CITATION: Two-Tyme Recycling Inc. v. Woods, 2010 ONSC 5672
COURT FILE NO.: 09-CV-384829
DATE: 201001022

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TWO-TYME RECYCLING INC. Plaintiff	**Edward J. Babin and Clifford Jackman**, for the Plaintiff
- and -	
RONALD WOODS, DARLENE JOAN WOODS, RALPH WOODS, PATRICIA WOODS, TARA LYNN WOODS and AMANDA LOUISE WOODS Defendants	**Jerry Herszkopf**, for the Defendants
AND BETWEEN:	
RONALD WOODS, DARLENE JOAN WOODS, RALPH WOODS, PATRICIA WOODS, TARA LYNN WOODS and AMANDA LOUISE WOODS Plaintiffs by Counterclaim	**Jerry Herszkopf**, for the Plaintiffs by Counterclaim
-and-	
CHRISTOPHER ROTTER and TWO-TYME RECYCLING INC. Defendants to the Counterclaim	**Edward J. Babin and Clifford Jackman**, for the Defendants to the Counterclaim
	HEARD: September 20, 2010 Supplemental written submissions from the plaintiff dated September 23, 2010[1]

Hoy J.

REASONS FOR DECISION

[1] The plaintiff, Two-Tyme Recycling Inc., (sometimes referred to in these reasons as "TTR") brings this motion for partial summary judgment seeking an order:

[1] Counsel for the defendants elected not to provide further written submissions.

(a) granting summary judgment against the defendant Darlene Woods in the amount of $608,493.93 for fraudulent conversion;

(b) granting summary judgment against all or some of Darlene Woods' husband, Ronald Woods, her in-laws, Ralph and Patricia Woods, and her daughters, Tara Woods, age 29, and Amanda Woods, age 27 for fraudulent conversion or breach of fiduciary duty or knowingly assisting the breach of fiduciary duty; and

(c) in the alternative to each of (a) and (b) above, granting summary judgment against all or some of the defendants for a tracing at law and all monies had and received by them.[2]

[2] The plaintiff is a waste management company founded by Ronald Woods. The defendants Darlene, Ronald, Tara and Amanda were full time employees. Darlene, Tara and Amanda worked out of the same small office. Ralph helped out, with no fixed hours, and no fixed salary. Patricia is retired and had no involvement in the plaintiff.

[3] At the time of the events in issue, Ronald Woods had a 31% interest in the plaintiff. The remaining shares are owned by third parties. The plaintiff was financially stretched: customers were not paying their bills in a timely manner, or so the third party shareholders were led to believe. In 2009, they discovered a significant fraud.

[2] The plaintiff sued the defendants seeking, *inter alia*, damages for breach of contract, breach of fiduciary duty, conversion, intentional interference with economic and contractual relations, unjust interference with economic and contractual relations, unjust enrichment, loss of goodwill and business reputation and conspiracy, and a tracing of all monies had and received by the defendants. In the statement of claim, the plaintiff does not use the words "fraud" or "deceit"; however, the facts plead in the statement of claim make it clear that the manner in which the defendants were alleged to have carried out the acts on which the various causes of action plead (such as conversion) were founded was fraudulent. For example, the plaintiff describes intentional, dishonest diversion of the plaintiff's funds.

In its Amended Notice of Motion, the plaintiff indicated that the motion was for summary judgment for $608,493.93, without indicating on what basis, and a tracing. The grounds set out in the Notice of Motion specifically identify the alleged fraud. At paragraph 109 of the plaintiff's factum, the plaintiff indicated it sought relief for "fraud" and not for the intentional and dishonest conversion specifically plead. Comments made by counsel for the defendants during the course of the hearing indicated that counsel understood that the claim was for fraudulent conversion. The plaintiff also referred in its factum to its claim against the defendants other than Darlene Woods as for "participating in" or "knowingly assisting" in the fraud. In its Supplementary Written Submissions filed after the hearing in response to my request for clarification of the nature of its claim against the remaining defendants, the plaintiff submitted that summary judgment should be granted against the remaining defendants for conspiracy and for knowingly assisting Darlene and Ron Woods to breach fiduciary duties which they owed to the plaintiff. The plaintiff also indicated that its position is that the remaining defendants actively participated in the alleged fraudulent conversion - in essence that they acted in concert with Darlene to misappropriate $608,493.33. As the remaining defendants are alleged to have been joint tort feasors in relation to the fraudulent conversion, it is not necessary to rely on the conspiracy claim, and I do not address it. In light of the Supplementary Written Submissions, the "knowing assistance" claim is considered in relation to the alleged breach of fiduciary duty, not the claim in fraudulent conversion.

