COURT OF APPEAL FOR ONTARIO

CITATION: B.L.T. Construction Services Inc. v. Una Pizza Napoletana Inc., 2025 ONCA 849
DATE: 20251208
DOCKET: COA-24-CV-1294

Zarnett, Sossin and Pomerance JJ.A.

BETWEEN

B.L.T. Construction Services Inc.

Plaintiff (Respondent)

and

Una Pizza Napoletana Inc., Pizza Couture Inc., John Chetti, Rocco Mazzaferro* and Tony Chung

Defendants (Appellant*)

Patrick Di Monte, for the appellant

Christopher A.L. Caruana, for the respondent

Heard: September 17, 2025

On appeal from the judgment of Justice Colin P. Stevenson of the Superior Court of Justice, dated November 5, 2024.

Pomerance J.A.:

OVERVIEW

[1] The respondent, B.L.T. Construction Services Inc. (“BLT”), was retained to perform construction management services for two new pizza restaurants. The restaurants were run by Una Pizza Napoletana Inc. (“Una”) and Pizza Couture Inc.

("Couture", collectively, "the Corporations"). The appellant, Rocco Mazzaferro ("Mazzaferro") served as an officer and director of Una. The respondent submitted invoices for its work but was never paid. Those cheques that were sent were returned for non-sufficient funds.

[2] The respondent launched a claim that included allegations that the Corporations received leasehold improvement advances from the third-party landlords to fund the construction projects, yet failed to advance the funds to the respondent. The respondent's claim asserted that this constituted a breach of the trust imposed by s. 7 of the *Construction Act*, R.S.O. 1990, c. C.30, as well as an unjust enrichment of the Corporations. It alleged that the individual defendants, including the appellant, were liable because they were each a person with effective control of" the Corporations and had assented to or acquiesced in the misuse of trust funds.

[3] The appellant had been noted in default, after his defence was struck and he had taken no steps to defend the action for several years. In response to the respondent's motion for judgment he brought a motion to set aside the order striking his defence. The motion judge refused to set aside the order striking the appellant's defence, and concluded that the appellant was jointly and severally liable, along with his co-defendants, for the amount of $180,372.49, a figure that represented the amount of the unpaid invoices. The motion judge further held that

the defendants, including the appellant were jointly and severally liable for costs in the amount of $8750.92.

[4] The appellant Mazzaferro raises the following issues:

(1) Did the motion judge err in failing to set aside the striking out of the appellant's defence?

(2) Did the motion judge err in granting judgment against the appellant, finding him to be jointly and severally liable for the amount of $180,372.49?

[5] I conclude that the motion judge did not err in his assessment of either issue. I will explain why in the reasons that follow.

NO ERROR IN REFUSING TO SET ASIDE STRIKING OF APPELLANT'S DEFENCE

[6] Dealing with the first issue, the motion judge did not err in refusing to set aside the order striking the appellant's defence. The litigation of this action was protracted, extending over several years. Apart from filing initially filing a statement of defence, the appellant did nothing to defend against the claim until the proverbial 11th hour, when he brought a cross-motion to set aside the orders striking his defence and finding him in default.

[7] On May 21, 2021, Associate Judge Abrams set a timetable for the action. By that time, one of the individual defendants, John Chetti had entered into a

bankruptcy proposal and the case against him was stayed. In November 2021, counsel for the remaining defendants obtained an order removing himself as counsel. As no steps were subsequently taken by the defendants, Associate Judge Abrams granted an order striking the defences (including that of the appellant) on August 22, 2023. On August 31, 2023, the defendants (including the appellant) were noted in default.

[8] The respondent brought a motion for default judgment. Before the hearing, various case conferences were held. On December 15, 2023, Papageorgiou J. gave the appellant and other defendants one last opportunity to participate, advising that, if they did not do so before January 8, 2024, the motion for default judgment would be determined in writing.

[9] Prior to January 8, 2024, David Pomer, a lawyer with whom the appellant had consulted, advised that the appellant would participate in the motion. However, Mr. Pomer later advised that he had not been retained by the appellant. In February 2024, new counsel for the appellant wrote to counsel for the respondent to advise that he would be moving to set aside the order striking his defence. Yet again, no steps were taken. Eventually, a case conference was set for August 30, 2024 and was heard before the motion judge.

[10] Despite being given notice of the case conference, neither the appellant nor his new counsel attended. On that date the motion judge set a timetable for the

filing of materials. The motion judge directed that his order be sent to both Mr. Pomer and the new counsel for the appellant.

[11] It was not until September 26, 2024 that the appellant acted. It was then that he brought a motion to set aside the order striking his defence, asking that it be heard at the same time as the respondent's motion for default judgment.

[12] The appellant filed an affidavit in which he offered various explanations for his dilatory conduct. He claimed that he had not been aware that counsel for the defendants had been removed from the record. He claimed not to have received the order, alleging that it was sent to the wrong email address. He claimed not to have received hard copies of prior motion materials that had been sent to him. He claimed that his inattention was due to the death of his mother-in-law, but did not explain the lapse in time between that event and the events in the litigation. He also attributed his inattention to his wife's continuing illness, but he failed to offer any details or supporting medical documentation.

