CITATION: Bergman et al v. Diamond & Diamond et al, 2025 ONSC 5698
COURT FILE NO.: CV-24-00729978-0000
DATE: 20251009

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ZEV BERGMAN and ZEV BERGMAN PROFESSIONAL CORP., Plaintiffs

AND:

DIAMOND & DIAMOND LAWYERS LLP, JEREMY DIAMOND, SANDRA ZISCKIND, ISAAC ZISCKIND, JEREMY DIAMOND PROFESSIONAL CORP., SANDRA ZISCKIND LAW PROFESSIONAL CORP., and ZISCKIND PROFESSIONAL CORP., Defendants

BEFORE: Parghi J.

COUNSEL: *Stephen J. Moreau*, for the Plaintiffs

Milton A. Davis and *Alexander Evangelista*, for the Defendants

HEARD: August 6, 2025

ENDORSEMENT

[1] This action was commenced by Zev Bergman and his professional corporation, who practiced with the defendant Diamond & Diamond Lawyers LLP (the "firm") until their termination in September 2024. Mr. Bergman and his professional corporation allege that their termination was a wrongful dismissal and a breach of the "Partnership Agreement ('Non-Equity')" entered into by them, the firm, and the individual defendants (the "Agreement"). They allege that various fees are owed to them and that the defendants unlawfully tried to pursue Mr. Bergman's clients after terminating him.

[2] The plaintiffs name seven defendants: the firm; three professional corporations that are partners of the firm (Jeremy Diamond Professional Corporation, Sandra Zisckind Law Professional Corporation, and Zisckind Professional Corporation), to whom I will refer as the "PC defendants"; and the individual defendants, who are the sole shareholders of each of the PC defendants (Jeremy Diamond, Sandra Zisckind, and Isaac Zisckind).

[3] The defendants brought a motion to strike the Fresh as Amended Statement of Claim under rule 25, or, in the alternative, to delete or remove the PC defendants and individual defendants as parties, or to stay the action against those defendants, under rule 5. Associate Justice La Horey bifurcated the motion, heard the rule 5 motion, and then dismissed the rule 5 motion (according to the plaintiffs) or the entire motion (according to the defendants). The defendants now appeal from that decision. They also bring their pleadings motion under rules 25.06 and 25.11.

[4] The plaintiffs cross-appeal, seeking full indemnity costs from the motion before the associate justice on the basis that the defendants failed to bring to the court's attention a binding authority, *Zwicker Slavens v. Diamond & Diamond Lawyers LLP et al.*, 2024 ONSC 193 (unreported).

[5] For the reasons below, I dismiss the defendants' appeal and motion to strike. I also dismiss the cross-appeal, although I find that the *Slavens* decision is squarely relevant and ought to have been disclosed by defence counsel.

The appeal of the associate justice's decision

[6] On April 1, 2025, the associate justice bifurcated the rule 5 and rule 25 components of the defendants' motion. On April 3, 2025, she heard the rule 5 motion. By endorsement dated April 8, 2025, she dismissed the motion.

[7] The defendants now advance two grounds of appeal.

The bifurcation and dismissal of the motion

[8] First, the defendants assert that the associate justice erred by bifurcating the motion and then dismissing the motion in its entirety. They say that the associate justice ruled on the rule 25 motion before hearing them on it. This led to a "procedurally unfair and legally absurd result" and demonstrated a reasonable apprehension of bias, because once she dismissed the motion in its entirety, she could not fairly adjudicate a portion of the motion that she had already ruled on.

[9] I reject this submission outright. It is clear from the associate justice's endorsement on the motion that her ruling applied to the rule 5 motion only. The endorsement states the following in a footnote:

> In the same motion record, the defendants seek an order striking out the statement of claim pursuant to rule 25.06 and 25.11, without leave to amend. As set out in my endorsement of April 1, 2025, the parties did not book enough time to argue all issues and so only the relief sought under rule 5 was argued before me on April 3, 2025. If the parties cannot resolve the remaining issues, I will hear the balance of the defendants' motion to strike.

