CITATION: Garcia v. 1162540 Ontario Inc., 2013 ONSC 6574
DIVISIONAL COURT FILE NO.: 295/12
DATE: 2013-12-11

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Michael Garcia, Plaintiff (Respondent)

- v. -

1162540 Ontario Inc., (c.o.b. as Venice Fitness) and Jack Eghbali, Defendants (Appellants)

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *F. Scott Turton,* for the Defendants (Appellants)

Shelley B. Brown, for the Plaintiff (Respondent)

HEARD: October 22, 2013

ENDORSEMENT

[1] The defendants, 1162540 Ontario Inc. ("116") carrying on business as Venice Fitness and Jack Eghbali ("Eghbali") (collectively, the "defendants"), appeal an order dated May 8, 2012 of Deputy Judge Prattas of the Toronto Small Claims Court (the "Order"). The Order granted judgment against each of them in favour of the plaintiff Michael Garcia (the "plaintiff") in the amount of $21,475.67 for wrongful dismissal and $3,524.33 on account of two unpaid invoices for his services, plus costs, interest and disbursements.

[2] This action was commenced by a statement of claim in the Superior Court and transferred on consent of all parties to the Small Claims Court where the plaintiff's claim was limited to $25,000.

Background

[3] The plaintiff worked at "Venice Fitness" for 12 years, principally the Scarborough location. The plaintiff had no written employment agreement. He was paid biweekly after submitting an invoice setting out an agreed fixed salary and a calculation of commissions at an agreed percentage for membership sales.

[4] This action was triggered by a failure to pay the plaintiff's invoice of August 1, 2007. After Eghbali avoided speaking to the respondent and then left for Montreal, the plaintiff took $2,700 from the membership cash receipts and stopped reporting for work.

[5] After Eghbali returned from Montreal, the parties met in the presence of a policeman. The plaintiff returned the cash expecting to receive payment of his invoice. The defendants have not paid the invoice nor a subsequent invoice dated August 15, 2007.

[6] The Deputy Judge held that: Eghbali was a proper party defendant and was properly sued in his personal capacity; the plaintiff was an employee not an independent contractor; the plaintiff did not resign voluntarily; the withholding of the plaintiff's wages constituted an anticipatory breach of a fundamental term of the contract which amounted to constructive dismissal; and the plaintiff suffered damages comprising the amount of the two invoices and damages for wrongful dismissal equal to eight months pay in lieu of notice.

Standard of Review

[7] The standard of review on an appeal from an order of a deputy judge of the Small Claims Court is set out in *Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10, 19, 25, 27 and 28. On this standard, a decision will be interfered with only if the deputy judge made an error of law or exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error.

Analysis and Conclusions

[8] The defendants raise four grounds of appeal.

Constructive Dismissal

[9] The Deputy Judge held that the plaintiff was constructively dismissed and did not voluntarily resign. He based his determination of constructive dismissal on a finding that Eghbali never had any intention of paying the plaintiff any money and that, as a legal matter, the withholding of an employee's pay constitutes a fundamental breach of the employment agreement resulting in constructive dismissal.

[10] The defendants argue that the Deputy Judge failed to make an express finding that the plaintiff had established the requirement for a finding of a constructive dismissal – demonstration of an intention of the defendants no longer to be bound by the employment agreement. The defendants also say that, in determining the defendants' intentions, the Deputy Judge erred in taking into consideration events that occurred after the plaintiff ceased coming to work after August 6.

[11] I am not persuaded that the Deputy Judge erred in reaching his determination of constructive dismissal.

[12] With regard to the law, the Deputy Judge correctly identified the test for constructive dismissal set out in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 26 – whether a

reasonable person in the same situation as the employee would have felt that the essential terms of the employment agreement were being changed.

[13] With regard to his factual determinations, the Deputy Judge could reasonably conclude that Eghbali was not credible in respect of his explanation for failing to pay the plaintiff on August 1, 2007. The Deputy Judge could also reasonably conclude on the evidence that Eghbali had no intention of paying the plaintiff the monies owed to him. Whether or not he was entitled to take into consideration Eghbali's behaviour after August 6, 2007, particularly the failure to pay him at their meeting on August 15, 2007, there was ample evidence to support that conclusion as of August 6, 2007. Eghbali had failed to pay him, had avoided contact, had left for Montreal and had offered no explanation for his failure to pay. Although the Deputy Judge did not make an express finding that the plaintiff actually felt the terms of his employment agreement were being changed, that is implied in his finding that the plaintiff did not resign voluntarily, which is discussed below. Moreover, I think it is clear that the Deputy Judge found that the objective test for constructive dismissal had been satisfied – whether a reasonable person in the plaintiff's position would have considered that the terms of his employment agreement had been changed. There is ample evidence to support such a finding.

