

CITATION: Iakovleva v. Rybine., 2013 ONSC 825
COURT FILE NO.: CV-12-468198
DATE: 20130205

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Irina Iakovleva)
) *Arkadi Bouchelev*, for the Plaintiff
Plaintiff)
)
- and -)
Oleg Olegovitch Rybine) *Self-represented* Defendant
)
Defendant)
)
)
)
) **HEARD:** January 29, 2013

MORGAN J.

[1] The Plaintiff is a finance professional who recently immigrated to Canada from Russia. The Defendant is a graphic designer. He is also originally from Russia, but he came to Canada with his family a number of years ago. The Defendant's parents were family friends of the Plaintiff in Russia.

[2] The Plaintiff wanted to invest in Toronto real estate prior to moving to Canada. She was introduced to the Defendant by his father. The Defendant had recently bought and sold one or two condominium properties in Toronto. A mutually agreed-upon arrangement ensued whereby the Plaintiff sent the Defendant funds for investment and the Defendant located properties in Toronto. The arrangement was never reduced to writing and remained rather ill-defined.

[3] The record before me describes a number of different transactions and aborted transactions that were either entered into or discussed between the parties. The series of transactions that was the focus of the trial before me related to a condominium at 330 King Street East, Unit 519, Toronto ("King East 519"). The Plaintiff claims that she paid for King East 519, but that the Defendant took title in his own name and has failed to have it assigned to the Defendant. In addition, the Plaintiff claims that she transferred him certain funds to be used for various upgrades and finishes in King East 519, as well as for another condominium she

purchased at 1201 Dundas Street East, Unit 312, Toronto ("Flatiron 312"), but that the Defendant never paid these funds to the builders but rather has kept them in his own bank account.

[4] Although the dealings between the parties became acrimonious and involved the application and apparent misapplication of funds to a number of different properties, there is not much in issue between them. The Defendant concedes that King East 519 rightfully belongs to the Plaintiff as the deposits paid on it to date have all been with her money. Likewise, the Defendant concedes that the Plaintiff sent him \$6,800.00 for upgrades and finishes in Flatiron 312 and another \$4,982.00 for upgrades and finishes in King East 519, and that none of these funds has been used for their intended purpose. He still has those funds in his account and agrees that they are owing to the Plaintiff.

[5] The Plaintiff also claims that the Defendant has rented out King East 519 to tenants, but has taken the rent money for himself and has failed to turn it over or to account for it to the Plaintiff. The Defendant likewise concedes this point, but argues that he has been paying the occupancy rent charged by the builder pending final closing of the condominium sale and that the rent received is only \$100 more per month than the rent paid.

[6] In my view, this is all easily resolved. The Defendant must pay \$6,800.00 plus \$4,982.00, for a total of \$11,782.00, to the Plaintiff in respect of the money sent for upgrades and finishes. The Defendant must also account for all of the rent monies he has received for King East 519 and for all of the monies he has paid as occupancy rent for that property. The occupancy rent paid can be set off against the rent monies received, and the balance paid by the Defendant to the Plaintiff.

[7] The Defendant is hereby declared to hold any and all interest that he has in King East 519 in trust for the Plaintiff; and, moreover, the Defendant must immediately take all feasible steps to have his interest as purchaser under the Agreement of Purchase and Sale of King East 519 assigned to the Plaintiff. Any registration fees or other fees charged by the builder for this assignment are to be borne by the Defendant.

[8] Counsel for the Plaintiff submits that it is not certain that the builder of King East 519 will consent to the assignment of the Agreement of Purchase and Sale. He has produced a letter received last week from the lawyers for the builder in which they indicate that the builder's consent will turn on the creditworthiness of the assignee. I assume that the builder has no interest in refusing to approve the assignment if the Plaintiff is truly creditworthy. Indeed, the builder is doubtless under a duty not to withhold its consent unreasonably.

[9] If, for reasons beyond the parties' control, the builder refuses to approve the assignment of title to King East 519, the Plaintiff will be free to bring a motion within the context of this action, on notice to the builder, to compel the assignment. The Defendant must cooperate with the Plaintiff in that motion.

[10] I am confident that the builder will respond in a reasonable way to the assignment request. It stands to reason that if the Plaintiff, as assignee of the purchaser's interest, is able to qualify for a mortgage in order to ultimately close the transaction, she will be able to satisfy the builder's financial criteria as well. Contrarily, if the Plaintiff is not sufficiently creditworthy to satisfy the builder and to get its consent to the assignment, she would also not be able to qualify for a mortgage and would in any case be unable to close. I will remain seized of any motion regarding the assignment of the Defendant's interest under the Agreement of Purchase and Sale for King East 519.

[11] The one complicating factor in this action, and the reason the trial consumed more hours than might be suggested by the rather straightforward resolution of the issues set out above, is that the Plaintiff alleges that the Defendant's conduct amounted to fraud. On the basis of the fraud allegation, the Plaintiff claims punitive damages over and above the compensation she is owed.

