

CITATION: Sayward Investments Inc. v Da Silva 2024 ONSC 7031
COURT FILE NO.: CV-20-1448
DATE: 2024 12 13

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
SAYWARD INVESTMENTS INC.) Stephen Schwartz and Emily Quail, for
) the plaintiff (defendant by counterclaim)
)
)
- and -)
)
)
)
VILSON MARCIANA DA SILVA,) Matthew Kersten, for the defendants
DAENN MONTEIRO LOUREIRO, and) (plaintiffs by counterclaim)
LEBLON CARPENTRY INC.)
)
)
)

COURT FILE NO.: CV-20-4085

AND BETWEEN:)
)
LEBLON DRYWALL INC.) Jonathan Frustaglio, for the plaintiff
) (defendant by counterclaim)
)
)
- and -)
)
)
)
KING STATION FACILITY INC. and) Stephen Schwartz and Emily Quail, for
INSITE CONSTRUCTION) the defendants (plaintiff by counterclaim)
MANAGEMENT INC.)
)
)
)

COURT FILE NO.: CV-22-1933

AND BETWEEN:)	
)	
INSITE CONSTRUCTION)	Stephen Schwartz and Emily Quail, for
MANAGEMENT INC.)	the plaintiff
)	
- and -)	
)	
)	
VILSON DA SILVA, LEBLON)	Jonathan Frustaglio, for the defendants
DRYWALL INC. and LEBLON)	
CARPENTRY INC.)	
)	
)	
)	HEARD: June 17, 18, 19, 20, and 21,
)	2024

2024 ONSC 7031 (CanLII)

REASONS FOR JUDGMENT

THE HONOURABLE JUSTICE RANJAN K. AGARWAL

I. OVERVIEW

[1] Raymond Nicolini and Vilson Da Silva were friends. They both worked in the construction industry. Nicolini engaged Da Silva to do drywall work on a construction project. Around the same time, Nicolini loaned Da Silva money for Da Silva’s carpentry business. A few months later, Nicolini advanced some more money to Da Silva.

[2] But then their relationship broke down. The drywall work stopped. The loans weren't repaid. Matters escalated. They hadn't memorialize their various agreements. Nicolini tried to enforce the loans against Da Silva and Daenn Monteiro Loureiro's home. Da Silva registered a lien on the project. Nicolini and Da Silva sued and countersued. In short, Nicolini and Da Silva went to war.

[3] This complex litigation history raises fourteen issues:

Sayward Loan Action (CV-20-1448)

- (a) did Da Silva, Loureiro, and Leblon Carpentry Inc. breach the 2019 loan agreement with Sayward Investments Inc.?
- (b) what are Sayward's damages for breach of the 2019 loan?
- (c) was Sayward's advance in 2020 a loan or for a joint venture?
- (d) are Da Silva or Loureiro parties to the 2020 loan?
- (e) is the 2020 loan secured by a mortgage?
- (f) what are the terms of the 2020 loan?
- (g) what are Sayward's damages for breach of the 2020 loan?

Leblon Drywall Lien Action (CV-20-4085)

- (h) what are the terms of the contract between InSite Construction Management Inc. and Leblon Drywall Inc.?
- (i) did InSite breach the drywall contract?
- (j) alternatively, did the parties mutually agree to terminate the drywall contract?
- (k) has the lien amount been grossly exaggerated?
- (l) is Leblon Drywall liable for alleged deficiencies?

InSite Action (CV-22-1933)

- (m) did Da Silva and his companies oppress InSite?
- (n) did Da Silva and his companies conspire against InSite?

[4] For the reasons discussed below, I conclude as follows:

- (a) Da Silva, Loureiro, and Leblon Carpentry breached the 2019 loan agreement by failing to pay off the loan;
- (b) Sayward's damages for breach of the 2019 loan are \$38,909.29, along with prejudgment and postjudgment interest at the statutory interest rate;
- (c) Sayward's advance in January 2020 was a loan;

- (d) Leblon Carpentry and Da Silva are the only counter-parties to the loan;
- (e) the mortgage is security for only the 2019 loan;
- (f) Da Silva and Nicolini agreed that Leblon Construction would pay Sayward 1/3 of its actual profits from both the Briarwood and Fifth Avenue projects instead of interest as compensation for the loan;
- (g) Sayward's damages for breach of the 2020 loan are \$203,735.20, along with prejudgment and postjudgment interest at the statutory interest rate;
- (h) the final contract price, which included taping, was \$1,330,742, inclusive of taxes—there was no profit sharing agreement;
- (i) InSite didn't breach the drywall contract because Leblon Drywall didn't suffer a loss;
- (j) the parties mutually agreed to terminate the drywall contract in April 2020;
- (k) InSite hasn't claimed damages for any alleged exaggeration of the lien;
- (l) InSite agreed that it wouldn't seek to recover the costs of repairing any deficiencies or any overpayment;
- (m) Sayward isn't a complainant so it can't claim oppression; and
- (n) the lien claim wasn't intended to injure InSite so there's no conspiracy.

[5] I also order that the mortgage registered against Da Silva and Loureiro's matrimonial home shall be discharged upon the payment of the amounts in paragraph 4(b) above.

II. BACKGROUND

A. The Parties

[6] Leblon Drywall is a drywall construction business. It was incorporated by Da Silva as a special purpose vehicle for drywall, metal framing, and insulation work on the Sorrento Retirement residence. Da Silva also owns and operates Leblon Carpentry, a carpentry business. Loureiro is Da Silva's wife.

[7] King Station Facility Inc. is a development company. It owns the lands for the Sorrento Retirement project. InSite is a construction manager. I infer that Sayward is an investment company. Nicolini is an officer, director, and shareholder of King Station, InSite, and Sayward. They're his companies.

[8] This dispute is really between Da Silva and Nicolini, although through their various companies. As a result, for ease, I generally refer to Da Silva or Nicolini, though the rights and claims may be held by the other parties.

B. Background Facts

[9] In 2018, InSite engaged Leblon Drywall to supply drywall for the construction of Sorrento Retirement. Da Silva alleges that InSite and King Station didn't pay Leblon Drywall

for its work. Leblon Drywall started a lien action in November 2020 (CV-20-4085). InSite and King Station counterclaimed. Nicolini alleges that Leblon Drywall defaulted on the contract before the work was finished, and InSite had to repair the deficiencies. King Station paid over \$1.1m into court to vacate the lien.

[10] In 2019, Nicolini loaned \$300,000 to Da Silva, Loureiro, and Leblon Carpentry through Sayward. The loan was secured by a mortgage on Da Silva and Loureiro's matrimonial home. In 2020, Nicolini advanced another \$300,000 to Leblon Carpentry. Nicolini says this advance was another loan to Da Silva, Loureiro, and Leblon Carpentry, and it was secured by the same mortgage as the 2019 loan. Da Silva responds that the advance was for a joint venture between Leblon Carpentry and Sayward. The loans weren't fully repaid. Nicolini threatened to sell Da Silva and Loureiro's home. In October 2020, Sayward sued Da Silva, Loureiro, and Leblon Carpentry for breach of contract (CV-20-1448). The mortgage remains on title. Da Silva and Loureiro counterclaimed for an order restraining Sayward from enforcing the mortgage security.

[11] In July 2020, InSite sued Da Silva, Leblon Drywall, and Leblon Carpentry for several torts, including oppression and conspiracy (CV-22-1933). Nicolini alleges that Da Silva started the lien action in retaliation for the Sayward action.

C. The Cast of Characters

[12] Nicolini, Da Silva, and Loureiro all testified at trial. In addition, there were several other witnesses:

- Daniel Palanki, who worked as a site supervisor for Leblon Drywall on the project
- Andressa Beccaro, Leblon Carpentry's project manager
- Brunno Dourado, a drywall worker
- David Moore, InSite's former project manager (who testified for Da Silva)
- Howard Wortzman, Nicolini's business partner
- Dawn Munro, a bookkeeper for King Station, InSite, and Leblon Drywall

[13] Nicolini didn't cross-examine Palanki or Beccaro.

[14] Credibility and reliability are different. Credibility has to do with a witness's veracity; reliability with the accuracy of the witness's testimony. Reliability engages consideration of the witness's ability to accurately observe, recall, and recount events in issue. Any witness whose evidence on an issue isn't credible can't give reliable evidence on the same point. Credibility, on the other hand, isn't a proxy for reliability: a credible witness may give

unreliable evidence. See *R v GF*, 2021 SCC 20, at para 82; *R v HC*, 2009 ONCA 56, at para 41.

[15] I don't find Da Silva or Nicolini to be credible. They seemed dishonest when it suited their purposes. Their interest in particular outcomes led them to exaggerate evidence that was favourable to them, and discount evidence that was prejudicial to them. Their evidence often contradicted documents and other witnesses. It was, at many junctures, unreasonable. They both told deliberate lies to further their theories of the case.

