**CITATION:** Thrive Capital Management Ltd. v. Noble 1324 Queen Inc., 2023 ONSC 1383
**COURT FILE NO.:** CV-20-00639748-00CL
**DATE:** 20230228



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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| **BETWEEN:** | ) | |
| | ) | |
| THRIVE CAPITAL MANAGEMENT LTD., THRIVE UPLANDS LTD., 2699010 ONTARIO INC. and 2699011 ONTARIO INC. | ) | *Brian N. Radnoff, Dan A. Poliwoda*, and *Daniel Waldman*, for the plaintiffs |
| Plaintiffs | ) | |
| **– and –** | ) | |
| NOBLE 1324 QUEEN INC., MICHAEL HYMAN, GIUSEPPE ANASTASIO, DAVID BOWEN, NOBLE DEVELOPMENTS CORPORATION, HAMPSHIRE AND ASSOCIATES INCORPORATED, LISA SUSAN ANASTASIO, RAJEREE ETWAROO CON-STRADA CONSTRUCTION GROUP INC. | ) | *Lorne Sabsay*, for the Defendants Michael Hyman, Hampshire and Associates Incorporated and Giuseppe Anastasio (the "Developer Defendants") |
| Defendants | ) | **HEARD:** November 7, 2022 |

**KIMMEL J.**

## REASONS FOR DECISION
## (Motions for Default Judgment and Leave to File Defences)

[1] Thrive Capital Management Ltd. and its affiliated entities (the plaintiffs) move for default judgment against Michael Hyman, Hampshire and Associates Incorporated and Giuseppe Anastasio (together, the "Developer Defendants")[1]. At the same time, the Developer Defendants ask the court

[1] Capitalized terms used herein and not otherwise defined shall have the same meaning as in the Second Sentencing Decision.

to set aside their noting in default and seek leave to file a Statement of Defence, claiming they have successfully purged previous orders that found them in contempt.

[2] The plaintiffs allege that the Developer Defendants misappropriated $9 million that the plaintiffs advanced in connection with two real estate projects: the Spring Valley Project in Brampton (associated with an account held at the Royal Bank of Canada in the name of 2699010 Ontario Inc., "9010") and the Uplands Project in Richmond Hill (associated with an account held at the Royal Bank of Canada in the name of 2699011Ontario Inc. "9011").

**Procedural Background**

[3] There is a long procedural history in this matter dating back to the spring of 2020. On August 21, 2020, Koehnen J. found the Developer Defendants to be in contempt of an April 23, 2020 Mareva and Disclosure Order and follow-on orders of May 19, June 1, June 10, 2020 (collectively, the "Mareva and Disclosure Order"): see *Thrive Capital Management Ltd. v. Michael Hyman et al.*, 2020 ONSC 4921.

[4] In the first sentencing decision released on January 21, 2021, following a November 5, 2020 sanction hearing, Koehnen J. granted judgment against the Developer Defendants for $9 million: see *Thrive Capital Management et al. v. Michael Hyman et al.*, 2021 ONSC 482. That decision was appealed. The Court of Appeal sent the matter back for a new sentencing hearing in a decision dated October 15, 2021: see *Thrive Capital Management Ltd. v. Noble 1324*, 2021 ONCA 722, 463 D.L.R. (4th) 377.

[5] The re-sentencing hearing was heard on May 3, 2022. My reasons for decision were released on July 12, 2022 (the "Second Sentencing Decision"): see *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, 2022 ONSC 4081. The Developer Defendants were incarcerated for their contempt, which had still not been purged by that time. Mr. Anastasio's Statement of Defence was struck and various further orders and directions were provided regarding the "last chance" that the Developer Defendants were being provided to purge their contempt before judgment would be granted against them.

[6] At the next hearing on September 20, 2022, the plaintiffs advised the court that they remained dissatisfied with the additional disclosure provided by the Developer Defendants. Certain deficiencies in the most recent disclosures were noted. A hearing date was booked for the plaintiffs' motion for default judgment. The Developer Defendants asked for additional time to demonstrate or supplement their compliance (or demonstrate the impossibility of compliance by a further endorsement of the court) and indicated that they would seek leave to file their defences. The following further guidance was provided by the court:

> I strongly urge and encourage the Developer Defendants to take advantage of this additional time to demonstrate their compliance (or the impossibility of any further or better compliance if that is their position, for example with respect to the production of their text messages) by connecting documentary or other evidence to the accounting with the overarching objective of explaining, to the best of

> their knowledge, information and belief, what happened to the funds advanced by the plaintiff in respect of the subject development projects.

[7] The Developer Defendants were sentenced to jail time under the Second Sentencing Decision. Their sentence was structured so as to afford them time to purge their contempt. The court summarized in the Second Sentencing Decision the circumstances under which the Developer Defendants would be permitted to file their defences:

> The Developer Defendants may apply to the court for leave, in the case of Anastasio to re-file and in the case of Hyman to file, a Statement of Defence in response to the Statement of Claim against them (on behalf of themselves and their affiliated companies who comprise the Developer Defendants) after and only if they purge their contempt by doing the things that have been identified in paras. 81 and 41(a) to (c) of this decision as still being outstanding.

