

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
ATLAS DEWATERING CORPORATION)	
Applicant)	B. Greenberg, for the Applicant
)	
– and –)	
)	
JEAN LUC BLANCHARD and)	M. Benson, for the Respondent
LYSANDRE WODICKA)	
Respondent)	
)	
)	HEARD: June 27, 2024, virtually

2024 ONSC 4217 (CanLII)

REASONS ON SUMMARY JUDGMENT MOTION

McCARTHY, J.

The Motion

- [1] The Plaintiff moves for summary judgment against the Defendants. More specifically, the Plaintiff seeks an order: (i) declaring that the Plaintiff’s claim for breach of trust should not be compromised pursuant to the provisions of section 50(15) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“the BIA”); and (ii) granting judgment in the sum of \$72,960.09 which represents the balance owing to the Plaintiff for services provided to the Defendants.

- [2] The Plaintiff states that there is no genuine issue requiring a trial of the claim framed in its pleading.

- [3] The Defendants oppose the relief sought, suggesting that there are genuine issues requiring a trial: principally whether the Defendants engaged in wrongful conduct which might trigger the setting aside of the compromise of claims against the Defendants as directors of the company which was included in a consumer proposal filed by the company.

Background

- [4] The Plaintiff was a sub-contractor/supplier on a project in Smith Falls in 2018 and 2019 (“the project”) during which it supplied rental equipment and services worth \$103,931.75. The Defendants were the directors and principals of Gestion Pontiac Inc. (“Gestion”) which was the contractor on the project.
- [5] Gestion received payments in excess of \$2.8 million on the project from the project owner but failed to pay any amount to the Plaintiff for its services. It used the payments instead for its day-to-day operations and to meet its other ongoing obligations.
- [6] Gestion then delivered a notice of intention to file a proposal (“the proposal”) pursuant to the BIA which was accepted by Gestion’s creditors (including the Plaintiff) on July 3, 2019, and approved by the court. Pursuant to the proposal, the Plaintiff received payment in the sum of \$30,971.66.
- [7] The proposal contained a compromise (“the compromise”) [or “quittance” in the French language original] which purported to release all claims against the directors of Gestion which arose prior to the proposal.
- [8] On April 20, 2020, the Plaintiff issued the present claim. While acknowledging the proposal and the amount recovered under it by the Plaintiff, the claim goes on to assert that the Defendants’ breach of trust provisions under the *Construction Act*, R.S.O. 1990, c. C.30, leaves them liable for the balance of the amount owing to the Plaintiff for the goods and services it supplied to the project.

Summary Judgment

- [9] The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. This will be the case when the process: (i) allows the judge to make necessary findings of fact; (ii) allows the judge to apply the law to the facts; and (iii) is a proportionate, more expeditious and less expensive means to achieve a just result. In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and the judge may: (i) weigh the evidence, (ii) evaluate the credibility of a deponent; and (iii) draw any reasonable inference from the evidence, unless it is in the interest of justice for such powers to be exercised only at trial.

The Construction Act

- [10] Pursuant to section 8(1) of the *Construction Act*, all amounts received by a contractor or subcontractor on account of the contract or subcontract price of an improvement constitutes a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.
- [11] Pursuant to section 8(2) of the *Construction Act*, a contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the funds to the contractor’s or subcontractor’s own use

or to any use inconsistent with the trust until all subcontractors and other persons who supplied services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

- [12] Every director or officer of a corporation who assents to or acquiesces in conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for breach of trust: s. 13(1) of the *Construction Act*.
- [13] The Plaintiff submits that by assenting to or acquiescing in conduct which they knew or ought to reasonably have known amounted to a breach of trust, the Defendants are personally liable to the Plaintiff for breach of trust under to s. 13(1) of the *Construction Act*.

The BIA

- [14] A compromise of claims against directors that arose before the commencement of proceedings BIA may be included in a consumer proposal under s.50(13) of the BIA. However, a provision for a compromise of such claims may not include claims that, *inter alia*, are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors: s.50(14) of the BIA.
- [15] Pursuant to Section 50(15) of the BIA, the court may declare a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances. The Plaintiff submits that the breach of the Defendants' trust obligations under the *Construction Act* amounts to either misrepresentation or wrongful conduct under section 50(14) of the BIA which should allow the Plaintiff's action to succeed despite the automatic stay of proceedings engendered by the accepted consumer proposal by virtue of under s. 69.31(1) of the BIA.

