# COURT OF APPEAL FOR ONTARIO

CITATION: York University v. Markicevic, 2018 ONCA 893
DATE: 20181108
DOCKET: C62351



Feldman, Pepall and Pardu JJ.A.

BETWEEN

York University

Plaintiff (Respondent)

and

Michael Markicevic, Janet Fleming, Mima Veronica Markicevic, Aleeyah Apparel Inc., operating as A-Tech Construction and Design Inc., Alleyah Inc., AFC Inc. operating as Arsenal Facility Consulting Inc., Toronto Engineering Company, Guga's International, Canadian & American Concrete Renovation & Drain-Layer Ltd., Roman Ritacca, Luigi Lato, Phil Brown, Riaz Jadavji, Helen Saoulli Georgiou, Vasos Georgiou, George Saoulli, Georgia Saoulli, Guram Sekhniashvili, Gia Sekhniashvili, John Doe #1, John Doe #2, John Doe #3, Jane Doe #1, Jane Doe #2, Jane Doe #3

Defendants (Appellant)

Jamie Spotswood and Daniel Zacks, for the appellant

William C. McDowell, Brian Kolenda and Laurel Hogg, for the respondent

Heard: October 16, 2018

On appeal from the judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated June 6, 2016, with reasons reported at 2016 ONSC 3718, 33 C.C.E.L. (4th) 26.

**Pardu J.A.:**

## A. BACKGROUND

[1] The appellant, Michael Markicevic, misappropriated nearly a million dollars from York University ("York"). At the time, he was the Assistant Vice President of Campus Services and Building Operations.

[2] Between 2007 and 2009, he devised a scheme to falsely invoice the university for work that was not actually done at the university. York paid $374,983.50 for these invoices and the appellant and his co-conspirators pocketed the cash.

[3] In 2009 the appellant inflated a quote for drain repair. The excess was applied to personal home improvements for the appellant and cash was also distributed to the appellant and his co-conspirators. York lost $515,461 as a result of this scheme.

[4] The appellant also had York employees perform work at his personal residences in 2008 and 2009. York paid these employees $23,000 for their time on these jobs.

[5] Finally, the appellant charged York for $61,241 worth of materials that he purchased for his own use.

[6] On February 1, 2010, before York was aware of the extent of the appellant's dishonesty, it terminated the appellant's employment without cause

and negotiated and finalized a severance agreement with him that contained mutual releases. During those negotiations, the appellant vehemently denied any wrongdoing. York agreed to pay him 36 months' gross salary, amounting to $696,166. The appellant's continued employment had become untenable because York had to conduct an investigation into the rumours circulating about his financial impropriety and because of the complaints concerning his bullying behavior.

[7] As a result of the investigations undertaken after the appellant's departure, York learned of the full extent of the appellant's misconduct and sued to set aside the releases, recover the money stolen and for repayment of the severance package.

[8] Following a 25-day trial, the trial judge found in favour of York and rescinded the severance agreement including the releases. She held that, as a fiduciary, the appellant had a positive obligation to disclose his fraudulent activity before he entered into the severance agreement. She also found that the releases and the severance agreement were obtained by fraudulent misrepresentation. The appellant had materially misrepresented his innocence to York and if York had known of the fraud, they would not have terminated him without cause, paid him, and given him a release. In addition, the trial judge made a factual finding that January 29, 2010 was the earliest date York could

have discovered its potential claim and, accordingly, its claim was not barred by the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B.



## B. ARGUMENTS ON APPEAL

[9] The appellant argues that the trial judge erred in concluding that his misrepresentations of innocence induced York to enter into the severance agreement and to release the appellant from any claims York might have against him.

[10] The appellant also argues that York's claim was barred by the *Limitations Act, 2002*. York issued the statement of claim on January 26, 2012. The appellant argues that York knew of the allegations of theft and fraud by the appellant as of January 19, 2010 and that, accordingly, the claim was issued after the expiry of the two-year limitations period.

## C. TRIAL JUDGE'S FINDINGS

### (1) Fraudulent misrepresentation

[11] The trial judge found at paras. 145-147 that the appellant had intentionally misled York when, just before the severance agreement was signed, he said he was innocent of any wrongdoing:

> [W]hen one party has induced another party to enter into an agreement by making a material misrepresentation, the principal remedy is rescission. A misrepresentation, to be material, must relate to a matter that would be considered by a reasonable

> person to be relevant to the decision to enter the agreement in question. It is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it does not matter if the misrepresentation was only one of several factors contributing to the plaintiff's decision.
>
> Mr. Markicevic made a material misrepresentation to both Mr. Brewer and Ms. Lewis when he denied any wrongdoing. There is no question that if Mr. Brewer had known of any [of] Mr. Markicevic's fraudulent activities, York would not have terminated him without cause, would not have paid him a large severance (or any severance at all), and would not have granted him the Release.
>
> The Severance Agreement, including the Release, must therefore be set aside.