[4] A Mareva Order was obtained from Justice Perell and continued by Justice Belobaba. The defendants moved before Justice Harvison-Young to discharge the Mareva Order, alleging material non-disclosure. Darlene and Ronald Woods filed affidavits in support of the motion and were cross-examined.

[5] Justice Harvison-Young dismissed the defendants' motion, writing:

> ...the Plaintiff's central allegation is that the Defendants misappropriated, at a minimum, over $600,000 in just less than three years by diverting payments made by customers which should have been deposited into the HSBC account into the TD Bank account. These amounts were never entered into the TRUX accounting system and never appeared in the TTR books. The amounts deposited, however, did get transferred out of the account for the benefit of Ron and Darlene Woods, either as cash withdrawals, transfer to personal credit card accounts, or to personal bank accounts. The entire amount appears to have been dissipated. Significant portions of the funds were withdrawn by Darlene and apparently spent at Casino Rama....
>
> As TTR submitted in its factum, the denials and assertions made by the Defendants in this matter have consistently shifted and grown more improbable. None of them change the fact that substantial Company funds were flowing into the TD account and then being withdrawn, transferred into other accounts, or otherwise being used for the benefit of the Defendants, without ever being recorded on the books and records of the Company. Indeed, Darlene Woods admits this was the case, but now claims, in effect, that Mr. Rotter made her do it.
>
> ...Viewed as a whole, including the affidavits and cross-examinations, the evidence of misappropriation remains overwhelming.

[6] By way of further background, Darlene Woods, who acted as the office manager, had primary responsibility for collections. She, along with her two daughters, was responsible for recording any payments received from the plaintiff's customers in the plaintiff's financial software system, TRUX. All deposits should have been made to the plaintiff's HSBC account and should have been recorded in TRUX. The plaintiff's TD account was - with the exception of a few automated payments which continued to flow through it - essentially dormant. Only Darlene and Ron Woods and Ralph and Patricia Woods were signatories on the TD account. The evidence before Justice Harvison-Young, and before me, included the TD bank statements, and a tracking of payments from that account.[3] Money was transferred from the TD account as quickly as it was transferred in. During the relevant period a total of

[3] The plaintiff obtained bank statements in respect of the defendants' personal accounts.

$633,630 was deposited into the TD account; none of these receipts was recorded in TRUX. Customers whom Darlene said were delinquent had in fact paid their accounts. A total of $608,493.93 was withdrawn from the TD account: $137,673.30 was withdrawn in cash; $85,070 was used to pay various Woods family credit card bills without the plaintiff's knowledge or consent; $62,683.80 went out in bank drafts; $17,676.83 was used for miscellaneous Woods family expenditures of which the plaintiff was unaware; and $305,390.00 was transferred into various Woods family bank accounts, all of which are now empty. As well, $101,077.78 was deposited to Ronald and Darlene's personal account (exclusive of transfers from the TD account) during the relevant period.

[7] Since the motion before Justice Harvison-Young, Darlene and Ronald Woods have been charged criminally with fraud.

[8] In support of this motion, the plaintiff filed a detailed affidavit of Christopher Rotter, a shareholder, director and officer of the plaintiff. Among other things, Mr. Rotter reviewed the evidence before Justice Harvison-Young. The defendants did not cross-examine Mr. Rotter.

[9] Darlene Woods filed no evidence in response to this motion. The remaining defendants filed brief affidavits.

[10] Pursuant to Rule 20.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 , the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. Pursuant to Rule 20.04(2.1), in making such determination, a judge may, unless it is in the interests of justice for such powers to be exercised only at a trial, weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence.

