

CITATION: 1438767 Ontario Inc. v. Giovinazzo, 2024 ONSC 6641
COURT FILE NO.: CV-21-00659413-0000
DATE: 20241128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

148767 ONTARIO INC.

Plaintiff

– and –

CHRISTINA GIOVINAZZO also known as
CHRISTINA DANIELLA GIOVINAZZO
also known as CHRISTINA DANIELA
GIOVINAZZO also known as CHRISTINA
D. GIOVINAZZO also known as
CHRISTINA FAVILLA also known as
CHRISTINA DANIELLA FAVILLA also
known as CHRISTINA DANIELA
FAVILLA also known as CHRISTINA D.
FAVILLA, FABRIZIA FAVILLA,
LAUTARO NAVARRO also known as
LAUTARO DANIEL NAVARRO also
known as LAUTARO D.NAVARRO also
known as LAUTARO NAVARRO-FENOY
also known as LAUTARO D. NAVARRO-
FENOY also known as LAUTARO
DANIEL NAVARRO-FENOY also known
as LAUTARO NAVARRO FENOY also
known as LAUTARO DANIEL
NAVARRO FENOY also known as
LAUTARO D. NAVARRO FENOY,
1432528 ONTARIO INC. also known as
1432528 ONT INC., 2143325 ONTARIO
INC. also known as 2143325 ONT INC.,
THE BANK OF NOVA SCOTIA, JANE
DOE, JOHN DOE and DOE
CORPORATION

Defendants

Ari Lokshin, for the Plaintiff

Jonathan Plender, for the Defendant, The
Bank of Nova Scotia

) **HEARD:** November 20, 2024

REASONS FOR JUDGMENT

CHALMERS J.

Overview

[1] The plaintiff, 1438767 Ontario Inc. claims that it is the victim of a fraud carried out by its employee, Christina Giovinazzo. The plaintiff brings a motion for summary judgment. The defendant, the Bank of Nova Scotia (BNS) settled the action brought against it by the plaintiff with the payment of \$250,000. BNS also brings a motion for summary judgment on its crossclaim against Ms. Giovinazzo.

[2] Ms. Giovinazzo was hired as the plaintiff's bookkeeper and office manager in June 2014. Her duties included maintaining records with respect to the services performed by independent truck owner and operators. During the period she was employed with the plaintiff, Ms. Giovinazzo created fictitious tickets for the amounts owing to drivers for hauling services. She fabricated in excess of 130 account payables to two numbered companies. She prepared cheques payable to the two companies and caused the plaintiff to issue the cheques. After the cheques were signed, she deposited the cheques into her personal bank account at the BNS.

[3] As a result of her fraudulent scheme, a total of \$279,409.55 was paid into her account from June 2014 to January 2021. In January 2021, Ms. Giovinazzo went on maternity leave. The fraud was discovered during her leave. Her employment was terminated.

[4] The plaintiff caused the Statement of Claim to be issued on March 25, 2021. The defendants included Ms. Giovinazzo and the BNS. The plaintiff brought a motion for a *Mareva* injunction. The motion came before Justice Steele on April 9, 2021. She granted the injunction.

[5] Ms. Giovinazzo delivered a Statement of Defence. The defence contains a blanket denial without pleading any material facts. In the *Mareva* injunction motion, Ms. Giovinazzo was cross-examined on her affidavit. She testified that to supplement her income she created the cheques and deposited them into her BNS account. She admitted that she created fictitious companies and prepared cheques to the fictitious companies.

[6] The plaintiff settled its action against BNS for \$250,000.

[7] The plaintiff and BNS brought motions for summary judgment. The matter came before Justice Merritt in Civil Practice Court. She scheduled the motion for November 20, 2024. Ms. Giovinazzo did not file any material in accordance with the timetable. The plaintiff's counsel sent several emails to Ms. Giovinazzo but received no response. Ms. Giovinazzo did not attend the motion.

Discussion

Liability

[8] The moving parties have put before the court compelling evidence of Ms. Giovinazzo's fraudulent activity. Ms. Giovinazzo admitted on cross-examination that she created fictitious cheques and deposited the money into her account. The bank records confirm the deposits. She did not deliver any material in response to the motion for summary judgment and did not attend the motion.

[9] I find that Ms. Giovinazzo fabricated records and prepared cheques payable to fictitious companies. She caused the plaintiff to issue the cheques to the fictitious companies and she deposited the cheques into her personal bank account.

