CITATION: Ho v. Toronto Police Services Board, et al. ONSC
COURT FILE NO.: CV-15-531061-0000
DATE: 20201102

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Simon Ho and Heung Pan	)	*S. Ho, self-represented;*
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
	)	
Toronto Police Services Board, Nick Bokalo, Alan Fazeli, Jesse Van Nest, The Personal Insurance Company, c.o.b. Desjardins Insurance Co., and Desjardins General Insurance Group, Arlene Lange, RBC Insurance Company, Kodsi Engineering Incorporated, Jian Ping Min, John Doe, Jane Doe and Robert Doe	)	*R. Bush* and *S. Sweet* for the Defendants, Toronto Police Services Board, Nick Bokalo, Alan Fazeli, Jesse Van Nest;
	)	
	)	*D. Zarek,* for the Defendants, The Personal Insurance Company, c.o.b. Desjardins Insurance Co., and Desjardins General Insurance Group, Arlene Lange;
	)	
Defendants	)	*M. Coleman,* for the Defendant, Kodsi Engineering Incorporated;
	)	
	)	*W. Morris,* for the Defendant, Jian Ping Min
	)	
	)	
	)	**HEARD: September 10 and 18, 2020**

CHALMERS, J.

ENDORSEMENT

OVERVIEW

[1] On May 7, 2011, there was an incident in the Woodside Square Mall parking lot involving Simon Ho and Jian Ping Min. Mr. Ho was driving in the parking lot. Heung Pan was a passenger in his car. Mr. Ho states that as he drove past a parking space, Mr. Min reversed his car and struck his car. Mr. Ho states that his car was tilted or lifted as a result of the collision and was damaged. Mr. Ho states that following the accident Mr. Min offered to pay $15 for the damage to Mr. Ho's vehicle. Mr. Min left the scene. Mr. Ho was able to get the licence plate number of Mr. Min's vehicle.

[2] Mr. Min's version of events is quite different. He states that as he was reversing from a parking spot, he was blocked by Mr. Ho's vehicle. He got out of his car and spoke to Mr. Ho. Mr. Ho claimed that Mr. Min had backed into him and there was damage to the front passenger corner of his car. Mr. Min denied there was any touching of the two cars. Mr. Min claims that Mr. Ho demanded payment. Mr. Min refused and left the scene without providing any contact information.

[3] Later that day, Mr. Min reported the incident to his insurer, RBC Insurance Company. Mr. Ho reported the incident to the Toronto Police Services (TPS) Collision Reporting Centre. Mr. Ho's report was received by Detective Sergeant Fazeli on May 11, 2011. Detective Sergeant Fazeli conducted a search of the other vehicle's licence plate number and determined it was owned by Mr. Min. He wrote to Mr. Min and requested that Mr. Min contact him as soon as possible.

[4] Shortly after receiving the letter, Mr. Min contacted Detective Sergeant Fazeli. He stated that there was no contact between the two vehicles. On May 17, 2011, Detective Sergeant Fazeli concluded that the alleged accident investigation could be closed on the basis that the vehicles were insured, and the alleged accident occurred on private property and as such there was no jurisdiction to lay a charge under the *Highway Traffic Act*, R.S.O. 1990, c. H.8. In addition, there were different accounts as to whether an accident occurred, and neither driver's version of events provided a basis to lay a charge.

[5] On May 16, 2011, Mr. Ho reported the accident to his insurer, The Personal Insurance Company (now Desjardins General Insurance Group) ("Desjardins"). The claim was reviewed by the Desjardins employee, Joseph Pagliaro. He noted similarities with a previous claim made by Mr. Ho. Mr. Pagliaro called Mr. Min, who denied there had been any contact between the cars.

[6] On May 24, 2011, Mr. Pagliaro advised Mr. Ho that Mr. Min denied an accident occurred and that there would be no coverage for the property damage until the investigation was concluded. Mr. Pagliaro asked Arlene Lange, an investigator with Desjardins' Special Investigation Unit, to commence an investigation into the alleged accident.

[7] Ms. Lange attended at Mr. Ho's home on May 24, 2011. She took a statement from him and photographed his vehicle. On the same day she also met with Mr. Min and photographed his vehicle. On May 26, 2011, Desjardins retained Kodsi Engineering Incorporated ("Kodsi") to determine whether the accident occurred. Ms. Lange provided photographs and documentation to Kodsi.

[8] Raffi Engeian, a professional engineer with Kodsi, inspected the vehicles on June 2, 2011. Both Mr. Min and Mr. Ho were present at the time of the inspections. Mr. Engeian prepared the report which is dated June 29, 2011. He noted that the Ho vehicle had damage throughout and that there was no visible damage to the Min vehicle. There was no paint transfer. The damage Mr. Ho stated was caused by the impact did not correspond to any contact with Mr. Min's vehicle. Mr. Engeian concluded that there was no collision between Mr. Ho's vehicle and Mr. Min's vehicle.

[9] On June 2, 2011, Detective Sergeant Fazeli was contacted by Ms. Lange, who advised that her investigation suggested that Mr. Ho may have made a fraudulent insurance claim. She provided the documentation and information generated from her investigation. On July 13, 2011, Ms. Lange forwarded a copy of the Kodsi report to Detective Sergeant Fazeli. On July 19, 2011,

Detective Sergeant Fazeli met with Ms. Lange and obtained a statement from her. On August 4, 2011, Ms. Lange advised the police of the amount of Mr. Ho's insurance claim.

