**CITATION:** Nutrition Guidance Services Inc. et al v. Schwartz et al., 2024 ONSC 3760
**COURT FILE NO.:** CV-21-00660134-0000
**DATE:** 20240702

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:**<br><br>NUTRITION GUIDANCE SERVICES INC., DR. EARL SCHWARTZ, ROSIE SCHWARTZ and DR. EARL SCHWARTZ PROFESSIONAL CORPORATION<br><br>Plaintiffs<br><br>**– and –**<br><br>DR. MARTIN SCHWARTZ and SUSAN SCHWARTZ<br><br>Defendants | ) | Jordan Goldblatt and Emma Parry, for the Plaintiff/Applicant - Align Accordingly<br><br>Robert B. Macdonald and Teodora Obradovic, for the Defendants |
| | ) | **HEARD:** May 28, 2024 |

**AKAZAKI J.**

## REASONS FOR JUDGMENT

## INTRODUCTION

[1] Both sides of this dispute brought summary judgment motions exercising their rights over a small medical office building in midtown Toronto. The corporate plaintiff and the defendants hold ownership interests as tenants in common. Over time, they acquired unequal shares in the property from the previous owners. The Schwartz brothers are doctors. Rosie and Susan are their spouses. Rosie is a dietician operating out of Nutrition Guidance Services Inc., a company she controls. Susan is not in the health care business and has never worked out of the building.

[2] The point of the plaintiffs' lawsuit is to characterize the building as the asset of a partnership. They hope the court will require the defendants to sell NGSI their share for an appraised value. The plaintiffs must first convince the court that the parties held it as a general partnership under the *Partnerships Act*, R.S.O. 1990, c. P.5. Earl Schwartz says he will retire instead of relocating his practice elsewhere, if the court orders a market sale.

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[3] The defendants deny the parties were ever partners and seek sale under the *Partition Act*, R.S.O. 1990, c. P.4. The defendants do not believe Earl's retirement threat and say he is scheming to buy out the defendants' share for a bargain and sell the building to a property developer for a much higher price.

[4] It would be Earl's patients' loss, if he were to stop practising because of a dispute with his brother over real estate and money. The parties' motives or plans for the building are immaterial to the issues the court must decide. Rather, the existence of a partnership depends on historical facts of the tenure and management of the building. I have concluded they were only owners. Their relationship was not a business partnership. I will order the sale of the property by the defendants. I will now summarize the facts and explain why the only reasonable result is resolution in the defendants' favour.

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**ISSUES ARISING FROM THE HISTORY OF THE PROPERTY AND THE PLAINTIFFS' RELATIONS**

[5] The property is currently held as follows: NGSI holds 75%. Martin (Marty) Schwartz holds 20%, and his wife Susan owns 5%. NGSI and Marty were initially minority owners. Each bought 20% of the property back in 1979. Other health care professionals or their holding companies held other 60%.

[6] The others departed in 1993 and 2006. NGSI, Marty, and Susan acquired the share of a Dr. Blumenstein in 1993, raising NGSI's share to 50%, Marty's to 20%, and introducing Susan as an owner of 5%. In 2006, Drs. Seymour and Nathan Haber retired and transferred their 25% share to Earl. In 2019, Earl transferred that share to NGSI, to raise NGSI's portion to 75%. Earl currently has no share.

[7] There was no written contract among the owners, either past or present.

[8] Since 1979, the building was owner-occupied at cost for use as a medical centre. The exception to this was Susan's 5% share. She never worked there. The 95% shared expenses, such as equipment leases, utilities, insurance, administrative staff, and professionals such as bookkeepers, accountants, and a blood technician. They also collected rent from occasional tenants to fill unused space. The 'building,' as an asset, almost aways ran at a loss. The owners funded the operating deficit as required, until Marty moved his practice out.

[9] In 2006, Marty moved out. Since then, the parties have disputed over Marty's refusal to pay a share of the expenses. Earl requested Marty to contribute to the property's maintenance and upkeep. Marty engaged a litigation lawyer to demand particulars of rent collected from tenants. Earl sent Marty annual financial statements. Marty has not paid any of the requested share of expenses since his departure. Earl, on behalf of NGSI, claims $216,818.09, consisting of 25% of a loan of $54,204.52 and 25% of the 2022 operating deficit.

[10] Marty agrees he and Susan owe NGSI and/or Earl 25% of costs associated with ownership of the building, but he never trusted the accounting.

