

COURT OF APPEAL FOR ONTARIO

CITATION: Wiebe v. Smith, 2025 ONCA 794

DATE: 20251119

DOCKET: COA-25-OM-0387

Thorburn J.A. (Motion Judge)

BETWEEN

Judith Wiebe and Bradley Proudfoot

Plaintiffs (Responding Parties)

and

Colin Smith, Mary Loretta Howard*, Dunmar Homes Ltd., Dunmar Financial Services Corp., Dunmar Holdings Inc., Dunmar Properties, Dunmar Investments* and Goliath Capital Corporation

Defendants (Moving Parties*)

Arnie Herschorn, for the moving parties

Ronald Sleightholm, for the responding parties

Heard: November 13, 2025

REASONS FOR DECISION

[1] The moving party defendants, Mary Loretta Howard (“Ms. Howard”) and Dunmar Investments, seek an order for an extension of time to deliver their Notice of Appeal.

A. THE TEST TO BE MET

[2] The test on a motion to extend time is well-settled. The overarching principle is whether “the justice of the case” requires an extension of time. Each case depends on its own circumstances, but the court is to consider all relevant considerations, including:

- (a) whether the moving party formed a good faith intention to appeal within the relevant time;
- (b) the length of, and explanation for, the delay in filing;
- (c) any prejudice to the responding parties caused, perpetuated, or exacerbated by the delay; and
- (d) the merits of the proposed appeal.

1250264 Ontario Inc. v. Pet Valu Canada Inc., 2015 ONCA 5, at para. 6; *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15.

[3] The merits of a proposed appeal have been described as the most important factor: *Robson v. Law Society of Ontario*, 2023 ONCA 709, at para. 5. Lack of merit alone may be a sufficient to deny an extension: *Enbridge Gas*, at para. 16; *Laski v. Laski*, 2016 ONCA 337 at para. 37; *Wardlaw v. Wardlaw*, 2020 ONCA 286, at para. 4.

[4] When assessing the merits of the appeal, it is not with a view to determining whether the appeal will succeed, but to determine whether it has so little merit that

the court could reasonably deny the important right of an appeal: *Issasi v. Rosenzweig*, 2011 ONCA 112, 277 O.A.C. 391, at para. 10. The moving party must identify some possible error of law or palpable and overriding error of fact that would allow this court to interfere with the decision of the trial judge: *Sutherland Lofts Inc. v. Peck*, 2017 ONCA 803, 68 M.P.L.R. (5th) 1, at para. 12.

B. BACKGROUND

[5] In their Statement of Claim, Ms. Wiebe and Mr. Proudfoot (“the plaintiffs”) alleged that Ms. Howard and her former spouse and business partner Mr. Smith defrauded them by misappropriating funds from a real estate project (the “project”). The plaintiffs obtained summary judgment against Mr. Smith and other defendants. A trial then took place to determine whether Ms. Howard should be personally liable for the plaintiffs’ investment losses.

[6] The Reasons for Decision for the trial were released on October 22, 2024. Ms. Howard was found liable for fraudulent misrepresentation.

[7] Upon receipt of the Reasons, Ms. Howard instructed her trial counsel to appeal the decision. Her trial counsel did not deliver the Notice of Appeal within the time set out in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as she was dealing with various personal issues.

[8] On April 9, 2025, Ms. Howard's trial counsel advised her that she had failed to deliver a notice of appeal. The Notice of Appeal has not yet been filed with this court.

[9] Although this matter has been ongoing for many years, the respondents have not argued that there is serious prejudice beyond the ongoing delay in having a final disposition.

[10] The central issue therefore, is the merits of the proposed appeal.

C. ANALYSIS

[11] Ms. Howard claims the motion judge erred in holding her personally liable for fraudulent misrepresentation.

[12] The trial judge made adverse credibility findings against Ms. Howard because of her failure to call Mr. Smith as a witness at trial. He found that:

On October 24, 2022, Ms. Howard advised the court through counsel of her intention to call Mr. Smith as her witness at trial. Despite this, she did not serve him with a summons to witness after he refused to voluntarily testify at trial ...

...

The court previously adjourned the trial after she gave assurances that she would call him as her witness to make his evidence available. In the circumstances and having regard to the plaintiffs' earlier objection to an adjournment of the trial due to the risk of his non-attendance, it was incumbent on her to take reasonable

steps to secure his attendance by serving him with a summons to witness, particularly after he purportedly refused to testify at trial. Taking this all into account, I find that an adverse inference should be drawn that Mr. Smith's evidence would not have supported Ms. Howard's defence in this case. [Emphasis added.]

[13] Second, the trial judge made adverse credibility findings against Ms. Howard because she failed to keep records of the relevant transactions. He noted that, although Ms. Howard was a well-educated woman with considerable business experience:

Ms. Howard adduced only a few records into evidence and offered vague or imprecise accounts of events that are largely if not wholly uncorroborated and unsupported. Much of her testimony was directed at minimizing her role and involvement in the partnership with Mr. Smith, in her discussions with the plaintiffs, and in the Oakville Project.... Instead, she tried to testify about things [Mr. Smith] allegedly told her or that others allegedly said about him. Despite some initial efforts to preserve business records, she purportedly acquiesced when her children made arrangements to return the paper records and computer to him without meaningfully explaining why she would willingly give up these records (i.e., apart from inferring that she or her children were seeking closure) and without retaining any copies of either the paper or Cloud-based records. I am quite troubled by the timing of the return of the paper records and computer to Mr. Smith as it largely coincided with the police investigation into the partnership's business activities after the bookkeeper quit sorting out the partnership's business records and reported concerns to police. The return of the documents also coincides with when the plaintiffs commenced this action. [Emphasis added.]