[11] As indicated by Justice Perell in *Healey v. Lakeridge Health Corp.*, 2010 CarswellOnt 556 (S.C.J.) (W.L.), the real question is whether "the issues to be resolved cannot be truthfully, fairly, and justly resolved without the forensic machinery of a trial".

Summary Judgment Against Darlene Woods for Fraudulent Conversion

[12] The evidence of fraudulent conversion[4] on the part of Darlene Woods is overwhelming. As Justice Harvison-Young noted, Darlene Woods ultimately admitted to committing the fraud. There is no genuine issue requiring a trial. Indeed, the holding of a trial would, in the case of Darlene Woods, amount to a failure of procedural justice. Summary judgment in favour of the plaintiff against the defendant Darlene Woods in the amount of $608,493.93 (the total amount withdrawn from the TD account) for fraudulent conversion shall accordingly issue.

[4] Counsel for the defendants did not argue that the tort of conversion did not apply in the circumstances, and I am satisfied that it does.

Summary Judgment Against Ron Woods for Fraudulent Conversion or Breach of Fiduciary Duty

[13] On the motion before Justice Harvison-Young, Ron Woods swore an affidavit dated September 10, 2009, in which he accepted all of Darlene's evidence in her affidavit of the same date. Ron attended Darlene's cross-examination. She admitted that significant parts of her evidence were false. Ron made no effort to correct the court record. Darlene swore a further affidavit, with a last and desperate story. Ron was cross-examined on October 23, 2009. He adopted all of Darlene's evidence. As noted above, Justice Harvison-Young described Ron's and Darlene's evidence as consistently shifting and improbable. I agree with that description.

[14] Mr. Rotter, in his affidavit in support of this motion, deposed that: Darlene and Tara had primary responsibility for collections; however, both Ron and Amanda assisted and had regular contact with the plaintiff's customers; Ron specifically agreed that the plaintiff would conduct all of its business out of the HSBC account; Ron became very defensive when the subject of having the other shareholders take on a greater role in collecting accounts receivable was brought up and assured the shareholders that he would get tougher with the plaintiff's customers to ensure they paid their bills; Darlene, Ron and the other shareholders spent hours in meetings discussing debts owed to the plaintiff to determine how much could be collected; Ron opposed the sale of the plaintiff's assets to a third party in the spring of 2008, refusing to support any sort of a deal despite the plaintiff's untenable financial position, but ultimately agreed to a sale to a third party, with the accounts receivable to be retained by the plaintiff; after a serious concern that a fraud had occurred arose, Ron advised another employee that "things were about to get ugly" or words to that effect and told the employee to take her vacation. Then Ron (together with Darlene, Amanda and Tara) searched through the plaintiff's files and moved them around. Ron was at this point removed as an officer of the plaintiff. The plaintiff discovered that all of Darlene's, Tara's and Amanda's data had been erased from the hard drives of their computers and all of the plaintiff's paper documents had been removed from the office. All of the plaintiff's tools were removed from the shop and its John Deere loader was missing. Darlene admitted that the Woods family had taken the loader, Ron was charged with theft over $5,000 and the loader mysteriously reappeared. Only a week after the plaintiff had learned about the fraud, Ron brought a wholly unsuccessful injunction application on the date the third party sale was scheduled to close, in an attempt to de-rail the sale.

[15] Regarding the collection of customers' receivables, Mr. Rotter appended to his affidavit an e-mail sent by Darlene, signed "Ron & Dar", which indicates "Myself and Ron has discussed your meeting with Brad Morgan….you are not taking the receivables away from us, it is the only thing you haven't taken. We have a repore [*sic*] with our customers it is not like Toronto. Call us hillbillies if you wish but we work with our customers and not threaten them and it is working, maybe not as fast as you would like but it is working. If we did it your way we would not have any customers…."

