

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
ROBERT BONISTEEL	)	<i>Cynthia L. Spry and Julia Webster for the</i>
	)	Plaintiff
Plaintiff)	
)	
- and -)	
)	
)	
INVESTMENT PLANNING COUNSEL, IPC	)	<i>Meredith Hayward for the Defendants</i>
INVESTMENT CORPORATION, IPC	)	Investment Planning Counsel, IPC Investment
SECURITIES CORPORATION, NATALIE	)	Corporation, IPC Securities Corporation,
FLETCHER, AKA NATALIA AZULAY,	)	Natalie Fletcher, aka Natalia Azulay and Ron
RON GRAHAM, ACTUBEN CONSULTING	)	Graham
INC., BRIAN JENKINS, MACDONALD)	
PORTER DREES, BARRISTERS AND	)	<i>Murray Stieber for the Defendants Actuben</i>
SOLICITORS, and MARY J. E. MARTIN	)	Consulting Inc. and Brian Jenkins
)	
Defendants	)	<i>Michael R. Kestenberg for the Defendants</i>
	)	Macdonald Porter Drees, Barristers and
	)	Solicitors, and Mary J. E. Martin
)	
	)	HEARD: January 26, 2016

PERELL, J.

REASONS FOR DECISION

- [1] There are several summary judgment motions before the court.
- [2] In the action, the Plaintiff, Robert Bonisteel, claims that he suffered financial losses because he was misled to believe that he could realize his future career and retirement plans by: retiring as a high school teacher; commuting his pension entitlement under the Teachers' Pension Plan ("TPP"); beginning a new career as a consultant; and establishing an Individual Pension Plan ("IPP").
- [3] In his action, Mr. Bonisteel sues: (a) the investment advisors; i.e., Ron Graham, Natalie Fletcher, aka Natalia Azulay, Investment Planning Counsel, IPC Investment Corporation, and IPC Securities Corporation; (b) the actuaries; i.e., Actuben Consulting Inc. and Brian Jenkins, that designed the IPP; and (c) the lawyers; i.e., Macdonald Porter Drees, Barristers and Solicitors, and Mary J. E. Martin, the lawyer at the firm that did the legal work to create a corporation for Mr.

Bonisteel's IPP.

[4] Mr. Bonisteel's claims sound in: (1) negligence; (2) breach of contract; (3) negligent misrepresentation; (4) breach of fiduciary duty; and (5) unjust enrichment.

[5] The actuaries and the lawyers respectively brought summary judgment motions to have Mr. Bonisteel's action and the cross-claims dismissed. The Defendants argued that Mr. Bonisteel had suffered no damages and that his claims were statute-barred. Mr. Bonisteel brought a cross-motion for a partial summary judgment on liability against all the Defendants. If Mr. Bonisteel's summary judgment was successful, then the amount of his damages, if any, would remain to be determined at a trial.

[6] The motions came before the court on January 26, 2016. Preliminary to the argument of the motions, I made the following endorsement:

There are three groups of defendants; namely: the investment advisors; the actuaries; and the lawyers. The actuaries and the lawyers bring motions for summary judgment. A review of their factums indicates that they make two arguments: (1) that the plaintiff's claims are statute-barred; and (2) that the plaintiff suffered no damages. The plaintiff brings a cross-motion for summary judgment on the issues of liability against all three groups of defendants. The plaintiff sought an adjournment of the motions on the grounds that he was taken by surprise by the limitation period argument. The defendants opposed the adjournment, but the parties ultimately agreed that the motions could proceed today on the basis that the defendants' limitation period arguments would be adjourned *sine die* pending the determination of the competing motions. I shall remain seized of the action if the limitation issue is brought on for argument. Order accordingly.

[7] The summary judgment motions were argued, and I reserved judgment. While the motions were under reserve, I received correspondence advising me that Mr. Bonisteel had agreed to discontinue the action without costs against all the Defendants except the lawyers. Thus, the extant motions are Mr. Bonisteel's motion for summary judgment against the lawyers and the lawyers' summary judgment motion.

[8] For the reasons that follow: (1) I dismiss Mr. Bonisteel's summary judgment motion; and (2) I dismiss the "no damages" branch of the lawyers' summary judgment motion. There are numerous genuine and serious issues for trial, and it is not in the interests of justice to determine this matter summarily for either side.

[9] In *Hryniak v. Mauldin*, 2014 SCC 7, although the Supreme Court of Canada commanded a very robust summary judgment procedure, it did not foreclose lower courts from simply dismissing the summary judgment motion and ordering that the action be tried in the normal course. Indeed, where there are genuine issues for trial and the lower court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily: *Mitusev v. General Motors Corp.*, 2014 ONSC 2342 at para. 79; *Gon (Litigation Guardian of) v. Bianco*, 2014 ONSC 65 at paras. 41-47; *Lopez v. Dr. M. Douris Dentistry Professional Corporation*, 2015 ONSC 3675.

[10] Because I think the case at bar is not appropriate for a summary judgment, I shall make no binding findings of fact, and, rather, I shall discuss the factual background very briefly and only so far as necessary to explain why I am dismissing the summary judgment motions and, subject to the resumption of the limitation period branch of the lawyers' motion, leaving it to a

trial judge to determine the dispute between the parties.

[11] In 1999, Mr. Bonisteel, who had been a high school physical education teacher for 29 years with the Ottawa Carleton District School Board, attended a retirement planning seminar given by Ron Graham, an investment advisor at Independent Planning Counsel (“IPC”). At the time, Mr. Bonisteel was enrolled with the TPP. After the seminar, Mr. Bonisteel spoke to Mr. Graham and his colleagues at IPC, Ian Roberts and Natalie Azulay (now Natalie Fletcher). Mr. Bonisteel alleges that they convinced him to retire as a teacher, commute his pension entitlement, and establish an IPP for his new career as an education consultant.

