has been filed against the subject properties.

[9] Counsel for the PGT argues that the principal claim by Ms. Von Wiegen is based upon constructive trust / unjust enrichment, which is an action on equitable grounds, and therefore s. 2(1)(h) of the *Limitations of Action Act* applies. That section provides that an action on “equitable grounds” . . . “shall be commenced” . . . “within six years from the discovery of the cause of action”. Further, she submits, the time began to run on that limitation period no later than September 3, 1997, when Ms. Von Wiegen commenced her first action against Mr. Hobe. By that time, the parties and their financial interests had clearly been separated and Ms. Von Wiegen’s cause of action for constructive trust was discoverable. Thus, counsel submits that Ms. Von Wiegen should have commenced her current action within six years from September 3, 1997. However, since she did not do so until September 23, 2005 - over eight years later - she is statute barred.

[10] Counsel for Ms. Von Wiegen submits that s. 17 of the *Limitations of Action Act* is the applicable limitation period in this case. That section provides that no person shall take proceedings “to recover any land” more than 10 years after the time when “the right first accrued to the person taking the proceedings”. If this submission is correct, then Ms. Von Wiegen's claim is not barred, as it was commenced within the 10-year limitation period.

ANALYSIS

1. Is the applicable limitation period in s. 2(1)(h) or in s. 17 of the Limitation of Actions Act, RSY 2002, c. 139?

[11] The first question which arises here is whether the claim of constructive trust is a proceeding to recover land within the meaning of s. 17. Counsel were unable to provide me with any case law on this point. My own research reveals that the matter is surprisingly less than clear in the jurisprudence. In his text, *Limitation of Actions in Canada* (Toronto: Butterworths, 1972), J.S. Williams, at p. 85, states that an action for recovery of land is “the successor to the action in ejectment”. He also notes the relationship between the type of limitation period in s. 17 and the doctrine of adverse possession. At p. 86, he says that such possession must be exclusive of, and therefore adverse to, the possession of the true owner.

[12] In *Freeland* v. *Freeland*, [1982] A.J. No. 592 (Q.B.), Veit J. was dealing with a case involving a claim of constructive trust and the potential applicability of s. 18(a) of the Alberta *Limitation of Actions Act*, which I understand to be the equivalent of our s. 17. In that case, the defendant pleaded that s. 18(a) of the Alberta *Act* precluded the plaintiff’s claim of constructive trust. Veit J. disagreed, citing Williams’ text, which I just cited, at para. 32, where she stated:

> “The word "recover" in s. 18 therefore means return to the legal owner. The cases on this point bear out the interpretation given to the section by Williams. These are all cases of adverse possession. This is not the case here and, in my view, there is nothing arising on the facts of this case which cause me to question the traditional interpretation given to the limitation period . . .” (my emphasis)

Accordingly, Veit J. held that the plaintiff's claim of constructive trust was not an action for the recovery of land and therefore was not barred by the limitation period dealing with recovery of land.

[13] Similar comments are made by Graeme Mew in his text, *The Law of Limitations*, 2d ed. (Ontario: Butterworths, 2004), at p. 207, where he dealt with the general principles relating to recovery of land, stating:

> "At common law, a person who is wrongfully dispossessed or who discontinues possession of land has the right to enter upon the land and repossess it. This right has been modified by statutes – in most provinces the general Limitations Statute . . . – which limit the period of time in which an owner of land can make entry or distress or bring an action to recover the land . . . " (my emphasis)

Later, at p. 208, Mew says:

> "In actions for the recovery of land, the expiry of a limitation period not only bars the enforcement of a remedy. It also has the effect of adjudicating the land to the occupant who has remained in possession of the land throughout the limitation period, thus barring the original owner's right to property as well. This extinction of the rights of the dispossessed owner does not, however, automatically confer title upon the dispossessor." (my emphasis)

[14] In *Skippon* v. *Scharnatta*, [1986] S.J. No. 106 (C.A.) at p. 6 (Q.L.), Brownridge J.A., in dissent, referred to the "formidable argument" of the respondents, who relied on the judgment of Estey J. in the Supreme Court of Canada in *Canadian Pacific Railway Co.* v. *Turta,* [1954] S.C.R. 427, which held that for an action to be a "proceeding to recover land" within the meaning of s. 18 of the Alberta *Statute of Limitations*, there must be a claim for both ownership and possession. Brownridge J. concluded, at p. 6 (Q.L.), that the appellant wife there was claiming neither; rather:

> "What she is claiming is an unjust enrichment by retention of the benefits of her labour without compensation. It is apparent that her claim is not one for the recovery of land within the meaning of s. 18 of the Act." (my emphasis)

[15] Cameron J.A., for the majority in *Skippon*, found it unnecessary to decide the point, since, in his view, the wife's application for a declaration that she be entitled to half of the equitable title to the farm fell within s. 43 of the Saskatchewan *Limitation of Actions Act*. That section provided that in an action against a trustee, if the trustee retains the trust property and the claimant is a beneficiary of the trust, then the trustee cannot rely on a limitation period defence.

