CITATION: Conti v. Daytona Auto Centre Ltd., 2024 ONSC 4564
COURT FILE NO.: CV-23-00697033
DATE: 20240819

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Massimo Conti, Appellant

– AND –

John Duca, Joseph Duca, and Daytona Auto Centre Ltd., Respondents

BEFORE: Justice E.M. Morgan

COUNSEL: *Gregory Gryguc*, for the Appellant

Joseph Duca, on his own behalf

Sergio Grillone, Intervener

HEARD: August 16, 2024

ENDORSEMENT

[1] The Appellant appeals from the Order of Associate Justice McGraw dated November 29, 2023, vacating a certificate of pending litigation ("CPL") from title to a property located at 53 Grampian Crescent, Toronto (the "Property"): *Conti v. Duca*, 2023 ONSC 6626.

[2] The Associate Justice, in an unusual ruling, allowed the Respondents' former lawyer, Sergo Grillone, to intervene in the motion. Mr. Grillone deposed, and the Defendants concur, that the Defendants owe him outstanding legal fees and had undertaken to him to pay him from the equity in the Property once it is sold. The Associate Justice determined that that was enough of an interest in the matter for Mr. Grillone to have standing to make submissions at the motion under Rule 13.01(1) of the *Rules of Civil Procedure*.

[3] In addition, the Associate Justice assessed that, having regard to the nature of the claim and the issues on the motion, it was likely that Mr. Grillone could make a useful contribution to the submissions on the motion: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co*. (1990) 70 OR (2d) 164. I am not inclined to second guess that assessment. And while there is an element of bootstrapping in my saying so, the Associate Justic was right. Mr. Grillone's factum and oral

submissions were indeed helpful in this Appeal and it appears to me that they were equally helpful to the Associate Justice.

[4] There is an element of discretion in permitting an intervenor to participate in a matter before the court. I conclude that the Associate Justice exercised his discretion properly and committed no legal or factual error in allowing Mr. Grillone to intervene.

[5] The Appellant was an employee of the Respondents' when he first moved to Canada from Italy. In his Statement of Claim he alleges that he entered into a verbal agreement with the two individual Respondents by which they would purchase the Property and the Appellant would live there and pay all related costs and the Property would eventually be transferred to him. The Appellant pleads that the eventual transfer of title to the Property was part of his employee compensation package.

[6] In early 2023, the Appellant left his job with the Respondents and took a new job. He continued to reside at the Property.

[7] In mid-March 2023, the Respondent, Joseph Duca, advised the Appellant that he planned to sell the Property and offered the Appellant the opportunity to purchase it or to enter into a rental agreement. That offer was responded to by the Appellant on March 22, 2023, when his lawyer sent Joseph correspondence advising him that he was asserting an ownership interest in the Property. The following week, on Marh 29, 2023, Joseph commenced proceedings to terminate the Appellant's tenancy by delivering a Notice to End Tenancy and an Eviction Notice requesting the Appellant to vacate the Property within 7 days.

[8] Two days later, on Friday, March 31, 2023, Appellant's counsel filed a Motion Record with the court with an urgent request for a CPL. That motion was requested to be in writing, but the court indicated that an urgent motion should be spoken to in court. The Associate Justice relates in his endorsement that he received the motion record that same day in his capacity as Duty Associate Judge for urgent motions. At paras. 7 and 24 of his endorsement, *ibid*., the Associate Justice explains:

> After my review, I asked [Appellant]'s counsel through the court office if the Motion was being brought on notice and if they had canvassed dates with the [Respondents]. Counsel replied: 'the motion will be brought on notice, however, there has been no response from the opposing party and they do not have counsel at this time so effectively it is without notice.' I directed that the Motion be added to my Regular Motions list on April 3, 2023, for 20 minutes on notice to the [Respondents]…
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> The Motion proceeded in Joseph's absence and he received the Order and the April 3 Endorsement later on April 3.

[9] The April 3, 2023, endorsement is a short one and is unpublished. It states, in part: "The [Respondents] are on notice of this motion and this attendance, were short served and have not responded." As the Associate Justice relates in his November 29, 2023, endorsement: "This was based on representations by [Appellant's] counsel in email correspondence to the court on March 31 that the Motion would proceed on notice and counsel advising the court at the April 3 hearing that the [Respondents] had been provided with notice of the virtual hearing": *Ibid*., at para. 23.

[10] The next appearance in this matter was at a telephone case conference with the Associate Justice on April 11, 2023. Joseph advised that the Respondents would be bringing a motion to discharge the CPL. After several adjournments and scheduling discussions, the motion under appeal here was heard by the Associate Justice on November 29, 2023.

[11] In his November 29 endorsement, the Associate Justice explained that at this point he finally came to understand why none of the Respondents had attended at the hearing of April 3, 2023, when the Appellant sought the order authorizing the CPL. As he put it, "Although [Appellant's] counsel uploaded [to CaseLines] an amended Motion Record, Notice of Motion and a draft order on March 31 indicating that the hearing was proceeding virtually on April 3, these materials were not served on or provided directly to the [Respondents]… the [Appellant] did not take any steps to advise Joseph or any of the [Respondents] directly after being advised by the court that the Motion would proceed by virtual hearing on April 3": *Ibid*.