[10] This language makes it abundantly clear that the associate justice was not deciding the rule 25 motion and that her decision was restricted to the rule 5 motion only. The defendants' claim to the contrary flies in the face of the associate justice's clear and express language.

[11] Consistent with this clear and express language, the order from the motion, which the defendants themselves drafted and circulated for approval, indicates that "only the Rule 5 portion of the motion" was heard.

[12] I do not give effect to this ground of appeal. It is without merit.

The dismissal of the rule 5 motion

[13] The second ground of appeal is that the associate justice erred by not granting the rule 5 motion – that is, by not removing the individual defendants and PC defendants from the claim or staying the action as against them. Embedded within this issue is the question of whether the associate justice erred by not interpreting the Agreement.

[14] Rule 5 deals with the joinder of claims and parties. It provides in relevant part:

> Joinder of Parties
>
> 5.02 …
>
> *Multiple Defendants or Respondents*
>
> (2) Two or more persons may be joined as defendants or respondents where, …
>
> (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief; …
>
> Misjoinder, Non-Joinder and Parties Incorrectly Named
>
> *Proceeding not to be Defeated*
>
> 5.04 …
>
> (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> Relief against Joinder
>
> 5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may, …
>
> (d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent [.]

The deletion of defendants under rule 5.04(2)

[15] The defendants asked the associate justice to make an order deleting the individual defendants and PC defendants under rule 5.04(2). The associate justice declined to do so, holding as follows:

a. It was not her role to interpret the Agreement.

b. There was a basis for the claim against the individual defendants, each of whom had signed the Agreement. This case was unlike the one in *Tataryn v. Diamond & Diamond*, 2021 ONSC 2624, on which the defendants relied. *Tartaryn* involved litigation commenced by a client of a law firm against the law firm partnership. The client had signed a retainer agreement solely with the firm and not its individual partners. By contrast, here, the Agreement was signed not just by the firm, but also by the individual defendants.

c. There was a basis for the claim against the PC defendants, arising from the enurement clause in the Agreement, which provides that the Agreement is binding upon the individual defendants' heirs, successors and permitted assigns.

d. She could not say that subsection 10(4) of the *Partnerships Act*, R.S.O. 1990, c. P5 required the action to be dismissed as against the non-firm defendants.

e. At this stage of the proceeding, rule 5.02(2)(c) was engaged.

[16] The associate judge's conclusion that rule 5.02(2)(c) was engaged meant that there was doubt as to the person or persons from whom the plaintiffs were entitled to relief. The joinder of the individual defendants and PC defendants was therefore proper.

[17] The associate justice's finding that rule 5.02(2)(c) permitted the inclusion of the non-firm defendants is a finding of mixed fact and law, subject to review for palpable and overriding error, unless there is an extricable error in principle, which will be reviewed for correctness (*Housen v. Nikolaisen*, [2002] 2 SCR 235, at paras. 27-28).

[18] There is no reason to interfere with the associate justice's decision. I agree with it.

[19] I reject the submission of the PC defendants and individual defendants that they are improperly joined as defendants "despite trite law" that a plaintiff may sue a partnership or its partners, but not both. The defendants misapprehend the law. Based on *Tataryn*, when a client sues a partnership, they will typically have to choose between suing either the partnership or the partners. However, as the associate justice correctly noted, that is not the case here. The plaintiffs are not former clients of the defendant firm, as the plaintiff in *Tataryn* was. They are its former partners. The Agreement was signed not just by the firm, as the agreement in *Tataryn* was, but also by all the individual defendants. The individual defendants each contracted directly with the plaintiffs. That is a significant difference between this case and *Tataryn*, and one with which the defendants do not grapple.

