CITATION: Duninger Corporation v. Montour, 2023 ONSC 5152
COURT FILE NO.: CV-16-547619
DATE: 20230912

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DUNINGER CORPORATION c.b.a. ACTIVE ENGINEERING Plaintiff	Simon Bieber, Nathaniel Read-Ellis, and Sydney McIvor, for the Plaintiff
– and –	
JERRY MONTOUR Defendant	Brian D. Duxbury and Andrew D. Pelletier, for the Defendant
	HEARD: March 13-15 and May 17, 2023

DINEEN J.

[1] This action arises from a planned cannabis grow operation on the territory of the Pit River Tribe in California. The plaintiff was engaged to provide consulting services and then to oversee the electrical work done to prepare the greenhouses at the facility for operation. While everyone involved in developing the project seemingly believed it to be compliant with local laws, the project failed after American federal authorities executed a search warrant at the facility and pursued a related criminal investigation. This event caused substantial losses for everyone involved.

[2] The plaintiff had been paid for most of its work up to the point of the raid with funds disbursed from the trust account of the project's lawyer. Following the execution of the warrant, payments ceased. The plaintiff sues for $458,369.29 in United States dollars[1] plus interest based on its unpaid invoices. This amount includes payment for its own work and reimbursement for materials it ordered from suppliers for the project on the plaintiff's own account.

[3] The issue on this action is not whether the plaintiff performed the work covered by the invoices to the required standard with the approval of those overseeing the project, and so

[1] Unless otherwise noted, all amounts in this judgment are in United States dollars.

is owed this money by someone. Instead, the issue is the defendant's role in the project and consequent liability. The defendant is located in Ontario and no issue as to jurisdiction is raised.

[4] The plaintiff had no formal written contract with the defendant, or indeed with anyone, and never interacted with the defendant at all. Instead, the plaintiff dealt primarily with a man named Rami Reda who acted as the *de facto* project manager on the site. It is agreed however that the defendant was the ultimate source of the funds used to pay the plaintiff before payments stopped. The plaintiff also sued Mr. Reda but has reached a settlement with him and his company Big Bee Corporation.

[5] The primary position of the plaintiff is that Mr. Reda and the project's lawyers were acting as agents of the defendant when they hired the plaintiff to perform work on the site and issued payments for that work. It argues that it had a valid contract and that Mr. Reda had both actual and ostensible authority to bind the defendant. In the alternative, the plaintiff submits that the defendant and the Tribe were partners in the project.

[6] The position of the defendant is that he simply loaned money to the tribe to build the cannabis grow facility because he understood them to lack access to traditional forms of credit. His position is that he had neither a direct financial stake nor a management role in the project and that he never authorized Mr. Reda to enter into contracts on his behalf. He argues that he was nothing more than the equivalent of the project's banker and denies that he is bound by any contract the plaintiff made with the Tribe or anyone else. The defendant argues that the plaintiff's misfortune arises from its own lack of care in failing to obtain a formal contract with someone who would be in a position to pay.

The evidence at trial

The parties and other relevant characters

The plaintiff and International Greenhouse Company

[7] The plaintiff is a business incorporated in the state of Washington. Terry Jensen is the owner of the plaintiff and formed it in the mid-1980s with a business partner. The focus of the business is electrical engineering and Mr. Jensen and the firm have a particular expertise in greenhouse projects.

[8] The plaintiff has frequently worked with a company called International Greenhouse Company, which does business as Greenhouse Megastore. This business was established by David George, a friend and associate of Mr. Jensen, and is currently operated by his sons including Benjamin George, who was a witness at this trial. On projects where they collaborated, Mr. George's company would design and build the greenhouses and the plaintiff would carry out the electrical work.

The defendant

[9] The defendant is the former CEO of Grand River Enterprises, a manufacturer of tobacco products located on the Six Nations reserve near Brantford, Ontario. The defendant himself is a Wahta Mohawk of the Six Nations and it is clear from the evidence at trial that he is a person of substantial means. He testified that he operates a charitable foundation dedicated to funding Indigenous projects.

The Pit River Tribe

[10] The Pit River Tribe controls territory in the northeast of California, including the land on which the cannabis-growing project at issue in this trial was to be operated.

John Peebles

[11] Mr. Peebles is an American lawyer. The evidence at trial was that his firm was well-known as a leading one in the area of Indigenous law. Mr. Montour testified that Mr. Peebles acted both for him and for the Pit River Tribe. Mr. Peebles did not testify.