[10] Detective Sergeant Fazeli reviewed the information provided by Ms. Lange, including the Kodsi report. After his consideration of the evidence available to him, he concluded that there were reasonable and probable grounds to believe Mr. Ho committed the offences of Fraud Under $5,000 and Public Mischief.

[11] On August 10, 2011, Desjardins made the decision to deny Mr. Ho's property damage claim and to deny his entitlement to accident benefits should any such claim be made. Desjardins wrote to Mr. Ho on August 16, 2011 denying his claim. On August 26, 2011, Mr. Ho acknowledged receipt of the denial letter. On May 22, 2012, Mr. Ho contacted Desjardins and asked that it reconsider the denial of the claim. Desjardins sent a second denial letter to Mr. Ho on June 20, 2012.

[12] On August 30, 2011, Detective Sergeant Fazeli accompanied by Detective Constable Van Nest attended at Mr. Ho's residence and served him with a Form 9/Appearance Notice. Mr. Ho was not arrested or detained. The Crown elected to proceed with the prosecution of the charges.

[13] The criminal trial proceeded before Justice Cleary starting on May 2013 and ending on June 7, 2013. Mr. Engeian was called as an expert witness at the trial. On June 25, 2013, Justice Cleary released his Reasons for Judgment. He dismissed the charges on the basis that he was not satisfied beyond a reasonable doubt that Mr. Ho knew there had been no impact between the vehicles.

[14] On May 24, 2013, Mr. Ho made a complaint against Kodsi to the Professional Engineers of Ontario ("PEO"). Mr. Ho claimed that the Kodsi report was not compliant with the duties and responsibilities of a professional engineer in Ontario. On January 6, 2014, the PEO Complaints Commission provided its decision and reasons. The Committee concluded that Kodsi's investigation and report appeared to meet the industry standard for this type of work. The Committee found no evidence of unprofessional conduct.

[15] Mr. Ho issued the Statement of Claim on June 24, 2015. The claim by Ms. Pan was dismissed on February 9, 2017. The action and all crossclaims against RBC were dismissed by order dated July 31, 2020.

[16] Each remaining Defendant brings a motion seeking summary judgment dismissing the action. For the reasons set out below I grant the relief sought and dismiss the Plaintiff's action in its entirety.

THE ISSUES

[17] The issues are as follows:

A. Toronto Police Services Board, Nick Bokalo, Alan Fazeli and Jesse Van Nest (the "TPS Defendants")

i) Is the Plaintiff's claim for false arrest, wrongful imprisonment, breaches of his rights under the *Charter of Rights and Freedoms*, intentional infliction of mental suffering, conspiracy, harassment and intimidation barred because they were commenced outside the two-year limitation period?
ii) Are the TPS Defendants liable to the Plaintiff for negligent investigation?
iii) Was the Plaintiff arrested or wrongfully imprisoned?
iv) Are the TPS Defendants liable to the Plaintiff for harassment, intentional infliction of mental suffering, or intimidation?
v) Are the TPS Defendants liable to the Plaintiff for malicious prosecution, or misfeasance in public office?
vi) Are the TPS Defendants liable to the Plaintiff for conspiracy?
vii) Are the TPS Defendants liable to the Plaintiff for negligence, inducing breach of contract or unlawfully interfering with economic relations?
viii) Was there a breach of the Plaintiff's section 7 and 9 *Charter* rights?

B. The Personal Insurance Company, c.o.b. Desjardins Insurance Co. and Desjardins General Insurance Group, and Arlene Lange (the "Desjardins Defendants")

i) Is the Plaintiff's claim for property damaged barred pursuant to s. 259.1 of the *Insurance Act*, R.S.O. 1990, c. I.8?
ii) Is the Plaintiff's claim for Accident Benefits barred because it was not mediated before the action was commenced?
iii) Is the claim for damages in bad faith barred?

C. Kodsi Engineering Incorporated

i) Does expert witness immunity apply to Kodsi?
ii) Is the Plaintiff's action barred by operation of the applicable limitation period?
iii) Did the Plaintiff establish that Kodsi was negligent, biased or involved in a conspiracy?

D. Jian Ping Min

i) Is Mr. Min liable to the Plaintiff for malicious prosecution?

ANALYSIS

Test for Summary Judgment

[18] The law with respect to the test for summary judgment is not in dispute.

[19] The court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. A trial is not required if the record before the court; "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result" than going to trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, at para. 49 and 66.

[20] On a motion for summary judgment, the moving party bears the initial onus of establishing that there is no genuine issue for trial. The responding party must then meet the burden of demonstrating that their claim has a real chance of success: *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at paras. 30 and 32. In responding to a summary judgment motion, a party must put its best foot forward and may not rest on the mere allegations or denials in its pleadings. The court will assume that the parties have placed before it, in some form, all of the evidence that will be available at trial: *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 33 and 201-206.

[21] The Defendants have each agreed that any unsuccessful Defendants will abandon their crossclaims as against the successful Defendants and as a result there is no risk of duplicative proceedings.

[22] I am satisfied that this is an appropriate case for summary judgment.

A. TPS Defendants

i) Is the Plaintiff's claim for false arrest, wrongful imprisonment, and breaches of his Charter rights barred because the claim was commenced outside of the two-year limitation period?

[23] The action was commenced against the TPS Defendants on June 24, 2015. The TPS Defendants take the position that the claims for false arrest, wrongful imprisonment, breaches of his *Charter* rights, intentional infliction of mental suffering, conspiracy, harassment and intimidation are barred because they were commenced outside the two-year limitation period.

