COURT OF APPEAL FOR ONTARIO

CITATION: Rassouli-Rashti v. Tayefi, 2023 ONCA 315
DATE: 20230505
DOCKET: C69939

Roberts, George and Favreau JJ.A.

BETWEEN

Mohammad Rassouli-Rashti
and Mohammad Reza Tayefi

Plaintiffs
(Respondents)

and

Ehsan Tayefi and Ralph Michael Levine

Defendants
(Appellant)

Jayson W. Thomas, for the appellant

Joseph P. Maggisano, for the respondents

Heard: April 11, 2023

On appeal from the judgment of Justice Mohan Sharma of the Superior Court of Justice, dated September 24, 2021 and October 26, 2021.

Roberts J.A.:

[1] This appeal concerns a dispute among family members arising out of the breakdown of their partnership to construct and sell two residential houses. The appellant appeals the judgment in favour of the respondents and the dismissal of his counterclaim.

Background

[2] Mohammad Rassouli-Rashti is the brother-in-law of Mohammad Reza Tayefi and Ehsan Tayefi, who are brothers. The three of them entered into a partnership to purchase and construct residential houses on properties at 393 and 395 Elm Road in Toronto. To cover the purchase and development costs of the project, each partner contributed capital (60% by the respondents and 40% by the appellant) and a $1.875 million mortgage from Home Trust was secured over both properties. New houses were constructed on those properties. They decided to sell 393 Elm Road first, but when it did not sell after 70 days on the market, the partners decided instead to sell 395 Elm Road first. 395 Elm Road sold more quickly than 393 Elm Road because it had more contemporary and other desirable features.

[3] Prior to the sale and closing of 395 Elm Road, the partners had a falling out and discussed terminating the partnership. The appellant proposed a dissolution and distribution agreement, allocating values to each property. Unknown to the respondents, on July 17, 2018, the appellant had accepted an offer to purchase 395 Elm Road for $2.545 million. In the dissolution discussions with his partners, the appellant proposed a value for 395 Elm Road that he knew was $200,000 less than the actual sale price. The respondents learned of the sale from others in late July, 2018. The appellant did not confirm the sale until mid-August 2018 nor that a

deposit cheque dated July 18, 2018 for $230,000 was paid by the purchasers. In fact, the appellant changed the date of the deposit cheque to August 18, 2018.

[4] The sale of 395 Elm Road closed on October 3, 2018. Unknown to his partners, the appellant made arrangements to partially discharge the Home Trust mortgage on only 395 Elm Road by misrepresenting to Home Trust that no one else but he had an interest in the property. $900,500 of the sales proceeds were paid to Home Trust for the partial discharge. Also unknown to the respondents, from the sales proceeds, the amount of $61,298.56 was paid to the appellant's lawyer in trust and $1,361,288.89 was paid to the appellant.

[5] On October 4, 2018, the respondents advised Home Trust of their interest in 395 Elm Road and of their refusal to agree to a partial discharge of the mortgage. Home Trust did not complete the partial discharge and eventually applied the amount received to the full mortgage on both properties.

[6] At the beginning of November 2018, the respondents commenced litigation against the appellant and the appellant instigated a counterclaim. There were a number of interlocutory attendances concerning the undistributed funds, among other matters. In the course of the proceedings, approximately $983,000 of the funds released to the appellant from the sale of 395 Elm Road were subsequently frozen by court order.

[7] 393 Elm Road was listed for sale in May 2019 and the sale of the property closed on January 24, 2020. The Home Trust mortgage was fully discharged on closing. The remaining proceeds were distributed among the partners in accordance with their partnership shares. However, the funds received from the sale of 393 Elm Road were insufficient to put the respondents on the same footing as the appellant given the funds that had already been distributed from the sale of 395 Elm Road.

[8] The trial judge found that the partnership did not terminate in July 2018 and that it was in force and effect at the time of the sale of 395 Elm Road. He held that the appellant was in breach of his fiduciary duties to his partners, notably, by concealing the sale of 395 Elm Road, by proposing a value for 395 Elm Road that was $200,000 less than the actual sale price, and by attempting to partially discharge the mortgage on only 395 Elm Road.

[9] The trial judge accepted the respondents' calculation of damages, as set out in their "Updated Exhibit D". Specifically, he found that $164,396.79 should be paid to the respondents to place them on the "same footing" as the appellant in terms of the already distributed funds. This allocation was in accordance with their respective interests in the partnership. It included the damages resulting from the appellant's breaches, such as their proportionate share of the mortgage interest, and the respondents' expenses related to the properties.

