

Business partner liable for breach of fiduciary duty and civil fraud

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Business partners generally owe each other fiduciary duties and can be liable for civil fraud if funds invested in the partnership business are not used for their intended purpose.

In *Nguyen v Adas*, 2022 ONSC 2541 (CanLII), the plaintiff was interested in investing in a trucking business as he believed there was an opportunity to capitalize on the increase in small deliveries for various companies, such as Amazon. He had made previous investments of \$5,000 and \$10,000 in AirBnB properties with the defendant, Manu.

He was told by Manu that her common-law spouse, Adas, had the right experience and connections to make it work. Once Manu had introduced the two men, Adas continued to represent that he would establish a trucking business with the plaintiff. In April 2017, the plaintiff gave Adas and Manu \$100,000 for the advance costs of setting up the business.

On 5 May 2018, the plaintiff and Adas signed a written partnership agreement containing the following terms:

- Both parties were to contribute \$100,000 to the start-up of the business.
- The funds of the partnership would be placed in bank accounts designated by the partners and not comingled with those of any other person or entity.
- Adas would be the managing partner and was obligated to keep full and accurate business records in accordance with GAAP and prepare reports reasonably necessary to keep the partners informed.
- All partnership funds would be only used for the trucking business.

Adas gave ongoing assurances to the plaintiff into June 2018 that all was well. However, no business was ever established. Instead, Adas and Manu used the money for their own purposes.

It turned out that Adas never deposited the plaintiff's \$100,000 into any account for the partnership business. After using the plaintiff's funds for their immediate needs, the defendants used the balance of the advance to flip a residential property in Midland, Ontario with Manu's sister. By the end of August 2017, however, the real estate project had failed.

For a full year thereafter, Adas continued to misrepresent to the plaintiff that all was well with their trucking business. He advised the plaintiff by email that "things are great" and that he was "on the verge of closing a nice contract" for the trucking business with a brokerage. These statements were lies. At no time did the business negotiate any contracts or conduct any business.

Unbeknownst to the plaintiff, Adas and Manu had issued a claim against Manu's sister in a futile attempt to recover the funds received from the plaintiff.

In August 2018, the plaintiff discovered that there was no trucking business and that his money had been lost. He commenced the action against the defendants and found out about the failed real estate venture and the subsequent litigation between the defendants and Manu's sister.

In 2019, after the plaintiff discovered the ruse, he obtained default judgment against the defendants to repay the full amount of \$100,000 jointly and severally, plus costs and pre-judgment interest. Adas subsequently sought to set aside the default judgment and was granted leave to file a statement of defence. Manu did not do so.

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At trial in 2022, Adas argued that the plaintiff had only entered into an agreement with Manu, for a one-year loan of \$100,000 to be repaid to the plaintiff at 20% interest. Adas pointed to the prior Airbnb investments that the plaintiff had made with Manu and an agreement signed at the time of the April 2017 advance in which Manu had acknowledged receipt of the \$100,000. However, the plaintiff's draft for \$100,000 was payable to Adas alone and was deposited into his account.

Manu testified at trial in support of the plaintiff's version of events. She testified that she had deliberately taken no steps to set aside the judgment against her and that she would do what she could, to make things right. She advised that Adas had assured her that he was going to take care of the matter and pay the plaintiff back.

The court noted that it was possible that Adas had some intention to start a trucking business as he had incorporated a logistics company in May 2017. However, he did not open a business account for the \$100,000 or keep any books and records as to its use. Instead, the \$100,000 travelled from his chequing account to his savings account, and he immediately spent \$20,000 for which an accounting had never been provided. The balance of \$80,000 went into the Midland property.

The court found that the plaintiff and Adas had intended to form a partnership based on their conduct. The key terms of the written May 2018 agreement formalized the terms of a partnership that was created and relied upon in April 2017 when the plaintiff agreed to advance the \$100,000 for the start-up costs of the trucking business.

The well recognized, core principles of a partnership are duties of loyalty, utmost good faith and avoidance of conflict of duty and self-interest: *Rochweg v. Truster*, 2002 CanLII 41715 at paras 36-37. Partners owe each other a fiduciary duty, which includes a requirement that they not directly or indirectly use partnership assets for their own private benefit, which includes all "partnership property" as defined in s. 21 of the Ontario *Partnerships Act*.

Adas had misused the \$100,000 provided by the plaintiff for his own purposes and for joint purposes with the co-defendant, Manu. Those purposes were wholly unrelated to the trucking business and constitute a breach of Adas's fiduciary duties to the plaintiff which arose immediately upon his receipt of the \$100,000.

Further, Adas was liable for civil fraud, as the plaintiff was induced to provide the \$100,000 bank draft to Adas on a false misrepresentation that the funds would be used for the start-up costs of a joint trucking business, Adas knew that the money was being used for other purposes, and the plaintiff suffered a resulting loss: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 87.

While it was possible that Adas did not initially intend to defraud the plaintiff, his continued misrepresentations long after the monies had been lost, including his deceit in crafting, and signing a Partnership Agreement full of misrepresentations, removed any doubt that he deliberately breached his fiduciary obligations and that his actions constituted a civil fraud. The plaintiff did not have to demonstrate that Adas' actual intentions were to deceive or cheat him.

In the result, the court granted the plaintiff judgment for \$100,000 against Adas, jointly and severally with Manu, plus interest. The court found that the plaintiff would not have engaged with the defendants had he known the true use to which his funds were to be put. He was therefore entitled to the repayment of his investment, plus interest from the time that he lost the use of those funds in April 2017.

The case is a cautionary tale of the risks inherent with entering into an informal business relationship without ensuring that partnership funds will be regularly and properly accounted for. Investors may be swayed by the opportunities and assurances promoted by potential partners, but safeguards to ensure the proper use and accounting of funds should always be followed.

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