[24] The *Limitations Act* provides that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim is discovered. A cause of action is deemed to be discovered on the date the act or omission upon which the claim is based, took place. The onus to prove that the claim was not immediately discoverable by the exercise of reasonable diligence, rests with the plaintiff: *Limitations Act*, ss. 4 and 5.

[25] The charges were laid by the TPS on August 30, 2011 when the Form 9 was served on Mr. Ho. Claims for false arrest and false imprisonment and associated *Charter* breaches crystalize on the date of the arrest: *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973, at para. 11. The Plaintiff commenced the action more than two years after the date of the arrest. As a result, these claims are presumptively out of time.

[26] If the tort claims and the criminal charges are mirror images of each other, there may be an exception to the general rule that the cause of action crystalizes on the date of the arrest. The exception applies if the criminal charges and civil claims are so intertwined that the verdict in the criminal matter must be a crucial factor in the plaintiff's decision of whether to proceed with the civil claim: *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962, 138 O.R. (3d) 641, at paras. 28, 31 and 34.

[27] I am satisfied that the exception discussed in *Winmill* does not apply in this case. The false arrest and false imprisonment claims, and the allegations of *Charter* breaches do not depend on the results of the criminal proceeding. Mr. Ho alleges that his rights were infringed at the time he was arrested/detained. His success or failure with respect to these claims is not dependent upon the result in the criminal proceeding. The issue is whether on August 30, 2011, Detective Sergeant Fazeli had lawful grounds to serve Mr. Ho with the Form 9: *Kolosov v. Lowe's Companies Inc.*, at para. 248-251.

[28] Mr. Ho did not put forward any facts or arguments to suggest that he did not discover the false arrest/false imprisonment or Charter breaches at a date other than the date of the arrest. The elements of the causes of action for false arrest and wrongful imprisonment are independent of and do not depend on the results of the criminal proceeding. I am satisfied that there is no reason to deviate from the basic two-year limitation period with respect to the claims of false arrest, false imprisonment and *Charter* breaches. I find that those causes of action are barred by the two-year limitation period.

ii) Are the TPS Defendants liable to the Plaintiff for negligent investigation?

[29] Mr. Ho claims that the TPS Defendants are liable for carrying out an investigation that was not, "transparent, comprehensive, fair, reasonable or conducted in good faith". He argues that the police ought to have inspected the vehicles and interviewed all of the potential witnesses including the passenger in his vehicle, Ms. Pan. Mr. Ho also argues that the police ought to have obtained CCTV footage from the parking lot on the day of the incident.

[30] To succeed in the tort of negligent investigation, a plaintiff must establish the following five elements:

a) The proceeding was initiated by the defendant;
b) The proceeding was terminated in favour of the plaintiff;
c) There was an absence of reasonable and probable grounds to commence the proceedings as against the plaintiff;
d) In conducting the investigation, the defendant owed a duty of care to the plaintiff; and
e) The defendant did not meet the objective standard of a reasonable police officer in similar circumstances: *Romanic v. Michael Johnson,* 2012 ONSC 3449, at para. 9, aff'd 2013 ONCA 23.

[31] The relevant principles relating to the law of negligent investigation were reviewed by Justice Leach in *J.H. v. Windsor Police Services Board et al.*, 2017 ONSC 6507. The relevant principles include the following:

a) Investigating police officers owe suspects a duty of care, requiring the investigation to be conducted in a competent, non-negligent manner;
b) The plaintiff has the burden of proving that the police officer failed to meet the standard of care and that the failure caused them harm;
c) The appropriate standard is that of a reasonable police officer in like circumstances;
d) The law does not require a police officer to meet a standard of perfection, only that the police act reasonably;
e) Police officers are not required to make judgments as to guilt or innocence or evaluate evidence according to legal standards;
f) The police officers are not required to exhaust all possible routes of investigation or enquiry;
g) The police officer must have a subjective belief that they had reasonable and probable grounds, and those grounds must be justifiable from an objective point of view;
h) If the police officer swears an affidavit that he or she subjectively had reasonable and probable grounds and is not cross-examined on that belief, the court is entitled to accept that evidence; and,
i) A determination by the Crown that there is a reasonable prospect of conviction supports a finding that there were reasonable grounds to charge an accused: *J.H.*, at para. 6.

[32] TPS Defendants initiated the proceedings on August 30, 2011, when the Form 9 was served on Mr. Ho. The criminal proceedings were terminated in favour of the Plaintiff when Justice Cleary dismissed the charges on June 25, 2013. The first two elements of the tort of negligent investigation are satisfied. The Plaintiff must also prove that there was an absence of reasonable and probable grounds and that the TPS Defendants did not meet the objective standard of a reasonable police officer.

Reasonable and Probable Grounds

[33] Before charging Mr. Ho, Detective Sergeant Fazeli had the self-collision report prepared by Mr. Ho, Mr. Min's statement that there had been no impact between the vehicles, the findings of Kodsi that the damage to Mr. Ho's vehicle did not correspond to any impact with Mr. Min's vehicle, the fact that Mr. Min's vehicle did not have any damage, and that Mr. Ho was advancing an insurance claim for at least $2,000.

[34] Detective Sergeant Fazeli deposed in his affidavit that based on the investigation, he formed the belief that he had reasonable and probable grounds to proceed with the charges against Mr. Ho. He was not cross-examined on his affidavit. I accept Detective Sergeant Fazeli's evidence that he had a subjective belief that there were reasonable and probable grounds. I am of the view that his subjective belief was justifiable on the basis that a reasonable police officer in his position and faced with the same investigation would have concluded that there were reasonable and probable grounds to charge Mr. Ho.

