COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Petersen v. Proline Management Ltd.,***
2008 BCCA 541

Date: 20081229
Docket: CA035208

Between:

Irene Rose Petersen

Appellant
(Plaintiff)

And

Proline Management Ltd. and
The Owners Strata Plan VIS845

Respondents
(Defendants)

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe

R.S. Margetts, Q.C. — Counsel for the Appellant

N.C. Carfra — Counsel for the Respondents

Place and Date of Hearing: Victoria, British Columbia
8 December 2008

Place and Date of Judgment: Vancouver, British Columbia
29 December 2008

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] On 4 August 1998, the plaintiff/appellant Rose Petersen fell over a 26-inch wall at the edge of the patio outside her condominium, dropping 13 feet into a concrete stairwell and suffering serious injuries.

[2] On 10 September 2004, Ms. Petersen, who was then self-represented, commenced an action against several defendants including the respondents Proline Management Ltd. ("Proline") and The Owners, Strata Plan VIS845 (the "Owners"), for damages for her personal injuries. That action was dismissed on 2 June 2005 by Melvin J. as out of time and barred by s. 3(2) of the *Limitation Act*, R.S.B.C. 1996, c. 266, insofar as the claims were advanced in contract and tort. Melvin J. granted Ms. Petersen leave to amend her statement of claim to plead that her injuries were caused by a breach of fiduciary duty by the respondents. A trial followed on liability only.

[3] The claims for breach of fiduciary duty were dismissed by the trial judge with reasons indexed as 2007 BCSC 790. He concluded that the respondents did not owe Ms. Petersen a fiduciary duty in the circumstances. In the event he erred in that conclusion, he went on to decide that damages for breach of fiduciary duty would be within time and not barred by the two year limitation period. He also concluded that the contributory negligence provisions of the *Negligence Act,* R.S.B.C. 1996, c. 333, would apply and liability should be divided equally between Ms. Petersen and the respondents.

[4] The sole issue on this appeal is whether the trial judge erred in concluding that there was no applicable fiduciary relationship between Ms. Petersen and the respondents.

Facts

[5] Ms. Petersen purchased Unit 203, a ground floor unit in the Owners' strata title building in the summer of 1997. There was a low wall at the edge of her patio and she was unaware, until after she moved in, that there was an open stairwell descending about 13 feet on the other side of the wall. The hazard presented by the inadequate height of the wall was apparent. On 6 November 1997, she wrote to Proline, the management company contractually providing management services to the Owners, drawing attention to the low wall and open stairwell. Ms. Petersen also testified that she telephoned Proline to complain about the height of the wall before she sent her November letter. The trial judge made no finding on that point but he did accept that Ms. Petersen would not allow guests to go out on the patio and she locked the patio door when guests were present.

[6] Proline responded to Ms. Petersen's November letter, stating that it was possible that the 26-inch wall did not meet building code requirements and that it would contact the Saanich building inspection department. It promised to be in touch with Ms. Petersen after it discussed the matter with Saanich and the strata council. The subject was raised by Proline at the 17 November 2007 strata council meeting of the Owners; the minutes recorded that Proline was instructed "to deal with the issue and to agree with whatever terms are necessary to remedy the

problem." Ms. Petersen also had a noise complaint that was being pursued with Proline and the strata council at the same time. Proline's representative, Mr. Spurling, informed Ms. Petersen by letter on 15 December 1997 that he had not yet had the building inspector visit the site but he would let her know once he had been there.

[7] The subject of the safety of Ms. Petersen's patio was raised, discussed and deferred at strata council meetings on 6 January, 24 February, and 16 April 1998. No further investigation or corrective action was taken during that period. Ms. Petersen wrote to Proline complaining of inaction on 27 April 1998. Mr. Spurling replied on 19 May apologizing for the delay, advising that he had called the building inspector, and expressing hope that the matter could be resolved shortly. He telephoned the building inspection department and was informed that a 42-inch railing was required by the building code. He so advised the strata council at its meeting on 27 May; the minutes recorded that Proline would arrange to have a 42-inch railing installed. Ms. Petersen was so advised by letter of 28 May.

[8] An on-site contractor declined Proline's request to install the railing and Proline directed its caretaker to find a handyman to do the work. Nothing was done before Ms. Petersen fell over the wall on the afternoon of 4 August 1998. The railing was finally installed a month later at a cost paid by Proline of $552.76.

[9] Ms. Petersen was heavily intoxicated at the time of the accident. The parties agreed that Ms. Petersen had no recall of the events of 4 August other than that she

was alone and binge drinking. She had been a binge drinker for some 25 years. This history was not known to either respondent before the accident.