**(2) Limitations period**

[12] The trial judge addressed the limitations issue in her reasons at paras. 148-151:

> Mr. Markicevic submits that York's action is barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24. The action was commenced on January 26, 2012. Mr. Markicevic argues that York cannot meet its burden of proving that it did not know, or could not have known with reasonable diligence, of the facts giving rise to the claim against Mr. Markicevic prior to January 26, 2010.
>
> Mr. Markicevic relies on the notes of Noel Badiou, York's Director of Human Resources. Those notes reveal that by mid-December 2009, various York employees had approached Mr. Badiou to complain about Mr. Markicevic's bullying management style. Some of those complaints also included allegations of financial impropriety. However, none of the potential witnesses were willing to come forward and go on the

> record at that point. Mr. Badiou continued to speak to potential witnesses and gather information through the end of December and into the first three weeks of January.
>
> It was not until January 29, 2010 that the Whistleblower went on the record, met with Ms. Lewis and brought some documents to support the allegations of financial impropriety.
>
> In my view, that was the earliest date that York can be held to have "discovered" a potential claim against Mr. Markicevic, as defined in s. 5(1)(a) of the *Limitations Act*. Accordingly, the claim is not statute barred.



## D. ANALYSIS

### (1) Fraudulent misrepresentation

[13] By January 27, 2010 the appellant had heard of the circulation of rumours that he was having work done on his personal residences by York employees. He attributed these suggestions to animus on the part of the union for York tradespersons and in a letter copied to Brewer, his supervisor, described the allegations as unfounded, libelous, slanderous and "completely in line with previous unfounded accusations" emanating from the union. The appellant met with Brewer on January 27, 2010 and reacted with an attitude of absolute denial and "almost outrage".

[14] On January 28, 2010, the appellant wrote to Brewer, York's counsel and York's President, responding vigorously to the rumours:

I will bring to your attention that it appears slander and libel seem to be common practice at York. General community sentiment is that the University is inclined to act upon such rumour and innuendo as it does not possess the courage to confront such issues in an open, objective and impartial manner.

While to date I do not share this view, I am left with being accused, my reputation and integrity questioned and my career jeopardized at all levels of both York's organizational structure and the community at large.

I would ask you to consider the organizational environment such unsubstantiated claims create and the negative impact they are having on myself on both a personal and occupational level.

…

As for the misallocation of University resources, I will remind you that one of my first management initiatives at York was to work with Procurement to vastly improve and tighten Procurement policy and procedures within CSBO.

The establishment of a separate and objective financial control process within CSBO has received numerous accolades from our Audit department.

My willingness to effectively steward and manage University resources in a consistent and prudent manner with the upmost of integrity, I suggest to you, is unquestionable.

While I understand, given the sense of entitlement that many members of the York community feel they may have relative to what they deem to be their rights, I am prepared to respectfully suggest to you that these rights do not include the systematic unsubstantiated assassination of both my character and livelihood.

[15] The appellant does not argue that these were not fraudulent misrepresentations. Rather, he argues that York could not have reasonably relied on these to enter into the severance agreement.

[16] The allegations came to light when several employees spoke to Badiou, York's Director of Human Rights[1]. This was a position akin to an ombudsman. There was an expectation that confidentiality would be preserved unless the individual speaking to him agreed to waive that confidentiality.

[17] Badiou met with the President to discuss the allegations on December 17, 2009. He summarized them in his notes from that meeting:

> Dec 17/09
>
> Mtg w/ Pres re Internal/Informal investigation
>
> - Now met w/spoke to about dozen people
> - some union
> - some managers
> - some former employees
>
> …
>
> 3) Allegation of Theft/Fraud
>
> - One person has indicated that Mike has had staff purchase security and other electronic equipment by the University to be installed at his house or other properties.

[1] The trial judge misdescribed the position as Director of Human Resources.

- Another person has said that Mike has ordered pain [sic] and other supplies paid by the University that a staff member was sent to his home to paint entire house – the invoices were noted as work at Glendon.

- Three people allege that in March 08 a bill was approved by Mike for rekeying of Ross Bldng – say this never done – one says was for work done in his home – another says company at the address is a Kitchen Cabinetry place. One person was not prepared to sign off as it was single source because emergency. All say not done and suspicious that either this is Mike's con company or it was for work done in his home.

