

**CITATION:** Zanini v. DiPasquale, 2025 ONSC 840  
**COURT FILE NO.:** CV-23-00701397  
**DATE:** 20250207

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
JOHN ZANINI, DUNPAR ) *Roshni Khemraj*, for the Plaintiffs  
DEVELOPMENTS INC. and 1609514 )  
ONTARIO INC. )  
)  
Plaintiffs )  
)  
– and – )  
)  
MICHAEL DIPASQUALE and ANDREA ) *Niklas Holmberg*, for the Defendants  
)  
Defendants )  
)  
) **HEARD:** February 3, 2025

2025 ONSC 840 (CanLII)

**PAPAGEORGIU J.**

**Overview**

[1] This is a pleadings motion.

[2] The Plaintiff Mr. John Zanini (“Zanini”) is the President and Owner of the Plaintiff Dunpar Developments Inc. The Plaintiff 1609514 (“160Ont”) is a company incorporated by Zanini.

[3] The Defendant Michael DiPasquale (“DiPasquale”) was employed by Dunpar as Chief Financial Officer (“CFO”) and Chief Operating Officer (“COO”). The defendant Andrea Cheng (“Cheng”) is Mr. DiPasquale’s wife.

[4] The overall fact pattern involves an allegation that DiPasquale and Cheng sought to defraud the Plaintiffs in respect of property located at 359 Royal York Road (the “Property”). The Property was purchased by 160Ont by way of agreement of purchase and sale dated August 11, 2018.

[5] On August 21, 2018, Cheng and Zanini entered into a nominee agreement in relation to this purchase. This created a bare trust in which Cheng would become the registered owner and Zanini was identified as the sole beneficiary.

[6] The Property was then sold in February 2021 for \$1,445,862 pursuant to an agreement entered into dated February 26, 2020.

[7] DiPasquale then resigned from Dunpar in or around May 2021.

[8] On May 14, 2021, DiPasquale and Cheng transferred \$1 million of the sale proceeds to Zanini's personal bank account.

[9] The issue in the proceeding concerns the balance of the funds in the approximate amount of \$400,000 that were not immediately transferred to Zanini.

[10] In or around 2023 the Plaintiffs commenced this lawsuit claiming misappropriation by way of Statement of Claim dated June 20, 2023.

[11] The original Statement of Claim claimed damages on behalf of Dunpar, Zanini and 160Ont. It pleaded in several places that Zanini was the beneficial owner pursuant to the Nominee Agreement. It also claimed damages on behalf of Dunpar on the basis that DiPasquale owed it duties as a full-time employee, that he breached his duties to all Plaintiffs by committing fraud, embezzlement and theft by misappropriating the sale proceeds from the Plaintiffs and concealing this, failing to remit taxes, and keeping commission fees he agreed to remit. It also pleaded that he breached his duties as a fiduciary, that Dunpar entrusted DiPasquale with autonomy and discretion to make unilateral decisions affecting its business interests, including all aspects of finance and operations, and the purchase of the Property. It said that DiPasquale breached his duty by stealing, misappropriating, and converting the Plaintiffs' assets and control over Dunpar and Zanini's affairs to facilitate the theft and stifle and frustrate any detection of his wrongdoing.

[12] Then, in July 2023, after receipt of the Statement of Claim, DiPasquale and Cheng transferred the remaining \$400,000 to Zanini. They did so without any admission of wrongdoing and took the position that they had held back these funds to satisfy any potential tax liability and that once they were so satisfied, they transferred the final amount to Zanini.

[13] In August 2023, the Plaintiffs then delivered an Amended Statement of Claim where the Plaintiffs acknowledged the remaining funds had been repaid and adding additional claims for damages including commission paid to DiPasquale, interest and lost opportunity in respect of moneys unlawfully withheld, CRA penalties and interest, accounting fees and damages for breach of DiPasquale's employment agreement including repayment of bonuses paid in 2019 and 2020 in the amount of \$200,000.

[14] The Defendants then sought to schedule a motion to strike out the claims of Dunpar and 160Ont on the basis that if Zanini was the beneficial owner of the Property, then whatever DiPasquale did in relation to the Property could not have been done in his capacity as Dunpar's employee or have anything to do with 160Ont. Therefore, DiPasquale could not have breached his employment and fiduciary duties to Dunpar.

