

COURT OF APPEAL FOR ONTARIO

CITATION: Mughal v. Bama Inc., 2020 ONCA 704

DATE: 20201104

DOCKET: C67351

Roberts, Trotter and Thorburn JJ.A.

BETWEEN

Nadeem Ahmed Mughal also known as Nadeem Mughal

Plaintiff (Respondent)

and

Bama Inc., Abdul Raheem Qureshi, ET Zone Supplies Inc., Zainab Sayeed
Noman, Badar Sohail Khan, Mansoor Ahmed Khan and
Muhammad Noman Yusuf also known as Muhammad Yusuf

Defendants (Appellant)

Jonathan Shulman, for the appellant, Mansoor Ahmed Khan

John S. Contini, for the respondent, Nadeem Ahmed Mughal

Heard: October 28, 2020 by video conference

On appeal from the order of Justice Lucy K. McSweeney of the Superior Court of Justice, dated July 26, 2019, with reasons reported at 2019 ONSC 4504 and from the costs order, dated February 24, 2020.

REASONS FOR DECISION

[1] The appellant, Mansoor Ahmed Khan (“MA Khan”), appeals from the judgment against him for civil conspiracy to cause economic injury to the respondent and the award of substantial indemnity costs. He asks that the

respondent's action be dismissed. In the alternative, he asks that the matter be remitted to the Superior Court for a retrial.

[2] At the conclusion of the hearing, we advised that the appeal was dismissed with reasons to follow. These are those reasons.

Preliminary Motion to Adjourn

[3] At the outset of this appeal hearing, counsel for MA Khan sought to adjourn the appeal. He claimed that approximately one month ago, he discovered that one of the co-defendants, Abdul Raheem Qureshi who has also appealed this judgment, will bring a motion to admit fresh evidence on his appeal.

[4] Although the relationship between Mr. Qureshi's application for fresh evidence and the present appeal was not made exactly clear, counsel argued the fresh evidence pertains to the domain name for Bama Inc. He also suggested that his client might seek to raise an allegation of ineffective assistance of counsel.

[5] Counsel for MA Khan advised the court that he was in possession of a copy of what we understood to be the proposed notice of motion and affidavit of Mr. Qureshi, but did not provide any of the documents to which he made reference nor did he advise that he would be seeking an adjournment until the commencement of the hearing.

[6] Counsel provided no explanation for the failure to address these issues before the commencement of the appeal hearing, why the evidence could not have

been adduced earlier, or why he had never sought to join this appeal with Mr. Qureshi's appeal. In the absence of any particulars or fresh evidence of the new allegations, we are unable to discern how MA Khan's appeal could be affected.

[7] Moreover, we agree the respondent would suffer non-compensable prejudice because of the requested adjournment. He used his life savings and borrowed money to invest in Bama Inc. because of Mr. Qureshi's fraudulent misrepresentations and the fraudulent conspiracy carried out by Mr. Qureshi, MA Khan and Bama Inc., all of which he lost. He is paying interest on the money he borrowed. There was no offer to pay the costs thrown away.

[8] For these reasons, the adjournment was refused, and the appeal was argued on its merits.

Brief Factual Background

[9] The respondent renewed his friendship with Mr. Qureshi, his old friend from Pakistan. Mr. Qureshi offered the respondent an opportunity to invest his retirement savings and funds from a line of credit in a business venture.

[10] The respondent thought he was investing in Bama Inc., which Mr. Qureshi told him was an active and successful electrical supply company. Bama Inc. had

three directors: Mr. Qureshi, MA Khan and Badar Sohail Khan¹. In fact, Bama Inc. was a shell company.

[11] On November 28, 2014, the respondent transferred \$60,000 into the business account of Bama Inc. On December 1, 2014, Mr. Qureshi transferred this amount into the ET Zone account.

[12] On June 4, 2015, the respondent transferred \$50,000 from his line of credit at CIBC to Mr. Qureshi personally.

