

**CITATION:** Nanny & Eldercare Services Inc. v. Walsh Business & Tax Management Ltd.,  
2024 ONSC 5563  
**COURT FILE NO.:** CV-23-708507-0000  
**DATE:** 20241007

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
NANNY & ELDERCARE SERVICES INC. ) *J. Toso*, for the Plaintiff  
)  
Plaintiff )  
)  
– and – )  
)  
WALSH BUSINESS & TAX )  
MANAGEMENT LTD., ANDREW )  
WALSH and ARTHUR WALSH )  
)  
)  
Defendants ) **HEARD: In Writing**  
)  
)

2024 ONSC 5563 (CanLII)

**REASONS FOR JUDGMENT**

**CHALMERS, J.**

**OVERVIEW**

[1] The plaintiff Nanny & Eldercare Services Inc. (Nanny) brings this motion for default judgment against the defendants Walsh Business & Tax Management Ltd., (Walsh Business) and Andrew Walsh (Walsh).

[2] Nanny provides nanny recruitment services to families requiring childcare and eldercare assistance. Nanny retained Walsh and his company, Walsh Business as its bookkeeper in 2019 until 2023. Nanny terminated the relationship after discovering that Walsh and Walsh Business had misappropriated money that had been sent to them in trust for the benefit of the Canadian Revenue Agency (CRA).

[3] Between January 28, 2020 and February 24, 2023, Nanny sent a total of \$318,278.18 (the CRA Trust Money) to Walsh and Walsh Business. The funds were to be paid to the CRA for corporate taxes, HST and payroll deductions.

[4] In February 2023, Nanny was contacted by a representative of the CRA who advised that Walsh and Walsh Business had not provided the CRA with a T4 summary. Nanny was advised that no HST, payroll or corporate taxes had been remitted to the CRA since 2019. Nanny contacted Walsh who advised that the remittances had been made but there had been a mistake made by the CRA. He claimed that the money had inadvertently gone to a wrong CRA account.

[5] The CRA conducted a trust examination of Nanny's payroll accounts on August 15, 2023. Walsh did not present any evidence to the CRA that the money had been remitted but went to the wrong account. On August 31, 2023, the CRA released its findings of the investigation. The findings confirm that the payroll taxes had not been paid to the CRA. Nanny later learned that in addition to the payroll taxes, no HST or corporate taxes had been remitted by Walsh and Walsh Business to the CRA. The CRA charged penalty and interest as a result of the non-payment. As of August 31, 2023, the penalty and interest charge was \$21,594.45.

[6] The plaintiff caused the Notice of Action to be issued on October 27, 2023. The Statement of Claim was filed on November 15, 2023, and was served on the Defendants by personal service on November 16, 2023. The Defendants did not deliver a Statement of Defence.

[7] The matter first came before me on November 10, 2023. The plaintiff brought a *Mareva* injunction without notice. By endorsement dated November 14, 2023, I granted the relief sought. I found that the plaintiff had satisfied the test for civil fraud.

Here, the evidence provides that the Funds were transferred to the Defendants for the benefit of the CRA. The Funds were not remitted to the CRA, and when asked to provide documentation as to where the Funds were sent, the Defendants failed to provide the documentation.

I am satisfied that the evidence on this motion supports a strong *prima facie* case for fraud.

[8] The matter returned before me on November 20, 2023. Walsh was in attendance. I continued the injunction. I also ordered Walsh to provide an affidavit as to assets and to provide the name of the individual at the CRA who was trying to resolve the issue of the misplaced CRA payment. Walsh failed to comply with the order.

[9] Since the date of the *Mareva* order, I made five separate orders which required Walsh to provide documents and information to the plaintiff's counsel. He did not produce any of the documentation ordered. He did not provide the name of the person with whom he was dealing at the CRA. By endorsement dated April 5, 2024, I found Walsh in contempt of court.

[10] On June 24, 2024, Walsh and Walsh Business were noted in default.

[11] On September 3, 2024, the plaintiff brought the motion for default judgment. The motion record was served on Walsh and Walsh Business on September 9, 2024. Walsh and Walsh Business did not respond to the motion.

## ANALYSIS

### *Default Judgment*

#### *a. Liability*

[12] Nanny brings this motion for default judgment under R. 19.02(1)(a). On a motion for default judgment, the court must undertake the following inquiry:

- i. what deemed admissions of fact flow from the facts pleaded in the statement of claim;
- ii. do those deemed admissions of fact entitle the plaintiff, as a matter of law to judgment on the statement of claim; and
- iii. if they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitle it to judgment on the pleaded claim: *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, at para. 14.

