COURT OF APPEAL FOR ONTARIO

CITATION: Conti v. Duca, 2025 ONCA 356
DATE: 20250508
DOCKET: M55926 (COA-25-CV-0417)

Simmons J.A. (Motions Judge)

BETWEEN

Massimo Conti

Plaintiff
(Appellant/Responding Party)

and

John Duca*, Joseph Duca* and
Daytona Auto Centre Ltd.

Defendants
(Respondents/Moving Parties*)

Joseph Duca and John Duca, acting in person

Gregory Gryguc, for the responding party

Heard: April 29, 2025

ENDORSEMENT

Introduction

[1] The self-represented moving parties, Joseph Duca and John Duca seek an order requiring the appellant, Massimo Conti, to post security for costs in the amount of $25,000 and to pay outstanding costs orders totaling $12,100 plus interest, as a condition of proceeding with this appeal.

[2] The motion relates to Mr. Conti's appeal of a judgment dated March 5, 2025 in which the trial judge dismissed Mr. Conti's claim for an ownership interest in a residential property located at 53 Grampian Crescent, Toronto (the "House") registered in the name of Joseph Duca. Mr. Conti has appealed by way of notice of appeal dated March 18, 2025.

[3] In his action, Mr. Conti claims that, following his employment by Daytona Auto Centre Ltd. ("Daytona"), the parties made an agreement that the House would be purchased for him but registered in the name of Jospeh Duca. He was to be responsible for all expenses in relation to the House and when he was financially able, the House would be transferred into his name. John Duca is the sole director and shareholder of Daytona. Joseph Duca is John Duca's son and apparently the operations manager of Daytona.[1]

[4] Joseph Duca and John Duca (collectively "the Duca's") deny that the agreement alleged by Mr. Conti was ever made. They claim that, in December 2011, John Duca purchased the House[2] as an investment for his son, Joseph Duca, and also to provide a home for Mr. Conti to live in while he was employed at Daytona. It is undisputed that John Duca recruited Mr. Conti to come from Italy to work for Daytona and assisted him with his expenses so that he could do so.

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[1] Endorsement and Order of Brown A.J., dated December 13, 2024.
[2] On the trial judge's findings, the purchase price of the House was $366,139.50 paid by way of $77,090 in cash and the balance by way of a first mortgage.

[5] According to Mr. Conti, after moving into the House shortly after it was purchased, he paid $1,700 per month to John Duca to cover expenses, paid the utilities, and also performed many renovations. On the trial judge's findings, Joseph Duca paid the mortgage, tax and insurance payments on the House, but the amounts are unspecified.[3]

[6] In 2017, John Duca waived the $1,700 monthly payments in lieu of a raise. In March 2023, Mr. Conti left his employment at Daytona and thereafter recommenced making payments of $1,700 per month to John Duca. He commenced the action after being served with an eviction notice.

[7] The trial judge dismissed Mr. Conti's action based on a number of findings, including the following:

- as there was no document evidencing a trust, there was no express trust in favour of Mr. Conti;
- she preferred the evidence of the Duca's over that of Mr. Conti;
- even if she accepted Mr. Conti's version of events, he had not established a gift in his favour but rather an arrangement whereby he could purchase the home when and if he was financially able.

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[3] The trial judge also noted that John and Joseph Duca opened a joint bank account to manage the deposits and payments for the House.

- as there was no evidence that Mr. Conti had contributed money toward the purchase price of the House, there was no basis to find a purchase money express trust; and
- in all the circumstances, there was no basis to find an unjust enrichment to the detriment of Mr. Conti and that justice does not require a remedy by way of an order vesting title of the House in him based on the doctrine of constructive trust.

[8] For the reasons that follow, I order that Mr. Conti post security for costs in the amount of $6,700 payable as follows: $2,500 on or before May 30, 2025, $2,500 on or before June 30, 2025, and $1,700 on or before July 31, 2025. In the event Mr. Conti fails to make any one or more of these payments on or before the specified dates, the moving parties may move for an order dismissing the appeal on notice to Mr. Conti. Nothing in this order shall suspend Mr. Conti's obligations to take the steps necessary to perfect the appeal in a timely manner.