[15] The matter proceeded to a case conference before me where the Plaintiffs provided the explanation that this was a land assembly deal, much like many others that DiPasquale had worked on for Dunpar. They advised that these deals cannot be done in Dunpar's name because if they are, then the sellers know that someone is trying to assemble land, and this drives the price up. They advised that this was one that DiPasquale was working on for Dunpar even if it would be beneficially held by Zanini initially.

[16] It was agreed that the Plaintiffs would seek to amend their Claim to clarify this.

[17] The Plaintiffs delivered the draft Amended Amended Statement of Claim on June 27, 2024. It pleads that even though the Property was purchased pursuant to a Nominee Agreement whereby Zanini was the beneficial owner, DiPasquale was acting in his capacity as an employee for Dunpar with respect to this Property which was ultimately intended to be part of a land assembly that Dunpar would be involved in. The Amended Amended Statement of Claim pleaded that he breached his duty as employee by facilitating the sale of this Property and then keeping the \$400,000 in proceeds.

[18] At the July 30, 2024 case conference the Defendants took the position that the Amended Amended Statement of Claim resulted in a withdrawal of the admission that Zanini was the beneficial owner. I then scheduled the motion to strike.

[19] Thereafter, on August 7, 2024, the Plaintiffs served the Defendants with the Amended Amended Statement of Claim.

[20] The Plaintiffs seek leave to amend the claim pursuant to r. 26.02 if the amendments do not constitute a withdrawal of an admission or pursuant to r. 51.015 if the amendments are found to constitute a withdrawal of an admission.

[21] The Defendants bring a motion to strike.

### **Decision**

[22] For the reasons that follow, I find that the Amended Amended Statement of Claim does not withdraw admissions. I grant the amendments. I do not strike the claim.

### **Issues**

- Issue 1: Does the Amended Amended Statement of Claim seek to improperly withdraw an admission, and, if so, have the Plaintiffs satisfied the requirements of r. 51?
- Issue 2: Should I grant leave for the Plaintiffs to amend their claim in accordance with the Amended Amended Statement of Claim as part of this motion?
- Issue 3: Is it plain and obvious that the claim set out in the Amended Amended Statement of Claim is bound to fail?

## Analysis

### **Issue 1: Does the Amended Amended Statement of Claim seek to improperly withdraw admission and, if so, have the Plaintiffs satisfied r. 51?**

[23] In my view, r. 51 is not applicable because what the Defendants say are admissions, do not satisfy the test.

[24] In *Korte v Deloitte, Haskins & Sells* (1996), 1996 ABCA 15 (CanLII), 178 AR 199 (CA), Hunt J.A., expressed the view that an allegation in a statement of claim, without more, is not an admission. In *Korte*, the plaintiffs applied to amend their statement of claim where the pleadings had not yet closed. They argued that the allegation which they sought to amend was not an admission, on the ground that an admission must be responsive and, in the context of pleadings, must be something that is responsive to an allegation made by the opposite party. The Court found that the Rules tended to support that view. Hunt J.A. concluded at paragraph 15:

I do not find it necessary to decide whether it is ever possible to have an admission in a Statement of Claim, although in the face of the Rules mentioned above, I am inclined to the view that it is not.

[25] Ontario courts have reached the same conclusion. Leach J., in *Petrasovic Estate v 1496348 Ontario Ltd*, 2012 ONSC 4897 at paras 25-31, embarked on an extensive review of the relevant case law. He concluded that, in order to constitute an admission, an allegation in a statement of claim must be an unambiguous deliberate concession made by the party pleading it to a position taken by the opposing party, and such an admission would be rare in a statement of claim. Leach J. relied on the following conclusions in other cases:

(a) "Rule 51.05 includes deemed admissions arising from our specific pleading rules and from the rule concerning a request to admit facts and documents. There is nothing in the rule, however, which endorses the concept of an inadvertent admission. I adopt the definition of an admission as being an unambiguous deliberate concession to the opposing party. Such an admission would be rare in a statement of claim and I do not view the pleading in the case at bar as an admission which requires leave": *Petrasovic Estate* at para. 26; *Hughes v. Toronto-Dominion Bank*, [2002] O.J. No. 2145 at paras. 9-10.

(b) "It is rare that an allegation in a statement of claim can be an admission within the meaning of Rule 51.03. An admission must be an intentional concession to the other side and not simply the result of words chosen in the claim": *Petrasovic Estate* at para. 27; *Belsat Video Marketing Inc. v. Zellers Inc.*, [2003] O.J. No. 3168 at paras. 12-16.