[16] In response to this motion, Ron filed a short affidavit, the body of which is less than two pages in length. He deposed that: Mr. Rotter and the other shareholders were aware that the TD account was active and Mr. Rotter knew that cheques were being deposited into the

TD account; and he had no involvement with the operation of the TD account, assumed that Darlene was making some deposits to that account so that certain expenses could be paid from it as agreed by the other shareholders, was unaware of $281,650 being transferred from the TD account to his and Darlene's account and had no knowledge or involvement in any of Darlene's alleged misappropriations from the plaintiff.

[17] In his affidavit, Ron did not dispute or otherwise address Mr. Rotter's evidence filed on this motion. He did not, for example, indicate that he did not deal with customers to collect receivables, as Mr. Rotter had deposed and the "Ron & Dar" e-mail indicates was the case, or depose that he had no knowledge of the "Ron & Dar" e-mail.

[18] The plaintiff cross-examined Ron Woods. On cross-examination, Ron Woods indicated that: the "odd time" he interacted with the plaintiff's customers; 9 out of 10 times customers would not even know who he was if they met him; the notes made by Darlene to the effect that Ron had spoken to various customers to discuss accounts receivable were "probably accurate", and it is "possible" he could have talked to them…."; he tried to collect money for the plaintiff whenever he could; Mr. Rotter told Darlene to put money into the TD account so that the "automatics" got paid[5]; he has not yet seen the documents with respect to the transfer of funds to his and Darlene's account, although he keeps asking for them; he has not looked at his personal bank account statements; he did not know the transfer of funds to his and Darlene's account took place; it is a possibility that the transfers to their account were in repayment of loans; and he does not know who was responsible for entering cheque information into TRUX.

[19] The plaintiff submits that there is no genuine issue requiring a trial whether Ron acted in concert with Darlene and is therefore jointly and severally liable for the fraudulent conversion for, among others, the following reasons:

(a) Ron was a signatory of the TD account;
(b) Ron knew that the shareholders had decided to use the HSBC account;
(c) hundreds of thousands of dollars were transferred into accounts in his and his wife's joint names;
(d) Ron represented to the other shareholders that he would get tougher with customers regarding the collection of their accounts - accounts that were no longer owing;
(e) after the fraud was discovered, Ron participated in the moving of files at the office and launched a spurious injunction to stop the sale transaction; and
(f) Ron's evidence is completely lacking in credibility.

[20] As noted by Justice Karakatsanis (as she then was) in *Cuthbert v. TD Canada Trust*, 2010 CarswellOnt 867 (S.C.J.) (W.L.), paras. 12 and 13:

> The new rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party

[5] It is not disputed that certain small automatic payments were debited from the TD account.

> who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule 20.02(2), a responding party 'may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial'. In other words, consistent with existing jurisprudence, each side must 'put its best foot forward'. The court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.

[21] Under the new Rule, on a motion for summary judgment, the motions judge may make factual findings, including a finding of a material fact: *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, [2010] O.J. No. 3987 (S.C.J.).

[22] *Cuthbert* arose out of a mortgage fraud scheme. Monies were obtained from the Royal Bank by fraud and deposited in Mr. Cuthbert's account at the TD Bank. The TD Bank debited the funds from Mr. Cuthbert's account and returned them to the Royal Bank. The Royal Bank subsequently commenced a mortgage fraud action against several defendants, including Mr. Cuthbert. The action against Mr. Cuthbert was dismissed on consent, without costs. The Royal Bank evidence was that it did so because Mr. Cuthbert was elderly and had no exigible assets. After the dismissal, Mr. Cuthbert commenced an action against the Royal Bank for return of the funds from his account and sought summary judgment against the Bank. The Bank in turn moved for summary judgment, dismissing the action against it.

[23] The key disputed factual issue was whether Mr. Cuthbert received the funds in repayment of loans, as he deposed was the case.

[24] Justice Karakatsanis found that Mr. Cuthbert was not credible, dismissed Mr. Cuthbert's motion and granted summary judgment in favour of the Bank, dismissing Mr. Cuthbert's action. She noted that while she did not have the opportunity of observing Mr. Cuthbert's demeanour during testimony, "courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency and consistency with contemporaneous and undisputed documents. I have numerous sworn statements - three affidavits and two cross-examinations - relating to this issue and numerous undisputed documents with which to test his evidence."