Preliminary Matters

[9] At the outset of the oral hearing, Joseph Duca appeared by Zoom purporting to represent himself, his father, John Duca, and Daytona. After I informed him that he would be required to obtain an order from this court permitting him to represent Daytona in this court and that he could not represent his father, he arranged to have his father join the Zoom hearing and asked that the motion

proceed on behalf of him and his father only. As the responding party did not object, I permitted the motion to proceed on that basis. Accordingly, Daytona did not participate in this motion.

[10] Because the responding party had not received a copy of the moving parties' Oral Hearing Compendium, I struck it from the motion record.

[11] Sergio Grillone (the "Intervener") was granted intervener status in the court below and appeared, initially, on this motion. Because he had not applied for intervener status in this court, I ruled that he was not entitled to participate in the motion and struck his Oral Hearing Compendium from the motion record.

The Moving Parties' Grounds for the Relief Claimed and the Relevant Rules

[12] The moving parties relied on the following grounds in support of the relief claimed on the motion:

- the action and the appeal are frivolous, and the responding party is using the appeal as a delay tactic to cause them financial harm;
- the responding party has failed to pay outstanding costs orders from interlocutory motions;
- the responding party is financially unstable – in addition to being unable or unwilling to pay outstanding costs orders: although the responding party swore an affidavit in December 2024 claiming he was working, as far as the moving parties are aware, he has not worked since October 31, 2024 and

the moving parties therefore have a reasonable belief that he will not be able to pay costs if the appeal fails; and

- it is in the interests of justice to require security for costs to prevent an abuse of process and protect the moving parties from unnecessary financial harm.

[13] The moving parties referred only to rule 61.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") generally in their notice of motion. Based on my review of the Rules and the moving parties' grounds for the motion, I would particularize the Rules on which the moving parties rely as follows:

> Rule 61.06(1) In an appeal where it appears that,
>
> > (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
> >
> > (b) an order for security for costs could be made against the appellant under rule 56.01; or
> >
> > (c) for other good reason, security for costs should be ordered,
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> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.
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> Rule 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
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> > ...
> >
> > (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part.

Discussion

(1) Rule 61.06(1)(a)

[14] While I am satisfied the appellant's grounds of appeal are weak, I am not satisfied that they are frivolous.

[15] In his notice of appeal, Mr. Conti lists several general grounds of appeal, raising both issues of fact and law without specifics. A copy of the notice of appeal is attached as Appendix 'A'. As an example of the lack of specificity, as his first ground of appeal, the responding party states that the trial judge erred "by failing to properly apply and interpret the principles of equity and trust". When questioned during oral submissions, counsel for the responding party did not particularize any errors of law but rather asserted that the trial judge misapplied the law based on factual errors she had made. Another example of the lack of specificity is the claim, without any particulars, that the trial judge erred by inappropriately overruling/dismissing objections of the responding party.

[16] The responding party also raises several grounds of appeal relating to alleged procedural errors, such as permitting Joseph Duca to represent all defendants, permitting the defendants and the Intervener to proceed virtually, and a ground relating specifically to the Intervener. I conclude that there is good reason to believe these grounds are frivolous, in the sense of "readily recognizable as devoid of merit, as... having little prospect of success": *Pickard v. London (City)*

Police Services Board, 2010 ONCA 643, 268 O.A.C. 153, at para. 19. An order was made permitting Joseph Duca to represent Daytona prior to trial. John Duca was apparently present at trial. The fact that Joseph Duca was the primary, if not the sole, presenter, does not mean that Joseph was representing John who was present and apparently adopted Jospeh's position. The responding party has not provided particulars of any adverse effects of proceeding virtually. His claim concerning the Intervener is irrelevant to the issues on this motion.

[17] Overall, I conclude that the force of the responding party's grounds of appeal, lies in the following ground:

> The trial judge erred...:
>
> > C) By not recognizing, giving appropriate weight misinterpreting, and applying critical evidence of the [responding party's] witnesses, including but not limited to Steve Armellin and evidence with respect to the [responding party's] ownership and beneficial interest per the [House].

