

CITATION: Szajna v. Szanja, 2024 ONSC 7176
COURT FILE NOS.: CV-23-00699084-0000
MOTION HEARD: 2024-10-29

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: IRENA SZAJNA et al, plaintiffs

AND:

MAREK SZAJNA, defendant

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: Sarah Rustomji for the defendant / moving party

Shane Greaves for the plaintiffs / responding parties

HEARD: October 29, 2024

REASONS FOR DECISION

[1] This is a motion by the defendant, Marek Szajna (“Marek”) to set aside the order of Associate Justice Jolley dated May 11, 2024 (the “CPL Order”) and for related relief. The CPL Order, obtained by the plaintiffs on an *ex parte* basis, granted leave to the plaintiffs to have issued and to register a certificate of pending litigation (the “CPL”) on a property municipally known as 313 Thrace Avenue, Mississauga, Ontario (“313 Thrace”).

[2] The defendant submits that the plaintiffs failed to make full and fair disclosure of material facts that were known to the plaintiffs at the time they obtained the CPL Order on an *ex parte* basis. The plaintiffs deny that they failed to make full and fair disclosure. They also assert that even if there had been non-disclosure of material facts, the motion should be denied because of the defendant’s delay in bringing it.

[3] The record for this motion is voluminous, and the parties’ submissions included many arguments that will have to be determined at a later stage in these proceedings and on their merits. Suffice it to say that the parties agree on very few of the material facts, including the import and interpretation of many of the documents included as exhibits to the affidavits filed on the motion. The evidence I consider in these reasons is limited to that which is pertinent to the issues on this motion, including whether the plaintiffs failed to make full and fair disclosure on the *ex parte* motion.

[4] For the reasons that follow, the defendant’s motion is granted.

A. FACTS

[5] In the underlying action, the plaintiffs seek, among other things, an order declaring that the defendant holds legal title to 313 Thrace in trust for them, and an order vesting legal title of 313 Thrace in their name.

[6] When the action was commenced, the plaintiffs brought an *ex parte* motion for a certificate of pending litigation. In support of the motion, the plaintiffs filed two affidavits: one from the plaintiff Irena Szajna (“Irena”), and one from her daughter, Paulina Harirbafan (“Paulina”), who is also the defendant’s sister. The other plaintiff, Janusz Szajna (“Janusz”), did not deliver any affidavit evidence in connection with the *ex parte* motion or this motion.

[7] Irena’s evidence on the *ex parte* motion included the following:

- (a) The plaintiffs started their own immigration consulting business (the “Business”) in 2003. As the Business grew, Marek and Irena became partners in the business and agreed orally that (among other things) Marek would receive 40% of the proceeds from the Business while the plaintiffs would receive 60% of the proceeds. No specific date is provided for when the partnership was created. Later, in July 2016, the parties incorporated a company called Esteem Immigration Services Inc. (“Esteem”). Until that time, however, they carried on the Business as a partnership without any written partnership agreement.
- (b) The plaintiffs purchased a residential property municipally known as 364 Thrace Avenue, Mississauga, Ontario (“364 Thrace”) in June 2009. On closing, title to 364 Thrace was placed in Marek’s name alone for the purpose of obtaining a mortgage. The purchase price was \$346,000. In addition to mortgage financing, part of the purchase price (\$24,600) was paid from proceeds of the Business, and another part (\$10,000) was from the plaintiffs’ personal bank account.
- (c) Although title to 364 Thrace was placed in Marek’s name alone (to obtain a better mortgage rate), the parties explicitly agreed in writing that Irena was the sole beneficial owner of that property. Specifically, Marek and Irena executed a Declaration of Trust Agreement dated June 30, 2009 (the “Trust Agreement”) wherein they agreed (among other things) that:
 - (i) 364 Thrace was purchased with Irena’s money;
 - (ii) Marek was holding 364 Thrace in trust for Irena;
 - (iii) Irena was the 100% beneficial owner of 364 Thrace; and
 - (iv) Marek would transfer 364 Thrace to Irena as she might direct.
- (d) Later, on November 17, 2021, legal title to 364 Thrace was transferred to Irena for consideration of \$0.00 in accordance with the Trust Agreement.
- (e) A second house, 313 Thrace was purchased to provide a residence for Paulina who was moving to Canada with her family. The agreement of purchase and sale for

313 Thrace was originally in Irena's name. After executing the agreement of purchase and sale, the parties again determined that Marek should be listed on title for the purpose of obtaining a better mortgage rate.

- (f) The purchase price for 313 Thrace was \$488,833.20. In addition to mortgage financing:
- (i) \$101,029.18 of the purchase price was paid from the proceeds of the Business (of which the plaintiffs said they held a 60% interest in accordance with their oral partnership agreement); and
 - (ii) \$68,654.02 of the purchase price was paid from a refinancing of 364 Thrace (of which Irena's evidence was that she was the sole beneficial owner in accordance with the Trust Agreement).
- (g) Following the purchase of 313 Thrace, Janusz invested approximately \$50,000 of his own money and labour in order to renovate the house for Paulina's family.

