CITATION: National Money Mart v 24 Gold Group Ltd, 2017 ONSC 6373
COURT FILE NO.: CV-16-565240
DATE: 20171027

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
NATIONAL MONEY MART COMPANY, carrying on business under the firm name and style of MONEY MART Plaintiff	*Marvin J. Huberman*, for the Plaintiff
– and –	
24 GOLD GROUP LTD. and KAMEL W. L. HANNA Defendants	*Jack Zwicker*, for the Defendants
	HEARD: October 23, 2017

ENDORSEMENT

DIAMOND J.:

Overview

[1] The plaintiff seeks damages in the amount of $1,573,903.94 from the defendant 24 Gold Group Ltd. ("24 Gold"). Between July 1, 2010 and June 30, 2012, 24 Gold purchased unrefined gold from the plaintiff pursuant to a series of transactions. The plaintiff now brings a motion for summary judgment seeking payment of $1,573,903.94. This sum represents the amount of HST paid by the plaintiff as vendor/supplier when 24 Gold failed to remit that sum.

[2] The facts in this proceeding are not in dispute, and can be summarized as follows:

- the plaintiff carries on business under the firm name and style of Money Mart, a leading financial services company with over 550 branches across Canada. 24 Gold is an Ontario corporation carrying on business as a private, precious metal refiner, dealer and bullion supplier.

- pursuant to an oral agreement, between July 1, 2010 and July 1, 2012 the plaintiff sold unrefined gold to 24 Gold for the total, aggregate sum of $12,160,933.37.

- under section 277.1(1) of the *Excise Tax Act*, R.S.C. 1985 c. E-15 ("the *Excise Tax Act*"), an obligation to remit HST in the amount of $1,573,903.94 was imposed upon 24 Gold as purchaser

- 24 Gold never complied with its obligation to remit the HST to the Minister of Finance.

- In 2015, Canada Revenue Agency ("CRA") conducted an audit of the plaintiff's HST returns (inclusive of the 2010-2012 years), and ultimately issued HST assessments on June 1, 2015 to the plaintiff demanding payment of the $1,573,903.94.

- CRA satisfied itself of the outstanding HST by using part of the plaintiff's 2016 corporate tax payments to pay the assessed HST in full. The plaintiff thus remitted payment of the subject HST to CRA in relation to the transactions with 24 Gold.

- as a result of CRA's audit, the plaintiff issued two invoices, both dated May 31, 2015, to 24 Gold which codified the subject transactions and identified the HST component of $1,573,903.94.

- the plaintiff delivered both invoices to 24 Gold, and demanded that 24 Gold reimburse the plaintiff for payment of the outstanding HST which the plaintiff had remitted to CRA on behalf of 24 Gold.

- 24 Gold refused to pay the plaintiff, and as a result the plaintiff issued this proceeding on December 2, 2016.

Summary Judgment

[3] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant a summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[4] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada held that on a motion for summary judgment, the Court must first determine whether there is a genuine issue requiring a trial based only upon the record before the Court, without using the fact-finding powers set out in the 2010 amendments. The Court may only grant summary judgment if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure.

[5] The overarching principle is proportionality. Summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case.

[6] As held in *Sanzone v. Schechter* 2016 ONCA 566 (CanLII), only after the moving party discharges its evidentiary burden of proving that there is no genuine issue requiring a trial for resolution does the burden then shift to the responding party to prove that its claim has a real chance of success. The Court must address the threshold question of whether the moving party discharges its evidentiary obligation to put its best foot forward by adducing evidence on the merits.

[7] Nothing in *Hyrniak* or the subsequent jurisprudence displaces the onus upon a party responding to a motion for summary judgment to "lead trump or risk losing". The Court must assume that the parties have put their best foot forward and placed all relevant evidence in the record. If the Court determines that there is a genuine issue requiring a trial, the inquiry does not end there and the analysis proceeds to whether a Court can determine if the need for a trial may be avoided by use of its expanded fact-finding powers.

[8] In the circumstances of this case, and on the record before me, I find the motion for summary judgment to be the most proportionate, timely and cost effective approach necessary to deal with the two issues raised by 24 Gold below.

