# Court of Queen's Bench of Alberta

Citation: Stamos v Virk, 2021 ABQB 143

Date: 20210224
Docket: 1903 07112
Registry: Edmonton

Between:

Panayoti Stamos

Plaintiff

- and -

Navdeep Virk, operating as Virk Law

Defendants

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Endorsement
of
W.S. Schlosser, Master of the Court of Queen's Bench of Alberta

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[1] This is a Defendant's summary dismissal application. It is the procedural culmination of what can only be described as a tragedy of errors. The Defendant argues that the limitation period expired before this claim was issued. They argue, in the alternative, that the underlying claim was without merit and that this claim should be dismissed on that ground alone.

[2] Mr. Stamos was assaulted at The Bank Ultra Lounge in February 2009. In January 2011, he retained personal injury firm #1. The first Statement of Claim issued on January 28, 2011. In October 2011, this Statement of Claim was thought to be served on the person operating the night club under a trade name. Service was said to be made by registered mail. There was no defence. The Defendant was noted in default.

[3] The Plaintiff and his first lawyer did not get along. Mr. Stamos had understood (though incorrectly) that Lawyer #1 had failed to name the correct parties and the action was now statute-barred. Mr. Stamos paid his account and the first lawyer withdrew from the Record. Lawyer #2 then became involved.

[4] Mr. Stamos complained about the first lawyers conduct to ALIA, who, in February 2012, said they would investigate.

[5] Lawyer #2 explained that his main practice was criminal law and he advised the Plaintiff to retain another law firm; one that was more experienced with personal injury lawsuits. Mr. Stamos then retained firm #3 (March 6, 2012).

[6] ALIA advised Mr. Stamos that he did not have a claim against lawyer #1, as it appeared he still had a viable claim. A central issue was whether the original claim was valid because a numbered company had taken over the trade name of the nightclub on the day the first Statement of Claim was issued.

[7] Lawyer #3 reviewed the file and on the strength of an Affidavit of Service prepared by an assistant at firm #1, thought the appropriate way to move this claim forward (and avoid a delay application) was with an Affidavit of Records.

[8] An Affidavit of Records was prepared and served despite the Noting in Default. When it arrived at the Defendant's office, they advised that the Statement of Claim had never been properly served and that the Noting in Default was itself improper. This occurred on April 6, 2015.

[9] An Application to strike the original Statement of Claim for want of service proceeded before me on October 27, 2015 and the original action was dismissed.

[10] In January 2016, Mr. Stamos retained lawyer #4, the now Defendant. Lawyer #4 was to sue lawyer #1 for the loss of the action.

[11] Lawyer #4 issued a Statement of Claim against Lawyer #1 on May 17, 2017; 16 months after he had been retained, and two years, one month and 11 days after Mr. Stamos learned, in no uncertain terms, that the Defendant in the original action had not been served.

[12] I struck out that lawsuit in 2018 (***Stamos v Huculuk***, 2018 ABQB 566). That Decision speaks for itself. The Application succeeded on a limitations argument; essentially that Mr. Stamos would have known about a claim *at the earliest* when he complained to ALIA in November 2011; thinking Lawyer #1 had sued the wrong person and, at the latest, April 6, 2015 when the Defendant in the original action explained that he had not been served. My decision was affirmed on appeal.

[13] This lawsuit is against Lawyer #4 for failing to sue Lawyer #1 in time. The Defendant, Lawyer #4, would like to bring it to an end.

**Limitations**

[14] The *Limitations Act* puts a two-year deadline on most claims. So, the question is 'when did Mr. Stamos (or an objectively reasonable person in his position) and, by extension, Lawyer #4, know enough to sue Lawyer #1?'

[15] If the date was November 2011 when Mr. Stamos complained to ALIA, the time was up before he even retained Mr. Virk. If it began April 6, 2015, the time was still running when the Defendant had been retained but had expired by the time the Statement of Claim was issued. By then, it was about a month and a half too late, and, in the law of limitations, close is not enough.

