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Case Name:

Metropolitan Toronto Condominium Corp. No. 710 v. Khan

**RE: Metropolitan Toronto Condominium Corporation No. 710,
Plaintiff, and
Manzoor Moorshed Khan, Channel Property Management Ltd.,
Canali Engineering Group Ltd., Mountview Canadian Enterprise
Ltd., Lakewood Contracting Ltd., Reliance Electric Services
Inc. and PMP Canada Ltd., Defendants**

[2012] O.J. No. 4594

2012 ONSC 5494

Court File No. CV-12-9586-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: May 22, 2012.

Judgment: September 29, 2012.

(47 paras.)

Counsel:

J. Fine and K. Bailey, for the Plaintiffs.

No one appearing for the defendants.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Motion for summary judgment

1 The plaintiff, Metropolitan Toronto Condominium Corporation No. 710 moves for summary judgment against the defendants:

- (i) Manzoor Moorshed Khan ("Khan"), Channel Property Management Ltd. ("Channel") and Canali Engineering Group Ltd. ("Canali"), jointly and severally, for damages in the amount of \$1,142,552.18 for breach of contract, breach of trust, breach of statutory duty, breach of fiduciary duty, conversion, fraud and conspiracy;

- (ii) Khan and PMP Canada, jointly and severally, for damages in the amount of \$47,370.00 for fraud and conspiracy;
- (iii) Khan and Mountview Canadian Enterprise Ltd., jointly and severally, for damages in the amount of \$35,723.60 for fraud and conspiracy; and,
- (iv) Khan and Lakewood Contracting Ltd., jointly and severally, for damages in the amount of \$107,298.00 for fraud and conspiracy.

2 Low J. initially scheduled the summary judgment motion to be heard on October 20, 2011.

3 In support of its motion the plaintiff filed affidavits from (i) James Bezemer, the court-appointed administrator of MTCC 710, sworn September 9, 23 and October 3, 2011, (ii) Said Duale, a former MTCC 710 Board member, sworn September 10, 2011, (iii) Hamed Baloutch, a former MTCC Board member, sworn September 12, 2011, and (iv) Linda Greco, a legal assistant at plaintiff's counsel, sworn September 30, 2011.

4 Last fall Khan and Channel were represented by counsel, Mr. A. Datt. Those defendants filed a responding record containing one affidavit, from Natasa Bodganovic, an employee of Channel. Khan did not file an affidavit.

5 On October 4, 2011 cross-examinations were conducted of Bezemer, Duale, Baloutch and Bodganovic on their affidavits.

6 The October 20, 2011 hearing did not proceed. Khan made an assignment in bankruptcy on October 18, 2011. Channel had made an assignment on September 14, 2011. This action was transferred to the Commercial List where I have case managed it and other actions involving Khan as a defendant. By order made January 26, 2012, I lifted the automatic stays against Khan and Channel. On May 1, 2012, I directed that this motion be heard on May 22, 2012.

7 On March 27, 2012, Mr. Datt served on the parties a notice of intention by Khan to act in person. On May 14, 2012, I granted Mr. Datt an order removing him as solicitor of record for Channel.

8 At the May 22 return of the plaintiff's summary judgment motion no one appeared on behalf of the defendants. The Trustees for Khan and Channel had advised plaintiff's counsel that they took no position on the motion. I was satisfied that proper notice of the motion had been given to the defendants, so I heard some submissions by counsel and then reserved to give the materials a closer review.

9 For the reasons set forth below, I grant summary judgment.

II. The plaintiff's claim

A. The plaintiff's allegations

10 In its April 29, 2011 Statement of Claim MTCC 710 alleged that since May 1, 2007, Channel, a company of which Khan was the principal, was the exclusive manager of the plaintiff's condominium property. MTCC 710 further alleged that Khan was a director and/or the directing mind of the defendants Canali, Mountview, Lakewood, Reliance and PMP.

11 According to the Claim, in the spring of 2007 MTCC 710 borrowed \$5.5 million to fund certain repair work to the condominium. Those funds were deposited into Channel's bank account at Khan's direction.

Claim against Khan, Channel and Canali

12 MTCC 710 alleges that Channel rigged the tender process for the work, resulting in the corporation entering into separate contracts with Canali and another company, Wall Savers Ltd., for the identical work on the same day, June 8, 2007. MTCC 710 pleaded that it did not know that Khan was the principal of Canali.

13 MTCC 710's consulting engineer, Best Consultants, paid Canali in excess of \$1,269,893.00. Channel directed Wall Savers to send it all invoices and, it is alleged, Channel and Canali profited to the tune of \$586,500.00, representing the difference between the amounts paid to Canali and those paid to Wall Savers.

