

CITATION: 784773 Ontario Limited v. Larkin, 2023 ONSC 3203
COURT FILE NO.: CV-18-00138604-0000
DATE: 20230529

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 784773 Ontario Limited O/A Lowton Co-Tenancy, Plaintiff

AND:

Michael Larkin and Larkin + Land Use Planners Inc., Defendants

BEFORE: Justice V. Christie

COUNSEL: Neil G. Wilson, Counsel for the Plaintiff

D. Gordon Bent, Counsel for the Defendants

HEARD: May 26, 2023

ENDORSEMENT
SUMMARY JUDGMENT MOTION

CHRISTIE J.

Overview

- [1] This action concerns money admittedly misappropriated by the Defendants while acting as trustees from 1995 to 2018. The Plaintiff has brought a motion for summary judgment.
- [2] The Plaintiff, 784773 Ontario Ltd., is a land development company. Beginning in 1995, the Plaintiff, together with two other developers, Ardree and Lindvest, retained the Defendants, Michael Larkin and his firm, to act as a trustee with respect to a cost sharing agreement between them for the development of lands into residential subdivisions in Newmarket, Ontario. Under the cost sharing agreement, the parties agreed to share the costs associated with the development of the land according to a formula tied to their proportionate share. The Plaintiff had the largest proportionate share, which was approximately 67%.
- [3] In their role as trustees, the Defendants collected funds from the parties to the cost sharing agreement and were expected to apply the funds to shared development costs. It was agreed that the trustee would issue calls for funds for community costs owing by the landowners under the agreement, collect the funds from the landowners, and disburse the funds to the various suppliers to whom money was owing. To do this, the Defendants operated a group account. Mr. Larkin and his firm were to be compensated for their services as a trustee by providing invoices for work completed.

[4] Nearing the conclusion of the project, in 2017, discrepancies in the accounting provided by the Defendants were discovered and it was ultimately determined that the Defendants had misappropriated funds. Initially when this was discovered, Mr. Larkin tried to cover up his actions by making up a \$2.195 million adjustment relating to servicing work completed by ConDrain. Meanwhile, the Plaintiff, Lowton, had already paid ConDrain. Mr. Larkin testified in his examination for discovery as follows:

663. Q. And so, Sir, to summarize, Metrus paid the ConDrain invoice?

A. Yes.

664. Q. You invoiced all of the group members including Metrus for the ConDrain invoice and they paid that money to you?

A. Yes

665. Q. And then you paid Metrus that amount of money?

A. Correct.

666. Q. And so at the end of the day, there was no additional refund or credit that should have been deducted from Metrus when you did the reconciliation in 2017?

A. Correct.

It is clear that this adjustment should never have been reflected and that Mr. Larkin indicated this adjustment in an attempt to cover up his actions. It is to be noted that on a more recent spreadsheet from Mr. Larkin, the \$2.195 million adjustment has been removed and the amount owing to Lowton is indicated as \$1,778,177.65.

[5] Mr. Larkin misappropriated the funds by taking money received, in excess of the calls for funds he issued, and transferred money from the group bank account, which he controlled, to his own personal and business bank accounts. When there was such an overpayment, Mr. Larkin was expected to account for that by applying the amount as a credit to the next call for funds. Instead of doing that, he simply requested more money and moved the overpayment into his own accounts.

[6] At his examination for discovery, on January 16, 2020, the Defendant admitted that he took funds from the Plaintiff that he had no legal entitlement to, and that he used those funds to pay operating expenses of his company. The Defendants undertook to provide their calculations of the total funds taken, and in their answers to undertakings on February 6, 2020, calculated the amount owing as \$1,038,616.

[7] On March 3, 2021, this court granted a partial judgment in the amount of \$1,038,616, pursuant to a Rule 51.06 motion, an amount which was not opposed by the Defendants. The Plaintiff's position was, and continues to be, that there is more owing. At that time,

the Plaintiff took the position that the total misappropriation was in excess of \$3.5 million, however, the position now is significantly less.

