CITATION: Gawri v Gupta 2024 ONSC 4377
COURT FILE NO.: CV-21-660272
MOTION HEARD: 20240722

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rakhi Satish Gawri in her personal capacity and in her capacity as Trustee of the Gawri Family Trust, Suresh Gawri in his personal capacity and in his capacity as Trustee of the Gawri Family Trust, 2560174 Ontario Inc., Plaintiffs

AND:

Ray Rattan Gupta, Sundeep Gupta, Sunray Group Ltd. d.b.a. Sunray Group of Hotels, 2554190 Ontario Inc. and 2554200 Ontario Inc., Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Yigal Rifkind, for the moving party plaintiffs

Micheal Simaan, for the responding party defendants

HEARD: 22 July 2024

REASONS FOR DECISION

OVERVIEW

[1] The plaintiffs' motion for leave to amend their statement of claim was originally before me on 31 January 2024. At that time, the plaintiffs had not provided the defendants or the court with a blacklined version of their proposed amended pleading so that one could understand what amendments were being sought.

[2] To make use of the booked court time, the portions of the motion dealing with validation of service and the addition of new parties was argued on January 31. Subsequent to the hearing of the motion and the delivery of my reasons, which allowed claims against the Schedule C and D companies, but denied the claims against the Schedule E companies, plaintiffs' counsel attempted by email to me to advance additional arguments not made during the motion to support their argument that leave should have been granted to add the Schedule E companies. I advised counsel that this was inappropriate and I did not review these new arguments.

[3] The plaintiffs were ordered to deliver a blacklined version of the proposed amended claim by 28 March 2024. They did deliver a version at that time but it became evident during the course of the hearing that they had not blacklined all the changes. Further, they had notated the proposed version with commentary and argument. I have not relied on those

side notations as they are not appropriate, but have confined myself to the plaintiffs' facta and oral argument.

[4] The only additional document that was to be uploaded after the January hearing was the blacklined version of the proposed pleading. Although they did not seek leave to do so, the plaintiffs also uploaded a second reply factum. They had received the defendants' factum on January 29 and had already delivered a reply factum on January 30. This new 46 page reply factum was uploaded May 16. The plaintiffs also used this factum to again attempt to advance new arguments to add the Schedule E parties, an issue I already determined in my decision released 15 March 2024.

[5] The proposed pleading runs some 80 pages and includes 87 footnotes. The prayer for relief alone is ten pages long. The claim is replete with pleadings of evidence, argument, inappropriate hyperbole and personal attacks. Overall, it reads like a bad novel.

[6] Despite the many issues with the form of the proposed pleading, the defendants narrowed their approach and took issue only with footnotes 8, 46, 78, 81, 82, 83 and 86 and paragraphs 20-22, 23, 24, 25, 27, 29, 64, 96, 104c, 108, 109, 111, 117, 118, 123-129, and 165(o)(ii) (iii) (iv). The complaint concerning footnote 85 was withdrawn.

[7] The rules are clear that every pleading shall contain "a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." (Rule 25.06(1)).

[8] The plaintiffs conceded that paragraphs 123 and 165(o)(ii), (iii) and (iv) should be removed. They otherwise argue that because they have pleaded fraud against the defendants, rule 25.06(8) requires them to plead "full particulars". This, they argue, entitles them to plead extensive evidence, even if the evidence does not relate to the pleaded fraud. Alternatively, they argue the paragraphs should remain, even if they are evidence, because they offer context to the complaint.

A. Footnotes in Issue - 8, 46, 78, 81, 82, 83 and 86

[9] While they were not specifically challenged, the plaintiffs agreed to remove footnotes 14, 15, 16, 17, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 65, 69, 70, 72, 73, 74, 75, 76, 77 from the proposed pleading.

[10] In general, the plaintiffs appear to use footnotes either to argue or expand on a point made in the body of the proposed pleading or to introduce a point that is not a material fact.

Footnote 8

[11] In paragraph 1(w) of the prayer for relief, the plaintiffs seek a declaration of ownership in the companies listed in Schedule B to the proposed pleading along with a declaration that the defendant Ray Gupta's assertions about ownership are oppressive, unfairly prejudicial and unfairly disregard the plaintiffs' interests. They then add a footnote that the oppression

has been carried out "by proffering a fictitious sale (devoid of merit, proof or documentation) contrived for purpose attempting [sic] to avoid accountability for his fraudulent and oppressive conduct and treatment of the Plaintiffs as shareholders of 2530258 Ontario Inc.".