[8] In summary, Irena's evidence on the *ex parte* motion was that although title to 313 Thrace was placed in Marek's name alone, it was purchased using: (i) the partnership's assets; and (ii) funds obtained through the refinancing of 364 Thrace, which was beneficially owned by Irena. On that basis, Irena's evidence was that she believed that Marek holds 313 Thrace in trust for the plaintiffs pursuant to the doctrines of resulting and/or constructive trust.

[9] In his affidavit and cross-examination evidence on this motion, Marek denies almost all of the plaintiffs' evidence filed in support of the plaintiffs' *ex parte* CPL motion. Specifically, Marek disputes:

- (a) Irena's evidence that the plaintiffs always had and continue to have a 60% ownership interest in the Business that ultimately became Esteem;
- (b) Irena's evidence about the sources of funding for the purchase of 364 Thrace;
- (c) Irena's evidence about the Trust Agreement, including when it was entered into and its purpose;
- (d) Irena's evidence about the purchase of 313 Thrace, including the sources of funding for its purchase and the plaintiffs' claim to an ownership interest in it.

[10] Marek also disputes Irena's evidence that he improperly withdrew and used funds from Esteem for his own purposes and that he improperly refinanced 313 Thrace without the plaintiffs' consent. He disputes that he requires the plaintiffs' consent to sell 313 Thrace.

[11] In turn, the plaintiffs' responding affidavit and cross-examination evidence on this motion disputes much of Marek's evidence. For this motion, the plaintiffs' responding evidence comes from Irena and a short affidavit from the plaintiffs' other daughter, Justyna Szajna. Neither Janusz nor Paulina provided any affidavit evidence in response to this motion.

B. ISSUES

[12] The issues on this motion are as follows:

1. Should this motion be dismissed because of the defendant's delay in bringing it?
2. Should the CPL Order be set aside and should the CPL be discharged because the plaintiffs failed to make full and fair disclosure when they sought and obtained the CPL Order on an *ex parte* basis?
3. If the plaintiffs failed to make full and fair disclosure when they sought and obtained the CPL Order, should the court exercise its residual discretion to allow the CPL to remain in place?

C. LAW AND ANALYSIS

(i) *Should this motion be dismissed because of the defendant's delay in bringing it?*

[13] Rule 37.14(1) provides as follows:

37.14 (1) A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

[14] The requirement to move forthwith applies to motions seeking the discharge of a CPL obtained without notice.¹ "Forthwith" means "immediately", "as soon as possible in the circumstances", "as promptly as possible" or "without any unreasonable delay".² Once a party has become aware the order exists, it is expected to take prompt action to challenge the order or otherwise acquiesce to its existence.³

[15] Whether a party has moved "forthwith" must be considered in the context of all of the circumstances. In assessing the delay, the court will consider the length and the reasons for it, the

¹ *Hawkins v. Girimonte*, 2023 ONSC 4415 ("*Hawkins*") at para 24

² *Hawkins* at para 22; citing *Ontario (Attorney General) v. 15 Johnswood Crescent*, [2009] O.J. No. 3971 (S.C.J.) ("*Johnswood*") at para 44

³ *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para 48; see also *Hawkins* at para 23; *Ma et al. v. 1835942 Ontario Inc. et al.*, 2023 ONSC 6530 ("*Ma*") at para 34

presence or absence of prejudice, the underlying merits of the case, and any other relevant circumstances.⁴

[16] In these proceedings, the defendant received a copy of the CPL and the statement of claim on May 19, 2023 and delivered a statement of defence and counterclaim on September 19, 2023. The plaintiffs then delivered their reply and defence to counterclaim on October 20, 2023. In mid-January 2024, the Defendant began taking steps to requisition a motion date for this motion. This was approximately seven months after the defendant received notice of the CPL. At a case conference before me on February 27, 2024, I set a timetable for delivery of materials in connection with this motion. In compliance with the timetable, the defendant delivered a motion record for this motion on April 30, 2024.

[17] Relying on *Becerra v. Ronchin*,⁵ the plaintiffs submit that April 30, 2024 (the date the defendant delivered his motion record) was the date that the motion was formally initiated. On that basis, the plaintiffs submit that: (1) there was an 11 month delay in bringing this motion; (2) the defendant did not satisfy the requirement of bringing this motion forthwith because the 11 month delay was not “immediately” or “as soon as possible”; and (3) the motion should be dismissed for delay.

