Court of Queen's Bench of Alberta

Citation: Kopr v. Kopr, 2006 ABQB 405

Date: 20060605
Docket: 0303 03069; 24 099267
Registry: Edmonton

Between:

Marie Kopr

Plaintiff

- and -

Milan Kopr and 795760 Alberta Ltd.

Defendants

And:

In the matter of the Bankruptcy of Marie Kopr

Reasons for Judgment
of the
Honourable Mr. Justice Frans F. Slatter

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[1] This is an application to substitute the Trustee in Bankruptcy as the plaintiff in this action, in place of the bankrupt Plaintiff Marie Kopr. The application raises the issue whether a claim for unjust enrichment (arising in the context of a common law relationship) is "property" under the *Bankruptcy and Insolvency Act*, R.S.A. 1985, c. B-3 (the "*B.I.A.*"). The application also raises the issue of substitution of plaintiffs after expiration of a limitation period.

Facts

[2] Marie Kopr and Milan Kopr were married in the 1980s, but they divorced on July 14, 1987. After a long period without any contact, the Koprs commenced cohabiting in the Spring of 1997.

[3] On October 9, 2002, while the parties were still cohabiting, Marie Kopr made an assignment into bankruptcy. About four months later, on February 15, 2003, the Koprs separated.

[4] On February 19, 2003, while an undischarged bankrupt, Marie Kopr commenced this action against Milan Kopr and his numbered company. She claimed that the value of Mr. Kopr's property had increased during the cohabitation, and that Mr. Kopr has been unjustly enriched. She accordingly claimed an interest in his property. Ms. Kopr never advised her Trustee in Bankruptcy that she had commenced this action.

[5] On August 8, 2003, Marie Kopr was discharged from bankruptcy. In December of 2004, her Trustee was discharged. This action continued and was virtually ready for trial when, in November of 2005, the Defendants challenged the status of Ms. Kopr to commence the action. An application was brought by the Defendants to strike out the action. After some delay, notice was given to the Trustee. A cross-application was then brought to reappoint the Trustee, and to substitute the Trustee as the plaintiff in this action. This cross-application is opposed.

Standing of the Defendants

[6] The Plaintiff first of all challenges the standing of the Defendants to even raise the issue of status. The Plaintiff cites ***Foldy v. D'Amico*** (1979), 31 C.B.R. (N.S.) 88, 25 O.R. (2d) 485, 104 D.L.R. (3d) 102 (Ont. S.C.). In ***Foldy*** the trustee purported to assign the cause of action to the Plaintiff under what are now ss. 40 and 41 of the *B.I.A.*. The Defendant alleged that there were certain deficiencies in the assignment process. The Court concluded that the Defendants were strangers to the bankruptcy, and had no standing to challenge the Plaintiff's status based on non-compliance with procedural matters.

[7] The Defendant in this action concedes that if Ms. Kopr and her Trustee had made a private arrangement for a transfer of the cause of action, the Defendants could not challenge that. However, in this case there was no arrangement between the Bankrupt and the Trustee, and indeed the Trustee had no knowledge whatsoever of the action. The Defendant argues that ***Foldy*** can be distinguished on this basis, and I agree.

[8] In any event, the decision in ***Foldy*** is somewhat problematic. A defendant who is sued by a plaintiff who potentially has no status to commence the action is placed in a difficult position. If the defendant settles with that plaintiff, or takes that plaintiff to trial, the defendant stands the risk that the true owner of the cause of action could appear later and sue a second time. A defendant should always be in a position to challenge the status of the plaintiff, as was allowed in

Thompson v. Coulombe (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.), if only to obtain a court order verifying the true owner of the cause of action. I accordingly conclude that the Defendant does have status to raise this issue.

Is the Claim "Property"?

[9] The *B.I.A.* defines property in s. 2:

> "Property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, *things in action*, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, *vested or contingent*, in, arising out of or incidental to property. (emphasis added)

This is obviously a very wide-ranging definition, designed to include almost every imaginable kind of property. The issue is whether a claim for unjust enrichment in a domestic context is included.