[8] The Developer Defendants say they have sufficiently purged their contempt and should be permitted to defend the action on the merits. They were noted in default by the Second Sentencing Decision. Therefore, they are deemed to admit the facts alleged in the Amended Statement of Claim if the noting in default is not set aside by their companion motion.

[9] The Developer Defendants ask the court to set aside their noting in default and seek leave to file their Statements of Defence. They say that they have exercised reasonable diligence and done all that they were reasonably able to do in the circumstances to purge their contempt since the Second Sentencing Decision.

[10] Paragraph 109(h) of the Second Sentencing Decision provides that if the court determines that the Developer Defendants failed to purge their contempt within the time afforded following their incarceration, the plaintiffs could move for default judgment and/or for a further sanction of incarceration.

[11] The plaintiffs now move for default judgment against the Developer Defendants. The plaintiffs maintain that what the Developer Defendants have done is still not enough and they have run out of chances to try to purge their contempt any further.

[12] These motions are mutually exclusive – for one to succeed, the other must fail.

**Summary of Outcome**

[13] For the following reasons, the Developer Defendants' motion is granted; the plaintiffs' motion is dismissed.

[14] The Developer Defendants were given a last chance to remedy the deficiencies in their compliance with the Mareva and Disclosure Order. The deficiencies were summarized in the Second Sentencing Decision. Because it was their "last chance", the standard for the Developer Defendants to meet is high, but it is not a standard of perfection. They say they have done all they are reasonably able to do at this time to address the identified deficiencies. They have apologized to the court for their previous shortcomings. They acknowledge that what they have provided is

incomplete but maintain that what remains outstanding is in the hands and knowledge of third parties or is no longer available.

[15] The Developer Defendants find themselves in a difficult position. Their original failure to comply with the Mareva and Disclosure Order, and the passage of time since then, have made it more difficult, or impossible, for them to obtain some of the records and information that they need to fully comply with that order. They should not be rewarded for their earlier failings. However, the last and final chance that they were given to purge their contempt after the Second Sentencing Decision was not intended to be an exercise in futility for the Developer Defendants. That would not serve the interests of justice. The court contemplated that they might rectify the deficiencies or demonstrate their efforts to do so in order to satisfy the court that they should be given the opportunity to defend the plaintiffs' allegations against them on the merits, rather than having default judgment entered against them.

[16] Since the Second Sentencing Decision, the Developer Defendants have made additional efforts to purge their contempt. They have engaged an accountant to assist them in their efforts to explain what happened to the funds they received from the plaintiffs and they have themselves attempted to organize the information and documents that they have, which they acknowledge do not provide a complete accounting. Their disclosures and explanations show that they either spent the funds (with some question remaining as to how much was spent on development or Project related expenses and how much was personal) or transferred them to relatives and affiliates who are now named as defendants. Their earlier delays and defaults have inhibited their ability to get information from some third parties, but they say that they have now provided everything that they can.

[17] This is not a situation where it has been established that the Developer Defendants took active steps to destroy or put the disclosure (or their assets) out of the reach of the plaintiffs or the court. Those extreme circumstances might have justified the outcome of a default judgment that the plaintiffs seek, but that is not the situation here. I am satisfied that the Developer Defendants have done enough to purge their contempt. The purpose of a sanction order for contempt is to encourage compliance to the extent possible, and that is what has occurred, even if the "extent possible" means that there are still gaps in the disclosure.

**Directions Regarding Contempt (Second Sentencing Decision)**

[18] In the Second Sentencing Decision, the court expressed concern about the lack of progress made by the Developer Defendants in their purported efforts to purge their contempt over the more than two years since the Mareva and Disclosure Order. The court made it clear that it will not simply keep giving further chances without a demonstration of respect for, and reasonable efforts to comply with, the court's orders and its process. The court observed that: "…every case has a breaking point, and it has been reached in this one."

[19] These motions turn on whether the Developer Defendants have demonstrated that they purged their contempt or that they made reasonable and diligent efforts to do so. What was expected of the Developer Defendants to purge their contempt under the Mareva and Disclosure Order was summarized in the Second Sentencing Decision. The key issue which the contemnors are required

to answer through their disclosure is: where did the money go?: *Jonsson v. Lymer*, 2020 ABCA 167, 7 Alta. L.R. (7th) 146, at para. 56; *Lymer (Re)*, 2020 ABQB 157, at para. 48.

[20] Paragraph 81 of the Second Sentencing Decision summarized what the Developer Defendants were required to do with respect to the accounting:

> With respect to the accounting exercise, their compliance can either be achieved by: (i) providing the detailed explanations of what happened to the plaintiffs' money that they were ordered to provide (e.g. what they themselves spent the funds they received on or, to the extent some of the funds were used to satisfy project-specific obligations, the details of such and all supporting documents); or (ii) if they do not themselves have direct knowledge of what happened to the funds that were paid out of the 9010 and 9011 bank accounts and ended up in the hands of third parties, at a minimum, they are expected to make inquiries of the recipients of any such funds and to provide particulars of when those inquiries are made, when they followed-up and any responses received, and copies of these communications if they are in writing.

