

Limitation Period Began to Run When Plaintiff Threatened Class Action

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In [*Asfar v. Sun Life*](#), Justice Nakatsuru of the Ontario Superior Court of Justice granted summary judgment in favour of the defendant and dismissed the plaintiffs' claim on the basis that the plaintiffs discovered that they had a claim against the defendant nearly 10 years prior to commencing their action. In particular, the court considered the fact that the plaintiffs threatened the defendant with a class action and therefore understood that they had potentially suffered loss or damage at the hands of the defendant.

Facts

The plaintiffs, Mr. Jean-Pierre Asfar and Equity Cheque Card Corporation Ltd. (ECCC), commenced an action in April of 2018 against Sun Life for a host of issues relating to five mortgages by Sun Life, the last of which discharged in 2006. In the Statement of Claim, the plaintiffs attacked the various aspects of the mortgage process, the conditions of the mortgage, the fees and interest charged, and the profits made by Sun Life. The plaintiffs claimed them to be fraudulent, forged, deceitful, and illegal. In response, Sun Life moved to have the plaintiffs' action dismissed, on the basis that the action was frivolous, vexatious and an abuse of process. Sun Life also moved for summary judgment on the ground that the plaintiffs' claims were statute-barred.

Outcome

Justice Nakatsuru was not satisfied that the plaintiffs' claim ought to be dismissed on the grounds that that the action was frivolous, vexatious and an abuse of process. Although the Court noted that the plaintiffs threatened to start a class action against Sun Life and even went so far as to publish an alleged libelous Class Action Notice in the Globe and Mail newspaper, the Court found it more appropriate to dispose of the plaintiffs' action by granting summary judgment in favour of the defendants.

In that regard, the Court considered whether or not there was a genuine issue requiring a trial with respect to all or part of the claim. Sun Life argued that the plaintiffs' claim was statute-barred and was commenced outside the applicable limitation period. The plaintiffs, on the other hand, argued that they only discovered they had a claim against Sun Life in 2016.

Upon review of the plaintiffs' own affidavit evidence, the Court was satisfied that by May of 2006, the plaintiffs knew that they suffered loss or damages and could bring a legal claim against the defendant. Indeed, in 2006, the plaintiffs created legal documents to try to enforce their claims against Sun Life. Specifically, the individual plaintiff wrote to Sun Life and threatened to commence a class action if his demands were not met.

The plaintiffs, however, argued that their claims were not statute barred, because they included claims of fraud, forgery, and various criminal acts, which, in the plaintiffs' view, suspended the limitation period. The Court did not agree, and remained satisfied that the plaintiffs discovered the "fraud" in May of 2006 and that the limitation period began to run on that date.

Takeaway

Justice Nakatsuru's decision serves as insight into the Court's analysis regarding discoverability. The Court considered, among other things, the fact that the plaintiffs threatened the defendant with a class action nearly 10 years earlier. Although a claim was not formally commenced at that time, the Court was satisfied that the plaintiffs were aware several years prior they had suffered injury, loss, or damages and a legal proceeding was the appropriate way to remedy it.

An interesting question, not addressed in the decision, is what would have happened if a different individual (not the one who had threatened the class action) had commenced a class proceeding more than two years (the applicable limitation period) after the threat. Arguably, the fact that a class action notice had been published in a major newspaper could mean that the claim of any class member who had seen the notice at the time would be statute-barred. At a minimum, the defendants could argue that the question of whether or not particular class members' claims would be statute-barred would be an individual issue that would make the case unsuitable for certification.

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