[14] Accordingly, this ground of appeal is dismissed.

Written Statements Introduced in Evidence

[15] The defendants say that the Deputy Judge erred in disregarding two written statements of individuals who were working at Venice Fitness at the time of the plaintiff's departure. They say that, because the plaintiff chose not to cross-examine the deponents, the evidence was unchallenged and should not have been disregarded.

[16] This matter must be addressed in the context of the issue in respect of which the statements were proffered – the defendants' submission that the plaintiff voluntarily resigned on or about August 6, 2007. The defendants submit that these statements demonstrate that the plaintiff voluntarily resigned and that, if the Deputy Judge had given proper weight to the statements, he would have made that determination.

[17] The Deputy Judge expressed skepticism regarding the probative value of these statements in paragraphs 77 and 78 of his reasons. Admission of these statements under Rule 18.02 of the *Rules of the Small Claims Court*, O. Reg. 258/98 does not require the trial judge to accept the statements as probative.

[18] Both of the statements are very general in their nature. Given that, as of August 6, 2007, the plaintiff had not been paid and was entitled to consider that he had been constructively dismissed, care must be taken when addressing the plaintiff's alleged language to the effect that he was quitting or leaving, or not intending to show up for work in the future. Such language can at least as easily support a finding that the plaintiff considered himself constructively dismissed as it can a finding that he resigned voluntarily. Moreover, given Eghbali's actions and the plaintiff's outstanding claims for prior unpaid wages, voluntary resignation at that time would have been contrary to common sense.

[19] In these circumstances, the exact words spoken and the intention of the plaintiff in uttering these words, as well as his emotional state at the time, are critical to an assessment of the weight to be given to the statements as evidence of the plaintiff's alleged voluntary resignation. The Deputy Judge could reasonably prefer the objective evidence, and the evidence of the parties themselves, to the written statements in the absence of oral testimony from the authors of these statements regarding the context in which the statements were allegedly made. His failure to place greater weight on these statements does not rise to the level of a palpable and overriding error. Therefore, I do not accept this ground of appeal.

Proof of Damages & Mitigation

[20] The defendants say that the plaintiff had the onus of proving damages, even though the defendant had the onus of demonstrating an absence of mitigation. The defendants say that the plaintiff failed to demonstrate that he suffered a loss because he failed to testify as to his employment situation after the termination. They say that the Deputy Judge should have drawn an inference that the plaintiff failed to establish a loss.

[21] The plaintiff says that there is an implied requirement on an employer who wrongfully terminates the employment of an employee without notice to pay damages quantified by reference to the appropriate notice period. He says the employer the corporate defendant, is obligated to pay damages in lieu of reasonable notice for such period, subject to any demonstration that the employee failed to mitigate his loss. In this case, the defendants alleged alternatively that the plaintiff voluntarily resigned or that he was never an employee. The defendants but did not raise the issue, or lead evidence on the issue, of mitigation.

[22] In reaching his conclusion, the Deputy Judge addressed and answered the following questions.

[23] First, he addressed the issue of whether the plaintiff mitigated his damages. He found that the plaintiff offered no evidence of mitigation or attempts to find comparable work.

[24] Second, he addressed whether the defendant plead or produced evidence on mitigation. He concluded that the defendant failed to offer any evidence that the plaintiff could have mitigated his damages. He correctly found that the defendants failed to discharge the onus on them to show that the plaintiff failed to mitigate his damages. The Deputy Judge also found that the defendants did not plead mitigation (by which I think he means a failure to mitigate) and therefore cannot assert a reduction of the plaintiff's damages on this ground.

[25] Third, the Deputy Judge addressed the issue of whether the plaintiff suffered any damages. He found that the plaintiff had suffered damages equal to the wages set out in the plaintiff's invoices that were withheld by the defendants, who took no issue with this finding. In addition, the Deputy Judge found that the plaintiff suffered damages "which flow automatically from the wrongful or constructive dismissal". This finding appears to relate to the costs of mitigation, although that is not entirely clear. The Deputy Judge referred to a paragraph at page 182 in *Christianson* v. *North Hill News Inc.* (1993), 49 CCEL 182 (Alta. C.A.), in which the court expressed the damages for wrongful dismissal as either lost salary (if mitigation was hopeless or tried but failed) or costs of mitigation (if mitigation succeeded or would have).