[10] I am satisfied that the facts support a finding of civil fraud. There are four elements of the tort of civil fraud:

- a. there is a false representation by the defendant;
- b. there is some level of knowledge of the falsehood of the representation on the part of the defendants;
- c. the false representation caused the plaintiff to act; and,
- d. the action resulted in a loss to the plaintiff: *Hryniak v. Maudlin*, 2014 SCC 7, at para. 68.

[11] All four elements are made out in this case. The uncontroverted evidence establishes that Ms. Giovinazzo created fake accounts and fictitious tickets. She knew those representations were false and she made the representations intentionally so she could supplement her income. The representations caused the plaintiff to issue cheques for the fake payables.

[12] The facts also support a finding of conversion. The essential elements of the tort of conversion are:

- a. the plaintiff has a possessory interest in personal property;
- b. the personal property is identifiable and specific;
- c. the defendant intentionally committed a wrongful act in respect of the property that is inconsistent with the plaintiff's right of possession: *DaimlerChrysler Canada Inc. v. Associated Bailiffs Co. Ltd.*, 2005 CanLII 24234 (ON SC), at para. 9.

[13] By causing the plaintiff to issue payments on fictitious payables Ms. Giovinazzo converted a total of \$279,409.55.

[14] In the alternative, the plaintiff claims unjust enrichment. The facts also support a finding of unjust enrichment. The elements of unjust enrichment are:

- a. there must be enrichment of the defendant;
- b. there must be a corresponding deprivation to the plaintiff; and,
- c. there must be an absence of a juristic reason for the enrichment:
Solarblue LLC v. Aus, 2014 ONSC 3482, at para. 20.

[15] Ms. Giovinazzo was enriched by \$279,409.55 which was the total amount of the fictitious cheques and payables. The plaintiff was deprived of this amount without any juristic reason.

[16] I am satisfied that the plaintiff and BNS have established the liability of Ms. Giovinazzo.

Damages for Civil Fraud and Conversion

[17] The plaintiff has proven that the total amount stolen by Ms. Giovinazzo was \$279,409.55. The plaintiff settled with BNS for \$250,000. I award damages to the plaintiff in the amount of the balance of \$29,409.55. I award damages to BNS in the amount of \$250,000.

Prejudgment Interest

[18] The last fraudulent transfer was made by Ms. Giovinazzo on January 22, 2021. The plaintiff seeks payment of prejudgment interest from this date to the date of judgment.

[19] The statement of claim was issued on March 25, 2021. The applicable interest rate for actions commenced in the first quarter of 2021 is 0.5%. The period from March 25, 2021 to November 25, 2024 is 1341 days. The total prejudgment interest rate is 1.84%. On damages of \$279,409.55, the amount of prejudgment interest is \$5,132.72.

[20] The BNS settled with the plaintiff with the payment of \$250,000. BNS is entitled to an award of prejudgment interest on this amount from the date of the settlement. The amount is to be deducted from the amount of prejudgment interest awarded to the plaintiff. If there is no agreement as between the plaintiff and BNS with respect to the allocation of prejudgment interest as between them, they may request a case conference with me.

Punitive Damages

[21] The plaintiff also seeks an award of punitive damages. BNS does not seek an award of punitive damages in its notice of motion.

[22] Punitive damages may be awarded in exceptional cases for “malicious, oppressive and high-handed” misconduct. The objective is to punish the defendant rather than compensate the plaintiff: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 36.

[23] The principles to be applied when determining punitive damages are:

- a. the degree of misconduct;
- b. the amount of harm caused;
- c. the availability of other remedies;
- d. the quantification of compensatory damages; and
- e. the adequacy of compensatory damages to achieve the objectives of retribution, deterrence and denunciation: *Midwest Amusement Park, LLC. V. Cameron Motorsports Inc.*, 2018 ONSC 4549, at para. 103.

[24] I find that Ms. Giovinazzo’s conduct justifies an award of punitive damages. Over a five-year period, she organized a fraudulent scheme that resulted in the transfer of \$279,409.55. She took active steps to conceal her conduct. I am satisfied that her conduct was high-handed, malicious and reprehensible. I find that her conduct is particularly egregious because at the time of the fraud she was in a position of trust as the plaintiff’s bookkeeper and office manager. Although her conduct was reported to the police, she has not faced any criminal penalties.

[25] I award punitive damages to the plaintiff in the amount of \$100,000. I am satisfied that an award of punitive damages in this amount is appropriate to punish Ms. Giovinazzo for her reprehensible conduct. Without an award of punitive damages an inappropriate message would be sent to those engaging in fraud, “that they may have no more to lose than paying back their ill-gotten gains”: *IBEW, Local 353 Trust Funds (Trustees of) v. Shojaei*, 2014 ONSC 3656, at para. 16.