[35] The decision to proceed with the prosecution of the charges rested solely with the Crown. The Crown considered the evidence and determined that there was a reasonable prospect of a conviction and decided to proceed to trial. A committal to trial for criminal charges is strong evidence that the police acted with reasonable and probable cause: *Fragomeni v. Greater Sudbury (Police Service)*, 2015 ONSC 3937, at para. 103; and *Wong v. Toronto Police Services Board*, 2009 CanLII 66385 (Ont. S.C.), at paras. 60 and 70.

[36] I conclude that Detective Sergeant Fazeli had reasonable and probable grounds to lay the charges against Mr. Ho.

Objective Standard of a Reasonable Police Officer

[37] Mr. Ho did not put forward any expert evidence as to the standard of care of a reasonable police officer in similar circumstances. Although such expert evidence would be of assistance it is not required in cases that are not technical or otherwise within the knowledge and expertise of the trier of fact: *J.H.*, at para. 6.

[38] Mr. Ho argues that Detective Sergeant Fazeli failed to meet the standard of a reasonable police officer because he did not conduct a proper investigation. In particular, Mr. Ho states that he failed to interview independent witnesses and failed to verify information given by the other Defendants. He also alleges that the police officer failed to obtain the surveillance video footage from the parking lot.

[39] Detective Sergeant Fazeli takes the position that he conducted a reasonable investigation. According to the investigation report, the surveillance cameras did not face into the parking lot and as a result there was no surveillance video evidence available. He did not interview Mr. Ho, but he had the benefit of the self-reporting collision report prepared by Mr. Ho. He did not personally inspect the vehicles, but the description of the vehicles was contained in the Kodsi report.

[40] Mr. Ho argues that a proper investigation would have included an interview of Ms. Pan, who was a passenger in Mr. Ho's vehicle. Although it may have been preferable that Ms. Pan had been interviewed, it is my view that the failure to do so does not result in a finding that the investigation was negligent. Even if Ms. Pan confirmed Mr. Ho's evidence as to how the accident occurred, the balance of the evidence, including the Kodsi report, supported his decision to charge Mr. Ho. There is no evidence that if Ms. Pan had been interviewed, the police officer would have reached a different conclusion.

[41] The identification of a list of actions the police officer could have taken is not enough to establish liability for negligent investigation. As stated in *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656, 132 O.R. (3d) 241, at para. 52:

> Nor is a police officer required to exhaust all possible routes of investigation or inquiry, interview all potential witnesses prior to arrest, or to obtain the suspect's version of events or otherwise establish there is no valid defence before being able to form reasonable and probable grounds.

[42] I am satisfied that Detective Sergeant Fazeli's investigation was sufficient to allow him to form the reasonable and probable grounds to charge Mr. Ho. The TPS Defendants met the standard of care of a reasonable police officer and therefore the claim in negligent investigation is dismissed.

iii) Was the Plaintiff falsely arrested or wrongfully imprisoned?

[43] To succeed in a claim for false arrest and wrongful imprisonment, a plaintiff must prove that the deprivation of liberty was:

a) Total or complete;
b) Against the plaintiff's will; and
c) Caused by the defendant.

If the three elements are established, the onus shifts to the defendant to justify the detention. A detention will be justified if there were reasonable and probable grounds for the arrest: *Wong*, at paras. 73-75.

[44] Here, the Plaintiff was not arrested. Instead he was served with a Form 9. This is known as an Appearance Notice and provides notification of an upcoming court date. Service with a Form 9/Appearance Notice is distinguished from an arrest: *Criminal Code*, R.S.C. 1985 c. C-46, s. 497.

[45] There is also no evidence that the Plaintiff was detained or imprisoned. The interaction between the TPS Defendants and Mr. Ho, when he was served with the Form 9, was only five minutes. He was not asked to go with the police to the police station. He was not handcuffed or imprisoned.

[46] I am satisfied that the Plaintiff was not arrested or detained. Even if I had found that Mr. Ho had been arrested or detained, I am of the view that there were reasonable and probable grounds for the TPS Defendants to charge Mr. Ho. In addition, the claims in false arrest and wrongful imprisonment were brought more than two years after the date of the arrest and therefore are statute barred.

iv) Are the TPS Defendants liable to the Plaintiff for harassment, intentional infliction of mental suffering, or intimidation?

[47] The tort of harassment does not exist in Ontario: *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, at para. 43, leave to appeal refused, 2019 CanLII 86846.

[48] To establish the tort of intentional infliction of mental suffering, a plaintiff must establish that the defendant's conduct:

a) Was flagrant and outrageous;
b) Was calculated to harm the plaintiff; and
c) Caused the plaintiff to suffer a visible and provable illness: *Merrifield,* at para 54.

[49] The only conduct on the part of the TPS Defendants complained of was the investigation into the circumstances of the accident, and the decision to charge Mr. Ho with Fraud Under $5,000 and Public Mischief. The mere fact the investigation was not concluded in favour of Mr. Ho and that he was charged with an offence is not enough to base an action in intentional infliction of mental suffering.

[50] As stated above, I conclude that there were reasonable and probable grounds to charge Mr. Ho, and therefore the conduct of the TPS Defendants was not flagrant or outrageous. In addition, there is no evidence which could establish an intention to cause harm to Mr. Ho.