(c) "Generally, admissions in a pleading are made boldly and baldly and they are, in general, specific and identifiable as admissions. An admission contemplated by rule 51 is one that is an unambiguous deliberate concession to a position taken by a defendant. An admission contemplated by rule 51 occurs when the plaintiff admits that a set of facts posed by the defendant is correct. An admission must be an intentional concession to the other side and not simply the result of the words chosen in the claim. A factual pleading made in error

cannot fairly be characterized as a deliberate admission."': *Petrasovic Estate* at para. 30; *Yang v. Simcoe*, [2011] O.J. No. 4773 (S.C.J.) at paras. 44-48.

[26] Similarly, in *Stronach v. Belinda Stronach in her Personal Capacity and as a Trustee of the Andres Stronach 445 Family Trust*, 2021 ONSC 3801, at para 84, Cavanaugh J. arrived at the same conclusion:

A plaintiff is not precluded by Rule 51 from amending a statement of claim to plead a new or different facts from those pleaded in an existing statement of claim, or from withdrawing statements of fact pleaded in a statement of claim, unless the statements qualify as admissions that were deliberately made as a concession to the opposing party. [Emphasis added]

[27] The Defendants' position that there were "deliberate unambiguous concessions" must fail.

[28] There was never any admission of a set of facts posed by the defendants.

[29] Even if the Plaintiffs pleaded that Zanini was the beneficial owner of the Property, these pleadings do not say anywhere that Zanini, and only Zanini, would ever be the beneficial owner. The pleading that Zanini was the beneficial owner is not inconsistent with nor does it preclude the new facts pleaded, which are that Zanini acquired this Property beneficially as part of a possible land assembly to be accomplished with the other Plaintiffs and that DiPasquale was involved because of his capacity as a CFO and COO of Dunpar.

[30] Dunpar and 160Ont were already Plaintiffs in the initial Claim.

[31] While the Defendants argue that the Plaintiffs have sought to reformulate their narrative to now make allegations that are not facts, but spin in response to a motion to strike, there were already significant pleadings about Dunpar and 160Ont's involvement which are entirely consistent with their involvement as part of a land assembly they intended to do in the future, but with Zanini initially holding beneficial title.

- Paragraph 10 already pleaded that the financial arrangements for the purchase were *in consultation with "his" CFO*, Mr. DiPasquale, but what it pleaded was that it was in conjunction with "his" or Zanini's CFO. The Plaintiffs have now changed this to "Dunpar's" CFO. Notably, paragraph 6 pleaded only that DiPasquale was Dunpar's employee only, not Zanini's personal CFO. Notably, as well, DiPasquale has submitted his Statement of Defence. He pleads that he was the CFO of Dunpar, not any employment relationship with Zanini. And so, "his" appears to have been a mistake or sloppy drafting.
- Paragraph 12 pleaded that because DiPasquale was publicly associated *with Zanini and Dunpar*, DiPasquale was not shown on title for the Property.

- Paragraph 24 pleaded that because DiPasquale surreptitiously deposited a cheque for \$1,000,000 in Zanini's bank account without Zanini's knowledge, the *Plaintiffs'* accounts were more difficult to reconcile, and the theft and fraud were concealed. This implies some relationship among the parties that involved the accounting for the Property among them.
- Paragraph 25 pleaded that DiPasquale *held a position of trust and authority and influence at Dunpar by virtue of his position and that Dunpar and Zanini* were particularly vulnerable to DiPasquale because of his control of their finances and financial reporting.
- Paragraph 26 pleaded that instead of clearly disclosing the sale of the Property to the *Plaintiffs* and accounting for all the rental income and sale proceeds received, DiPasquale surreptitiously deposited the money in Zanini's bank account and left his employment at Dunpar at the same time. *It also pleads that DiPasquale failed to report the sale of the Property to Dunpar's insurance broker.* If the original Claim unambiguously admitted that Dunpar had no role with respect to the Property, and that only Zanini was involved, why would there be a pleading of a requirement to report the sale to Dunpar's insurance broker?
- Paragraph 28 pleads that in early 2023 Zanini's staff were reviewing the accounts for *Zanini's corporations and discovered the discrepancy.*
- Paragraph 29 pleads that *Dunpar's accountants* reviewed the sale of the Property in greater detail and uncovered the further discrepancy. Again, if the original Claim unambiguously admitted that Dunpar had no role in this matter, and that only Zanini was involved, why was there a pleading that Dunpar's accountants reviewed the sale?
- Paragraph 39 pleaded that since being notified of this matter, Zanini discovered other instances of fraud. In particular, *he deleted many of his emails when he left Dunpar including emails in his sent folder to conceal his involvement.* He failed to provide the Plaintiffs external accountants with complete information regarding the sale of the Property despite his promise to do so. *In the months prior to his departure from Dunpar, he failed to ensure that the sale and income would be reported for tax purposes.* If the original Claim unambiguously admitted that Dunpar had no involvement, and that only Zanini was involved, why is there a pleading that Mr. DiPasquale used his work emails with respect to the Property?
- Paragraph 42 pleaded that DiPasquale conspired to evade his fiduciary responsibilities *at the expense of the Company* and that the Defendants were unjustly enriched by amounts that they failed to remit *from the sale and rental of the Property and amounts misappropriated during his tenure at Dunpar.* I make the same point as above.
- Paragraph 44 pleaded on behalf of all *Plaintiffs* that he was a *full-time employee and owed Dunpar a duty of trust honesty and fidelity and that he had a duty to Dunpar.*

