

**CITATION:** Carbone v. Boccia, 2023 ONSC 2282  
**COURT FILE NO.:** CV-22-00683894-0000  
**DATE:** 20230414

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ALBERT CARBONE and CATHY HORVAT, Plaintiffs

**AND:**

SALVATORE BOCCIA, ROSANNA BOCCIA, 215 HOLDING CORP, JANE  
DOE, JOHN DOE and DOE CORP., Defendants

**BEFORE:** Associate Justice Rappos

**COUNSEL:** *Daniel Milton and Helen Richards*, for the Plaintiffs

*David Shpilt*, self-represented proposed Defendant

*Albert Carbone*, Plaintiff (observing)

**HEARD:** April 12, 2023 (by videoconference)

**ENDORSEMENT**

**The Motion**

[1] The plaintiffs seek an order, *inter alia*:

- (a) adding David Shpilt as a defendant;
- (b) adding Pamela Atkinson as a defendant;
- (c) granting leave to register a certificate of pending litigation (“**CPL**”) with respect to property municipally known as 3513 Homewood Lane, London (the “**Homewood Property**”);
- (d) granting leave to amend their statement claim; and
- (e) validating service on Mr. Shpilt by e-mail.

[2] For the reasons that follow, the motion is granted with respect to the relief being sought against Mr. Shpilt. The balance of the motion is adjourned to May 19, 2023 for a 60 minute hearing before me.

### **Background**

[3] The plaintiffs commenced an action against the current defendants Salvatore Boccia, Rosanna Boccia and 215 Holding Corp. on July 12, 2022, seeking, among other things, damages in the sum of \$775,000 for fraudulent misrepresentation and unjust enrichment. The damages amount represents investments procured by the current defendants from the plaintiffs for cannabis businesses and contracts that the plaintiffs allege were entirely fabricated.

[4] The plaintiffs originally brought an *ex parte* urgent motion in writing requesting that Mr. Shpilt be added as a defendant and seeking injunctive relief against him. The plaintiffs wish to add Mr. Shpilt as a defendant on the basis that Mr. Shpilt was Mr. Boccia's business partner and had been working with Mr. Boccia to defraud the plaintiffs, had forged a contract that the plaintiffs relied on when making the investments, and had received a portion of the funds the plaintiffs had provided to the current defendants.

[5] In an Endorsement dated January 30, 2023, Justice Pollak held that it was not appropriate for the court to hear the motion on an *ex parte* basis, in writing. Justice Pollak required the plaintiffs to serve and notify Mr. Shpilt with the motion materials and the endorsement and request that the court schedule a hearing that was not in writing.

[6] On February 21, 2023, counsel to the plaintiffs and Mr. Shpilt attended before Justice Ramsay in Civil Practice Court. As set out in the Endorsement dated February 21, 2023, Justice Pollak confirmed that Mr. Shpilt had notice of the pending motion to add him as a defendant to this action, and that he had retained counsel and intended to respond to the motion. Justice Pollak determined that the motion to amend the pleadings was to be brought before an Associate Judge.

[7] The plaintiffs' motion was scheduled to be heard by an Associate Judge on an urgent basis on March 14, 2023. The plaintiffs served a motion record dated March 2, 2023 in support of their motion for relief as against Mr. Shpilt.

[8] On March 7, 2023, the plaintiffs served an amended motion record and amended notice of motion. It was in these materials that the plaintiffs included the relief now being sought against Ms. Atkinson - namely that she also be added as a defendant in this action and that a CPL be issued against the Homewood Property, which Ms. Atkinson is the sole registered owner on title.

[9] On March 14, 2023, counsel to the plaintiffs, and Mr. Shpilt, appeared before Associate Justice McAfee. The plaintiffs' motion was adjourned to April 12, 2023 to provide additional time for the plaintiffs to serve their motion materials on Ms. Atkinson.

### **Request for an Adjournment**

[10] During the course of the hearing, Mr. Shpilt requested an adjournment of the motion so he could retain counsel and respond to the motion. Mr. Shpilt confirmed that to date, he has not

retained counsel (which is contrary to what was represented to Justice Pollak on February 21, 2023). When pressed, Mr. Shpilt did not have a plan as to when he would retain counsel and be in a position to respond to the motion.

[11] The materials filed show that the plaintiffs served motion materials on Mr. Shpilt by e-mail on February 15, 2023. On February 21, 2023, Mr. Shpilt e-mailed counsel to the plaintiffs and confirmed that he had conducted a “very cursory review of the documents”. Justice Pollak’s Endorsement of February 21, 2023 indicated that Mr. Shpilt had notice of the pending motion.