[18] I do not agree. First, in determining the length of the delay, *Becerra* is distinguishable. In *Becerra*, the plaintiff was seeking to add new claims to the statement of claim, which raised a limitation issue. The precise nature of the proposed amendments at issue in that case were not provided to the defendant/responding party until the motion record was served containing the proposed fresh as amended statement of claim. Thus, for the purposes of considering the limitation question at issue in that case, the Court held that the motion was launched when the motion record was delivered. The Court’s reasons included the following:

[41] The limitations clock does not stop running until a proceeding is launched. In the case of a motion to amend a pleading, the proceeding is launched either when the motion record is served (arguably) or more correctly when the motion record is filed with the court. This is akin to the issuance of an action or application stopping the limitations clock where a plaintiff is launching a fresh proceeding. Service of an intention to issue a proceeding prior to issuance does not initiate the proceeding.⁶

[19] In this case, the process for scheduling a long motion before an associate judge in Toronto requires a party to submit a requisition form and attend a scheduling case conference. Here, the defendant submitted a long motion requisition form on February 6, 2024. I convened the scheduling case conference on February 27, 2024 and made a timetable order on that day pursuant to which the defendant was required to serve his motion record by April 30, 2024, which he did. While there was nothing preventing the defendant from serving his motion record prior to requisitioning the long motion scheduling case conference, it is common practice in Toronto to do so based on the timetable set at a scheduling case conference. In the result, I find that it is fair and

⁴ *Ma* at para 35, citing *Johnswood* at paras 34-35 and *Hawkins* at para 25

⁵ *Becerra v. Ronchin*, 2016 ONSC 4232 (“*Becerra*”) at para 41

⁶ *Becerra* at para 41

reasonable to treat February 6, 2024, the date that the defendant formally commenced the scheduling process for this motion, as the end point of the delay period. On that basis, the delay in bringing this motion was approximately 9 months.

[20] In *Ma v. 1835942 Ontario Inc.*,⁷ the lengthy delay in bringing a discharge motion was one of the grounds for dismissal of the motion. However, the delay in that case was approximately three years, significantly longer than the delay in this case. As well, after initially advising of their intention to bring a discharge motion, the defendants changed their position several times as to (1) whether they would be bringing a discharge motion, and (2) their stated basis for such a motion. In the interim period, which accounted for approximately 18 months of the overall three year delay, the parties conducted examinations for discovery.

[21] In my view, *Ma* is distinguishable. In this case, although the defendant has not provided any explanation for the delay in bringing this motion, that is understandable because the issue of delay was not raised at the scheduling case conference or in any of the plaintiffs' affidavit materials. It was first asserted in the plaintiffs' factum. While this does not excuse the delay, it gives some context as to why the defendant did not provide evidence or make any written submissions on the delay issue.

[22] In any event, the delay is significantly shorter than that three year delay in each of *Ma* and *413554 Ontario Ltd. v. Pine Valley Developments Corp.*⁸ It is also shorter than the 14 month delay in *Hawkins*, where the court declined to dismiss a discharge motion for reasons of delay. Further, unlike *Ma*, the defendant in this case did not take shifting positions regarding the timing and basis for this motion, and examinations for discovery have not yet taken place. There is no evidence of any specific prejudice to the plaintiffs (compensable in costs or otherwise) from the delay.

[23] In the result, considering the context and all the circumstances, I am not prepared to dismiss this motion on the basis of delay.

(ii) *Should the CPL Order be set aside because the plaintiffs failed to make full and frank disclosure?*

(a) *Applicable principles*

[24] Rule 39.01(6) states that:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application

[25] In *United States v Friedland*, [1996] O.J. No. 4399 (Ont Gen Div) Sharpe J. (as he then was) described the duty on a party who moves without notice as follows:

⁷ *Ma* at para 41

⁸ *413554 Ontario Ltd. v. Pine Valley Developments Corp.* [2011] ONSC 6193

27 ...That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts and law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

28 If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

...

36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the Gee text at page 98:

...The duty extends to placing before the court all matters which are relevant to the court’s assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the ‘weighing operation’ that the court has to make in deciding whether or not to grant the order must be disclosed.⁹

[26] The obligation to provide full and fair disclosure is not limited to injunctions but also extends to *ex parte* motions for certificates of pending litigation.¹⁰ While a moving party is “under no obligation to anticipate how he might be cross-examined about ‘contestable facts’ or ‘contestable interpretations’ of what inferences might be drawn from the facts” and is not required to argue against its own case, it is obliged to fairly present the material facts that may favour the opponent.¹¹

⁹ *United States v Friedland*, [1996] O.J. No. 4399 (Ont Gen Div) (“*Friedland*”) at paras 27-28 and 36 (emphasis added)

¹⁰ *Mao v. Rossi Diaz-Munoz*, 2021 ONSC 1929 at para 28.