[10] The trial judge therefore concluded that from the undistributed amount of $846,360.96, $693,999.58 would be allocated to the respondents and $152,672.09 would be allocated to the appellant. He ordered that the parties would also share in accordance with their partnership interests in whatever balance remained from the amount of $25,000 held in a lawyer's trust account. The trial judge awarded the respondents their costs in the amount of $180,000 and ordered that the appellant's $152,672.09 allocation would be paid towards those costs, leaving a balance owing by the appellant of $27,327.91.

Issues and Analysis

[11] The appellant submits that the trial judge made the following reversible errors. I consider each in turn.

(i) The trial judge did not address whether the respondents failed to mitigate their damages by their delay in listing 393 Elm Road for sale.

[12] The appellant argues that the respondents delayed by nine months in listing 393 Elm Road for sale and that, as a result, unnecessary mortgage interest was incurred for which the respondents should be entirely responsible.

[13] I do not accept these submissions. While the trial judge did not expressly address this issue in his reasons, his findings that the appellant's breaches solely caused the additional mortgage interest suffices to dispose of it. Specifically, the trial judge found that the appellant had breached his fiduciary duties, particularly

by his failure to abide by the agreement to pay off the entirety of the mortgage from the sale proceeds of 395 Elm Road. The appellant maintained until judgment that there was no such agreement. Although addressed in the trial reasons related to the appellant's counterclaim, the trial judge's explanation for rejecting the counterclaim because of the appellant's refusal to apply the proceeds to pay off the mortgage applies to the question of mitigation:

> Ehsan's theory of the case, on which most of his counterclaim is based, is inconsistent with the facts as I have found them. Plaintiffs' counsel wrote to Ehsan's lawyer, Mr. Levine, on October 9 shortly after the sale of 395. In that letter, he proposed that the sale proceeds of 395 be used to discharge the full mortgage. After which, they could reach agreement as to how the remaining funds were to be disbursed. Ehsan rejected this proposal. What ensued was that the Home Trust mortgage was renewed at a higher rate, causing a loss to the partnership that could have been avoided. Then by court order, the funds realized on the sale of 395 were frozen, depriving all parties of funds that could have been used to re-invest in new business opportunities. In my view, any losses incurred by Ehsan as alleged in his counterclaim could have been entirely avoided had he agreed to apply the proceeds of the sale of 395 to the full mortgage. He could have maintained his position that the partnership agreement terminated in July of 2018 and fought about the numbers later. He chose not to do so. Therefore, I see no basis upon which liability to the plaintiffs/defendants to the counterclaim can be found. They did not cause the economic harm which is the foundation of most of Ehsan's counterclaim. [Emphasis added.]

[14] Moreover, the appellant provided no evidence to support his arguments that the respondents failed to mitigate their damages. As the trial judge noted, when

initially listed for sale, 393 Elm Road sat on the market for 70 days without any offers. There was no evidence that comparable properties were being sold or that 393 Elm Road would have been sold earlier had it been listed at an earlier date. As it was, when it was listed a second time, 393 Elm Road did not sell for several months.

[15] The onus was on the appellant to prove on a balance of probabilities that the respondents' inaction was unreasonable in the circumstances of this case and that they had failed to mitigate their damages: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 45. While the respondents had an obligation to mitigate their losses caused by the appellant's breaches of his fiduciary duties, the issue of mitigation, including the timing of the listing of the property, must be examined contextually, particularly in the circumstances found by the trial judge to have been created by the appellant's own breaches: *Hunt v. T.D. Securities Inc.*, 66 O.R. (3d) 481, at paras. 107-115; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 553-554, per McLachlin J. (concurring), and pp. 580-581, per La Forest J (for the majority). Based on the trial judge's findings and the evidence in the record, the appellant has not discharged his burden of showing that the respondents' conduct was unreasonable in the circumstances of this case and that they failed to mitigate their damages.

(ii) The trial judge erred in finding that the partners had agreed that the funds from the sale of the first property sold would be used to discharge the entirety of the Home Trust mortgage because he misapprehended the appellant's evidence and erroneously concluded that the appellant had led no evidence to counter that agreement.

[16] The appellant focuses on the following highlighted sentence of para. 21 of the trial judge's reasons to demonstrate that he misapprehended the appellant's evidence:

> The plaintiffs' evidence was that there was agreement among the partners that upon sale of the homes, the funds would be used first to discharge the mortgage on both properties, followed by payment of any loans, followed by distribution of any profits among the partners. Ehsan did not adduce evidence to suggest that there was a different agreement. [Emphasis added.]