[12] It is hard to fault the Plaintiff for making this allegation. The Defendant's conduct exhibited numerous indicia of fraud: he signed the Plaintiff's name on contract documents without her consent, he used her funds for unauthorized purposes, he purchased property in his own name using her funds, he kept in his own account funds that she sent that were earmarked for upgrades on her property, he purchased King East 519 even though she said she was not interested in that condominium, he has not accounted for the rent received on her condominium unit, and, perhaps most problematically, he kept no account of the funds she sent him or how much he owed her and he became uncommunicative when she pressed him to answer.

[13] The Defendant has a retort, albeit one that does not reflect well on his judgment, for each of these allegations. He says that he signed the Plaintiff's name on a contract merely to facilitate a transaction that was in any case to her benefit, that he purchased King East 519 against her wishes because he was sure it was a good deal, that he purchased that condominium in his own name in order to hold it for her arrival in Canada, that he used her money only as a short term loan to purchase his own property, that he meant to forward the Plaintiff's funds to the builder but the builder has been slow in demanding or cashing the cheque, that he used the rental income from her property to pay the occupancy rent, etc. In general, the Defendant testified that he understood that the Plaintiff wanted him to be in charge of her Canadian investments and that he would not have to keep records or account for anything, at least until she was fully settled in Canada.

[14] In analyzing a claim of civil fraud, one must keep in mind the statement by Winkler J. (as he then was) in *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1998) 40 BLR (2d) 1, at 130, aff'd (1999) 45 OR (3d) 417 (Ont CA), "[f]raud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved." The well-known criteria for fraud, as summarized in Lewis N. Klar et al., *Remedies in Tort* (Toronto: Carswell, 2010), pp. 5-11, have been adopted by this court in *Lograsso v. Kuchar*, 2011 ONSC 5729, at para 61, as follows:

- (a) A false representation was made by the defendants;
- (b) The defendants knew the statement to be false;
- (c) The statement was made with the intention that it should be acted upon by the plaintiff;
- (d) The plaintiff acted upon the representation and suffered damages by so doing.

[15] The intention to deceive, and to induce the plaintiff's loss, is critical. Even where the other indicia of fraud are present, the intent to deceive and deprive "must still be strictly proved." *B.G. Checo v. B.C. Hydro* (1994) 4 CCLT (2d) 161, at 223, aff'd [1993] 1 SCR 12.

[16] If the Defendant here perpetrated a fraud, it would have to rank among the most ineffective and transparent frauds one could imagine. The Defendant did not hide his use of the Plaintiff's money; he made no attempt to cover his tracks by taking title in anything other than his personal name or by using any bank account other than his own personal account. He signed the Plaintiff's name on a contract without her consent or authorization, but he did it openly at the builder's office in front of the builder's sales employee without disguising the fact that he is not the Plaintiff. In his correspondence with the Plaintiff afterwards, he did not even seem to know what he signed and so asked her to send him a copy of the document with his own false signature.

[17] What is missing is any intent to deceive and deprive. Ironically, the Defendant was so blatant about his improper actions that one can only conclude that he was utterly lost in the world of real estate and finance, and that he truly did not know or understand what he was doing.

[18] Financial frauds have been described by courts in Canada as "clever devices", *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 CarswellBC 1229, at paras 95, 100 (BC CA), while fraud victims have been described as being taken in by the "clever machinations of the financial expert", *Straus Estate v. Decaire*, 2011 ONSC 1157, at para 98. Fraudsters themselves have been dubbed by Canadian courts as "clever and crooked", *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, at para 72. None of these descriptions applies to the Defendant and his actions.

[19] The Defendant was foolish, irresponsible, and downright juvenile in the way he handled the Plaintiff's transactions and her money. However, his conduct does not suggest that he actually intended to deprive her of what is rightfully hers. Rather, it suggests a combination of naivety in the ways and ethics of the business world, and arrogance in taking charge of another person's investments without taking the time and effort to properly account.

[20] The Defendant managed to wrongfully appropriate the Plaintiff's funds and property without committing fraud. Since an intention to deceive and deprive has not been made out, there is no basis for punitive damages as claimed by the Plaintiff.

[21] On the other hand, I am of the view that I should refrain from penalizing the Plaintiff in costs for having alleged fraud and not having proved it. Many of the usual signs of fraud were present – indeed, glaring – in the Defendant's conduct. It would have been difficult, prior to hearing the Defendant on the witness stand at trial, to ascribe any other label to his actions. The Plaintiff will have her costs against the Defendant on the usual partial indemnity scale.

[22] To sum up the orders that have been described above, the Defendant must repay the Plaintiff the \$11,782.00 she forwarded him for upgrades and finishes. The Defendant is declared to hold the interest in King East 519 in trust for the Plaintiff and must make every effort to assign that interest to her outright and to obtain the builder's authorization to do so, and if the builder refuses he must cooperate in the Plaintiff's efforts to compel the assignment. Further, he must account for rent monies received and occupancy rent paid for King East 519.

[23] The Defendant shall pay costs to the Plaintiff in the amount of \$15,700.00, inclusive of disbursements and HST.

E. Morgan J.

Released: February 5, 2013

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REASONS FOR JUDGMENT

Morgan J.

Released: February 5, 2013