[12] In March 2001, on Mr. Bonisteel’s behalf, Mr. Roberts retained a law firm, Macdonald Porter Drees, and Ms. Martin, to incorporate a company in order to establish the IPP. As he had done in the past for other clients, Mr. Roberts sent the law firm an IPP application form along with a cheque in the sum of \$550.00 to incorporate the company. The law firm incorporated the company, and Ms. Martin held a share in the company at incorporation that was subsequently transferred to Mr. Bonisteel. The law firm rendered two accounts on or about March 14, 2001 and April 19, 2004 for around \$1,300.00 in total. Thereafter, there was no contact between Mr. Bonisteel and the law firm until he sued them.

[13] Mr. Bonisteel alleges that he was never told why Ms. Martin was designated as the owner of the company at the time of the implementation of the IPP, but he now understands that it was designed to avoid difficulties with the Canada Revenue Agency (“CRA”) by deceiving it into believing that his IPP satisfied the primary purpose test, which is an essential ingredient for a lawful IPP. Mr. Bonisteel alleges that he was drawn into a scheme developed by the investment advisors, the actuaries, and the lawyers to obtain the fees associated with implementing and then managing the IPP.

[14] In November 2001, the CRA wrote Mr. Bonisteel and warned him that if it was determined that his IPP did not meet the “primary purpose test,” then the IPP could be retroactively revoked with severe tax consequences. Relying on the advice of his various advisors, Mr. Bonisteel, nevertheless, went ahead and established an IPP.

[15] Almost a decade passed. By letter dated March 7, 2011, the CRA wrote Mr. Bonisteel to advise him that it was considering issuing a Notice of Intent to Revoke his IPP.

[16] By letter dated February 7, 2013, the CRA advised Mr. Bonisteel that it intended to revoke his IPP.

[17] On June 27, 2013, a few months after the letter from the CRA, Mr. Bonisteel commenced his action against the investment advisors, the actuaries, and the lawyers. As noted above, the action progressed to the state that the lawyers brought a motion for summary judgment, and Mr. Bonisteel brought a cross-motion for a summary judgment on liability.

[18] To oversimplify, Mr. Bonisteel’s case against the lawyers is that they breached their duties to him to enrich themselves, and he asserts that had he been properly advised, then he would have retained his TPP. The gist of Mr. Bonisteel’s complaint against Ms. Martin is set out in para. 71 of his factum, which states:

71. Ms. Martin allowed herself to be used as an instrument to facilitate dubious transactions to the ongoing benefit of her firm and the detriment of Mr. Bonisteel. She acted throughout in a conflict of interest and did nothing to fulfill the fiduciary obligations she owed to Mr. Bonisteel. She in

effect simply followed the orders of Mr. Jenkins and Mr. Roberts. If Ms. Martin had applied an ounce of good judgment and scrutinized what she was asked to do, the IPP application would not have been made on the basis of false information. If the IPP had been made with properly completed forms, it never would have been approved.

[19] The lawyers deny all of the allegations. Put simply, they submit that Ms. Martin honestly provided legal services and implemented a lawful IPP that satisfied all regulatory requirements and all the business and planning decisions were made by Mr. Bonisteel who wished to establish an IPP and who has suffered no damages from having done so.

[20] Mr. Bonisteel's IPP continues to exist. It has not been revoked, nor has he been re-assessed. He acknowledges that it is unlikely that the CRA will revoke his plan or re-assess him at this juncture. However, he submits that had there been no wrongdoing, he would never have implemented an IPP, and he estimates that he has suffered over \$400,000 in damages, including the difference in value between the IPP and the TPP.

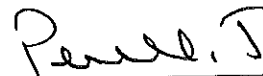
[21] With respect to Mr. Bonisteel's motion, there are genuine issues for trial about the liability, if any, of the lawyers, and it would not be just to resolve those issues summarily.

[22] With respect to the lawyers' summary judgment motion, the question of whether or not Mr. Bonisteel suffered damages cannot be determined without also determining whether or not the lawyers are liable for one or more of the various causes of action pleaded against them, but I have decided that a summary determination of liability (or of no liability) is inappropriate. It follows that the first branch of the lawyers' summary judgment motion should be dismissed.

[23] In contrast to the situation for Mr. Bonisteel's summary judgment motion and the lawyers' summary judgment motion about damages, the lawyers' remaining argument that Mr. Bonisteel's claims are statute-barred is a technical defence, the merits of which can be decided independent of the merits of Mr. Bonisteel's various causes of action.

[24] The parties may arrange a date for a case conference to schedule a date for the hearing of the balance of their summary judgment motion.

[25] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the lawyers' submissions within 20 days of the release of these Reasons for Decision followed by Mr. Bonisteel's submissions within a further 20 days. Given the divided success on the motions, my current inclination is to order costs in the cause.



Perell, J.

CITATION: Bonisteel v. Investment Planning Counsel, 2016 ONSC 1085
COURT FILE NO.: CV-13-483629
DATE: 20160211

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROBERT BONISTEEL

Plaintiff

– and –

INVESTMENT PLANNING COUNSEL, IPC
INVESTMENT CORPORATION, IPC SECURITIES
CORPORATION, NATALIE FLETCHER, AKA
NATALIA AZULAY, RON GRAHAM, ACTUBEN
CONSULTING INC., BRIAN JENKINS, MACDONALD
PORTER DREES, BARRISTERS AND SOLICITORS,
and MARY J. E. MARTIN

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 11, 2016