[51] To establish a claim in intimidation a plaintiff must establish four elements:

a) A threat made by a defendant;
b) An intention to injure the plaintiff;
c) An act or omission taken by the plaintiff as a result of the threat; and
d) Which resulted in damages to the plaintiff: *Tran v. University of Western Ontario,* 2015 ONCA 295, at para. 23.

[52] There is no evidence on the record which would establish any of the elements of the cause of action in intimidation. The TPS Defendants did not make a threat and there is no evidence of an intent to injure. The only action taken by the TPS Defendants was to charge Mr. Ho following its investigation. The decision to charge was based on reasonable and probable grounds.

v) Are the TPS Defendants liable to the Plaintiff for malicious prosecution, or misfeasance in public office?

[53] Mr. Ho claims that the TPS Defendants are liable for the torts of malicious prosecution and misfeasance in public office. These torts involve allegations of intentional bad faith, misuse and abuse of the criminal process and of the police officer's position: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129, at para. 182. In the Statement of Claim, Mr. Ho does not set out any particulars with respect to the claim of misfeasance in public office. The only allegations relate to malicious prosecution.

[54] To succeed in a claim for malicious prosecution a plaintiff must establish the following elements:

a) The prosecution was initiated by the defendant;
b) Was terminated in favour of the plaintiff;
c) Undertaken without reasonable and probable cause; and,
d) Was motivated with malice or for a primary purpose other than that of carrying the law into effect: *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339, at para. 3.

[55] Here, the first two elements of the cause of action of malicious prosecution are satisfied; the prosecution was initiated by the TPS Defendants and the prosecution was terminated in favour of Mr. Ho. To succeed, Mr. Ho must also prove that there was an absence of reasonable and probable grounds and that the TPS Defendants were motivated by malice or bad faith.

[56] For the reasons set out above, I am satisfied that the TPS Defendants had reasonable and probable grounds to initiate the prosecution. A finding that there were reasonable and probable grounds to charge Mr. Ho, is fatal to the Plaintiff's claim in malicious prosecution: *Wong*, at para. 73. There is also no evidence that the TPS Defendants engaged in any deliberate or unlawful conduct or acted with malice.

vi) Has the Plaintiff established that there was a conspiracy?

[57] To establish the tort of civil conspiracy, a plaintiff must establish either,

a) The predominant purpose of the defendants' conduct is to cause the plaintiff injury, whether or not the defendants' means were lawful, or

b) The defendants act in combination, by agreement or with a common purpose; their conduct is unlawful; their conduct is directed towards the plaintiff; the defendants know or ought to know that injury to the plaintiff is likely to result; and their conduct causes injury to the plaintiff: *Asghar v. Toronto Police Services Board*, 2019 ONCA 479, at para. 20.

[58] There is no evidence that the predominant purpose of the Defendants' conduct was to cause injury to Mr. Ho. The predominant purpose of the TPS Defendants was to carry out a police investigation and to charge Mr. Ho if there were reasonable and probable grounds. The predominant purpose of Mr. Min was to co-operate with the police and report what had occurred. The predominant purpose of Desjardins was to investigate the insurance claim. There is no evidence that they acted in concert to have Mr. Ho wrongfully charged with an offence.

[59] There is also no evidence that the actions by the Defendants were unlawful. The decision by the TPS Defendants to charge Mr. Ho was made after Detective Sergeant Fazeli obtained information from Ms. Lange, Kodsi Engineering and Mr. Min. Each Defendant acted lawfully in providing information to the police. The decision to charge was made by Detective Sergeant Fazeli alone and not by any of the other Defendants working in combination with the TPS Defendants.

[60] Mr. Ho claims that the Defendants conspired to wrongfully charge him. He was charged on August 30, 2011. Therefore, even if there was a valid claim in conspiracy, the claim is barred by reason of the two-year limitation period.

vii) Are the TPS Defendants liable to the Plaintiff for negligence, inducing breach of contract or unlawfully interfering with economic relations?

[61] Mr. Ho did not provide any evidence of a contract which was breached as a result of the conduct of the TPS Defendants. He also did not provide evidence of any economic relations which were interfered with.

[62] For the reasons set out above, I am satisfied that the TPS Defendants had reasonable and probable grounds to charge Mr. Ho. I am also satisfied that the TPS Defendants did not act negligently with respect to the investigation or prosecution of Mr. Ho.

viii) Was there a breach of the Plaintiff's sections 7 and 9 Charter rights?

[63] Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 9 of the *Charter* provides that individuals have "the right not to be arbitrarily detained".

[64] Mr. Ho alleges that his *Charter* rights were violated when the TPS Defendants attended at his premises to serve the Form 9 on August 30, 2011.

[65] For the reasons set out above, I am satisfied that Mr. Ho was not detained when he was served with the Form 9. At no time was his right to liberty affected. Even if he was detained, the TPS Defendants had reasonable and probable grounds to charge Mr. Ho and therefore the detention could not be considered to be arbitrary. A finding that there were reasonable and probable grounds to charge Mr. Ho is fatal to the claim for a breach of *Charter* rights: *Wong*, at para. 73.

[66] Even if his *Charter* rights were infringed, Mr. Ho failed to commence an action within two years of the infringement and as a result this claim is barred pursuant to the two-year limitation period.

B. The Desjardins Defendants

[67] Mr. Ho brings this action against his insurer, the Desjardins Defendants for property damage and accident benefits. He also alleges that his insurer handled his claims in bad faith and seeks exemplary and punitive damages. Desjardins denies the claim for property damage on the basis that the action was brought beyond the applicable limitation period. Desjardins denies the claim for accident benefits on the basis that the dispute had not been mediated before the action was commenced.