[20] I agree with the associate justice that the fact that the individual defendants signed the Agreement gives rise to a proper claim against them. Indeed, although it is not necessary

to interpret the Agreement at this stage of the proceedings, I note that many obligations articulated in the Agreement, including the ones pertaining to the calculation and payment of fees to the plaintiffs, are drafted in a way that does not specify whether they are to be discharged by the firm, the individual defendants, or both. For example, the Agreement provides that Mr. Bergman "shall be entitled to a base draw against fees earned and payable," without specifying who is to pay that base draw.

[21] The Agreement contains an enurement clause that provides that the Agreement is binding upon the individual defendants' heirs, successors and permitted assigns. I agree with the associate justice that the enurement clause gives rise to a proper claim against the PC defendants. The Fresh as Amended Statement of Claim pleads that at some point after the Agreement was signed, each PC defendant became a successor in interest to its shareholder partner, and thus became bound by the Agreement. The record indicates that the plaintiffs have no information as to whether the individual defendants continue to be bound by the Agreement or have transmitted their interests to their respective professional corporations. The individual defendants and PC defendants, despite alleging that they are improperly named as defendants, provide no evidence on this point. In these circumstances, it is appropriate to plead the action on the basis that there is a contractual claim by the plaintiffs against the PC defendants.

[22] I also agree with the associate justice's finding that the *Partnerships Act* does not require the action to be dismissed as against the individual defendants and PC defendants. Sections 10(2) to 10(4) of the Act, read together, provide that a partner in a limited liability partnership is not protected from liability for the partner's "own negligent or wrongful act or omission". The courts have interpreted these provisions to mean that if an individual partner assumes certain liabilities, even jointly with the partnership, the individual partner can be held liable. For example, in *Klana v. Jones*, 2003 CanLII 42363, the court considered an agreement that was ambiguous as to whether the partnership alone, or the partnership and the partners, were obligated to repay a particular loan. It observed that the defendants had drafted the agreement, and, applying the *contra proferentum* rule, found that all the defendants were jointly and severally liable. Here, too, the Agreement was drafted by the defendants and not subject to negotiation. The trial judge could, applying *Klana*, find that the Agreement's silence on who has to make the fee payments to the plaintiffs means that all the defendants are jointly and severally liable.

[23] I therefore agree with the associate justice's finding that, under rule 5.02(2)(c), there is "doubt as to the person or persons from whom" the plaintiffs were "entitled to relief," such that it is proper for the claim against the individual defendants and PC defendants to proceed.

[24] I also reject the argument that the associate justice ought to have interpreted the Agreement to evaluate whether it was binding solely on the firm. The associate justice considered whether rule 5.02(2)(c) applied. In finding that it did, she considered the enurement clause, which is pleaded in the Fresh as Amended Statement of Claim, together with the fact that the Agreement was signed by the individual defendants. There was no need for her to wade into the ultimate merits by interpreting the Agreement and the extent to which it bound the

various categories of defendants. Such an interpretation was not necessary for the purposes of the rule 5 motion.

The request for a stay under rule 5.05(d)

[25] The defendants asked in the alternative that the associate justice stay the claims against the individual defendants and PC defendants under rule 5.05(d), on the basis that the joinder of multiple parties would unduly complicate or delay the hearing or cause undue prejudice.

[26] The associate justice declined to exercise her discretion to grant the stay. She held that it was "hard to see how being named as defendants in a lawsuit can be said to be prejudicial to the individual defendants who signed the Agreement." By contrast, it would be prejudicial to the plaintiffs if she were to grant the relief, only for the trial judge to interpret the Agreement as providing that the individual defendants or PC defendants had independent obligations to the plaintiffs that the firm did not share. Nor had the defendants provided a "cogent basis" for their argument that narrowing down the defendants would streamline the process.

[27] The associate justice's decision not to grant a stay under rule 5.05(d) was a discretionary decision and is therefore owed a high degree of deference. It may only be set aside if it discloses an error of law or palpable and overriding error of fact (*H.B. Fuller Company v. Rogers (Rogers Law Office),* 2015 ONCA 173, at para.19).

[28] In my view, there is no reason to interfere with the associate justice's decision .