- Paragraph 45 pleaded that he breached his *duty to Dunpar by committing fraud, embezzlement and theft* by misappropriating the funds from the Plaintiffs and concealing same, and in concealing his activities. I make the same point as above.
- Paragraph 47 pleaded that *Dunpar entrusted DiPasquale with autonomy and discretion including all aspects of the purchase of the Property*. This one is particularly helpful to the Plaintiffs. This is a specific pleading that it was Dunpar who entrusted DiPasquale with all aspects of the purchase of the Property. If the Claim unambiguously admitted that Dunpar had no involvement, and that only Zanini was involved, why is this pleading there?
- Paragraph 51 pleaded that *DiPasquale used his position of trust and control over the operation of Dunpar and Zanini's personal affairs, to facilitate the theft of the funds and frustrate detection of their wrongdoing. This was a brazen breach of duty to Dunpar*. I make the same point.

[32] This is a situation of sloppy drafting and perhaps a failure to clearly set out the totality of the Plaintiffs' case at the outset but it is not the case of seeking amendments that would withdraw a clear and unambiguous admission that Zanini was the only one involved in this purchase and sale, or the corollary that Dunpar or 160Ont had no involvement in this matter, or that the only entity who would ever hold the Property beneficially was Zanini, which is what the Defendants are implicitly arguing.

[33] To put it another way, there cannot have been a clear and unambiguous admission that only Zanini was involved in this matter by virtue of his holding the Property beneficially, since there are clear facts already pleaded in the Claim about Dunpar's and to a less extent 160Ont's role with respect to the Property.

[34] In any event, the alleged admissions (which I find are not admissions) have not even been deleted from the Original Claim. There are only additions that provide context and clarification.

[35] I have set out all of the proposed amendments below. They are underlined as is required in an amended pleading where there are additions or struck out where wording has been deleted. Within these proposed amendments, I have set out in bold the admissions from the original Claim that the Defendants say are withdrawn by the proposed amendments:

- 9. In 2018, **Zanini, Dunpar and 160** sought to purchase a property located at the municipal address of 359 Royal York Road in the City of Toronto (the "Property") to facilitate a land assembly project for potential development by Dunpar and its related companies.
  - The previous para 9 read as follows: In 2018, **Zanini sought to purchase** property located at the municipal address of 359 Royal York Road in the City of Toronto (the "Property"). Therefore, only words have been added.