[12] The plaintiffs argue that this footnote goes to Ray's intent. However it is characterized, I find that footnote 8 pleads evidence or argument about how the plaintiffs are going to prove their allegation of oppression, a theme that runs through much of the pleading. Footnote 8 is not a material fact and not saved by rule 25.06(8). It is to be removed from the proposed pleading.

Footnote 46

[13] Paragraph 67(i) of the proposed pleading states that "Ray had, throughout 2019 [FN 46] fraudulently overstated to the Gawris the Islington Hotel and Restaurant's renovation costs by $4.4M".

[14] Footnote 46 lays out the evidence by which the plaintiffs propose to prove that allegation. It states: "Specifically in reports provided to the Gawris on April 9, 2019, November 6, 2019, and December 19, 2019 an [sic] in a meeting that occurred between Ray and various members of the Gawri family on October 16, 2019 at Sunray's offices". This is not an appropriate pleading and is to be removed.

Footnote 78

[15] Paragraph 96 of the proposed pleading begins as follows: "The Plaintiffs state that Ray's schemes purporting to strip the Gawris of their shareholding interests in the Schedule B Companies fit the classic definition and indicia of oppression [FN 78]." (The defendants also challenge the appropriateness of this paragraph, which is dealt with at paragraph 35, below.)

[16] Footnote 78 cites law in support of this proposition, specifically: "as adopted by the Court of Appeal in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, 2006 CanLII 15 (ON CA), [2006] O.J. No. 27 (C.A.) at para. 92 and enunciated by Greer J in *Millar v. McNally* (1991), 3 B.L.R. (2d) 102 (Ont. Gen. Div.)". This may be appropriate for a factum but is not appropriate for a pleading. It is also not saved by rule 25.06(2) which permits a party to "raise any point of law in a pleading". This footnote goes well beyond a point of law into legal argument. It is to be removed from the proposed pleading.

Footnote 81

[17] The plaintiffs describe Kailash Kasal as "a prominent and important non-party … who figures prominently in the full narrative of the Gawris' claim" (see paragraphs 16 and 17 of the proposed pleading.)

[18] Paragraph 100(a)(iii)(2) states: "In May 2019, when Suresh expressed the Gawris' May 2019 Complaints and his general dissatisfaction with Ray to Ray's partner Kasal. Kasal, in response: a. agreed with Suresh that: iii that the Gawris' outstanding obligation to remit a $250,000 shortfall on their Islington shareholder loan was not required given Ray's: (2) April 2019 report acknowledging that he had not contributed equally with the Gawris to the Islington [FN 81] and that $9.97M of Islington proceeds were sitting in the Islington's bank accounts."

[19] Footnote 81 sets out the plaintiffs' argument as to why they had no obligation to make any further contribution, what Ray should have done had there been a shortfall and why Ray was obliged to fix the issue at all. Specifically, it states: "and to the extent, if any that further contribution by the Gawris was required, it was, really Ray's obligation to fix and remedy (as the Gawris agent in control of the Gawris Oakville and Islington proceeds and profits) by routing the Gawris' acknowledged profit and proceed distribution entitlements in the Oakville and Islington to the Gawris' Islington shareholder loan". Presumably, this is the argument the plaintiffs will advance at trial as to why they were not required to make any further contribution. It is not a material fact and is to be removed from the proposed pleading.

Footnote 82

[20] Paragraph 104(b)(ii) pleads: "While the Plaintiffs were kept completely in the dark at the time (as per Ray's standard procedure) and were not entirely sure of the exact account categories or mechanics of how Kasal would obtain $3.3M from Ray towards their $4M investment in the Niagara Corps, the Plaintiff's [sic] were aware that Ray owed the Plaintiffs [sic] money, from, at least the following account categories, at the time: b. pursuant to Ray's April 9, 2019 reporting to the Gawris, (ii) Ray had acknowledged that $9.97M in mortgage refinancing proceeds were sitting in the Islington's bank accounts (FN 82)…."

[21] Footnote 82 states: "Which, pursuant to the Gawris original verbal agreements with Ray, the Gawris expected, at least some portion of which to be shared with them." Paragraph 104(b)(ii) already states that" the plaintiffs were aware that Ray owed the [plaintiffs] money." This footnote is the evidence they propose to lead in support of that position that Ray owed them money – there was an "original verbal agreement". This purported rationale is not a material fact but the means by which the plaintiffs intend to prove their allegation. It is to be removed from the proposed pleading.