Rami Reda

[12] Mr. Reda and the defendant's son were at one time close friends. Mr. Reda had worked in his own family's retail business – the Big Bee Corporation – before becoming involved in the Pit River project. The evidence at trial was that Mr. Reda was the apparent day-to-day decision maker while the project was under development. His exact role is one of the critical issues to determine.

[13] Mr. Reda and Big Bee were previously defendants in this action. They reached a settlement with the plaintiffs. Neither party called Mr. Reda as a witness and both relied on different portions of his discovery evidence, as I will discuss further below.

The origin of the Pit River project

[14] The defendant testified that he became involved in the project at the invitation of Mr. Peebles, who said that he had been contacted by a number of First Nations tribes in the United States who were planning to take advantage of an anticipated change in government policy that would permit tribes to regulate marijuana on their own territory. This appeared to be an opportunity for indigenous communities to legally and profitably grow and distribute medicinal marijuana despite its otherwise prohibited status in the United States. The defendant began to pay money into Mr. Peebles's trust account for the purpose of developing the Pit River project as a first attempt to make use of this legal development.

[15] Mr. Reda became involved in late 2014. The defendant asked him to travel to the site. As I will discuss further below, in pleadings and in his discovery evidence Mr. Reda has described his role in the project in a variety of ways, including as the defendant's eyes and ears; as an agent of the defendant; and, as an agent of "Two Bros," a business to be established by the defendant that would serve as the project's financing arm. Mr. Reda

testified that he was not compensated for his work on the project and that he was motivated by a desire to become a partner with the defendant. Through Mr. Peebles, Mr. Reda was put into contact with representatives of the Tribe.

[16] In early 2015, the defendant and his company Grand River began transferring money into the trust account of Mr. Peebles's law firm. By the end of March, $3.55 million had been transferred.

The work done on the project

IGC's contract

[17] The plaintiff was brought into the project through Mr. George and his company IGC. Mr. George had been approached in February, 2015 by a consultant who served as the primary grower for the project, a man named Ben Mitchell. Mr. George ultimately agreed to sell and install the greenhouses to be used in the project for approximately $2 million.

[18] Mr. George testified that he was initially skeptical about the scale of the proposed project and the aggressive timeline which required the installation of 350,000 square feet of greenhouses by June or July of that year. According to Mr. George, a phone call was arranged with the defendant and Mr. Reda to address these concerns. The defendant sought to reassure him about the legality of the project, saying that their lawyers were working with the District Attorney and local leaders and there was nothing to worry about. Mr. George recalled the defendant saying that he and his partners had set aside plenty of money for the project and that it was well-funded.

[19] Mr. George testified that there were negotiations about the structure of payments, because he wanted the security of upfront payment while they preferred to pay on delivery given that this would take months. A $1 million deposit was agreed. Mr. George also wanted his contract to be with the defendant and Mr. Reda rather than with the Pit River Tribe. He prepared a contract for their signature and forwarded it to Mr. Peebles to obtain the required signatures. Mr. George testified that a signed version of the contract was not returned to him and there was no evidence about whether the defendant ever signed it. Mr. George did however receive a wire transfer for $1 million and began to work. He testified that he neglected to follow up about a signed contract and never received one.

The March 19, 2015 meeting at the site

[20] Mr. George was invited to a meeting with Mr. Reda, members of the Pit River Tribe, and others to take place at the site of the proposed project on March 19, 2015. Mr. George suggested to Mr. Reda that they invite Mr. Jensen, who he recommended as someone who could handle the electrical work on the project. Mr. George phoned Mr. Jensen on March 14 or 15 and recommended that he attend.

[21] The site of the project was remote. Mr. Reda, Mr. Mitchell, Mr. George, Mr. Jensen, and an associate of Mr. Reda's named Mike Hermiz stayed in a hotel in Redding, California, the closest town to the site, on the night of March 18 and met for dinner. Both Mr. George

and Mr. Jensen testified that the group was very enthusiastic about the project's potential. Mr. Reda talked a lot about himself and represented himself as having significant financial resources from his Big Bee chain of stores. He said, according to Mr. Jensen, that "big tobacco" was behind the project and that he had "deep pockets," though the defendant's name was not mentioned. The group then visited the site and met with Tribe members.