[13] As it related to the merits, the appellant asserted in his affidavit that he had not been involved with the Corporations since 2017. He claimed to have sold his shares and resigned as director but offered no confirming documentation. The appellant claimed that he had never received any money arising out of or relating to the restaurant construction.

[14] The motion judge dismissed the appellant's motion. Among the factors considered by the motion judge were the appellant's behaviour, the length of the delay, the reasons for the delay, the lack of complexity, and the relatively low value of the claim: *Intact Insurance Company v. Kisel*, 2015 ONCA 205, 125 O.R. (3d) 365, at para. 13. The motion judge found the appellant's excuses and explanations to be unsubstantiated and incredible.

[15] The motion judge also found that the appellant did not have an arguable defence. He failed to show that he was not involved in building additional restaurant locations. He did not provide any evidence as to what happened to the leasehold improvement funds or why the invoices were not paid. He did not provide a rational explanation for why he should not be liable for breach of trust.

[16] I see no error in the motion judge's refusal to set aside the orders striking the appellant's defence and noting him in default. The appellant failed to participate in the proceedings, despite being given several opportunities to do so. His motion, filed after years of inaction, can be fairly described as "a little too little, a little too late". The motion judge's decision is entitled to deference, and there is no basis for appellate intervention.

NO ERROR REGARDING QUANTUM

[17] The motion judge found the appellant and co-defendants were jointly and severally liable for the amount of $180,372.49, that being the quantum of the unpaid invoices.

[18] The motion judge found that, by virtue of the appellant's default, he was deemed to admit the truth of all allegations of fact in the statement of claim. That was undoubtedly correct: *Rules of Civil Procedure*, r.19.02(1)(a). Those facts were that:

(a) The Corporations were in receipt of the leasehold improvement advances and that such funds were to be held in trust;

(b) That the trust funds were not used to pay BLT, as the "contractor", contrary to the requirements of the trust; and

(c) Mazzaferro (who was a director and officer of Una and was deemed to have admitted to being a person who had effective control over Couture and its activities) was aware of, or acquiesced in, conduct that gave rise to the breach of trust.

[19] The appellant argued in oral submissions that the claim was deficient, in that it did not specify the precise amount of money advanced by landlords for leasehold improvements. The appellant says that the respondent's claim should have specified how much, when, and to whom the money was advanced.

[20] I disagree. In the particular circumstances of this case, the claim was sufficient to make out the elements of breach of trust, and the quantum.

[21] It is important to situate the claim within the legislative framework. The respondent alleged a breach of trust under s.7 of the *Construction Act*, R.S.O. 1990, c. C.30. That section provides as follows:

> (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to **t**he payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (1).
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> (2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (2).
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> (3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (3).
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> (4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner. R.S.O. 1990, c. C.30, s. 7 (4).

[22] The facts alleged establish liability for breach of trust. Money is alleged to have been paid to the Corporations to be used to finance, that is, to pay for, the improvements undertaken by the respondent, and that money, which the Act required be used to pay the respondent, is alleged to have been used for a purpose

inconsistent with the trust, because it was not used to pay the respondent. As noted the appellant was deemed to admit all of those allegations, as well as his effective control over the Corporations that breached the trust.

[23] As for the quantum of the funds that were to be held in trust, the respondent's claim alleged that the Services and Materials provided by the respondent were particularized in the invoices it delivered, and that the funds advanced by the landlords to Corporations were "in respect of all or a portion of the Services and Materials supplied by BLT".

[24] Thus, the facts deemed to be admitted by the appellant included the allegation that the Corporations received funds in respect of "all" of the services and materials supplied by BLT, as set out in its invoices. It is true that the claim referred to "all or a portion of" the services and materials supplied by BLT. However, the reference to "a portion of" is properly seen as an alternative allegation, applicable if it was open to the appellant to contest the assertion that the full amount of the invoices was received by the Corporations, and if the appellant successfully did so.

[25] Here, because his defence was struck, and he was noted in default, there was no basis on which the appellant could contest the allegation that the landlords advanced an amount equal to all of the work and services provided by the respondent, as shown on its invoices. It was open to the motion judge to conclude

that the unpaid invoices accurately reflected the amount that was advanced by the landlords for leasehold improvements, and thus reflected the quantum of the breach of trust.

[26] Accordingly, the motion judge did not err in holding the appellant and his co-defendants jointly and severally liable to the respondent in the amount of $180,372.49.

[27] I would therefore dismiss the appeal. In accordance with the parties' agreement, costs are ordered against the appellant in the amount of $6,543.84 all inclusive.

Released: December 8, 2025 "B.Z."

"R. Pomerance J.A."
"I agree. B. Zarnett J.A."
"I agree. L. Sossin J.A."