[10] The Plaintiff argues that for many years it was assumed that a claim by a spouse for a division of property under the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, was not "property" under the *B.I.A.* This was based on the decision in ***Deloitte, Haskins & Sells Ltd. v. Graham*** (1983), 47 C.B.R. (N.S.) 172, 32 R.F.L. (2d) 356, 25 Alta. L.R. (2d) 84, 42 A.R. 76. The ***Graham*** decision held that a claim for division of matrimonial property was merely an application to the Court, asking the Court to exercise its discretion in dividing the property. As such, there was no "right" to the matrimonial property, the claim did not constitute "property" under the *B.I.A.*, and the bankrupt retained control of the claim.

[11] More recently the ***Graham*** decision has been thrown into doubt. Both ***Tinant v. Tinant***, 2003 ABCA 211, 15 Alta. L.R. (4th) 225, 330 A.R. 148 and ***LeCerf v. LeCerf***, 2004 ABQB 50, 33 Alta. L.R. (4th) 151, 378 A.R. 69 have held that a claim for division of matrimonial property is indeed "property". I would be prepared to accept that the right to a division of matrimonial property while the couple is still cohabiting is an inchoate right that does not form "property". It is analogous to a claim for a dower interest while the married couple is still living: ***Phan v. Lee***, 2005 ABCA 142, 43 Alta. L.R. (4th) 199, 363 A.R. 361. However, once the couple separates, the claim for division of matrimonial property is more than just a petition to the Court seeking the exercise of a judicial discretion or indulgence. The claimant has a right to have property divided under the *Act*, with a presumption of equal division. The claim for division of matrimonial property would appear to be a contingent right, and included in the definition of property in s. 2 of the *B.I.A.*

[12] In any event, it should be noted that this is not a claim for division of property under the *Matrimonial Property Act*. This was a common law relationship, and the *Matrimonial Property Act* regime does not apply: ***Nova Scotia (Attorney General) v. Walsh***, 2002 SCC 83, [2002] 4

S.C.R. 325. This is a common law claim for unjust enrichment, to be decided on restitutionary principles. Although there is no claim for division of matrimonial property while the couple still cohabits, it might theoretically be possible for a claim for unjust enrichment to be launched during cohabitation.

[13] The basis of a claim for unjust enrichment is that the defendant has been enriched, the plaintiff has been deprived, and there is no juridical justification for the enrichment. This is a direct claim for an interest in property, and would normally result in a money judgment. In my view, such a claim is clearly "property" under the *B.I.A.*

After-Acquired Property

[14] As of the date of bankruptcy, the Koprs were still cohabiting. As mentioned, it is likely that Ms. Kopr could have commenced the claim for unjust enrichment anyway. However, even if no such claim could be advanced until separation, the claim was crystallized on the date of separation, February 15, 2003, while Ms. Kopr was still an undischarged bankrupt. As such, the claim is after-acquired property under s. 67(1)(c) of the *B.I.A.*, being property "acquired by or devolved on her before her discharge". The claim accordingly vested in the Trustee, and Ms. Kopr had no capacity to commence this claim in her own name.

[15] I therefore conclude that the Trustee in Bankruptcy is the proper plaintiff in this action, and *prima facie* the trustee should be substituted for Ms. Kopr as Plaintiff.

The Limitation Period

[16] The Defendants however argue that it is not possible to substitute the Trustee at this late stage. The Defendants make two related arguments. First of all, they argue that the action as commenced by Ms. Kopr is a nullity, and no substitution or ratification can revive it. Secondly, they argue that it is not possible to substitute a plaintiff after the expiration of the limitation period.

[17] The law respecting the substitution of plaintiffs in an existing action is now covered by s. 6 of the *Limitations Act*, R.S.A. 2000, c. L-12:

> **6(1)** Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> **(3)** When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
>
> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and
>
> (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

The issue is whether the Trustee can place itself within this section.

[18] The Defendants point to the Court of Appeal decision in ***Long v. Brisson*** (1992), 13 C.B.R. (3d) 181, 3 Alta. L.R. (3d) 79, 131 A.R. 99 (C.A.). In ***Long*** the bankrupt plaintiff commenced an action in her own name, and when the deficiency was discovered she obtained a consent order from a Registrar transferring the cause of action to herself. The defendant argued that the transfer after the fact was ineffective, because the action was a nullity. The Court of Appeal agreed, and struck out the action.