[18] In essence, this is a challenge to the trial judge's findings of fact and credibility. Such findings are entitled to deference on appeal. As such, absent additional particulars, the responding party's ground of appeal in this regard is patently weak. Nonetheless, I am not prepared to say, at this early stage, that there is good reason to believe that it is recognizably devoid of merit. In particular, I observe the moving parties did not file a copy of the responding party's statement of claim. I do not know whether the responding party made any alternative claim

for relief in relation to his claim for unjust enrichment. If the trial judge's reasons on their face reveal any potentially arguable ground of appeal, I would say it lies in the holding that there was "no unjust enrichment to the detriment of Mr. Conti". I see little, if any merit, in the assertion that any unjust enrichment in this case could give rise to a propriety interest in the House. The responding party's contributions were simply not sufficient to support such a claim. However, I am not prepared to say that an argument concerning the finding of "no unjust enrichment" obviously devoid of merit. I am not satisfied based on the record before me that the renovations the responding party claims he made would not be capable of supporting monetary compensation for unjust enrichment if in fact they were made. In any event, while weak, I do not consider the responding party's challenge to the trial judge's findings of fact recognizably devoid of merit.

[19] In light of my conclusions, it is unnecessary that I address the other components of this rule.

(2) Rule 56.01(1)(c)

[20] It is undisputed that the responding party has not paid the following costs orders made in favour of the moving parties and Daytona:

- May 13, 2024, $4,600 awarded by McGraw A.J., payable within 30 days in relation to an order directing the removal of a certificate of pending litigation obtained by the responding party;

- October 11, 2024, $2,500 awarded by Morgan J. payable within 30 days in relation to an order dismissing an appeal from the order of McGraw A.J.

[21] The responding party was also ordered to pay the Intervener $2,500 in the McGraw A.J. order, and $2,500 in the Morgan J. order.

[22] The responding party submitted that these costs should not be considered as they are the subject of a pending appeal. The responding party's affidavit appends a notice of motion for leave to appeal the August 19, 2024 order of Morgan J. underlying his October 11, 2024 costs award. Even assuming that the leave motion has not been abandoned as the moving parties claim it has been, a motion for leave to appeal does not stay a costs award: see, e.g., *Ford v. Windsor (City)*, 2018 ONCA 992, at para. 1. This is because a notice of appeal, delivery of which would trigger an automatic stay, cannot be delivered while a leave motion is outstanding.

[23] I will discuss the impact of these costs awards remaining unpaid under the next section.

[24] During the oral hearing, I ruled that the moving parties are not entitled to rely on the alleged failure to pay costs awards made as part of the above-noted order in favour of the Intervener. Those orders do not fall within the scope of rule

56.01(1)(c). In any event, there was no admissible evidence that such orders were unpaid.[4]

[25] I also ruled that the moving parties were not entitled to rely on any alleged failure to pay the costs awarded by the trial judge as the trial costs were awarded on April 3, 2025 payable within 30 days. Since the motion was heard on April 29, 2025, the time period allowed for paying them had not yet expired.

(3) Rule 61.06(1)(c)

[26] Rule 61.06 (1)(c) permits an order for security for costs to be made where, for other good reasons, it appears that such an order should be made.

[27] Here, while not frivolous, for the reasons I have explained, the grounds of appeal appear to be weak. My finding that the grounds of appeal are not frivolous is based to some significant extent on the trial judge's discussion of unjust enrichment and the moving parties' failure to file a copy of the responding party's statement of claim, which would reveal whether he claimed any alternative remedy. However, even if the responding party claimed an alternative remedy, his grounds of appeal relating to a claim for a beneficial interest in the House are, in my view,

[4] During the oral hearing I advised the moving parties of the requirements of rule 39.01(4): An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

very weak. They are premised on alleged, but unparticularized, errors in the trial judge's fact finding, which are subject to deference on appeal.

[28] However, despite weak grounds of appeal, the responding party remains in the House, paying the sum of only $1,700 per month, a figure that was apparently agreed upon in 2011.

[29] As I have said, the responding party has failed to pay two outstanding costs orders, totaling $7,100.

[30] While the responding party has deposed that he is working, the documentary support he has provided is very weak, and he has not disclosed his salary, other assets or provided any other indications of his ability to pay the costs of the pending appeal.

[31] In all the circumstances, I conclude that the moving parties are entitled to protection in relation to the costs of a potentially unmeritorious appeal. The responding party has demonstrated either an inability or unwillingness to pay costs awards and he remains in the House that is the subject of the litigation at what appears to be a very favourable occupation cost. I decline to make any order for security of costs in relation to the outstanding costs orders as I do not wish to preclude access to justice.