[13] To establish civil fraud, a plaintiff must establish the following:

- a. a false representation made by the defendant;
- b. the defendant knew or was reckless as to the falsehood of the representation;
- c. The false representation causes the plaintiff to act; and
- d. the plaintiff's actions resulted in a loss: *Bruno Appliances and Furniture v. Hyrniak*, 2014 SCC 8, at para. 21.

[14] Walsh and Walsh Business were noted in default. Pursuant to Rule 19.02(1), Walsh and Walsh Business are deemed to admit the truth of the following allegations of fact made in the statement of claim:

- Nanny retained Walsh and Walsh Business to provide ongoing services to manage HST, payroll and corporate tax remittances to the CRA;
- Between January 2020 and February 2023, Nanny sent a total of \$318,278.18 to the defendants' accounts, in trust, for the CRA;
- Walsh and Walsh Business represented that the CRA Trust Money was being collected on behalf of the CRA and would be sent without deduction to the CRA;
- In February 2023 the CRA contacted Nanny and advised that it had not received the CRA Trust Money;

- Walsh stated that the CRA Trust Money was remitted to CRA but went into the wrong account. He did not provide any further information or documentation to support this explanation;
- On August 31, 2023, the CRA released its findings from a trust audit and confirmed that the defendants failed to remit any portion of the CRA Trust Money to the CRA;
- Nanny retained an accountant who confirmed that the CRA Trust Money was sent to the defendants but was not remitted to the CRA;
- The defendants accepted the CRA Trust Money on behalf of Nanny and owed a duty of fiduciary duty, and in failing to use the trust money for its intended purpose the defendants breached their fiduciary duty to Nanny;
- The CRA trust money was misappropriated and used for the benefit of the defendants to the detriment of Nanny;
- The defendants did not account for the money received from Nanny.

[15] The deemed admissions establish that Walsh advised Nanny that \$318,278.18 was owing to CRA. Nanny sent this amount to Walsh, in trust. Walsh stated that the money was collected on behalf of CRA and would be sent to the CRA. The funds were not sent to CRA. Walsh has not accounted for the funds.

[16] I am satisfied that the deemed admissions establish that Walsh and Walsh Business are liable to Nanny in fraud.

[17] Walsh and Walsh Business are also deemed to admit the allegation that they received the funds in trust and that they owed Nanny a fiduciary duty. The deemed admissions establish that Walsh and Walsh Business breached their fiduciary duty to Nanny.

[18] Section 178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the *Act*) provides as follows:

An order of discharge does not release the bankrupt from, [...]

d. any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity [...]

[19] I am satisfied that the deemed admission that Walsh and Walsh Business fraudulently misappropriated funds while acting in a fiduciary capacity justifies an order under s. 178(1) of the *Act* that the judgment survives any past, present or future assignment in bankruptcy. I am satisfied that this order is appropriate in the circumstances of this case even though Walsh has not yet declared bankruptcy: *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242, at para. 23.

***b. Damages***

[20] Nanny seeks its damages for losses directly caused by the actions of Walsh and Walsh Business. Nanny is also seeking punitive damages.

[21] Between January 2020 and January 31, 2023, Walsh Business charged Nanny, and Nanny paid the sum of \$12,922.14. Walsh was retained to provide bookkeeping services including managing corporate tax, payroll tax and HST accounts with the CRA. Walsh Business failed to provide those services. Nanny seeks a return of the money paid to Walsh Business. I am satisfied that Nanny is entitled to a return of the fees paid to Walsh Business.

[22] After discovering that Walsh Business and Walsh had failed to make the remittances to the CRA, Nanny retained Gera & Nirula PC, Chartered Professional Accountants (Gera & Nirula) for retroactive bookkeeping services. Gera & Nirula charged Nanny, and Nanny paid \$14,068.50. Gera & Nirula's services would not have been required had Walsh and Walsh Business not breached their duty to Nanny. I am satisfied that Nanny is entitled to reimbursement of the amount paid to Gera & Nirula.

[23] From 2019 to 2023, Nanny paid to Walsh and Walsh Business the sum of \$318,278.17. This was the amount to be remitted to the CRA for payroll tax, corporate tax and H.S.T. Nanny continues to owe this amount to the CRA along with interest and penalties. As of August 31, 2023, the interest and penalties totaled \$21,594.45.