[12] Mr. Shpilt was provided an additional month of time to retain counsel and respond to the motion since the appearance before Associate Justice McAfee on March 14, 2023. He has failed to do both. All of the plaintiffs’ materials have been served on him via e-mail at the e-mail address with which he has corresponded with counsel to the plaintiffs.

[13] In the circumstances, I do not believe it is appropriate to grant a further adjournment of the plaintiffs’ motion as against Mr. Shpilt, and I decline to do so.

### **Relief Sought Against Mr. Shpilt**

[14] As noted above, the plaintiffs’ wish to add Mr. Shpilt as a defendant to the action and request leave to issue a second amended statement of claim.

[15] Rule 5.03(4) of the *Rules of Civil Procedure* states that “[e]very person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.” Rule 5.04(2) allows the Court to add a party to the proceeding at any stage of a proceeding, “on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.”

[16] This action was commenced on July 12, 2022 and is still in its infancy. The statement of claim was amended on February 23, 2023. The pleadings have not closed, as Mr. Boccia has not defended the action to date. In its draft second amended statement of claim, the plaintiffs allege that Mr. Shpilt forged a contract that was used by the current defendants to solicit an investment from the plaintiffs. During a Rule 39.03 examination of Mr. Shpilt held on October 6, 2022, Mr. Shpilt confirmed that he created the contract, and that it represented a non-existent agreement with the alleged counterparty to the agreement.

[17] Additionally, documentation obtained by the plaintiffs from The Bank of Nova Scotia in connection with a Mareva order granted against the current defendants by Justice Morgan dated November 30, 2022 appear to show that Mr. Shpilt received \$95,000 of the funds the plaintiffs invested with the current defendants.

[18] As confirmed by the Court of Appeal in *Schembri v. Way*, 2012 ONCA 620, amendments to add parties should be presumptively approved, unless there is abuse of the court process or non-compensable prejudice. The Court noted at paragraph 26 that “plaintiffs could commence a new action against the proposed defendants and then seek to join it with the existing action. The procedure of adding parties to the existing action circumvents the costly and time-consuming process involved in that procedure.”

[19] In my view, it is appropriate to add Mr. Shpilt as a defendant in this proceeding, as his presence is necessary and there is no abuse of court process or prejudice that I am aware of that could not be compensated for by costs.

[20] Additionally, leave is granted to the plaintiffs pursuant to rule 26.01 to amend the second amended statement of claim to add language specifically with respect to Mr. Shpilt.

[21] With respect to service, Mr. Shpilt confirmed during the hearing that he prefers to receive all materials from the plaintiffs' lawyers by e-mail as opposed to personal service or regular mail. Mr. Shpilt previously communicated with counsel by e-mail and had requested that a summons be sent to him by e-mail as opposed to in person.

[22] Accordingly, an order shall go pursuant to rule 16.08 validating service of the plaintiffs' motion materials on Mr. Shpilt and granting the plaintiffs leave to serve any further documents on Mr. Shpilt at the e-mail address he has provided to counsel to the plaintiffs.

### **Relief Sought Against Ms. Atkinson**

[23] Ms. Atkinson is the estranged spouse of Mr. Shpilt. The plaintiffs have produced a parcel register for the Homewood Property, which shows that Ms. Atkinson is the sole registered owner on title. The parcel register also shows that Mr. Shpilt and Ms. Atkinson acquired the Homewood Property on July 24, 2003.

[24] Pursuant to a Transfer registered on title to the Homewood Property on March 25, 2013, Mr. Shpilt transferred his 50% interest in the property to Ms. Atkinson for \$0.00 in consideration as an "[i]nter-spousal transfer for natural love and affection."

[25] The plaintiffs allege that the Transfer is fraudulent and void and that an order should be granted setting aside the Transfer and transferring 50% of the ownership of the Homewood Property back to Mr. Shpilt. In the alternative, the plaintiffs seek a declaration that Mr. Shpilt is the beneficial owner of a 50% interest in the Homewood Property by virtue of an express, resulting, or constructive trust.

[26] The plaintiffs wish to add Ms. Atkinson as a defendant in this proceeding so as to seek the relief noted above and seek leave to register a CPL against title to the Homewood Property.

