

**CITATION:** Popov v. Jones, 2011 ONSC 3594

**COURT FILE NO.:** CV-10-398179

**DATE:** 20110622

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Sergiy Popov, Igor Golerkansky, Valeri Gourevitch, Liudmila Grishanov, Dzmitry Grishanov, Genady Kats, Michael Kharlab, Iouri Loukianov, Gennady Minskiy, Irina Obotnina, Larina Plankova, Sergei Tkach, Marina Vinogradov, Vladimir Vinogradov, Yuri Zabara and Vadim Zevlever, Plaintiffs

**AND:**

Marcel Jones, Shawn Jones, Blake Jones, 1754338 Ontario Inc., carrying on business as Edvac Capital Investment and Sudeesh Shivarattan, Defendants

**BEFORE:** Carole J. Brown J.

**COUNSEL:** *V. Kats and C. Wyche*, for the Plaintiff

*J. Ormston*, for the Defendant Marcel Jones,

*S. Turk*, for the Defendant Shawn Jones

*R. Van Kessel*, for the Defendant Blake Jones

**HEARD:** April 5, 2011

**ENDORSEMENT**

[1] The Defendants, Marcel Jones (“Marcel”), Shawn Jones (“Shawn”) and Blake Jones (“Blake”) ( collectively, the “Jones Defendants”) seek to overturn the decision of Master Glustein dated January 26, 2011, which granted production of the corporate defendant’s banking records from CIBC, a non-party, pursuant to Rule 30.10 of the *Rules of Civil Procedure* (“*Rules*”).

[2] This action arises out of allegations of breach of contract and fraud on the part of the Defendants. The Plaintiffs alleged that they deposited with Edvac Capital Investment (“Edvac”) between September 2008 and February 2009, a total of \$765,000, on the basis of representations that the Plaintiffs would receive a rate of return of 2% per month if they provided a loan to Edvac for six to twelve months and that they would be repaid the full amount of the principal of the loan depending on their individual agreed periods.

[3] The Plaintiffs allege that the Jones Defendants falsely represented that the principal sum advanced to Edvac would be invested in various projects and loaned to third parties with a mortgage security. They allege in the Statement of Claim that the Jones Defendants were the

controlling minds of Edvac, were personally engaged outside their roles as officers and directors of Edvac by their fraudulent conduct and, as such, are personally liable to the Plaintiffs for damages caused by their fraudulent conduct. They further allege that the Jones Defendants transferred the Plaintiffs' funds in Edvac to themselves personally, either directly or through a series of transactions, that Marcel used the investment funds for renovations on his property, and that Blake used the said funds to either purchase or renovate his property. The Plaintiffs obtained certificates of pending litigation ("CPL") on the properties of both Marcel and Blake, and the Jones Defendants have brought a motion to have the CPL removed from title.

[4] The Jones Defendants deny all of the allegations and also deny involvement with Edvac. Marcel pleads in his Statement of Defence that he is a shareholder of Edvac along with Blake and Shawn, but is not the controlling mind of Edvac. He pleads that Shawn has excluded Blake and himself, and is acting on behalf of Edvac without authority of the other shareholders. He further claims that Shawn borrowed money from Edvac without his knowledge, which monies were appropriated for his own use. Shawn denies that he is the operating or controlling mind of Edvac and pleads that his father, Marcel, was the operating mind.

[5] Blake pleads that he is not an officer or director and that the funds he used to purchase his home were borrowed from the line of credit of his father, Marcel. Each of the Jones Defendants crossclaims against the others. These denials regarding involvement with Edvac are not consistent with the Corporate Profile Report for Edvac produced by the Plaintiffs.

[6] The Plaintiffs seek the documents of CIBC as they relate to the issues in this action and the issue of the CPL, and CIBC does not oppose the motion. The Plaintiffs requested production of the CIBC banking records from the Jones Defendants in September of 2010, but the Jones Defendants have not, to date, provided them.

[7] Master Glustein ordered production of the said documentation pursuant to Rule 30.10 in his carefully analyzed decision dated January 26, 2011.

[8] Marcel and Shawn appeal the decision of the Master. Blake appeals only the costs award against him. Edvac failed to defend the action and was noted in default.

### **Positions of the Parties**

#### *The Appellants'/Defendants' Submissions*

[9] Each of the Jones Defendants are represented by separate counsel.

[10] It is the position of Shawn that the Master erred in holding as follows:

- (i) that relief could be granted pursuant to Rule 30.10 in furtherance of the CPL motion;
- (ii) that the motion was not premature given the stage of the proceeding;

- (iii) that he failed to consider the alternate nature of the Claim;
- (iv) that he did not consider or properly consider that the documents were being sought in furtherance of a tracing remedy;
- (v) that he failed to consider that Rule 30.10, where tracing is involved, must be approached with an abundance of caution;
- (vi) that he failed to properly distinguish the cases of *LaFarge Canada Inc. v. McAddoo Auto Parts Ltd.*, (2009) CanLII 2035 and *Sun-Times Media Group Inc. v. Black* [2007] O.J. No. 795 in view of the claims pleaded in the Amended Statement of Claim;
- (vii) in his finding that the issue of tracing pertained to the issue of relevancy only;
- (viii) in determining that the Plaintiffs were not required to lead evidence as to the relevance of the documents sought, given the tracing nature of the documents;
- (ix) in not making an adverse finding against the Plaintiffs regarding their refusal to lead evidence about the merits of the action and to answer questions in cross-examination about the merits of the action; and
- (x) in failing to determine that the Plaintiffs could not rely on their pleadings to seek the relief requested but rather had to establish the *prima facie* nature of their claim.