[68] The accident occurred on May 7, 2011. Mr. Ho first advised Desjardins that he had been involved in an accident on May 16, 2011. At that time, he sought coverage for the property damage to his vehicle. By letter dated August 16, 2011, Desjardins wrote to Mr. Ho and denied the property damage claim. Desjardins also denied his entitlement to accident benefits should such a claim be made. On August 26, 2011, Sophie Dailey of Desjardins spoke with Mr. Ho and advised that his claim was denied. During the telephone call, Mr. Ho confirmed that he had received the denial letter dated August 16, 2011. A second denial letter was sent to Mr. Ho on June 20, 2012. The Statement of Claim was issued on June 24, 2015.

i) Is the Plaintiff's claim for property damaged barred pursuant to s. 259.1 of the Insurance Act?

[69] Section 4 of the *Limitations Act* sets out the basic limitation period of two years from the day on which the claim is discovered. Section 5 provides that a person with a claim is presumed to know of the cause of action on the day the act or omission upon which the claim is based, took place. Both sections 4 and 5 are to be read together to determine the commencement date of the limitation period: *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88, 118 O.R. (3d) 694, at para. 16, leave to appeal refused, [2014] S.C.C.A. No. 143.

[70] The *Limitations Act* includes some exceptions to the general rule. One of those exceptions is with respect to claims brought against an automobile insurer for property damage. Section 259.1 of the *Insurance Act* provides that actions under a policy of insurance for loss or damage to an automobile, shall be brought within one year after the happening of the loss or damage.

[71] Here, the accident occurred on May 7, 2011. On August 16, 2011 Desjardins wrote to Mr. Ho and denied the claim. A second denial letter was sent to Mr. Ho on June 20, 2012. In his Statement of Claim at paragraph 31, Mr. Ho confirms that Desjardins denied his claim in the letter sent on June 20, 2012.

[72] The triggering event for the limitation period to start to run is the insurer's denial of the claim, or refusal to pay benefits: *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 57 O.R. (3d) 625 (C.A.), at para. 14. In this case Mr. Ho was advised of the denial of the claim by letter dated August 16, 2011, or at the latest June 20, 2012. Based on the one-year limitation period at s. 259.1 of the *Insurance Act*, the limitation period expired, at the latest, on June 20, 2013. Even if the two-year basis limitation period at s. 4 of the *Limitations Act* applied, the limitation period expired on June 20, 2014.

[73] The claim was issued on June 24, 2015: after the expiry of the limitation period. I am satisfied that the claim for property damage was brought beyond the limitation period and is statute barred.

ii) Is the Plaintiff's claim for Accident Benefits barred because it was not mediated before the action was commenced?

[74] Section 281(2) of the *Insurance Act* requires an insured person to seek mediation of a dispute in respect of the entitlement to accident benefits or the amount of the benefit prior to proceeding with the litigation. Failure to first mediate the entitlement to accident benefits results in the action being statute barred: *Younis v. State Farm*, 2012 ONCA 836, 113 O.R. (3d) 344, at para.12.

[75] Desjardins sent the Application for Accident Benefits package to Mr. Ho on May 18, 2011. No response was received and a follow-up was sent to Mr. Ho on May 27, 2011. A second application was sent to Mr. Ho on July 22, 2011, after he advised that the first application had been stolen from his vehicle. Mr. Ho did not complete the Application for Accident Benefits. He did not make any attempt to mediate his claim for accident benefits. In its letter dated August 16, 2011, Desjardins denied any claims for accident benefits. The second denial letter was sent on June 20, 2012.

[76] The Statement of Claim was issued on June 24, 2015. In the claim, Mr. Ho refers to the fact that he made a claim for accident benefits and the claim was denied. There is no evidence from Mr. Ho that an accident benefit claim was made, or was mediated before the Claim was issued.

[77] The limitation period that applies to claims for accident benefits is the basic two-year limitation period set out in section 4 of the *Limitations Act*. The denial of the accident benefits claim was made by letter, dated August 16, 2011. A second denial letter was sent on June 20, 2012. The limitation period for the claim for accident benefits expired, at the latest on June 20, 2014. The Statement of Claim was issued on June 24, 2015, more than two years after the date of the denial of benefits.

[78] I am satisfied that the claim for accident benefits is barred because the Plaintiff failed to mediate the claim before issuing the Statement of Claim. The claim is also barred because the action for accident benefits was commenced beyond the two-year limitation period.

iii) Is the claim for damages in bad faith barred?

[79] At paragraph 61 of the Statement of Claim, Mr. Ho alleges that Desjardins failed to adjust the claim in good faith. Particulars of the bad faith claim are set out in paragraph 64. Mr. Ho alleges that the bad faith conduct arose in connection with the insurer's failure to conduct a reasonable and thorough investigation into the property damage and accident benefit claims.

[80] A claim in bad faith which seeks aggravated, exemplary and punitive damages is subject to the same requirements set out in the *Insurance Act* as the claims for property damage and accident benefits. As stated in *Arsenault*, at para. 18:

> I am prepared to assume, without deciding, that there can be an independent claim for bad faith conduct in respect of the insurer's refusal to pay or continue to pay no-fault benefits. In order to establish such a claim, the appellant would first have to establish that the insurer's termination of her benefits was improper. Such a claim must comply with the requirements outlined in ss. 280-283 of the *Insurance Act*, one of which is the two-year limitation period for the institution of proceedings to determine this question. The appellant cannot, by the device of a claim for bad faith damages, extend three-fold the length of that termination period.