[21] Paragraphs 41(a) to (c) of the Second Sentencing Decision outlined the following further deficiencies in the Developer Defendants' compliance with the Mareva and Disclosure Order:

> Without going into every example of continuing non-compliance with the Mareva and Disclosure Order, and even if the Developer Defendants are taken at their word that they do not have any additional supporting documents to produce as part of the accounting exercise (beyond those provided, most of which have come from third party production orders obtained by the plaintiffs), a summary of some other persistent examples are:
>
> a. Hyman acknowledges that he has still not produced the metadata for electronic records that he promised to provide in a letter dated August 31, 2020. He places the blame for this on his former lawyer. However, as of the date of the sanction re-hearing, the metadata had still not been retrieved from the former lawyer and produced.
>
> b. Although the plaintiffs have done a lot of the work for the Developer Defendants through third-party production motions, there still remain missing bank and credit card statements that could be obtained from third parties and the evidence about the efforts of the Developer Defendants to obtain these records is lacking or deficient.
>
> c. The Developer Defendants appear not to have attempted to obtain lost texts or emails from service providers (to address the most recent excuses of lost or damaged phones and devices to address these missing records ordered produced).

[22] The following is a summary of the findings made in the Second Sentencing Decision regarding the continuing contempt of the Developer Defendants (at para. 109(a)):

> a. The Developer Defendants have still not purged their contempt. The following remains outstanding:
>
> i. Some of the plaintiffs' funds remain unaccounted for.
>
> ii. Hyman has still not produced the metadata for electronic records that he promised to provide in a letter dated August 31, 2020.
>
> iii. There still remain missing bank and credit card statements that need to be obtained from third parties.
>
> iv. The Developer Defendants appear not to have attempted to obtain lost texts or emails from service providers.

[23] These findings are at the centre of the determination that the court must make on these motions as to whether the Developer Defendants have satisfactorily purged their contempt.

**What must the Developer Defendants do to Purge Their Contempt?**

[24] Rule 60.11(8) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") provides that, on motion, a judge may discharge, set aside, vary or give directions in respect of a civil contempt order made under subrule (5) or (6), and may grant such other relief and make such other order as is just.

[25] The Court of Queen's Bench of Alberta (as it then was) in *Lymer (ABQB)*, at para. 30 puts it this way: "[t]he contemnor must satisfy the Court that they have subsequently complied with the order they previously breached to the full extent that they are reasonably able: *Lymer v. Jonsson*, 2017 ABQB 110, at paras. 24, 29; *Lymer (Re)*, 2018 ABQB 859, at para. 157; *Turkawski v. 738675 Alberta Ltd*., 2007 ABQB 745, at para. 37."

[26] Once found guilty of contempt, the onus falls on the contemner to show on a balance of probabilities that they have purged their contempt by doing that which was originally neglected or willfully refused to be done: see *Chiang (Re)*, 2009 ONCA 3, 93 O.R. (3d) 483, at para. 51.

[27] As held in *Re Axelrod et al v. City of Toronto (No.2)* (1985), 52 O.R. (2d) 440 (H.C.), at para. 8: "[t]he primary purpose [of contempt orders] is to coerce people or citizens into obeying court orders." Similarly, in *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, 121 O.R. (3d) 670, at para. 79, the court explained that the purpose of a penalty for civil contempt is to enforce compliance with a court order and to ensure societal respect for the courts.

[28] A finding of contempt may still be purged if the answers are incomplete due to factors beyond the party's control. A distinction is drawn between an inability and an unwillingness to respond to undertakings. Perfect compliance is not required: see *Lymer (ABQB)*, at paras. 37 and 38 (see also paras. 23 and 29):

> [37] It may be possible for a party found in contempt to purge their contempt without achieving perfect compliance with the order they previously breached. This may be the case where the party shows that they are unable – as opposed to unwilling – to satisfy elements of the earlier order (*Turkawski* I at para. 37; *Turkawski* II at para. 15). Additionally, the court may take into consideration that "the passage of time, and other factors, may affect the true importance of receiving complete satisfaction" of an earlier undertaking or requirement (*Turkawski* I at para. 32). The fact that a party has not achieved perfect compliance with an earlier requirement may be less important where the intended product of that requirement is no longer relevant (*Turkawski* I at para. 53).
>
> [38] Similarly, when document production is at the heart of the earlier contempt finding, a court may consider whether production has "run its course" at the time that a party applies to purge its contempt (*Demb v. Valhalla Group Ltd*., 2017 ABCA 340, at para. 6).

[29] Where a contemnor is found to have acted diligently to purge their contempt after obtaining new counsel, that is another mitigating factor that the court may consider. See *Matta v. Altmore Mortgage Investment Corporation*, 2022 ONSC 5322 at paras. 17-21.

**Efforts of the Developer Defendants to Purge their Contempt After the Second Sentencing Decision**

*Accounting*

[30] The Mareva and Injunction Order required the Developer Defendants to provide:

> a full and detailed accounting of all funds deposited, withdrawn or otherwise removed from the Accounts, including all backup and supporting documents and full and complete information about what was done with the funds, who the money went to, where it was sent, the account it was deposited into, what it was for and what any recipient did with that money.