[16] I also don't find Palanki or Moore to be credible witnesses. Palanki's evidence was inconsistent and often contradicted. He admitted being loyal to Da Silva, which tainted his evidence. Moore's evidence about his presence at the negotiations between Nicolini and Da Silva—the core of his testimony—was directly contradicted by other witnesses, including Da Silva.

[17] The other witnesses were, for the most part, credible and reliable. Their evidence largely tracked with each other and the documents, and they seemed honest.

[18] Da Silva argues that I should draw an adverse inference against Nicolini because of his failure to call certain witnesses to testify. See S Lederman, M Fuerst & H Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (LexisNexisCanada, 2022), at ¶6.509. When a trial judge draws an adverse inference, they must make clear the nature and details of the inference drawn. See *Conte v Pettle*, 2024 ONCA 733, at para 12.

[19] Da Silva contends that because Nicolini didn't call the subcontractors and labourers that allegedly did the deficiency work, I should conclude that they would've contradicted Nicolini's case or at least wouldn't support it. I don't agree that these witnesses were "material". It's Nicolini's burden to prove the deficiencies. If he doesn't call the necessary evidence, he won't meet his burden, and his claim will fail. In any event, as I discuss below, I find that Nicolini agreed that he wouldn't make a claim against Da Silva for the deficiencies, so it doesn't matter. Da Silva also argues that Nicolini failed to produce information to him about "how much money was received by Insite from King Station" and "how much it actually cost Insite for the materials it supplied". He says I should draw an adverse inference against Nicolini. I don't know what inference he wants me to draw, or how it's relevant to the issues in dispute.

C. Litigation History

[20] As discussed above, there are three proceedings:

Court File No.	Plaintiff	Defendant(s)	Cause of Action
CV-20-4085	Leblon Drywall	King Station InSite	Construction Lien Breach of Contract
CV-20-1448	Sayward	Da Silva Loureiro Leblon Carpentry	Breach of Contract
CV-22-1933	InSite	Da Silva Leblon Carpentry Leblon Drywall	Conspiracy Oppression Misrepresentation

[21] Regional Senior Justice Ricchetti (as he was then) case managed these proceedings. He made several findings or orders that are either relevant to the trial or provide important context:

- InSite’s motion for summary judgment was dismissed in May 2022—it had argued that Leblon Drywall’s lien was excessive and out of time
- Sayward’s action was originally started in Barrie—it was transferred to Brampton in April 2023

- King Station and InSite’s counterclaim in the lien action showed Da Silva as a defendant in the title of proceedings—after some procedural back-and-forth, he wasn’t added as a party
- as Da Silva and Leblon Carpentry can’t be plaintiffs to a counterclaim in the lien action, InSite had “no choice” but to sue them in a separate proceeding to make its claim that the lien action is retaliation for Sayward’s action
- though InSite’s claims against Leblon Drywall and Leblon Carpentry weren’t properly made, an order that the trial be heard together avoided the need for amendments to the pleadings

[22] Nicolini and Da Silva were examined for discovery on behalf of themselves and their companies. The parties agreed that the evidence given on the summary judgment motion could also be used at trial under the *Rules of Civil Procedure*, r 31.11.

D. The Conduct of the Trial

[23] The trials proceeded as a summary trial: the parties adduced evidence by affidavit. Nicolini presented his case first. He, Munro, and Wortzman were cross-examined on their affidavits. Da Silva presented his case next. He, Dourado, Moore, and Loureiro were cross-examined. The parties’ affidavits were made exhibits.

[24] Da Silva at first objected to the admissibility of some exhibits attached to Nicolini's affidavit. He withdrew those objections because the exhibits met the test for threshold reliability, but he reserved the right to argue that they weren't ultimately reliable. In his closing address, he didn't argue admissibility other than a single hearsay issue. I agree that paragraph 125 of Nicolini's trial affidavit is hearsay evidence and thus inadmissible. But, as I discuss below, it doesn't matter as other witnesses admitted the same facts.

[25] For reading in examinations of the adverse party, Da Silva filed tables listing the evidence from Nicolini's transcripts. Nicolini filed a table listing qualifying answers. The parties also marked several other documents as exhibits.

III. ANALYSIS AND DISPOSITION

A. Issue #1: did Da Silva, Loureiro, and Leblon Carpentry breach the 2019 loan agreement with Sayward?

[26] In April 2019, Nicolini loaned \$300,000 to Da Silva, Loureiro, and Leblon Carpentry through Sayward to fund Leblon Carpentry's operations. Da Silva repaid \$300,000 in late 2019. Nicolini claims that Da Silva, Loureiro, and Leblon Carpentry nonetheless breached the loan agreement by failing to pay all of the principal, the promised interest, and a "Facility Fee". Da Silva responds that he paid \$30,000 towards the interest soon after the loan matured, so little or nothing is owing.

[27] I agree with Nicolini. I find that the Da Silva, Loureiro, and Leblon Carpentry didn't pay all of the principal, the outstanding interest, or the fee. As a result, they breached the loan agreement.

[28] Da Silva, Loureiro, and Leblon Carpentry issued a promissory note to Sayward as security for the loan. Da Silva and Loureiro also granted Sayward a mortgage over their matrimonial home as further security. The promissory note evidenced the terms of the loan:

- the loan was interest-free for three months
- after July 12, 2019, the annual interest rate was 18 percent
- if the loan was not repaid by July 12th, Da Silva, Loureiro, and Leblon Carpentry would pay a Facility Fee of \$6700
- the loan matured on July 20th
- Da Silva and Loureiro authorized Sayward to register a Charge/Mortgage on their home as security if they didn't repay the loan by July 12th
- Da Silva, Loureiro, and Leblon Carpentry agreed to pay Sayward's costs of enforcing the promissory note

[29] Da Silva didn't repay the loan by July 12th. In October 2019, Nicolini registered the mortgage on Da Silva and Loureiro's home. The mortgage incorporated the terms of the promissory note.

[30] Da Silva eventually made significant payments on the loan—\$170,000 on October 31st, and another \$130,000 on December 3rd.

[31] Da Silva says he gave \$30,000 in cash to Munro in September 2019 to cover any interest. He says he saw her send a text message to Nicolini confirming receipt. The text message wasn't introduced into evidence.

[32] There's no evidence to corroborate Da Silva's narrative. He hasn't produced a receipt for the payment. Leaving aside proof of payment in the event of a dispute with Nicolini, it doesn't make sense that Da Silva wouldn't get a receipt given that he could have deducted the interest and fee as a business expense.

[33] Further, Da Silva's position contradicts subsequent statements made by his lawyer at the time, Paul Guaragna:

- on September 12, 2020, Guaragna acknowledged that the outstanding interest on the loan "remained unpaid"

- in the same letter, Guaragna asked for confirmation that the mortgage would be discharged “upon payment of that amount, plus the agreed upon Facility Fee of \$6,700”
- Guaragna repeated these positions on September 23rd
- in early October, Nicolini provided a “Promissory Note Statement”, which showed accrued interest and the two principle payments, but no payment for interest or fees
- in response, on October 14th, Guaragna advised Nicolini’s lawyer that Da Silva would be providing funds to pay the accrued interest shown on the Promissory Note Statement
- on October 19th, Guaragna advised Nicolini’s lawyer that his clients would pay the “full amount” owing under the promissory note into court
- on November 18th, Guaragna said he was holding \$40,000 in trust, which “represents more than the total maximum liability of my clients for the mortgage” (i.e., \$31,972.78 in outstanding interest to October 11th, per diem interest since that date, and \$6700 for the Facility Fee)

[34] Da Silva and Loureiro didn't ask for the mortgage to be discharged until September 2020—if, in fact, Da Silva had paid off the principal and interest by December 2019, there was no reason to leave the mortgage on title and risk that Nicolini could force a sale.

[35] There's also no communications corroborating Da Silva's version of the events. Between August 2019 and October 2019, Munro was hounding Da Silva to pay off the loan. I infer that Da Silva gave Munro a cheque for \$300,000 in August 2019 but told her not to cash it immediately. He kept putting her off until late October, when he finally gave her a draft for \$170,000. It's not believable that Da Silva and Munro would trade multiple messages during this period about the loan, and neither of them acknowledged the \$30,000 interest payment. Or that Nicolini wouldn't apply the \$30,000 cash payment to the loan principal.

[36] Loureiro's evidence accords with Nicolini's narrative. She said that the mortgage wasn't discharged because they still owed interest and fees. Her evidence was that they gave two drafts to Nicolini "to pay [the loan] off", and then \$40,000 to Guaragna to pay "any remaining balance".