[11] Earl stated that, out of frustration over the situation, he started the lawsuit on April 8, 2021. 2021 is also the valuation date for Earl's partnership claim. The plaintiffs allege service of the statement of claim amounted to notice of dissolution of the partnership under s. 32(c) of the *Partnerships Act*. The plaintiffs obtained an appraisal of the property for $2,000,000. Earl would like to hold onto the property to continue practising at the location. At this stage in his career, at age 76, he would not consider relocating to a new building. If forced to sell, he intends to retire.

[12] The defendants dispute this entire approach and take the position that the parties must sell the property on the open market. They believe the property is worth much more than the plaintiffs' appraisal, especially if sold to a developer. They contend the plaintiffs' legal tactic is akin to a corporate oppression to force the defendants to sell their shares at a minority discount.

[13] The facts are not in dispute. The parties disagree about the legal conclusions. To resolve the disagreement, I must deal with the following issues:

1. Preliminary issue regarding further evidence
2. Summary judgment principles
3. Are the parties partners or simply owners?
4. Financial Reconciliation (What, if anything, does Marty owe Earl?)
5. Plaintiffs' punitive damages claim

## 1. PRELIMINARY ISSUE – ADMISSIBILITY OF NORTH DRIVE OFFER

[14] The defendants sought to introduce evidence of an offer by a property developer, North Drive Investments Inc., to acquire the building as part of a potential land assembly or other development of the property in conjunction with neighbouring parcels.

[15] The plaintiffs objected to the introduction of the offer as hearsay and unreliable as a market valuation. The offer is not firm and is conditional on the ability of the purchaser to withdraw it during a "due diligence" period. The defendants contend that the evidence merely showed the existence of a development opportunity. They also pointed to the willingness of the buyer to allow the plaintiffs to occupy the building during the planning phase of the development.

[16] The usual mode of evidence in a motion is by affidavit, per rule 39.01. On a motion for summary judgment, rule 20.02 allows the court to draw an adverse inference from the failure of a party to tender evidence from a person with personal knowledge of contested facts. The developer could have provided a representative for proving the developer's intentions and the basis for its valuation.

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[17] There is no doubt the offer was admissible for the fact that the defendants received it. It is another matter whether the court can admit or rely on it as proof of its contents. Here, the contents would be how firm it would be and whether it reflects an offer that other developers might make. There is a lack of threshold reliability for its introduction as proof of the developer's actual resolve or commitment. Documents standing by themselves are not reliable: *R. v. Bradshaw*, [2017] 1 SCR 865, at para. 45.

[18] I admit the evidence of the offer for the purpose of establishing that the defendants received it and the fact that, in a general sense, a market for the use of the land as a development opportunity exists. However, I do not admit it for the purpose of establishing it as valuing the property at a figure higher than the appraisal obtained by the plaintiffs. Apples and oranges can be compared in some instances, maybe in this one, but a trial would be needed to resolve the conflict. If a material issue in the proceeding turns on the conflict between the appraiser's value of the property and the offer from North Drive, the appropriate remedy would be to direct a trial of the issue. This type of evidence is not persuasive in a motion for summary judgment.

[19] However, the comparison between the *as is* market appraisal and the development value is immaterial because I have determined no partnership existed. The parties need not consider the property's value as a partnership asset and take into consideration Earl's stated desire to remain in the building. Its value will be determined by a market sale.

## 2. SUMMARY JUDGMENT PRINCIPLES

[20] Ontario's summary judgment procedure under rule 20 underwent a radical culture shift after the Supreme Court of Canada released *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87. At paras. 52-60, Karakatsanis J. described how the interests of justice require courts to consider alternatives to the traditional trial in resolving civil disputes. After *Hryniak*, thousands of decisions have been reported in Ontario and in Canada: Alderson, "Sentinels of the *Hryniak* Culture Shift: Four Years On," in Archibald, *Annual Review of Civil Litigation, 2018*, (Toronto: Thomson Reuters, 2019), at p. 160. The general guidance from *Hryniak* suffices and I need not troll the waters for comparable cases in the jurisprudence.

[21] Despite the agreement of the parties to the summary judgment procedure, clause 20.04(2)(b) of the rule requires me to be satisfied that there is no genuine issue requiring trial. The requirement of a trial must be informed by the interests of justice as described in *Hryniak*. I see no genuine issue or service of the interests of justice in delaying to a distant trial date a property dispute among senior citizens that also continues to energize the cold war between brothers and their families. The material facts were neither complicated nor disputed.

