CITATION: 7539088 Canada Inc. v. Slattery, 2024 ONSC 4998
COURT FILE NO.: CV-22-00686234-00CL
DATE: 20241004

SUPERIOR COURT OF JUSTICE – ONTARIO
[Commercial List]

RE: 7539088 CANADA INC. and 1989474 ONTARIO INC.

Plaintiffs

AND:

MICHAEL SLATTERY, MERK INVESTMENTS LTD., SKYMARK FINANCE CORPORATION, PAUL MILLAR, 1266845 ONTARIO LIMITED, 1690682 ONTARIO INC., 142958 ONTARIO LIMITED, SKYLARK HOLDINGS LTD. and DINA NGUYEN

Defendants

BEFORE: Justice Jana Steele

COUNSEL: *Lincoln Caylor, Andrew Sahai* and *Nathan Shaheen*, for the Plaintiffs

Milton Davis, Ronald Davis, Natalia Sidlar and *Brian Greenspan*, for the Defendants, Michael Slattery and Skylark Holdings Ltd.

HEARD: August 20, 2024

ENDORSEMENT

Overview

[1] This is a motion for summary judgment by the defendants, Michael Slattery and Skylark Holdings Ltd.

[2] The parties brought motions in respect of this matter, and *Orr v. Slattery et al*. However, it was agreed that the motions in respect of *Orr v. Slattery et al* would be adjourned pending my determination on the summary judgment motion.

[3] The defendants, Michael Slattery and Skylark Holdings Ltd. (collectively, "Slattery"), bring a summary judgment motion to dismiss the action against them. Slattery's position is that the plaintiffs have not sustained any damages, and that the plaintiffs made an undisclosed settlement agreement with four co-defendants that altered the litigation landscape, in breach of the immediate disclosure rule.

[4] There were other issues raised in Slattery's factum that are not before the Court. Slattery's notice of motion raised only the issues of (i) whether the plaintiffs have sustained damages; and (ii) whether the plaintiffs failed to disclose their settlement in breach of the immediate disclosure rule.

[5] For the reasons set out below, Slattery's motions are dismissed.

Background

[6] Michael Slattery is a licensed mortgage broker. He is the sole officer, director, and shareholder of Skylark Holdings Ltd.

[7] The plaintiffs, 7539088 Canada Inc. ("753") and 1989474 Ontario Inc. ("198") commenced the action in August 2022.

[8] When the action was commenced it was against Michael Slattery and two companies for which Mr. Slattery was the CEO, a director, and a shareholder: Merk Investments Ltd. ("Merk") and Skymark Finance Corporation ("Skymark").

[9] The plaintiffs subsequently amended their statement of claim to add Paul Millar ("Millar") and three companies for which Millar is the sole director, officer and shareholder: 1266845 Ontario Limited, 1690682 Ontario Inc. and 1429458 Ontario Limited. The plaintiffs again amended their statement of claim in September 2023 to add Skylark and Dina Nguyen.

[10] Michael Orr ("Orr") is the sole officer and director of 753 and 198. He is also the sole shareholder of 198. Orr, Michael Slattery, and Millar are among over one hundred shareholders in 753.

[11] The plaintiffs' action relates to investments in 81 mortgages over a period of about 9 years. The plaintiffs initially sought at least $16 million in damages and other relief for "fraud, misappropriation, and unjust enrichment." The claim was reduced to $7.5 million with the September 2023 amendments.

[12] In the action, the plaintiffs allege that they discovered that various mortgages held in trust for them by Merk and Skymark had been surreptitiously discharged from title and that the principal amounts had not been repaid to the plaintiffs.

[13] Prior to the commencement of the action, the plaintiffs received monthly statements that set out, among other things, the principal amounts secured by the mortgages held in trust for the plaintiffs and the monthly interest amounts payable to the plaintiffs. The last monthly statement was issued by Merk and Skymark in June 2022 (the "June 2022 Statement").

