Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC. and THOSE CORPORATIONS LISTED ON SCHEDULE C HERETO

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT

and

SUCH OTHER RESPONDENTS FROM TIME TO TIME AS ARE ON NOTICE OF THESE PROCEEDINGS AND ARE NECESSARY TO EFFECT THE RELIEF SOUGHT

SUPPLEMENTARY SUBMISSIONS OF THE APPLICANTS (MOTION HEARD ON JUNE 3, 2016)

June 27, 2016

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Lawyers for the Applicants

TO: The Service List

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SUPPLEMENTARY SUBMISSIONS OF THE APPLICANTS (MOTION HEARD ON JUNE 3, 2016)

1. At the return of the Applicants' motion for judgment on June 3, 2016, the Court raised whether "fraud unraveled all".[1]

2. Fraud unravels all only when a party has established that they have been defrauded.

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[1] A contract tainted by fraud is not void, but only voidable at the election of the defrauded party.

3. The only parties who have established that they were defrauded are Dr. Bernstein and the Applicants.[2]

4. There are two frauds that have been perpetrated on Dr. Bernstein and the Applicants by the Walton Respondents:

(a) The Walton Respondents' fraudulent misrepresentations that ground the Applicants' $66 million damages claim (including the $22.6 million claim in knowing assistance against the Schedule C Company Respondents);[3] and

(b) The continued efforts by the Walton Respondents' to fraudulently prefer the interests of any other creditor over Dr. Bernstein and the Applicants.

5. The frauds against Dr. Bernstein do not result in a presumption of fraud in favour of all other third parties who have dealt with the Walton Respondents. Evidence is required. Only the DeJongs, the Levytams and the Condos appeared on this return of Application. No evidence of fraud was presented on behalf of the Levytams or Condos. Limited evidence, generally of the "us to" variety was presented on behalf of the DeJongs.[4] Fraud unravels all does not apply to these claims.

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[2] *Fiorillo v. Krispy Kreme Doughnuts Inc.*,2009 98 O.R. (3d) 103 (ONSC) at para 106, Brief of Authorities Re: Supplemental Submissions of the Applicants (Motion Heard June 3, 2016)("Supplemental BOA"), Tab 1

[3] Justice Brown found that the Walton Respondents had misused and misappropriated the Applicants' funds contrary to their fiduciary duties and the contracts that they had entered into with the Applicants. In some cases, Justice Brown found that the Walton Respondents' conduct amounted to fraud. The Applicants' motion was for a damages award for approximately $66 million on the basis of fraudulent misrepresentation.

[4] Note that all of the Schedule C Investors were served with the Third Fresh as Amended Notice of Application and the Amended Notice of Motion on November 26, 2015. The only two parties that responded to the Applicants' motion were the Levytams and the Condos. Other Schedule C Investors, including Gerry Gotfrit and Mr. Boudle have taken positions on motions in the interim and at least Mr. Gotfrit attended on June 3, 2016.

6. At the highest, the Levytams and the Condos have shown that they invested equity with the Walton Respondents in particular companies. It does not matter if the Levytams' and the Condos were shareholders or preferred shareholders in those companies.

7. When it became clear to the Walton Respondents that the companies in which the Levytams and the Condos had invested would not be able to return the Levytams and the Condos' investments, the Walton Respondents took steps to ensure the Levytams' and the Condos' recovery of their equity investment.

8. On December 12, 2013, immediately after the Applicants' first notice of motion relating to the Schedule C properties was served, Norma Walton ("Ms. Walton"), directed a wholesale "movement" of investments into the preferred shares of the Schedule C properties that likely had money. Ms. Walton backdated the documents to the time of the appointment of the Manager.[5]

9. Ms. Walton's email to Tom Trklja, dated December 12, 2013, is attached as Schedule "B" to this submission. The email demonstrates that:

(a) A multitude of investors were moved, all in anticipation of the initiation of proceedings against the Schedule C companies and backdated to a date supposedly before the appointment of the Manager;

(b) No consideration was given for the so called move;

(c) Presumably, the original investment was lost as no payout from the original investment occurred; and

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[5] Email from Norma Walton to Tom Trklja, dated December 12, 2013, Exhibit J to the Responding Record of the Levytams, attached at Schedule "B"

(d) The movement was a legal fiction. One does not simply issue shares in a different corporation in an effort to "switch" equity positions.[6]

10. It is incontrovertible that the intention of the Walton Respondents' movement of investors' funds was to substantially prefer the interests of the Schedule C Investors over the interests of Dr. Bernstein and his companies.