Discussion

- [16] I am not prepared to grant summary judgment.
- [17] In my view, given the wording of the applicable sections of the BIA and the *Construction Act*, coupled with the circumstances surrounding the consumer proposal and compromise, the court should undertake an assessment of the credibility of the actors involved in the events in question. This is best done at a trial of the issues.
- [18] While the evidence establishes that the Defendants knew about the outstanding amount owing to the Plaintiff and certainly were responsible for the decision to use the trust funds for ongoing operations, the issue of whether the Defendants were guilty of misrepresentation or engaged in wrongful or oppressive conduct sufficient to trigger the relieving provision of s. 50(15) of the BIA remains a triable issue.
- [19] Section 13 (1) of the *Construction Act* does indeed expose directors and officers of corporations to personal liability for breach of trust but only in circumstances where that officer or director, "...assents to, or acquiesces in, conduct that **he or she knows or**

reasonably ought to know amounts to breach of trust by the corporation” (emphasis added).

- [20] In most circumstances, absent an admission or something highly compelling, the question of whether a person possessed knowledge or should have that knowledge imputed to them, and the question of whether there was misrepresentation or wrongful conduct, should be determined by a trier of fact after a consideration and assessment of at least some *viva voce* evidence and some accompanying findings of credibility. Any fulsome analysis of “misrepresentation” would require a court to not only scrutinize what the Defendants did or said which might constitute a misrepresentation but also whether the Plaintiff relied upon that representation to its detriment. Such an exercise is best undertaken by a trial judge who can assess the credibility of the actors providing their respective versions of events.
- [21] There remains a triable issue of whether the parties intended and understood themselves to be bound by the “quittance” or compromise in the consumer proposal from the trustee’s office. The original French text of the “quittance” reads as follows:
- “...la proposition constitue une transaction sur toute réclamation contre les administrateurs, actuels ou anciens, de la Proposante dont ils peuvent être, es qualités, responsables en droit. Par ailleurs la proposition, dès son approbation consistera une quittance en faveur de tout administrateur actuel or ancien relativement à de telles obligations.”
- [22] In light of that wording of the “quittance”, there is assuredly a genuine issue of what the Plaintiff knew, understood or intended when it completed the proof of claim form dated July 3, 2019, and described itself as an unsecured debtor “without priority” for the sum of over \$103,931.75. On that same form, the Plaintiff omitted any claim against the directors of the company. It remains to be determined whether the Plaintiff knew or ought to have known of their breach of trust claim at the time of executing the proof of claim form and why it chose not to set out any requested details of why it opposed any compromise against the directors under s.50(13) of the BIA.
- [23] It will be essential for the trial judge to assess the credibility of the Plaintiffs evidence in this regard. It would be unfair to both the Defendants and to the other creditors if the Plaintiffs were impressed with knowledge at time of the accepting the proposal which should have caused them to reject it on the basis that they had surviving *Construction Act* trust rights, or that there had been misrepresentation or wrongful conduct by the directors sufficient to set aside the compromise. The evidence of the trustee might also be essential for a determination of that issue. Only upon a more fulsome evidentiary record would a court be in a position to determine whether it is just and equitable in all the circumstances to set aside the compromise.
- [24] There is also an overarching question about whether the trust provisions of the *Construction Act* survive the acceptance of a consumer proposal. In my view, this is a mixed question of fact and law. Any consideration of the survival of rights of a person

benefitting from *Construction Act* trust provisions should be accompanied by an assessment of the Plaintiff's understanding of the circumstances surrounding the consumer proposal and the reasonable expectation of the parties to the proposal, which is after all, a contract. Such a consideration might also entail the evidence of the trustee and the other creditors who were also parties to the proposal. In the circumstances of this case, an assessment of a such evidence would be required before a court could fairly determine whether it would be "just and equitable in the circumstances" to set aside the compromise of claims. After all, justice and equity are not limited to a consideration of only the rights and interests of the parties to the present claim but to the multiple creditors who accepted the compromise.

Disposition

- [25] In summary, there are genuine issues requiring a trial here: (i) the reasonable expectation of the parties in making and accepting the proposal and compromise; (ii) whether the Defendants knew or ought to have known that their conduct amounted to a breach of trust under the *Construction Act*; (iii) whether the Defendants engaged in wrongful or oppressive conduct; (iv) whether it is just and equitable that the compromise of the claims against the defendant directors should be set aside; and (v) whether the Plaintiff's rights under the trust provisions of the *Construction Act* should survive its acceptance of the consumer proposal and compromise.
- [26] I am not prepared to order that this matter proceed by way of mini-trial. In my view, there is little to be gained for conducting such an exercise which will not save any appreciable time or spare scarce judicial resources. This matter should proceed to trial in the conventional way.
- [27] I am unable to conclude that I would be in a better position than a trial judge to decide the issues raised by the pleadings and the evidence that I have reviewed. It is in the interest of justice that the above identified issues be determined at a trial.
- [28] The motion is dismissed, and the matter shall proceed to trial of the issues as framed in the pleadings. Either party may set the action down for trial and request a pre-trial date.
- [29] If the parties are unable to agree on costs, they shall take out an appointment to address that issue before me through the trial coordinator at the Newmarket Superior Court of Justice.

McCarthy J.

Released: July 26, 2024