COURT OF APPEAL FOR ONTARIO

CITATION: De Cerigo Properties Inc. v. Raffan, 2024 ONCA 215
DATE: 20240322
DOCKET: C70394

Lauwers, Roberts and Monahan JJ.A.

BETWEEN

De Cerigo Properties Inc., Studio Pyramid Inc.
and Milosh Pavlovicz

Plaintiffs (Appellants)

and

Christine Raffan

Defendant (Respondent)

and

David Corazza, Karen Caradonna and Robert Rourke

Third Parties

Michael Mazzuca and Broghan Masters, for the appellants

Deborah Berlach and Noah Eklove, for the respondent

Leon Melconian, for Karen Caradonna[1]

Heard: March 13, 2024

On appeal from the judgment of Justice Jane Ferguson of the Superior Court of Justice, dated February 9, 2022, with reasons reported at 2022 ONSC 1076.

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[1] Karen Caradonna was not named as a respondent on the appeal. Leon Melconian appeared but made no written or oral submissions on behalf of Karen Caradonna.

REASONS FOR DECISION

[1] The appellants, De Cerigo Properties Inc., Studio Pyramid Inc. and Milosh Pavlovicz, appeal the dismissal of their action. In their statement of claim, they seek, among other things, damages of $2 million against the respondent, Christine Raffan, for negligence, fraud, fraudulent misrepresentation, and intentional interference with economic relations. They allege that the damages arose as a result of the respondent altering and manipulating the accounting and financial records of Hippo Properties Inc. ("Hippo") in her capacity as Hippo's accountant, as well as the respondent gaining illegal and unauthorized access to the books and records of the appellants, De Cerigo Properties Inc. and Studio Pyramid Inc. These claimed damages include those caused by the respondent's alleged deletion of Hippo's debt to the appellants and her alleged creation of a fictitious debt owed by the appellants to Hippo.

[2] The appellants raise several issues on appeal. As explained below, we allow the appeal because of the trial judge's unfair dismissal of the action and her erroneous rejection of the appellants' expert. It is therefore unnecessary to determine the other grounds of appeal.

[3] In breach of the principles of procedural fairness, on her own initiative and without the parties' submissions, the trial judge dismissed the action before the appellants had completed their case. She dismissed the action after deciding that

the appellants' accounting expert, Dr. Lawrence Rosen, would not be permitted to testify because he had not set out the expected standard of care of a certified general accountant in his reports.[2]

[4] After initially determining that Dr. Rosen was qualified as a forensic accounting expert, the trial judge subsequently came to the conclusion, erroneously in our view, that he had not opined on the requisite standard of care of a certified general accountant in his reports, and the appellants' case therefore "had no chance of success". Other than stating, in a cursory manner during the *voir dire*, that "fraud is out the door, so it's really just a negligence case", and later that the appellants had not made out a case for fraud, the trial judge did not explain in her oral reasons, or in the nine paragraphs of her subsequently delivered written reasons dismissing the action, why "fraud is out the door", or why Dr. Rosen's evidence was not relevant to the appellants' other pleaded claims of fraud, fraudulent misrepresentation, or intentional interference with economic relations.

[2] There were other witnesses who testified for the appellants. It is unnecessary to analyze their evidence in any depth, given our disposition of the appeal. We do note, however, that the witnesses who testified referenced what they described as errors and deficiencies with the respondent's accounting. For example, the evidence given by Alexander Josipovicz, the half-owner of Hippo and a former director and officer of Studio Pyramid Inc., addressed, among other issues, that the respondent mistakenly recorded the personal expenses of Kenneth Whyte, the other half-owner of Hippo, on Hippo's records, lacked source documentation to complete verification and corrections of her accounting, and incorrectly accounted for mortgages that Studio Pyramid Inc. never held. Importantly, we also note that the trial judge's sparse reasons disposing of the action do not address this evidence. Whether or not this evidence is accepted is up to the trial judge hearing the new trial, however, on its face, it addresses the allegations raised the appellants' action.