[31] After the Second Sentencing Decision, the Developer Defendants engaged the services of expert forensic accountant Jennifer Lynch. She prepared an initial report in September 2022 in an effort to account for all funds deposited or withdrawn (or transferred out of) the identified bank accounts associated with the Developer Defendants. This was completed based on account statements (obtained by the plaintiffs from the bank) and some documents provided by the Developer Defendants. Her analysis suffered from some misinformation (e.g. missing bank statements and an erroneous transaction summary) and inappropriate assumptions (e.g. that the Developer Defendants were entitled to do whatever they wanted with the funds received from the plaintiffs and therefore once the funds were paid out of the corporate bank accounts no further accounting was required).

[32] Further, the supporting documents that the Developer Defendants provided were not initially organized or linked to the bank transactions in any obvious way. These, among other concerns, were identified by the plaintiffs at the first return to court following the Second Sentencing Decision on September 7, 2022. The original return date for September 14, 2022 was adjourned to give the Developer Defendants a further opportunity to address the preliminary concerns raised.

[33] This led to a revised report and response letter from Ms. Lynch. In addition to Ms. Lynch's analysis, the Developer Defendants prepared an excel spreadsheet with explanations for some of the transactions. The explanations in the excel spreadsheet are, according to the Developer Defendants, now linked to the available supporting documents, or documents that they say demonstrate their efforts to obtain supporting documents from third parties.

[34] Both sides raised evidentiary objections about the accounting evidence.

[35] The plaintiffs object to Ms. Lynch's "report" and response letter. They complain that these were tendered into evidence as attachments to an affidavit filed from a student from the Developer Defendant's lawyer's office, rather than through a proper expert's report or expert's affidavit.

[36] In the context of the contempt proceedings, Ms. Lynch was engaged to assist the Developer Defendants in tracing funds they received from the plaintiffs and accounting for them, which they now acknowledge was the essence of what the Mareva and Disclosure Order required them to do. Although I allowed for an expert report to be filed, and responded to, the Developer Defendants did not have an obligation to provide an expert accounting analysis to show what happened to the funds they received from the plaintiffs in their effort to purge their contempt.[2]

[37] Having now seen the accounting analysis prepared by Ms. Lynch, I do not view it, and have not received it, as expert opinion evidence in the context of the present motions. It is simply a synthesis of information to assist the Developer Defendants in showing what happened to the funds they received from the plaintiffs based on the documents and information she was given. The requirements for expert reports under the Rules need not be strictly adhered to for the Developer Defendants to address the immediate question of whether they have purged their contempt.

[38] Conversely, the Developer Defendants objected to the plaintiffs' criticisms of Ms. Lynch's analysis being presented through a lawyer's affidavit rather than coming from an accounting expert. This objection is also unfounded. First, for the same reason as the objection to Ms. Lynch's analysis was overruled: it was not being received as an expert report. Opposing counsel is entitled to point out gaps, holes and discrepancies in the analysis as they might do in argument. I have no difficulty in the plaintiffs' criticisms of the accounting analysis, which are essentially factual errors and omissions, being presented in this manner and repeated in the plaintiffs' factum. The fact that they were provided in an affidavit does not give them any more weight.

[2] Mr. Hyman represented early on that he would be presenting something from an accountant in his efforts. Engaging the assistance of an accounting professional to assist in some aspects of the immediate exercise was prudent, although its utility is constrained by the restrictions on the scope of her mandate and certain documents she appears not to have been given and assumptions she made.

[39] Having dismissed both sides' evidentiary objections relating to the accounting analysis, I turn back to the substance of what has been provided.

[40] The Developer Defendants contend that they have now accounted for all of the funds that exited their accounts by either:

a. providing detailed explanations of what happened to these funds; or,

b. making inquiries of the recipients of any funds, and providing particulars of when inquiries were made, when they followed up, any responses received, and copies of these communications, if in writing.

[41] The sufficiency of the disclosure and explanations provided is addressed in this section of the endorsement and the sufficiency of the third party inquiries is addressed in the next section of this endorsement.

[42] I do not agree that all of the explanations provided are "detailed." Their explanations are imperfect and there are gaps. But the Developer Defendants insist that they have provided all that they are able to. They say that each transaction for which there are supporting documents has been identified on their excel spreadsheet and links to the available documents have been provided.

[43] The plaintiffs point out that the links are often to high level documents or documents that are not obviously related to the outgoing payment of funds. They are dissatisfied with how the supporting documents have been organized and the sufficiency (and in some cases, legibility) of some of the explanations that have accompanied them. For example, a "construction expense" was paid when there was no construction undertaken for either project and the plaintiffs have suspicions about the legitimacy of the purported builder to whom they were paid, Joseph Perruccio. The plaintiffs also question the authenticity (at least as to the creation date) and accuracy of some of the supporting documents provided. They are displeased with how much work they have had to do in order to assess the sufficiency of the supporting documents (and in the case of the banking records, the work they had to do in order to obtain those records from the bank).