The plaintiff's work on the project

[22] Following the site visit, Mr. Jensen prepared a proposal and sent it to Mr. Reda. He sought payment of $14,300 with a 50% deposit, in return for which he would coordinate with Mr. Mitchell and the local electrical utility in order to identify the necessary electrical equipment for the project and to prepare a set of plans that could be used to install it. Mr. Jensen emailed this proposal to Mr. Reda, saying that he could simply email an acceptance and signatures could be obtained later.

[23] Mr. Reda emailed back accepting the proposal and the plaintiff invoiced Mr. Reda for the deposit. The initial invoice was addressed to "Big Bee Corporation, Can Global Traders Inc" which was the company on Mr. Reda's business card. Mr. Reda responded on March 26 asking that the invoice be addressed to "Pit River XL Rancheria." The plaintiff's bookkeeper made this change and the account was paid from Mr. Peebles's trust account on March 27.

[24] Mr. Jensen began coordinating with Mr. George and others to determine the electrical needs of the project and whether the utility would be able to provide sufficient power or whether generators, temporary or otherwise, would be needed. He also looked into whether an electrical contractor would be required or whether the project could effectively act as its own contractor and rely on Tribal labour. When issues arose, Mr. Reda was his contact person and was the decision-maker about how the project would proceed.

[25] On April 9, the plaintiff invoiced Mr. Reda for the balance of the consulting fee, again addressing the bill to "Big Bee Corporation, Can Global Traders Inc." Mr. Reda asked that the bill instead be addressed to "Two Bros" and that the first invoice also be revised in this way. This change was made and the bill was paid from Mr. Peebles's trust account.

[26] Following the delivery of his initial engineering work, Mr. Jensen proposed that he could continue to assist on the project as a consultant by sourcing the required materials through his own suppliers – allowing the project to benefit from discounted rates the plaintiff received from its established business relationships – and helping to supervise the work on site. He sent Mr. Reda a proposal on April 9 with a consulting price of $41,800 in addition to equipment costs and the cost of employees of the plaintiff who might assist with construction. Mr. Jensen testified that he was enthusiastic about continuing on the project because Mr. Reda appeared to be a "dream client": he made every decision quickly, was a quick study who trusted the advice Mr. Jensen gave, and paid promptly.

[27] Mr. Reda responded by proposing instead to simply buy materials through Mr. Jensen to obtain his discounted rates rather than retaining him as a consultant. Mr. Jensen was not

willing to agree to this. After further negotiations, on April 20 Mr. Reda eventually accepted the consulting proposal. The plaintiff sent Mr. Reda an invoice for half of the agreed payment addressed to Two Bros. On April 23, this invoice was paid by wire transfer from Mr. Peebles's trust account.

[28] The plaintiff began carrying out the proposed work, arranging for its own electricians from Seattle to work with local Tribal labour and sourcing materials from its suppliers. The plaintiff has tendered email correspondence between Mr. Jensen and Mr. Reda about different issues as the work progressed. On May 8, Mr. Jensen emailed three requests for payment of different amounts to their suppliers for materials, and these amounts were paid by wire transfer directly to the suppliers themselves. On May 28, he requested a further $150,000 for materials urgently needed to allow work to continue. Mr. Reda told him by email on June 1 that he might not be able to secure funds immediately and asked if the plaintiff could process the transaction with the supplier with an agreement that funds would come within seven days. Mr. Jensen agreed and on June 4 Mr. Reda said that funds would be coming in. That day and the following day, the defendant wired $650,000 to the law firm's trust account and payment was made on June 5.

[29] Mr. Jensen testified that as the project proceeded, the plaintiff began to supply more workers on site in response to various problems that arose, and that Mr. Reda would either initiate or agree to the use of the plaintiff's employees on each occasion. The plaintiff introduced spreadsheets documenting the labour it provided beginning on May 13. On May 28, the plaintiff invoiced Two Bros $29,656.50 for work completed to that point. This invoice was paid on June 5 by wire transfer. On June 11, Mr. Jensen emailed Mr. Reda a status report noting that all electrical materials purchased to date totalled $302,098.04 with the total labour to date costing $73,685 with a projected total labour cost to the end of the project being $243,685. He testified that neither Mr. Reda nor anyone else made any objection to these costs.