[13] On June 10, 2015, upon request made by Mr. Qureshi, the respondent transferred a further \$100,000 payable to Bama Inc., after Mr. Qureshi falsely promised the respondent a “bank guarantee” to secure the funds. This amount was then transferred to the ET Zone account.

[14] Throughout this time, the respondent received two “profit payments” from his own funds: one of \$4,000 on March 16, 2015 and another of \$3,500 on July 2, 2015.

[15] Unknown to the respondent until after the transfers, most of his money was transferred into a struggling company called ET Zone Supply Inc. Mr. Qureshi was ET Zone’s Business Development Manager.

¹ The trial judge dismissed the action against Badar Sohail Khan for lack of evidence of his involvement in the fraud.

[16] The respondent lost his \$210,000 investment.

[17] After a three-day trial, the trial judge found MA Khan was liable (along with Mr. Qureshi and Bama Inc.) for conspiracy to cause economic injury to the respondent.

Issues

[18] MA Khan's grounds of appeal can be fairly summarized as follows:

1. The trial judge applied the wrong legal test for and misapprehended the evidence to find he committed the tort of conspiracy to injure the respondent;
2. The trial judge erred in awarding substantial indemnity costs against him because of her inconsistent findings concerning civil fraud.

[19] At the hearing of the appeal, counsel for MA Khan attempted to argue the new ground of ineffective assistance of counsel. We did not permit him to do so. The respondent understandably objected. MA Khan had not raised this issue in his notice or supplementary notice of appeal nor was there any evidentiary foundation for it in the appeal record.

Analysis

(1) The trial judge made no error in finding that MA Khan conspired to cause economic injury to the respondent

[20] The trial judge applied the correct test for establishing civil conspiracy to injure. The test, as set out in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, was cited by this court in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, to which the trial judge referred.

[21] The tort of conspiracy to injure is recognized where:

- (1) Whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the respondent is likely to and does result in loss to the plaintiff.

[22] With respect to the second factor, it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but there must be a constructive intent derived from the fact that the defendants should have known that injury to the respondent would ensue and damage would be suffered by the plaintiff: *Agribrands*, at para. 24.

[23] Applying these factors, the trial judge made the following findings in support of her conclusion that MA Khan conspired with Mr. Qureshi and Bama Inc. to cause economic injury to the respondent:

- a. MA Khan knew of ET Zone, he and Mr. Qureshi had both invested in ET Zone, and Mr. Qureshi was working for ET Zone an electric supply company.
- b. MA Khan engaged Mr. Qureshi to join Bama Inc. because “we [ET Zone] may be able to do... some business” with Bama Inc., although there was no legitimate reason to do so because Bama Inc. was a shell corporation whose stated purpose was to provide IT and human resources, not electrical supply.
- c. MA Khan arranged for Mr. Qureshi to become the third director of Bama Inc. in June 2014 to create a vehicle for indirect investment into ET Zone.
- d. Bama Inc. was a shell company with no operations so there was no reason to create a new corporate account for dispersal of profit.
- e. MA Khan and Mr. Qureshi are two of only three directors of Bama Inc.
- f. MA Khan was the director of Bama Inc. with IT experience. His former address and his wife’s phone number were on the Bama Inc. website’s main pages and he did not deny the existence of a website for the shell company that purported to be a thriving electrical company.
- g. Since he was the Bama Inc. director with IT experience, the trial judge was satisfied on a balance of probabilities that MA Khan was involved in creating the fake website showing that Bama Inc. was a thriving electrical supply company when it was not.

