CITATION: 2441799 Ontario Inc. v. 2474187 Ontario Inc., 2024 ONSC 115
COURT FILE NO.: CV-22-682518
MOTION HEARD: 20230926
REASONS RELEASED: 20240105

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

2441799 ONTARIO INC.

Applicant

- and-

2474187 ONTARIO INC.

Respondent

BEFORE: ASSOCIATE JUSTICE McGRAW

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REASONS RELEASED: January 5, 2024

Reasons For Endorsement

I. Introduction

[1] This is a motion by the Applicant, 2441799 Ontario Inc. ("244") for leave to amend its Notice of Application to add Gil Shcolyar as a Respondent and to make related amendments.

II. Background

[2] The Application arises from 244's operation of a Petro-Canada gas station and convenience store at 12990 Highway 27, Nobleton, Ontario (the "Property") pursuant to various agreements including as assignee under a lease agreement between 3AN Inc., as Tenant and 233942 Ontario Inc., as Landlord ("233). 3AN Inc. assigned its rights under the Lease to 244 and the Respondent 2474187 Ontario Inc. ("247") purchased the Property from 233. Mr. Shcolyar is 247's sole director and officer.

[3] The Lease was set to expire on October 31, 2020. 244 alleges that it exercised its option for a 5-year renewal, however, 247 refused to renew and wrongfully terminated the Lease. 244

vacated the Property on September 15, 2020 when the fuel supply was shut off. 247 subsequently purchased the adjacent property which merged with the Property by operation of the *Planning Act* (Ontario) and sold the merged property (the "Merged Property") for $8,300,000. 247's position is that its consent was required to renew the Lease and that 244 was aware it would not be renewed.

[4] 244's Notice of Application was issued and served on June 9, 2022 and its Application Record was served on July 14, 2022. 244 claims damages of $375,000 for breach of contract and the duty of good faith, misrepresentation, intentional interference with economic and contractual relations, loss of income and chance and unjust enrichment. 244 also seeks declarations that 244 was entitled to exercise its right of renewal which was improperly denied by 247, that 247 fundamentally breached the Lease, a tracing and/or accounting and punitive damages of $100,000. The Application Record included the Affidavit of Dongmei Li, the principal of 244, sworn June 8, 2022.

[5] In his affidavit sworn July 10, 2023 (the "2023 Affidavit") filed on this motion, Ms. Li states that during discussions with 244's counsel after the Application Record was served about potential additional evidence it was discovered that 244 may have claims against Mr. Shcolyar with respect to: his proposal that 244 purchase a gas station in Barrie from another corporation he controlled; his offer to assist 244 in obtaining a loan from his bank by using fraudulent documents; his insistence that 244 pay for the removal of the existing fuel tanks as a condition of renewing the Lease; and his role in terminating the Lease. In its Amended Notice of Application, 244 alleges that Mr. Shcolyar personally acted and directed 247 to act in a way that was improper by, *inter alia*, encouraging 244 to rely on its representations as to the renewal clause, attempting to influence 244 to purchase another service station owned by one of his companies and to leave the Property and subsequently terminating 244 as a tenant of the Property to sell the Merged Property for a large profit and completely dominating and controlling 247 which was used as a shield for fraudulent and improper conduct. In the Amended Notice of Application 244 seeks declarations that Shcolyar was the directing mind of 247; acted in a manner flagrantly opposed to justice and the principles of honest and fair dealing and acted fraudulently and improperly by, *inter alia*, removing 244 from the Property (collectively, the "Amendments").

[6] 244 served its Motion Record in support of this motion on August 30, 2022. The Motion Record includes 2 affidavits from a law clerk and the 2023 Affidavit. The motion first came before me in writing. As set out in my Endorsement dated October 27, 2022, the motion could not proceed in writing as there was no indication of Mr. Shcolyar's position and if the motion was opposed, it would require a hearing. I indicated that the parties could attend before me on November 14, 2022.

III. The Law and Analysis

[7] Rule 14.09 provides that an originating process that is not a pleading may be struck out or amended in the same manner as a pleading. A Notice of Application is not a pleading but is an originating process which may be amended in the same manner as a pleading (*Angeloni* v. *Estate of Franceso Angeloni,* 2021 ONSC 3084 at para. 28). A Notice of Application is not a pleading as it is required to state only the precise relief sought, the grounds to be argued and the documentary evidence to be used at the hearing of the application, therefore, the supporting affidavit typically contains the relevant facts (*1100997 Ontario Limited v. North Elgin Centre Inc*. 2016 ONCA 848

at paras. 16-17; *Angeloni* at paras. 28-29).