14 MTCC 710 alleged that Canali invoiced it a further \$911,837.00 for work which was never done, but for which Canali received payment. On March 24, 2009 Canali repaid MTCC 710 \$246,821.38.

15 MTCC 710 pleaded that the net overcharge by Canali of \$1,251,500.00 ((\$586,550 + \$911,837) - \$246,821.38) constituted breaches of contract, trust, statutory duty, fiduciary duty, conversion, fraud and conspiracy. MTCC 710 alleged that Khan "was the mastermind of this massive fraud" and was personally liable as such.

Claim against Khan and PMP

16 The plaintiff alleged that another of Khan's companies, PMP, submitted a fraudulent invoice to it for \$12,600, plus GST, notionally to supply stone to level a temporary parking area, but such work was never performed by PMP. According to MTCC 710, Khan authorized the payment of this fraudulent invoice and other payments to PMP.

Claim against Khan and Mountview

17 MTCC 710 alleged that Khan authorized the payment of a fraudulent invoice submitted by Mountview in the amount of \$35,723.60 for the disposal of concrete, work which was never performed.

Claim against Khan and Lakewood

18 MTCC 710 alleged that Khan authorized the payment of \$107,298.00 to Lakewood for work the latter never performed.

B. Statement of Defence

19 The defendants (save for Canali) filed a single statement of defence; Canali was noted in default. The other defendants pleaded denials of the claims against them, assertions that the plaintiff was fully aware of the contracts in question and the profit earned by the defendants on those contracts, assertions that the work under the contracts was carried out and, as well, pleaded the *Limitations Act*, the want of corporate authorization for the action and Khan's lack of personal responsibility

20 Khan left Canada in the fall of 2011 and has not returned.¹

III. The evidence

A. Khan's relationship to the corporate defendants

21 The plaintiff has adduced evidence showing that, at the material times:

- (i) Khan was the sole director of Channel;
- (ii) Khan was a first director of Canali, resigning in April, 2008;
- (iii) Khan owned the condominium unit whose address PMP designated as its registered office;
- (iv) Khan was a director and officer of Mountview along with Rohin Sarwari; and,
- (v) The address for the registered office of Lakeview was the same as that for Mountview.

22 Hamed Balouch, a former MTCC 710 director, deposed that in July, 2011 Khan met with him and presented a letter dated May 1, 2007 which Khan had signed. The letter stated that Khan owned 100% of Channel and that he was "indirectly affiliated" with Canali, PMP, Reliance and Lakewood - "the owners of these businesses are either my family member or my relative". Khan asked Balouch to sign the letter on behalf of MTCC 710 in return for a cash payment; Balouch refused.

B. Discovery of the fraud

23 By agreement dated May 1, 2007 Channel agreed to act as the exclusive manager of MTCC 710. In that agreement Channel acknowledged that a relationship of "trust and confidence" existed between itself and the Board. The management contract stipulated a set annual fee as compensation for Channel's services.

24 This Court appointed Bezemer as administrator of MTCC 710 on June 7, 2010. Bezemer deposed that as a result of inspections he conducted in mid-June, 2010, he discovered that repair work covered by two contracts with Structural Contracting (2007 and 2008 contracts) and Canali (2007 contract) was not complete and further repairs were required. As a result of his inquiries, he terminated Channel's management contract in the fall of 2010. This action was commenced on April 29, 2011, some 10 months following the administrator's appointment.

25 As a result of irregularities Bezemer discovered during his review of the repair contracts, he obtained an order dated January 5, 2011 from Echlin J. appointing him as inspector pursuant to section 130 of the *Condominium Act, 1998*. During his subsequent investigation, Bezemer discovered, on February 8, 2011, the falsified Wall Savers contract.

C. The Canali and Wall Savers contracts

26 The evidence filed by Bezemer on this motion disclosed that:

- (i) MTCC 710 hired Best Consultants in December, 2006 to prepare specifications for exterior wall work;
- (ii) The work was funded by \$5.5 million in loans taken out by MTCC 710;
- (iii) Channel, who became property manager in May, 2007, completed the contract documents, called for tenders and decided which companies would provide quotations or bids;
- (iv) Four tenders were received, including one from Canali with a low bid of \$1,207,110, with a contingency of \$181,066.50. MTCC 701 entered into a June 18, 2007 contract with Canali for those amounts (the "Canali Contract"). With subsequent change orders the final value of the Canali Contract was \$1,312,259.00;
- (v) The Administrator's inquiries with Wall Savers disclosed an almost identical contract of the same date with Wall Savers for the same work with a contract value of \$659,980.06, and a contingency of \$98,997.01;
- (vi) The actual work was performed by Wall Savers, not Canali;
- (vii) Inquiries of Wall Savers disclosed that it thought MTCC 710 was paying it and Wall Savers was not aware of Canali; and,
- (viii) Wall Savers was paid in bank drafts. Khan told Wall Savers that bank drafts were the only method by which the bank would release funds to MTCC 710 for payments to contractors. The payments to Wall Savers came from Channel or were picked up at Channel's office.