Footnote 83

[22] Paragraph 105(a) of the proposed pleading states: "But, because Suresh had not yet discovered, by July/August 2019, the full extent of: (a) the $48.6M BMO mortgage [FN 83] … Suresh simply presumed that Kasal would obtain the remaining $3.3M to $3.5M balance owing for the acquisition of their Niagara Interests from Ray from some combination of the Oakville's repayment of the Gawris' $2.8M Oakville Shareholder Loan and the remaining $500,000 to $700,000 outstanding balance from some combination of

profit sharing from Oakville and Islington and/or from a portion of the Islington's $9.97M mortgage refinancing proceeds purportedly sitting in the Islington's bank accounts….."

[23] Footnote 83 states: "at this point in time the Gawris' were merely aware of what Ray had reported to them in April 2019: a new $25.17M Mortgage and $9.97M of mortgage proceeds sitting in the Islington's bank accounts." This is not a material fact. This is, at best, evidence the plaintiffs will present about when they knew certain information. The plaintiffs argue that this footnote specifies their awareness at a point in time. That is already pleaded in paragraph 105(a) which states that the plaintiffs had not discovered this issue by July/August 2019." Footnote 83 is to be removed from the proposed pleading.

Footnote 86

[24] Paragraph 114 of the proposed pleading states: "Also, in May 2019, Kasal, acting as agent on behalf of Ray acknowledged to Suresh Gawri that because: (a) the Gawris had contributed $3.25M (at that point in time) relative to Ray's acknowledged $2.68M [FN 86] the Gawris were absolved of the requirement to contribute any more money towards their ISL, and in fact, if any further funds were owing by the Gawris towards their ISL, Kasal confirmed, it was Ray's responsibility to route these funds to the credit of the Gawris ISL from the Schedule B Companies' profits and proceeds."

[25] Footnote 86 states: "purportedly acknowledge [sic] as contributed by Ray in his April 2019 reporting to the Gawris - but without records evidencing his contributions; accordingly not acknowledged as accurate by the Gawris". This is the evidence the plaintiffs will lead concerning Ray's contribution. Further, it is inconsistent with the paragraph to which it refers. Paragraph 114 references Ray's "acknowledged" $2.68M contribution. Footnote 86 then challenges that statement, arguing that it may not be acknowledged because the plaintiffs were not given records. It is not possible for the defendants to plead to this paragraph with the addition of footnote 86. For both of these reasons, footnote 86 is to be removed from the proposed pleading.

B. Paragraphs in issue - 20-22, 23, 24, 25, 27, 29, 64, 96, 104(c), 108, 109, 111, 117, 118, 123 and paragraphs 124-129

Paragraphs 20 to 22

[26] These paragraphs reference a settlement that the plaintiffs reached with Kasal. The settlement does not involve these defendants. In addition to explaining why Kasal "figures prominently ... notwithstanding the plaintiffs' settlement of their known claims against him", these paragraphs purport to set out representations that Kasal and Ray are alleged to have made to the plaintiffs about their relationship.

[27] Paragraph 20 pleads that "as a result of their settlement with Kasal, the Plaintiffs are hopeful and optimistic that no unknown claims will arise in respect of Kasal, during the course of this proceeding, that will require them to seek leave to add Kasal as a party to a further amended iteration of this herein claim." That the plaintiffs are hopeful and optimistic that they may not have to sue Kasal in future is irrelevant to this proceeding.

The plaintiffs argue that these paragraphs provide context. They do not. Nor would that make them appropriately included in a pleading.

[28] These paragraphs do not contain material facts. The plaintiffs do not allege that the defendants are liable for the acts of Kasal (even though they plead that Ray described Kasal as both his partner and his agent) or that the defendants somehow induced the plaintiffs to settle with Kasal.

[29] Paragraphs 20-22 are to be removed from the proposed pleading.

Paragraphs 23 and 24 under the heading Procedural History of this Action

[30] The fact that this action consolidates three statements of claim (even if true) and that the defendants did not plead to the three earlier actions is not a material fact and, likely not even relevant. Further, the use of "consolidation" suggests some merger of the other actions which is incorrect. This proposed amendment is the only pleading going forward. The paragraphs are to be removed from the proposed pleading.

Paragraphs 25, 27 and 29 under the heading General Overview/20,000 Foot View

[31] Paragraph 25 is an unnecessary introduction, more properly in a factum, and cannot be admitted or denied by the defendants. It is to be removed from the proposed pleading.