[44] The plaintiffs are justifiably frustrated with the organization of the supporting documents and the inability of the Developer Defendants to provide coherent and complete explanations about what happened to every dollar that they received from the plaintiffs. Those frustrations and failings may well result in cost and other consequences for the Developer Defendants in their defence of the action. However, the Developer Defendants have represented to the plaintiffs and the court that they have provided all that they have and all that exists in support of this accounting and tracing exercise. Their purported compliance now is sufficient to purge their contempt, even if incomplete and even though their explanations and disclosures remain subject to challenge by the plaintiffs and later scrutiny of the court when the merits of the claims are determined.

[45] The Developer Defendants' failure at the time of the Mareva and Disclosure Order to undertake the necessary work to account for and trace the funds they received from the plaintiffs and disbursed (at which time they might have been better situated than they are now to do so) could present difficulties for them in their defence of the action. Their disclosure thus far demonstrates only limited uses of these funds for actual project related development costs. Absent proof to the contrary (of which they have proffered very little), they will be presumed to have deployed the

plaintiffs' funds for other uses and will suffer whatever consequences follow. Notably, much of this will turn on whether they succeed in their assertion that their use of certain funds received from the plaintiffs (their "developer fees") was not restricted to expenses and costs in furtherance of the development of the two projects at issue.

[46] The Developer Defendants will have to defend themselves on the basis of this incomplete disclosure. While their continuing discovery obligations remain intact, the Developer Defendants will not be permitted, without leave of the court, to tender any further evidence in support of their defences that should have been produced under the Mareva and Disclosure Order. Any request for leave will need to be supported by a valid explanation for why the information and/or documents were not disclosed in their efforts to comply with the Mareva and Disclosure Order.

[47] In addition to the evidentiary issue discussed earlier, the plaintiffs argue that the updated accounting report and response letter from Ms. Lynch do not provide any additional disclosure or information about what happened to their funds. The criticisms of her report stem from a difference in the plaintiffs' expectations of what she would be doing (in essence, a forensic accounting and tracing) and what she did (organize information and documents that were provided to her by the Developer Defendants without questioning them). While a forensic accounting exercise may ultimately be required, as noted earlier, it is not required by the Mareva and Disclosure Order.

[48] Ms. Lynch's analysis is limited in its scope to the transactions in the 9010 and 9011 bank accounts and does not attempt to ascertain what happened to the funds after they left those accounts. There are discrepancies even with the transactions in the accounts with some funds seemingly unaccounted for. I agree with the plaintiffs that what Ms. Lynch did is, at best, only an incremental improvement of the previous five "accountings" that the Developer Defendants prepared themselves and is not particularly helpful to the overall exercise. Her assumption that no further work needed to be done to trace and account for funds paid to the Developer Defendants on account of their "developer fees" is an obvious shortcoming.

[49] However, the shortcomings of this report and response letter are not the end of the analysis for of whether the Developer Defendants have done enough to purge their contempt. The primary concern about the previous accountings provided by the Developer Defendants was with the lack of explanations and supporting documents, which they have now attempted to rectify through the newly produced excel spreadsheet that contains hyperlinks to over 4,900 supporting documents (some previously produced, some new, and some more readily accessible than others).

[50] The Mareva and Disclosure Order did not require the Developer Defendants to produce documents that they do not have. This back and forth over their explanations and the sufficiency of supporting documents has gone as far as it can.

*Parties in Receipt of Funds from the Developer Defendants*

[51] The secondary concern that the plaintiffs previously raised was with respect to the efforts to obtain documents and information from third parties. The plaintiffs note that very little has been disclosed about what the recipients did with the funds they received from the Developer Defendants.

[52] The issue is whether the Developer Defendants have done enough to obtain information and documents the recipients of funds who are now named as defendants (and from other third parties,

including account statements from the PNC Bank, text messages from Rogers and metadata from former counsel) to purge their contempt.

[53] The updated accounting and disclosure provided does not indicate that each and every recipient of funds from the Developer Defendants has been asked what they did with the funds they received. However, the situation is different now than it was when the Mareva and Disclosure Order was made (and the Second Sentencing Decision simply carried forward the originally indicated requirements). Most of the identified recipients have now been added by the plaintiffs as defendants (by the Amended Statement of Claim, amended in August of 2021), so the "litigation landscape" has changed.

[54] The addition of these defendants does not excuse the Developer Defendants from their obligations under the Mareva and Disclosure Order to ascertain what happened to the plaintiffs' funds. However, the Developer Defendants maintain that the addition of these recipient defendants renders the discovery process to be the more logical route for obtaining information and documents from the newly added recipient defendants about what happened to the funds. I agree that it makes sense at this point to pursue the information from the recipients of funds through that process, notwithstanding the original contemplation that this would be done by the Developer Defendants.

[55] That said, if the plaintiffs are forced to obtain the disclosure and tracing of the funds that they were supposed to receive pursuant to the Mareva and Disclosure Order (and that the Developer Defendants have failed to provide) from the added recipient defendants through the litigation process, the Developer Defendants may ultimately have to bear the cost of the necessary addition of those recipient defendants.

*Missing Bank and Credit Card Statements*

PNC Bank in Florida – Mr. Anastasio's Personal Account

[56] A request by Mr. Anastasio's former lawyer for these bank records went unanswered. The plaintiffs complain that they have not been provided with the documents to support the earlier requests. In the fall of 2022, PNC Bank said it would send these account statements to Mr. Anastasio's brother in the United States, but as of the hearing for these motions, the PNC Bank had still not done so. If and when those records are provided they will be produced.