[10] While the trial judge was not able to determine whether the wall was on Ms. Petersen's strata lot or the common property, he found that as between Ms. Petersen and the respondents, the respondents were responsible for the maintenance and safety of the retaining wall and the railing. No issue is taken with that finding. The trial judge was also uncertain whether the responsibility of the respondents was exclusive or whether Ms. Petersen could have made her own arrangements to have the work done independently. As I read his reasons, he addressed the fiduciary duty issue on the assumption that the respondents' responsibility was exclusive and I will make the same assumption. The respondents accept that the by-laws of the strata corporation imposed a contractual duty to maintain railings and the failure to install a railing on the wall of Ms. Petersen's patio that met minimum building code requirements before the accident was a breach of that duty.

The Fiduciary Duty Issue

[11] The respondents are jointly represented and accept that they may be treated as one on this appeal.

[12] The trial judge referred to the characteristics of a general fiduciary duty outlined by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136. They are:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[13] The trial judge held that Ms. Petersen failed to establish the third element of the *Frame v. Smith* criteria, that of peculiar vulnerability to the exercise of the fiduciary's discretion or power. He concluded that even if Ms. Petersen lacked the authority to arrange for the railing installation herself, she could have asserted her demand for action against the respondents and retained a lawyer to press the matter if necessary. He noted that Ms. Petersen had retained a lawyer to pursue her noise complaint but had not done so concerning the railing. In the result, after referring to *Hodgkinson v. Sims*, [1994] 3 SCR 377, and several other authorities, he concluded that Ms. Petersen had failed to establish the necessary fiduciary relationship with the respondents.

[14] In my view, the issue does not hinge solely on the third element of vulnerability. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at para. 65, McLachlin J. (as she then was) observed: "The essence of a fiduciary relationship … is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other". McLachlin C.J.C. repeated the observation in her majority reasons in *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 at para. 48. In both opinions she contrasted fiduciary duty with negligence and contract where "the parties are taken to be independent and equal actors, concerned

primarily with their own self-interest …" Those observations are apposite here. Equity supplements common law causes of action where the limited purview of the common law fails to reach conduct which equity considers unconscionable. There is no need to supplement viable common law duties with equitable duties where the defendants have not assumed any obligations of an equitable nature to act in the plaintiff's interest that render the plaintiff vulnerable to an unconscionable exercise of that power or discretion: *Frame v. Smith*, at 136.

[15] Ms. Petersen accepts that if a visitor on her patio had fallen over the wall, the visitor's claim for damages would sound only in tort. However, she argues that her status is different and fiduciary in nature because the respondents had an obligation to her as owner and occupier of the unit to remedy the hazard. The respondents accepted that responsibility which they failed to perform. In my view, this submission fails to recognize the nature of the obligation that the respondents acknowledged. The respondents did not assume or accept any power or discretion to act on Ms. Petersen's behalf or in her best interests. Their relationship to her was defined by the by-laws of the strata corporation and their control and occupation of the common property. They had an obligation, contractual under the by-laws of the strata corporation, to maintain railings. They recognized that contractual obligation extended to the installation of a railing on Ms. Petersen's wall that met building code standards. The accident added tort exposure for failing to remedy an unreasonable risk of harm for which the respondents had contractual or occupiers legal responsibility. In *Frame v. Smith* terms, the respondents were not assuming the exercise of a discretion or power which they could exercise unilaterally to affect

Ms. Petersen's legal or practical interests. They simply recognized (and failed to discharge) a non-discretionary duty in contract and tort to install a railing that met the requirements of the Saanich building code.

[16] Those common law duties of the respondents to Ms. Petersen did not involve any assumption of discretionary power to act in her best interest that could support a fiduciary relationship applicable in those circumstances. There was no trust-like relationship between Ms. Petersen and the respondents. An obvious cause of action for her injuries lay against the respondents in contract and tort; common law damages would have provided a comprehensive remedy. Regrettably, she lost her common law right of action because, self-represented, she issued her writ out of time. The claim for breach of fiduciary duty attempts to overcome the limitation period that now bars her common law action. A similar attempt failed in *K.L.B.* on analogous facts. There, the plaintiffs' damage claims against the B.C. government for direct negligence arising out of foster parent physical abuse were time barred. Those allegations of negligence could not ground a claim for breach of fiduciary duty. There was no question of disloyalty by the government or conscious motivation to prefer another interest in conflict with the plaintiffs. Similarly here, there was no element of unconscionability toward Ms. Petersen that elevates her claims beyond the boundaries of contract and tort. It follows that the relationship between Ms. Petersen and the respondents did not satisfy the fiduciary elements outlined in *Frame v. Smith*. Ms. Petersen was not vulnerable to any discretion or power assumed by the respondents to exercise selflessly on her behalf related to the wall and railing. The relationship was entirely defined by common law

obligations and those duties are time limited by the statutory limitation periods. While I sympathize with Ms. Petersen's plight, I do not think that we can create a fiduciary relationship where one does not otherwise exist simply to defeat a limitation defence.

[17] I would dismiss the appeal.

"The Honourable Mr. Justice Mackenzie"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Mr. Justice Tysoe"