[32] Paragraph 27 pleads that Ray did not tell the plaintiffs that he intended to "succeed at the Gawris' expense by exploiting the Gawris' misguided trust in him as well as every last ounce of value …" This could be material to the claims for breach of fiduciary duty and may remain in the proposed pleading.

[33] Paragraph 29 is a summary of the alleged fraud. Looking past the hyperbole, the subparagraphs (a) and (b) purport to set out Ray's alleged misrepresentations to the plaintiffs and his rationale for making the misrepresentations. Given the claim of fraudulent misrepresentation, the subparagraphs may remain in the proposed pleading. The introductory, summation portion of paragraph 29 is argument and is to be removed from the proposed pleading.

Paragraph 64

[34] This paragraph concerns the Gawris' alleged entitlement to the Oakville Deposits. The plaintiffs' position is fully set out in the preceding four paragraphs which state that the agreement was conditional on receiving documentation from Ray, they never received the documentation from Ray and they never waived their right to the documentation. Paragraph 64 purports to explain why the plaintiffs don't believe Ray's explanation without being provided with records. This is not a material fact, as the plaintiffs' position is they are entitled to the records. At best it is argument or a trial submission and is to be removed from the proposed pleading.

Paragraph 96 under the heading Ray's Contrived Schemes to Strip the Gawris of their Interests in the Schedule B Companies

[35] Paragraph 96 pleads:

> "96. The Plaintiffs state that Ray's schemes purporting to strip the Gawris of their shareholding interests in the Schedule B Companies fit the classic definition and indicia of oppression[78] and follow the similar fact pattern of other contrived claims by Ray like fraudulently overstated acquisition costs, inflated renovation costs, understated mortgage amounts, fraudulent under-reporting of the Islington's revenue, fraudulent under-reporting of the City's occupancy - all aimed at concealing Ray's wrongdoings as pled herein. Ray's denial of the Gawris' status, as shareholders of the Schedule B Companies, are designed to allow Ray to continue to avoid distributing profits/proceeds and escape legal accountability. Such schemes benefit Ray enormously while causing further loss to the Gawris. Given Ray's history of fraudulent claims when it suits his interests, his novel 2020 to 2021 denials of the Gawris' clearly evidenced shareholding interests fits the same pattern of dishonesty and fabrication. It matches his modus operandi of doing whatever it takes to misappropriate funds and assets and misrepresent to conceal his misappropriation and evade obligations to the Gawris. Ray's conduct, at all material times demonstrates a clear propensity for fraudulent assertions when beneficial to him. His denial of the Gawris' status as shareholders aligns with his past willingness to make contrived claims for his own gain. This context strengthens the conclusion that his denial of the Gawris' status as shareholders is another self-serving fabrication."

[36] The plaintiffs argue that paragraph 96 contains similar fact evidence and is therefore appropriate. It does not. It recites facts already pleaded. These are not materials facts, nor are the conclusions of law. They are argument, a conclusion strengthened when one notes the reference to case law in the footnote to this paragraph – "as adopted by the Court of Appeal in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, 2006 CanLII 15 (ON CA), [2006] O.J. No. 27 (C.A.) at para. 92 and enunciated by Greer J. in *Millar v. McNally* (1991), 3 B.L.R. (2d) 102 (Ont. Gen. Div.)." Paragraph 96 is to be removed from the proposed pleading.

Paragraph 104(c)

[37] The subparagraphs of paragraph 104 are said to be "account categories" from which Ray allegedly owed the plaintiffs money. Instead, subparagraph (c) appears to be the plaintiffs' argument as to why Ray did not give them their profit entitlement. This is the conclusion they will ask the trial judge to draw. The first sentence of subparagraph (c) may stand. The remainder starting with "(By April 2021" to the end of subparagraph (c) are not material facts and are to be removed from the proposed pleading.

Paragraphs 108, 109, 111, 117 and 118 under the Heading The Oppressive Tyranny of Ray's Contrived Scheme to Strip the Gawris of their Islington Interests

[38] The preamble to paragraph 108 is argument and not something to which the defendants could plead. That portion is to be removed from the proposed pleading and paragraph 108 will begin "In May 2018….

[39] Paragraph 109 commences with the plaintiffs' statement about what is "settled law" and speaks the "impossible onus" that Ray faces in rebutting this settled law. This is not a material fact. It is legal argument for a factum. Paragraph 109 is to be removed from the proposed pleading.