[5] The trial judge erred. The opinions expressed in Dr. Rosen's reports clearly address all the appellants' claims. It suffices to mention only some of them to illustrate this point. For example, at the outset of his almost 80-page September 14, 2020 report,[3] Dr. Rosen indicates that one of the issues that he was retained to address was "the appropriateness of accounting and related events" carried out and engaged in by the respondent. He then goes on to analyze in meticulous detail and opine on the impropriety of various actions taken by the respondent in her accounting role with the business operations of Kenneth Whyte ("Whyte"), including his family business, Hippo Publications, and Hippo, which affected Hippo, the appellants, and others. Dr. Rosen criticizes the respondent's accounting actions as "flawed", "false", "improper", "inappropriate", and "seriously misleading". He opines that the respondent's "refusals to reverse her unsupportable accounting changes typically constitutes at least accounting negligence". He states that, by her actions, the respondent caused considerable damage to the appellants and others, including Hippo. Dr. Rosen expresses the opinion that the respondent's accounting for Hippo was "improper" and "materially misleading", that Hippo's records were based on the respondent's "biased or incomplete accounting" and that "a profitable business (Hippo) was prematurely liquidated, based in large part on the circularization of false financial statements"

[3] Dr. Rosen repeats his opinions, in more summary form, in his August 20, 2021 report.

prepared by the respondent. According to Dr. Rosen, Hippo's books "were not following and recording the actual money flow" reflected in third-party documents such as its bank records, which "resulted in a false impression being left" and that "[a] completely false picture of what actually occurred…had been invented by [the respondent]". He notes that Hippo's liquidator was required to engage in a "reconstruction" of Hippo's books and make 250 entries to reverse the respondent's inaccurate and improper accounting actions. Dr. Rosen further opines that the apparent motive for her actions was an effort to shield Whyte from potential tax liability arising from the purported use of his RRSP funds contrary to income tax law, stating that:

> [The respondent], in our view, apparently saw her role and prime purpose as being quite different from what a professional accountant would have performed for shareholder reporting and income tax purposes. Protecting Whyte from income tax liabilities appeared to be of high importance to [the respondent], beyond other normal accounting practices and obligations to others, including the public in general.

[6] While Dr. Rosen might not have expressly used the specific words, "standard of care", it was not necessary for him to do so given the nature of the allegations in this case and the contents of his reports, including the unambiguous opinions he expressed about the negligence and impropriety of the respondent's actions. This is not a case involving a debate over the exercise of professional judgment concerning the implementation of a legitimate accounting approach

where expert evidence is required to explain why that approach falls below the requisite standard. Here, the alleged failings could not be more fundamental to the duties and obligations of a professional accountant. There can be no question that a professional accountant who is found to be in a conflict of interest and to have engaged in accounting negligence and actions that might amount to fraud, as Dr. Rosen has opined in his reports, has fallen below the relevant professional standard of care. On their own, Dr. Rosen's reports plainly and amply provide evidentiary support for the appellants' claims. Whether his opinions are rebutted or not accepted in whole or in part by the trier of fact are different questions, on which we express no view. However, the trial judge clearly erred in refusing to permit Dr. Rosen to testify because his evidence, on its face, was relevant and necessary.

[7] We do not accept the respondent's invitation to conduct the kind of evidentiary and legal analysis that the trial judge should have carried out before dismissing the action. That is not an appellate court's function but the fundamental role and obligation of the trier of fact. The trial judge's failure to carry out this review is exactly the problem here.

[8] The trial judge's premature and erroneous dismissal of the action in the circumstances of this case amounts to a miscarriage of justice and cannot be permitted to stand. The appeal is allowed. The trial judge's dismissal of the action is set aside. We order a new trial before a different justice of the Superior Court.

[9] The appellants are entitled to their costs of the appeal in the agreed-upon amount of $50,000, plus HST.

[10] With respect to the costs of the trial below, if the parties cannot otherwise agree, they may make brief written submissions of no more than three pages, plus a costs outline, within 15 days of the release of these reasons.

“P. Lauwers J.A.”
“L.B. Roberts J.A.”
“P.J. Monahan J.A.”