- [8] During submissions on this summary judgment motion, it was made perfectly clear that the Defendants admit that money was misappropriated, and that they took \$1,728,304 which they were not entitled to take. The Defendants also agreed that they are responsible to pay for the work conducted by the forensic accountants in the amount of \$50,238. Of this total amount of \$1,778,542, \$1,038,616 has already been paid, in satisfaction of the earlier judgment in 2021. The Defendants do not dispute the fact that the remaining funds, \$739,926, are not their funds, however, it is their position that the Plaintiff, Lowton, has not demonstrated that the entirety of this money belongs to them as opposed to one of the other two developers, Ardree or Lindvest.

Analysis

- [9] There are two critical facts that are uncontested:

1. Mr. Larkin admitted that he misappropriated funds when acting as trustee – in other words while acting in a fiduciary capacity. He took money that he had no entitlement to take.
2. Mr. Larkin has admitted that there was never any basis for him to move money from the group account into his own accounts in any amount greater than his invoice amounts.

- [10] At the time of the partial judgment in March 2021, Mr. Larkin admitted owing \$1,038,616 and he has paid that amount. At that time, the Plaintiffs were of the view that the total owing was just over \$3.5 million. The Plaintiffs now take the position that the remainder owing is \$739,926, which means the total is less than \$2 million.

- [11] The banking records and PwC analysis are both reliable and uncontested. It became clear during the hearing of this summary judgment motion that Mr. Larkin was no longer contesting the accuracy of the records and the ultimate conclusion that he took, in total, \$1,728,304 that he was not entitled to take.

- [12] The PwC analysis sets out the total amount removed from the group account from 2011 to 2018. In the executive summary to their report, PwC explains that they looked at two time periods, one beginning in 2008 through to 2019, and one beginning in 2011 through to 2019. PwC determined that the total net transfers (considering money that flowed back and forth between the group account and Larkin accounts) to the Larkin accounts was \$1,761,330. The Larkin invoices totalled \$652,963. Therefore, the difference between the transfers and the invoices amounted to \$1,108,367. It should be noted that there was never any legitimate reason for Mr. Larkin to be required to move money back from his personal account to the group account. The only reason that money should have been moving from the group account to his personal accounts would have been for the payment of invoices, therefore, there would never have been any reason to move money back if those transfers into his accounts were legitimate.

- [13] Two further transactions must be added on to the total reached by PwC when doing their analysis. As stated above, in determining the total net transfers to the Larkin accounts, PwC gave credit to the Defendants where money was paid back to the group account from the Larkin accounts. However, two repayments should not have been credited in such a manner. PwC was looking at the records for the time period between 2008 and 2019. During that time, they saw two payments being paid back into the account in 2017 for which Mr. Larkin was given credit. However, these payments back to the account were actually for funds that Mr. Larkin had improperly obtained back in 2005, which was outside of the review period.
- [14] In summary, in December 2004, Mr. Larkin issued a call for funds that were paid by Lindvest and Ardree in 2005, \$280,231.21 and \$339,706.35 respectively. That call for funds was subsequently cancelled but these funds were never repaid to Lindvest and Ardree. Therefore, those funds were improperly obtained in 2005, outside the review period of PwC. This went undetected until 2017 when Lindvest noticed that the payment was not documented. On November 17, 2017, Frank Palombi of Lindvest wrote to Mr. Larkin about this payment that was not reflected in the CFF Funding Summary. On November 23, 2017, Mr. Larkin responded to Mr. Palombi, without copying Lowton or the Lowton accountants, acknowledging that Mr. Palombi was correct and that he was “making arrangements to return the funds”.
- [15] The group account bank records for December 2017 show that money was deposited, specifically \$325,000 and \$300,000, and then two cheques issued, one to Ardree in the amount of \$339,706.35 and one to Lindvest in the amount of \$280,231.21. This is money that should have been repaid in 2005 when the call for funds was cancelled. Therefore, the Defendants were given credit for the \$625,000 that was paid back to the group account for money that never should have been taken in the first place and that was later paid out to Ardree and Lindvest. In his examination for discovery, the following exchange took place:
230. Q. You putting the money back into the account in 2017 was essentially putting back in money that already should have been put back in 2005?
- A. Correct, had that double counting been highlighted at the time it would have been, yes.
- [16] Therefore, it is clear that this repayment into the group account should not have been credited for this period as it was a credit back for payments made in 2005 that should have been returned at that time. Mr. Larkin received a credit for the money coming in, but PwC was not considering that the money was going right back out again to Lindvest and Ardree to repay something that should have been repaid years before.
- [17] In *Zenish Polyfilm LLP v. Alpha Marathon Film Extrusion Technologies Inc.*, 2023 ONSC 1936 (CanLII), Vermette J. provided a summary of the principles to be considered on summary judgment. The Court stated:

