COURT FILE NO.: 01-CV-215748CM3
DATE: 20040211

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
VITO AUCIELLO and VA REALTY LTD.	)	*Vadim Kats*, for the Plaintiffs
	)	
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
THE ROYAL BANK OF CANADA	)	*Bernard B. Gasee*, for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** January 23, 2004

Hoy J.

[1] The plaintiff, Vito Auciello, paid the premiums for his disability insurance by way of pre-authorized monthly withdrawals from a bank account at the defendant Royal Bank of Canada. The account was opened in the name of the plaintiff's company, VA Realty Ltd. VA Realty was initially also a plaintiff in this litigation, but was dissolved before the claim was issued and discontinued this action on September 17, 2003. The Bank dishonoured two pre-authorized payments to the disability insurer in September and October 1994. The insurer subsequently denied coverage on the basis of the unpaid premiums. The plaintiff says he is disabled. In a separate action, the plaintiff sues the insurer to recover disability benefits. In this action, the plaintiff sues the Bank

claiming that, by dishonouring the two cheques, the Bank breached an agreement with the plaintiff to provide overdraft protection, the Bank made misrepresentations with respect to the overdraft protection that would be provided and the plaintiff relied on those misrepresentations to his detriment, and the Bank owed the plaintiff a duty of care and breached that duty of care. Both actions are set down for a four-week trial, scheduled to commence May 10, 2004.

[2] The defendant Royal Bank seeks the following: (1) leave under Rule 48.04 to bring these motions after consenting to a trial date; (2) leave under Rules 26.01 and 26.02 to amend its Statement of Defence to add a paragraph pleading that the action is statute-barred; (3) assuming that leave to amend will be granted, summary judgment under Rule 20.01 dismissing the plaintiff Vito Auciello's claim on the basis that it is statute-barred and in the alternative a determination under Rule 21.01(1)(a) on what it says is a question of law, namely whether the plaintiff's claim is statute-barred; (4) an order under Rule 21.01(3)(d) or Rule 25.11 striking the plaintiff's action on the ground that the action is frivolous and vexatious, an abuse of process and may delay or prejudice the fair trial of the action on the basis the plaintiff has no valid cause of action because there was no privity of contract and no duty of care between the Bank and the plaintiff; (5) security for costs under Rules 56.01(1)(d) and (e) or, if leave is granted to bring its motion under Rule 20.01 but it is not successful, under Rule 20.05(3)(b); (6) an order staying, or dismissing, the action on the basis that the plaintiff, a discharged bankrupt, does not have the right under the *Bankruptcy and Insolvency Act,* R.S. 1985, c.B-3 to pursue the claim; and (7) in the alternative, and without reference to a basis in the Rules or otherwise for seeking the relief at this stage, an order fixing the Bank's costs of the action to date against the plaintiff.

[3] The plaintiff consents to the Bank's motion to amend, provided that he is granted the right on his cross-motion to add his former lawyer, Peter D. Hutcheon, as a party defendant and is compensated for the cost of doing so at this late stage. Mr. Hutcheon consented to be added as a party-defendant, subject to the right of his counsel to make

submissions in respect of the merits of the plaintiff's claim in connection with the Bank's motion described in (4) above.

[4] In its Notice of Return of Motion, the Bank specifically relied on Rules 21.01(3)(d) and 25.11 in seeking the relief described in (4) above, namely dismissal of the plaintiff's claim on the basis that the plaintiff has no valid personal cause of action because there is no privity of contract or duty of care. The Bank did not address this issue in the context of a Rule 20 motion in its factum. In his factum, the plaintiff reasonably assumed that the Bank only relied on Rules 21.01(3)(d) and 25.11 to challenge the alleged lack of a personal cause of action. I noted from Mr. Hutcheon's factum, however, that he seemed to assume that the Bank was moving under Rule 20. Before releasing these reasons, I advised counsel that I understood the Bank's motion on the "no personal cause of action" issue to have been brought under Rules 21.01(3)(d) and 25.11 only, and that I could not simply treat this as a Rule 20 motion because a proposed defendant seems to have thought it was one. I accordingly proceeded on that basis.

(1) Leave under Rule 48.04

[5] Rule 48.04(1) provides as follows:

> (1) Any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

[6] Rule 48.04(2) sets out certain exceptions, none of which are argued to be relevant in this case.

[7] With the exception of leave to amend its Statement of Defence to plead that the plaintiff's claim is statute-barred, the plaintiff argues that at this late stage leave should not be granted to the Bank to bring motions.