[27] The affidavits of service filed by the plaintiffs indicate that they served Ms. Atkinson with materials by sending them to Mr. Shpilt's e-mail address. Mr. Shpilt confirmed during the hearing that he had not forwarded the materials on to Ms. Atkinson.

[28] The plaintiffs' materials also show that a process server attended at the Homewood Property on March 7, 2023 in an attempt to personally serve Mr. Shpilt and Ms. Atkinson with the plaintiffs motion materials. The affidavit of attempted service of Kevin Wilson sworn March 10, 2013 indicated that the Homewood Property was vacant. Pictures taken of the property and appended to the affidavit show that it is a gated property, and a sign was posted that the property was subject to a seizure order of the Court of Queen's Bench of Alberta.

[29] Mr. Shpilt stated during the hearing that Ms. Atkinson had left the Homewood Property in fall 2022, and that it was his understanding that TD Bank had commenced power of sale proceedings against the property.

[30] An affidavit of attempted service of Kevin Wilson sworn March 14, 2023 states that the process server also attempted to serve Ms. Atkinson at a potential work address in London, Ontario. Mr. Wilson attended the premises on two separate days and states that the premises were closed and appeared vacant.

[31] Based on the materials before me, I am not convinced that the plaintiffs' motion materials have come to Ms. Atkinson's attention. The plaintiffs' motion was adjourned by Associate Justice McAfee on March 14, 2023 to allow for additional time for service to be provided on Ms. Atkinson. Since that time, all materials were sent by the plaintiffs to Mr. Shpilt's e-mail address, which he did not send on to her.

[32] Accordingly, I am adjourning the plaintiffs' motion with respect to the relief sought against Ms. Atkinson.

[33] As noted above, the relief sought by the plaintiffs include a CPL against the Homewood Property. Given Mr. Shpilt's statement that the property is subject to power of sale proceeding, and given the notice posted at the Homewood Property regarding the property being subject to court order<sup>1</sup>, I am concerned that the property may be dealt with pending the return of the motion seeking the CPL.

[34] In the circumstances, I believe it is appropriate for an interim order to be granted and registered on title to the Homewood Property to prevent the property from being transferred or sold. The plaintiffs shall send a copy of this Endorsement and the Court's Order to each of the mortgagees that have a mortgage registered on title to the Homewood Property.

[35] With respect to service on Ms. Atkinson, Mr. Shpilt has provided an e-mail address for her that he said she uses. Despite the request made of him during the hearing, he has not provided a mailing address for Ms. Atkinson to date. As set out in the Further Supplementary Affidavit of Mark Ross sworn March 30, 2023, counsel to the plaintiffs retained an investigation firm to locate a mailing address for Ms. Atkinson. The firm was unable to do so.

[36] Accordingly, the plaintiffs shall serve all of its materials by e-mail on Ms. Atkinson at the e-mail address provided by Mr. Shpilt.

## **Disposition**

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<sup>1</sup> I note that in the Further Supplementary Affidavit of Mark Ross sworn March 30, 2023, it states that counsel conducted court searches in Alberta and were unable to find any information on a potential court order dealing with the Homewood Property.

[37] For the reasons set out above, the Court orders that:

- (a) Mr. Shpilt be added as a defendant to his action and the title of proceedings is to be amended accordingly;
- (b) leave is granted for the Amended Statement of Claim to be amended in accordance with a draft Second Amended Statement of Claim, which shall only include amendments with respect to Mr. Shpilt and not Ms. Atkinson;
- (c) service of the plaintiff's motion materials on Mr. Shpilt by e-mail is hereby validated;
- (d) leave is granted for the plaintiffs to serve any further documents required to be served in relation to this action on Mr. Shpilt by e-mail;
- (e) leave is granted for the plaintiffs to serve its motion materials on Ms. Atkinson by e-mail at the e-mail address supplied by Mr. Shpilt, and no further order validating service is required so long as the materials have been served in this manner;
- (f) no transfer or sale of the Homewood Property shall occur until further order of the Court;
- (g) the plaintiffs may register a copy of the Court's order on title to the Homewood Property;
- (h) the plaintiffs shall send a copy of this Endorsement and the Court's order by regular mail to every party with a mortgage registered on title to the Homewood Property; and
- (i) the balance of the motion is adjourned to May 19, 2023 for 60 minutes.

[38] Costs of this motion will be spoken to at the hearing of the balance of the motion on May 19, 2023.

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Associate Justice Rappos

**DATE:** April 14, 2023