[30] A further increase in cost occurred when the power utility informed Mr. Jensen and Mr. Reda that they would not be able to supply power to the site unless the project funded a new power substation directly adjacent to the site. Mr. Jensen testified that the only alternative would be to power the project with generators indefinitely which would require some 550 gallons of gasoline per hour. Mr. Jensen testified that Mr. Reda said he needed to speak with "Jerry" about this issue.

Concerns about law enforcement attention

[31] By the middle of June, Mr. George and Mr. Jensen testified that there were increasing concerns among workers on the site about law enforcement interference with the project. Many people involved were being pulled over by the local sheriff or seeing him record their license plates, and there were rumours that the sheriff had personal reasons to object to the project and was planning to shut it down. Some workers were discussing whether or not to continue working at the site in view of these concerns.

[32] Mr. Jensen testified that he believed he learned around this time that the defendant was Mr. Reda's previously unnamed partner in the project because there were rumours that the defendant was going to come to the site to put everyone at ease. Mr. George testified that Mr. Reda arranged a meeting between him and the defendant for this purpose at a hotel bar in Alturas. He recalled the defendant telling him that their lawyers were working on the issue and that everything was under control. He further recalled the defendant describing plans to use the project as a model for other Tribal lands across the country, and suggesting that if Mr. George partnered with them he could become very wealthy.

[33] The defendant did not recall this meeting or what was discussed but did not deny that it might have taken place. Mr. George came across as quite starstruck by the defendant's wealth and forceful personality. I accept that this encounter was much more memorable for him than it was for the defendant, and that it took place generally as he recalled.

The unpaid invoices

[34] On June 18, the plaintiff invoiced Mr. Reda for $57,200 for work done between May 28 and June 13. Mr. Reda replied on June 22 that he would get the bill processed the following day. No funds were subsequently transferred. On June 29, Mr. Jensen told Mr. Reda he would be sending a further bill for materials and manpower and that their electrical supplier required $100,000 for materials needed to light one of the greenhouses. He followed up with invoices for $20,900 for the remaining consultancy work and $133,702 for manpower and expenses between June 14 and June 27. This bill was not paid.

[35] Mr. Jensen testified that in early July he became increasingly concerned about the lack of payment. On July 7 he gave Mr. Reda an ultimatum that he would pull his workers from the project, causing the likely death of the plants that were then being grown, unless payment was made the following day. He testified that Mr. Reda replied that the payment was all set up, saying "my word is my bond." That day, $1 million was paid into the trust account of Mr. Peebles's firm.

The raid and its aftermath

[36] On July 8, officers of multiple federal agencies including the Drug Enforcement Administration executed a search warrant at the project site and seized the marijuana being grown. All work on the project immediately stopped and a criminal investigation ensued. The defendant testified that Mr. Peebles sent all the remaining money in the trust account back to Grand River Enterprises and retained his own lawyer and terminated their solicitor-client relationship. He further testified that he had sent between $10 million and $14 million to Mr. Peebles to fund the project and lost this entire amount after law enforcement shut it down.

[37] That same day, Mr. Jensen sent a further email to Mr. Reda requesting payment and outlining the amounts owed. He testified that he had not heard about the raid at the time. According to Mr. Jensen, for the week or so after the raid, Mr. Reda was in contact with him by phone assuring him that the raid was a mistake and that the project would resume

and the plaintiff would be paid. After that, Mr. Reda stopped answering phone calls and responding to emails. The plaintiff sent a bill for $60,840 for the rest of the work they performed up to the raid, bringing the total amount owed to $272,103 for the plaintiff's work. The plaintiff also paid $105,501 to suppliers for electrical equipment used on the project, $15,466.29 for irrigation expenses, and $63,299 for a cooling tower and related equipment for use on the project. None of these amounts were ever paid.

The history of the litigation

[38] The plaintiff originally sued Mr. Reda, Big Bee Corporation and "John Doe," identified as "an unknown person on behalf of whom Mr. Reda acted." Both parties observe that the other has substantially amended its position during the course of the litigation. The plaintiff's original pleadings generally asserted that its contract was with Mr. Reda. The plaintiff learned the defendant's identity as the source of the project's funds through the litigation process and joined him to the action. The defendant originally took the position that any contract of the plaintiff was with the corporate entity Two Bros, which he now says was never actually formed. Had Mr. Reda and the defendant contracted on behalf of a corporation that was never formed, this could result in personal liability: *Real Estate Professionals Inc. v. Castel Homes Inc. et. al.* 2023 ONSC 4099 at para 78-85.