- h. Mr. Qureshi and MA Khan opened a Bama Inc. account on November 21, 2014 by depositing \$222. Thereafter, that account was used to deposit monies received from the respondent.
- i. After the respondent deposited money to the Bama Inc. account, the money was moved to the ET Zone without notice to the respondent.
- j. MA Khan knew or was willfully blind as to where the deposits into the Bama Inc. account came from, as they were not flowing in as profits to be “dispersed” from ET Zone.
- k. MA Khan withdrew thousands of dollars from the Bama Inc. account for his personal purposes.
- l. Despite MA Khan’s testimony at trial that “we [the investors in ET Zone] all had individual agreements with ET Zone”, he did not produce his own investment agreement to explain the amounts withdrawn for his personal purposes from the Bama Inc. account once the respondent’s money was put into it.

[24] The trial judge concluded that although MA Khan did not personally make specific misrepresentations to the respondent nor was he present when the misrepresentations were made, he was nonetheless involved in the conspiracy to injure the respondent and that the Bama Inc. account was used to “mislead the [respondent] into believing his funds were being invested in Bama Inc.” At para. 62, the trial judge concluded:

I find on a balance of probabilities that MA Khan conspired with Qureshi to obtain money for ET Zone through Bama Inc. He did so by working with Qureshi to create a corporate presence (bank account and website) to support the false impression that Bama Inc. was an active electrical-supply business. This misrepresentation

was central to the success of the fraud on the [Respondent]. It would not have succeeded if MA Khan had not taken steps to make Qureshi a director of Bama Inc. Qureshi's experience as an engineer in the electrical-supply industry was necessary for him to credibly hold himself out to the [Respondent] as a director of Bama Inc. as an electrical-supply business. It was Qureshi who had that background, not MA Khan. MA Khan's background is in IT.

[25] MA Khan submits that the trial judge erred in failing to address the fact that there was another email address on Bama Inc.'s website and to find that this email address proved someone else created the website. We do not accept this submission. It was open to the trial judge on the evidence before her to find that MA Khan was implicated in the creation of the website. That others may have been involved does not invalidate the trial judge's finding of MA Khan's involvement.

[26] He also argues that the trial judge misapprehended the evidence and erred in failing to consider that an amount he paid in June 2014 to ET Zone was similar to an amount paid by the respondent to Bama Inc. in November 2014. We disagree. The trial judge was clear that MA Khan himself had invested money in ET Zone. There was no error; the two payments were unrelated.

[27] The evidence amply supports the trial judge's conclusion that both MA Khan and Mr. Qureshi were personally liable for tortious conduct in conspiring to defraud the respondent. All the elements of the tort of conspiracy were made out because:

- a. MA Khan and Mr. Qureshi created the false impression that Bama Inc. was an active, successful

electrical supply company in order to obtain funds to give to ET Zone, where both had invested money;

- b. they obtained funds in the name of Bama Inc., knowing or constructively knowing the respondent was likely to lose his money;
- c. they acted in furtherance of this plan; and
- d. the respondent suffered damages as a result.

[28] We see no basis for appellate intervention.

(2) The trial judge made no error in her costs award

[29] MA Khan argues that the trial judge erred in awarding substantial indemnity costs against him in the amount of \$133,501.61 based on civil fraud when she expressly found in her trial judgment that he did not commit civil fraud.

[30] We do not accept this submission.

[31] While MA Khan was not found liable for civil fraud, deceit or conversion, he was found liable for his fraudulent behaviour in committing the conspiracy to cause the respondent economic injury. It is clearly on this latter basis that the trial judge determined that MA Khan should pay the respondent's costs on a substantial indemnity basis.

[32] Cost awards are accorded deference. The behaviour of MA Khan, Mr. Qureshi and Bama Inc., as found by the trial judge, was egregious and justified the exceptional substantial indemnity scale. There is no basis to overturn the costs award.

Disposition

[33] For these reasons, the appeal is dismissed.

[34] The respondent is awarded partial indemnity costs in the amount of \$10,551.48 inclusive of taxes and disbursements.

“L.B. Roberts J.A.”

“Gary Trotter J.A.”

“J.A. Thorburn J.A.”