[29] The defendants say that the non-firm defendants' involvement in the litigation is prejudicial to them because "[s]erious allegations without any factual foundation have been made against them." I agree that serious allegations have been made. However, I do not agree that there is no factual foundation, as I discuss below.

[30] They state that the prejudice is enhanced by the fact that the allegations are made against the defendants "*en masse*," making it impossible for the various defendants to understand the case against each of them. As I discuss below, this is an appropriate manner of pleading in the circumstances. In any event, I am not persuaded that it constitutes prejudice.

[31] Finally, the defendants say that there will be no prejudice to the plaintiffs if a stay is granted. I do not agree. As the associate justice observed, if the stay is granted and the trial judge later interprets the Agreement as establishing independent obligations on the part of the non-firm defendants toward the plaintiffs, which obligations are not shared by the firm, then the plaintiffs will most certainly be prejudiced.

[32] I agree with the associate justice's reasoning entirely, and find she made no error of law or palpable or overriding error of fact in exercising her discretion not to grant the stay.

The pleadings motion

[33] The defendants also bring a pleadings motion under rules 25.06 and 25.11. I dismiss the motion.

[34] The Court of Appeal for Ontario has held that "the bar for striking a pleading is very high" (*PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at para. 30). The question is whether the action has no reasonable prospect of success or whether it is plain and obvious that the action cannot succeed. The facts pleaded are to be treated as true, the pleadings are to be read generously, and leave to amend should be denied "only in the clearest of cases" (*PMC York*, at para. 31, authorities omitted). The court is to assess whether the pleadings, as presently drafted or as reasonably amended, "disclose a question that is not doomed to fail" (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 90).

[35] Applying this standard here, I find that the defendants' pleadings motion is without merit.

The rule 25.06 motion

[36] The defendants make two main submissions in their rule 25.06 motion.

[37] The first is that the claim that the defendants appropriated and retained the plaintiffs' personal property is pleaded vaguely. I note that the allegation of appropriation of information forms only one narrow aspect of the overall claim. It is surprising, therefore, that it forms the focus of the defendants' motion.

[38] In any event, this claim is properly pleaded. The Fresh as Amended Statement of Claim pleads that the plaintiffs "relied entirely" on the defendants to maintain personal information relating to the plaintiffs' practice and remuneration. It describes the information and documents alleged to have been appropriated by the defendants, which include referral lists. It describes how Mr. Bergman allegedly entrusted the information to the defendants, how he allegedly asked for it back, and how the defendants allegedly refused to return it. It alleges that the defendants "unilaterally and systematically took steps so that they could secure the clients" for whom Mr. Bergman had been responsible, including by contacting those clients to advise them that Mr. Bergman was no longer with the firm. It pleads that the defendants did not provide the clients with enough information to let them make informed choices as to whether to keep their matters with the firm, with Mr. Bergman, or with a third party. It outlines the ways in which the plaintiffs say the defendants' actions violated their fiduciary and ethical duties and duty of good faith.

[39] The plaintiffs have claimed breach of contract arising from these facts. The Fresh as Amended Statement of Claim discusses the relationships and dealings among the parties, the requirements of the Agreement, and the *Rules of Professional Conduct* governing members of the legal profession. It then pleads in detail how the defendants are alleged to have improperly pursued the plaintiffs' clients, using personal information belonging to the plaintiffs. It is clear, reading these allegations against the backdrop of everything else that has been pleaded, that the breach of contract claim is an allegation that the appropriation of the plaintiffs' property amounted to a breach of the contractual duties owed by the defendants to the plaintiffs.

[40] The pleading explains how and why the plaintiffs say the defendants have a fiduciary duty to firm clients, have violated those duties by misusing the information to communicate with clients in a way that does not comply with their professional obligations, and, in so doing, have breached the implied terms of their contracts with the plaintiffs and/or breached their duty of contractual good faith to the plaintiffs.