[39] In 2021, the plaintiff reached a settlement agreement with Mr. Reda and Big Bee under which Mr. Reda agreed that he acted as the defendant's agent and with actual authority to contract on the defendant's behalf, with an agreement that Mr. Reda would testify at this trial and meet with counsel for the plaintiff in advance.

Issues and analysis: Is the defendant bound by the contract formed between the plaintiff and Mr. Reda?

[40] I accept that the plaintiff negotiated a valid contract for consulting services and the provision of labour and supplies to the project with Mr. Reda and that it is entitled to the amounts it has claimed in this litigation plus the contractual interest rate set out in its invoices. This was not seriously disputed at trial. The real issue is whether the defendant is bound by the contract formed with Mr. Reda.

The evidence about the nature of the relationships among the defendant, Mr. Reda, the Pit River Tribe, and Mr. Peebles

The defendant's evidence

[41] The primary direct evidence of the defendant's role in the project came from the defendant himself. He denied having any ownership stake in the project and testified that his role was solely to lend money to the tribe to develop the project itself.

[42] The defendant testified that his understanding of the relevant law at the time was that the legality of the project was entirely contingent on tribal ownership: while he believed that the tribe was permitted to grow cannabis on its own territory, outsiders could not. He further testified that he understood that Indigenous projects like this one struggled to obtain

traditional financing because loans could not legally be secured against property on tribal lands.

[43] The plaintiff objects to the admissibility of this evidence, observing correctly that the defendant was not qualified as an expert in this foreign law and that no expert evidence on the subject was led. I find that this evidence is admissible on the issue of the defendant's state of mind to explain his decisions and actions, and not as evidence of the actual state of the law. Mr. Jensen testified that his belief at the time was that the tribe had to approve the project for it to be legal but that they did not have to own it. No evidence was led by either party about which view may have been correct.

[44] The defendant testified that the funds he advanced were purely a loan. As for Mr. Reda, he introduced him to the tribe as a person with some knowledge of cannabis operations who could help them set up the project. He testified that he never empowered Mr. Reda to speak for him or to contract on his behalf especially on tribal lands where the defendant was very concerned about maintaining his good reputation. He denied that he was bound by any contract or agreement made between Mr. Reda and the plaintiff and understood Mr. Reda to be a consultant for the tribe. He denied having any knowledge of how the funds he advanced were spent and testified that Mr. Peebles had the authority to disburse funds as he saw fit for what was a tribal project.

[45] While he produced a trust statement from Mr. Peebles's law firm, the defendant has otherwise not tendered or produced any documents or correspondence supporting his testimony. He testified that any documents governing his loan arrangement with the tribe would have been seized by American authorities. According to the defendant, the amount of the loan was to be open-ended and was to be re-paid within five years of the project becoming operational. He did not know whether interest would be paid. His motive was less to make profits for himself than to empower Indigenous persons through what he believed was an important economic opportunity.

[46] The defendant has also produced no email or other correspondence that would shed light on his relationships with the other participants in the project. He testified that he does not have any emails or records stored on a computer because he does not use computers except to occasionally look at pornography. In his examination for discovery, he stated memorably: "Anybody ever came to me with an email, I bump their head because I don't do email."

[47] In cross-examination, the defendant testified that he had no knowledge of a company called "Two Bros" and could not say whether it ever existed. He was confronted with his discovery evidence and original statement of defence claiming that he loaned money to Two Bros for the purpose of funding the project. The defendant explained that, at the time, there were ongoing investigations and grand jury proceedings and he was facing a potential 90-year sentence for criminal charges relating to the project in the United States, and that he was entirely preoccupied with this. He testified that his lawyers put together his statement of defence with little guidance from him and that during his discovery his priority was to avoid saying anything that might implicate him or anyone else in an American

criminal prosecution. He said that by the time of trial, the statute of limitations had expired without any charges having been brought, and so he felt free to simply be candid with no duress. This was also the defendant's explanation for other inconsistencies with his discovery evidence, such as his claim at that time that he could not recall having any conversation about the project with any member of the Pit River Tribe, and that his only arrangement was with Mr. Peebles's law firm and not the tribe. He acknowledged that he did not attempt to correct any of the answers given during his examination for discovery before trial.

Mr. Reda's evidence

[48] As noted above, Mr. Reda was not called to testify at trial. Instead, both parties read in portions of his examinations for discovery, which took place in 2017 before he settled with the plaintiff.