[37] Da Silva says he made a mistake in not telling Guaragna about the \$30,000 payment, which is why Guaragna never once refers to it. That doesn't make sense. It's not believable that Da Silva would let Guaragna repeatedly acknowledge to Nicolini that Da Silva owed interest and fees if Da Silva had paid the interest the year before. Similarly, it doesn't make

sense that Da Silva would voluntarily pay \$40,000 into court when, according to him, he owed less than \$10,000.

[38] The more reasonable explanation is that Da Silva knew he owed Nicolini another \$40,000 but because of their ongoing business relationship, he didn't see the need to make the payment. There was a fair amount of money flowing between Da Silva's and Nicolini's companies until May 2020. But when their relationship broke down, and Nicolini threatened to sell Da Silva and Loureiro's home, Da Silva had to repay the debt. I don't know why Da Silva manufactured a story about prepaying the interest given all the evidence to the contrary.

[39] As a result, I find that Da Silva, Loureiro, and Leblon Carpentry breached the 2019 loan agreement by failing to pay off the loan.

B. Issue #2: what are Sayward's damages for breach of the 2019 loan?

[40] Nicolini claims that his damages for breach of the 2019 loan are \$57,473.28 as of April 15, 2024. Da Silva argues that "maximum owing" is \$38,627.78 because Nicolini refused to accept his offer in September 2020 to pay money into court in exchange for discharging the mortgage. The difference between their positions is outstanding interest between November 2020 and April 2024.

[41] Nicolini's position is that he was owed \$31,972.78 as of October 7, 2020. The per diem interest amount is \$15.77. He started legal proceedings on October 23, 2020. Thus, as

of that date, the outstanding interest and fee is \$38,909.29 (\$31,972.78 + \$236.51 + \$6700). I order and adjudge that Leblon Construction, Da Silva, and Loureiro shall pay to Sayward the amount of \$38,909.29 for outstanding interest and the Facility Fee on the 2019 loan.

[42] Nicolini also seeks an award of interest at a prejudgment interest rate of 18 percent. Da Silva effectively argues that there should be no interest because Nicolini unreasonably rejected their offer to pay \$40,000 into trust or into court.

[43] I agree with Da Silva. As a result, I order and adjudge that Leblon Construction, Da Silva, and Loureiro shall pay prejudgment interest at the statutory rate of 0.5 percent from the start of the action to the date of this judgment.

[44] Absent exceptional circumstances, the interest rate which had governed the loan before breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender. See *Bank of America Canada v Mutual Trust Co.*, 2002 SCC 43, at para 49. Exceptional circumstances may include vague or unclear terms, overriding policy concerns such as a criminal interest rate, unconscionable conduct by the lender, or commercially unsophisticated parties. See *Lundy's Regency Arms Corp. v Niagara Hospitality Hotels Inc.*, 2016 ONSC 4199, at para 14.

[45] I find that Nicolini's conduct towards this loan and the enforcement of the mortgage was unreasonable. It would be unjust to apply the contractual interest rate in these exceptional circumstances.

[46] In August 2020, Nicolini sent a Notice of Intention to Enforce Security under section 244(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. He claimed a total amount of indebtedness of \$520,288.80 (which included amounts under the 2019 loan and the 2020 loan). Then, in September 2020, he sent a notice of sale under the *Mortgages Act*, RSO 1990, c M.40, again claiming an indebtedness of over \$520,000. He threatened to sell Da Silva and Loureiro's matrimonial home in October 2020 if the full amount of the indebtedness wasn't paid.

[47] Nicolini refused to discharge the mortgage because he insisted that the mortgage was valid security for the 2020 loan. As I elaborate on below, it wasn't. Nicolini's unreasonable position has encumbered Da Silva and Loureiro's matrimonial home for over four years, all over a debt that they offered to pay off in November 2020.

[48] For the same reason, the judgment bears interest at the statutory postjudgment interest rate of 6 percent per year starting on the date of this judgment.

[49] Finally, I order that the mortgage registered as Instrument No. YR3020482 against Da Silva and Loureiro's matrimonial home shall be discharged upon the payment of the judgment in paragraphs 41-48 above.

C. Issue #3: was the \$300,000 advance in 2020 a loan or for a joint venture?

[50] In 2020Q1, Nicolini gave another \$300,000 to Da Silva through Sayward. He says it was a loan to Da Silva, Loureiro, and Leblon Carpentry. Da Silva responds that the money was an investment in a joint venture between Leblon Carpentry and Sayward.

[51] I agree with Nicolini. I find that he loaned \$300,000 to Leblon Carpentry and Da Silva (but not Loureiro, as I discuss below). I find that there was no joint venture between Leblon Carpentry and Sayward.

1. The Parties' Positions

[52] The parties agree that there's no written agreement documenting either the loan or the joint venture agreement. When dealing with contracts which are substantially or wholly oral, it's necessary to distill from the words and actions of the parties what they intended. The test of what the parties agreed to requires an objective determination. See *S & J Gareri Trucking Ltd. v Onyx Corp.*, 2016 ONCA 505, at para 7. As a result, I must rely on the parties' oral evidence of their intentions, which is in direct contrast.

[53] According to Nicolini, Da Silva asked him in January 2020 for a loan for Leblon Carpentry:

- Leblon Carpentry had subcontracts for two ongoing projects, Briarwood Young's Cove and Fifth Avenue Homes

- the general contractor only paid Leblon Carpentry every 60 to 90 days but Leblon Carpentry needed to pay its workers sooner, leaving it in a cash flow deficit
- Da Silva believed that the carpentry workers would accept a lower wage rate if they were paid sooner than 60 to 90 days
- Da Silva asked for short-term loan to fund these labour costs, which would result in substantial cost savings and increased profits

[54] Nicolini says he was reluctant to lend money to Da Silva again because the 2019 loan was in default and he didn't want to lose access to the funds, even for three months. To entice Nicolini to make the loan, Da Silva offered to pay Nicolini 1/2 of the profits from the two projects. In February 2020, Da Silva provided Nicolini with spreadsheets showing the estimated profit. According to Nicolini, the spreadsheets had mathematical mistakes, so Munro created her own spreadsheets showing Nicolini's profit share to be \$291,481.25 for the two projects, which Da Silva agreed with.

[55] Nicolini says the parties agreed on the following loan terms:

- the amount of the loan was \$300,000, which was advanced in six instalments between January 7, 2020, and March 18, 2020
- the interest rate would be 18 percent from the date of each advance

- the term of the loan was three months, and Da Silva would make payments as the general contractor released funds on the two projects
- Nicolini would receive a guaranteed return by the repayment date, which was 1/2 of the estimated profits ($\$104,831.15 + \$186,650.10$) on the two projects
- Da Silva and Loureiro would give Sayward a mortgage as security for this loan and the profit share

[56] According to Nicolini, the parties also agreed that he would get the profit share regardless of Da Silva's recovery. In other words, if Da Silva earned more than the estimated profits, he would keep the surplus but he would also cover any shortage if it earned less than estimated.

[57] Finally, Nicolini says that Da Silva agreed that they would use the security documents from the 2019 loan to avoid Da Silva paying to discharge the mortgage and register a new mortgage. As a result, Loureiro was also a party to the loan even though she didn't participate in any of the loan negotiations. Nicolini is adamant that he wouldn't have given Da Silva an unsecured loan.

[58] Da Silva paid \$150,000 to Nicolini between May 2020 and June 2020. Nicolini claims that the rest of the loan principal, the interest, and his share of the projects' profits are unpaid.

[59] In contrast, De Silva says that Nicolini was party to a joint venture project:

- Nicolini contributed \$300,000 to the joint venture
- Leblon Carpentry would repay \$300,000 to Nicolini when the Briarwood project was completed
- Nicolini would receive 1/3 of the actual profits from the Briarwood project
- the joint venture didn't involve the Fifth Avenue project
- Loureiro wasn't a party to the joint venture, and Da Silva and Loureiro didn't agree to provide security for Nicolini's investment in the form of a mortgage on their home

[60] According to Da Silva, the expected profit was, at most, \$3 per square foot, or \$131,100 ($\$3 \times 19 \text{ houses} \times 2300 \text{ sq. ft.}$). The builder didn't accept this offer. Da Silva says that Nicolini accepted that the joint venture would make less profit than initially estimated because the builder had "millions and millions of jobs to do in the future", and if they did this job for "cheaper", they "make some money each, and then...going to go up from there." That said, Da Silva also stated there was no guarantee that he and Nicolini would be partners on any future jobs for that builder.

[61] Da Silva says that he earned only \$68,235.59 in profits from the Briarwood project, meaning that he owes \$22,745.20 for Nicolini's share of the profits. Da Silva acknowledges that he also owes \$150,000 to the joint venture.