Issue #1 **Do the provisions of section 225 of the *Excise Tax Act* preclude the plaintiff from succeeding on its claim?**

[9] 24 Gold argues that there is a genuine issue requiring a trial due to an alleged statutory limitation under the *Excise Tax* Act precluding the plaintiff's right to sue. In support of that position, 24 Gold relies upon the following sections of the *Excise Tax Act*:

> "Right of supplier to sue for tax remitted
>
> 224 Where a supplier has made a taxable supply to a recipient, is required under this Part to collect tax from the recipient in respect of the supply, has complied with subsection 223(1) in respect of the supply and has accounted for or remitted the tax payable by the recipient in respect of the supply to the Receiver General but has not collected the tax from the recipient, the supplier may bring an action in a court of competent jurisdiction to recover the tax from the recipient as though it were a debt due by the recipient to the supplier.
>
> Net tax
>
> 225 (4) An input tax credit of a person for a particular reporting period of the person shall not be claimed by the person unless it is claimed in a return under this Division filed by the person on or before the day that is
>
> (a) where the person is a specified person during the particular reporting period,
>
> (i) if the input tax credit is in respect of property or a service supplied to the person by a supplier who did not, before the end of the particular reporting period, charge the tax in respect of the supply that became payable during the particular reporting period and the person pays that tax after the end of the particular reporting period and before the input tax credit is claimed, the earlier of

(A) the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within two years after the end of the person's fiscal year in which the supplier charges that tax to the person, and

(B) the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period,

(ii) if the input tax credit was claimed in a return under this Division filed, on or before the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within two years after the end of the person's fiscal year that includes the particular reporting period, by another person who was not entitled to claim it and the person has paid the tax payable in respect of the acquisition or importation of the property or service, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period, and

(iii) in any other case, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within two years after the end of the person's fiscal year that includes the particular reporting period;

(b) where the person is not a specified person during the particular reporting period, the day on or before which the return under this Division is required to be filed for the last reporting period of the person that ends within four years after the end of the particular reporting period; or

(c) where

(i) the input tax credit is in respect of property or a service supplied to the person by a supplier who did not, before the end of the last reporting period of the person that ends within four years after the end of the particular reporting period, charge the tax in respect of the supply that became payable during the particular reporting period and the supplier discloses in writing to the person that the Minister has assessed the supplier for that tax, and

(ii) the person pays that tax after the end of that last reporting period and before the input tax credit is claimed by the person,

the day on or before which the return under this Division is required to be filed for the reporting period of the person in which the person pays that tax."

[10] The jurisprudence is clear that HST is imposed as a tax upon a recipient/purchaser of the goods or service, who then becomes the payor of the HST. The supplier/vendor of the goods or

service is the collector of the HST as agent on behalf of Her Majesty, who then remits the HST to the Minister of Finance once it is collected from the recipient/purchaser.

[11] A review of section 224 of the *Excise Tax Act* discloses that in situations where a supplier/vendor pays an outstanding tax due and owing from a recipient/purchaser (i.e. the vendor/supplier having not been able to collect the tax from the recipient/purchaser), then and only then does the supplier/vendor acquire the right to commence a legal proceeding to recover the outstanding tax from the recipient/purchaser "as though it were a debt due by the recipient/purchaser". In other words, until such time as the supplier/vendor "steps into the shoes" of the recipient/purchaser, no right to sue exists as such an action would be premature.

[12] 24 Gold submits that while there is no express limitation upon the plaintiff as vendor/supplier to commence this legal proceeding, section 225(4) of the *Excise Tax Act* places a limitation 24 Gold's ability to claim the corresponding input tax credit no later than two years after the plaintiff's 2010-2012 fiscal years. As such, since 24 Gold has allegedly lost the right to claim the corresponding input tax credit through the plaintiff's own delay, the plaintiff ought to be precluded from proceeding with this action.

[13] I reject 24 Gold's position. To begin, and as conceded by 24 Gold, section 224 of the *Excise Tax Act* does not contain any time limit within which the plaintiff must bring its legal proceeding. On that basis alone, I do not find the presence of any limitation period in the *Excise Tax Act* to commence a legal proceeding contemplated under section 224.

[14] Moreover, a close reading of section 225(4)(c) of the *Excise Tax Act* permits the input tax credit claims to be filed no matter how late the HST may be charged in connection with the subject transaction(s), provided that the HST was not originally charged by the vendor/supplier and the CRA has subsequently assessed the vendor/supplier for that outstanding HST. This appears to be the exact situation in which 24 Gold currently finds itself, and there is no evidence before me that 24 Gold has sought to avail itself of the provisions of section 225(4)(c) of the *Excise Tax Act* to file the input tax credit.

[15] Accordingly, the answer to Issue #1 is "No.

