CITATION: York Condominium Corporation v. Superior Energy Management, 2013 ONSC 2615
COURT FILE NO: CV-12-464322
DATE: 20130506

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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YORK CONDOMINIUM CORPORATION NO. 62	)	*Michael Campbell,*
	)	for the Applicant
Applicant	)	
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- and -	)	
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	)	
SUPERIOR ENERGY MANAGEMENT GAS L.P.	)	*Erik Penz,*
O.A. SUPERIOR ENERGY	)	for the Respondent
	)	
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	)	
Respondent	)	
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	)	**HEARD**: April 30, 2013

GOLDSTEIN J.:

[1] The Applicant is a condominium corporation. The Applicant has a property manager that carries out the day to day operations and maintenance of the condominium. The Respondent is a natural gas supplier. In May 2008 a representative of the property manager entered into a fixed-price contract with the Respondent for the supply of natural gas. Unlike regular corporations, where an employee or agent can contract on behalf of the corporation, condominium corporations cannot contract unless there is a resolution of the Board of Directors authorizing (or ratifying) the contract. In this case, the Applicant's property manager had no authorization and the Board never ratified the fixed-price contract. This application seeks a declaration that the fixed-price contract was void. The Applicant also seeks consequential relief,

including damages representing the difference between the price it paid under the fixed-price contract and the price it would have paid if it had entered into a contract with a different supplier.

[2] The Application was commenced in September 2012. The Respondent says that the claim was known to the Respondent at some point between July and November 2009. The Respondent says that the claim, therefore, is barred by sections 4 and 5 of the *Limitations Act 2002*, S.O. 2002, c. 24, Sched. B. I agree with the Respondent. The Application will be dismissed.

FACTS

[3] Prodded by the Applicant's residents, in July 2009 the Board of Directors decided to look into costs of utilities. On July 15, 2009 a representative of the Applicant's property manager contacted the Respondent to inquire about the fixed price contract.

[4] On August 4, 2009 the Applicant's counsel, David Thiel of Fogler Rubinoff, sent a letter to the Applicant's property manager and two members of the Board. The subject of the letter was "natural gas supply contract". The contents of the letter have been redacted as privileged. The issue of the gas contract was discussed at a meeting of the Board of Directors on September 10, 2009.

[5] In October, 2009 the property manager lodged a complaint with the Ontario Energy Board. The complaint concerned a fixed-price electricity contract that the Applicant signed with the Respondent at the same time as the fixed-price gas contract. The complaint specified that the fixed-price electricity contract had been signed without Board authorization.

[6] During the summer and fall of 2009 the Applicant's property manager wrote, faxed, and called the Respondent. The Applicant took the position in all of these communications that the contract was not valid. The Respondent was completely unresponsive to the Applicant's requests to discuss or vary the contract.

[7] On October 19, 2009 the Applicant's property manager wrote to the Respondent. The letter was written as a follow up. The letter included the following passage:

> The YCC 62 Board of Directors had originally requested a representative from your firm to contact us and discuss the contract and perhaps sign an AUTHORIZED contract. Since there has been absolutely no response to these requests, the Board has requested to be returned to direct billing. As previously noted the contract with Superior Energy was signed without Board of Directors authorization.

[8] The Respondent responded with a form letter on October 29, 2009 that did not address the Applicant's issues and, in fact, was addressed to "Sheng Jun Tang", a person unknown to the Applicant. It is fairly obvious that the form letter was a cut-and-paste job, and that whoever was

cutting and pasting forgot even to change the name of the addressee. A further letter from the Applicant's property manager went unanswered.

[9] The Applicant did not do anything significant between October 29, 2009 and November 18, 2010, when counsel for the Applicant wrote a demand letter to the Respondent. The letter stated that the contract was unenforceable due to the lack of authorization to enter into it. The letter further demanded that the Applicant be removed from the Respondent's client list. The letter also stated:

> The board of directors of the corporation recently became aware that a former manager of the corporation executed a Superior Energy Price Plan Agreement dated May 20, 2008….

[10] The Respondent did not respond to the demand letter. This Application was issued on September 26, 2012.

ANALYSIS

[11] Pursuant to the agreement of counsel, the hearing before me was limited to the issue of whether or not the Application is barred by s. 4 and s. 5 of the *Limitations Act*.

[12] Section 4 of the *Limitations Act* sets out a general two year limitation period. Section 5 deals with discoverability:

> 5. (1) 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).

[13] Mr. Campbell's position is that it was not until the demand in November 2010 that there was a duty on Superior to make a serious decision with respect to the validity of the contract.