[49] In the portions of his evidence tendered by the plaintiff, Mr. Reda adopted his pleadings and testified that his participation in the project was solely as the defendant's agent and that he had no authority to contract or do anything on behalf of the Pit River Tribe. He testified that the defendant told him he would be a representative of both the defendant and "Two Bros." When asked about the business name Two Bros, Mr. Reda said that this was interchangeable with the defendant and that there was no distinction between them.

[50] Mr. Reda said that his role was to observe and report on the progress of the project to the defendant. The defendant paid for his expenses to travel to California but he otherwise was not paid, and he took this role in the hope of forming future partnerships with the defendant. He had no written agreement with the defendant or any corporate vehicle associated with the defendant.

[51] He did not know how the defendant was to be repaid for the invested money. He assumed it was being lent to the Tribe. He suggested at one point that he believed the defendant was in a 50/50 partnership with the Tribe to share profits but did not identify clearly his basis for this belief.

[52] Mr. Reda agreed with suggestions from the plaintiff's counsel that his agreement with the plaintiff included the understanding that the outstanding bills from suppliers were to be paid by the defendant. He testified that he believed he had some general discussions with the defendant about making this payment after the raid but never received a clear response.

[53] The defendant relies on other portions of Mr. Reda's discovery evidence where he testified that, when describing the project to contractors like the plaintiff, he would have told them that it was owned by the Pit River Tribe with Two Bros acting as the financing arm of the project. He testified that payments were approved by Mr. Peebles, who was the lawyer for the tribe, the defendant, and Two Bros.

[54] Mr. Reda agreed with the suggestion that he was not authorized to enter into a contract on behalf of the defendant personally and would not have done this, but believed that he could contract on behalf of a corporate entity. When asked about the contract prepared by Mr.

George and described above at paragraph 19, he testified that neither he nor the defendant signed it and that they never intended to be personally bound by such a contract. He also denied that any of his communications with Mr. Jensen constituted an agreement to hire them to carry out work, instead taking the position that he was simply recommending proposals as a consultant for the further approval of Mr. Peebles and the tribe.

[55] Mr. Reda testified that he reported to the defendant that they had contractors lined up, but that it was the tribe who had authority to make decisions. When asked about his request to the plaintiff to invoice Pit River XL Rancheria rather than Big Bee, he testified that this would have been a direction from Mr. Peebles because the tribe owned the project.

Factual findings

The credibility of the witnesses

[56] In my view, the evidence amply establishes that the plaintiff contracted with Mr. Reda to perform the work it did on the project and to procure the electrical and other supplies that form part of its claim. While their arrangement was never formalized in a written contract that clearly identified the parties to the agreement, the email correspondence as supplemented by the testimony of Mr. Jensen and Mr. Reda makes clear that Mr. Reda directed the plaintiff to carry out this work and represented that they would be paid from the funds held in Mr. Peebles's trust account.

[57] The key factual issue for me to resolve is on whose behalf Mr. Reda contracted with the plaintiff. I have concluded that I am not able to rely on either of the witnesses who gave direct evidence on the issue. The defendant's credibility is fatally undermined by the variance between his trial testimony and his discovery evidence, particularly in view of his failure to ever clarify his discovery evidence in the years that passed before trial. As the plaintiff observes, this is required by Rule 31.09 with the potential exclusion of the evidence inconsistent with his discovery as a possible sanction.

[58] Even assuming the evidence is nonetheless admissible, I would not rely on it. I understand the defendant's explanation that at the time he gave the evidence he now repudiates, he feared the legal consequences of making any statement that could implicate himself or anyone else in the then-ongoing American criminal investigation. However, this is not in my view a reasonable explanation for giving false evidence under oath in this proceeding, nor does it explain his failure to formally clarify his evidence before trial after he believed that the statute of limitations had passed. The tone of the defendant's evidence at discovery and at trial also frequently demonstrated a hostility to and disrespect for these proceedings that make me reluctant to rely on his testimony.

[59] I am also troubled by the defendant's failure to produce any correspondence or documentary evidence supporting his position that he was merely a lender rather than a partner in the project. I appreciate the defendant's evidence that business carried out between Indigenous businesspeople and communities is based on trust and reputation. I do not wish to impose culturally inapplicable norms on the defendant's business practices.

