



## **The Claim**

[2] The plaintiff claims liability against all of the named defendants and seeks damages, certain declarations, prejudgment interest and costs as specified in the Statement of Claim.

## **Evidence at Trial**

[3] The Plaintiff, Miroslaw Placha, was present in court and his affidavit (Exhibit 2) sworn November 10, 2011 was filed. Copies of numerous documents were appended to the affidavit by way of 22 Tabs. These documents chronicle the business relationship between the Plaintiff and the Defendants as well as the dispositions of the properties in question. These include the following:

- 1) estimates for the work and materials to be supplied
- 2) the contract between the parties
- 3) invoices for work performed
- 4) financial statements indicating work complete and reference to payment already received
- 5) correspondence from the Plaintiff seeking final payment
- 6) photos of the properties in question
- 7) abstract of title and transfers to ultimate purchasers
- 8) summary of the properties
- 9) the Agreement of Purchase and Sale including Statement of Adjustments on each transaction
- 10) summary/table of amounts received on all relevant Statements of Adjustment
- 11) corporate documents for Limo Homes Ltd., Glen Forest Homes Ltd. and 2024139 Ontario Limited

## **Findings of Fact**

[4] Based on the uncontradicted evidence presented at trial, I make the following findings:

- a) The Plaintiff is owed approximately \$67,000 for construction services and products provided to the Defendants. The specific amount of damages claimed is \$64,900.

- b) The Defendants, Tony Limotta, Sandro Limotta and Efin Zbrizher were at all material times the sole officers, directors and controlling minds of the corporate Defendants Limo Homes Ltd., Glen Forest Homes Ltd. and 2024139 Ontario Ltd.

### **Analysis**

[5] The Plaintiff was the beneficiary of a trust under s. 8(1) of the *Construction Lien Act*, R.S.O. 1990 C 30. The Defendants were the trustees of those funds. The onus then shifts to the Defendants to demonstrate that payments made from trust funds were to proper beneficiaries of the trust. In this trial there was no such evidence presented on behalf of the Defendants. Ref. *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2010), Carswell Ont. 1450, 2010 ONCA 198, 87 CLR (3d) 163 at paras. 83, 84; *St. Mary's Cement Corp. v. Construc Ltd.* (1997), CarswellOnt 939, 32 O.R. (3d) 595 paras. 9-12, 35.

[6] The individual named Defendants are jointly and severally liable with the corporate Defendants based on their positions as officers or directors of those corporations. *St. Mary's Cement Corp. v. Construc Ltd.*, *supra*, at para. 45-49; *Construction Lien Act* s. 13(1).

### **Re Defendant Tony Limotta also known as Antonio Nicola Limotta (Bankrupt)**

[7] Counsel for the Plaintiff submits that notwithstanding the insolvent status of Tony Limotta, a judgment should issue against him since the Court has determined there was a breach of fiduciary duty. In support he cites the following: s.178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 C B-3, and the decision of Justice Pepall of this court in *Re Dicroce* (2004), CarswellOnt. 1673, 49 CBR (4<sup>th</sup>) 196, 33 CLR (3d) 59. That case involved a finding that the bankrupt and his company had committed a breach of trust and misappropriated funds while in a fiduciary capacity. That court found that there was improper conduct that constituted misappropriation or defalcation.

[8] This issue was addressed by the Ontario Court of Appeal in *Simone v. Daley*, [1999] O.J. No. 571, 43 O.R. (3d) 511. That court held as follows:

- a) In examining the words “misappropriation or defalcation while acting in a fiduciary capacity” they import elements of “dishonesty, wrongdoing or misconduct” (para. 36).
- b) Not all breaches of obligation by a fiduciary are breaches of a fiduciary obligation. They may simply be an inadvertence, negligence or incompetence (para. 37).
- c) Courts should avoid attempting to sweep into concepts such as “misappropriation” or “defalcation” which in their ordinary meanings connote some element of wrongdoing, improper conduct or improper accounting – any and all failure by the fiduciary to comply with the obligations attending upon that capacity (para. 38).

- d) Had Parliament intended that any innocent breach of an obligation on the part of the fiduciary would give rise to a debt that would not be released by a discharge from bankruptcy it could very easily have said so by providing that an order of discharge does not release the bankrupt from any debt or liability arising from a breach of fiduciary obligation. It did not do so.

[9] Unlike the *Dicroce* case, *supra*, the facts before me do not reveal aspects of misconduct, misappropriation or defalcation that would bring into operation the provisions of s.1778 of the *Bankruptcy and Insolvency Act*. The fact that I have found that there was money owed by the Defendant, Tony Limotta, to the Plaintiff and that a trust existed by virtue of the *Construction Lien Act* without more is not sufficient to conclude that a judgment in this case survives the insolvency process. Therefore, I will not enter a judgment against the individual Defendant, Tony Limotta.

### **Judgment**

[10] The Plaintiff shall have judgment against all named Defendants except Tony Limotta, also known as Antonio Nicola Limotta, as follows:

1. Damages in the amount of \$64,900.
2. Prejudgment interest at the rate of 2.8% from March 9, 2005.
3. A declaration that all amounts paid to the corporate defendants and all amounts owing to or received by the corporate defendants on account of the contracts in question constitute trust funds for the benefit of the Plaintiff pursuant to ss. 7, 8 & 9 of the *Construction Lien Act*, R.S.O. 1990 c C30 as amended.
4. Declaration that the corporate Defendants were trustees with respect to all funds received from the transactions in question.
5. Declaration that the corporate Defendants breached their trust obligations.
6. Declaration that the individual defendants other than Tony Limotta are jointly and severally liable for the breach of trust committed by the corporate defendants pursuant to s.13 of the *Construction Lien Act*.
7. I decline to order exemplary or punitive damages. Counsel very fairly did not strenuously seek such an order in oral submissions.
8. A copy of this Judgment is to be sent by registered mail by the solicitors for the Plaintiff's to all of the Defendants at the addresses shown on the order of Master Peterson dated November 2, 2007.

**Costs**

[11] Bearing in mind the factors set out in Rule 57.01 of the Rules, costs are fixed in the amount of \$14,000.

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**B. O'Marra J.**

**Released:** November 18, 2011

**CITATION:** Placha, Mirko Construction v. Limotta, 2011 ONSC 6779  
**COURT FILE NO:** 05-CV-285587PD1  
**DATE:** 20111118

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

MIROSLAW PLACHA, CARRYING ON BUSINESS AS  
MIRKO CONSTRUCTION

Plaintiff

- and -

TONY LIMOTTA, ALSO KNOWN AS ANTONIO NICOLA  
LIMOTTA (BANKRUPT), HOYES, MICHALOS &  
ASSOCIATES INC. (TRUSTEE IN BANKRUPTCY) FOR  
THE BANKRUPT TONY LIMOTTA, ALSO KNOWN AS  
ANTONIO NICOLA LIMOTTA, SANDRA LIMOTTA,  
EFIM ZBRIZHER, LIMO HOMES LTD., GLEN FOREST  
HOMES LTD. AND 2024139 ONTARIO LTD.

Defendants

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**JUDGMENT**

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**B. O'Marra J.**

**Released:** November 18, 2011