[14] The June 2022 Statement indicated that the principal amounts owing to 753 totaled $8,977,500 and the principal amounts owing to 198 totaled $5,375,000 (total principal amounts owing to the 2 corporate plaintiffs - $14,352,500).

[15] Certain findings of fact regarding the nature of the trust relationship between Merk and Skymark and the plaintiffs were made by Osborne J. when he allowed the plaintiffs' motion (December 2022 Endorsement):

> [6] ... In respect of each mortgage, Slattery executed a Trust Declaration on behalf of one or other of the corporate Defendants expressly acknowledging the mortgage investment, the interest of one or other of the Plaintiffs, and the fact that the relevant corporate Defendant held the interest in trust for the relevant Plaintiff. Monthly statements with respect to the principal outstanding and repayments received by the relevant purchaser were generated and produced.
>
> [...]
>
> [14] To be clear, the right of a beneficiary to such production by a trustee is a proprietary right separate and apart from the right of any plaintiff to production of relevant and otherwise properly producible documents in the course of a proceeding and as provided for in the Rules. The proprietary right from the beneficial ownership of the beneficiary in the trust property and the derivative right to records relevant to the accounting for such property.
>
> [...]
>
> [24] Given the acknowledgement and agreement of all parties that there were trust relationships, the relief sought by the Plaintiffs in the form of an order that if the Defendants or anyone acting on their behalf currently possess or receive in the future outstanding payments on account of interest or principal from borrowers in connection with the mortgages that are the subject of this action, such funds shall be remitted forthwith to the new trustee appointed under my order of October 31, 2022.

[16] On or about March 6, 2023, Alvarez & Marsal Canada Inc. was appointed as the receiver and manager of Merk and Skymark, further to an application by PricewaterhouseCoopers Inc., in its capacity as receiver and manager of Bridging Finance Inc.

Analysis

Is summary judgment appropriate on the basis that the plaintiff has suffered no damages?

[17] Slattery submits that the plaintiffs have not suffered any damages, and accordingly there is no genuine issue for trial and the Court ought to grant summary judgment.

[18] Rules 20.04(2) and (2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provide that summary judgment is mandatory if the Court is satisfied that there is no genuine issue requiring a trial. These rules set out the Court's powers regarding, among other things, weighing evidence and evaluating witness credibility:

> 20.04 (2) The court shall grant summary judgment if,
>
> > (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; [...]
>
> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[19] The principles governing summary judgment motions were set out by the Supreme Court of Canada in *Hryniak v. Maudlin*, 2014 SCC 7.

[20] In *Mazza v. Ornge Corporate Services Inc.*, 2015 ONSC 7785, summarizing *Hryniak* and other relevant case law, the Court set out the following general principles related to summary judgement:

> a. The court *shall* grant summary judgment based on the evidence before it if it is satisfied that such evidence discloses no genuine issue requiring a trial with respect to a claim or defence. [Citations omitted.]
>
> b. If a genuine issue requiring a trial appears based upon the evidence, the judge must then determine whether it is in the interests of justice to exercise his or her discretion to use the enhanced fact-finding tools provided in Rule 20.04(2.1) by weighing the evidence, evaluating the credibility of a deponent or drawing inferences from the evidence. [Citations omitted.]

> c. Where the judge hearing a summary judgment concludes that some or all of the issues raised on the motion require a trial in order to be fairly dealt with, the judge should normally be seized of the matter as trial judge and should use the powers or Rule 20.05 to specify what issues remain in dispute or to require a "mini-trial" or trial of issues unable to be resolved at the summary judgment hearing itself. [Citations omitted.]
>
> d. In weighing a motion for summary judgment, the court is entitled to assume, with some limited exceptions, that both parties have placed before it *all* of the evidence that they would intend to lead at trial in relation to the issue or issues raised: phrases such as "best foot forward", "leading trump", "not an occasion to keep powder dry" and "not holding anything back" are commonly employed to emphasize this point and have been approved by our Court of Appeal. [Citations omitted.]
>
> e. A summary judgment motion *shall* give rise to a decision that will be *res judicata* in relation to the matters of fact and law raised on the motion *unless* the court determines based on the evidence before it that there is a genuine issue requiring a trial to determine them – a corollary of this is that a cross-motion is not normally required and judgment in favour of the respondent will normally be granted *against* the unsuccessful moving party. [Citations omitted.]