[78] Each party must put its best foot forward to establish whether or not there is a genuine issue requiring a trial: see *Ramdial v. Davis*, 2015 ONCA 726 at para. 27 (“*Ramdial*”). The court is entitled to assume that the record contains all the evidence that the parties would present at trial: see *Toronto-Dominion Bank v. Hylton*, 2012 ONCA 614 at para. 5 and *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para. 7. Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party’s evidence or risk a summary judgment: see *Soliman v. Bordman*, 2021 ONSC 7023 at para. 133. A responding party has an obligation to “lead trump or risk losing” and cannot rely on allegations or denials in the pleadings; it must present evidence of specific facts demonstrating that there is a genuine issue requiring a trial: see *Ramdial* at paras. 28 and 30, and *Sylvite v. Parkes*, 2020 ONSC 5569 at para. 16. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 432 at para. 31.

- [18] It is clear that this court has all of the available evidence before it. Everyone has put their best foot forward. Mr. Larkin will not have any better evidence than he has today. Quite frankly, there is very little in dispute.
- [19] It must be remembered that this summary judgment motion is occurring in the context of an admitted misappropriation of significant funds by a person with an admitted fiduciary duty. In *Borrelli v. Chan*, 2018 ONSC 1429 (CanLII), there were allegations of fraud and breach of fiduciary duty. The Court stated as follows:

[932] When the plaintiff adduces evidence connecting the defendant’s tortious conduct to the injury suffered, it is appropriate for the court to infer the defendant’s liability for these injuries in the absence of a credible explanation by the defendant. Evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted: *Blatch v. Archer* (1774), 98 E.R. 969, at p. 970.

[933] This is especially the case where the facts lie particularly within the knowledge of the defendant. The Court may infer causation in the absence of evidence to the contrary. The Court may make such inferences even if the plaintiff adduces little affirmative evidence and lacks positive or scientific proof of causation. The Court may make an adverse inference against the defendant if the defendant fails to provide a credible explanation to rebut the

evidence adduced by the plaintiff. This is not a reverse onus. Instead, it is merely the application of a “robust and pragmatic approach to the...facts” and is consistent with the trial judge’s fundamental role in weighing evidence: *Snell*, at paras. 33-34.

[934] Canadian courts have applied this basic evidentiary principle to fraud and breach of fiduciary duty. Adverse inferences may be drawn against defendants as long as the plaintiff has made reasonable efforts to adduce evidence to link the defendant’s conduct to the harm suffered and the defendant provides no credible explanation. The court assessing damages will not demand exacting proof of the precise loss from fraud or breach of fiduciary duty, but instead draw an adverse inference against a defendant found to have been fraudulent or in breach of fiduciary duty unless that defendant leads evidence to disprove the amount or cause of the loss, *Huff v. Price*, (1990) 1990 CanLII 5402 (BC CA), 76 D.L.R. (4th) 138 (B.C.C.A.), at para. 38.

[935] It is also a well-established legal principle that the Court is entitled to resolve evidentiary difficulties against the wrongdoer who created them. As the Ontario Court of Appeal ruled in *Ticketnet Corp v. Air Canada*, (1997) 1997 CanLII 1471 (ON CA), 105 O.A.C. 87, at para. 85: evidentiary difficulties should be resolved against the wrongdoer “where the wrongdoer’s own actions make it difficult for the innocent party to prove its loss or where the facts needed to prove the loss are known solely by the wrongdoer and the wrongdoer does not disclose these facts to the innocent party.” The Court of Appeal cited the Supreme Court of Canada in *Kohler v. Thorold Natural Gas Co*, (1916) 1916 CanLII 629 (SCC), 52 S.C.R. 514, at 530-31, where Duff J. held:

[A]s against a wrongdoer, and especially where the wrong is of such a character that in itself it is calculated to make and does make the exact ascertainment of damages impossible or extremely difficult and embarrassing, all reasonable presumptions are to be made.