¹¹ *Karkoulis v. Karkoulis*, 2023 ONSC 499 (“*Karkoulis*”) at paras 32-33; *Hazelton Homes Corporation v. Mehta*, 2020 ONSC 849 (“*Hazelton*”) at para 20

[27] Where there has been serious non-disclosure, the certificate of pending litigation obtained on an *ex parte* basis will be discharged even if the plaintiff may otherwise have been entitled to a certificate.¹²

(b) *Analysis*

[28] The evidence filed on this motion covers a broad range of issues in dispute in this action. A significant amount of that evidence relates to issues that will have to be determined at a later stage in this litigation. In this regard, I accept the plaintiffs' submission that it is not appropriate to assess certain aspects of the disputed evidence through the lens of the full and fair disclosure. As a result, there are many disputed facts that I do not refer to in these reasons as they do not form the basis of my conclusion that the plaintiffs failed to make full and fair disclosure. I also accept that there is a limit to which a plaintiff can be expected to anticipate every argument a defendant may make in response to evidence filed on an *ex parte* motion. However, if a plaintiff is aware of facts that contradict their position, they must put those known facts before the court. Doing so does not call for conjecture or unreasonably require a plaintiff to anticipate a defendant's evidence and arguments. To the contrary, doing so is an aspect of a plaintiffs' duty to "fairly present the material facts that may favour the opponent".¹³

[29] For the purposes of this motion, I focus on the evidence relating to information that was available to or known by the plaintiffs, that was relevant to the issues before Associate Justice Jolley at the hearing of the *ex parte* motion, and that was not included in the *ex parte* motion materials. These fall into the following broad categories: (1) ownership of the Business/Esteem; (2) funding to purchase 364 Thrace and ownership of 364 Thrace (the first house); (3) funding to purchase 313 Thrace; (4) the constructive trust claim with respect to 313 Thrace; and (5) Paulina's evidence in support of the *ex parte* motion. I deal with each of these in turn.

1. Ownership of Esteem

[30] As noted, Irena's evidence on the *ex parte* motion was that the plaintiffs are 60% owners of the Business/Esteem. This is important evidence because many of the arguments the plaintiffs made in support of the *ex parte* motion flow from the assertion that they are 60% owners of the Business/Esteem and that Marek has used funds from the jointly owned business both to his sole advantage (which is not directly relevant to the issues on this motion) and for the purposes of funding the purchase of 364 Thrace in 2009 and 313 Thrace in 2014.

[31] While the plaintiffs are entitled to assert this position about ownership of the Business/Esteem, they had an obligation to fairly present the material facts that may favour the defendant on this issue.¹⁴ That includes evidence known to them that would contradict their claim to have a 60% ownership interest in the Business/Esteem.

¹² *Anselmini v. Noonan Estate*, 2008 CanLII 1833 (ON SC) at para 9

¹³ *Boal v. International Capital Management Inc.*, [2018] O.J. No. 1954 at para 87, as cited in *Karkoulis v. Karkoulis*, 2023 ONSC 499 ("Karkoulis") at para 33; *Friedland* at para 27

¹⁴ *Hazelton* at para 20

[32] As noted, I accept that some of the evidence that the defendant asserts was not disclosed falls into the category of disputed facts or interpretations. However, some of the evidence more clearly contradicts the plaintiffs' position. For example, the Master Business Licence under which Marek and Irena operated for a period of time listed Marek as sole proprietor. More importantly, Irena made several regulatory filings that state that she was an employee of Esteem with no ownership interest in the Business.

[33] In her responding affidavit evidence and in argument, Irena asserts that the paperwork incorrectly describes how the Business was structured in substance. She also asserts that the documents listing her as an employee without an ownership interest were prepared so that she would not have to complete her own trust accounting. While Irena now puts forward an explanation about the documents that contradict her assertion about ownership of the Business/Esteem, this demonstrates that her initial affidavit painted an incomplete picture. Her need to explain the documents demonstrates their relevance to the issue of the ownership of the Business/Esteem. In asserting the claimed ownership interest, Irena should have disclosed the paperwork that contradicts her position and provided her evidence explaining why that paperwork is not an accurate reflection of the true ownership structure. It would then have been open to Associate Justice Jolley to assess the issue of ownership based on fairly presented evidence. Instead, Associate Justice Jolley was presented only with the plaintiffs' side of the case in circumstances where the plaintiffs were aware that there was contradictory information.

[34] In addition, although the plaintiffs assert that the defendant agreed they would receive 60% of the proceeds of the Business (now Esteem), Janusz filed no affidavit evidence on that issue (or any other issue) in support of the *ex parte* motion or in response to this motion. In his affidavit evidence on this motion, Marek denies that Janusz is an owner of the Business, and he includes a letter from Janusz that Marek says demonstrates Janusz is not an owner. That letter was not included in the affidavit material before Associate Justice Jolley. In my view, it is telling that Janusz does not respond directly to Marek's evidence about ownership, and it is a further indication that the evidence before Associate Justice Jolley about ownership of the Business/Esteem was not presented in a full and fair manner.

[35] To be clear, I am not making any determination on the merits of the ownership issue. That important issue will be determined a later stage in these proceedings. However, based on the evidence before the court, I find that there was a failure to make full and fair disclosure about the ownership of the Business/Esteem.