[19] The ***Long*** decision is problematic, because it purported to rely on ***Thompson v. Coulombe*** (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.). However, ***Thompson*** decided the exact opposite of ***Long***, namely that the action was not a nullity and could be cured after the fact. I am of course bound by the decision of ***Long***, if it is still good law. ***Long*** was decided before the new *Limitations Act*, and in my view it is inconsistent with the new *Act*, and subsequent decisions like ***Stout Estate***, *infra*. I conclude that it no longer reflects the law of Alberta.

[20] The law of limitations has always been plagued with the issue of "nullities". Generally, whether an action is a "nullity" is of no consequence if the limitation period has not expired. In those situations, the true plaintiff can simply commence a new action. The issue of nullity is therefore intimately related to limitation periods. The issue repeatedly arose in a number of situations. One situation was where someone other than the personal representatives purported to sue on behalf of an estate, or else the estate was incorrectly described. A second category arose from so-called "misnomers", where the party was mis-described. Sometimes there was in fact a party (usually another corporation) with the exact name used in the Statement of Claim, but it was subsequently argued that a different person or corporation was intended as the plaintiff. A third situation arose when actions were commenced in the name of dissolved corporations. In these cases the named plaintiff had no cause of action, and one could describe the action as a "nullity".

[21] The new *Limitations Act* has attempted to deal with all of these situations. The scheme of s. 6 of the *Limitations Act* is to focus on notice to the defendant. The purpose of the *Limitations Act* is to bar stale claims, and a claim is not truly "stale" if the defendant had timely notice of it. In all of the situations where the wrong plaintiff has sued, the defendant does in fact have notice that a claim is being advanced. Often the defendant will actually know the identity of the true plaintiff, as well as the substance of the claim. In these situations, there is no prejudice to the defendant that the *Limitations Act* would try to obviate, and accordingly s. 6 permits substitution of claims and parties where the defendant had adequate notice of the claim within the limitation period, and where the substituted claim or party relates to the same conduct and events as the original claim.

[22] In this new limitations environment it is inappropriate to speak of "nullities". Many of the misnomer situations, and the other cases concerning status of the plaintiff, could well be categorized as "nullities", because the plaintiff originally named had no cause of action. However, under the new *Act* all of these actions are allowed to proceed when the conditions of s. 6 are met, whether one wishes to characterize the original action as a "nullity" or not. The defendant is simply not entitled to immunity as a result of the passage of time in these situations.

[23] In ***Stout Estate v. Golinowski Estate***, 2002 ABCA 49, [2002] 4 W.W.R. 588, 100 Alta. L.R. (3d) 5, 299 A.R. 13, 18 C.P.C. (5th) 146, 43 E.T.R. (2d) 117 the action was commenced by an Administrator *Ad Litem*, appointed by court order on behalf of the estate of an intestate. The Administrator *Ad Litem* eventually applied for and was granted Letters of Administration. A Chambers judge subsequently held that the action was an incurable nullity, and that the subsequent Letters of Administration did not cure the defect. While the factual and legal context is undoubtedly distinguishable, the Court of Appeal did hold at para. 82, following earlier comments in ***Frank v. King Estate*** (1987), 56 Alta. L.R. (2d) 289 (C.A.):

> These procedural amendments are not present in this jurisdiction, but the judicial pronouncement in ***Frank Estate*** is to the same effect. In circumstances closer to the old nullity cases than this appeal, the court directed that the nullity characterization is no longer supportable. ***Frank*** is binding. There is no reason not to extend the reasoning in ***Frank*** to a plaintiff in these circumstances. The order granting the Administrator *Ad Litem* appointment is not a nullity; neither is the claim brought under its authority. Rather, the pleading is an irregularity at most. The question is whether the irregularity can and should now be cured by amendment.

In my respectful view the reasoning in ***Stout Estate*** is compelling. Holding actions to be nullities even though they are subsequently rectified is excessively technical, and can only lead to injustice. A defendant who loses the benefit of the limitations statute as a result of the amendment of the pleadings to include the proper plaintiff, cannot truly be said to be prejudiced.