[32] The moving parties did not submit a costs outline in relation to the appeal. Because they are self-represented, I will estimate costs based on the same

principles used by the trial judge, $125 per hour lost opportunity costs for Joseph for preparation and attendance on the appeal, and $120 per hour lost opportunity costs for John for attendance on the appeal (I anticipate that it will be Joseph who takes responsibility for preparing for the appeal). I calculate approximately $1,000 for attendance on the appeal and approximately $4,500 for preparation and disbursements. As the successful parties, the moving parties are also entitled to costs and security for their costs of this motion. I award $1,200 on account of such costs inclusive of disbursements.

Disposition

[33] Based on the foregoing reasons, Mr. Conti is ordered to post security for costs in the amount of $6,700 payable as follows: $2,500 on or before May 30, 2025, $2,500 on or before June 30, 2025, and $1,700 on or before July 31, 2025. In the event Mr. Conti fails to make any of these payments on or before the specified dates, the moving parties may move for an order dismissing the appeal on notice to Mr. Conti. Nothing in this order shall suspend Mr. Conti's obligations to take the steps necessary to perfect the appeal in a timely manner.

[34] Costs of this motion are to the moving parties on a partial indemnity scale fixed in the amount of $1,200 inclusive of disbursements.

"Janet Simmons J.A."

APPENDIX A

Ontario Court of Appeal File No.:
Ontario Superior Court of Justice File No.: CV-23-00697033

ONTARIO
COURT OF APPEAL

B E T W E E N:

MASSIMO CONTI

Plaintiff / Appellant

- and -

JOHN DUCA, JOSEPH DUCA, and DAYTONA AUTO CENTRE LTD.

Defendants / Respondents

NOTICE OF APPEAL

THE PLAINTIFF/APPELLANT appeals to the Court of Appeal from the Judgement of the Honourable Justice Leiper dated March 5, 2025, made at Toronto.

THE PLAINTIFF/APPELLANT ASKS THAT that the judgment be set aside and that judgment be granted to the Plaintiff/Appellant for the relief sought in the statement of claim and for amounts to be determined by this court, with costs both in this court and in the court below.

THE GROUNDS FOR THE APPEAL are as follows**:**

1. The trial judge erred generally in consideration of the law and facts of the trial;

2. The trial judge erred in the decision/judgement rendered which was inconsistent with the weight of the evidence and unsupported based on the evidence presented;
3. The trial judge erred in fact, law, and procedure, as per the following, causing a miscarriage of justice:

A) By failing to properly apply and interpret the principles of equity and trusts;

B) By not recognizing the Plaintiff's/Appellant's ownership and beneficial interest per the subject matter property (municipally located at 53 Grampian Crescent, Toronto, Ontario, M9L 2L2) [hereinafter, the "Property"], based on equitable principles of an express trust, resulting trust, constructive trust, proprietary estoppel, and unjust enrichment;

C) By not recognizing, giving appropriate weight, misinterpreting, and applying critical evidence of the Plaintiff's witnesses, including but not limited to Steve Armellin and evidence with respect to the Plaintiff's/Appellant's ownership and beneficial interest per the Property;

D) By permitting the Defendant/Respondent, Joseph Duca to personally represent the Defendants, John Duca and Daytona Auto Centre Ltd.;

E) By permitting the Defendants/Respondents, Joseph Duca, John Duca, and Daytona Auto Centre Ltd., as well as the Intervener, Sergio Grillone to proceed with the trial virtually, albeit an in-person trial was ordered and the evidence called for such method of attendance;

F) By permitting the Intervener, Sergio Grillone to proceed with the trial personally, albeit he had no authority to do, as he was under bankruptcy with a trustee in bankruptcy;

G) By inappropriately overruling/dismissing objections of the Plaintiff/Appellant in favour of the Defendants/Respondents and Intervener; and,

H) Such further and other grounds as counsel may submit in this Honourable Court may deem just and appropriate under the circumstances.

THE BASIS OF THE APPELLATE COURTS JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

2. The Order appealed from is a final order;

3. Leave to appeal is not required for this appeal;

4. There are no further relevant facts to establish jurisdiction; and,

5. The Plaintiff/Appellant requests that this Appeal be heard before the Ontario Court of Appeal in Toronto.

March 18, 2025

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MASSIMO CONTI
Plaintiff / Appellant

-and-

JOHN DUCA, JOSEPH DUCA, and DAYTONA AUTO CENTRE LTD.
Defendants / Respondents

Ontario Court of Appeal File No.: _____

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PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

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