27 Hamed Baloutch was a member of the MTCC 710 Board from November, 2006 until February, 2009. He deposed that the Board relied on Khan's advice regarding payments to be made to service providers and contracts for MTCC 710: "If Channel or Khan had approved a payment and gave the Board a cheque to sign, the Board members would sign the cheque." Said Duale, a Board member from November, 2006 until June, 2010, gave evidence to the same effect.

28 Baloutch recalled signing the Canali Contract, but he was not aware that Khan was affiliated with Canali: "Khan did not disclose that fact to the Board and the Board did not consent to same. If I had known that Khan was affiliated with Canali, I would not have agreed to hire Canali." Duale deposed to the same effect.

29 As to the Wall Savers contract, Baloutch deposed that someone had falsified his signature on the contract: "MTCC 710 did not enter into any contract with Wall Savers. I know the name Wall Savers only as a subcontractor of Canali ... I did not sign any cheques or authorize any payments to be made to Wall Savers by MTCC 710."

30 According to Bezemer, Best issued only eight authentic payment certificates certifying payment to Canali of \$1,585,049.90 under the Canali Contract. Bezemer deposed that as a result of the scheme "Khan, Channel and Canali profited in the range of \$586,500.00, being the approximate difference in the amount of the two contracts."

31 In their defence Khan and Channel admitted that they received a profit but "with the full knowledge, consent and agreement of the plaintiff and the members of the plaintiff Board of Directors at the time." Duale and Baloutch denied that MTCC 710 was aware that Khan or Channel received a profit "nor did the Board consent to, or agree to, Khan and Channel receiving a profit."

D. Additional payments to Canali

32 Bezemer deposed that in addition to the work described in the Canali Contract, that company invoiced MTCC for an additional 11 payments for other work, totaling \$911,837.00, none of which was tendered or certified for payment by Best. Bezemer deposed: "I believe that these invoices rendered by Canali were false and the additional alleged work was never done." The plaintiff adduced copies of all such invoices.

33 Canali repaid \$246,821.38 to MTCC 710 by bank draft dated March 24, 2009. Duale deposed that this repayment was for a duplicate payment which MTCC 710 had made to Canali.

34 Duale deposed that the Board did not approve any additional work by Canali beyond that described in the Canali Contract. Any cheques paid by MTCC 710 to Canali for such work were done only after approval by Best or Channel and on the understanding that such payments were due and owing under the Canali Contract. Baloutch also deposed that the Board did not approve additional work beyond the Canali Contract.

E. PMP

35 Bezemer learned from Best that it did not know who PMP was and did not authorize PMP to supply any stone to level a temporary parking lot. Bezemer adduced cheques totaling \$47,370 from MTCC 710 to PMP for which work was

not carried out. Duale and Baloutch deposed that PMP was not hired by MTCC 710 for construction or any other work nor did the Board authorize such work.

F. Mountview

36 Bezemer learned from Best that it did not know who Mountview was, had no knowledge of the invoice from Mountview for concrete work in the garage and it seemed unlikely that Mountview would perform work in the garage without Best's knowledge. Bezemer adduced a cheque from MTCC 710 to Mountview in the amount of \$35,723.60 for work which he deposed was not carried out. Duale and Baloutch deposed that Mountview was not hired by MTCC 710 for construction or any other work nor did the Board authorize such work.

G. Lakewood

37 MTCC adduced a cheque to Lakewood for \$107,295.50. Bezemer deposed: "At no time did the plaintiff contract with Lakewood to perform any work, and it does not appear on MTCC 710's records that invoices were submitted, it does not appear on MTCC 710's records that any such work was carried out by Lakewood, nor was any such work approved or certified by Best." Duale and Baloutch deposed that Lakewood was not hired by MTCC 710 for construction or any other work nor did the Board authorize such work.

F. Summary of MTCC's claim

38 In its affidavit material MTCC 710 claimed against the defendants a total of \$1,322,944.12, calculated as follows:

- (i) \$478,042.75, representing the difference between the amounts paid by MTCC 710 to Canali under the Canali Contract supported by 10 payment certificates (\$1,269,893.00)² and the amount paid by bank draft to Wall Savers (\$791,850.25);
- (ii) \$664,509.43, calculated as the amount paid to Canali without supporting payment certificates (\$911,330.81), less the amount Canali repaid (\$246,821.38);
- (iii) \$190,392.00 paid to Lakewood, Mountview and PMP. No claim is made in respect of payments made to Reliance

