

CITATION: Sneaky Mommies Inc. v. Deliri, 2025 ONSC 3440
DIVISIONAL COURT FILE NO.: 145/25
DATE: 20250612

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: SNEAKY MOMMIES INC. AND NATALIA MAURER, Appellants/Plaintiffs

AND:

ASE DELIRI, Respondent/Defendant

BEFORE: Coats, Matheson and Nakatsuru JJ.

COUNSEL: *Matthew P Maurer*, for the Appellants/Plaintiffs

No one appearing for the Respondent/Defendant

HEARD: June 10, 2025, in Toronto (by videoconference)

ENDORSEMENT

[1] The appellants/plaintiffs appeal the decision of Koehnen J. dated January 27, 2025 (the Decision) arising from a motion for default judgment. The motion judge granted judgment in the amount of \$2,260, without costs. The appellants submit that the motion judge misapprehended the evidence and therefore erred in failing to grant the following remedies: a mandatory order that the respondent provide an accessible website backup, an additional \$90,000 for lost revenue, and costs.

[2] This appeal is dismissed for the following reasons.

[3] Briefly, the statement of claim and related affidavit recount that Ms. Maurer and a friend decided to pursue a common interest in food and healthy recipes online. Ultimately, Ms. Maurer incorporated the corporate plaintiff and pursued the idea on her own, creating a small influencer website. The plaintiffs used a website that Ms. Maurer built herself, and social media, to create and share family-friendly recipes.

[4] Ms. Maurer knew the respondent from university. The respondent proposed to provide her with website services. He would design and create a new website, migrate the existing website and related steps, and optionally manage the new domain. Leaving aside the optional services, which did not occur, the plaintiffs would pay him about \$5,000 in total. As of May 2020, the time needed to complete the work was estimated at six weeks.

[5] At the end of June 2020, the respondent sent a first invoice for \$2,260 (inclusive of tax), which was paid. The respondent made little progress after that time, only providing a two-page mock up in September 2022. In October 2022, Ms. Maurer said they should part ways. She said that she was going to take her website offline and would permit the respondent to keep the \$2,260 if he provided her with a backup of her website that she could access by October 26, 2022. The respondent agreed. The statement of claim and affidavit defined this backup and access as the “SMI Website Deliverables”.

[6] The respondent told Ms. Maurer that he had downloaded the website and was looking into the best solution for her. The deadline for delivery passed.

[7] Before getting a backup that she could access, Ms. Maurer let her website expire.

[8] In November 2022, the respondent sent a backup via a link to a zip file and referenced earlier information he had provided about how to use the zip file. Ms. Maurer could not make it work. There are no facts indicating that she sought technical assistance from someone else.

[9] The respondent shipped the plaintiffs a hard drive in December 2022 but Ms. Maurer found nothing on it. The respondent sent another one in September 2023 that did have content, but Ms. Maurer could not access it. There are no facts indicating that she sought technical assistance from someone else.

[10] The parties continued in contact until December 2023. At that time, the respondent emailed with his perspective on the events leading up to that point, including that he had delivered the backup as required.

[11] The appellants then sued, seeking damages and a mandatory order that the respondent provide the backup and instructions for access (the SMI Website Deliverables). The respondent was noted in default. In the motion for default judgment, Ms. Maurer sought repayment of the \$2,260, \$90,000 for lost revenue covering a period of two years, and the above mandatory order.

[12] As set out in the Decision, the motion judge found as follows:

- (i) that the claim was grossly disproportionate to the real issues, which were, in essence, a breach of contract claim;
- (ii) that the plaintiffs had failed to mitigate their damages, having provided no explanation for why they did not go to another service provider in a period of over two years, disentitling them to any damages for lost income;
- (iii) that he would not make the mandatory order in that it represented a further example of their exorbitant use of the litigation process and that at some point proportionality must come into play;
- (iv) that they were entitled to the return of the \$2,260; and,

- (v) that they should have no costs since the claim ought to have been brought in the Small Claims Court.

[13] On this appeal, the appellants submit that the motion judge erred by “misapprehending the evidence.” They submit that the motion judge wrongly proceeded on the basis that the respondent was obliged to provide a backup of his own work product, rather than a backup of the appellants’ existing website. The appellants submit that other errors flow from this one.

[14] The appellate standard of review applies, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The standard of review for questions of fact is palpable and overriding error.

[15] The appellants have not shown that the motion judge misapprehended the evidence. Looking at paras. 5 and 10 of the Decision, it is apparent that the motion judge understood that the backup was for the existing website. The reasons for decision correctly and expressly referenced the SMI Website Deliverables. They do not support the submission that there was a misapprehension that the plaintiffs were seeking a backup of the respondent’s work product.

[16] The appellants also challenge the discussion regarding mitigation. The motion judge found that, due to a failure to mitigate, the appellants were not entitled to their claimed \$90,000 in damages. The motion judge observed that the plaintiffs could have gone to another service provider rather than then stretching out their discussion with the respondent for more than two years. This finding was available to the motion judge on the facts. The respondent had not produced deliverables for years and provided two backups that the appellants could not access.

[17] The appellants further submit that they could not mitigate because their website was gone. But it was the appellants who decided to let their website lapse. They could have gone to another service provider. They could have deferred taking their website offline. Instead, they decided to let their website lapse even though the time to receive a backup from the respondent had gone by and no accessible backup had been received.

[18] The contract provided that the respondent could keep the \$2,260 he had received if he provided the SMI Website Deliverables. He did not do so. The motion judge ordered that he pay back the \$2,260. We find no successful ground of appeal regarding the failure to mitigate, which resulted in the denial of the claimed additional damages. We note that there are other apparent problems with that \$90,000 damages claim, starting with the question of whether they would be available as damages arising from the above contract, and moving to the inadequate supporting evidence on the motion. We need not address those frailties given that we uphold the motion judge’s decision.

[19] On the mandatory order, the appellants submit that the motion judge erred by declining the order based on the (unsuccessful) ground of alleged misapprehension of the evidence. At the oral hearing, counsel further submitted that if the motion judge did not misapprehend the evidence, he still erred in failing to grant the mandatory order. The appellants submit that the motion judge should not have criticized them for an exorbitant and disproportionate use of the litigation process, declining the remedy on that basis.

[20] The appellants overlook the discretionary nature of the mandatory order sought. It is equitable relief. As equitable relief, the motion judge was entitled to question the conduct of the plaintiffs, including their choices, delays and lack of proportionality, in deciding whether to grant that relief. We are not persuaded that the motion judge made a palpable and overriding error of fact or otherwise erred in declining the mandatory order.

[21] The appellants do not identify any separate error regarding the costs decision.

[22] The appeal is therefore dismissed without costs.

Coats J.

Matheson J.

Nakatsuru J.

Date: June 12, 2025