[8] Rule 5.04(2) provides that at any stage of a proceeding the court may add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[9] Rules 26.01 and 26.02 state:

> "26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> 26.02 A party may amend the party's pleading,
>
> (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
>
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
>
> (c) with leave of the court.

[10] A party should be at liberty to craft a pleading in the manner it chooses, providing that the rules of pleadings are not violently offended and there is no prejudice to the other side (*Sleep Clinic London Inc.* v. *Merchea,* [2012] O.J. No. 2471 at para. 22). Amendments should be presumptively approved unless they would result in prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action (*Andersen Consulting* v. *Canada (Attorney General)*, 2001 CarswellOnt 3139 (C.A.) at para. 37; *Schembri* v. *Way*, 2012 ONCA 620 at paras. 25 and 44). The court retains a discretion to deny an amendment in a proper case, even in the absence of non-compensable prejudice, when it is sought to change the parties to a proceeding (*Mazzuca* v. *Silvercreek Pharmacy Ltd.*, (2002) 56 O.R. (3d) 768 (C.A.) at para. 30).

[11] The Court of Appeal summarized the law on leave to amend motions in *1588444 Ontario Ltd.* v. *State Farm Fire and Casualty Co.,* 2017 ONCA 42:

> "[25] The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:
>
> The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: *Iroquois Falls Power Corp. v. Jacob Canada Inc.*, [2009] O.J. No. 2642, 2009 ONCA 517, 75 C.C.L.I. (4th) 1, at paras. 15-16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 367, 2010 CarswellOnt 425; and *Andersen Consulting Ltd. v. Canada (Attorney General),* [2001] O.J. No. 3576, 150 O.A.C. 177 (C.A.), at para. 37. [page688]

> The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.* (1996), 27 O.R. (3d) 479, [1996] O.J. No. 227 (Gen. Div.), revd (1999), 42 O.R. (3d) 641, [1999] O.J. No. 237 (C.A.), revd [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18.
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> There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21; and *Mazzuca v. Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.), at para. 65.
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> The non-compensable prejudice may be actual prejudice, *i.e.*, evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841, [1994] O.J. No. 633 (C.A.), at paras. 5-7; and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106, [1995] O.J. No. 2220 (Gen. Div.), at para. 9.
>
> Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky*, [1996] O.J. No. 4049, 95 O.A.C. 297 (C.A.), at para. 2; and *Andersen Consulting*, at paras. 36-37.
>
> At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669, 2006 CanLII 5135 (C.A.), at para. 6.
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> The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576, [1996] O.J. No. 231 (C.A.), at paras. 3-4; and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74, [2003] O.J. No. 3034 (Master), at para. 21.
>
> The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6." (*State Farm* at para. 25).

[12] In *Farmers Oil and Gas Inc.* v. *Ontario (Natural Resources)*, 2016 ONSC 6359, the Divisional Court held:

> "In the end result, the requirement to read a pleading generously, and the concomitant requirement to allow amendments unless they will inflict non-compensable prejudice, means that the presumption is that any amendment, that can reasonably be seen as falling within the four corners of the existing claim, ought to be permitted…."(*Farmers Oil* at para. 31).

[13] For the reasons that follow, I grant the motion in part. I conclude that Mr. Shcolyar should be added as a Respondent and that the Amendments should be allowed with the exception of the allegations of fraud against him, which are dismissed with 244 granted leave to amend. While there is a larger issue as to whether an application is the appropriate proceeding in the circumstances as opposed to an action, this issue was only discussed during case management and is not before me.