## 3. PARTNERS OR SIMPLY OWNERS?

[22] As co-owners, tenants in common are entitled to force sale of the property. The right to sell is basic to property law. The court cannot refuse a sale order in the absence of

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malicious, vexatious or oppressive conduct: *Charbonneau v. Gracie*, 2022 ONSC 3804, at para. 20. There is no dispute that the defendants have wanted to sell the property as early as 2006, after Marty moved his medical practice out of the building. It was the plaintiffs who initiated the lawsuit. There are no grounds to hold that the defendants have conducted themselves in a manner that precludes the court-ordered sale of the property. An eighteen-year wait and a suit by the plaintiffs clearly showed no effort by the defendants to oust the plaintiffs from the property until the plaintiffs chose the right time to force the issue.

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[23] The building owners can also be partners. It is not an either-or question. The statutory starting point for the determination of the existence of a partnership is s. 2 of the *Partnerships Act*, codifying the common law. The operative portion reads:

> 2. Partnership is the relation that subsists between persons carrying on a business in common with a view to profit …

[24] The Supreme Court of Canada has extracted from these three ingredients of a partnership: (1) a business, (2) carried on in common, and (3) with a view to profit: *Backman v. Canada*, [2001] 1 SCR 367, at para. 18.

[25] The first element seems, on its face, easy. Section 1 defines "business" as including an "occupation" or "profession." However, there is no evidence that the parties were in a medical partnership, even if that is allowed. There was some discussion during the hearing whether the Ministry of Health allows Ontario Health Insurance Plan billings by anyone other than a doctor or a medical professional corporation. Susan was the exception to the owner-occupants, in that she is not a medical professional and never worked at the building. Rather, the issue here was whether the parties operated the building in partnership. In *Backman*, the court described a business in terms of holding oneself out to others in the sale of goods or services.

[26] I do not consider the outward character of being a "business" necessarily precluding the parties' ownership of the building in the instant case. However, this illustrates the futility of considering the ingredients in isolation and the "mechanical application of a checklist or a test with more precisely defined parameters": *Backman*, para. 26. In *Lor-Wes Contracting Ltd. v. The Queen*, [1986] 1 FC 346 (FCA), at 352, the Federal Court of Appeal labelled Prof. Drieger's modern approach to statutory construction the "words-in-total context" method. However one describes the principle, it is impossible to consider the word "business" without considering the later words "with a view to profit."

[27] The immediate difficulty with the plaintiffs' partnership argument in relation to its status as a "business" was that the owners were, with minor exceptions, their only "customers." The owners paid themselves "rent" by contributing to a bank account operating as a float to meet expenses. Earl's evidence on the issue of non-owner tenants was that they once leased an office to a Dr. Nishikawa, who left, and that Dr. Bot is the only current tenant. Given the building's accounts were generally in deficit, these tenancies could not have been meant to put the accounts into the black.

[28] There is no categorical exclusion from the definition of a business the fact that the owners also partake in the product or service. A live-in owner of a rooming house or a bed and breakfast clearly operates a business. Two or more of such owners could be considered to have formed a partnership. Contrast that to co-habiting owners of a residence who let out a spare room or a basement apartment to help pay the mortgage. Theirs could be a partnership in the family law sense, but not as a business partnership.

[29] The next ingredient of a partnership is the manner of the business' operation, that it be carried on in common. This is a more nebulous concept. Various indicia of a common business purpose include the existence of a partnership agreement, method of management, holding out to the public as partners, contribution of skill, knowledge or assets, and common finances: *Backman*, para. 21.

[30] In relation to the instant case, there is an element of the common purpose collapsing into itself because, from 1979 onwards, there was no change in the common intent to provide the doctors premises for their offices without paying commercial rent. The fact that they bought into the building meant the expected accretion of value would also offset their operating costs. The latter is a common feature of property ownership. It is no different from any other election to buy instead of rent.

[31] If their common purpose was to facilitate their separate activities, i.e. medical practices, that is different from buying a much larger facility that takes on the form of a business entity distinct from the owners. The common purpose can therefore be characterized legally in terms of gradation. Perhaps if the building had been twice the size required for the owner's practices, the question of the use of the asset for the owners or for renting to others could have tipped towards a common purpose as a business. Since Marty took his practice elsewhere and, according to Earl, abandoned the property, it is hard to see the commonality of purpose.

[32] Susan's 5% stake also appears to be a fly in the ointment for the plaintiff's argument. The building serves no business purpose for her, and it never has.

[33] The final ingredient under s. 2 is the profit motive. A partnership does not have to turn a profit. Many a business operates at a loss for a long time. However, a common element of any for-profit business is that if it has low prospects of ever turning a profit, the rational businessperson will close shop. The plaintiffs tendered no evidence of Earl or Rosie's intention to continue the business of running the building going past Earl's retirement from medicine. The terminal nature of the loss-making venture, as well as Earl's contentment with things being that way, confirm there was never an intent to make money from the building separate from its real estate value. In that regard, the parties treated it as a long-term investment. They were not in the business of buying and selling commercial properties. In the case of Susan, even silent business partners expect some economic return.