11. In paragraph 273 of his Reasons for Decision dated August 12, 2014, Justice Brown describes these attempts by the Walton Respondents to prefer their other investors by "moving" their preferred shares to 44 Park Lane Circle:

> ...The task now facing the Court is, in part, to put in place a process which will minimize the damage caused by the Waltons unlawful conduct and which will deal fairly with all competing interests. Ms. Walton, in her evidence, disclosed her intention to prefer improperly the interests of other creditors over those of Dr. Bernstein, for it was her position that the claims of preferred shareholders and debtors of Schedule C Companies should rank first in priority over any claim which Dr. Bernstein might have in the proceeds of sale from any Schedule C Property. As Ms. Walton put it, Dr. Bernstein should not be "permitted to leapfrog over the claims of the innocent third party investors". In paragraph 86 of her Factum Ms. Walton also stated that she intended to apply all proceeds of sale from the severed Park Lane Circle properties to pay her "investors and debtors", except for Dr. Bernstein. Further, quite unnecessary problems arose when Ms. Walton arranged the sale of the Gerrard Street and Front Street properties earlier this year; those problems resulted in parties incurring unnecessary expenses.[7]

12. For these reasons, investors such as the Levytams and Condos can point to no evidence that one dollar of their funds was received by the Corporations in question.

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[6] *Ibid*

[7] Reasons for Decision of Justice D.M. Brown, dated August 12, 2014, Tab 1 of the Applicants' Argument Compendium at Tab 3 (emphasis added)

13. This second fraud was a fraud on Dr. Bernstein in which these investors could only be beneficiaries.

14. An investor takes the risk that the company they invest in will engage in conduct that will decrease the value of their investment. With respect to the consequences that will flow to the Levytams and the Condos as shareholders, in *Canadian Dredge & Dock*, Estey J. recognized that economic penalties may feed through to shareholders who are totally innocent.[8] He went on to find that this was nevertheless a "tolerable result", and a risk or cost associated with the privilege of operating through the corporate vehicle. The economic penalty may be borne by the members or shareholders who may be totally innocent:

> The corporation which set the directing mind in position to do the wrong will suffer an economic penalty. While it is true that this penalty will feed through to the stockholders, who may well be totally innocent as in the case of a large public company, it may be seen as a risk or cost associated with the privilege of operating through the corporate vehicle. In the case of personal corporations, the imposition of a criminal penalty on the corporation may be an additional penalty imposed upon the "personal" corporate stockholder but such a result would be an acceptable part of the sentencing process as it simply reflects the economic identification, as well as the legal identification, present in such a corporation. In the case of a public corporation, the economic identification factor is absent, and in a theoretical sense there is an additional penalty for the same act which must be justified in some way other than that suggested above. This is the inevitable result of the pragmatic adoption of the attribution of the acts of its delegates to the delegating corporation in order to bring that corporation within the system of criminal justice. Whether the route taken be the doctrine of respondeat superior or identification, the result is the same. The corporation in reality has three elements: the legal entity, the personal shareholder (a natural person directly or indirectly), and the employee. Once the process is set in motion, the criminal penalty will extend directly or indirectly to all three which is quite unlike the situation of a natural proprietor where only two of these elements are present. All this, in my view, while not entirely logical, is a tolerable result for a

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[8] *R. v. Canadian Dredge & Dock Co.* [1985] 1 S.C.R. 662, Supplemental BOA, Tab 2: This case analyzed the effect on shareholders of economic penalties imposed on a corporation in criminal proceedings.

> community where reality dictates corporate criminal accountability in certain circumstances.[9]

15. A shareholder who stands to lose their investment, cannot point to a fraud by the company on a third party to elevate their position to that of a creditor. Accordingly, the Levytams and the Condos claims are subordinate to the Applicants' claim resulting from the irrefutable knowing assistance of the Schedule C Company Respondents as well as the claim of any other unsecured creditor.

16. For CDJ Inc., it cannot benefit either. It is a shareholder. It has to prove an entitlement that ranks ahead of the Applicants.

17. The other Schedule C Investors did not appear on this application to assert any entitlement.

18. The notion that "fraud vitiates all" has no place here.

19. In the alternative, if this Honourable Court determines that the Applicants and those Schedule C Investors who asserted their claims on this application are *pari passu*, the only result possible on this record is that the Applicants' claim of $22.6M, which flowed to the net benefit of the Schedule C Companies, ranks alongside what would otherwise be equity claims of the Schedule C Investors.