[57] Regardless of what may have previously transpired, these records are in the hands of a third party bank and there does not appear to be more that Mr. Anastasio can do than to keep asking for them, which he should continue to do until the records have been produced. As long as Mr. Anastasio continues in his efforts to obtain these records, I do not consider him to be in contempt of court for not yet having received them.

[58] Discrepancies noted by the plaintiffs in the explanations and evidence about what these funds were used for (e.g. to support Mr. Anastasio's wife and children or for some other purpose) are best addressed once the records have been obtained.

Related Developer Company Bank Statements

[59] The Developer Defendants maintain that related companies, Noble 376 Derry Corp. and 2704536 Ontario Inc., do not have, and never had, bank accounts. As such, there are no "missing" bank statements for these companies. While the plaintiffs suggest that this assertion is not credible, they have not provided any evidence to indicate otherwise.

[60] The same applies with respect to the requested internal accounting records for these companies. The Developer Defendants insist that there simply are none, and never were. They did not keep accounting records and did not have a bookkeeper. If documents do not exist and never existed, they cannot be produced.

*Text Message Retrieval*

[61] The Mareva and Disclosure Order required the Developer Defendants to produce "all information, including communications and text messages, relating to the Properties, including the Developer Defendants' dealings with the Properties and third parties, to determine what the Developer Defendants did."

[62] The Developer Defendants maintain that they are unable to retrieve text messages that were sent on the Rogers telecommunications network in 2020. Mr. Hyman claims that he attempted to do so in 2020, although the evidence of this is scant.

[63] In September 2022, counsel for the Developer Defendants received written confirmation from Rogers that it does not retain text content and that no other text details are available for the time period sought (2020). This is consistent with the case that the Developer Defendants say confirms the recognized practice of telecommunications companies of destroying text messages after 30 days: see *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3.

[64] There may be a spoliation argument available to the plaintiffs if they can show that these text messages could have been retrieved earlier, but it appears to be impossible now to obtain them.

*Missing Metadata*

[65] At the second sentencing hearing, Mr. Hyman indicated that he had provided an electronic file to his former lawyers containing his available electronic records and associated metadata. Mr. Hyman was eventually able to obtain the electronic files containing the available metadata from his former lawyers and they were produced (the complete file) to the plaintiffs' lawyers on September 20, 2022, after a privilege review was completed.

**Conclusion Regarding the Purging of Contempt**

[66] The Developer Defendants have obtained new counsel and an accountant to assist them in their efforts to purge their contempt. They have improved upon what they previously provided since the Second Sentencing Decision. They appear to have an appreciation and understanding of the need to respect the court's process and orders: see *Matta* and *Boily*. They have demonstrated that they have produced the information and documents that they have, to the extent that they are reasonably able to do so at this time: see *Lymer (ABQB).* The gaps in the accounting and the areas

in which the plaintiffs seek to poke holes in the credibility of the Developer Defendants' explanations will all be fodder for the plaintiffs when it comes to address the claims on their merits, but the Developer Defendants do not need to survive a full merits and credibility based inquiry to demonstrate that they have purged their contempt.

[67] The plaintiffs argued that, even if it was impossible for the Developer Defendants to purge their contempt after the Second Sentencing Decision (for example, by retrieving their text messages), the court could and should still conclude that they failed to purge their contempt and grant default judgment. That does not serve the purpose of the contempt order and sentence imposed in this case, which was first and foremost to compel compliance.

[68] If there had been nothing that the Developer Defendants could have done to purge their contempt as at the date of the Second Sentencing Decision, compliance could not have been achieved and giving them a chance to do so would have been an exercise in futility. That was not the court's intention. This is a case in which the distinction between an inability and an unwillingness to do what is required should be given effect. Perfect compliance is not required: see *Lymer (ABQB)*, at para. 37. If their earlier delay in complying has now rendered them unable to provide complete disclosure of information and documents that they once had, there are other consequences that can be imposed for that, some of which are referenced above.

[69] While the accounting and disclosure provided by the Developer Defendants remains incomplete, I am satisfied that the purpose of the contempt order and sentence has been served by the efforts undertaken by the Developer Defendants to date, even though it was built on the significant work the plaintiffs had to do on their own to obtain documents from the banks when the Developer Defendants were in contempt.

[70] I am satisfied on a balance of probabilities that, in the circumstances as they exist today, what the Developer Defendants have done in furtherance of the accounting exercise and their efforts to obtain information and documents from others since the Second Sentencing Decision is all that they are reasonably able to do at this time and is sufficient to purge their contempt. While it is not a complete excuse, the court is mindful of the fact that the Developer Defendants have had their accounts frozen for a number of years and have limited resources to devote to compelling information and documents from third parties.

[71] I agree with the plaintiffs that a "last chance" must mean something in situations involving repeated breaches of court orders that are being flouted: see *Typhoon Capital BV v. Jacob*, 2022 ONSC 1663, at paras. 32-34. That was a concern earlier in this case, but I do not consider the Developer Defendants' conduct since the Second Sentencing Decision to be fairly characterized as them flouting or continuing to utterly disregard the Mareva and Disclosure Order.