2. Funding to purchase 364 Thrace and ownership of 364 Thrace

[36] The importance of the evidence about ownership of the Business/Esteem becomes apparent when it is considered in conjunction with the evidence about the purchase of 364 Thrace. Irena's evidence on this point was that the funds used to purchase that property included "\$24,600 paid from the proceeds of the Business". This is problematic for several reasons.

[37] First, it implies that the payment was made by the transfer of funds directly from the Business, although there is no evidence of that. More importantly, the relevance of funds allegedly coming from the Business is based on the premise that the plaintiffs were and are 60% owners of

the Business/Esteem. Again, while that may one day be proven, for purposes of this motion I have concluded that the plaintiffs failed to make full and fair disclosure about the ownership of the Business/Esteem. Therefore, the incomplete evidence about ownership of the Business/Esteem impacts the evidence about the alleged use of funds from the Business to purchase 364 Thrace. In my view, had full and fair disclosure been made, this may have had an influence on how Associate Justice Jolley viewed the evidence about the alleged funding from the Business to purchase 364 Thrace.

[38] The plaintiffs also argue that there is additional evidence that they funded the purchase of 364 Thrace, including an alleged \$10,000 gift they made to the defendant. In my view, this does not overcome their failures, noted above, to make full and fair disclosure. Associate Justice Jolley was presented with an unequivocal statement that a significant portion of the cash funding for the purchase of 364 Thrace came from the Business and that the plaintiffs have a 60% ownership interest in it. Had full and fair disclosure been made, this may have influenced how Associate Justice Jolley viewed the evidence about other aspects of the alleged funding.

[39] The above failures in disclosure are significantly exacerbated by Irena's evidence about the Trust Agreement she references in her affidavit filed in support of the *ex parte* motion. The evidence in that affidavit cannot be read in any way other than to say that a written trust agreement was entered into when 364 Thrace was purchased in June 2009, and that the transfer of legal title to Irena in 2021 was a mere formality pursuant to the terms of the Trust Agreement. That was not the case, and Irena has admitted that the Trust Agreement, which she describes as "very important", was not entered into until 2021.

[40] On its own, the evidence suggesting that the Trust Agreement was entered into in June 2009 is a significant misstatement. It colours much of the remaining evidence in Irena's affidavit filed in support of the *ex parte* motion. In context, the misstatement is even more concerning because the evidence about the Trust Agreement dovetails neatly with the evidence about ownership of the Business/Esteem. They naturally support each other. Yet the evidence about the Trust Agreement is a clear misstatement and, for the reasons outlined above, the evidence about ownership of the Business/Esteem tells only one side of the story.

[41] The importance of these two assertions is apparent from paragraph 3 of Associate Justice Jolley's endorsement:

[3] The parties paid for [313 Thrace] through a combination of funds from the immigration business they ran together, a first mortgage and a refinancing on another property at 364 Thrace Avenue. The immigration business was owned 60% by the plaintiffs and 40% by Marek. 364 Thrace Avenue was owned by the plaintiff Irena. She purchased it in June 2009 and title was held for her in trust in Marek's name pursuant to a written Declaration of Trust Agreement.

[42] Clearly, the combined information that the plaintiffs were 60% owners of the Business and that the parties had entered into the Trust Agreement at the time 364 Thrace was purchased influenced Associate Justice Jolley's conclusion that 364 Thrace was "owned by the plaintiff

Irena”. As I will expand upon below, this also impacts the assessment of the plaintiffs’ claim to an ownership interest in 313 Thrace.

[43] The plaintiffs also failed to make full and fair disclosure about the circumstances surrounding the execution of the Trust Agreement. As noted, the plaintiffs now acknowledge that the Trust Agreement was not executed until 2021. They submit that this was merely paperwork to put into place what had been agreed upon in 2009. In support of this, the plaintiffs rely on certain documents (a “Promissory Note” and a “Legal Statement”) that they submit are consistent with the Trust Agreement. They also rely on some email correspondence indicating that the consideration for the transfer of 364 Thrace was for a nominal amount because the property was in Marek’s name for mortgage purposes only. However, there are several problems with the plaintiffs’ arguments.

[44] First, the additional documents that the plaintiffs now rely on demonstrate that there were contentious issues regarding the plaintiffs’ alleged ownership in 364 Thrace and the transfer of legal title to Irena. Even taking those documents at the highest and best interpretation for the plaintiffs, they demonstrate that there were issues relating to the transfer that were not disclosed to the court on the *ex parte* motion. The plaintiffs’ need to rely on those documents in response to the defendant’s position demonstrates that the issue is a contentious one. Further, the plaintiffs had other documentation that was inconsistent with their position. For example, the land transfer document with respect to 364 Thrace indicates that the transfer was a gift rather than a transfer pursuant to a trust.