- 10. Various financial arrangements to purchase the home were considered by Zanini, Dunpar and 160 in consultation with ~~his~~ Dunpar's CFO, DiPasquale. Cheng was also involved in these communications. The parties agreed to enter into a nominee agreement whereby Cheng and DiPasquale would act as nominees (trustees) for the Property on behalf of the beneficiary, Zanini. While Zanini was the beneficiary under the nominee agreement and the beneficial owner of the Property, it remained to be seen how Zanini, Dunpar and 160 would structure the land assembly and which corporate entity related to Dunpar would control the land assembly and the Property. The transaction was part of DiPasquale's standard employment duties as the CFO of Dunpar: he was frequently asked to participate and structure such land assemblies in a way that would disguise Dunpar's involvement so as not to drive up prices of surrounding properties. The only word struck out is “his”. DiPasquale has provided his defence. He pleads that he was Dunpar’s CFO not Mr. Zanini’s personal CFO. This amendment makes sense.
- 11. **Cheng was listed as the legal owner of the Property to provide the beneficiary (Zanini) Zanini, Dunpar and 160 with the privacy necessary to potentially develop the Property together with surrounding properties.**
  - The previous paragraph 11 read: **Cheng was listed as the legal owner of the Property to provide the beneficiary (Zanini) the privacy necessary to potentially develop the Property together with surrounding properties**
- 12. Since DiPasquale was publicly associated with Zanini and Dunpar, DiPasquale was not shown on title for the Property. However, the Plaintiffs plead that DiPasquale assumed the role of trustee (Executor De Son Tort) since he managed the entire transaction as part of his employment duties in his role as CFO of Dunpar.
- 17. In any event, Cheng and DiPasquale were acting as trustees in all their dealings with the Property because they did not pay for the Property. **Zanini paid all amounts to purchase the Property and was the beneficial owner of the Property** through the doctrine of resulting or constructive trust. **All the parties knew and understood that Zanini, Dunpar, 160 or their related companies intended to be the beneficial owner of the Property** and did not intend to gift the Property, or any part of it, to Cheng or DiPasquale.
  - The previous para 17 read as follows: In any event, Cheng and DiPasquale were acting as trustees in all their dealings with the Property because they did not pay for the Property. **Zanini paid all amounts to purchase the Property and was the beneficial owner of the Property** through the doctrine of resulting or constructive trust. **All the parties knew and understood that Zanini intended to be the beneficial owner of the Property** and did not intend to gift the Property, or any part of it, to Cheng or DiPasquale.

- 20. During the residential tenancy, Cheng collected at least \$58,300.00 in rent (\$2,650.00 per month over approximately 22 months). After maintenance and repair costs, utility bills, and taxes, \$46,984.62 should have remained in Cheng's account as of the closing date of the sale of the Property. **The net rental income belonged to Zanini as the beneficial owner.**
- 21. Zanini, Dunpar and 160 **ultimately decided not to proceed with this particular land assembly** or to develop the Property, and the Property was sold on February 15, 2021, for \$1,440,000.00 pursuant to an Agreement of Purchase and Sale dated February 26, 2020, and subsequent amendments thereto (the "Second APS"). These amendments were made on June 3, September 1, and November 27, 2020.
  - The previous para 21 read: **Zanini ultimately decided not to develop the Property**, and the Property was sold on February 15, 2021...
- 27. DiPasquale and/or Cheng then surreptitiously closed the bank account that had been opened specifically for the purpose of the Property accounting and took all the funds related to the Property including the balance of the proceeds of sale and the rental income for themselves.
- 31. As trustee, or *Executor De Son Tort*, DiPasquale and Cheng **breached their duties to Zanini...** (b) Continuing to **withhold funds that belong beneficially and legally to Zanini...**(e) Misappropriating Zanini's assets. This has not been amended but is paragraph 32.
- 35. To the extent that Cheng and DiPasquale cooperated in the scheme, they entered into a conspiracy **to injure Zanini** when they agreed to **misappropriate these funds from Zanini and** concealed the misappropriation. **Zanini has suffered damages and continues to suffer damages as a result of this conspiracy....**
- 37. DiPasquale misappropriated Zanini's funds. That misappropriation constitutes fraud and conversion, **and Zanini suffered damages as a result.** This was previously paragraph 36 has not been changed.
- 39. Since being notified of the discrepancy regarding the Property's funds, Zanini, Dunpar and their staff have uncovered, and continue to uncover, further evidence that DiPasquale intentionally defrauded Zanini and attempted to conceal the fraud. For example: (a) DiPasquale misappropriated the rental profit and closing proceeds from the sale of the Property that belong to Zanini; (b) DiPasquale deleted many of his emails when he ended his employment at Dunpar, including the emails in his "Sent" folder, to conceal his involvement; (c) DiPasquale misappropriated the remaining funds from the subject bank account and closed this account without the Plaintiffs' knowledge or consent; (d) Zanini, Dunpar and their staff were unable to locate the remaining funds and believed that these funds may have already been used by the Defendants; (e) DiPasquale failed to provide the

Plaintiffs' external accountant with complete information regarding the sale of the Property despite his promise to do so; and (f) In the months before his departure from Dunpar, DiPasquale failed to ensure that the sale and rental income would be reported for tax purposes.