[24] In a related context, an action commenced by a corporation that has been struck off is not a nullity: ***Modern Livestock v. Kansa Insurance*** (1993), 11 Alta. L.R. (3d) 355, 143 A.R. 46, 18 C.C.L.I. (2d) 266 aff'd (1994) 24 Alta. L.R. (3d) 21, 157 A.R. 167, 24 C.C.L.I. (2d) 254 (C.A.). While this decision depends on the wording of the statute, the decision and the statute show a policy against finding actions to be nullities where the defendant has notice of the claim, and the nullification of the action would defeat a claim. To the same effect, in ***Alberta v. Canadian National Railway Co.*** (2001), 309 A.R. 157, 2001 ABQB 984, 2 Alta. L.R. (4th) 195, 19 C.P.C. (5th) 306 aff'd 2003 ABCA 69, 12 Alta. L.R. (4th) 4, 320 A.R. 373, 35 C.P.C. (5th) 307 the Court allowed the substitution of the real plaintiff (RailLink Canada Ltd.) for the original plaintiff (RailLink Ltd.), even though the original plaintiff had no cause of action at all.

[25] It should be noted that the suggestion that a subsequent grant of authority by the Trustee in Bankruptcy does not revive an action originally started by the bankrupt runs counter to the general proposition that ratification of unauthorized acts is retroactive: *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur* ("Every ratification relates back and is equivalent to a prior authority"): ***Bolton Partners v. Lambert*** (1889), 41 Ch. D. 295 (C.A.). Where the argument is that some necessary authorization was not obtained, and the necessary authorization is subsequently obtained, it is the height of formality to say that the original action remains unauthorized. If the principal and agent agree that everything was properly done, why should the defendant be able to argue otherwise?

[26] This is the general result under English law when an action has been started without authority. In ***Presentaciones Musicales SA v. Secunda***, [1994] Ch. 271, the Court of Appeal held, at paras. 22, 37, 39:

> It is well recognised law that where a solicitor starts proceedings in the name of a plaintiff - be it a company or an individual - without authority, the plaintiff may ratify the act of the solicitor and adopt the proceedings. In that event, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured. See ***Danish Mercantile Co. Ltd v. Beaumont,*** [1951] Ch. 680, since approved by the House of Lords. The reason is that by English law ratification relates back to the unauthorised act of the agent which is ratified . . . the point can best be tested by considering the simple case of an action begun by solicitors in the name of a plaintiff without authority, raising a single cause of action which would not have been barred by the Limitation Act if the issue of the Writ had been duly authorised in advance, but would have been barred if the nominal plaintiff had issued a fresh Writ at the much later date of his adoption or ratification of the unauthorised action. . . .
>
> Where a Writ is issued without authority, the cases show that the Writ is not a nullity. For the nominal plaintiff to adopt the Writ, or ratify its issue, does not require any application to the Court. Accordingly, on the same general principle

> that justifies ***Pontin v. Wood***, the plaintiff, in the simple example of an action raising a single cause of action which has been begun by solicitors without authority, must be entitled to adopt the action notwithstanding the expiration of the limitation period applicable to that cause of action.

In my view this is the proper approach, especially considering the philosophy of the new *Limitations Act*.

Conclusion

[27] In conclusion, the claim being advanced by Ms. Kopr is "property" under the *B.I.A.* The cause of action vested in the Trustee, and the Trustee should have been the plaintiff in the action. There is at present no impediment to substituting the Trustee as plaintiff in place of Ms. Kopr. I accordingly reappoint the Trustee as Trustee of the Estate of Marie Kopr, and I direct that the Trustee be substituted as the plaintiff in this action.

Heard on the 26th day of May, 2006.
Dated at the City of Edmonton, Alberta this 5th day of June, 2006.

Frans F. Slatter
J.C.Q.B.A.

Appearances:

R.T.G. Reeson, Q.C. and Alvin Goldsman
for the Plaintiff

Michael J. Penny and Michael Kraus
for the Defendants

Lyle B. Brookes
for the Trustee