[45] In summary, there are factual disputes about precisely what happened in 2009 and 2021, including the import of the Trust Agreement and other documentation regarding ownership of 364 Thrace and the transfer of legal title to Irena. Those factual disputes will have to be resolved at a later stage in these proceedings. But the point is that it was known to the plaintiffs that there was more to be disclosed than what was included in Irena’s May 10, 2023 affidavit. The plaintiffs failed to do so. The evidence on this motion demonstrates clearly that the plaintiffs’ *ex parte* materials were not a fair representation of the known facts surrounding the ownership of 364 Thrace. On a motion without notice, it was not proper for the plaintiffs to present only their version of the facts. The plaintiffs did not satisfy their obligation of full and fair disclosure.

3. Funding for the purchase of 313 Thrace and alleged resulting trust claim

[46] The evidence before Associate Justice Jolley with respect to the funding for the purchase of 313 Thrace was also incomplete. Irena’s evidence was as follows:

29. The purchase price was funded as follows:

(a) \$319,150.00 from a first mortgage from Scotiabank;

(b) \$101,029.18 paid from the proceeds of the Business (of which Janusz and I held a 60% interest in accordance with the Partnership Agreement); and

(c) \$68,654.02 from a refinancing of the [364 Thrace] (of which I was the sole beneficial owner in accordance with the Trust Agreement).

[47] Several aspects of this evidence are problematic. First, for the reasons outlined above, the evidence about the plaintiffs' alleged ownership interest in the Business was incomplete. Here, the failure to make full and fair disclosure about the ownership of the Business is repeated in the statement that the purchase price for 313 Thrace was funded in part by "\$101,029.18 paid from the proceeds of the Business (of which Janusz and I held a 60% interest in accordance with the Partnership Agreement)" (emphasis added). The statement that "\$68,654.02 from a refinancing of the [364 Thrace] (of which I was the sole beneficial owner in accordance with the Trust Agreement)" (emphasis added) is also problematic. It repeats a material misstatement, namely indicating that the written Trust Agreement had been entered into at the time 313 Thrace was purchased in 2014. In fact, the referenced Trust Agreement did not exist at the time that 313 Thrace was purchased. Rather, it was entered into in 2021.

[48] The combination of the plaintiffs' evidence about ownership of the Business/Esteem and the existence of the Trust Agreement when 364 Thrace was purchased appears to have influenced Associate Justice Jolley's conclusion that 364 Thrace was "owned by the Plaintiff Irena". Further, the evidence about funding for the purchase of 364 Thrace may have influenced Associate Justice Jolley to reach the following conclusion:

[4] While, unlike 364 Thrace, there was no express or written trust agreement signed with respect to [313 Thrace], the plaintiffs have demonstrated through the evidence on the financing of [313 Thrace] that there is a triable issue on their resulting trust claim. (emphasis added)

[49] Once again, I acknowledge that the plaintiffs are entitled to assert their position about the ownership of the Business/Esteem, 364 Thrace, and 313 Thrace. But having moved on an *ex parte* basis to obtain a CPL, they had an obligation to make full and fair disclosure of the material facts regarding those assertions. For the reasons outlined above, the plaintiffs did not satisfy that obligation.

4. Constructive trust claim with respect to 313 Thrace

[50] The plaintiffs also assert a constructive trust claim with respect to 313 Thrace. They provided evidence that 313 Thrace was refinanced, allegedly without their knowledge or consent, and submit that this was contrary to their interest as beneficial owners of 313 Thrace. They also assert that Janusz invested \$50,000 in money and labour to make improvements to 313 Thrace, which have benefited the defendant.

[51] Associate Justice Jolley's endorsement on these points was follows:

[5] The plaintiffs have also led sufficient evidence to demonstrate a triable issue on their constructive trust claim. The plaintiffs learned that their son had re-financed [313 Thrace], allegedly without their knowledge or consent and took the mortgage proceeds for his own use. There is evidence upon which a court could find that Marek has been enriched by holding [313 Thrace] in his name and benefitting himself through the refinancing. Further, there is evidence to support the plaintiffs' argument that Marek has benefited from the work and money put into [313 Thrace]

by his father, Janusz and that there is no juristic reason for his enrichment and his parents' corresponding deprivation.

[52] The plaintiffs' assertion that the refinancing of 313 Thrace required their consent is based on their claim to be beneficial owners of that property. For the reasons outlined above, the plaintiffs did not make full and fair disclosure with respect to the claimed ownership interest in 313 Thrace. In my view, the court's assessment of the plaintiffs' constructive trust claim may have been influenced by evidence presenting a more complete picture of the circumstances regarding (i) the ownership of the Business/Esteem, (ii) the purchase of 364 Thrace, and (iii) funds that may have been used from 364 Thrace and the Business to purchase 313 Thrace.

5. Paulina's evidence in support of the *ex parte* motion

[53] I also find that Paulina's evidence on the *ex parte* motion was presented in a manner that lacked full and fair disclosure. In her May 2023 affidavit, Paulina describes learning of the defendant's intention to sell 313 Thrace. However, Paulina's evidence on the *ex parte* motion fails to disclose that:

- (a) she had been well-aware of Marek's intention to sell 313 Thrace for some time and had previously been discussing it and corresponding about it with him by text; and
- (b) she was in a precarious financial position and would not be able to afford paying rent at market rates for a similar residence if she was required to move out of 313 Thrace.