[17] The appellant submits that the trial judge misapprehended his evidence because the appellant did provide evidence regarding this issue, namely, he denied that any such agreement was discussed or arrived at among the parties.

[18] I am not persuaded that the trial judge misapprehended the evidence. The appellant's blanket denial of the existence of any agreement is not evidence of "a different agreement". The trial judge's finding on this issue is entitled to deference and I find that he made no reviewable error.

(iii) The trial judge erred in his conduct of the trial and in his failure to ensure trial fairness for the appellant, a self-represented litigant, by: a) prohibiting the appellant from cross-examining Dr. Rassouli-Rashti on his professional discipline conviction for lying to his disciplinary regulator; and b) refusing to allow the appellant to refer to an outline while testifying.

[19] The appellant's grounds here challenge the exercise of the trial judge's trial management powers. Given their discretionary nature, absent error in principle or unreasonable exercise, deference is owed on appeal to trial management decisions: *R. v. Samaniego*, 2022 SCC 9, 466 D.L.R. (4th) 581, at paras. 25-26. However, erroneous evidentiary rulings and trial unfairness cannot be justified under trial management. No deference is owed to a trial management decision that amounts to an error in principle or an unreasonable exercise of discretion, or that otherwise renders a trial unfair: *Katz v. Zentner*, 2022 BCCA 371, at paras. 61-62, 76; *R. v. Wesaquate*, 2022 SKCA 101, 418 C.C.C. (3d) 225, at paras. 95-96; *Ker v. Sidhu*, 2023 BCCA 158, at paras. 80-84; *Samaniego*, at para. 26. Appellate review of trial management decisions requires a contextual approach; it is important to consider them in the context of the trial as a whole, rather than as isolated incidents: *Samaniego*, at para. 26.

(a) Did the trial judge err in curtailing the appellant's cross-examination of Dr. Rassouli-Rashti?

[20] The appellant complains that trial unfairness resulted from the trial judge not permitting him to cross-examine Dr. Rassouli-Rashti on his professional discipline conviction dated October 20, 2008. The conviction arose from a finding that Dr. Rassouli-Rashti provided a false alibi for a fellow doctor who was charged with sexual assault.

[21] The issue arose at trial when counsel for the respondents objected to the appellant asking Dr. Rassouli-Rashti in cross-examination if his medical licence had ever been revoked. When the trial judge asked the appellant what the relevance of this question was, the appellant replied: "Your, Your Honour, we are relying on the oral evidence and I believe the – it's go backs also to history of the people as well that he had misled at court before and that's why he lost his license twice" (emphasis added). He did not proffer nor refer to any disciplinary decision.

[22] The next day, the trial judge ruled that the appellant could not pursue this line of inquiry or call the proposed evidence because he found it would be more prejudicial than helpful in assisting him in "coming to the truth". He further noted that if he were asked to review the evidence underlying the disciplinary panel's decision, "it is hearsay evidence and the only way that we could get to determine whether their conclusions or their assessments in, in those proceedings were

reliable, we'd have to go down a rabbit hole of literally doing that same hearing all over again". This, he stated, was unnecessary and would detract from his task of "assessing the credibility of witnesses."

[23] There is no dispute that it would have been permissible for the appellant to question Dr. Rassouli-Rashti about whether there were prior findings of professional misconduct against him involving dishonesty, in an attempt to impugn his credibility as a witness: *Deep v. Wood* (1983), 143 D.L.R. (3d) 246 (Ont. C.A.), at para. 10. As the appellant's counsel stated in oral submissions, if Dr. Rassouli-Rashti had denied this, the appellant could have shown, through evidence of the past disciplinary decision and the Discipline Committee's findings, that he was lying about this answer and that there had been a prior decision impugning his credibility.

[24] However, that is not what the appellant did or requested to do here. He indicated to the trial judge that he wanted to call oral evidence to show that Dr. Rassouli-Rashti was lying. There was no reversible error in the trial judge not permitting the appellant to call oral evidence.

[25] The appellant argues that the trial judge should have questioned him further to explain that he was entitled to use the disciplinary decision to impeach Dr. Rassouli-Rashti's credibility. In hindsight, further questions may have clarified the appellant's intended use of this evidence. However, no trial unfairness resulted.