- Search reveals

    1) no registered company at that address.
    2) Physical address has a Kitchen Cabinet business and 411 reverse address lookup reveals owner as C Adam and V. Georgvou.

[18] Badiou left the meeting with a plan to see if further information or details could be provided to "better assess and determine … what might be going on". Badiou met again with York's President on January 17, 2010 and with both York's President and Brewer on January 19, 2010, but no additional details or additional substantiation were available by that time.

[19] On January 29, 2010, Lewis, counsel for York, met with one of the individuals, the "whistleblower" who had made allegations against the appellant. The whistleblower was now prepared to come forward with a signed statement and also provided documents to support the allegations of financial misfeasance

by the appellant. Lewis reviewed the allegations with the appellant and he angrily denied them.

[20] On February 1, 2010, Brewer told the appellant he did not believe any of the allegations against him. He testified that as of February 1 he still "firmly believed in the integrity" of the appellant. He testified that he would not have approached the severance negotiations in the same way had he known of the dishonesty.

[21] A contracting party who is induced to enter into a contract as a result of a fraudulent misrepresentation is entitled to rescission, and restoration of the benefits conferred on the other party to the contract: S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at para. 421. The question of whether a contracting party did in fact rely on the misrepresentation, at least in part, to enter into the contract is "a question of fact to be inferred from all the circumstances of the case and evidence at the trial": G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 291.

[22] The trial judge's finding that York was induced to enter into the severance agreement by the appellant's fraudulent misrepresentation that he was innocent of any financial dishonesty is supported by the evidence and no palpable or overriding error has been shown. It is difficult to imagine circumstances in which

an employer acting responsibly would pay three years severance pay to an employee it knew had misappropriated large sums of money from it.



**(2) Limitations period**

[23] Section 5(1) of the *Limitations Act, 2002* provides:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (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 the person against whom the claim is 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; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[24] The appellant argues that the trial judge focused only on the date on which York knew that the loss had occurred, and that she did not consider that s. 5(1) required her to consider the earliest of two dates: the date York knew the loss had occurred, and the date on which "a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known" of the loss.

[25] I do not agree. Consideration of both branches of this test is implicit in the trial judge's articulation of the appellant's argument at trial that "York cannot meet its burden of proving that it did not know, or could not have known with reasonable diligence, of the facts giving rise to the claim" (emphasis added).

[26] The appellant further argues that York knew it had a claim against the appellant as early as December 17, 2009 when Badiou informed York's President of the allegations by several employees, and at the latest when Badiou went to the President on January 19, 2010 to report in general terms the allegations reported to him about financial misfeasance by the appellant. However at that stage, neither Badiou nor the President knew York had suffered a loss or that the appellant was the person responsible. It had only allegations by persons unwilling to come forward publicly, which were firmly denied by the appellant. These allegations, as noted by the trial judge, were limited to "the use of door locks, hardwood flooring and paint in [the appellant's] house", valued at $23,320. The other fraudulent schemes were separate frauds only uncovered much later.

[27] The question of whether a claim was discovered and the limitations period triggered is a question of mixed fact and law entitled to deference absent palpable and overriding error: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38. As indicated in *Longo*, at para. 44, certainty of a potential defendant's responsibility for an act that caused the loss is not required.

Rather, what is required are *prima facie* grounds to infer that the defendant did the act that caused the loss. I agree with the trial judge that York did not have those *prima facie* grounds before January 29, 2010. The trial judge's conclusion that the claim was not discovered before two years preceding the date the statement of claim was issued was reasonably available to her on the evidence and is not affected by palpable and overriding error.



**(3) Other arguments**

[28] Given that these two bases are sufficient to sustain the trial judge's decision, it is not necessary to consider the appellant's other argument that the trial judge erred in concluding that a fiduciary, like the appellant, was bound to look after York's interests while negotiating the severance agreement and secondly, his argument that the language of the release was broad enough to release the appellant from responsibility for the misappropriations. Here, even if the release was broad enough to bar any claim by York for recovery of the money misappropriated, the release was an integral part of the agreement induced by the misrepresentations as to his honesty. Once that agreement and release were rescinded, York was no longer barred from recovery. This result does not depend on whether or not the appellant was a fiduciary.

[29] For these reasons I would dismiss the appeal.

## E. COSTS

[30] The trial judge awarded costs of the trial to York on a full indemnity basis. In light of the appellant's dishonesty I would award costs of the appeal to York on the same basis. I would award costs of the appeal to York in the sum of $105,527.

Released: "K.F." Nov 8 2018

"G. Pardu J.A."
"I agree. K. Feldman J.A."
"I agree. S.E. Pepall J.A."