[14] Mr. Shcolyar does not claim that he would suffer any prejudice, presumed or actual, if he

is added as a Respondent and the Amendments are permitted. I cannot otherwise conclude that any prejudice would result from granting leave. Mr. Shcolyar submits that the court should exercise its discretion to deny leave to add him as a Respondent notwithstanding the absence of prejudice on the basis that there is a "fatal absence of factual underpinning" for the Amendments (*876761 Ontario Inc.* v. *Maplewood Ravines Ltd.,* [2002] O.J. No. 2261 at para. 25). Mr. Shcolyar relies heavily on *Maplewood* in which Master Clark (as he then was) dismissed a motion seeking leave to add 4 individual defendants to a Statement of Claim due in part to the absence of underlying facts in support of the amendments. In the alternative, Mr. Shcolyar submits that if the court grants leave that he the proposed fraud claims against him should not be added.

[15] On a motion for leave to amend pleadings, the allegations in the pleading are taken to be true and provable, therefore the only issue is whether the allegations as pleaded plead all of the necessary components of an identifiable cause of action (*Schembri* at para. 27). The law is clear that unless the facts alleged are based on assumptive or speculative conclusions that are incapable of proof, they must be accepted as proven and the court should not look beyond the pleadings to determine whether the action can proceed (*Schembri* at para. 33).

[16] Master MacLeod (as he then was) described the requirement that proposed amendments be legally tenable in *Plante* v. *Industrial Alliance Life Insurance Co.,* 2003 CarswellOnt 2961:

> "21..(b) The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting: …." [citations omitted].

[17] The approach for determining legal tenability was summarized by Fregeau J. in *Essa* v. *Panontin,* 2010 ONSC 691 at para. 8:

> "To be allowed, the amendments requested by the Plaintiffs must be tenable at law. On a motion to add a party and/or to amend the statement of claim against existing parties, the court may not consider the factual and evidentiary merits of the proposed new claims. A court is not to concern itself with the credibility of the case set forth by a party seeking an amendment. The court, in its analysis, is not to consider whether the amending party is able to prove the amended claim. The court must assume the facts pleaded in the proposed amendment are true. The only question is whether they disclose a tenable cause of action. The court is not to make findings of fact or weigh evidence. Amendments are to be read generously with allowance for deficiencies in drafting."

[18] The Court of Appeal has held that an amendment is to be granted unless it would have been struck out under Rule 21.01(1)(b) had it been pleaded originally as clearly impossible of

success (*Fram Elgin Mills 90 Inc.* v. *Romandale Farms Limited*, 2016 ONCA 404 at para. 31; *Spar Roofing & Metal Supplies Ltd. v. Glynn*, 2016 ONCA 296 at para. 42).

[19] I reject Mr. Shcolyar's assertion that I cannot consider the 2023 Affidavit as part of the factual foundation or the "pleadings" for the Application. The 2023 Affidavit was sworn further to Ms. Li's earlier affidavit and he indicates that if leave is granted he will file a supplementary affidavit. I have not been referred to any authorities which would exclude its consideration on this motion and/or the Application and counsel concedes that the difference between its use on both is a "fine distinction". In my view, to not consider the 2023 Affidavit would be an unnecessarily technical approach which prefers form over substance. If necessary, I would have granted 244 leave to amend its "pleadings" as I have done below with its proposed fraud claims, however, this would cause unnecessary delay, inefficiencies and costs contrary to Rule 1.04(1).

[20] With the exception of the Amendments alleging fraud, I cannot conclude that the Amendments are incapable of proof, clearly impossible of success, not legally tenable or that there is a fatal absence of factual underpinning. In arriving at these conclusions, I have considered that 244 submits that the corporate veil should be pierced (*Schembri* at para. 18; *Maplewood* at para. 25). Reading 244's "pleadings" generously with allowances for drafting deficiencies, there are sufficient facts set out in the 2023 Affidavit and the Amended Notice of Application to support the Amendments and to permit Mr. Shcolyar to file responding materials. This is not a case like *Maplewood* where the court found that the pleading contained conclusions without stating facts.