[54] In addition, Paulina's affidavit does not disclose that she was seeking a payment from the defendant in exchange for moving out of 313 Thrace willingly, or that she had noted the possibility that a certificate of pending litigation could disrupt the defendant's plan to sell 313 Thrace. In one of her texts to the defendant, Paulina wrote as follows:

Instead of looking at whether I am justified in asking for the money you should maybe do some math and calculate how much of a better price you could get without a tenant who is unwilling to move. Or the delays that are gonna be caused by a certificate of pending litigation (emphasis added)

[55] I also note that Paulina did not file any affidavit evidence in reply to the defendant's assertions about her knowledge of the defendant's intention to sell 313 Thrace, her demand for a payment from the defendant in exchange for being cooperative with respect to the sale of the property, and her precarious financial circumstances. Although Irena's affidavit evidence denies that Paulina was having financial difficulties, I do not put any weight on that evidence given the absence of any direct evidence from Paulina on this issue. Paulina had sworn an affidavit in support of the *ex parte* motion and the plaintiffs do not explain why Paulina could not provide direct evidence refuting the defendant's evidence, if she disagreed with it. Finally, I note that the text messages between Paulina and the defendant that were put into evidence do not assert that the plaintiffs have a proprietary interest in 313 Thrace.

[56] For these reasons, I find that the inclusion of Paulina’s affidavit in the evidence filed on the *ex parte* motion is a further example of the plaintiffs’ failure to make full and fair disclosure.

(c) *Conclusion on full and fair disclosure*

[57] Prior to bringing the underlying action, the plaintiffs had registered a caution on title to 313 Thrace and advised the plaintiff they had done so. Paulina referred to the possibility of a certificate of pending litigation in a text to the defendant. The plaintiffs then decided to move for a CPL on an *ex parte* basis, as they had the right to do. But in deciding to move without notice to the defendant, the plaintiffs had a duty to make full and fair disclosure of the material facts presented to the court. Here, the combination of gaps in full and fair disclosure is sufficient for me to conclude that the plaintiffs did not comply with their disclosure obligations on an *ex parte* motion.

[58] The plaintiffs submit that it is open to the court to uphold the *ex parte* order even where there has been non-disclosure.¹⁵ In my view, the case law the plaintiffs rely on is distinguishable. In those cases, the non-disclosure related to facts that were not material to the claim to an interest in the property in issue, or it was not sufficiently significant to merit the setting aside of an *ex parte* CPL order. Here, the claims to an interest in the Business and the claim to a beneficial ownership of 364 Thrace are clearly material to the basis on which the plaintiffs claim an interest in 313 Thrace. The non-disclosure goes beyond contested facts, interpretations and inferences, and proper disclosure would not have required the plaintiffs to anticipate how they might be cross-examined on contestable facts or interpretations.¹⁶ The non-disclosure in this case is substantial and goes directly to the substance of the Plaintiffs’ claim.¹⁷ In my view, the non-disclosed information may have influenced the court’s approach to the motion.¹⁸

[59] In the result, I find that the CPL Order should be set aside on the basis of the plaintiffs’ failure to make full and fair disclosure.

(iii) *In view of the plaintiffs’ failure to make full and frank disclosure, should the court exercise its residual discretion to allow the CPL to remain in place?*

[60] Where a plaintiff has failed to make full and fair disclosure, “the presumptive remedy should be to set aside the order. The plaintiff should have to bear a real burden to show why it is just and equitable for the court to exercise its discretion to maintain or reissue the order on all the facts. ...[W]ere it otherwise, the [disclosure] duties would be empty and the law would be powerless to protect the absent party.”¹⁹ Nevertheless, while the failure to make full and fair disclosure of all material facts is in and of itself a sufficient ground for setting aside an *ex parte*

¹⁵ See [Greek Canadian v. Clergy Properties Limited](#), 2014 ONSC 5156 at para 35; *Karkoulis* at para 36

¹⁶ *Karkoulis* at paras 33

¹⁷ *Zhao v. 8657181 Canada Inc.*, 2020 ONSC 2864 at para 25

¹⁸ *Karkoulis* at para 26

¹⁹ *Moses v. Metro Hardware and Maintenance Inc.*, 2020 ONSC 6684 at para 76, as cited in *Hawkins* at para 27

order, the court retains the discretion to consider whether a CPL registered pursuant to an *ex parte* order should be continued or discharged.²⁰

[61] If I were to find that the equities favour the plaintiffs in terms of the issuance of a CPL, I would then consider whether, despite the plaintiffs' breaches of their duties of full and fair disclosure, the overall justice of the case supported maintaining the CPL (or, alternatively, whether the defendant should be required to post security if the CPL is discharged). However, for the reasons set out below, I find that the equities favour the defendant.