[25] In this case, the existence of a fraud is undisputed. The issue is Ron's knowledge of and involvement in it, which he denies in his affidavit. Silence in the face of a fraud can be sufficient to ground a finding that the person acted in concert with the fraudster and is jointly liable for the fraud: see *Osborne v. Pavlick*, 2000 BCCA 120, 74 B.C.L.R. (3d) 311, 2000 CarswellBC 325.

[26] In my view, the plaintiff has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution. The evidence that Ron was, at a time when the fraudulent conversion was ongoing, representing that he was getting "tough" with customers to ensure they paid their bills - when those customers had in fact paid their bills and he, given his interactions with them, would have known this - is clear evidence that he was acting in concert with Darlene to misappropriate the plaintiff's receivables for their own use. While someone may be found to have acted in concert to commit a fraud when he is simply silent in the face of the fraud, Ron Woods was more than simply silent: he actively participated by making statements in furtherance of the fraudulent conversion.

[27] Ron Woods has not proven that his defence that he had no knowledge or involvement in the fraud has a real chance of success.

[28] In this case, as in *Cuthbert*, there is a strong evidentiary basis on which to make a finding of credibility without the need to observe the witness' demeanour.

[29] Ron's evidence is wholly lacking in credibility. I reject his evidence that he had no knowledge or involvement in the fraud.

[30] The transcript shows him to be an evasive witness.

[31] Ron founded the plaintiff and built up its business. He was responsible for operations. His initial evidence on cross-examination - that he did not interact with customers - is implausible, and inconsistent with the documentary evidence prepared at the time the fraud was perpetrated, namely the notes prepared by Darlene, which while presumably not true as to the nature of the exchanges with customers nonetheless show that it was customary for Ron to be engaged in collections, and the e-mail from Darlene signed "Ron & Dar" which also shows that Ron was involved with collecting receivables from customers and his own subsequent admission that he attempted to collect money for the plaintiff whenever he could.

[32] The TD bank statements were included in the motions records in respect of the Mareva injunction. He was served with those motions records. It is not true that such statements were unavailable to him.

[33] It is implausible that Ron would not have noticed the transfer of hundreds of thousands of dollars into his bank account or, given the allegations, reviewed his personal bank statements. The transfers to his and Darlene's personal account began at the outset of the period during which the fraud occurred, and continued, with regularity, throughout the relevant period. Ron adduced no evidence of any loans owing to him. Given his role at the plaintiff, and his relationship with Darlene, his evidence that he did not know who was responsible for entering cheque information into TRUX is also implausible.

[34] A claim for fraudulent conversion is serious. In *Cuthbert*, the finding that Mr. Cuthbert was not credible did not result in a judgment in fraud. Despite the nature of the claim in this matter, I have concluded, without hesitation, that summary judgment for fraudulent conversion can be granted against Ron Woods.

[35] As noted above, I am entitled to assume that the record contains all of the evidence that Ron Woods would present if there was a trial and, based on the record, I am satisfied, on a balance of convenience, that Ron Woods acted in concert with Darlene Woods to effect the fraudulent conversion of $$608,493.93. In any event, based on Ron Woods' evidence before Justice Harvison Young and in response to this motion, I cannot believe that he would be more forthcoming, and that there would be a materially fuller evidentiary record, at trial. Moreover, not only can the issue of whether Ron Woods acted in concert with his spouse to effect the fraudulent conversion be resolved fairly without a trial, requiring the issue to be determined at trial might result in an injustice.

[36] In addressing whether a motion for partial summary judgment seeking relief in the alternative was appropriate, the plaintiff acknowledged and committed that if I was prepared to grant the alternative relief for monies had and received and a tracing at law sought on this summary judgment, but not judgment for fraud, it would not proceed to trial against such defendants on the fraudulent conversion claim. As noted above, the funds in the Woods' family bank accounts have been dissipated; counsel advised that the plaintiff, the victim of a significant fraud, does not have the resources to proceed to trial. The plaintiff will take whatever relief it can get against the defendants at this juncture: there will be no civil trial on these issues. A judgment against Ron for tracing and money had and received (which I would have granted in respect of monies transferred into his and Darlene's joint account, had summary judgment for fraudulent conversion not be sought and granted) will not survive a discharge in bankruptcy; a judgment for fraudulent conversion will. Ron would be able to rid himself of civil liability if a finding of criminal fraud - with its higher standard of proof - is not made.