[21] I agree with the plaintiffs that there is competing evidence on the key issue of whether Orr (and the plaintiffs) relied upon the statements, including the June 2022 Statement:

a. Mr. Slattery's evidence is that Orr directed him to falsify the statements, including the one that Orr and the plaintiffs relied upon, and that he did so. Mr. Slattery's evidence is that Orr knew that the statements were fraudulent.

b. Orr's evidence is that he relied on the statements as true, and only discovered they were fraudulent in July 2022. Orr's purported reliance on the statements, including the June 2022 Statement, is the basis for the plaintiffs' damages claim.

c. Mr. Slattery himself admitted that there was competing evidence on this issue. The following are excerpts from Mr. Slattery's cross-examination:

> Q95 All right. And just so I understand this, you say it's incorrect because the statement and the outstanding principal amounts, based

on your evidence, does not disclose what's actually outstanding as of June 2022. Have I got that right?

A. Yes

Q96 Okay and Mr. Orr's evidence is that he relied on the statements, and they were accurate. Do you have that understanding?

Yes. I understand he thinks that way, yes.

Q97 And my only point is that your evidence, as I take it in your affidavits is that the statement is not accurate for the reasons you say in your affidavits, correct?

Correct.

[...]

Q100 And I understand that there's your evidence and Mr. Orr's evidence will be in conflict, or you'll have different evidence to give regarding the statements. So, I'm not trying to resolve that issue with you, Mr. Slattery. And for the purpose of this motion, I'm not suggesting whether your evidence should be accepted or not.

My only point is, is that – and see if you'll agree with me on this – is that you – your evidence with respect to the statements and how they were generated and why is different than what Mr. Orr would say about how the statements were generated and why. Does that sound right?

That sounds right, Mr. Caylor.

Q101 All right and that's the only point I was trying to make.

So, the competing issues here would be that you would have a different way of looking at the statement and concluding on the amounts owing. And Mr. Orr, based on his evidence, would have another way of looking at the statements and calculating what's owing. Does that sound fair?

That sounds fair.

Q102 All right and it's not for you or me or your lawyer to determine which is right. Ultimately, a trial judge would be asked to do that. Does that also sound right?

That's correct.

[22] The plaintiffs state that Slattery is incorrect in asserting that the plaintiffs have no cause of action for having suffered no damage. Slattery's position is that $8.356 million (or more) has been repaid on the mortgages, which is more than the plaintiffs' claim, and accordingly, Slattery says that the plaintiffs have not suffered any damages. Slattery appears to take the position that the payments that have been made (or the amounts that were safeguarded) were made against the $7,500,000 amended claim, as opposed to having been made against the original claim of $16,000,000.

[23] The plaintiffs' position on damages is premised upon whether the plaintiffs relied upon the June 2022 Statement. As set out above, the June 2022 Statement disclosed a total of $14,352,500 of outstanding principal owing to the two plaintiffs. Originally, the plaintiffs claimed $16,000,000 of damages. However, that amount was reduced to $7,500,000 when the statement of claim was amended in September 2023. The plaintiffs state that the amount claimed was reduced to take into account principal amounts totaling $7,221,000 that had been repaid or safeguarded due to the transfer of the remaining mortgages to the plaintiffs' new trustee (The Equity Shoppe Inc.) further to the order of Osborne J. This transfer reduced the total principal amount claimed by the plaintiffs. Since that time, the plaintiffs have recovered another approximately $2,000,000. Accordingly, based on the plaintiffs' position that they relied upon the June 2022 Statement, the plaintiffs assert that just over $5,000,000 in damages remains outstanding.

[24] Because the reliance by the plaintiffs on the June 2022 Statement is an issue that is contested and will come down to the evidence at trial, including the credibility of the witnesses, there is a genuine issue for trial. Accordingly, I am of the view that summary judgment is inappropriate.