G. The defendants' evidence

39 The only evidence filed by the defendants came from Natasa Bogdanovic, an employee of Channel up to the time of its bankruptcy. Her evidence was of no probative value. From her cross-examination it was clear that she simply swore an affidavit placed before her by Khan's counsel, Mr. Datt, without possessing any personal knowledge of the material facts asserted in the affidavit. Before swearing her affidavit she had not been able to discuss the plaintiff's allegations with Khan because he had left the country,³ and her duties had not involved her in the management of properties or Channel's accounting function.⁴ She testified under cross-examination: "I did not have anything to do with MTCC 710",⁵ and she had no knowledge about whether any of the plaintiff's allegations were true or not.⁶ In brief, her evidence was useless because she had no personal knowledge of the matters relating to the plaintiff's allegations or the defendants' defences; Ms. Bogdanovic simply swore her affidavit because "Mr. Khan was a good boss."⁷ In light of her lack of personal knowledge as admitted on cross-examination, it is apparent that Ms. Bogdanovic's affidavit was replete with falsehoods. I am very disappointed that counsel for Khan and Channel would file an affidavit in this court from an affiant who patently lacked any personal knowledge of the issues in dispute.

IV. Analysis and conclusion

40 I conclude that the evidence adduced by MTCC 710 reveals that no genuine issue exists requiring a trial. I am able to reach a full appreciation of the issues on the evidence filed on this motion. The evidence of Bezemer, Duale and Baloutch was not shaken on cross-examination in its materials aspects. The evidence filed by the plaintiffs which I have summarized above was not rebutted by the defendants - the responding affidavit from Ms. Bogdanovic was really no affidavit at all since she lacked any personal knowledge of the issues in dispute in this action.

41 The plaintiff's evidence overwhelmingly established that Khan orchestrated a massive fraud against MTCC 710 by using Channel and other related companies to invoice MTCC 710 for work which was never performed and which was not authorized by the Board of MTCC 710. Khan, in the letter he gave to Baloutch in July, 2011, admitted that he was the controlling mind of Channel. Channel was the exclusive property manager for MTCC 710 and arranged for the payments to PMP, Mountview and Lakewood. It follows from the evidence filed, and the notable absence of any evi-

dence from Khan who has fled the country, that Khan pulled the strings at Channel and orchestrated the entire fraud. Both he and the corporations are liable to MTCC 710 for the damages claimed.

42 As set out above, MTCC 710 filed detailed evidence to support the damages it claims in this action.

43 There is no basis for the defendants' limitations defence. The fraud only came to light after the appointment of the administrator, and this action was commenced within a year of such discovery.

44 MTCC 710 is entitled to judgment in accordance with the draft filed, even though the amounts sought appear to be slightly less than that supported by the evidence. I grant judgment in favour of MTCC 710 as follows:

- (i) against Manzoor Moorshed Khan, Channel Property Management Ltd. and Canali Engineering Group Ltd., jointly and severally, for damages in the amount of \$1,142,552.18;
- (ii) against Khan and PMP Canada, jointly and severally, for damages in the amount of \$47,370.00;
- (iii) against Khan and Mountview Canadian Enterprise Ltd., jointly and severally, for damages in the amount of \$35,723.60; and,
- (iv) against Khan and Lakewood Contracting Ltd., jointly and severally, for damages in the amount of \$107,298.00.

45 As to costs, given the fraudulent conduct of Khan and his companies, MTCC 710 is entitled to elevated costs of the action and this motion on a full indemnity scale. I have reviewed the Costs Outline submitted by the plaintiff. I have taken into account the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality. Preparation of this action and this motion required extensive forensic work and generated the expenditure of significant legal time. I have considered the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

46 I conclude that an award of costs in the amount of \$105,876.19, inclusive of disbursements and HST, would be a reasonable one in the circumstances, and I order the defendants to pay MTCC 710 that amount within 30 days. Khan and Channel are liable, jointly and severally, for the full amount of those costs. The other defendants are liable for a share of those costs calculated by reference to the proportion that the judgment against them constitutes of the overall judgment.

47 Plaintiff's counsel may file a judgment with my office for issuance. Service of the entered judgment on the trustees in bankruptcy for Khan and Channel shall constitute good and sufficient service of the judgment on Khan and Channel.

D.M. BROWN J.

cp/e/qljel/qlpmg

1 Bogdanovic cross-examination, Q. 25.

2 MTCC 710 discovered that these payment certificates were forgeries and that in fact eight authentic payment certificates existed totalling a higher amount. MTCC 710 calculated its claim under the 10 payment certificates.

3 Bogdanovic CX, QQ. 26 to 28.

4 *Ibid.*, QQ. 51 and 52.

5 *Ibid.*, Q. 54.

6 *Ibid.*, Q. 134 and 136.

7 *Ibid.*, Q. 94.