2. Disposition

[62] I find that Nicolini's advance of \$300,000 in 2020 was a loan and not a contribution to a joint venture. I prefer Nicolini's evidence on this issue. The idea of a joint venture doesn't make commercial sense. In a joint venture, both parties contribute something to the undertaking, share in the risk or the reward, and have mutual control over the project. See *1088558 Ontario Inc v Musial*, 2022 ONSC 5239, at para 123.

[63] First, under Da Silva's theory, the parties didn't share the risks and rewards of the venture. Nicolini contributed \$300,000. Da Silva contributed labour and materials. Usually, in a joint venture, if the project loses money, the parties share the loss. But, here, Da Silva says he had to repay Nicolini even if the project didn't make a profit. Da Silva is describing a loan not a strategic partnership.

[64] Second, there's no evidence that Nicolini had any control or input into the completion of Da Silva's work on the projects. He had no control or oversight over Da Silva's negotiations with the owner or trades, or Da Silva's costs. It doesn't make commercial sense that Nicolini, who has extensive experience in construction management, would defer all of the management of the contract to Da Silva if they were in a joint venture.

[65] Finally, there's no evidence that Nicolini was interested in future joint ventures. And, as Da Silva admitted, there was no agreement between him and Nicolini that they would work together again.

[66] The more reasonable explanation is that Nicolini again loaned money to Da Silva but, as I discuss below, this time they agreed that Nicolini would be reimbursed through a profit share. Da Silva may have called this agreement a joint venture. But it was a loan.

D. Issue #4: are Da Silva or Loureiro parties to the 2020 loan?

[67] Unlike the 2019 loan, there's no promissory note or other written agreement for the 2020 loan. Nicolini argues that Loureiro is a party to the loan. Da Silva argues that only Leblon Carpentry is indebted to Nicolini.

[68] I find that Leblon Carpentry and Da Silva are the counter-parties to the loan. I find that Loureiro is not a party.

[69] There's no dispute that Loureiro agreed to be liable for repayment of the 2019 loan, as shown by the promissory note and the mortgage. But there's also no dispute that Loureiro had no involvement in the negotiation of the 2020 loan. Nicolini relies on Loureiro's admission that she depended on Da Silva to negotiate the 2019 loan fairly, and to repay the loan. He argues that I can infer that she did the same for the 2020 loan, in part because both loans were for the same amount and had the same purpose—to fund Leblon Construction. But Loureiro knew nothing about the 2020 loan until she got the *BLA* notice in August 2020.

[70] Though Loureiro didn't ask for the mortgage to be discharged until September 2020, it's unclear that she even knew that the mortgage was still on title to do so. I infer from all the evidence that she thought that Da Silva had repaid the 2019 loan, and the matrimonial home was free and clear. She didn't know that Da Silva had borrowed another \$300,000 from Nicolini. When Da Silva and Nicolini's relationship broke down and Nicolini threatened to sell the home, Loureiro learned that the 2019 loan hadn't been paid in full and Nicolini was alleging he was owed another debt.

[71] Nicolini is an experienced and sophisticated businessperson. If he wanted to make Loureiro jointly liable for the 2020 loan, he could've insisted on a fresh promissory note or a new loan agreement. It would've cost almost nothing for Nicolini or his lawyers to reformat the April 2020 promissory note, especially compared to the amount of the investment. I can't find that Loureiro was a party to the loan absent any evidence of her consent or agreement.

[72] That said, I reject Da Silva's argument that he wasn't a party to the loan. Unlike Loureiro, he was directly involved in the negotiations with Nicolini. Though Da Silva denies that he borrowed money from Nicolini, he doesn't dispute that he and Nicolini made some agreement that led to Nicolini giving \$300,000 to Leblon Construction. It doesn't matter that only Leblon Construction was a party to the Briarwood subcontract—just because the general contractor didn't insist on Da Silva's personal liability doesn't mean that Nicolini didn't do so either.

[73] Nicolini insisted on some security for the 2019 loan. I believe his evidence that, eight months later, he still needed some security, especially given Leblon Carpentry may have become unable to repay the debt. It makes commercial sense that Nicolini would've required Da Silva to personally guarantee the loan by being a party.

E. Issue #5: is the 2020 loan secured by a mortgage?

[74] Given that Loureiro isn't a party to the loan and didn't consent to the mortgage being used as security for the 2020 loan, I find that the mortgage is security only for the 2019 loan.

[75] I accept that Nicolini intended for the existing mortgage to be security for the 2020 loan. It was convenient to continue the preexisting security to avoid legal costs, given the loans were for the same amount, and since the mortgage was already registered on title. But Nicolini didn't take the steps necessary to properly encumber the matrimonial home. Again, he's an experienced and sophisticated businessperson, with access to legal advice. He knew Loureiro and Da Silva were married, and the 2019 mortgage was on their matrimonial home. He needed to obtain Loureiro's consent, which he failed to do. As a result, the loan was, effectively, unsecured.

[76] A spouse can't encumber an interest in the matrimonial home unless the other spouse "joins in the instrument or consents to the transaction". See *Family Law Act*, RSO 1990, c F.3, s 21(a). The purpose of this law is to "protect the interests of spouses in matrimonial property by prohibiting unilateral dealings that threaten to interfere with their interest." See

Peerenboom v Peerenboom, 2020 ONCA 240, at para 24. If the mortgagee knows the mortgagors are spouses, “extra precaution” must be taken to ensure that both spouses signed the mortgage and received independent legal advice. See *Iori v Village Building Supplies (1977) Ltd.*, 2005 CanLII 23122, at paras 20-21, aff’d 2007 ONCA 156.

[77] Though Loureiro hasn’t applied under section 23 of the *FLA* to set aside the mortgage transaction, her defence effectively seeks the same result. It wouldn’t have made sense for Loureiro to start *FLA* proceedings against her husband once she learned about the mortgage (and the parties were embroiled in these claims)—Nicolini is the adverse party.

[78] If Loureiro had done so, the transaction would’ve been set aside. If a spouse encumbers an interest in a matrimonial home without consent, the transaction may be set aside unless the person holding the encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or agreeing to acquire it, that the property was a matrimonial home. See *FLA*, s 21(2). Again, Nicolini knew that Da Silva and Loureiro were married, and he knew it was their matrimonial home. See, e.g., *Shouldice v Shouldice*, 2016 ONSC 6203, at paras 147, 152. He should have taken extra precaution.

[79] The parties make several arguments about the *Statute of Frauds*, RSO 1990, c S.19, the doctrine of part performance, the *Bills of Exchange Act*, RSC 1985, c B.4, and the parol evidence rule. There’s no evidence of an oral agreement between Loureiro and Sayward,

either for the 2020 loan or amending the promissory note for the 2019 loan, so I don't consider these submissions in detail.

[80] As a result, I find that the mortgage is security only for the 2019 loan.

F. Issue #6: what are the terms of the 2020 loan?

[81] Nicolini's claim for breach of the 2020 loan agreement relies on three terms: (a) the interest rate to be paid is 18 percent; (b) he was guaranteed 1/2 of the estimated profits from Leblon Construction's work on the Briarwood project (\$104,831.15) and (c) he was guaranteed 1/2 of the estimated profits on the Fifth Avenue project (\$186,650.10).

[82] Da Silva responds that: (a) the parties didn't agree to any interest rate; (b) Nicolini is only entitled to 1/3 of Leblon Construction's actual profits on the Briarwood project (\$22,745.20); and (c) Nicolini isn't entitled to any profits from the Fifth Avenue Project (Leblon Construction's profits were \$92,970.44).

1. Interest Rate

[83] Nicolini claims that the parties amended the promissory note from the 2019 loan to apply to the 2020 loan, meaning that the same interest rate applied.

[84] I don't agree. The promissory note is very specific to the 2019 loan. Amending the note would require agreement to change the due date, the borrowers (or get Loureiro's consent), and the payment terms, and delete the Facility Fee. Though Nicolini says he and

Da Silva agreed to a new due date, there's no evidence about the parties agreeing to delete the Facility Fee or changing the payment so that interest began accruing upon funds being advanced instead of on the due date. And I've already found that Loureiro didn't know anything about the 2020 loan.

[85] I'm also not prepared to find that the parties orally agreed to an 18 percent interest rate. Again, there's no evidence about them doing so. Moreover, as I discuss below, it doesn't make commercial sense for Da Silva to agree to pay 18 percent interest *and* a share of the projects' profits.

[86] In April 2019, when Nicolini made a short-term loan to Da Silva that wasn't tied to a specific project, it makes sense that he would seek compensation in the form of interest for temporarily parting with his funds. But, as I discuss below, I find that Nicolini's compensation for the 2020 loan was only the profit share.

2. Briarwood Profit Share

[87] Again, Nicolini argues that he's guaranteed 1/2 of Da Silva's estimated profits from the Briarwood project (\$104,831.15). Da Silva responds that Nicolini is only entitled to 1/3 of Leblon Construction's actual profits. These submissions raise two interrelated issues: (a) whether Da Silva guaranteed the profit share based on his estimates at the time of the loan; and (b) if not, the amount of the profit share.