[26] Fourth, the Deputy Judge considered whether the plaintiff should be given some post-termination recovery time following dismissal before the plaintiff became subject to an obligation to mitigate. He concluded it was reasonable to allow such a period, which he fixed at two months.

[27] Lastly, the Deputy Judge calculated the plaintiff's damages. In addition to the two unpaid invoices, which are not at issue on this appeal, he awarded damages for wrongful dismissal. This award was calculated as the amount of 12 months' pay in lieu of notice, plus the two months of recovery time described above, during which time the plaintiff would not be obligated to look for new employment, less four months' pay for the plaintiff's failure to mitigate. As this yielded an amount in excess of the jurisdiction of the Small Claims Court, the Deputy Judge reduced the amount to the difference between $25,000 and the total of the plaintiff's two unpaid invoices, which results in an award for wrongful dismissal of $21,475.67.

[28] It appears that the Deputy Judge proceeded on an incorrect understanding of the principles regarding proof of damages and mitigation in the context of a wrongful termination and, therefore, on an incorrect approach to the onus of proof in the present circumstances.

[29] For ease of reference, I will restate the relevant statement of Laskin C.J. in *Michaels* v. *Red Deer College*, [1976] 2 S.C.R. 324, at para. 11, referred to by the Deputy Judge in his reasons:

> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences. From this passage, the following is clear. First, the plaintiff must demonstrate that he suffered damages in the form of a loss of income. Second, if the plaintiff has established damages, the defendant has the onus of demonstrating a failure to mitigate. Third, if the defendant asserts a mitigation defence, the plaintiff has no legal onus to demonstrate mitigation but, in most circumstances, self-interest would dictate that a plaintiff adduce such evidence.

[30] In the present case, the plaintiff failed at the first stage. He failed to demonstrate damages in the form of a loss of income. This is not the same as saying the plaintiff failed to mitigate. That is a conclusion reached if and when evidence pertaining to a mitigation defence is adduced. The problem in the present case is simply that the plaintiff never testified that he was unemployed for any period of time after his dismissal.

[31] The level of proof required to establish lost income is not onerous. It is not the same as the proof required to establish mitigation. It is simply evidence that the plaintiff was not employed, or not employed at the same level of salary or wages as he was prior to the wrongful termination of his employment.

[32] This issue was never raised on examination-in-chief and, not surprisingly, was never raised by the defendants. Indeed, as the defendants correctly note, there is a complete veil of secrecy drawn over the plaintiff's employment status after his constructive dismissal. On the evidence, it is just as probable that he replaced his lost income with income from a new job as that he incurred lost income because he was unemployed. Accordingly, the Deputy Judge had no basis for finding that the plaintiff suffered any loss as a result of the wrongful termination.

[33] The plaintiff's position is that there is an automatic entitlement to pay in lieu of notice for the notice period as established by the Deputy Judge, subject to any reduction for a failure to mitigate if demonstrated by the defendants. This is too strong a proposition, although it may explain why the plaintiff failed to lead evidence on damages. The correct proposition is that the plaintiff is entitled to damages equal to pay in lieu of notice for the appropriate notice period, less the amount of any salary or other remuneration received from alterative employment during the period and subject to any reduction for a failure to mitigate if demonstrated by the defendants.

[34] Accordingly, I conclude that the Deputy Judge erred in finding that the plaintiff suffered damages as a consequence of the wrongful dismissal, given the absence of any evidence of lost income during the period.

[35] This leaves the issue of the proper relief in the present circumstances. Reluctantly, I am of the opinion that, on the basis of the trial record, in the absence of any evidence of lost income, the award of $21,475.67 for damages as a result of the plaintiff's wrongful termination must be set aside.

The Notice Period

[36] The defendants submit that the Deputy Judge erred in his determination of the award of damages for wrongful termination in failing to provide an analysis of the factors in *Bardal v. Globe & Mail Inc.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), in making his determination. The defendants also say that in view of the absence of information regarding the plaintiff's education, prior job experience and training, factors which are specifically referred to in *Bardal*, the Deputy Judge should have concluded that he had insufficient evidence to reach a conclusion on the appropriate notice period. In view of the determination above, it may be unnecessary to address this issue. I have, however, set out my conclusion on this issue in case it becomes relevant.