[14] I cannot agree that the date of the demand letter is the date upon which the limitation period began to run. The *Limitations Act* is clear that a "claim" begins to run from the date upon which the damage is discovered, not when the Applicant made or articulated its demand. To find

otherwise would allow potential litigants to pick and choose the timing for the commencement of a proceeding.

[15] Discoverability depends upon the date that a litigant discovers that he or she has a potential claim. The principle was stated by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 18:

> Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

[16] As Perell J. stated in *Tender Choice Foods Inc. v. Versacold Logistics Canada*, [2013] O.J. No. 634, 2013 ONSC 80:

> [56] Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.
>
> See also: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

[17] The term "damage" as set out in s. 5 of the *Limitations Act* was recently considered by the Ontario Court of Appeal in *City of Hamilton v. Mansfield*, 2012 ONCA 156, [2012] O.J. No. 1099, 347 D.L.R. (4th) 657, where LaForme J.A. stated:

> **54** The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. *Damage* is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage*.

[18] It is clear that the Board of Directors of the Applicant was aware of the fact that the contract with the Respondent was void at least as of September 10, 2009, when the subject was discussed at a Board meeting. It is possible that the Board of Directors became aware of the issue on August 4, 2009, when Mr. Thiel gave his legal advice. At the latest, the Board was aware of the issue as of October 19, 2009 when the property manager wrote to the Respondent, stating that the contract was void due to a lack of Board authorization. Certainly, the Respondent's refusal to even respond in a meaningful way coupled with the Ontario Energy Board's refusal to take up the complaint regarding the fixed-price electricity contract should have alerted the Board that litigation was a real possibility.

[19] Whichever date is picked, it is clear that when the Application was finally issued in September 2012 it was beyond the two-year limitation period.

[20] Mr. Campbell also argues that because Superior was otherwise innocent, the clock could only start running when it was asked to make a decision with respect to its position, and to take a position on the Applicant's claim that the contract was void. His position is that the cause was not actionable until then. He says that prior to the demand letter all other communication with Superior was inconsequential.

[21] I respectfully disagree with that point as well. There is no authority for the proposition that the running of a limitation period is somehow dependent on whether or not a Respondent (or Defendant) is asked to make a decision.

[22] In *Fuller v. Happy Shopper Markets Ltd.*, [2001] 1 W.L.R. 1681 (Ch.D.), Lightman J. stated:

> 18. In my view, when the case of *Freeman v. Jeffries* is properly understood, the law is clear: if the rescission of a contract gives rise to a right on the part of a party to repayment of moneys had and received, the due exercise of the right of rescission by giving notice of rescission must precede the accrual of the right of action for money had and received. But in the absence of some such special consideration, and in particular where no question of rescission arises, *e.g.* where the contract is void or (as on the facts of this case) where there is an overpayment, the general rule is that no notice or demand is required. I am confirmed in reaching this conclusion by the views expressed in Goff & Jones, *The Law of Restitution* 5th ed. p.195 and Graham Virgo's *The Principles of Restitution* p.770 which affirm the general rule that no demand is required and that *Freeman v. Jeffries* should not be allowed to stand in the way of reaching this conclusion. There is a good reason why this should be so which is hinted at by Hamilton J. in *Baker v. Courage* [1910] 1 KB 56 at 65 and spelt out by Graham Virgo:
>
> > Despite certain dicta [in *Freeman v. Jeffries*] that a restitutionary cause of action will accrue only once the plaintiff has demanded return of the enrichment, the better view is that there is no such requirement, for otherwise the plaintiff would be able to postpone the date from which the limitation period begins to run until it suits him or her to inform the defendant of the restitutionary claim.

[23] I, therefore, find that the limitation period began to run at the latest by September 10, 2009. The limitation period was not dependent on the demand made by the Applicant. The Application was, therefore, commenced after the limitation period expired.

DISPOSITION

[24] As noted, this matter came on before me in order to make a discrete finding regarding the *Limitations Act* issue. Counsel agreed that if I found that the Application was statute barred I

could dismiss it. Counsel further agreed that if I found otherwise, the merits of the Application would be heard at a later date. Since I have found that the Application is statute-barred, it is dismissed.

COSTS

[25] If the parties are unable to agree on costs, the Respondent may submit, within 30 days, a brief costs submission (not exceeding 2 pages) and a costs outline. The Applicant may then submit, within 15 days after that, a brief costs submission (also not exceeding 2 pages) and a costs outline in reply.

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GOLDSTEIN, J.

DATE: May 6, 2013

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YORK CONDOMINIUM CORPORATION NO. 62

Applicant

- and -

SUPERIOR ENERGY MANAGEMENT GAS L.P.
O.A. SUPERIOR ENERGY

Respondent

JUDGMENT

GOLDSTEIN J.

Released: May 6, 2013