[88] I find that Nicolini and Da Silva agreed that Leblon Construction would pay Nicolini 1/3 of its actual profits on the Briarwood project as compensation for the 2020 loan.

[89] Nicolini makes four arguments for finding that Da Silva guaranteed a return of \$104,831.15 from his profits on the Briarwood project. First, Da Silva admits that he owes some profit share to Nicolini. This argument isn't probative of whether the profit share was based on Da Silva's estimated or actual profit or the amount.

[90] Second, Nicolini says he wouldn't have lent \$300,000 to Da Silva without a guaranteed return because of the size of the loan, the expected rate of return, and the prior default. The loan was not small. Given that the interest rate for the 2019 loan was 18 percent (although after a three-month interest free period), it's reasonable that Nicolini expected a similar rate of return on his investment (around \$13,500). Finally, Da Silva's default of the 2019 loan for almost five months created some uncertainty for Nicolini.

[91] That all said, Nicolini's risk was mitigated by the mortgage on Da Silva and Loureiro's marital home. I acknowledge that I've found that the mortgage didn't apply to the 2020 loan. But when Nicolini loaned the money, he thought he had valid security. And Sayward is an investment business. There's no evidence that Nicolini was lending personal funds or faced any financial prejudice in making this loan. Further, Nicolini and Da Silva were in business together on the Sorrento Retirement project. Da Silva couldn't abscond with Nicolini's money given that they were in regular contact on the job site.

[92] Third, Nicolini argues that he negotiated a guarantee because he had no ability to “independently verify” Leblon Construction’s profit. I don’t accept this argument. It’s not that he couldn’t verify the profit—he just didn’t negotiate any oversight terms with Da Silva.

[93] Finally, Nicolini says Da Silva agreed to a guaranteed profit share based on the spreadsheets created by Munro. I don’t find Nicolini’s evidence about the spreadsheets to be credible or reliable. As a result, I don’t rely on the spreadsheets as evidence of a guaranteed profit share or for the amount of the profit share.

[94] Nicolini’s evidence is that he received two spreadsheets from Da Silva, which showed the estimated profits for each of the two projects (\$209,424.28 for Briarwood and \$158,567.60 for Fifth Avenue).¹ He says that he and Munro found mistakes in the spreadsheets, so Munro created her own versions. The versions produced by Nicolini show the estimated profits to be higher (\$209,662.29 for Briarwood and \$379,646.30 for Fifth Avenue). There are two versions of each of Munro’s spreadsheet: one shows “Ray Share” being 1/2 (as shown above) and other shows it being 1/3.²

¹ Da Silva says he gave hard copies of the spreadsheets to Nicolini. The versions in evidence state: “Last Update: Feb 3 2020” and “Last Update: Feb 6 2020”. I infer that the initial versions have been lost.

² Da Silva argues that Nicolini shouldn’t be believed because, at examinations for discovery, he said he received Munro’s version of the spreadsheets from Da Silva. First, Nicolini corrected his answer. Second, in any event, Nicolini’s evidence wasn’t properly used to impeach his trial testimony.

[95] Both of Munro’s spreadsheets include a row labelled “Ray Share”:

Estimated profit per Leblon Schedule		209,424.28
As per above		208,007.04
Difference is on Lot #6 (sch. 13.25/sq.ft - billed 12.50)		1,655.25
		209,662.29
Ray Share	1/2	104,831.15

Ray Share	50%	186,650.10
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[96] Nicolini argues that Da Silva accepted Munro’s spreadsheets, and thus guaranteed the return on Nicolini’s investment.

[97] To begin, there’s nothing on Munro’s spreadsheets that would suggest the parties agreed on a guaranteed profit share. At it’s highest, the spreadsheets show Nicolini calculating his share if he received either 1/2 or 1/3 of the estimated profits.

[98] Nicolini’s argument about the spreadsheets is bolstered by his oral evidence. But I don’t believe him on this point.

[99] Nicolini’s position is that he asked Wortzman to share in the deal, in which case each of Nicolini, Wortzman, and Da Silva would receive 1/3 of the profits. But neither

Wortzman or Da Silva were interested. So Nicolini says that he and Da Silva agreed to a 50/50 share of the guaranteed profits as reflected in these spreadsheets.

[100] Wortzman testified that Nicolini asked him to join the deal *before* Nicolini advanced the first tranche of funds under the loan (i.e., before January 7, 2020). This timing makes sense: Nicolini would've asked Wortzman to share in the deal before finalizing the agreement with Da Silva.

[101] But that doesn't explain how or why "Ray Share" is on Munro's spreadsheets. Those spreadsheets were created in February 2020.

[102] Munro testified that she created the spreadsheets for Nicolini to "keep track of the invoices" because Nicolini wasn't "getting paid properly". This evidence only makes sense if the spreadsheets were created after Nicolini and Da Silva agreed on the terms of the loan, the money started flowing, and Da Silva wasn't repaying the loan. The metadata for the spreadsheets relied on by Nicolini state they were created on January 30, 2020 (after the first advances). That metadata aligns with Munro's evidence that she created the spreadsheets after the loan was negotiated. At trial, Nicolini reluctantly admitted that these spreadsheets were made in February 2020.

[103] In that case, there would be no need to show Nicolini's share in a three-way deal because Wortzman had already rejected the proposal. Unless Nicolini's share was, in fact, 1/3.

[104] Munro testified that Nicolini told her to put into the spreadsheets the lines about “Ray Share”. Nicolini told her that he was “50 percent invested” in the projects but there was a “different understanding before at the one-third.” Given that the spreadsheets were created after the parties negotiated the terms of the loan, the only reasonable inference from this evidence is that the “Ray Share” lines were added at Nicolini’s request after the loan was advanced.

[105] The spreadsheets contain invoice data up to June 11, 2020, which is consistent with them being used as tracking documents, and not the basis for the parties’ oral agreement. The use of tracking sheets contradicts Nicolini’s position that he was guaranteed a return. Nicolini’s thesis is that Da Silva had to repay the \$300,000 loan, 18 percent in interest, and \$104,712.14 from Leblon Construction’s profits regardless of whether he made money or lost money on the Briarwood project. It doesn’t make sense that Munro would meticulously track Leblon Construction’s revenues and costs (at the cost of her time) if Nicolini was guaranteed a return, especially where the investment was supposed to be secured by a mortgage on Da Silva and Loureiro’s matrimonial home.

[106] Nicolini also argues that anything less than a guaranteed profit participation doesn’t make sense. I disagree. In fact, Nicolini’s thesis doesn’t make sense. If Nicolini is right, Da Silva borrowed \$300,000 for three months, and agreed to repay the original advance, 18 percent interest (\$13,500), *and* over \$290,000 in profits. That’s a 400 percent return on Nicolini’s investment. Given that Nicolini loaned Da Silva the same amount of money a few

months earlier and accepted 18 percent interest, it doesn't make sense that he would demand 20x that amount even given Da Silva's history of default. Though perhaps Da Silva made this deal because, without it, he couldn't get a loan anywhere else, I find that hard to believe. Da Silva could've found a lender that would've loaned him \$300,000 on a short-term basis at a non-criminal interest rate, which would still be better than the deal he apparently negotiated with Nicolini.

[107] Taking all of this evidence together, the most reasonable explanation is:

- Da Silva provided Nicolini with spreadsheets showing the estimated profit for the two projects sometime in December 2019 as part of their negotiations over the loan
- Da Silva and Nicolini agreed that Nicolini would receive a share of the profits instead of interest as compensation for the loan
- Nicolini asked Wortzman if he wanted to participate in the deal, but Wortzman wasn't interested

- Nicolini agreed to 1/3 of Da Silva's actual profits on the Briarwood project—using Da Silva's estimates³, Nicolini's rate of return would be between 58 percent and 93 percent
- if Wortzman had participated, Nicolini would've received the same share of the profits, but invested less, thereby increasing his rate of return
- Munro recreated the spreadsheets to track Da Silva's profits, in part because Da Silva was still in default on the 2019 loan and the parties were running into issues on the Sorrento Retirement project

[108] Even if Da Silva's estimates were exaggerated (as they ultimately were), Nicolini had a lot of room to do better than the 18 percent interest rate he'd used a few months before. If Da Silva's profits were only \$41,000, Nicolini would still earn more than he did under the 2019 loan.

[109] As a result, again, I find that Nicolini and Da Silva agreed that Leblon Construction would pay Nicolini 1/3 of its profits on the Briarwood project as compensation for the 2020 loan.