I also accept the defendant's evidence that he has a philanthropic interest in supporting Indigenous communities and that not every investment he makes with this in mind is meant for profit. That said, it strains credulity that the defendant committed more than $10 million to this project with no documentation whatsoever about the terms of his investment and no settled arrangement about what all of the terms of this purported loan might be. As the plaintiff notes, at trial the defendant testified that he believed that there would have been some legal documentation with respect to the loan but suggested that it had all been seized by federal officials in the United States. I have difficulty accepting that no copies of any such documents made their way to the defendant in Canada if a loan agreement of some sort was prepared.

[60] Both parties relied on different portions of Mr. Reda's evidence. The plaintiff argues that the passages on which the defendant relies were the product of a "sweetheart" cross-examination in which he simply adopted suggestions made by the defendant's counsel. My reading of his evidence is that his entire discovery was marked by a willingness to accept any suggestion that might serve to reduce his own legal responsibility for the project, its failure, and the consequent losses, even at the expense of any consistency. I am not satisfied that any of his evidence is sufficiently credible to deserve any substantial reliance.

Conclusions about the nature of the defendant's involvement in the project

[61] This leaves me having to infer the nature of the defendant's involvement in the project from the evidence of how it operated and what was said by the participants at the time. The plaintiff's position is that Mr. Reda was either an agent for the defendant personally or that the defendant was a partner in the project. The defendant's position is that he did nothing more than lend money to the tribe to spend on the project in ways approved of by Mr. Peebles acting as the tribe's lawyer, though he was also the defendant's lawyer.

[62] The plaintiff submits that I should draw an adverse inference from the failure of the defendant to call evidence from Mr. Peebles or anyone from the tribe in support of his position. I would not do so. It is obvious from the evidence that the law enforcement raid on the project caused everyone involved to scramble to protect themselves from serious legal liability and this is a reasonable explanation for why Mr. Peebles and the tribe would be unlikely to cooperate with the defendant no matter what his true role may have been.

[63] I conclude on a balance of probabilities that the project was a partnership between the defendant and the tribe, and that Mr. Reda was acting as an agent for this partnership when he contracted with the plaintiff.

[64] A partnership has three ingredients, as set out in *Continental Bank Leasing Corp. v. Canada* (1998) 163 D.L.R. (4th) 385 (S.C.C.) at para 22 by Bastarache J. (dissenting, but not on this issue):

> Section 2 of the [Ontario] *Partnerships Act* defines partnership as "the relation that subsists between persons carrying on a business in common with a view to profit". This wording, which is common to

> the majority of partnership statutes in the common law world, discloses three essential ingredients: (1) a business, (2) carried on in common, (3) with a view to profit.

[65] He added further at para. 24:

> The Partnerships Act does not set out the criteria for determining when a partnership exists. But since most of the case law dealing with partnerships results from disputes where one of the parties claims that a partnership does not exist, a number of criteria that indicate the existence of a partnership have been judicially recognized. The indicia of a partnership include the contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts. (See A. R. Manzer, A Practical Guide to Canadian Partnership Law (1994 (loose-leaf)), at pp. 2-4 et seq. and the cases cited therein.)

[66] As I have said, in this case the defendant denies the existence of a partnership and argues that he was acting in effect as a bank. I do not accept that his role was strictly to lend money with an unspecified interest rate with no expectation of participating in the project's profits. While I believe that the defendant was concerned about the legality of anyone but the tribe having a formal ownership role in the project, I find that he and the tribe did intend to share profits, and that he asserted a mutual right of control or management over the enterprise. I infer that the concern about legality is likely the explanation for the lack of documentation about the defendant's role and the relative secrecy about his involvement at the time.

[67] In my view, the conversation the defendant had with Mr. George is telling evidence that he expected to directly profit from the project. The evidence of all participants is that there was broad excitement about the scope of the project and the potential to reproduce it on other tribal lands. Mr. George described the defendant telling him that his involvement in the project and in future such projects that they might undertake together could move Mr. George to a completely different level of personal wealth. On Mr. George's evidence, the defendant presented himself as someone who was exercising a measure of control over the project, not as merely a passive lender.