[81] Mr. Ho alleges in the Statement of Claim that Desjardins enlisted the assistance of the TPS Defendants to harass him. It is also alleged that Desjardins conspired with the other Defendants. The pleading of conspiracy does not take the matter outside the *Insurance Act*. Those claims are also subject to the same requirements set out in the *Insurance Act* as are the claims for property damage and accident benefits claims. As stated in *Mader v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714, 123 O.R. (3d) 120, at para. 49-50:

> ...The claims asserted by the appellant all flow from the denial of benefits. At their essence, they amount to nothing more than a claim that the appellant was wrongfully denied benefits to which she believes that she is entitled to receive. This is precisely the type of claim contemplated for resolution by the procedure in ss. 280 to 283 [of the *Insurance Act*]....

> The pleading of a conspiracy does not transform the appellant's claim into an independent actionable wrong. The facts underlying the appellant's conspiracy claim are the same as those underlying the rest of her claims. The object of the alleged conspiracy was to deny the appellant her benefits.

[82] As stated in *Arsenault*, the limitation period for bringing a claim in bad faith is two years from the date of loss. The allegations in the Statement of Claim refer to the bad faith handling of the Plaintiff's claims for property damage and accident benefits. Those acts occurred in the period before the claim was first denied on August 16, 2011, and later on June 20, 2012. In addition, it is alleged that Desjardins conspired with the other Defendants to have the criminal proceedings brought against Mr. Ho. Mr. Ho was charged on August 30, 2011. There are no allegations that any acts of bad faith took place after that date.

[83] The Statement of Claim was issued on June 24, 2015. I am satisfied that the claim in bad faith was brought beyond the two-year limitation period and is statute barred.

C. Kodsi Engineering Incorporated

i) Does the application of expert witness immunity apply to Kodsi?

[84] Kodsi was retained by Desjardins to inspect the two vehicles and provide a forensic engineering report. Mr. Ho takes the position that Kodsi prepared a report that was negligent and fell below the standard of care. He also alleges that Kodsi failed to conduct a full investigation into the facts of the collision and failed to include important information in its report.

[85] Kodsi argues that expert witness immunity applies to the claim brought against it. The principle of expert immunity was addressed in *Sheehan v. Snell*, 2016 ONSC 6340, 135 O.R. (3d) 147, at paras, 43-45:

> The protection of the integrity of the judicial process requires that an expert witness be immune from civil suit by any person with whom his or her relationship derives from the judicial proceedings....
>
> ...
>
> Immunity from suit extends not only to reports filed in court and oral evidence given in court, but also to activities outside of court related to a report or its preparation....
>
> The protection is absolute. Even allegations of bad faith are insufficient to remove the application of the immunity doctrine....

[86] Mr. Ho argues that expert witness immunity is not available to a party who acts as an assessor in an entirely private capacity and does not apply to an individual who is engaged to provide an expert report in a non-litigious situation: *Varghese v. Landau*, 2004 CanLII 5084 (Ont. S.C.), at para. 51. Mr. Ho notes that at the time Kodsi was retained, there was no legal proceeding, and therefore his report must have been for a non-litigious purpose.

[87] Kodsi argues that the *Varghese* case is distinguished on the facts. Here, Kodsi was retained in contemplation of litigation. Although at the time of Kodsi's retainer there was no legal action, the reasonable expectation was that if legal proceedings were commenced at a later date, Kodsi would be available as an expert witness.

[88] I am satisfied that Kodsi's only involvement in the case was to provide an expert opinion with respect to the circumstances of the accident. Kodsi had no other relationship with the parties. The allegations made against Kodsi arise out of its investigation and the preparation of its expert report. Although litigation had not been commenced at the time Kodsi was retained, litigation could be reasonably expected if Kodsi found there was no contact between the vehicles.

[89] I am satisfied that expert witness immunity applies to Kodsi in the circumstances of this case. However, if expert witness immunity does not apply, I find that there is no liability on Kodsi because there is no evidence of negligence, and the action was brought beyond the applicable limitation period.

ii) Did the Plaintiff establish that Kodsi was negligent, biased or involved in a conspiracy?

[90] Kodsi was retained by Desjardins to examine the two vehicles and prepare a report. I am not satisfied that Kodsi owed a duty of care to Mr. Ho. In any event, Mr. Ho has not provided any evidence in support of his allegation that Kodsi was negligent.

[91] Mr. Ho did not file a report by an engineer which contradicts the findings of the Kodsi report. Also, Mr. Ho did not file an expert report which provides the opinion that the conduct of Kodsi fell below the accepted standard of care of a professional engineer. The only evidence before the court with respect to the conduct of Kodsi is the conclusion of the PEO investigation that Kodsi appeared to meet the industry standard for this type of work.

[92] Mr. Ho has also not provided any evidence that Kodsi was involved in a conspiracy. Kodsi provided the report to Ms. Lange at Desjardins. There is no evidence that it was involved in providing the report to the TPS Defendants.

iii) Is the Plaintiff's action barred by operation of the applicable Limitation Period?

[93] Kodsi completed and signed its report on June 29, 2011. Mr. Engeian of Kodsi testified at the criminal trial. The evidence in the trial was concluded on June 7, 2013. On May 24, 2013, the Plaintiff made a complaint to the Professional Engineers of Ontario ("PEO"). He claimed that the Kodsi report was not compliant with the duties and responsibilities of professional engineers. Mr. Ho testified on his examination for discovery that he had the Kodsi report at the time he made the complaint to the PEO.