[14] The trial judge held that, “All of this [casts] serious doubt on the credibility and reliability of her [Ms. Howard’s] evidence that I find should be treated with real caution. Where her evidence was inconsistent with the plaintiffs’ evidence I prefer the testimony of the plaintiffs.”

[15] Absent a reversible error, findings of credibility such as these are owed deference: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81; *Liquid Capital Exchange Corp. v. Daoust*, 2024 ONCA 489, at para. 28.

[16] Next, the trial judge found that Ms. Howard made false representations to the plaintiffs, which included a discussion of her participation in business meetings with Mr. Smith and the plaintiffs. He held that:

Although I accept that Mr. Smith did most of the talking when the four met together to discuss investing in real estate, I am satisfied that Ms. Howard was present during the meetings, willingly participated in the group discussions, agreed with the statements and representations that were made to the plaintiffs, did not object to or otherwise qualify any of the statements or representations, and never suggested that investing in the Oakville Project would be risky for them. To the extent that Ms. Howard was present but silent at meetings when Mr. Smith made statements and representations about the Oakville Project to the plaintiffs, I am satisfied that she adopted his statements and representations by silence.

...

I accept that her silence implicated a false representation due to what was left unsaid as the circumstances would have raised a duty to speak to avoid subjecting the

plaintiffs to inaccurate representations. [Emphasis added; citations omitted.]

[17] The trial judge then found her personally liable for fraudulent misrepresentation as:

I find that [Ms. Howard] made fraudulent misrepresentations to the plaintiffs to encourage them to invest in the Oakville Project. As she was an officer and director of both Dunmar Holdings and Dunmar Homes, I find that she should be personally liable for the losses the plaintiffs incurred in this context. More importantly, as Mr. Smith's business partner, Ms. Howard was to share any profits from the project with him. Given these circumstances, I find that Ms. Howard was acting in a personal capacity, and in her capacity as an officer and director of the corporations, when she made the fraudulent misrepresentations to the plaintiffs that led them to invest in the project. She claims to have been a silent or 'passive' officer or director and not a directing mind of the corporations. However, she assumed significant personal liability by guaranteeing the building mortgage for the project and by allowing the use of her unlimited charge card to pay for project-related and other business expenses for the corporations. In turn, I do not accept that she passively let Mr. Smith run the companies without her and reject her evidence on this. In my view, she was a directing mind of the corporations at all material times. Accordingly, I find that the facts of this case fall squarely within the circumstances in which her conduct exhibited a separate identity or interest from that of the corporations to make her personally liable for her misrepresentations. [Emphasis added; citations omitted.]

[18] The moving parties have identified no error of fact or law in the trial judge's reasons. Rather, they claim no adverse inference should have been drawn against Ms. Howard for the failure to call Mr. Smith because this was her trial counsel's

error, a decision which has far-reaching implications for Ms. Howard although she herself did not make the decision.

[19] I do not agree. Ms. Howard was aware that Mr. Smith had not agreed to testify, and there is no suggestion that Ms. Howard instructed her trial counsel to call Mr. Smith and that this instruction was not followed.

[20] Moreover, this is but one of several reasons why the trial judge drew adverse inferences against her credibility, as set out in his lengthy reasons. There was also the fact that she did not preserve and provide the business records of her business partnership with Mr. Smith in support of her testimony.

[21] Further, the moving parties argue that the trial judge should not have found that Ms. Howard was knowledgeable or reckless to the truth of Mr. Smith's representations as she was merely silent when those representations were made. However, the moving parties have not identified any reviewable error in the trial judge's analysis with respect to this point.

[22] The trial judge relied on the appropriate caselaw stating that (i) silence can constitute a misrepresentation and that (ii) silence can constitute adoptive admission of representations made by another party, finding that Ms. Howard's silence constituted false representations.

[23] When the trial judge's reasons are read as a whole, it is clear that based on the evidence, including Ms. Howard's business experience and her personal

liability for guaranteeing the building mortgage for the project, the trial judge rejected Ms. Howard's evidence that she had no knowledge of key aspects of the project. He also found that her representations about the project's viability and profitability were made without meaningful regard to their accuracy or truth, in light of the risks associated with the fact that neither she nor Mr. Smith had worked on a build project of similar magnitude. Therefore, the trial judge found that her representations to the plaintiffs that the project remained viable and profitable were made with reckless disregard at minimum. The moving parties have not identified a reversible error in this analysis.

[24] In short, there is no valid basis to extend the time to file a Notice of Appeal as the moving parties have identified no errors in the decision below.

D. DISPOSITION

[25] The motion to extend the time to file the Notice of Appeal is therefore denied with costs to the respondents in the amount of \$5,000 all inclusive.

“Thorburn J.A”