[41] The other causes of action alleged to flow from the improper retention and appropriation of the plaintiffs' information and property are likewise adequately pleaded. The pleading explains how and why the plaintiffs say the defendants breached their confidence by retaining and misusing the information. It describes the control by the defendants of the information, which is a key element of the claims of detinue and conversion. It pleads the "touching" of the property by the defendants, which lies at the heart of the claim of trespass to chattel. It explains the unauthorized retention of the property that the plaintiffs say grounds the claim of theft. It pleads in detail the nature and consequences of the alleged unlawful use of the information.

[42] It is all there. It is readily apparent from the pleading, read as a whole, what is being alleged in respect of the appropriation and retention of the plaintiffs' personal property, and on what basis. I reject the defendants' claim to the contrary.

[43] The defendants' second submission is that the allegations in the pleading do not specify whether they are advanced against the individual defendants, the PC defendants, the firm, or some combination thereof, with the result that the defendants are unable to understand the case to meet.

[44] I disagree. It is a natural consequence of joinder that allegations will be made against some or all defendants. Allegations may properly be advanced against some or all defendants, especially where, as here, the events at issue arise from an alleged employment relationship, and as a matter of law an employee may have more than one employer, or where, as here, there is doubt as to the person or persons from whom the plaintiffs are entitled to seek relief. The defendants are at liberty to plead in their Statement of Defence which of them are responsible for the conduct and decisions pleaded in the Fresh as Amended Statement of Claim. That is information that may well be in their possession and not the plaintiffs'. But the fact that the plaintiffs do not yet have information as to which, if any, of various properly joined defendants committed certainly properly pleaded wrongful acts is not a basis for striking the claim.

[45] Although the remaining claims, separate and apart from the appropriation of personal property claim, do not appear to form part of the defendants' motion, I am of the view that they are also adequately pleaded. For example, the pleading lays out the wrongful dismissal claim in detail, including by offering a granular list of the facts that the plaintiffs point to as indicia of an employment relationship. The defendants acknowledge that unlawful interference with economic relations is not a tenable claim on the facts, and have agreed to strike that allegation. In my assessment, every remaining claim is properly pleaded.

[46] I accordingly dismiss the rule 25.06 motion.

The rule 25.11 motion

[47] The defendants say that the Fresh as Amended Statement of Claim contravenes rule 25.11 because it is scandalous, frivolous, vexatious, or an abuse of process. They allege that the claim includes allegations of breach of fiduciary duty, unlawful interference, and theft that are "wholly designed to embarrass" the non-firm defendants; that it is prolix and improperly pleads evidence and conclusions of law; and that it contains extraneous and immaterial facts, "inflammatory" language, and "rambling" pleas. In oral argument, they described the allegations as "way over the top" and "unduly aggressive".

[48] I see nothing scandalous, frivolous, or vexatious in the pleading. I see no excessive or inappropriate language. There is no rule against pleading allegations that are serious in nature. There is no rule against asserting that someone has failed to comply with the rules of professional conduct that govern members of their profession. To their credit, the plaintiffs have advanced these allegations clearly, concretely, and without improper language. They have specified which rules they say have been violated, and how. The allegations and supporting facts pleaded are material and there is no basis for striking them.

[49] I see nothing prolix in the pleading. The pleading is granular in content. There is nothing improper about that. To the extent that evidence is pleaded, that is done to clearly articulate the allegations of wrongdoing and the basis on which certain legal claims, such as the claim that the plaintiffs were employees of the defendants, are advanced. I am not sure how the defendants allege both that there is too much evidence and particularity in the pleading, such that it is prolix, and that the pleading is vague and does not disclose the case to meet. Those two things cannot be true at the same time.

[50] I dismiss the rule 25.11 motion.