[8] It is not disputed that discoveries were completed in April 2002, that a joint mediation failed in June 2002 and that current Bank counsel first consented on

September 18, 2002 to a trial date of May 20, 2003 and then on March 18, 2003, when it became apparent that the matter should be on the long trials list, consented to an adjournment to May 10, 2004.

[9] This motion was originally served on May 21, 2003, after the May 10, 2004 trial date had been agreed to.

[10] VA Realty discontinued the action after the trial date had been set and, notably, after the motion was initially brought.

[11] The plaintiff points to cases that indicate leave should be denied where the facts underlying the proposed motion had been known to the moving party before the matter was set down for trial and no new or unexpected change in circumstances had been shown to have arisen since that date: *Financial Trust Co. v. Royal Trust* (1985), 5 C.P.C. (2d) 114 (Ont. S.C.); *Theodore Holdings Ltd. v. Anjay Ltd.* (1993), 18 C.P.C. (3d) 160 (Ont. C.J.); *Hill v. Ortho Pharmaceutical* (1992), 11 C.P.C. (3d) 236 (Ont. C.J.). *Theodore Holdings* is particularly relevant because in it Justice Then declined to grant leave for a summary judgment on the above basis. The plaintiff refutes the Bank's argument that Rule 48.04(1) does not apply to case managed actions. In *Wancho v. Liberty Mutual*, [2002] O.J. No. 1488 (S.C.J.), Master Haberman held that this Rule applies equally to case management actions, such as this, where the parties set a trial date at Trial Scheduling Court. The Bank attempted to argue that these cases were decided under the former Rules, which required leave to bring motions after a party delivered a certificate of readiness. This is not so. All of the cases, with the exception of *Financial Trust*, were decided under the current version of the Rule.

[12] The plaintiff says the Bank knew all of the facts regarding the limitation and bankruptcy issues following the examinations for discovery held April 8, 2002.

[13] The Bank's motion record contains a Certificate of Status dated April 24, 2003, indicating that VA Realty was dissolved on February 4, 1995. Hence, the Bank was

clearly aware of VA Realty's corporate status before the motion was originally brought. The Bank's original notice of motion dated May 2003 only referenced VA Realty's lack of corporate status as a basis for requiring security for costs under Rules 56.01 (1)(d) and (e) and did not seek to have the action dismissed against VA Realty on that basis. This is perhaps because the plaintiff could have responded to such a motion by seeking to revive VA Realty.

[14] The Bank notes that VA Realty discontinued the action only on September 17, 2003 and says the Bank, as a consequence, changed its original notice of motion to seek an order dismissing the plaintiff's action under Rules 25.11 and 21.01(3)(d). The Bank contends that these facts are the new or unexpected circumstances justifying leave to seek all of the relief sought in its Notice of Return of Motion. The limitation and bankruptcy issues were raised in its initial Notice of Motion. The Notice of Return of Motion refers to the motion before me inconsistently as a "fresh motion to take into considerations (sic) that have arisen since the original motion was served" and as the return of the original motion, which was adjourned on consent to a long motion date.

[15] The Bank argues that its motions, if successful, would result in the Bank not having to participate in a four-week trial. The plaintiff is impecunious. If the plaintiff is unsuccessful at trial, the Bank will not be able to recover costs. These factors, the Bank argues, justify granting leave. In *Theodore Holdings Ltd.,* the plaintiff argued that leave should be given because a successful motion for summary judgment would save the time required for a trial. Justice Then declined to grant leave, because no new or unexpected circumstances had been shown since the matter was set down for trial. He commented that it is of course appropriate for the court to consider that a successful motion for summary judgment might obviate the need for a trial or substantially lessen the time required for trial, but that in the case before him the plaintiff had not demonstrated either that the motion for summary judgment would likely be successful or that the motion would dispose of the action. Moreover, he expected that the matter would proceed to trial in the not too distant future. In this case, the trial date is imminent.

[16] I have concluded that the Bank was aware of the facts underlying its motions in relation to the limitation period, the plaintiff's bankruptcy and the issue of security for costs well before the trial dates were set. On that basis, and with the one exception noted below, I have concluded that leave to bring the motions with respect to those issues, which are numbers (3), (5) and (6) in the second paragraph of these reasons, should be denied. I note that I have determined that had leave been granted, the Bank's motions in relation to the limitation period, the plaintiff's bankruptcy and the issue of security for costs would in any event have been dismissed and the outcome on this motion would have been the same. This supports my view that leave should not be granted.