[62] In considering the equities, the court considers the following non-exhaustive list of factors known as the *Dhunna* factors: (a) whether the plaintiff is, or is not, a shell corporation; (b) whether the land is, or is not, unique; (c) the intent of the parties in acquiring the land; (d) whether there is an alternative claim for damages; (e) the ease or difficulty of calculating damages; (f) whether damages would be a satisfactory remedy; (g) the presence or absence of another willing purchaser; and (h) the harm done to the defendant if the certificate is allowed to remain, or to the plaintiff if the certificate is removed, with or without the requirements of alternative security.²¹

[63] Certain of the equitable factors weigh in favour the plaintiffs. For example, the plaintiffs in this case are natural persons, which weighs in their favour. Further, the claim does not seek damages as alternative relief, which favours the plaintiffs somewhat, but should not, alone, be a basis for granting or maintaining a certificate of pending litigation.²² As there is no evidence of a willing purchaser for 313 Thrace, I find this to be a neutral factor.

[64] With respect uniqueness, there is both a subjective and objective aspect to this factor. In terms of the subjective aspect, the court examines it from the point of view of the plaintiff at the time of contracting. The court will then determine objectively whether the plaintiff has demonstrated that the property in issue has characteristics that make an award of damages inadequate for the particular plaintiff. Uniqueness means that the property has a quality that makes it suitable for the proposed use that cannot be reasonably duplicated elsewhere.²³ Here, the plaintiffs submit that the property is unique to them given that it is a long-time residence for Paulina which is on the same street as the plaintiffs' home. However, there is no evidence that the plaintiffs would be unable to find an alternative similar property on the same street or in the vicinity of their house at 364 Thrace. Even accepting the plaintiffs' subject view of uniqueness, there is no basis to find that there are no alternative properties available, and I am unable to conclude that 313 Thrace is unique. For the same reason, I do not consider the plaintiffs' subjective intent in acquiring 364 Thrace (that is, as a house for Paulina's family on the same street as them) to be an important factor.

²⁰ *Hawkins* at para 27, citing *Gong v Neuhaus Management Ltd.*, 2021 ONSC 531 ("*Gong*") at para 51

²¹ 572383 *Ontario Inc. v. Dhunna*, 1987 CarswellOnt 551, [1987] O.J. No. 1073 ("*Dhunna*") at paras 10-18

²² It may be open to the plaintiffs to seek an amendment to the statement of claim to seek damages as alternative relief.

²³ *Gong* at para 60, citing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (Ont. S.C.J.), affirmed (2003), 63 O.R. (3d) 304 (Ont. C.A.),

[65] I also do not accept the plaintiffs' submission that damages would be difficult to calculate for a variety of reasons, including (1) that certain funds for the purchase were contributed to by the Business and from the proceeds of refinancing 364 Thrace, and (2) fluctuating property values. There is no evidence to support this assertion and I am unable to find any basis on which it would be difficult to calculate damages. Further, I do not accept the plaintiffs' argument that damages would not be a satisfactory remedy because the equity in the property has been depleted by the refinancing of 313 Thrace. There is no evidence as to the current value of that property, or that the remaining equity is insufficient to cover the plaintiffs' claimed interest if they succeed in the action, or that the defendant would have insufficient assets to pay a damages order.

[66] In terms of the relative harm to the parties, I find that this factor favours the defendant given my findings on several of the other equitable factors, including that the property is not unique, and that damages are easily calculable and would be a satisfactory remedy.

[67] In the result, considering the *Dhunna* factors, I find that the equities favour the defendant and are not a basis for exercising my discretion to keep the CPL in place or to order any alternative relief in favour of the plaintiffs.

D. DISPOSITION AND COSTS

[68] For the reasons outlined above, the defendant's motion is granted.

[69] With respect to costs, the parties agreed that costs should be fixed and payable to the successful party in the amount of \$30,000, inclusive of disbursements and taxes. As the defendant was successful on this motion, the plaintiffs shall pay to the defendant costs of this motion fixed in the amount of \$30,000, inclusive of disbursements and taxes.

[70] I order as follows:

1. The May 11, 2023 Order of Associate Justice Jolley in this action (the "CPL Order") is hereby set aside.
2. The certificate of pending litigation issued pursuant to the CPL Order is hereby discharged.
3. The Land Registrar for the Land Registry Office in the Regional Municipality of Peel, Ontario (No. 43) is hereby directed to remove and delete the certificate of pending litigation and the CPL Order from title to the property municipally known as 313 Thrace Avenue, Mississauga, Ontario and legally described as:
PIN: 13357-0129 (LT)
PT LT 177, PL 906, AS IN VS241021; S/T VS163237 MISSISSAUGA
4. The plaintiffs shall pay the defendant costs of this motion in the amount of \$30,000, inclusive of disbursements and taxes, within 30 days.

DATE: December 20, 2024

R. Frank Associate J.