[16] The law is clear. The clock begins when the plaintiff knows (or reasonably ought to have known) of the facts that would warrant a proceeding (***HOOPP Realty Inc v Emery Jamieson LLP***, 2020 ABCA 159). The prospects of the lawsuit do not matter, nor is it necessary to have a legal opinion before the clock begins to run.

[17] The original action was, in fact, dead (or 'voidable', if I can put it that way) on January 29, 2012, but nobody knew it. Until April 6, 2015, Lawyer #1, Lawyer #2, Lawyer #3 and ALIA all thought that the original action was good. I will assume that the lawyers involved (and ALIA) can be said to be representative of what a reasonable person in the position of the Plaintiff should think. None of them, nor would anyone, objectively speaking, have concluded on the facts as presented that an action was warranted. Everyone thought the action had been served.

[18] Mr. Stamos thought the Statement of Claim had been served but that the wrong party had been sued. (There was an Affidavit of Service). ALIA thought that the Statement of Claim had been served and concluded that there was still a viable claim. Lawyers #2 and #3 thought that the action was good and, on the strength of this, served their Affidavit of Records. No one knew the central fact giving rise to the claim against Lawyer #1 until April 6, 2015.

[19] ***HOOPP Realty*** instructs us that it is the facts that matter to the limitations clock, not opinions (unless the 'opinion' is a binding decision of the Court which may itself be a fact: ***Aseniwuche Winewat Nation of Canada v Ackroyd LLP***, 2020 ABQB 666); much less ill-formed subjective opinions, when the central fact remains concealed. Mr. Stamos' wrongly held opinion is irrelevant. What matters is the key fact of non-service; when it was known and when it reasonably ought to have been known. This date was plainly April 6, 2015. On that analysis, the claim was still in time when Mr. Stamos retained Mr. Virk to sue Lawyer #1. Mr. Virk made the unfortunate mistake of suing it a month and a half too late.

**Merit**

[20] The Defendants argue that even if the claim had been started in time, it was valueless because it was without merit. I acknowledge that cases such as these (the underlying bar-room assault) are difficult to prove. The identities of the assailants are often unknown and it is an uphill battle to pin the blame on the owner of the nightclub (eg. ***Rai v 1294477 Alberta Ltd (Vinyl Retro Dance Lounge)***, 2015 ABQB 349).

[21] The argument here is that if the underlying action had no merit and was essentially valueless, the loss of it does not constitute damages. Without damages a cause of action in solicitor's negligence would be incomplete. An action against a lawyer based in tort requires proof of damages just like any other negligence claim.

[22] There are, however, out-of-pocket expenses that had been incurred in reliance on the first lawyer's advice and, secondly, in pursuing the matter through several other counsel.

[23] The other point is that a cause of action against a lawyer can be concurrent in contract and tort. The litigant is free to choose the cause of action that most benefits them (***Central Trust Co v Rafuse***, [1986] 2 SCR 147). Given that there is contractual cause of action, and a cause of action in contract does not require damages to be complete but is complete on the breach, there is still a cause of action against the lawyer in contract, notwithstanding the difficulties of proof of value of the original underlying cause of action. So, it's not a question of whether, but how much.

[24] In this type of an application, the burden is reversed. The burden is on the Applicant to show no merit in the original, underlying action (***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at paras 32 and 35). I acknowledge that the Applicant demonstrated that it would certainly be an uphill battle but not that the underlying claim was valueless or wholly without merit.

**Disposition**

[25] The Application is dismissed. A procedural order might be useful though I presume it will now proceed to Assessment. The parties can address the issue of costs if they are not agreed.

Heard on the 18th day of January, 2021.
Additional written submissions received January 28, 2021 and February 15, 2021.
Dated at the City of Edmonton, Alberta this 24th day of February, 2021.

W.S. Schlosser
M.C.Q.B.A.

Appearances:

Coralie J Mohr
of Witten LLP
for the Applicant Navdeep Virk

Todd A Shipley
of Reynolds Mirth Richards & Farmer LLP and
Anthony L R Oliver
of Oliver Litigation
for the Respondent, Panayoti Stamos