[17] Leave is granted to the Bank to bring its motion under Rule 21.01 (1)(a) on what the Bank says is a question of law, namely whether the plaintiff's claim is statute-barred. I note that *Theodore Holdings Ltd.* suggests that Rule 21.01 is exempt from Rule 48.04 because that Rule speaks to a determination being made before trial. Hence, subject to the requirement of Rule 21.02 that a Rule 21 motion be brought promptly, a different test may be applicable with respect to the motion that the Bank seeks to bring under Rule 21.01(1)(a).

[18] Leave is also granted to the Bank to bring the motion under Rules 21.01(3)(d) and Rule 25.11 for an order striking the plaintiff's claim on the basis that it is frivolous and vexatious, an abuse of process or may delay or prejudice the fair trial of the action because the plaintiff has no valid cause of action, number (4) in the second paragraph of these reasons. The Bank argues that if there was a contract, a misrepresentation or a duty of care, it was with or to VA Realty and not the individual plaintiff. The Bank learned that VA Realty was dissolved and VA Realty discontinued the action after the matter was set down for trial. The determination that the claim was being advanced solely by the plaintiff, in his individual capacity, and that the Bank would not in any event have to defend a claim by the party in whose name the bank account had been opened,

justified the Bank bringing a motion challenging the validity of the plaintiff's cause of action.

(2) Amendment to plead that the plaintiff's claim is statute-barred.

[19] The plaintiff says that as a result of the Bank's amendment to its Statement of Defence to plead a limitations defence, the plaintiff will need to add Mr. Hutcheon as a party defendant, which will cause significant expenditure of legal fees. A further round of documentary and oral discoveries will be required. The plaintiff has prepared a bill of costs on a prospective basis and claims $14,808.80. The Bank does not dispute the entitlement to costs, but says the amount sought is excessive and, because the plaintiff is impecunious, argues for a right to set-off these amounts against costs that may be awarded to the Bank at trial. The bill of costs includes sixteen hours of oral discovery, which does seem excessive.

[20] An order shall issue granting leave to the Bank to amend its Statement of Defence as requested, with the Bank to pay the plaintiff costs of up to $8,000, payable following trial, subject to delivery of a bill of costs and supporting docket entries confirming that the costs have been incurred, and granting leave to the plaintiff to add Mr. Hutcheon as a party defendant and amend its Statement of Claim in accordance with the draft found at Exhibit "A" to the affidavit of the plaintiff.

(3) Is the plaintiff's claim statute-barred?

Rule 20.01.

[21] In the event that I am found wrong in my decision to deny leave to the Bank to bring its motion for summary judgment, I have considered the summary judgment

motion on its merits. My analysis of the Rule 20.01 motion will also dispose of the defendant's Rule 21.01(1)(a) motion.

[22] Pursuant to Rule 20.04, if the court is satisfied that there is no genuine issue for trial with respect to a claim, the court shall grant summary judgment accordingly.

[23] My role as motions judge is a narrow one. Evaluating credibility, weighing evidence and drawing factual inferences are functions reserved for the trial judge. My function is not to resolve an issue of fact, but to determine whether one exists: *Irving Ungerman Ltd. v. Gelanis* (1991), 4 O.R. (3d) 545 (C.A.), *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.).

[24] The plaintiff says that a limitation period does not begin to run against a plaintiff until he knows, or ought reasonably to know by the exercise of due diligence, the fact or facts upon which his claim is based. This is the so-called "discoverability rule." The determination of when the limitation period begins to run is one of fact: *Smyth v. Waterfall et al* (2000), 50 O.R. (3d) 481 (C.A.).

[25] The Bank does not dispute the applicability of the discoverability principle but argues that there are no material facts in dispute as to when the plaintiff knew, or ought reasonably to have known by the exercise of due diligence, the facts upon which his claim is based. The plaintiff says that material facts are in dispute, and I agree.

[26] The Bank says VA Realty's bank statements for September and October 1994 showed that the Bank had dishonoured the two cheques to the disability insurer. The Bank points to an October 26, 1994 letter from the disability insurer advising that payment had not been made. The Bank also points to the plaintiff's admission that his former wife told him on or about March 8, 1995 that the insurer had not been paid. The Bank says that the plaintiff knew the facts upon which his claim is based by, at the latest, March 8, 1995 and ought to have known them sooner. The plaintiff issued its

claim against the Bank on August 13, 2001, a little more than five months after the six-year mark, if calculated from March 8, 1995.