Issue #2 **Is the plaintiff's claim statute-barred by reason of the provisions of the *Limitations Act 2002* S.O. 2002 C.24 ("the *Limitations Act 2002*").**

[16] Pursuant to section 5(1)(a) of the *Limitations Act 2002*, a claim is discovered on the earlier of the day upon which a person with the claim first knew, or a reasonable person with the abilities and in the circumstances of that person, first ought to have known,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of a person against whom the claim was made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

[17] Section 5(2) of the *Limitations Act, 2002* and the jurisprudence developed thereunder is clear that a person with a claim shall be presumed to have known of the matters referred to above on the day the act or omission upon which the claim is based took place unless the contrary is proved. This is a presumption that can be rebutted by a plaintiff with necessary evidence.

[18] As the Court of Appeal for Ontario recently held in *Miaskowski v. Persaud* 2015 ONSC 758 (C.A.), a plaintiff is presumed to have discovered the material facts upon which his/her claim against a defendant is based on the day the accident took place. There is an obligation upon a plaintiff to act with due diligence in determining if he/she has a claim. No limitation period will be tolled while a plaintiff sits idle and takes no steps to investigate any of the matters referred to in section 5(1)(a) of the Act.

[19] A plaintiff is not required to possess a comprehensive understanding of his/her potential claim in order for the limitation period to commence. As held by the Court of Appeal for Ontario in *Lawless v. Anderson* 2011 ONSC 102 (C.A.), "the question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant."

[20] Discoverability is thus a fact-based analysis. The discovery of a claim does not depend upon a plaintiff's knowledge that his/her claim is likely to succeed, or awareness of the totality of a defendant's wrongdoing. Knowledge of the material facts, and not the elements of a cause of action, will inform the Court's assessment of the commencement of a limitation period. A plaintiff must show that he/she was both not subjectively aware of the factors set out in section 5(1)(a) of the Act, and that a reasonable person "with the abilities and in the circumstances of the person with the claim" would also not have been aware of these factors. In other words, the plaintiff bears the onus of leading evidence to displace both the objective and subjective components of the tests set out in section 5(1)(a) of the Act.

[21] As held in *Miaskowski*, a plaintiff has an obligation to establish why, with the exercise of a reasonable diligence, he/she could not have discovered the identity of a defendant prior to the expiry of the applicable limitation period.

[22] 24 Gold submits that, through the exercise of "reasonable business diligence", the plaintiff should have immediately realized its failure to contemporaneously invoice 24 Gold at the time of the subject transactions, and as a result the plaintiff ought to have known that the HST was in fact outstanding well before CRA's audit. To quote 24 Gold's submissions, "at the very latest, the plaintiff ought to have issued a Statement of Claim by the summer of the year 2012" (i.e. at the conclusion of the series of its transactions with 24 Gold).

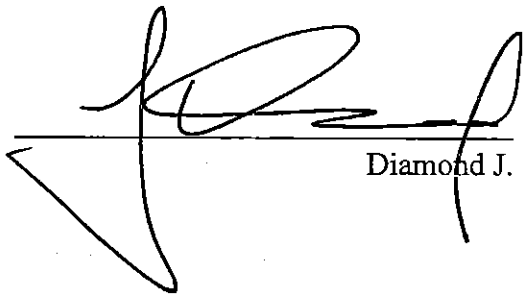
[23] Section 5(1)(a)(iv) of the *Limitations Act 2002* requires a person to have known that, having regard to the nature of the person's loss, a legal proceeding would be an appropriate means to seek to remedy that loss. As previously stated, the plaintiff did not possess any cause of action under the *Excise Tax Act* until the provisions of section 224 were invoked. Only when the plaintiff ended up paying the HST itself did it acquire a cause of action for the debt now due by 24 Gold. While I do not condone the delay on the part of the plaintiff to properly invoice the

subject transactions, the bottom line is that the plaintiff could not commence a legal proceeding until the CRA audit resulted in the payment by the plaintiff of the outstanding HST. No cause of action in law existed until that point. Before then, the collection of the outstanding HST from 24 Gold was not recoverable by the plaintiff. As such, the limitation period did not commence until, at the earliest, June 1, 2015.

[24] Accordingly, the answer to Issue #2 is "No".

[25] I therefore grant the plaintiff's motion for summary judgment and order 24 Gold to remit payment of $1,573,903.94 to the plaintiff pursuant to section 224 of the *Excise Tax Act* together with pre-judgment and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act* R.S.O. 1990 c. C-43.

[26] As agreed between the parties, as the successful party the plaintiff is to be awarded costs of the motion in the amount of $7,500.00 all-inclusive. I therefore order 24 Gold to pay the plaintiff its costs of this motion in the all-inclusive sum of $7,500.00.



Diamond J.

Released: October 27, 2017

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Plaintiff

– and –

24 GOLD GROUP LTD. and KAMEL W. L. HANNA

Defendants

ENDORSEMENT

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