[37] The exchange with counsel described in the preceding paragraph occurred before counsel for the plaintiff focused on its claim for breach of fiduciary duty in its supplementary submissions. While not every liability arising from a breach of a fiduciary duty survives a discharge from bankruptcy, a misappropriation or defalcation while acting in a fiduciary capacity does. Ron Woods was an officer of the plaintiff and one of the signing officers on the TD account. As the plaintiff submits, he owed a fiduciary duty to the plaintiff and clearly breached it. Given that the breach entailed conduct sufficient to result in summary judgment for fraudulent conversion, it would similarly survive a discharge in bankruptcy. However, as summary judgment for fraudulent conversion has been granted, it is not necessary to grant relief on this alternate basis.

Summary Judgment Against the Remaining Defendants for Fraudulent Conversion or knowingly assisting Ron Woods to breach his fiduciary duty to the plaintiff

[38] In my view, in the case of Ralph and Patricia Woods and Tara and Amanda Woods there is, in respect of both the allegations of fraudulent conversion and knowingly assisting Ron Woods to breach his fiduciary duty, a genuine issue requiring a trial.

[39] Of the $608,493.93, $14,200 was transferred to Ralph and Patricia's joint account and $6,300 was transferred to an account shared by Ralph, Patricia, Ronald and Darlene - what

Ralph describes as their "mortgage account".[6] During the relevant period, a further $55,385 was transferred from Ronald and Darlene's joint account into the mortgage account and $19,593.73 was deposited into Ralph and Patricia's account.

[40] Patricia is retired, in ill health and 71 years of age. Her evidence is that: she was not involved in the financial operations of the plaintiff, the operation of the TD account or in any mortgage payments; she relied on Darlene to make the mortgage payments and has no knowledge of any transfers being made to any accounts she had or has an interest in; and she had no knowledge or involvement in any of Darlene's alleged misappropriation from the plaintiff.

[41] Ralph Woods similarly deposes that he has no knowledge of the alleged misappropriations. He does not recall what the transfer of the $14,200 was for; he says it may have been for repayment of his loan or salary. (He was not on the company payroll but, according to him, received cash payments on a regular basis). He deposed that he would like an accounting from the plaintiff. Such an accounting has in fact been available, but he has never availed himself of it. Ralph Woods did not provide details of the alleged outstanding shareholder loan owing to him. As to the $6,300, it may, he says, have been for the mortgage: he does not know. He says he left the mortgage up to Ron and Darlene. As to the $55,385 transferred from Ron and Darlene's account to the mortgage account, he says only that its source may have been Ron's or Darlene's pay; he does not know. His evidence is that the $19,593.73 in cash deposited to his and Patricia's joint account could have been for pay, repayment of his shareholder's loan, a loan from Darlene or Ron to him; he says he would like to see the accounting. (He is the payee and it is his personal account; he should be in possession of the accounting.)

[42] According to Mr. Rotter's affidavit, in or about 2003, "in exchange for Ralph and Patricia's 21% interest in the plaintiff a company owned by two of the other shareholders provided the plaintiff with a loan of $168,000". From a corporate perspective, as described, this transaction seems somewhat unusual: one would have expected the consideration arising from Ralph and Patricia's share interest to flow to them, not the plaintiff. The plaintiff's own evidence suggests that it is possible that some kind of shareholder loan account arose from this transaction, lending some credibility to Ralph Woods' belief that some of the monies might have been in repayment of a loan.[7]

[43] Of the $608,493.93 at issue, only $1,730 made its way into Tara Woods' bank account and $600 was transferred into Amanda Woods' bank account. While they worked in the same small office as their mother, and did receive some of the funds, it is not entirely implausible that they may not have been aware of the fraud, or at least the extent of it. They were not signatories on the TD account. Certainly, it is plausible that their parents might have sought to shelter them, and that their less than forthcoming evidence could be attributed to an attempt to protect their parents.