[40] Paragraph 111 pleads that "Ray only denied the Gawris' shareholder status in June 2021 after learning that they had commenced legal action against him. This timing suggests his denial of the Gawris' status as shareholders is, again, a tactic to avoid legal accountability rather than a tenable legal position." The first sentence may remain. The plaintiffs suggest that the second sentence provides full particulars of the alleged fraud. It does not. It is pure argument and is to be removed from the proposed pleading.

[41] Paragraphs 117 and 118 are arguments as to why the plaintiffs should not be required to contribute $250,000 toward the Islington property. Ignoring the hyperbole again, I would allow these paragraphs to stand as they seem to respond to a demand for payment.

Paragraphs 123-129 under the heading Ray's Partner Wei Wei and the Risk of Illegal Gambling at the Edward where City of Toronto Refugees are Still Housed

[42] As noted earlier, the plaintiff agreed to remove proposed paragraph 123. The remaining paragraphs allege that Ray had a partner, the partner was charged running an illegal casino, the charges were dropped, but the plaintiffs are concerned that Ray might have intermingled the plaintiffs' money with the partner's money and in future the government may try to seize the partner's Edwards property because of his wrongdoing on some other property.

[43] Paragraph 128 pleads: "The Plaintiffs have more recently received additional new information that Wei Wei maintains an entire floor to himself in the Edward that is closed-off to regular hotel staff and that sees unusual characters, who are not hotel guests entering and exiting the floor at late hours during the week and at all hours on weekends."

[44] The plaintiffs argue that this is similar fact evidence but could not say of what. They argued that the pleading should remain as the fact scenario is disconcerting and they would like more information about it and they are "gravely concerned" that the alleged constructive trust interest may be devalued should these forfeiture fears relating to the partner come to pass. None of these eight paragraphs contain material facts and are to be removed from the proposed pleading.

[45] Further, paragraphs 123 and 124 were not blacklined as required and do not appear in the original pleading. The plaintiffs argued that they are the "rewording" of original

paragraphs 47 and 49. That are not. This is why they were required to be blacklined. They should be struck on that basis alone.

[46] On a similar note, paragraphs 34 and 35 were not blacklined and are new. Counsel advised they were "an elaboration" of paragraph 17 of an earlier version of the statement of claim. As they were not blacklined, as ordered on 28 March 2024, these two paragraphs are to be removed from the proposed pleading. The same is said for paragraphs 14 and 15 and the many un-blacklined subparagraphs of paragraph 48. The plaintiffs may revert to the original language of the earlier versions of these paragraphs should they wish, but these amendments are not permitted.

[47] In their second reply factum, the plaintiffs attempted to seek an amendment to the proposed pleading to make changes to subparagraph 67(q). This is inappropriate. It was not requested in the notice of motion or any amended notice of motion. New relief is not requested by including it in a factum. No amendment to subparagraph 67(q) is granted.

Costs

[48] Costs of the first motion heard 31 January 2024 were reserved to the hearing of this motion. The plaintiffs did not upload a bill of costs for that motion but promised to do so by the end of day 31 January 2024. As of the release of the decision on that motion on 15 March 2024, they still had not done so. Nor did they provide that bill of costs by the commencement of this motion or a bill of costs for this portion of the motion.

[49] Although I advised counsel for the plaintiffs that I would not entertain costs of this motion given they had not uploaded a costs outline for the second time, it appears they then uploaded a bill of costs to case centre on July 22, after the conclusion of the hearing. It is identified as from "the respondent, 2035881 Ontario Inc." The plaintiffs were the moving parties, not the respondents, and 2035881 Ontario Inc. is not a party to this proceeding in any event. I have not considered this bill of costs.

[50] While the plaintiffs were the more successful party on the first motion, I make no costs order in their favour due to their repeated failure to provide me with a bill of costs.

[51] On this portion of the motion, the defendants were very largely successful. To the extent the plaintiffs' bill of costs dated June 21 and uploaded July 22 was useful, it gave context to the amount sought by the defendants, as the plaintiffs' bill amounted to $153,171.90. The defendants sought less than half that amount, $64,926.93 on an all-inclusive partial indemnity basis. Give the moving targets to which the defendants had to respond, I find the time spent and the costs incurred to be an appropriate amount for the plaintiffs to pay the defendants and well within the plaintiffs' reasonable expectations. Costs of $64,926.93 will be paid by the plaintiffs to the defendants within 30 days of today's date.

Associate Justice Jolley

Date: 6 August 2024