[34] Earl relied on evidence from Marty's cross-examination, in which the latter accepted that the original owners, Seymour and Nathan Haber, held the property to make a profit, and

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that Marty himself thought likewise. Marty also accepted that he and Susan contemplated making a profit, not only from the value of the building but also from its rental operations.

[35] With some exceptions, the medical arts building in question has operated through the subsidy of its practitioner owner-tenants since 1979 and perhaps earlier. As the defendants' counsel pointed out, those who left the tenancy over the years simply sold their percentage interests to the parties to this lawsuit.

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[36] Indeed, the very remedy sought by the plaintiffs in this case is a buy-out based on a fixed appraisal of the market value of the property, less adjustments for Marty's share of the recent operating expenses. If the business, operated in common, had a profit objective, there should be an actuarial value for the future profitability of the enterprise. If such value is zero or a negative value, as all the evidence indicates, it is hard to see a profit motive. I return to the question, perhaps rhetorical, about the ability to turn a profit if the owners of the business are its only expected customers.

[37] The plaintiffs' desire to buy the defendants' share at a historical 2021 appraised value is also somewhat problematic. They have had the use of the property since that time. They wish to compensate the defendants for their shares as if the defendants ceased to be owners three years ago. The premise is not only counterfactual, but it also means they would have had the occupancy benefit of 100% of the property even though they owned only 75%.

[38] I have determined the parties were not partners within the meaning of s. 2 of the *Partnerships Act*. Therefore, the analysis in s. 3 is not required.

[39] Finally, the manner of acquisition of the property can provide evidence of the intention to form a partnership, or the lack of such intention. In this regard, s. 22 of the *Partnerships Act* ostensibly applies because it treats as partnership property assets bought "with money belonging to the firm." However, this is really a distinction between partnership assets, which must be applied to losses and debts in the priority set out in s. 44, and assets purchased with a partner's own money and never belonging to the firm. Thus, for example, a vehicle bought or leased by a partner does not become a partnership asset by dint of having been used to drive to business meetings, etc.

[40] Had Earl and Marty bought the property from a common pool of funds ("money belonging to the firm"), that could have served as evidence that the building was acquired as partnership property, pursuant to s. 22 of the *Partnerships Act*.

[41] Earl's evidence was that he, Marty and Susan, together with others, bought shares in 1978. This appears to have been inaccurate. The parcel register for the property does not allow examination of title before a transfer to Marty and NGSI, and two numbered companies on May 26, 1980. The defendants filed the original transfer from Nathan Haber to those parties, dated February 14, 1979. That document showed that the transfer was not registered until May 26, 1980. Susan did not acquire her share until July 14, 1993. The subsequent transactions, including Earl's acquisition of an additional ownership percentage from a numbered company operated by Dr. Blumenstein, involved transfers by and to

named persons. None of the transactions tracked in the evidence exhibited any purchase by a pool of funds contributed by the parties. Rather, the current owners acquired their shares as separate owners. Therefore, there was no evidence that the parties purchased their property interests as a partnership asset by pooling their funds.

[42] The partnership among the parties existed only as an allegation in the lawsuit which, according to the plaintiffs, ended it. It did not exist in the reality of their relationship as co-owners prior to the lawsuit. The property is only an asset owned by NGSI and the defendants, and it must be sold.

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## 4. FINANCIAL RECONCILIATION

[43] What, if anything, does Marty owe Earl? The plaintiffs seek reimbursement of Earl's ownership expenses from the property. The claim consists of $42,360 in accumulated operating deficits to 2022, as well as $8,375 in 2024 and $5,687 anticipated in 2024, for a total of $56,422.

[44] There was some dispute over whether the court should fix the amount on the summary judgment or direct a reference to an associate judge. The argument is based on unjust enrichment, in that the defendants should not reap the value of the property if Earl has paid for the repair and upkeep of the building. For his part, Marty accepted responsibility for contribution to the cost of ownership but refused to pay because he did not trust the accounting. It would be fair to say his strained relations with his brother fueled the mistrust and that Earl did provide a reasonable level of financial accounting for the expenses.

[45] In equity, the claim for expenses by an occupant in possession triggered a countervailing right by the owner out of possession to occupation rent: *Kazmierczak v. Kazmierczak*, 2001 ABQB 610, at para. 88. Ordinarily, absent wrongful or forcible ouster, the out-of-possession joint owner is not entitled to occupation rent from the one in possession because joint ownership entitles both to full ownership. This applies both to joint tenancies and tenancies in common. However, if the occupying co-owner collects rent, that owner is required to account for it. See *Osachuk v. Osachuk*, 1971 CanLII 997 (MB CA) at pp. 422-23.