[68] While I believe the defendant was motivated in part by wanting to provide economic assistance to another Indigenous community, this conversation shows that he also expected the project and subsequent such projects to enrich non-Indigenous businesspeople such as Mr. George. I find it difficult to believe that the defendant, who was taking a very significant economic risk on the project, expected to profit only through an unspecified and undiscussed interest rate on an unsecured loan while others such as Mr. George earned

great wealth. I accordingly reject the defendant's submission that this conversation is equally consistent with his expecting a good return on his financing of the project. I conclude on a balance of probabilities that he was in a partnership with the Tribe where he supplied the funds and some expertise and management through Mr. Reda while the Tribe supplied labour, the land, and the legal authority to proceed.

[69] Mr. Reda's central involvement in the project is also in my view more consistent with the defendant being a partner rather than a lender. It is apparent that Mr. Reda had considerable freedom to make day-to-day decisions about the work to be done. He had no prior relationship whatsoever with the Tribe or with Mr. Peebles and his involvement was at the instigation of the defendant. It is also agreed that Mr. Reda was reporting back to the defendant throughout the project. The defendant's ability to install a person of his choice as the site manager who engaged contractors to carry out the necessary work is more consistent with a partnership role in the project than a status as a mere lender. I find that by installing Mr. Reda as the site manager the defendant was asserting and exercising a significant element of "control or management of the enterprise".

[70] I cannot say exactly what the terms of this partnership were. I do not consider Mr. Reda's statement that the defendant and tribe intended to share eventual profits on a 50/50 basis to be reliable. That said, I think that the agreement was likely along those lines and that it may not have been documented to avoid any potential legal consequences from an appearance of outside ownership. I do not accept the defendant's submission that such a profit-sharing agreement was simply a mechanism to repay the defendant for a loan and that he expected no actual profit.

[71] I find that Mr. Reda had authority to retain contractors on behalf of the partnership. Mr. Peebles undoubtedly had authority to approve expenses for the project on behalf of both the defendant and the tribe. He disbursed funds to the plaintiff and to suppliers in accordance with the consulting agreement expressly agreed to by Mr. Reda. I accept that Mr. Reda was not contracting on his own behalf. I find from his communications with Mr. Jensen, and from the sequence of payments that were made, that Mr. Reda both represented himself as having authority from the defendant and the tribe to contract on behalf of their project with the plaintiff and other contractors such as Mr. George for supplies and labour, and that he had actual authority to do so.

Should the amount awarded be reduced on the basis that Mr. Reda exceeded his authority as an agent and is required to indemnify the defendant?

[72] I do not accept the defendant's submissions that his claim for indemnity against Mr. Reda should eliminate any amount owing to the plaintiff beyond any amount the plaintiff has recovered from Mr. Reda pursuant to their settlement. The defendant stakes this position on an argument that Mr. Reda breached his contractual obligations to the defendant to the extent that he bound him personally to a contract, which Mr. Reda testified he did not have authority to do.

[73] I have found that Mr. Reda did have authority to contract on behalf of the project, which was a partnership between the defendant and the Tribe. Mr. Reda and the defendant may have intended to set up a corporate vehicle named Two Bros through which to operate the defendant's role in the project, but this apparently never took place. The only reasonable inference from the evidence and the flow of funds that took place before the raid is that the defendant's arrangement with the tribe was that he was responsible for paying contractors like the plaintiff.

Disposition

[74] I accept the plaintiff's position that the defendant is liable for $274,103 for outstanding work performed and $184,266.29 for materials and services ordered from suppliers through the plaintiff. These amounts are in United States dollars. I further accept that the plaintiff is entitled to interest at 18% a year as a contractual rate as provided on its invoices, a rate that was never objected to by Mr. Reda, Mr. Peebles, the defendant, or anyone else on behalf of the project: see *Paul's Transport Inc. v. Immediate Logistics Limited* 2022 ONCA 573. The exception to this interest rate is an amount of $63,299 still outstanding to the supplier GB Systems on which interest has not been demanded.

[75] If the parties cannot agree on costs, the plaintiff may file brief submissions within three weeks of the date of this judgment and the defendant will have three further weeks to respond.

[76] I thank all counsel for their able assistance.

Dineen J.

Released: September 12, 2023

CITATION: Duninger Corporation v. Montour, 2023 ONSC 5152
COURT FILE NO.: CV-16-547619
DATE: 20230912

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DUNINGER CORPORATION c.b.a. ACTIVE ENGINEERING

Plaintiff

– and –

JERRY MONTOUR

Defendant

REASONS FOR JUDGMENT

Dineen J.

Released: September 12, 2023