[27] The plaintiff says that neither he nor his insurance broker received the October 26, 1994 letter from the insurer, or the earlier September 27, 1994 letter it refers to. The plaintiff's former wife, and not the plaintiff, reviewed the bank statements. When she advised him on or about March 8, 1995 that the payment to the insurer had not been made, the Bank's negligence was not apparent to him. The plaintiff learned, in a telephone conversation with a bank employee on September 26, 1995, that the reason the insurer did not receive the payments was that the Bank had "inadvertently" marked the cheques as NSF. The plaintiff says that he pursued the matter further and met with a Bank representative on February 7, 1996. He says that it was at this meeting that he learned the balance of the material facts of the Bank's negligence. He quotes from and attaches a "without prejudice" memorandum. The Bank objected to its inclusion in evidence. The plaintiff says that an exception to privilege exists when the privileged document is not referred to as evidence of liability or a weak cause of action. The plaintiff argues that the memorandum should be admissible as evidence of when the plaintiff discovered the material facts. The material facts seem to be the possibility of alleging that the Bank had established a course of conduct of extending overdrafts on which the plaintiff might rely. My decision does not turn on what transpired at this February meeting.

[28] The plaintiff says that on November 23, 1994, he became totally disabled and unable to work as a Real Estate Broker due to depression and other health problems. The plaintiff includes in evidence a copy of his psychiatrist's "Attending Physician's Statement", indicating a primary diagnosis of depression and that the plaintiff was totally disabled (unable to do any work) from November 24, 1994. His evidence is that he remained disabled until February 25, 2002. He says that his health issues hindered his ability to assess the Bank's liability. The Bank notes that the plaintiff indicated that he was not disabled in a March 1995 Application for Reinstatement provided to the insurer.

I note, however, that the insurer advised the plaintiff that it denied the application as a result of a change in his insurability.

[29] In my view, regardless of what the plaintiff learned during the February 7, 1996 meeting, there is a genuine issue of material fact as to when, given the evidence before me as to the plaintiff's mental state, he knew or ought reasonably to have known by the exercise of due diligence the facts upon which his claim against the Bank is based. This is an issue for the trial judge to resolve. The defendant's motion for summary judgment is accordingly dismissed.

Rule 21.01(1)(a)

[30] Rule 21.01(1)(a) provides that a party may move, before trial, for the determination of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in substantial saving of costs.

[31] No evidence is admissible on a motion under Rule 21.01(1)(a) except with the leave of the judge or consent of the parties. Rule 21.02 provides that a motion under Rule 21.01 shall be made promptly and that a failure to do so may be taken into account by the court in awarding costs.

[32] I do not need to consider whether evidence should be admissible on this motion under Rule 21.01(1)(a) or whether I would be justified in dismissing the Bank's motion because of its delay. It has been conceded that what is at issue is the applicability of the discoverability principle and that is a question of fact, not law. The motion is not appropriately brought under Rule 21.01(1)(a) and is dismissed for that reason.

(4) Are the claims of breach of contract, misrepresentation and negligence advanced by the plaintiff in his personal capacity frivolous and vexatious or an abuse of process?

[33] Under Rule 21.01(3)(d), a defendant may move before a judge to have an action stayed or dismissed on the ground that the action is frivolous or vexatious or is otherwise an abuse of process of the court. Rule 21.02 requires that such a motion be brought promptly and that failure to do so may be taken into account by the court in awarding costs.

[34] Under Rule 25.11, the court may strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading or other document: (a) may prejudice or delay the fair trial of the action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of the process of the court.

[35] Relief under Rule 21.01(3)(d) is granted to a moving party in only the clearest of cases. A plaintiff who asserts a proper cause of action where there is some evidence upon which the case can be built should not be foreclosed: *Temilini v. Ontario Provincial Police (Commissioner*) (1990), 73 O.R. (2d) 664 (C.A.). The test under Rule 25.11 is the test applied under Rule 21.01(b), namely whether it is "plain and obvious" that there is no reasonable cause of action, or some higher test: *Kellogg Co. v. Imperial Oil Ltd.* (1996), 29 O.R. (3d) 70 (S.C.J.).

[36] The Bank says that the action is frivolous and vexatious because the account was opened in the name of VA Realty and the dishonoured cheques in question were drawn on the account of VA Realty. The Bank says there was no privity of contract or duty of care owed by the Bank to the plaintiff.