[37] The evidence before the Deputy Judge included evidence regarding the plaintiff's length of service, his compensation, his age, the nature of his employment and his level of seniority. The Deputy Judge could reasonably reach a conclusion regarding an appropriate notice period in the circumstances of this case, notwithstanding the absence of the further categories of information identified by the defendants that would have been desirable for a more nuanced determination. None of these factors is sufficiently material on its own, or collectively with the

other factors, to ground a finding that the Deputy Judge committed an error of law in making a determination on the basis of the evidence before him.

[38] As the defendants note, the onus of proving damages rests with the plaintiff. In certain circumstances, the failure to provide evidence regarding one or more of the *Bardal* factors could result in a determination of a notice period that was shorter than a plaintiff would consider appropriate. This is the risk that a plaintiff runs in providing less than complete evidence regarding the *Bardal* factors. However, such circumstances are not a basis for a denial of damages in their entirety as the defendants suggest.

[39] Similarly, it would have been preferable for the Deputy Judge to have provided a more complete analysis of the factors that he took into consideration in finding that an appropriate notice period was 12 months. However, the failure to do so is not a ground for setting aside the award in circumstances, such as the present, where the appellate court is in a position to assess the reasonableness of the award based on the evidence in the record and the applicable case law. In this case, the Deputy Judge's determination, while at the upper end of the range, is within the range of awards for comparable circumstances and is therefore reasonable.

Liability of Eghbali

[40] Lastly, Eghbali says that the issue of his liability as the plaintiff's employer was not pleaded in the statement of claim and was not a live issue at trial. He says it was therefore unfair for the trial judge to impose liability on him personally. The plaintiff says that if the basis of an award can be supported by the pleadings, it should not be set aside where the defendant is not misled and there is no unfairness, even if it was not specifically pleaded.

[41] The Deputy Judge referred to the following factors in finding Eghbali personally liable: (1) the business was carried on as "Venice Fitness" without any further designation or qualification to reflect a corporation, i.e., no use of "Ltd." or "Limited"; (2) Eghbali was the directing mind of "Venice Fitness"; (3) there was no basis in the evidence for excluding Eghbali's personal ownership of the business; and (4) there was no evidence that the corporate defendant was carrying on business under the business name of "Venice Fitness".

[42] The Deputy Judge also referred to the following passage of Finlayson J.A. from *Truster* v. *Tri-Lux Fine Homes Ltd.* (1998), 18 R.P.R. (3d) 1 (C.A.), at para. 21:

> [P]ersons wishing to benefit from the protection of the corporate veil should not hold themselves out to the public without qualification. They should identify the name of the company with which they are associated in a reasonable manner or risk being found personally liable if the circumstances warrant it… if one expects to benefit from this protection, then others must, at a minimum, be informed in a reasonable manner that they are dealing with a corporation and not an individual.

[43] The Deputy Judge concluded that, as Eghbali had failed to produce evidence that he had notified the plaintiff that the business was owned by the corporate defendant and not himself, "[Eghbali] cannot benefit from any protection by the numbered corporation", apparently in reliance on the foregoing passage in *Tri-Lux*. The Deputy Judge then held that, on a balance of probabilities, Eghbali was a "proper party defendant and that he was properly sued in his

personal capacity." The Deputy Judge found Eghbali personally liable with the corporate defendant on a joint and several basis.

[44] There is an obvious problem with this conclusion, insofar as the Deputy Judge found the parties jointly and severally liable.

[45] In *Tri-Lux*, two individuals signed an agreement without indicating that the agreement was intended to be on behalf of a particular corporation and without using the correct name of the corporation. Moreover, despite the fact that the agreement was intended to survive the closing of the transaction contemplated by it, the individuals did not correct the error when it was identified at the time of closing but, instead, added an undertaking of the intended corporate party. In those circumstances, both parties could be found liable – the individuals on the agreement and the corporation on the undertaking, although not jointly and severally.

[46] In the present circumstances, however, there was a single continuing relationship of employment. There is no basis in the principle expressed in *Tri-Lux* or otherwise in the present circumstances for finding both defendants liable. In the absence of any basis for a finding that Eghbali was acting as agent for an undisclosed principal, the Deputy Judge had to impose liability on either Eghbali or the corporate defendant but not both.

[47] This raises the question of whether the Deputy Judge could reasonably find that the plaintiff had contracted with Eghbali personally. The Deputy Judge's reasons indicate that he considered that Eghbali was personally liable on the basis that he did not notify the plaintiff that he was acting as an officer of the corporate defendant and that there was no business registration or other notice to advise the plaintiff of this fact. He considered that he was entitled to apply the principle in *Tri-Lux* that persons who assert after the fact that they contracted solely on behalf of another party bear the onus of establishing that the party with whom they were dealing was aware of the capacity in which they acted.