Permitting the appellant to cross-examine Dr. Rassouli-Rashti on his dated disciplinary conviction for lying to the Discipline Committee would not have changed the outcome at trial. The trial judge's findings did not depend on Dr. Rassouli-Rashti's credibility but flowed from other witnesses' testimony and documentary evidence. Moreover, as the trial judge noted, he was not prepared to accept the appellant's evidence because of the appellant's own lack of credibility and deceitful actions.

(b) Did the trial judge err in not allowing the appellant to use his outline?

[26] I see no error in the trial judge's discretionary treatment of the appellant's request to use his outline in the circumstances of this case. The appellant had completed a good portion of his evidence in chief before he asked to rely on his outline. The respondents objected to its use. The trial judge noted that the appellant was doing "a decent job of going through the chronology" without relying on it and that he should keep following the chronology. The appellant proceeded to complete his evidence without renewing his request or indicating any difficulty in testifying.

[27] The appellant did not produce his outline nor was it described for the record other than as a chronology aid. It is therefore not possible to know what it contained and whether the appellant's proposed use of his outline was permissible, or his

outline was admissible evidence. There is no dispute that the appellant could not simply read in whatever was contained in the chronology.

[28] In any event, the appellant has not pointed to any prejudice or trial unfairness that he experienced by being precluded from relying on his outline. I see none here. The trial judge was in the best position to assist the appellant and assess whether he needed the outline to complete his evidence. He determined that he did not. There is no indication in the record that he committed a reversible error in that discretionary assessment. The appellant completed his evidence without any apparent difficulty and did not renew his request to look at his outline. He has not alleged that he missed crucial – or any – evidence that he wished to present to the court as a result of not using his outline.

(iv) The trial judge erred by accepting the respondents' evidence of their project expenses and by failing to consider the appellant's evidence of his project expenses.

[29] It was open to the trial judge to accept the respondents' evidence of their project expenses which were supported by documentary and oral evidence. During their partnership, the respondents' expenses were uploaded to the parties' "Slack" expenses excel sheet. There is no evidence that the appellant raised any issues about the respondents' project expenses during the partnership. At trial, he did not

seriously challenge them during his cross-examination of the respondents' witnesses. I see no basis to intervene.

[30] Turning to the appellant's claim for project expenses, while the trial judge explained in his reasons why he did not accept the appellant's "Accounting and Distribution of Funds" related to capital gains tax and HST tax liability, he did not address the appellant's list of project expenses and attachments that were marked as Trial Exhibit 21 or indicate why he did not accept them.

[31] This was an error on the part of the trial judge. However, rather than remit this issue for a retrial with the attendant further expense and delay, I am of the view that it would be appropriate and just in the circumstances of this case for this court to determine the question of the appellant's project expenses. We have the complete evidentiary record that permits us to do so fairly in accordance with s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[32] The appellant testified at trial that he had paid for all the expenses set out in Exhibit 21 and that the attached emails and invoices were proof of their payment. However, other than the amount of $1,376.44 for payment of Enbridge Gas, Fido internet, and Toronto Hydro expenses that are supported by invoices, the approximately $52,000 the appellant has claimed for various expenses are not supported by any cogent evidence. Importantly, the appellant acknowledged in a text message contained in Exhibit 21 that many of the figures included in the

$52,000 were only estimates. That the $52,000 is uncertain is borne out by the emails and schedules attached in apparent support of the $52,000. They do not serve to demonstrate which amounts were paid and for what items. Some of the attachments are not in English and are untranslated. They are also conflicting such that it is not clear how much the appellant is claiming. For example, for staging, the amount claimed varies from $5,000 to $8,000 but is unsupported by an invoice.

[33] As a result, the appellant has not proven on a balance of probabilities his claimed expenditure of $52,000 as project expenses. The only amount that is proven is $1,376.44.

Disposition

[34] Accordingly, I would allow the appeal in part and order that the appellant's project expenses of $1,376.44 be factored into the distribution of the unallocated partnership assets in accordance with the parties' respective partnership shares - 60% to the respondents and 40% to the appellant. The appellant's allocation is to be paid from the distribution of the proceeds from the sale of the properties but net of any monies still owing to the respondents in damages or costs, including the costs of this appeal. I would otherwise dismiss the appeal.

[35] If the parties cannot otherwise agree on the disposition of the costs of this appeal, I would invite them to make brief written submissions of no more than two pages, plus a costs outline, within seven days of the release of these reasons.

Released: May 5, 2023 “L.B.R.”

“L.B. Roberts J.A.”
“I agree. J. George J.A.”
“I agree. L. Favreau J.A.”