[94] The relevant limitation period is the basic two-year limitation period set out in section 4 of the *Limitations Act*. The claim against Kodsi was issued on June 24, 2015, more than two years after Mr. Ho was aware of the report and after he had made his complaint to the PEO. I am satisfied that the claim against Kodsi was brought beyond the limitation period and is statute barred.

D. Jian Ping Min

i) Is Mr. Min Liable to the Plaintiff for malicious prosecution?

[95] Mr. Ho issued an earlier claim on October 13, 2013 in which he sued Mr. Min for negligence arising out of the incident in the parking lot. That action was commenced after the criminal charges were dismissed on June 25, 2013. Mr. Ho did not include a claim in malicious prosecution in the earlier action.

[96] The earlier action was brought more than two years after the date of the accident and Mr. Min pleaded that the action was statute barred. The action was not pursued and was dismissed for delay on November 26, 2018. Mr. Min argues that the present claim in malicious prosecution was brought to get around the fact that the earlier claim against Mr. Min for negligent operation of his vehicle was brought out of time.

[97] At paragraph 95 of the Statement of Claim, Mr. Ho alleges that Mr. Min is liable for malicious prosecution. Mr. Ho alleges that Mr. Min provided the police with false information with respect to the accident. He also alleges that Mr. Min acted with malice.

[98] As noted above, to succeed in a claim for malicious prosecution, the plaintiff must establish, among other things, that the prosecution was initiated by the defendant: *Miazga*, at para. 3. In this case, the criminal proceedings were initiated by the TPS Defendants. Mr. Min argues that Mr. Ho's claim fails on the basis that he did not initiate the prosecution.

[99] A private individual will not be found to have initiated criminal proceedings except in limited circumstances. These circumstances include the following:

a) the defendant desired and intended the plaintiff to be prosecuted;
b) the facts were so completely within the defendant's knowledge that it was virtually impossible for the prosecutor to exercise any independent discretion or judgment; and,
c) the defendant provided information to the prosecutor which he knew to be false or withheld information he knew to be true, or both: *Curley v. Taafe*, 2019 ONCA 368, 146 O.R. (3d) 575, at para. 21.

[100] There is no evidence which establishes any of the criteria set out above. Mr. Min did not initially report the incident to the police. He spoke to the police only after Mr. Ho reported the matter. There is no evidence that Mr. Min desired the police to pursue the prosecution against Mr. Ho. There is no evidence that he was involved in retaining Kodsi or in providing the report to the police.

[101] There is also no evidence that the facts were so completely within Mr. Min's knowledge that the police could not exercise any independent discretion or judgment. The evidence is to the contrary. Mr. Min's statement to the police was only one part of the police investigation. On the basis of Mr. Min's statement alone, Detective Sergeant Fazeli did not charge Mr. Ho. He charged Mr. Ho only after he received additional information from Desjardins, including the Kodsi report. The police officer deposed that upon consideration of all of the evidence available to him, he concluded that there were reasonable and probable grounds to believe Mr. Ho had committed the offences of Fraud Under $5,000 and Public Mischief. There is no evidence that Detective Sergeant Fazeli was unable to exercise his discretion because of the information provided by Mr. Min.

[102] I am satisfied that Mr. Min did not initiate the criminal proceedings against Mr. Ho and therefore the claim in malicious prosecution is dismissed.

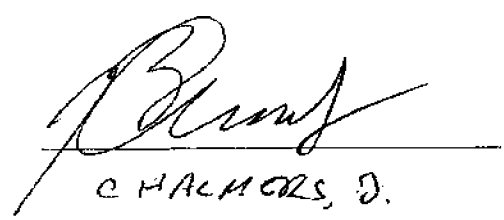
DISPOSITION

[103] Over nine years ago, there was an incident between Mr. Ho and Mr. Min in the parking lot of the Woodside Mall in Scarborough. As a result of that encounter, Mr. Ho was charged with Fraud Under $5,000 and Public Mischief. The criminal proceeding was tried over the course of five days in 2013. There was a hearing into Kodsi's conduct by the PEO. After the criminal charges were dismissed, two separate actions were commenced. For the past five years, the parties have been engaged in lengthy and expensive litigation.

[104] Mr. Ho brought a variety of claims against the Defendants. For the reasons set out above, I conclude that there is no merit to any of the claims. There are no genuine issues requiring a trial. I grant each Defendant's motion for summary judgment and I dismiss the Plaintiff's claim in its entirety.

[105] The Defendants are each presumptively entitled to their costs of the action. I encourage the Defendants to meet with Mr. Ho to settle the issue of costs. If the parties are unable to come to an agreement, the Defendants may each deliver written costs submissions of no more than three pages in length within 20 days of the date of this endorsement. Mr. Ho may deliver written submissions in response on the same basis, within 20 days of receiving the Defendants' submissions.

DATE: November 2, 2020



CITATION: Ho v. Toronto Police Services Board, et al. ONSC
COURT FILE NO.: CV-15-531061-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Simon Ho and Heung Pan

Plaintiffs

– and –

Toronto Police Services Board, Nick Bokalo, Alan Fazeli, Jesse Van Nest, The Personal Insurance Company, c.o.b. Desjardins Insurance Co., and Desjardins General Insurance Group, Arlene Lange, RBC Insurance Company, Kodsi Engineering Incorporated, Jian Ping Min, John Doe, Jane Doe and Robert Doe

Defendants

ENDORSEMENT

Chalmers, J.

Released: November 2, 2020