- 42. The Defendants received a benefit, **Zanini suffered a deprivation**, and there was no juristic or other reason for that benefit and deprivation. The Defendants **should repay all of Zanini's losses by way of restitution**. This is now paragraph 42 but has not been amended. This was previously paragraph 41 but is unchanged.
- 43. Accordingly, **the Defendants hold their assets and property in trust for the benefit of Zanini**. [emphasis added] This was previously paragraph 42 but is unchanged.
- 44. DiPasquale's role in the purchase and sale of the Property was part of his employment duties at Dunpar. The Plaintiffs plead that DiPasquale, as a full-time employee in a management position, owed Dunpar a duty of trust, honesty, and fidelity (e.g., the duty of good faith or loyalty). DiPasquale agreed expressly or by implication to use his best efforts to promote the interests of Dunpar, to perform his duties honestly, diligently and in good faith, to adhere to company policies, and to act in good faith in the best interests of Dunpar and its shareholder.
- 46. The Plaintiffs plead that, in addition to his ordinary employee duties, DiPasquale owed heightened duties as a fiduciary employee of the Plaintiffs. In any event DiPasquale owed fiduciary duties to all of the Plaintiffs given the trust and confidence that was placed in him by each of them.
- 51. Instead, DiPasquale breached his duty by stealing, misappropriating, and converting the proceeds of sale of the Property. DiPasquale used his position of trust and control over the operations of Dunpar and Zanini's personal affairs, not only to facilitate the theft of funds, but also to stifle and frustrate any detection of his wrongdoing. The Plaintiffs therefore plead that DiPasquale engaged in a brazen and egregious breach of his duties to Dunpar and Zanini.
- 52. To date, the Plaintiffs have incurred significant losses and harm as a direct result of DiPasquale's breach of his duties as a fiduciary and as a fiduciary employee.
- 60. On May 26, 2023, a follow-up letter from Zanini was sent to DiPasquale, in which DiPasquale was once again asked to return the misappropriated funds. ~~To date there has been no response to this letter.~~
- ~~To date, DiPasquale has failed to return at least \$411,686.88 in stolen funds, despite being fully apprised of the situation and receiving multiple requests from Zanini.~~

- 61. After being served with the original version of this statement of claim, DiPasquale or Cheng delivered a bank draft payable to John Zanini for \$409,406.20 on or around July 5, 2023. In effect, after being caught misappropriating funds, DiPasquale returned some of the misappropriated funds (the "Repayment").
- 62. The Plaintiffs have suffered additional damages above the \$409,406.20 that has now been returned. In particular, the Plaintiffs' damages include: (a) the commission improperly paid to DiPasquale of \$1,945.00; (b) interest and loss of opportunity on moneys unlawfully held, estimated at \$98,827.28 based on 8% interest; (c) CRA penalties and interest, estimated at \$20,000.00; (d) internal and external accounting fees to review the last year of DiPasquale's employment and review and re-file taxes, estimated at \$25,000.00; (e) damages for breach of DiPasquale's employment agreement, and repayment of 2019 and 2020 bonuses in the collective amount of \$275,000.00; and (f) punitive damages and substantial or full indemnity costs, which are necessary to deter the behaviour exhibited by the defendants in this action. It is not sufficient that the defendants repay the amount that they believe they owe after being "caught out" misappropriating the Plaintiffs' funds. This behaviour must be deterred.
- ~~63. Zanini may also be subject to potential CRA penalties due to the Defendants' failure to provide the enclosing funds, ensure that the transaction was reported, and discharge their duties as nominee or as a financial executive of the company.~~

[36] The alleged admissions that the Defendants say have been withdrawn are still there. What the amendments do is add facts and explain that Dunpar and to a lesser extent, 160Ont were involved in a land assembly deal with Zanini and that he was instructed to be involved in this by his employer Dunpar where he was a CFO and COO.

[37] The Plaintiffs' counsel explained in an affidavit that the reason why they did not initially plead that DiPasquale was arranging the property transaction in this lawsuit as part of his employment duties is because they believed it was obvious that he was doing so in his role as CFO and COO. It was part of his employment duties in general to participate in and structure land assembly deals for Dunpar, specifically in ways that would disguise Dunpar's involvement so as to not drive up the prices of surrounding properties. While Zanini or other parties would sometimes be the sole beneficial owner at the initial states of deals, it was understood among employees involved in the project that other entities, such as Dunpar, may become involved as owners later in the assembly. This was a common practice for Dunpar's land assemblies and is a standard practice in the industry.