³ Da Silva's trial evidence was that Leblon Construction would earn, at most, \$131,100 in profit, which he says he told Nicolini in December 2019. Da Silva's spreadsheet, which he says he gave to Nicolini around the same time, shows that Leblon Construction would earn a profit of \$209,424.28. Da Silva wasn't questioned on this discrepancy.

3. Fifth Avenue Profit Share

[110] The Fifth Avenue project raises some of the same issues as the Briarwood project. Nicolini argues that he was guaranteed 1/2 of the estimated profits on the Fifth Avenue project (\$186,650.10). Da Silva responds that Nicolini isn't entitled to any profits from the Fifth Avenue Project.

[111] I find that Da Silva also agreed to pay 1/3 of actual profits from the Fifth Avenue project. To begin, I find that there was no agreement on a guaranteed profit for the Fifth Avenue project for the same reasons that there was no guarantee for the Briarwood project.

[112] Da Silva admits he gave Nicolini a spreadsheet showing the anticipated profits for the Fifth Avenue project. He says it was for Nicolini to use as a model for a different project that Da Silva was part of. This explanation is plausible, though Nicolini's experience in the construction management business meant he must have had access to such models.

[113] In March 2020, Munro asked Leblon Construction's Project Manager, Andressa Beccaro, for cash receipts and invoices for the Fifth Avenue project. Beccaro provided the invoices, copying Da Silva on the email. Beccaro's trial evidence is that Nicolini wasn't "involved in any way with the Fifth Avenue project." She says that Munro didn't tell her why she was asking for the cash receipts and invoices. But Beccaro doesn't explain why she gave the documents to Munro if Nicolini had nothing to do with the Fifth Avenue project. For his part, Da Silva says the invoices were sent by mistake but he doesn't explain why he or

Beccaro didn't correct the misunderstanding. Da Silva argues that he trusted Munro so didn't question her.

[114] To believe Da Silva's theory, I have to believe that Munro created a spreadsheet for Fifth Avenue even though Nicolini wasn't sharing in the project's profits. And then I have to believe she meticulously tracked the revenues and costs for over four months (with documents provided by Da Silva and Beccaro) either because of some gross misunderstanding or because Nicolini had decided, in February 2020, to exploit the Fifth Avenue spreadsheet. That's unreasonable.

[115] The more reasonable explanation is that Da Silva needed funds to complete these two projects, and Nicolini was prepared to lend the funds provided he earned a healthy rate of return. Again, he thought the loan was secured by a mortgage on Da Silva's home, and he was working with Da Silva on the Sorrento Retirement project so the risk of default was minimal.

[116] Using Da Silva's admittedly incorrect spreadsheet, Nicolini would get over \$50,000 in profit for a short-term investment. That number would increase to almost \$125,000 once the math was corrected. Again, Da Silva could make only \$40,000 on *both* projects and Nicolini would still do better than he did under the 2019 loan.

G. Issue #7: what are Sayward's damages for breach of the 2020 loan?

[117] Da Silva acknowledges that the loan hasn't been repaid in full. I find that Leblon Construction and Da Silva are liable to Sayward for \$203,735.20, which is the unpaid portion of the 2020 loan (\$150,000) and 1/3 of the actual profits that Leblon Construction earned from the two projects (\$22,745.20 + \$30,990).

[118] I also find that Leblon Construction and Da Silva are liable for prejudgment interest at the statutory interest rate from the start of the claim to the date of this judgment, and the statutory postjudgment interest rate from the date of this judgment. As I discussed above, there was no contractual interest rate.

[119] I order and adjudge that Leblon Construction, Da Silva, and Loureiro shall pay to Sayward the amount of \$203,735.20 and prejudgment interest at the statutory rate of 0.5 percent from the start of the action to the date of this judgment.

H. Issue #8: what were terms of the contract between InSite and Leblon Drywall?

[120] Nicolini engaged Da Silva in September 2018 to do drywall work on the Sorrento Retirement project. Like with the 2020 loan agreement, Da Silva and Nicolini agree that there's no written contract between them. They now disagree about the terms of the contract.

[121] There's no dispute that the contract was between InSite and Leblon Drywall. Da Silva alleges that King Station was also a party to the contract. Though Nicolini is an officer or director of King Station, there's no evidence that he was negotiating the contract for both King Station and InSite. The general contractor, not the owner, usually engages subtrades. I can't find that King Station was a party.

[122] Oral agreements are legally binding contracts, just like written agreements, if they meet all necessary requirements (e.g., price, timing, and scope of work). See *Hollowcore Inc. v Visocchi*, 2014 ONSC 6802, at para 85, rev'd on other grounds, 2016 ONCA 600; *Cleanol Integrated Services Ltd. v Johnstone*, 2015 ONSC 768, at para 34).

[123] Da Silva argued that, if there's no contract, Leblon Drywall is entitled to recover on a quantum meruit basis if there was no contract between the parties. There's no dispute about the *existence* of an oral contract—the only dispute is about the essential terms. As a result, I don't need to consider these submissions.

1. Price

[124] Da Silva's position is that the contract value of \$2,234,510 plus HST. Nicolini's position is that the contract value was \$1,177,648 plus HST.

[125] I prefer Nicolini's evidence on this issue. As a result, I find that the contract price was \$1,330,742, inclusive of taxes ($\$1,177,648 + 13 \text{ percent HST}$). Da Silva concedes that

Leblon Drywall has been paid \$1,617,119.54—Nicolini never explained this overpayment, though it's common for there to be extras on a fixed-price contract.

[126] Da Silva argues that he and Nicolini fixed the contract price using the lowest comparative quote that they obtained for the work. Eco Drywall Inc. quoted \$1,787,608 plus HST for labour, materials, and equipment. But it's a non-union company. Da Silva says that he and Nicolini expected that the project would become unionized, so they agreed to add a mark-up of 25 percent to account for union labour rates ($\$2,234,510 = \$1,787,608 + 25$ percent markup).

[127] In contrast, Nicolini says he, Da Silva, and Wortzman negotiated the price based on Da Silva's estimated costs. In Spring 2018, Nicolini and Da Silva met to discuss engaging Da Silva to supply drywall labour for the project. Da Silva had a relationship with Palanki, an experienced drywall foreperson. Da Silva proposed that Palanki would help price the job and act as the site foreperson. Palanki prepared a "takeoff" (i.e., how much material they would need to complete the job). The takeoff included estimated union labour rates.

[128] On July 9, 2018, Da Silva emailed the takeoff to Nicolini, under the subject line "Prices". Da Silva then met Nicolini and Wortzman. Wortzman used the estimated labour rates and the material pricing from the takeoff to calculate the contract price using a spreadsheet. On July 16, 2018, Wortzman emailed the spreadsheet to Da Silva, under the subject "Retirement Residence Contract Value", and wrote: "The attached is what we came

up with at our last meeting at Ray's office." This document has a price of \$1,681,742 (exclusive of taxes)—it includes materials, labour, and profit.

[129] Nicolini says they all agreed on a price of \$1,155,742 plus HST for the labour portion of the contract. Nicolini would supply the materials. The price was increased to \$1,177,648 plus HST in October 2018 when the parties agreed to add framing doors in the scope of work.

[130] Nicolini says that he got quotes from Eco Drywall to cross-check Da Silva's pricing. Again, Eco Drywall quoted the job in August 2018 for \$1,787,608 plus HST. The quote is for: "a supplied and install lump sum price as per drawings to furnish labour, materials and necessary equipment". On August 27, 2018, Pereira texted Nicolini: "Ray my metal frame includ [sic] labor is \$446 k plus hst". Eco Drywall provided a second quote for \$1,736,608 plus HST.

[131] Both of Eco Drywall's quotes (which I find included non-union labour and materials) were higher than pricing calculated by Wortzman using Palanki's takeoff. As a result, Nicolini engaged Da Silva in September 2019.

[132] Da Silva's narrative doesn't make sense. First, there's no evidence of Da Silva ever suggesting the price was \$2,234,510 before it registered a lien claim in September 2020. In contrast, there's documentation from Wortzman to Da Silva suggesting they all calculated a price of \$1,155,742 for labour.

[133] Second, Da Silva's evidence that Eco Drywall's quote didn't include materials is contradicted by the quote itself, which expressly states that it includes materials. It also contradicts Pereira's August 2018 text message to Nicolini—the metal framing component of the quote included materials, suggesting that the rest of the quote did too.

[134] Third, Da Silva's position is inconsistent. If the parties had agreed to fix the price based on Eco Drywall's quote, why did Nicolini use Eco Drywall's first, higher quote, not the second, lower quote? It doesn't make sense that Nicolini would pay even \$50,000 more than he had to if that was the parties' agreement.

[135] Fourth, Da Silva's price is higher than Eco Drywall's quotes. It doesn't make sense that Nicolini wouldn't engage Eco Drywall in that case. InSite isn't a unionized workplace—it was using other non-union subcontractors on the project. The only reason it used unionized workers is because Leblon Construction is a unionized employer, and Da Silva assumed (rightly) that Leblon Drywall would be treated as a common employer.