[11] Marcel's grounds for the appeal are the same.

[12] Blake appeals only on the issue of costs awarded against him on a joint and several basis in the amount of \$11,000 and submits that the costs as against him individually should be reduced to \$750 all inclusive.

***The Respondents'/Plaintiffs' position***

[13] The Plaintiffs argue that the decision of Master Glustein is correct and that there are no grounds on which to overturn it.

[14] The Plaintiffs emphasize the fact that the motion is not brought simply for purposes of tracing of the assets, but to assist in advancing its case, particularly given the fact that the Jones Defendants have denied any involvement in Edvac and have crossclaimed as against one another with respect to involvement in Edvac.

### **Standard of Review**

[15] On this Appeal, the Court must determine whether the Master made any error in law. Where an error in law has occurred, the standard of review is correctness. With respect to the Appeal of Blake regarding costs, leave to appeal a discretionary award of costs is required.

### **Disposition**

[16] The Master carefully and properly reviewed all of the evidence and caselaw. He analyzed the issues raised by all parties at pages 6 – 18 of his decision. I find that he correctly applied the facts, evidence and caselaw before him to the issues raised in arriving at his decision.

[17] The documentation sought from CIBC is material to the issues and it would be unfair to have the Plaintiffs proceed without this documentation. The Master correctly found that “[t]he issues of (i) whether the Jones Defendants appropriated Edvac funds and (ii) whether Blake and Marcel used Edvac funds to renovate or purchase their properties are seminal issues in the action and the CPL Discharge Motions”, and “that the CIBC Documents are of pivotal importance in determining the liability of the Jones Defendants which depends, in significant part, on their involvement in Edvac and their use of funds invested in Edvac by the Plaintiffs.”

[18] The Jones Defendants have not produced their banking documentation despite the Plaintiffs’ requests and there is no other source for this documentation apart from the non-party CIBC.

[19] With respect to the Order for production of documents pursuant to Rule 30.10, having reviewed all of the evidence, the applicable caselaw and the Master’s decision, and having considered the submissions of the parties on appeal, I find that there are no grounds on which to overturn the Master’s decision and am satisfied that the Master correctly found that:

- (i) the motion for production of documents is not premature as the Jones Defendants have filed pleadings and Edvac is deemed to admit the truth of the pleadings pursuant to Rule 19.02(1)(a);
- (ii) the documents are clearly relevant to the action, as well as the motion and Rule 30.10 is applicable;
- (iii) there was sufficient evidence before the Court to establish the relationship of the CIBC documents to the action and the CPL motion, and the relevance of those documents to the issues;
- (iv) no adverse inference was to be drawn from the Plaintiffs’ decision not to lead evidence concerning the merits of the action or their refusal to answer cross-examination questions as to the merits of the action and the decision to file no evidence in support of the merits of the action, as both decisions were well-founded;

- (v) compelling production after cross-examination on a CPL motion does not constitute a finding that the materials ordered produced may automatically be used for the CPL motion;
- (vi) the CIBC documents are necessary to establish the cause of action and not, as the Jones Defendants argue, only to trace the assets after the cause of action is found to exist, *i.e.* after judgment;
- (vii) the CIBC documents are of pivotal importance in determining the liability of the Jones Defendants, which depends in significant part on the involvement in Edvac and their use of the funds invested in Edvac by the Plaintiffs;
- (viii) production at the discovery stage is necessary to avoid unfairness, and the documents cannot be obtained from other sources, as the Plaintiffs have no access to the CIBC documents and the Jones Defendants have not produced them;
- (ix) the *Stavro* factors were carefully analyzed by the Master in the context of this action and the factors have been met;
- (x) the Master properly considered, analyzed and distinguished *LaFarge* and *Sun-Times* in the costs paragraph.

[20] Accordingly, the Appeal is dismissed and the Order of Master Glustein dated January 26, 2011 is upheld.

### **Costs Awarded by the Master**

[21] With respect to the motion brought by Blake, I find there to be no reason to overturn the decision of Master Glustein that the costs should be awarded against the Jones Defendants to the Plaintiffs in the amount of \$11,000 on a joint and several basis.

[22] While counsel for Blake submits that Blake did not actively participate in the motion and simply ‘dipped his toe into the pool of water, while the other two Jones Defendants jumped in’, I find the analysis of the Master to be correct. Master Glustein held as follows:

“Counsel for Blake submitted that since he had only filed a brief factum and made brief submissions, Blake should not be required to pay costs. However, each of the three Jones Defendants opposed the motion and a costs order in favour of the successful party should be paid by all defendants who opposed the motion, not on the basis of who made the principal argument.”

[23] I note as well that, whether Blake participated actively or passively, or to a greater or lesser extent than the others in the motion and this appeal, he will benefit in the event that a decision is rendered in favour of the Jones Defendants. I find there to be no error in the decision as rendered by Master Glustein with respect to the production of documents and the award of costs.

**Costs of this Appeal**

[24] I would urge the parties to agree among themselves as to the costs of this motion. In the event that they are unable to do so, I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, care of Judges' Administration at 361 University Avenue, within five days of the release of this Endorsement.

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Carole J. Brown J.

**Date:** June 22, 2011