[38] I add that the Defendants have now submitted their Statement of Defence and they specifically plead that DiPasquale was coerced by Zanini to become involved in this land deal and that he was able to pressure Mr. DiPasquale because of DiPasquale's employment position at Dunpar.

[39] DiPasquale has essentially pleaded in his Statement of Defence he was required to do this work because of his position as CFO and COO at Dunpar. While he alleges this was improper on the part of Dunpar and Zanini, (and he may continue to allege that and try to prove it) there is a clear link pleaded in Zanini's own defence between his employment at Dunpar and his involvement in this transaction.

[40] Therefore, the alleged admissions are not admissions and even if they were, they are still there.

[41] As such I proceed to the second issue, which is whether the amendments should be granted.

**Issue 2: Should I grant leave for the Plaintiffs to amend their claim in accordance with the Amended Amended Statement of Claim as part of this motion?**

**The Test**

[42] On a motion to amend a pleading pursuant to r. 26.01, leave is "presumptively approved". A court is "required" to grant leave, unless the defendants have satisfied their onus to prove "non-compensable prejudice, abuse [or] where the proposed pleading is untenable at law": *Marks v. Ottawa*, 2011 ONCA 248, 280 O.A.C. 251, at para. 19; *York Region Standard Condominium Corporation No. 1206 v. 520 Steeles Developments Inc.*, 2018 ONSC 632, at para. 13; *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, 135 O.R. (3d) 694, at para. 25.

[43] In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42 at para 25, Hourigan J.A. noted as follows:

- The rule requires the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action.
- The amendment may be permitted at any stage of the action.
- There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source.
- The non-compensable prejudice may be actual prejudice, i.e., evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided.
- Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial.

- At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed.
- The onus to prove actual prejudice lies with the responding party.
- The onus to rebut presumed prejudice lies with the moving party.

[44] The Amended Amended Statement of Claim sets out a tenable claim that even though Zanini was the beneficial owner pursuant to the Nominee Agreement, Dunpar, Zanini and 160Ont were working on a land assembly deal.

[45] There is also a pleaded case that DiPasquale was acting in his capacity as an employee of Dunpar in respect of this possible land assembly.

[46] There was no employment caselaw presented that indicated that an employee could not be directed, as part of his employment duties, to assist the controlling mind of his corporate employer, with this type of transaction.

[47] The Nominee Agreement will be before the ultimate trier of fact who will be able to assess the merits of the Plaintiffs' claims in regard to Dunpar's and 160Ont's participation or intended participation and whether DiPasquale was involved in this matter in his capacity as an employee for Dunpar or as some private and unremunerated matter for Zanini.

[48] The Defendants have not shown any non-compensable prejudice apart from the possibility of a successful claim. The draft Amended Amended Claim was delivered before the close of pleadings such that this matter is just beginning. There is no concern that any documents or other materials have disappeared because of any delay. The Defendants chose to deliver their Statement of Defence immediately after the draft Amended Amended Claim was delivered presumably to foreclose the argument made at the case conference that the Plaintiffs could amend as of right as pleadings were still open, but even still, they have not pointed out any positions they took in their Defence based upon the original Statement of Claim that now cause them prejudice based upon the Amended Amended Statement of Claim.

[49] Therefore, I grant the amendments.

**Issue 3: Is it plain and obvious that the claim as against Dunpar and 160Ont is bound to fail?**

[50] The Defendants conceded that if I determined that the amendments were granted there would be no basis to strike out the claim against the other Plaintiffs.

[51] The parties may provide submissions as follows: The Plaintiffs within 5 days no longer than 5 pages followed by the Defendants also no longer than 5 pages.

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**Papageorgiou J.**

**Released:** February 7, 2024

**CITATION:** Zanini v. DiPasquale, 2025 ONSC 840  
**COURT FILE NO.:** CV-23-00701397  
**DATE:** 20250207

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JOHN ZANINI, DUNPAR DEVELOPMENTS INC.  
and 1609514 ONTARIO INC.

Plaintiffs

– and –

MICHAEL DIPASQUALE and ANDREA

Defendants

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**REASONS FOR JUDGMENT**

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**Papageorgiou J.**

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