[136] Finally, Nicolini and Wortzman's evidence is corroborated by the cost consultant's reports. These reports repeatedly state that the "Sub Drywall" budget is \$1.85 million, which equals the total drywall price of \$1,681,742 plus a 10 percent markup (\$168,260) for InSite.

2. Scope

[137] The parties agree that the scope of the job was to supply labour for drywall work, metal framing, and insulation. They disagree over whether the scope included taping. Da Silva says it didn't. Nicolini says it did.

[138] Da Silva's only evidence in support of his position is Palanki's affidavit, where Palanki asserts that the scope of work didn't include taping because he didn't include labour estimates in the takeoff.

[139] In contrast, Nicolini relies on three sets of documents. First, several of Leblon Drywall's invoices include labour done by tapers. Second, the acknowledgment signed by Da Silva in May 2020 describes the scope of work as "metal framing, boarding and taping labour performed by Leblon...." To add, the takeoff has a reference to tape: "TAPE 13212".

[140] Based on this evidence, I find that the scope of work included taping. Regardless of whether the takeoff included taping, Da Silva was passing on taping costs to Nicolini and later acknowledged that the scope included taping.

3. Profit Sharing

[141] Da Silva argues that Leblon Drywall was, in effect, a joint venture between him and Nicolini: Da Silva would be Leblon Drywall's sole officer and director, and Nicolini would

personally receive 1/3 of the profits from the drywall job (to the exclusion of InSite and King Station).

[142] Other than Da Silva's and Moore's oral evidence, there's nothing else that supports this claim. I don't believe either of them. Da Silva's argument rests on a convoluted theory that other drywallers were charging much more than him for the job (which Moore introduced, for the first time, in cross-examination with no supporting documents). So Nicolini engaged Da Silva (who had no experience drywalling before), which had the twin benefits of reducing King Station's costs and giving Nicolini a kickback (in breach of his legal duties to King Station). Though I have trouble with Nicolini's evidence, Da Silva and Moore's evidence alone, which is also unreliable, isn't enough to prove this claim.

I. Issue #9: did InSite breach the drywall contract?

[143] Da Silva argues that he wasn't paid for work between April 2020 and September 2020, when Nicolini stopped him from finishing the job and fixing any deficiencies. He claims that he's owed over \$900,000 based on a contract price of \$2.5 million. Nicolini responds that he and Da Silva mutually agreed to terminate the contract in April 2020. Thus, Nicolini argues that he doesn't owe anything to Da Silva even if the contract price is \$2.5 million.

[144] Given my finding that the final contract price was \$1,330,742 and Da Silva has been paid \$1,617,119.54, Leblon Drywall hasn't suffered a loss. As a result, Leblon Drywall's claim for breach of contract is dismissed.

J. Issue #10: alternatively, did the parties' mutually agree to terminate the drywall contract?

[145] If I'm wrong about the price, I consider the parties' arguments about the termination of the drywall contract. Nicolini argues that the parties mutually agreed to end the drywall contract in April 2020, when the job was 98 percent complete. He took over finishing the work and repairing any deficiencies. Da Silva says that he was pressured into signing the termination document to help Nicolini mislead the project's lenders, the union, the federal government, and King Station.

[146] I prefer Nicolini's evidence. As a result, I find that the parties mutually terminated the contract and effectively released each other of any claims.

[147] Palanki left the project in January 2019. Nicolini says that Da Silva's work on the job declined after that. Nicolini states he hired other trades to remedy the deficiencies and complete the job. By March 2020, he was losing money.

[148] According to Nicolini, he and Da Silva met in April 2020 to negotiate an oral termination agreement:

- Leblon Drywall wouldn't be entitled to any more payments beyond what was already invoiced
- InSite wouldn't seek to recover the costs of repairing any deficiencies

[149] On May 7, 2020, Da Silva signed an "Acknowledgment of All Amounts Due". The Acknowledgment states that InSite paid \$1,644,847 to Leblon Drywall for "metal framing, boarding and taping labour". According to Nicolini, the purpose of this type of statement is to ensure there's no dispute with their subcontractors at the end of a contract.

[150] After April 2020, Da Silva didn't submit any further timesheets or invoices to InSite for payment. He didn't communicate to Nicolini about the work until September 2020, including never asking for payment. Munro told the union that Leblon Drywall wasn't on site, and she didn't submit any more reports or union dues after April 2020.

[151] Dourado and Daniel Martins completed the job. Dourado provided timesheets for his and Martins's hours to Munro, not Leblon Drywall. InSite paid them directly. InSite issued T4 slips to the workers. InSite issued ROEs to the workers, which showed they worked until June 2020.

[152] Da Silva agrees that he signed the Acknowledgment, but he says he was pressured to do so to help Nicolini mislead InSite's lenders, the union, and the federal government. Da Silva's theory is that Nicolini used the Acknowledgment to convince InSite's lenders and the union that Leblon Drywall walked off the job in April, which allowed InSite to use non-union labour and get further advances from its banks and COVID funding from the government.

[153] As part of the scheme, Da Silva says he continued to work on the job until September 2020, using Dourado, Martins, and other workers. He submits that Dourado's and Martins's paperwork was part of the scheme. His claim is that he didn't get paid for any work they did between April 2020 and September 2020.

[154] Da Silva introduced invoices from Martins and Dourado showing that they worked 800 hours on the job between May 2020 and August 2020 (the same period they were being paid by InSite). These invoices show an hourly rate of \$43.23. Dourado's hourly rate between October 2019 and February 2020 was \$29.62. That's how much InSite paid him as well. Da Silva's explanation is that the invoices supported a cash "top-up" of \$13.61 that he paid directly to the workers.

[155] I don't find these invoices credible. The story doesn't make sense. Even if I accepted Da Silva's narrative, why would he agree to pay the workers a 47 percent premium? Why would Nicolini, who according to Da Silva was sharing in Leblon Drywall's profits,

agree to reduce his profit share by paying the workers a premium? Why would Da Silva risk breaching the collective agreement by employing unionized workers indirectly? Da Silva also didn't explain whether he paid the workers' full rate or just the top up after InSite terminated their employment in June (presumably they wouldn't work for just the top-up). Finally, Dourado contradicted Da Silva—Dourado said that Da Silva paid him in cash for the full amount of the invoices, not just a top up. If Dourado is believed, he was paid twice for the same work.

[156] Da Silva and Dourado also introduced evidence that Dourado was working on the job on September 2, 2020. There's a cheque to Dourado from Leblon Drywall, dated September 2nd and photos of Dourado on site on that day. I find that Da Silva and Dourado manufactured this evidence to “bootstrap” Da Silva's lien claim. Leblon Drywall preserved its lien claim on September 18, 2020. Under section 31(3)(a) of the *Construction Lien Act*, RSO 1990, c C.30, a contractor's lien expires at the end of the 45-day period following the completion or abandonment of the contract.⁴ The court will not permit a claimant to bootstrap its claim by late attendance at a job site after its lien rights have expired. See *Urbacon Building Groups Corp. v Guelph (City)*, 2012 ONSC 81, at para 4.

[157] Other than Dourado's pictures from September 2nd, there's no evidence that Da Silva or his workers were on site any time in the 45 days before the lien was registered (or

⁴ Both parties rely on the *Construction Lien Act*, not the *Construction Act*, RSO 1990, c C.30. See *Construction Act*, s 87.3(1).

even after April 30th). Dourado says Martins took the photos. It's suspicious that the only photos Martins ever took of Dourado were on the same day that Nicolini refused to allow Leblon Drywall on the job. There's no evidence of Martins being paid for that day's work. It's suspicious that Da Silva paid Dourado by cheque for this day's wages but cash for all the other days. Dourado said his practice was to sign in with the project foreperson but he didn't do so this day. As a result, I find that the lien was registered out of time—the drywall contracted was terminated at least by May 7, 2020, meaning that the lien should've been preserved by June.

[158] For me to accept Da Silva's evidence, I need to infer that Nicolini was so motivated by greed that he, with Munro's help, would defraud everyone and anyone he came across. I can't do that. First, Da Silva has significant credibility issues.

[159] Second, there's no evidence—circumstantial or direct—that otherwise supports this claim. In fact, common sense suggests otherwise. Martins and Dourado were paid \$44,382.23. Union dues were 25 percent. It doesn't make sense that Nicolini would go to the lengths suggested by Da Silva to defraud the union of only \$11,000 on a multi-million dollar project.

[160] Finally, and most importantly, Da Silva's theory turns on him being a co-conspirator in Nicolini's scheme. To accept Da Silva's evidence is to also accept that he went along with the plan. Otherwise, why didn't he continue submitting timesheets or invoices for the work

Leblon Drywall did? Why did he go along with Munro's apparent lies to the union, which put him, a unionized employer, at greater risk than InSite?