20. The Schedule C Companies were net beneficiaries of $25.5M. On a balance of probabilities, $22.6M of that benefit was derived from a corresponding detriment to the Applicants. The Schedule C Company Respondents and their shareholders received millions of

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[9] *Ibid,* at para 33

dollars of benefits at Dr. Bernstein's expense. That is the best and highest evidence of the flow of funds.

21. With respect to the Schedule B Companies, the Applicants have been treated as equity investors and subordinated to mortgagees, lien claimants, secured creditors and unsecured creditors. There is no legal principle to elevate the Schedule C Investors, and in particular the Levytams and Condos, above the Applicants' claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of June, 2016.

Peter H. Griffin

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Danielle Glatt

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Fiorillo v. Krispy Kreme Doughnuts Inc.*, 2009 98 O.R. (3d) 103 (ONSC)
2. *R. v. Canadian Dredge & Dock Co.* [1985] 1 S.C.R. 662

SCHEDULE "B"

Tom Trklja 144

From: Norma Walton
Sent: Thursday, December 12, 2013 2:44 PM
To: Tom Trklja
Subject: Change of shares

Dear Tom,

Please prepare preferred shares in the following companies:

1. 1793530 Ontario Inc.:
   a. Joel Schachter, 175,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   b. Barbara Naglie, 100,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   c. Stockton & Bush P.M.I. Inc., 100,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   d. Stockton & Bush Holdings Ltd., 100,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle)
   e. 1788371 Ontario Inc., 100,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle)
   f. 1788371 Ontario Inc., 100,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   g. Ormsby Investments Limited, 100,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   h. Ormsby Investments Limited, 200,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle
   i. Cary Silber, 50,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle)

2. Cecil Lighthouse Inc.:
   a. John Rocha and Michele Peng, 62,800 preferred shares as of December 31, 2011 (cancel Rose and Thistle)
   b. Duncan Coopland, 150,000 preferred shares as of October 29, 2010 (cancel 150,000 shares in Twin Dragons)
   c. Duncan Coopland, 121,500 preferred shares as of October 7, 2013 (nothing to cancel);
   d. Dennis Condos, 150,000 preferred shares as of October 7, 2013 (cancel Rose and Thistle);
   e. Peggy Condos, 10,000 preferred shares as of October 7, 2013 (nothing to cancel);
   f. Vane Plesse, 100,000 preferred shares as of October 21, 2013 (cancel Richmond East);
   g. Gideon and Irene Levytam, 199,000 preferred shares as of October 7, 2013 (cancel Richmond East 245,000 shares)
   h. Gideon and Irene Levytam, 46,000 preferred shares as of October 7, 2013 (indicate in U.S. funds on the certificate, the above cancellation covers this one)
   i. Gideon and Irene Levytam, 200,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle).

3. Academy Lands:
   a. Joe and Teresa (Maria) Memme, 100,000 preferred shares as of October 27, 2010 (cancel 100,000 shares in Twin Dragons)
   b. Joe and Teresa (Maria) Memme, 121,500 preferred shares as of October 7, 2013 (nothing to cancel);
   c. 1607544 Ontario Inc. (Fareed Ansari), 200,000 preferred shares as of November 30, 2012 (cancel Rose and Thistle);
   d. 1607544 Ontario Inc. (Fareed Ansari), 100,000 preferred shares as of December 31, 2011 (cancel Rose and Thistle);
   e. 1607544 Ontario Inc. (Fareed Ansari), 100,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle);
   f. 1607544 Ontario Inc. (Fareed Ansari), 100,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle)
   g. Grace and Ken Bugg, 340,000 preferred shares as of October 1, 2013 (cancel Richmond East)
   h. Ange Boudle, 150,000 shares as of April 15, 2012 (cancel Rose and Thistle);
   i. Dian Cohen, 100,000 shares as of April 15, 2012 (cancel Rose and Thistle);
   j. Christine DeJong Medicine Professional Corporation, 500,000 preferred shares as of April 15, 2012 (cancel Rose and Thistle)
   k. Carlos Carreiro, 285,000 shares as of December 12, 2013 (repayment of Rose and Thistle loan – no shares to cancel)

l. Michael De Jong Homes Inc., 131,500 preferred shares as of December 12, 2013 (cancel Front Church);
and

m. C2M2J Holding Company, 617,000 preferred shares as of December 12, 2013 (cancel Front Church).

4. 1636483 Ontario Inc.
Transfer all of Legal Audit's shares to John and Myrne Rawlings as of September 3, 2013.

Let me know if you have any questions.

Thanks,
Norma

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Applicants

-and-

NORMA WALTON et al.
Respondents

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