[21] The alleged facts underlying the Amendments and Mr. Shcolyar's addition are set out in the 2023 Affidavit. Ms. Li alleges that after he advised Mr. Shcholyar that 244 intended to exercise its option to renew the Lease, Mr. Shcolyar: i.) insisted that 244 was responsible for the removal of the existing fuel tanks, which was a condition of Lease renewal and that he would convert the Property to a different use if 244 did not do so (paras. 9-10, 14, 21); ii.) proposed that 244 purchase another gas station in Barrie owned by one of his companies and offered to write his bank and prepare fraudulent documents inflating the value of the Property and 244's financial position to assist 244 in securing a loan to purchase it (paras. 11-13, 21); and iii.) caused 247 to wrongfully terminate the Lease (paras. 16, 23). In my view, this is sufficient basis to support the Amendments and personal claims against Mr. Shcolyar for, among other things, breach of the duty of fair dealing and good faith and improperly terminating the Lease. To accept Mr. Shcolyar's submissions that this is insufficient or that the Amendments are incapable of proof or success would require a consideration of the merits of 244's proposed claims which is not possible or appropriate on this motion. Mr. Shcolyar's position is not assisted by the fact that he elected not to cross-examine Ms. Li on the 2023 Affidavit.

[22] With respect to the Amendments related to fraud, Rule 25.06(8) provides that where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading must contain full particulars in order to, among other things, provide the defendant or respondent with notice of the case against them and permit them to plead a defence (*EnerWorks Inc.* v. *Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 at paras. 39-40; *Nikon Optical Canada Inc. v. Theordorus Heereans*, 2017 ONSC 4167; *Gensteel Doors Ontario Inc.* v. *All Can Doors & Hardware Inc.*, 2016 ONSC 2026 at paras. 8-11). I am not satisfied that there are sufficient particulars regarding 244's allegations of fraud against Mr. Shcolyar to satisfy the heightened threshold to give Mr.

Shcolyar notice of the case he must meet and file responding materials. 244 alleges that Mr. Shcolyar used 247 to shield fraudulent conduct and/or commit fraud, however, the elements of fraud, fraudulent misrepresentation or other fraudulent activity are not "pleaded". Further, other than some general references to fraud and the proposed fraudulent documents for the bank, the specific acts or conduct which 244 alleges constitutes fraud are not identified as such or with sufficient particularity. This is distinct from conduct which 244 alleges is "dishonest" or "improper". Consistent with the case law, I am satisfied that the appropriate and just remedy in the circumstances is to grant 244 leave to amend if it wishes to advance any claims grounded in fraud against Mr. Shcolyar (*Nikon Optical Canada Inc. v. Theordorus Heereans*, 2017 ONSC 4167; *Enerworks* at para. 55).

[23] I also reject Mr. Shcolyar's submissions regarding the timing of this motion. He argues that to dispel any suspicions of ulterior motives 244 is required to explain why it did not initially include him as a Respondent and why it seeks to now (*Re/Max Ontario-Atlantic Canada Inc.* v. *Re-Max Metro-City Realty Inc.*, [2008] O.J. No. 1935 at paras. 18-22; *Maplewood* at para. 10). While it is unclear to me based on more recent case law whether such an explanation is required where a limitations period and/or discoverability are not at issue, to the extent to which one is necessary, I am satisfied that 244 has provided a sufficient and reasonable explanation. Namely, the commencement of the Application was delayed due to financial difficulties related to COVID-19 and the cessation of operations at the Property and the Notice of Application was issued in the face of the presumptive limitations period. In the months after the Application Record was served, Ms. Li had further discussions with 244's counsel regarding additional evidence which led to the discovery of potential claims against Mr. Shcolyar (paras. 19-24).

[24] There are also no issues of delay as in *Re-Max*. In that case, over 2 years passed from the issuance of the original Notice of Application until the motion for leave to amend. In the present case, this motion was brought less than 3 months after the Application was commenced. Given the explanation, the timing and the overall circumstances, I am satisfied that the Amendments are not being sought for any ulterior motive.

III. Disposition and Costs

[25] Order to go granting leave to amend the Notice of Application to add Mr. Shcolyar as a Respondent and make the related Amendments except those alleging fraudulent conduct by Mr. Shcolyar with 244 granted leave to amend. If 244 wishes to plead fraud as against Mr. Shcolyar it shall deliver a further amended Amended Notice of Application together with Ms. Li's supplementary affidavit in support of the Application to the Respondents within 60 days. The Respondents shall deliver their Responding Application Record within 60 days.

[26] If the parties are unable to agree on the costs of this motion they may file written costs submissions not to exceed 3 pages (excluding Costs Outlines) with me on a timetable to be agreed upon by counsel but only after the above application materials have been delivered.

[27] Counsel may schedule a telephone case conference with me for further case management and directions if necessary.

Released: January 5, 2024

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Associate Justice McGraw