[37] The plaintiff argues that there is precedent for lifting the corporate veil in cases where the tort victim has conducted his personal business through a corporate entity, and that a shareholder may have a personal cause of action in tort where he has been directly and individually harmed, even though the corporation may have a separate and distinct cause of action. In *Royal Bank of Canada v. Roland Home Improvements Ltd.,* [1994] O.J. No. 2149 (C.A.), leave to appeal refused (1995), 87 O.A.C. 319, the trial judge found that the Royal Bank had failed to clear corporate cheques written on a corporate account and that, in doing so, it had breached an agreement with the principal shareholder of the corporation. The Court of Appeal held that in assessing damages in such an instance, the corporate veil should have been ignored. The Court of Appeal noted that the appellants had referred them to cases in tort where the court had pierced the corporate veil in the interests of the tort victim who had conducted his personal business through a corporate entity, but noted that in that case it was not necessary to do so because the corporation and the individuals were parties to the action. In the case before me, the plaintiff pleads that he opened the bank account in question through VA Realty, that he sought and was given overdraft protection and that the Bank breached that agreement in dishonouring the cheques in question.

[38] In *Martin v. Goldfarb* [1998] 41 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. refused, the trial judge found that an individual had breached his fiduciary duty to several corporations and their controlling shareholder. The Court of Appeal held that the shareholder could claim for the losses that were personal to him, but not the losses of the corporation. In the case before me, the plaintiff argues that the loss of the disability benefits is personal to him and that he can therefore claim for them.

[39] The plaintiff notes that he also alleges misrepresentation by the Bank with respect to the provision of overdraft protection.

[40] In *Walters v. Royal Bank of Canada*, [2000] O.J. No. 702, the Court of Appeal heard an appeal from a plaintiff whose claim was struck by the motions judge as disclosing no reasonable cause of action. The plaintiff in that case was the principal and directing mind of his corporation. He claimed against his corporation's banker for negligent misrepresentation, alleging that the bank had told him that it intended to continue to provide operating funds to the corporation when it had in fact decided to terminate the line of credit after the Christmas sales season. The Court of Appeal held that the individual was entitled to allege any loss he suffered in his personal capacity as a result of any misrepresentation that may have been made to him by the bank.

[41] Based upon the affidavit of the plaintiff, there is some evidence upon which the case can be built. In my view, while the plaintiff's action is not an easy one, it is not frivolous, vexatious or an abuse of process and I dismiss the motion on that basis, without the need to consider the Bank's considerable delay in bringing the motion.

[42] I note that there was considerable discussion about whether a Verification Agreement, which the plaintiff was questioned about during his discovery and which was included in the Bank's Affidavit of Documents, could be relied upon by the Bank as evidence in this motion. In its Notice of Return of Motion, the Bank indicated that it would rely on documentary evidence consisting of an Affidavit and the exhibits attached thereto, the transcripts of the examinations for discovery of the plaintiff and a

representative of the Bank, the Affidavits of Documents of the parties and the documents therein and a compendium of key documents and the Notice of Discontinuance of VA Realty Ltd. The agreement in question was not an exhibit to the affidavit filed by the Bank in support of this motion. Nor was it referred to in the Bank's factum. The plaintiff complained of ambush, and that what the Bank sought to rely upon as evidence was not permissible under Rule 39.04(1) or Rule 31.11(1). Ultimately, I concluded that nothing turned on the admissibility of that agreement. Even if admitted, there was still some evidence on which the plaintiff's case could be built. Accordingly, the Bank's motion under Rules 21.01(3) and Rule 25.11 must fail. Without deciding the issue, I will comment that while, from the Bank's perspective, the practice it adopted in this instance is perhaps cost efficient, it makes it very difficult for the presiding judge to evaluate the evidence.

(5) Security for Costs.

[43] While I have concluded that leave should not be given to the Bank at this stage to bring its motions for security for costs or summary judgment, I have considered the merits of its motion for security for costs, and my analysis is set out below.

[44] The Bank seeks costs because the plaintiff is impecunious.

[45] Rule 20.05(3)(b) provides that where on a motion for summary judgment an action is ordered to proceed to trial, the court may give such directions or impose such terms as are just, including an order for security for costs.

[46] Rules 56.01(1)(d) and (e) provide as follows:

> (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to play the costs of the defendant or respondent;

> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

[47] Rules 56.01(d) and (e) have no application in the present case. As to (d), the plaintiff is an individual and not a corporation. As to (e), a finding that the action is frivolous and vexatious is a pre-condition and I have concluded that the action is not frivolous and vexatious.