Did the plaintiffs breach the immediate disclosure rule?

[25] Slattery states that the plaintiffs failed to immediately disclose a settlement agreement that was concluded in March 2024 with the Millar Defendants.

[26] Slattery's position is that the undisclosed settlement agreement, the Release, materially changed the landscape of the litigation. Slattery takes the position that there was an abuse of process.

[27] The settlement agreement concerns a mortgage held by Merk securing investments in the form of the principal amount of loans of $5,650,000, to be held in trust for the plaintiffs, which was to be registered on title to three properties in Toronto: 65 George Street, 187 King Street East, 275 Richmond Street West (the "Mortgage"). The three properties are owned by separate companies (the "Millar Companies"), in respect of each of which Millar is a director, officer, and shareholder. At the time that the plaintiffs started the action, the Mortgage had been discharged from title to 65 George Street but remained registered on title to 187 King Street and 275 Richmond Street. The Release was executed by Orr on March 28, 2024, on the understanding that Millar and the Millar Companies would repay the $5,650,000 principal amount that was secured by the

mortgage. The Release was to be held in escrow by counsel pending the payment. The principal amount of $5,650,000 was repaid on April 16, 2024, and the Release was released from escrow. On May 3, 2024, counsel to the other defendants, including Slattery, were advised by the plaintiffs' counsel as follows:

> Our clients have been repaid the principal amounts secured by mortgages registered on title to 187 King Street East, 275 Richmond Street West and 65 George Street. In connection with that repayment, they have agreed not to pursue claims against Paul Millar, 1266845 Ontario Limited, 1690682 Ontario Inc. or 1429458 Ontario Limited in respect of those properties. Our clients will be amending the statement of claim to remove those claims. The other pleaded claims are not impacted. We will circulate the amended statement of claim shortly.

[28] A copy of the Release was included in the case conference brief for the June 11, 2024, appearance before Osborne J.

[29] Both parties referred the Court to the recent Court of Appeal decision of *Kingdom Construction Limited v. Perma Pipe Inc.*, 2024 ONCA 593. Zarnett J.A. (for the Court) sets out the following restatement of the immediate disclosure rule, at para. 1:

> Settling parties must immediately disclose a partial settlement – a settlement between a plaintiff and some, but not all, defendants – if the settlement changes entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation. The failure to do so is an abuse of process, the remedy for which is a stay of the action against the non-settling defendants [...].

[30] In *Kingdom* the defendants appealed the rejection of their motion by the motion judge. The motion judge had determined that the litigation landscape had not been altered to a degree such that immediate disclosure was required and that the disclosure of the terms of the settlement about 27 days after it was reached was sufficient. Among other things, the motion judge noted that not all partial settlements require immediate disclosure, and the determination is "fact specific." The Court of Appeal dismissed the appeal.

[31] The plaintiffs submit that the Release did not "significantly [alter] the dynamics of the litigation." Under the Release, the only defendants that are removed from the litigation are the corporations that are owned by Millar. Millar, however, remains a defendant and remains adverse to the plaintiffs. Further, Millar is cooperating with Slattery, not with the plaintiffs.

[32] The plaintiffs further submit that the disclosure of the Release, within 16 days, was immediate such that there could not be an abuse of process.

[33] The amended statement of claim removes the Millar Companies as defendants, but Millar remains as a defendant adverse in interest to the plaintiffs.

[34] In my view the Release did not significantly alter the dynamics of the litigation. While the three Millar Companies have been removed as defendants, Millar remains a defendant and remains adverse in interest to the plaintiffs. Further, the existence of the settlement agreement was disclosed l6 days after the Release was released from escrow.

[35] I am not satisfied that there has been a breach of the immediate disclosure rule.

Disposition and Costs

[36] Slattery's motion is dismissed.

[37] Slattery shall pay the plaintiffs' partial indemnity costs fixed in the amount of $95,000 (inclusive of taxes and disbursements).

J. Steele J.

Released: October 4, 2024