[46] I have considered whether the potential development value of the land should be factored into this analysis. If the property is to be knocked down, none of Earl's upkeep and maintenance will matter. It would have turned out to be of value only for Earl's occupation of the building. For the reasons I stated in my ruling regarding the evidence of the offer from the developer, there is simply insufficient reliability in this evidence to accord it any weight in the determination of any issue in the motion. While it could have made this part of the decision easier, I will not consider the development potential of the land to be a factor in the financial reconciliation of the parties as co-owners.

[47] The difficulty with the plaintiffs' claim for reimbursement of ownership expenses, expressed as operating deficits, is that the subsidy by Earl's holding company to zero out that deficit is really the cost to Earl's professional corporation of operating out of the

building. While it may be true that Marty and Susan would face property tax assessments for their share if the property was unoccupied, that ignores the reality that Earl's operation benefited economically by not having to pay rent to a commercial landlord.

[48] Despite my misgivings about ordering what would amount to Marty and Susan's subsidy of Earl's practice, this is a summary judgment motion. The defendants did not provide evidence of the actual economic benefit to Earl's practice of not having to pay market rent. Accordingly, on the face of the record, the defendants' failure to adduce such evidence meant the plaintiffs' evidence on this point was uncontested. I therefore fix the amount owed by the defendants to the plaintiffs in the financial reconciliation of the property ownership to be $56,422. Given that this reconciliation arises out of an equitable remedy instead of a contractual or other debt, it is just and equitable to require this amount to be paid to the corporate plaintiff out of the proceeds of sale and not as a judgment debt owed by the defendants to NGSI.

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### 5. PLAINTIFFS' PUNITIVE DAMAGES CLAIM

[49] The plaintiffs made a claim of $100,000 for punitive damages. At the motion, they sought an amendment of the amount of this claim to $500,000. The basis for the claim was that Marty left Earl to shoulder the expenses of the property.

[50] The plaintiffs relied on *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 SCR 595. At paras. 78-83, the Supreme Court widened the availability of this head of damages to contract cases in which the wrongful breach amounts to tortious conduct. There was no contract between Earl and Marty, or as among any combination of the parties to this suit. Moreover, there was no identifiable tort. The claim for a financial reconciliation sounded in partnership law and unjust enrichment.

[51] Even if the plaintiffs had been successful in the partnership argument, I would have found no basis in the facts to consider Marty's failure to contribute to expenses, when he was not occupying the property, as grounds for a punitive damages claim. The punitive damages claim appears to have been inserted into the mix by the plaintiffs' counsel as a means of mollifying Earl's opprobrium of Marty. There is no genuine issue requiring a trial to impede the court from dismiss this groundless claim for punitive damages.

## COSTS

[52] The defendants have succeeded on the main issue in the summary judgment motion. Their bill of costs demanded $43,647 on a partial indemnity scale, compared to $59,694 claimed by the plaintiffs in their bill of costs. The defendants' costs demand is reasonable and should also be paid out of the proceeds of the sale.

## CONCLUSION

[53] The plaintiffs' claim for a declaration that the parties were engaged in a partnership is hereby dismissed. No declaration is required to establish that NGSI, Marty and Susan are owners as tenants common in the proportions registered on title. Because of the parties'

positions regarding the sale of the property, the defendants should have the first opportunity to sell the property at its highest market value, and the consent of the plaintiffs to complete the sale shall be dispensed with for a period of 90 days. The defendants shall also retain and instruct the real estate lawyer acting on the sale.

[54] The $56,422 due to the plaintiffs and the $43,647 due to the defendants shall be reflected in the final payout on the sale of the property. Subject to these allocations, the ordinary adjustments at the time of the sale shall be calculated by the real estate lawyer acting for the defendants as vendors.

[55] I am reluctant to direct a reference for the sale of the property. Now that the partnership issue has been resolved, I am hopeful that the parties might collaborate in the sale of the property in a manner that maximizes the collective sale price and transitions Earl and NGSI in the least disruptive way. If, at the end of the 90-day period, the property has not been sold, the parties may contact the court either to seek an extension or to resolve any impediment to the sale.

Akazaki J.

**Released:** July 2, 2024

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Plaintiffs

**– and –**

DR. MARTIN SCHWARTZ and SUSAN SCHWARTZ

Defendants

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**REASONS FOR JUDGMENT**

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Akazaki J.

**Released:** July 2, 2024