---

[6] The Woods family residence was owned by Ralph, Patricia, Ronald and Darlene and was subject to a mortgage.

[7] This raises an issue as to Ralph Woods' knowledge of the fraud, and his knowing assistance of the breach of fiduciary duty, not the actual characterization of the funds paid to him.

Summary Judgment Against the Remaining Defendants for a Tracing at Law and Monies Had and Received

[44] This leaves the issue of whether or not judgment should be granted against Ralph, Patricia, Amanda and Tara for a tracing at law and all monies had and received by them. The answer to that question is "yes".

[45] Where the plaintiff can demonstrate a property interest in money that has come into the defendant's hands, an action in money had and received will lie against the defendant for its value...the action for money had and received remains an *in personam* claim. The plaintiff does not recover the specific money from the defendant, but rather is awarded a personal judgment for its equivalent value...

..It must be shown that the money received by the defendant was the money of the plaintiff. This often requires that the plaintiff "follow" the money into the defendant's possession or "trace" it into some substitute asset held by the defendant.

P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf (Aurora, Ont: Canada Law Book Inc., 1992), page 6-16.

[46] ...tracing at law is permitted where a person has received money rightfully claimed by the claimant. Liability is based on mere receipt, and the extent of liability will depend on the amount received. It is sometimes said that funds cannot be traced to bank accounts at common law. This view overstates the rule and fails to take into account the fact that, as an evidentiary process, tracing is possible if identification is possible....tracing is impossible only when the means of ascertainment fail.....

...neither the fact that a cheque is cleared through the banking system before being deposited in the payee's account nor the fact that the payee has mixed the funds with other funds is sufficient to bar recovery at common law.

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia, 2009 CarswellBC 809 (S.C.C.) (W.L.), paras. 79, 80.

[47] In this case, all of the funds in the plaintiff's TD account were the property of the plaintiff: $600 was transferred directly to Amanda's account; $1,730 was transferred to Tara's account; $14,200 was transferred directly to Ralph and Patricia's joint account; and $6300 was transferred directly to the Darlene, Ron, Ralph and Darlene's joint account.

[48] The fact that such defendants may have had other funds in their accounts does not destroy the claim for tracing. It does not prevent proof that the money they received was the plaintiff's money.

[49] Judgment shall accordingly issue against Amanda for $600; Tara for $1,730 and Ralph and Patricia, jointly and severally, for $20,500 ($14,200 + $6,300).

[50] In the event of recovery against Darlene and/or Ron, the amounts above shall be deemed to be the last monies paid by them. In other words, Amanda, Tara, Ralph and Patricia shall be relieved of liability only in the event of full recovery against Darlene and/or Ron.

Costs

[51] The plaintiff may make brief written submissions on the issue of costs within the two weeks following the release of these reasons. The defendants shall provide any submissions they wish to make in response within ten days thereafter. No reply submissions shall be provided without leave. If the above timetable is problematic for any party, I may be spoken to for a brief extension.

_____

Hoy J.

Released: October 22, 2010

CITATION: Two-Tyme Recycling Inc. v. Woods, 2010 ONSC 5672
COURT FILE NO.: 09-CV-384829
DATE: 201001022

ONTARIO
SUPERIOR COURT OF JUSTICE
B E T W E E N:

TWO-TYME RECYCLING INC.

Plaintiff

- and -

RONALD WOODS,
DARLENE JOAN WOODS, RALPH WOODS,
PATRICIA WOODS, TARA LYNN WOODS
and AMANDA LOUISE WOODS

Defendants

AND BETWEEN:

RONALD WOODS,
DARLENE JOAN WOODS, RALPH WOODS,
PATRICIA WOODS, TARA LYNN WOODS
and AMANDA LOUISE WOODS

Plaintiffs by Counterclaim

-and-

CHRISTOPHER ROTTER and
TWO-TYME RECYCLING INC.

Defendants to the Counterclaim

REASONS FOR DECISION

Hoy J.

Released: October 22, 2010