[48] However, the circumstances in the present case differ in one material respect from those in *Tri-Lux*. This is not a case in which Eghbali asserted after the fact that the plaintiff had contracted with the corporate defendant. It is, instead, a case in which the plaintiff raised the issue for the first time in closing submissions.

[49] The statement of claim was drafted to distinguish the employment claims, which are asserted against the corporate defendant, from the defamation claim in paragraph 15, which was asserted against Eghbali and was withdrawn when the action was moved to the Small Claims Court. Similarly, the statement of defence distinguishes between the corporate defendant, referred to as "Venice Fitness", and Eghbali, who is described as the president of Venice Fitness. Moreover, as the Deputy Judge noted, the plaintiff did not explain why his style of cause referred to the corporate defendant as the party carrying on business as "Venice Fitness". More fundamentally, there is no explanation as to how the plaintiff was able to identify the corporate defendant if he had no prior knowledge of its existence or the fact that it was carrying on the business.

[50] There is therefore nothing in the pleadings that constitutes an assertion by the Plaintiff of either joint and several liability, presumably on the basis of an agent acting on behalf of an undisclosed principal, or personal liability of Eghbali rather than of the corporate defendant.

[51] In these circumstances, if the plaintiff wished to assert a claim for joint liability or personal liability on the part of Eghbali, he had an obligation to bring such claim to Eghbali's attention at the opening of the trial. However, he failed to do so in his counsel's opening statement. The only reference to the issue came from Eghbali's counsel, who appears to have attempted to confirm the absence of any such claim. The Deputy Judge also observed that neither party presented any evidence at trial regarding the ownership of Venice Fitness. This is entirely consistent with the fact that the issue was not raised in the pleadings.

[52] The Deputy Judge stated that there was some ambiguity prior to trial as to whether the business was owned by the corporate defendant or Eghbali personally, even though the style of cause shows the corporate defendant as the entity carrying on the business. The Deputy Judge also remarked that it was remarkable that the plaintiff did not know, despite working there for many years, that "Venice Fitness" may have been owned by a corporation. However, I do not see any basis in the transcript for either of these findings of the Deputy Judge. The only question put to the plaintiff that was remotely related to this issue was the question at page 30 of the trial transcript regarding his knowledge of who hired the receptionists and other employees, to which the plaintiff's answer was "Venice Fitness". In making these findings therefore, I think that the Deputy Judge made a palpable error.

[53] In the absence of a finding that the plaintiff was unclear as to who owned the "Venice Fitness" business, the only evidence before the Deputy Judge was that an employment agreement existed and that the contracting party was liable for breach of that agreement. The plaintiff's pleading asserted that the contracting party was the corporate defendant and the parties proceeded accordingly at trial. In particular, the defendants made it clear in their pleading and at trial that they understood that the employment claims were asserted against the corporate defendant alone. The evidence before the Deputy Judge was consistent with this finding and it is not disputed by the plaintiff.

[54] As mentioned, this claim was apparently asserted for the first time in the written closing submissions, which are not before the Court on this appeal. Accordingly, Eghbali was denied the opportunity to produce evidence that addressed his position on this appeal that the plaintiff's employer was the corporate defendant.

[55] Given the pleadings and the plaintiff's actions at trial, the defendants were entitled to proceed on the basis that the claim for wrongful termination was asserted solely against the corporate defendant. If the plaintiff had asserted his claim for wrongful dismissal against Eghbali personally, I would agree that the principle in *Tri-Lux* would be applicable. As he failed to do so, however, the onus rested with the plaintiff to establish that he had contracted with Eghbali rather than the corporate defendant. He failed to satisfy the onus. He cannot rely on Eghbali's alleged failure to adduce evidence to the contrary when Eghbali had no onus on him to do so, given the fact that the issue was neither pleaded nor raised at trial.

[56] Accordingly, I conclude that the Deputy Judge erred in reaching the conclusion that Eghbali was jointly and severally liable with the corporate defendant. The judgment against Eghbali personally must therefore be set aside.

Costs

[57] The Deputy Judge awarded costs of the trial in favour of the plaintiff in the amount of $3,500. This award is set aside. As the successful party at trial, the defendants are entitled to costs in the same amount. In addition, the defendants are entitled to costs of the appeal, which are also fixed at $3,500.

Wilton-Siegel J.

Date: December 11, 2013