[72] The Developer Defendants are no longer scornful or insolent to the court, as they were previously found to be. They are no longer acting in a manner that demonstrates a determination to consider themselves not to be bound by the court's orders so as to overcome the court's bias favouring the resolution of disputes on the merits: see *London Eco-Roof Manufacturing Inc. v. South River Developments Ltd.*, 2019 ONSC 1183, 97 C.L.R. (4th) 360, at paras. 24-25. They are not seeking to avoid an adjudication of the case on the merits, but rather are seeking the opportunity to

defend on the merits: see *Falcon Lumber Limited v. 24803375 Ontario Inc.*, 2019 ONSC 4280, at paras. 86-97, aff'd 2020 ONCA 310.

[73] Beyond costs, the plaintiffs are concerned about the prejudice of lost records, such as the text messages. That cannot be resolved at this time, as there is some evidence that those text messages may not have been available beyond a 30 day period from Rogers, the service provider, in any event. The plaintiffs' challenge to the credibility of the coincidental loss of both Mr. Hyman's and Mr. Anastasio's cell phones can be further explored in the context of the determination of the claims. The plaintiffs may also have a spoliation claim.

**Should The Defendants be Granted Leave to File Defences**?

[74] As was required pursuant to paragraph 105 of the Second Sentencing Decision, I am satisfied that the Developer Defendants have done enough to address the items identified in paragraphs 81 and 41(a) to (c) of that decision to purge their contempt. Accordingly, the Developer Defendants are granted leave to defend the Amended Statement of Claim.

[75] The merits of the plaintiffs' claims and the merits of the potential defences of the Developer Defendants, to the extent relevant to the contempt motion and remedies that flow from it, have already been addressed in the Second Sentencing Decision and do not need to be revisited on the motion by the Developer Defendants for leave to file defences. If I had not been satisfied with the efforts made by the Developer Defendants, they would not have been granted leave to file their defences, irrespective of the merits-based arguments that they advanced on these motions.

[76] It had been originally contemplated that Mr. Anastasio would simply re-file the Statement of Defence he previously delivered, but that Mr. Hyman would be filing a new defence (since one had not previously been filed). To put all of the Developer Defendants on the same footing with the benefit of all that has transpired in the course of these contempt proceedings, the Developer Defendants shall have 30 days from the date of this endorsement within which to deliver their Statements of Defence. Should Mr. Anastasio choose to re-file his earlier Statement of Defence, that is his prerogative.

[77] The motion by the Developer Defendants for leave to file defences was a required step under the terms of the Second Sentencing Decision. It was required because of their contempt of the court's previous orders. While the court has found that they have now (finally) done enough to purge their contempt, it was by no means clear that was the case given the remaining deficiencies in their accounting and disclosure. This is relevant to the question of the costs of this motion.

[78] In the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 57 of the Rules, even though the Developer Defendants were ultimately successful, I decline to award any costs of this motion. The Developer Defendants have managed to convince me that they have purged their contempt by their additional efforts and despite the fact that it is now impractical or impossible to obtain certain information from third parties, but the plaintiffs were justified in questioning whether what the Developer Defendants had done was sufficient and putting them to their onus of proof. Each party shall bear their own costs of this motion.

**The Plaintiffs' Motion for Default Judgment**

[79] In light of my finding that the Developer Defendants made sufficient efforts to purge their contempt and my decision to grant them leave to file defences, there is no present basis on which to grant default judgment in favour of the plaintiffs.

[80] If I had concluded otherwise, the Developer Defendants would have remained in default (as provided for in paragraph 104 of the Second Sentencing Decision) and the only relevant consideration on the plaintiffs' motion for default judgment would have been whether the facts as pleaded and evidence filed by the plaintiffs entitled them to judgment in the amount claimed: see *Canada Mortgage and Housing Corp. v. CMC Medical Centre Inc.*, 2017 ONSC 7551, at para. 14; *Elekta Ltd v. Rodkin*, 2012 ONSC 2062, at para. 14.

[81] I do not agree with the assertion by the Developer Defendants that the "merits" of their defences, the magnitude and complexity of the claim, the factual disputes, the credibility concerns with the plaintiffs' representative[3], or the Developer Defendants' desire to defend and tell their "side of the story" would have been reasons not to grant default judgment. The merits would only be relevant to the extent that the plaintiffs must demonstrate that the pleaded cause(s) of action and alleged facts (presumed to be true) support the relief claimed by default (e.g. $8,745,606.09 in damages, representing the funds paid by the plaintiffs less their recoveries thus far in this action).

[82] Although the plaintiffs' motion for default judgment is dismissed, given the persisting incomplete disclosure from the Developer Defendants, it was not unreasonable for the plaintiffs to have brought this motion (the logical outcome that would have flowed if the court had dismissed the Developer Defendants' motion for leave to file defences). The Developer Defendants did not come to court with a clean record of full compliance; rather, they came with a record that had to be pieced together to make out the case that they have now provided all that they are reasonably able to do at this time, based on the available information and documents (some of which may have become inaccessible as a result of their own delays).