See also *581257 Alberta Ltd. v. Aujla*, 2013 ABCA 16, 542 A.R. 123, at para. 56.

- [20] The focus in submissions by the Defendants was that, while this money most certainly does not belong to Mr. Larkin or his company, the Plaintiff has not demonstrated that the entirety of the remaining money to be paid, \$739,926, is owed to the Plaintiff. The Defendants point out that this was a group account – not Lowton’s account. There were three members of that group: Lowton, Ardree and Lindvest. The Defendants argued that there has been

no tracing or attempt to trace the funds to compare money in and money out. According to the Defendants, the Plaintiff has simply not established that the money belongs to Lowton, rather this was simply an assumption on the part of PwC when doing the analysis – an assumption which the Defendants claim is faulty. The Defendants state that all that has been established by the Plaintiff is the total amount that Mr. Larkin took that he was not entitled to, but that there is no evidence to support who is entitled to that money, out of the group of three. It is for that reason that the Defendants argue that either the summary judgment motion be dismissed, or, at its highest, this court should only grant partial summary judgment in the amount of \$119,989, as the credits in 2017 seem to relate to Ardree and Lindvest, but certainly not Lowton. The Defendants suggested that this would still permit the Plaintiff to pursue the remaining money at a trial.

- [21] It is the view of this court that there is nothing further that a trial judge will be presented with that is not already before this court. All parties have presented all of their evidence. There is nothing more. A trial judge would be considering the same issue on the same evidence. There is likely no further work that can be done by the accountants. It would appear that the bank records do not go back any further than 2007.
- [22] In this case, there is an admitted breach of a fiduciary duty. There is an admitted misappropriation. There is an admitted amount – the Defendants admit that they took \$1,728,304 that they were never entitled to take. The only contentious issue is whether the Plaintiff is owed the entirety of that misappropriated amount. In such a case as this, surely the admitted wrongdoer should not benefit from a lack of exacting proof, as pointed out in *Borrelli*.
- [23] This court cannot accept the Defendants argument. If this court were to accept this argument, Mr. Larkin would keep over \$600,000 of money which he admits he misappropriated and is not entitled to, as opposed to providing that money to Lowton, who is the only Plaintiff that has come forward seeking this money and who held 67% of the share.
- [24] Neither Lindvest or Ardree have made a claim, despite this action now being 5 years old and the issue being discovered in 2017. There is no reason to believe that a claim will be forthcoming in the future. When the discrepancy was noticed by Lindvest and Ardree in 2017, they received 100% of what they were seeking. There is every reason to believe that they were satisfied with such a result.
- [25] For all of the foregoing reasons, it is clear that there is no genuine issue requiring a trial. There is no question of law or fact to be argued. Summary judgment is most certainly warranted in these circumstances. This Court orders:
- a. The summary judgment motion is granted;
 - b. The Plaintiff is entitled to judgment in the amount of \$739,926;

- c. The Plaintiff is entitled to reimbursement for the costs of \$50,238 incurred for the PwC investigation / report. The Defendants took no issue with this request and it is obviously reasonable in the circumstances given the admissions in this case;
 - d. A declaration that the debt owing under this judgment arose out of fraud, embezzlement, misappropriation or defalcation that occurred while the Defendants were acting in a fiduciary capacity. The Defendants took no issue with this request and it is obviously reasonable in the circumstances given the admissions in this case.
 - e. Post-judgment interest in accordance with the *Courts of Justice Act*.
- [26] This Court strongly encourages the parties to attempt to resolve the issue of costs. If the parties are unable to agree on costs of this application, the court will accept a two-page written submission on costs from each party, to be filed with the court, uploaded to Caselines, and emailed to Bev.Taylor@ontario.ca, no later than Friday, June 9, 2023 at 4:30 p.m.

Justice V. Christie

Date: May 29, 2023