[24] The plaintiff is not advancing a claim for prejudgment interest.

[25] The plaintiff seeks an award of punitive damages. The Supreme Court of Canada stated in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18 that the purpose of punitive damages relates to retribution, denunciation and deterrence. Punitive damages are awarded in exceptional cases of "malicious, oppressive and high-handed" misconduct: at paras. 36, 111.

[26] I am of the view that punitive damages are justified in this case. Walsh and Walsh Business perpetrated a fraud on Nanny over the course of several years. Walsh and Walsh Business took advantage of a small business owner who trusted Walsh and Walsh Business with the money it was required to remit to the CRA. The fraud meets the standard of high-handed, malicious and reprehensible conduct. There is no evidence before me that Walsh has pleaded guilty to a crime for the same conduct, or that he has already been punished in the criminal justice system.

[27] As noted by Sossin J. (as he then was) in *Gennett Limber Co. v. John Doe a.k.a. Milton Harvey et. al.*, 2019 ONSC 1345 (CanLII); "it is hard to see how simply returning the funds fraudulently acquired would be sufficient, particularly with the goal of deterrence in mind": at para. 33. Courts have recognized the need to increase the range of punitive damages to better reflect the goals of deterrence: *Elekta Ltd. v. Rodkin*, *supra*, at para. 31.

[28] I have considered the blameworthiness of Walsh and Walsh Business, the degree of vulnerability of the plaintiff, the harm directed to the plaintiff and the need for deterrence. I am of the view that an award of punitive damages in the amount of \$75,000, is proportionate and reflects the goals of retribution, denunciation and deterrence.

*Costs*

[29] Nanny seeks its costs on a full indemnity basis, in the amount of \$29,363.96, inclusive of counsel fee, disbursements and H.S.T.

[30] Costs may be awarded on a full indemnity scale in exceptional circumstances. Full indemnity costs are reserved for the rare and exceptional cases where the conduct of the party against whom costs is ordered has engaged in very egregious conduct such as fraud or deceiving the court: *Marcos Limited Building Design Consultants v. Lad*, 2018 ONSC 7812 (CanLII), at para. 7.

[31] I am satisfied that full indemnity costs are justified in the circumstances of this case. I found that Walsh and Walsh Business perpetrated a fraud on the plaintiff. In my Reasons for Sentence dated May 7, 2024, I found that Walsh consistently lied to the court that he was working with a person at CRA to correct the error. He breached my various productions orders and continued to operate his business despite my order of March 19, 2024, that he not do so. His conduct required multiple court attendances.

[32] I reviewed the plaintiff's cost outline. The amounts claimed are fair and proportionate, and there is no basis to reduce the amount. I award costs to the plaintiff against Walsh and Walsh Business on a full indemnity basis, fixed in the all-inclusive amount of \$29,363.96. I am satisfied that the cost award in this amount is fair, reasonable and within Walsh and Walsh Business' expectation to pay.

#### *Conclusion*

[33] For the reasons set out above, I am satisfied that the plaintiff has pleaded facts that establish liability against Walsh and Walsh Business in fraud.

[34] I am also satisfied that the plaintiff has proved the following damages:

- a. damages of \$318,278.17 which is the amount of the CRA Trust Money which was misappropriated by Walsh and Walsh Business;
- b. damages of \$21,594.45 levied by the CRA against the plaintiff in penalties and interest;
- c. damages to \$12,922.14 which is the amount paid to Walsh Business for bookkeeping services between January 2020 and January 31, 2023;
- d. damages in the amount of \$14,068.50 which is the amount paid to Gera & Nirula for retroactive bookkeeping services;
- e. Punitive damages in the amount of \$75,000.

#### **DISPOSITION**

[35] For the reasons set out above, I make the following order:

- I grant judgment in favour of the plaintiff against Walsh and Walsh Business in the amount of \$441,863.26;
- I award costs to the plaintiff on a full indemnity basis payable by Walsh and Walsh Business, fixed in the amount of \$29,363.96, inclusive of counsel fee, disbursements and H.S.T.

[36] I signed the draft order.

Date: October 7, 2024

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Chalmers J.

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NANNY & ELDERCARE SERVICES INC.

Plaintiff

**– and –**

WALSH BUSINESS & TAX MANAGEMENT LTD.,  
ANDREW WALSH and ARTHUR WALSH

Defendants

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**REASONS FOR JUDGMENT**

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Chalmers J.

**Released: October 7, 2024**