[12] At the hearing Joseph acknowledged receiving a CaseLines notification that materials had been uploaded, and he confirmed that he had been able to access the motion materials. But it turned out that the Notice of Motion that he was able to access was the Appellant's initial one for an in-writing motion. The Respondents never got notice of the April 3 attendance before the Associate Justice.

[13] The Associate Justice was understandably concerned about this non-disclosure. The Respondentsa did not have proper service of the motion. CaseLines notification is not a replacement for proper notice – especially where CaseLines linked the Respondents to a Notice of Motion that did not contain the hearing date. More than that, however, Appellant's counsel had specifically advised the Associate Justice that the motion was on notice, and apparently did not clarify the matter when attending before him on April 3rd.

[14] In *Moses v Metro Hardware and Maintenance Inc*., 2020 ONSC 6684, at paras. 2-3, Justice Myers observed:

> [2] The plaintiffs obtained the order for the issuance of the CPL without notice to the defendants. In doing so, the plaintiffs made no effort to fulfill their duties to make full and fair disclosure of all material facts to the Master. They failed to disclose material facts of which they were aware. They did not identify any of the defendants' likely responses to their evidence and allegations. They relied improperly on inadmissible evidence.

> [3] There was no necessity for the plaintiffs to bring the motion for a CPL without notice. Having chosen to do so, as they were entitled to do, the plaintiffs voluntarily and knowingly undertook the extra obligations under Rule 39.01 (6) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, to make full disclosure and fair disclosure of the facts and law to the Master. They did not even try to meet these obligations. Therefore, on that basis alone, the order should be set aside and the CPL discharged.

[15] Likewise in the case at bar, Appellant's counsel failed to meet the disclosure obligations that come with a motion that was, in effect if not in intent, without notice. They did not advise the Associate Justice of the state of affairs in respect of non-service of the motion materials. They may not have been required to provide notice of the CPL motion, but having decided to do so, and having assured the Associate Justice that they had done so, full disclosure that they had ultimately not given proper notice was called for.

[16] Without that disclosure, the Associate Justice was not in a position to understand that the Respondents may have had a defense to the motion and the claim. He would have been entitled to assume that the Respondents' absence from the April 3rd hearing indicated that they have nothing to say in response to the motion. For that reason alone, the CPL was rightly discharged at the next appearance on November 29, 2024.

[17] In his endorsement, the Associate Justice went on to indicate that even without the non-service issue he would have discharged the CPL. As he described it, there are so many errors in the affidavit and other materials filed by the Appellants that it is hard to follow. For example, the motion material identifies the wrong party as the president of the corporate Respondent. At paras. 29-31 of his November 29, 2023, endorsement, the Associate Justice states:

> [29] At paragraph 2 of the Affidavit, the [Appellant] incorrectly states: "…the [Respondent] Daytona Auto Centre, and the [Respondent] Joseph Duca, the President, an Officer and Director, of, offered to bring me to Canada to work for them." Further, at paragraph 3 of the Affidavit, the [Appellant] states:
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> > "…I entered into an agreement with Joseph Duca and his son the [Respondent] , John Duca for him to purchase the Property in his name for me, on the understanding I will be satisfying all associated costs and eventually the property would be transferred back to me ["Agreement"]."
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> [30] At paragraph 4 of the Statement of Claim, Joseph, though correctly referred to as John's son, is again incorrectly referred to as "the President (Officer/Shareholder) and Director of [Respondent] Daytona".
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> [31] There is no dispute that these statements are incorrect. Joseph is not the President of DACL and John is not his son. John is the President of DACL and Joseph is his son. Joseph is currently an employee of DACL. He has been an

> employee of DACL since 2018-2019 and was working at RBC at the time the [Appellant] was hired. He had no involvement in the [Appellant]'s hiring and was the [Appellant]'s co-worker at DACL. It was Joseph's father John who hired the [Appellant] and negotiated the terms of his employment.

[18] He then relates an attempt by Appellant's counsel to file an affidavit of their own correcting the errors, which ended up repeating the errors and making matters more confusing. The Associate Justice finally concludes in respect of all of this, at para. 34: "The greater issue is that the court relied on the incorrect evidence and information in the Affidavit and the Statement of Claim in granting the CPL. Even accepting that the incorrect statements were made out of mistake or inadvertence (I make no finding in this regard), they were material to the consideration of the Motion."

[19] Given the non-disclosures and the numerous, significant misstatements of fact contained in the Appellant's motion record below, the Associate Justice made no error in discharging the CPL. He could not in good conscience let it stand in view of the lack of full and frank disclosure and the filing of an inaccurate evidentiary record by the Appellant.

[20] The appeal is dismissed.

[21] The parties may make written submissions on costs. I would ask Mr. Duca and Mr. Grillone to send by email to my assistant brief written submissions within two weeks of today, and for Appellant's counsel to send by email to my assistant brief written submissions within two weeks thereafter.

Date: August 19, 2024 **Morgan J.**