[83] The Developer Defendants had the onus to satisfy the court that they made reasonable efforts to produce what they could after the Second Sentencing Decision and it was a close call. The plaintiffs' motion for default judgment was a logical corollary to put an end to the action if the Developer Defendants had not succeeded. This is not an appropriate case for an award of costs against the plaintiffs for having brought this motion.

[3] In particular, the Developer Defendants placed much reliance on this motion upon another action in which the plaintiffs are named as defendants (referred to as the "Riar Action" CV-21-00655815-00CL) and allegations of fraud made in that action as against the plaintiffs. I fail to see the relevance of the allegations in that action to the issues to be decided on the present motions. Accordingly, the Riar Action and allegations made in it have not factored into my decision on these motions. Beyond the motions, I have some difficulty with the suggestion that the Developer Defendants cannot be held accountable for their handling of funds advanced to them by the plaintiffs, if demonstrated to have been improper, because the plaintiffs in turn may be accountable to others for those funds as a result of some wrongdoing by the plaintiffs. However, this assertion is an issue for another day.

[84] In the exercise of my discretion, this is a situation in which I find it to be appropriate to award no costs to any party for this motion. Each party shall bear their own costs of this motion.

**Other Procedural Matters**

[85] The Developer Defendants suggest in their factum that they intend to seek a review of the Mareva and Disclosure Order (the comeback hearing for that having been adjourned pending the contempt proceedings). Some aspects of that may be moot at this point, but if they do seek to have the court review any continuing aspects of the Mareva and Disclosure Order, they may only do so with leave of the court to be sought at a case conference before me on a date after their defence(s) have been delivered and any reply from the plaintiffs has been delivered (or the time for doing so has expired). Depending on the scope and nature of the issues to be raised, a motion may need to be scheduled.

[86] At the conclusion of the hearing of these motions, there was a discussion about a consent variation of the Mareva and Disclosure Order to permit the Developer Defendants access to funds for their legal expenses. If that has been or can be resolved on consent, the parties may submit a consent order in writing to deal with this.

[87] Other terms have been imposed by the court under r. 37.13 in making the order granting leave to the Developer Defendants to deliver defence(s), which are set out in more detail in the summary of outcome and disposition below.

**Summary of Outcome and Disposition**

[88] For the foregoing reasons:

a. The plaintiffs' motion for default judgment is dismissed.

b. The Developer Defendants' motion to set aside their noting in default and for leave to file defences is granted.

c. The Developer Defendants shall have 30 days from the date of this endorsement within which to deliver their Statement(s) of Defence. The plaintiffs may deliver a reply in the normal course pursuant to the Rules (which for purposes of the directions herein shall constitute the close of pleadings even if defences have not been requested or delivered by any of the other defendants).

d. The Developer Defendants may only move to vary or dissolve the Mareva and Disclosure Order with leave of the court, to be sought at a case conference (preferable before me if my schedule permits) after the close of pleadings.

e. The history of non-compliance by the Developer Defendants will be a relevant consideration in the event of any future defaults by them of their obligations under the Rules and/or any court orders. They should expect that the court will have very little, if any, tolerance for future defaults. They should consider themselves to be on probation.

f. Notwithstanding the production and disclosure already made by them pursuant to the Mareva and Disclosure Order, for the avoidance of any future uncertainty or misunderstandings, the Developer Defendants remain obligated to comply with all discovery obligations under the Rules, including the delivery of affidavits of documents and their continuing disclosure obligations. The parties shall confer and agree upon a discovery plan. If they cannot agree, a case conference may be scheduled (preferably before me if my schedule permits) at which the court may impose a discovery plan.

g. Although they continue to be obligated to make production of all relevant documents that are currently or may later come into their possession, control or power, the Developer Defendants will not be permitted, without leave of the court, to tender any further evidence as may be disclosed in support of their defences that should have been produced under the Mareva and Disclosure Order. Any such request for leave shall be accompanied by a fulsome explanation of why earlier disclosure was not made and will be subject to challenge by the plaintiffs and the scrutiny of the court.

h. The Developer Defendants will be presumed to have deployed the plaintiffs' funds for their personal use and/or uses other than expenses and costs in furtherance of the construction and development of the two projects at issue, absent proof to the contrary (which, based on the disclosures to date, is limited and does not come close to accounting for the use of the majority of the funds provided by the plaintiffs).

i. There shall be no costs of either the plaintiffs' motion for default judgment or the Developer Defendants' motion to set aside the noting in default and for leave to file defences. Each party shall bear their own costs of these motions.

j. There may, however, be cost consequences later imposed upon the Developer Defendants associated with the addition of the Related Developer Defendants and Additional Recipient defendants (as defined in the Amended Statement of Claim) to address the failings of the Developer Defendants to provide the required accounting, tracing and disclosure of what happened to the funds advanced by the plaintiffs that the Developer Defendants, in turn, paid to those other defendants. These costs may include not only the plaintiffs' added costs for work the plaintiffs had to do in the face of the Developer Defendants' contempt, but also the costs of those added defendants who will now have to respond to the action, absent some agreement being reached for their release from the action in exchange for disclosure and/or other protections as may be determined to be appropriate.

[89] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out. Any party may take out a formal order by following the procedure under r. 59.

Kimmel J.

DATE: February 28, 2023