The cross-appeal

[51] The plaintiffs cross appeal, seeking full indemnity costs from the proceedings before the associate justice. They do so on the basis that the defendants improperly failed to disclose a relevant legal precedent, *Slavens*, to the court. They say that counsel for the defendants was obligated under rule 5.1-2(i) of the *Rules of Professional Conduct* to inform the court of *Slavens*, and that, had counsel done so, the defendants' rule 5 motion would have been scheduled to be heard by a judge, because only a judge would have been in a position to make a holding contrary to the one in *Slavens*. As a consequence of the defendants' failure to disclose, however, the matter had to go through the "costly stepping-stone motion process" before an associate justice, resulting in higher costs to the plaintiffs.

[52] An issue arose before me as to whether the plaintiffs were required to seek leave to appeal to advance this argument under section 133 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, given that they are appealing only a costs order. An issue then arose as to whether, if they were required to seek leave to appeal, they could do so before me.

[53] I need not decide the leave issue, because in my view, while the defendants should have brought *Slavens* to the attention of the court, their failure to do so does not attract the sanction proposed by the plaintiffs.

[54] Rule 5.1-2(i) of the *Rules of Professional Conduct* provides that a lawyer must not "deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by the other party".

[55] In my view, *Slavens* is directly on point. It is dispositive of the rule 5 issues that were argued before the associate justice. The defendants should therefore have brought it to the attention of the court. *Slavens* involved a plaintiff who, like Mr. Bergman, was a former partner of the firm. It involved the same firm and individual defendants as the ones here, and the same agreement as the one here. It involved a nearly identical motion to strike by the defendants on the basis of rule 5. It considered the same issue, namely, whether the non-firm defendants had been improperly joined, having regard to the requirements of rule 5 and the *Partnerships Act*. The court in *Slavens* dismissed the motion to strike and held that the claim against the individual defendants was not legally untenable. It distinguished *Tataryn*, on which the defendants relied, just as they did before the associate justice and before me.

[56] Counsel for the defendants says the *Slavens* is distinguishable from this case, such that there was no duty to disclose it to the court. Counsel notes that Ms. Slavens was a former partner, whereas Mr. Bergman says he was not a partner. Ms. Slavens claimed that the partnership was overholding her money, which Mr. Bergman does not allege. Ms. Slavens did not seek to have herself characterized as an employee, which Mr. Bergman does.

[57] I disagree. *Slavens* is squarely relevant to this case on the issue of joinder. On that issue, it is on all fours with, and dispositive of, the matter before the associate justice. The types of employment- and compensation-related claims that Mr. Bergman and Ms. Slavens advanced have nothing to do with the joinder issue and therefore do not satisfy me that *Slavens* is not relevant. The appropriate approach, even if counsel did believe the two cases were distinguishable, would have been to bring *Slavens* to the attention of the court and opposing counsel and then explain why the cases are distinguishable.

[58] Nonetheless, I accept counsel's explanation that he held a good faith belief that *Slavens* was not relevant, and that, had he found it to be relevant, he would have disclosed it. In my view, his belief that the case did not need to be disclosed was incorrect, but it was sincere and held in good faith. I am satisfied that counsel did not "deliberately refrain" from disclosing to the court what he understood to be a binding authority under rule 5.1-2(i).

[59] I accordingly dismiss the cross-appeal.

Conclusion

[60] The defendants' appeal and motion are dismissed. The plaintiffs' cross-appeal is dismissed.

[61] The plaintiffs are successful on the appeal and motion, which by far formed the largest part of the proceedings before me. While they did not succeed in the cross-appeal, it was quite appropriate for them to have raised with the court their concerns about the failure of the defendants to disclose the *Slavens* case, and I have agreed with them that *Slavens* ought to have been disclosed.

[62] The plaintiffs are therefore entitled to their costs on this motion on a partial indemnity basis, in the amount of $16,140.47, inclusive of disbursements and HST. This amount is to be paid within 30 days.

[63] Finally, the plaintiffs voice concern with the slow progress of this matter and seek a timetabling order. I order the parties to contact their case management judge within seven days of the date of this endorsement to request a case management conference to address scheduling the delivery of the Statement of Defence and a mediation, and any other issues the case management judge wishes to address.

Parghi J.

Date: October 9, 2025