[161] The whole story is unbelievable. The more reasonable explanation is that, by May 2020, the business relationship between Nicolini and Da Silva was over. Da Silva, by that point, had been paid more than the contract price, so he was prepared to leave the job unfinished. Nicolini, who had paid more than the contract price, needed to finish the job on budget so he did it himself rather than use Da Silva. They agreed, like many sophisticated businesspeople do, that a walk-away deal was better for both of them.

K. Issue #11: has the lien amount been grossly exaggerated?

[162] Any person who gives written notice of a lien, (a) for an amount which the person knows or ought to know is grossly in excess of the amount which the person is owed; or (b) where the person knows or ought to know that the person does not have a lien, is liable to any person who suffers damages as a result. See *Construction Lien Act*, s 35(1).⁵

[163] Nicolini submits that the lien was grossly exaggerated given the contract price, the paid invoices, and the lack of evidence about any work after April 30th. Da Silva argues that Leblon Drywall has a lien for the contract price, as defined under sections 14(1) and 1(1) of

⁵ Again, the parties rely on the *Construction Lien Act*, not the *Construction Act* (which amended section 35(1) to use the word "wilfully" not "grossly").

the *Construction Lien Act*. That said, he doesn't make any alternative submissions where, as I've found here, the contract price is less than the paid invoices.

[164] Nicolini hasn't advanced a claim for damages from the allegedly exaggerated lien. I appreciate that King Station was required to pay into court a good deal of money, but Nicolini hasn't articulated his losses as a result of doing so. Thus, I need not decide this issue.

L. Issue #12: is Leblon Drywall liable for alleged deficiencies?

[165] If the contractor significantly fails to complete the work or delivers poor-quality work, the owner may have grounds to terminate the contract. In such cases, the owner can claim damages, which typically involve the cost of fixing the issues or completing the unfinished work. See *D & M Steel Ltd. v 51 Construction Ltd.*, 2018 ONSC 2171, at para 51. The framework for analysis is as follows:

- (a) is there a deficiency?
- (b) was the deficiency caused by the subcontractor?
- (c) what are the general contractor's damages?

See *1632093 Ontario Inc. v York Condominium Corporation No. 74*, 2019 ONSC 5789, at para 18, rev'd on other grounds, 2020 ONCA 843.

[166] The claimant should be put in the same monetary position they would've been if the contract had been fulfilled. The injured party may have their claim to damages limited, reduced, or denied if they fail to mitigate their injuries. See *Safe Step Building Treatments Inc. v 1382680 Ontario Inc.*, 2004 CanLII 35054, at paras 58-60, 81 (Sup Ct).

[167] Nicolini alleges that InSite incurred \$1,211,219 (inclusive of taxes) in costs to remedy Leblon Drywall's deficiencies. Da Silva responds that Nicolini hasn't proved his claim and, in any event, InSite failed to mitigate its losses.

[168] Nicolini's claim is fully answered by InSite's pleading that the parties "agreed that neither party would make a claim against the other for payment under the [drywall] Contract or damages arising therefrom." Nicolini affirmed his position in his evidence about the termination agreement:

We negotiated an agreement concerning his departure. I agreed that InSite would pay all outstanding Drywall invoices. Da Silva agreed that Drywall would not be entitled to any further payments from InSite beyond the work already invoiced. Notwithstanding my earlier position that Drywall would be responsible for the cost to repair the deficiencies and of the overruns, ***I agreed that InSite would not seek to recover those costs or any other damages.*** [emphasis added]

[169] Given my finding that the parties mutually terminated the drywall contract on these terms, Nicolini can't pursue Da Silva for any deficiency-related costs. Nicolini also makes passing reference to an overpayment of \$342,259. At trial, Nicolini agreed that this amount was covered by the termination agreement: "Part of the agreement, the termination

agreement, was we weren't going to seek this and he was going to just terminate and away you go. That was the deal.”

[170] Alternatively, I would have found that Nicolini failed to mitigate InSite's injuries by refusing to allow Da Silva to correct the work or remedy the alleged defects. Nicolini's argument about the deficiencies is confusing. He says that he hired other workers to fix the deficiencies while Da Silva was onsite. That doesn't make any sense—give the fixed price contract, why didn't Nicolini ask Da Silva to correct the deficiencies at Leblon Drywall's cost? To the extent that Nicolini discovered deficiencies after Da Silva left the job, Da Silva should have been permitted to remedy the defects. Nicolini's failure to allow him to do so disentitled him to damages. See *D & M Steel Ltd.*, at para 52.

M. Issue #13: did Da Silva and his companies oppress InSite?

[171] In Nicolini's closing address, he submits that Da Silva and his companies oppressed Sayward. There's no claim for oppression in Sayward's action against Da Silva, Loureiro, and Leblon Carpentry. In any event, I've found that Da Silva and Leblon Carpentry are liable to Sayward in contract. As a result, it's unnecessary for me to consider Sayward's oppression claim because the remedy it seeks (repayment of the loans) is duplicative. See *J.S.M. Corporation (Ontario) Ltd. v The Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, at para 58.

[172] InSite, in contrast, did sue Da Silva, Leblon Drywall, and Leblon Carpentry for oppression. But InSite isn't a “complainant” under the *Business Corporations Act*, RSO 1990, c.

B.16. It's not a creditor (never mind a securityholder, director, or officer) of Leblon Drywall. First, I've already found that Nicolini released InSite's claims for damages arising from the deficiencies and the costs overruns. Second, the oppression remedy wasn't intended to be a "substitute for an ordinary right of action in contract...." See *J.S.M. Corporation (Ontario) Ltd.*, at paras 65-66. To prove that InSite was a creditor, Nicolini had to show "unlawful and internal corporate manoeuvres" by Leblon Drywall that it couldn't protect itself against. It hasn't done so. So it can't claim oppression.

N. Issue #14: did Da Silva and his companies conspire against InSite?

[173] Again, Nicolini's closing address claims that Da Silva and his companies conspired against Sayward and InSite. Sayward didn't claim conspiracy in its action; InSite did. It claims \$1.2 million in damages, which is comprised of its costs of the completing the "scope of work and remedy deficiencies" and the "overpayment by InSite to Leblon".

[174] The tort of conspiracy to injure is recognized where:

- (a) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
- (b) if the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know

in the circumstances that injury to the respondent is likely to and does result in loss to the plaintiff.

See *Mughal v Bama Inc.*, 2020 ONCA 704, at paras 20-21.

[175] Nicolini argues that Da Silva registered the lien against the project to retaliate against him for trying to enforce the loans. I'm not persuaded that Da Silva's "predominant purpose" was to injure InSite. By August 2020, both men were on a war footing. Da Silva had been exited from the Sorrento Retirement project. Nicolini believed that he'd overpaid Da Silva, and there was still more work to do. Da Silva owed Nicolini a small amount on the 2019 loan. The 2020 loan was still unpaid. Nicolini fired the first salvo by demanding that Da Silva pay him over \$500,000 or risk losing his house. Da Silva fired back by making a lien claim. The totality of the evidence leads me to conclude that both men took these steps to try to leverage a resolution. In that way, they were trying to cause pain to each other. Nicolini says as much: "I believe that Da Silva intentionally retaliated against *me* for demanding payment of the Sayward Loans by registering the Claim for Lien" (emphasis added).

[176] But I'm not persuaded that Da Silva used the lien claim to specifically injure InSite. I say that, in part, because Nicolini has introduced no evidence about InSite's injuries other than King Station had to pay a lot of money into court. That's inconvenient for King Station but it's not injurious to InSite.

[177] Also, InSite's claimed remedy is for the deficiencies and overruns and the difference between the contract price and Leblon Drywall's invoices. These claims were released.

IV. CONCLUSION

[178] For most of two years, Da Silva and Nicolini had the makings of a fruitful business relationship. But, as sometimes happens, their relationship broke down. Rather than resolving matters in a businesslike manner, they went to war, resulting in multiple claims and counterclaims, and dragging spouses, business partners, and former employees into their battle. They used extreme litigation tactics to try to get leverage. Their dispute was exacerbated by failing to write down the essential terms of their deals. And all for what? As I have found, Da Silva owes around \$240,000 to Nicolini, much of which was conceded long ago.

[179] Keeping that in mind, the parties will engage in meaningful discussions and negotiations respecting the costs of this trial. If they can't resolve costs, any party seeking costs will serve, file, and upload to Case Centre costs submissions (2500 words maximum), any relevant offers to settle, and their bill of costs by January 17, 2025, 4pm. The other party's responding submissions (2500 words maximum) will be served, filed, and uploaded to Case Centre by January 31, 2025, 4pm.

Released: December 13, 2024

Agarwal J