[48] The plaintiff's evidence is that he is impecunious and that if ordered to pay costs, he will be denied his day in court. I have determined that the plaintiff's claims, based on breach of contract, misrepresentation and negligence are not frivolous and vexatious, that there is a genuine issue for trial on the limitation defence now pleaded by the Bank and that the bankruptcy issues raised by the Bank do not defeat the plaintiff's claim at this stage. While there are clearly very significant challenges to the plaintiff's action, given those determinations, it would not be just for me to award security for costs under Rule 21.01(3)(d) when as a result the plaintiff would be unable to proceed to trial.

(6) Bankruptcy Issues

[49] The plaintiff made a personal assignment into bankruptcy on April 19, 2000, before the lawsuit was commenced. He was discharged in early January 2001. In June 2003, after the lawsuit was commenced, the trustee assigned to the plaintiff his causes of action against the Bank and the disability insurer.

[50] The parties agree that pursuant to s.68(1) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c.B-3,in effect at the applicable time (the "BIA"), "salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt" did not vest in the trustee on an assignment into bankruptcy and are not divisible among his creditors.

[51] The Bank says that the plaintiff's claim against the Bank for damages, while quantified by reference to lost disability benefits, are not "salary, wages or other remuneration for the services being performed by a bankrupt for a person employing a bankrupt" within the meaning of the BIA and therefore vested in the trustee on the plaintiff's bankruptcy. It further contends that the assignment of the causes of action to the plaintiff following his discharge were ineffective.

[52] The Bank did not indicate in its Notice of Return of Motion, its factum or its oral submissions what Rule it relied on in bringing this motion. I have inferred from the reference to the phrase "abuse of process" in its Notice of Return of Motion and the fact that it asks in its Notice of Return of Motion for a stay or dismissal of the plaintiff's action that the motion is brought under Rule 21.01(3)(d). This is consistent with the plaintiff's understanding, as reflected in his factum.

[53] The question before me, therefore, is simply whether the plaintiff's claims against the Bank are frivolous and vexatious because of the reasons cited by the Bank. I have concluded that they are not, and dismiss the motion as it relates to the bankruptcy issues on that basis, and without regard to the fact that the motion was not promptly brought, as Rule 21.02 requires.

[54] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, the court held that a right of action for damages for wrongful dismissal constituted salary, wages or other remuneration within the meaning of the BIA. It commented that the damages award filled the pocket that would otherwise have been filled with salary or wages and was therefore the functional equivalent. It also noted that several courts have construed the phrase broadly, and that it has been held to include disability benefits. While provided as a result of employment, disability benefits are customarily payable by an insurer and not an employer. VA Realty may have paid the plaintiff's disability premiums as an incident of employment. Having regard to *Wallace v. United Grain Growers,* it can hardly be said that a claim asserted by a discharged bankrupt for damages, calculated

by reference to disability benefits, which were denied as a result of the Bank's alleged breach of contract, misrepresentation or negligence, is frivolous and vexatious.

[55] Having regard to this conclusion, it is not necessary to consider the parties' submissions as to whether it is plain and obvious that the assignment by a trustee to a discharged bankrupt of a cause of action started by the bankrupt following his assignment into bankruptcy must fail.

(7) Fixing of Costs.

[56] I see no basis for fixing the Bank's costs of the action to date against the plaintiff at this time.

CONCLUSION

[57] The Bank has leave to amend its Statement of Defence in accordance with Schedule "A" of its Notice of Return of Motion. The Bank shall pay the plaintiff up to $8,000 to compensate it for costs incurred as a result thereof, such amounts to be paid following trial upon the Bank being furnished with an actual bill of costs and supporting docket entries confirming that such costs have been incurred.

[58] The balance of the Bank's motion is dismissed.

[59] The plaintiff shall be entitled to add Mr. Hutcheon as a party defendant and amend its Statement of Claim in accordance with the draft found at Exhibit "A" to the affidavit of the plaintiff.

[60] If the parties are unable to agree as to costs, the plaintiff may provide brief written cost submissions, together with a draft bill of costs prepared in accordance with the costs grid and setting out counsel's year of call and actual hourly rate and particulars of any special fee arrangements in place. The Bank may provide its brief written submissions in response thereto within ten days after receipt of the plaintiff's submissions. No reply submissions shall be provided.

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Hoy J.

Released:

COURT FILE NO.: 01-CV-215748CM3
DATE: 20040211

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

VITO AUCIELLO and VA REALTY LTD.

Plaintiffs

- and –

THE ROYAL BANK OF CANADA

Defendant

REASONS FOR JUDGMENT

Hoy J.

Released: February 11, 2004