Order Pursuant to s. 178 of the Bankruptcy and Insolvency Act

[26] The plaintiff and BNS seek a declaration pursuant to s. 178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) that the judgment against Ms. Giovinazzo survives bankruptcy. The section reads as follows:

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

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

(e) any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation. [...]

[27] To be entitled to an order under s. 178 of the *BIA*, the plaintiff must establish that Ms. Giovinazzo was acting in a fiduciary capacity. The test for determining whether there is a fiduciary relationship is as follows:

- a. the fiduciary has scope for the exercise of some discretion or power;
- b. the fiduciary has direction for the unilateral exercise of that power;
- c. the beneficiary has a vulnerability to the fiduciary's discretion or power,
- d. there is an understanding, express or implied, that the fiduciary will act in accordance with a duty of loyalty: *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, (*Water Matrix*) at para. 54,

[28] Ms. Giovinazzo was the bookkeeper and office manager of the plaintiff. She was responsible for all bookkeeping aspects of the business. She was often entirely unsupervised. I am satisfied that as the bookkeeper for the plaintiff's business she was in a fiduciary relationship: *Water Matrix, supra*; and *Constantineau v. Squirrel*, 2014 ONSC 4616; *Earhadt v. Kendrick*, 2017 BCSC 813, at para. 28-29.

[29] I find that Ms. Giovinazzo is liable to the plaintiff is fraud and embezzlement. I further find that the fraud occurred while she was acting in a fiduciary capacity as the plaintiff's bookkeeper and office manager. I grant the order under s. 178(1) of the *BIA* that the judgments in favour of the plaintiff and BNS survive any past, present or future assignment in bankruptcy and that Ms. Giovinazzo shall not be released by any discharge from bankruptcy. I am satisfied that this order is appropriate in the circumstances of this case even though Ms. Giovinazzo has not yet declared bankruptcy: *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242, at para. 23.

Costs

[30] The plaintiff and BNS are successful on this motion and entitled to their costs. The plaintiff seeks its substantial indemnity costs in the amount of \$53,356.91, for counsel fee, inclusive of H.S.T., and \$2,693.34 for disbursements inclusive of H.S.T. The total amount claimed is \$56,050.25. BNS is seeking payment of its costs on a substantial indemnity basis in the all-inclusive amount of \$56,209.10, plus H.S.T. in the amount of \$7,223.06.

[31] A finding of fraud often results in an award of substantial indemnity costs because it is a form of reprehensible conduct that warrants the court's disapproval: *BH Frontier v. Canadian Choice Supply*, 2022 ONSC 3707, at para. 6. I find that Ms. Giovinazzo is liable to the plaintiff and BNS for her fraudulent conduct. I am satisfied that the plaintiff and BNS are entitled to their costs on a substantial indemnity basis.

[32] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court with discretion in the determination of costs. In fixing costs of the motion, I am not undertaking the

same task as an assessment officer or fixing costs with mathematical precision. I am to exercise my discretion guided by the factors set out in R. 57.01 and having regard to the overriding principles of reasonableness, fairness and proportionality. The costs must be within the reasonable expectation of the unsuccessful party to pay: *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 71 O.R. (3d) 291 (C.A.), (Boucher) at para. 38.

[33] I award costs to the plaintiff on a substantial indemnity basis fixed in the all-inclusive amount of \$50,000. I also award costs to BNS on a substantial indemnity basis in the all-inclusive amount of \$50,000. I am satisfied that an award of costs in the amount of \$50,000 to both the plaintiff and BNS is proportionate, fair and within the reasonable expectations of Ms. Giovinazzo to pay.

Disposition

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

- I find that Ms. Giovinazzo is liable to the plaintiff and BNS in fraud and conversion;
- I award damages to the plaintiff in the amount of \$29,409.55, and I award damages to BNS in the amount of \$250,000;
- I award prejudgment interest on the total damages in the amount of \$5,132.72. This amount is to be allocated as between the plaintiff and BNS. If there is no agreement as between the parties with respect to the allocation, the parties may request a case conference before me;
- I award punitive damages in favour of the plaintiff in the amount of \$100,000;
- I order and declare that the judgments in favour of the plaintiff and BNS survive Ms. Giovinazzo's declaration of bankruptcy pursuant to s. 178 of the *BIA*;
- I award substantial indemnity costs to the plaintiff fixed in the all-inclusive amount of \$50,000;
- I award substantial indemnity costs to BNS fixed in the all-inclusive amount of \$50,000.

[35] The plaintiff and BNS may submit a draft judgment for my consideration.

Chalmers J.

Released: November 28, 2024

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