[16] In *Hartman Estate* v. *Hartfam Holdings Ltd.*, [2006] O.J. No. 69, the Ontario Court of Appeal addressed an estate case involving, in part, the potential application of s. 4 of the *Limitations Act* in that province. That section is similar to s. 17 of the Yukon *Limitation of Actions Act*, in that it creates a 10-year limitation period for an action to "recover" land. The respondents argued that s. 4 did not apply to claims for recovery of land based on resulting and constructive trust principles, as such actions are for a declaration of ownership and not to "recover" land. Ultimately, it became unnecessary for the Court of Appeal to decide the question, because s. 43(2) of the *Limitations Act* contained an exception within which the proposed trust claims squarely fell, with the result that the appellants could not rely on s. 4 to bar the proposed trust claims.

Nevertheless, the Court commented, at para. 57:

> "On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the Act. In *Williams* v. *Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover

> any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court". See also *OAS Management Group Inc.* v. *Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect."

Ultimately, at para. 85, the Court said:

> "It is apparent that there is no *clear*, general answer to the question of whether claims to land based on resulting or constructive trust are subject to a statutory limitation period . . .".

[17] On balance, I prefer the "traditional" view, referred to by Veit J. in *Freeland*, that an action to recover land is one brought by the original legal owner, which ordinarily follows from an ejectment or dispossession of that owner.

[18] In the case at bar, Ms. Von Wiegen does not claim to be the "legal" or "original" owner of the lands. Nor does she claim that she is an owner who has been "dispossessed" of the lands by Mr. Hobe. She has raised no issue of adverse possession. Rather, Ms. Von Wiegen specifically seeks a declaration that she has an equitable one-half interest in Mr. Hobe's lands at McClintock Place by virtue of the principles of constructive trust. In my view, her claim is not a proceeding to recover land and therefore s. 17 of the *Limitation of Actions Act* does not apply. The constructive trust claim is, however, an action grounded in equity and therefore s. 2(1)(h) of the Yukon *Limitation of Actions Act* is applicable. In the result, the claim by Ms. Von Wiegen is statute barred.

2. With respect to the doctrine of laches, does the plaintiff's delay in commencing the within action constitute acquiescence on her part, or has it resulted in circumstances that would make continued prosecution of the action unreasonable?

[19] Laches is defined in *Black's Law Dictionary*, 5th ed., as "neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity". In *Louie* v. *Lastman* (2002), 61 O.R. (3d) 459, at para. 15, the Ontario Court of Appeal quoted La Forest J., who summarized the doctrine in *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6, as follows:

> "Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine."

[20] If I am in error on the limitations question, I would find in the alternative that the laches doctrine applies to bar Ms. Von Wiegen's claim. In particular, I find that there has been acquiescence by Ms. Von Wiegen in this case. Although she started her debt action in September 1997, shortly after her separation from Mr. Hobe, that claim was specifically limited to the allegation that she loaned Mr. Hobe $12,500 and had yet to be repaid. She made no reference whatsoever to any potential assertion of a constructive trust in her favour with respect to Mr. Hobe's lands at McClintock Place. That plea was not made until eight years later, when she filed her writ of summons in the within action on September 23, 2005. In my view, that is a significant lapse of time. If Ms. Von Wiegen

truly felt she had an equitable claim to the lands, one reasonably would have expected her to act sooner to enforce her rights.

[21] I also conclude that the second branch of the laches doctrine has been satisfied. Specifically, it would be unreasonable to allow Ms. Von Wiegen to prosecute the within action given her unexplained delay in asserting the claim. It would be very difficult now for the estate to effectively defend Ms. Von Wiegen's action because of the passage of time generally, but also because of Mr. Hobe's death in particular. Mr. Hobe would have been the principal witness in his own defence. Ms. Von Wiegen waited more than four years after his death on August 9, 2001 to commence the action. That delay will prejudice the estate if the proceeding is allowed to continue.

[22] Further, allowing Ms. Von Wiegen to continue with this action will almost certainly delay the distribution of the estate proceeds. In my view, that is a relevant factor to consider in determining whether it would be reasonable to allow her to do so. Christina Hobe, as well as Mr. Hobe's son and daughter, each have a potential interest in Mr. Hobe's estate. The PGT has deposed that the cash on hand in Mr. Hobe's estate totals about $10,700. In addition, an extensive number of Mr. Hobe's personal effects were identified and described in the inventory of the estate's assets and liabilities. These items include several pieces of jewellery and other pieces of significant potential value. However, because of this action, as well as another action commenced by Mr. Hobe's children in December 2005 against Christina Hobe and the PGT, none of Mr. Hobe's assets have been distributed to date. While the dismissal of the within action for reasons of laches will not necessarily result in an immediate distribution of the estate proceeds,

since the action by Mr. Hobe's children will likely also have to be resolved before that can be done, it will at least simplify matters to some degree.

CONCLUSION

[23] In summary, I order that this action be dismissed and that the *lis pendens* be vacated, with costs to the defendant.

[24] Pursuant to Rule 41(8) of the *Rules of Court*, I direct that it is not necessary for Ms. Von Wiegen to approve in writing the order confirming this judgment.

GOWER J.