

Civil Conspiracy Established against Directors of Shell Company for Loss of Investment

Civil Law | Fraud | Litigation | Litigation & Dispute Resolution | Ontario Court of Appeal

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The Ontario Court of Appeal has confirmed that liability for civil conspiracy may arise from the “constructive intent” of a defendant to cause harm even if they are not in direct communication with the plaintiff during the time at issue.

In *Mughal v. Bama Inc.*, 2020 ONCA 704 (CanLII), the Plaintiff worked as a security guard in Mississauga. In 2014 he reconnected with an old friend from their university days in Pakistan in the 1980s. The Plaintiff’s friend, Qureshi, was a director of an electrical supply company known as “Bama,” and offered the Plaintiff an opportunity to invest his retirement savings in the business, which he did. Pleased with the initial returns, the Plaintiff then invested funds totaling \$210,000 secured in part by a line of credit against his home. Within months of his final investment, his money had disappeared.

It turned out that the Plaintiff’s funds were not invested in Bama but in another company called ET Zone Supply, where Qureshi worked as a Business Development manager. Bama was only a shell company and ET Zone went into receivership.

The Plaintiff sued Qureshi and Bama for civil conspiracy along with another director of Bama, Khan. Khan had not personally made any specific misrepresentations to the Plaintiff, and was not present when the alleged misrepresentations were made.

The trial judge made the following findings in support of the conclusion that Khan conspired with Qureshi and Bama to cause economic injury to the Plaintiff:

- Khan knew of ET Zone, he and Qureshi had both invested in ET Zone, and Qureshi was working for ET Zone, an electric supply company.
- Khan engaged Qureshi to join Bama because “we [ET Zone] may be able to do... some business” with Bama, although there was no legitimate reason to do so because Bama was a shell corporation whose stated purpose was to provide IT and human resources, not electrical supply.
- Khan arranged for Qureshi to become the third director of Bama in June 2014 to create a vehicle for indirect investment into ET Zone.
- Bama was a shell company with no operations so there was no reason to create a new corporate account for dispersal of profit.
- Khan and Qureshi are two of only three directors of Bama.
- Khan was the director of Bama with IT experience. His former address and his wife’s phone number were on Bama website’s main pages and he did not deny the existence of a website for the shell company that purported to be a thriving electrical company.
- Since he was the Bama director with IT experience, the trial judge was satisfied on a balance of probabilities that Khan was involved in creating a fake website showing that Bama was a thriving electrical supply company when it was not.
- Qureshi and Khan opened a Bama account in November 2014 by depositing \$222. Thereafter, that account was used to deposit monies received from the Plaintiff.
- After the Plaintiff deposited money to the Bama account, the money was moved to ET Zone’s account without notice to him.
- Khan knew or was willfully blind as to where the deposits into the Bama account came from, as they were not flowing in as profits to be “dispersed” from ET Zone.
- Khan withdrew thousands of dollars from the Bama account for his personal purposes.
- Despite Khan’s testimony at trial that he was an investor in ET Zone, he failed to produce his own investment agreement to explain the amounts withdrawn for his personal purposes from the Bama account after the Plaintiff’s money was deposited.

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The trial judge concluded that Khan was liable along with Qureshi and Bama for conspiracy to cause economic injury to the Plaintiff pursuant to which they conspired to obtain money for ET Zone through Bama. Khan did so by working with Qureshi to create a corporate presence (bank account and website) to support the false impression that Bama was an active electrical-supply business. This misrepresentation was central to the success of the fraud on the Plaintiff and it would not have succeeded if Khan had not taken steps to make Qureshi a director of Bama. Qureshi's experience as an engineer in the electrical-supply industry was necessary for him to credibly hold himself out to the Plaintiff as a director of Bama, an electrical-supply business. It was Qureshi who had that background, not Khan, whose background was in IT.

In 2020, the Court of Appeal dismissed Khan's appeal. The Court of Appeal confirmed that the trial judge applied the correct test for establishing civil conspiracy to injure as set out in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC) and *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (CanLII), pursuant to which the tort of conspiracy to injure is recognized where:

- (1) The predominant purpose of the defendants' conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful; or,
- (2) Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury is likely to and does result in loss to the plaintiff.

With respect to the second factor, the Court of Appeal confirmed that it is not necessary that the predominant purpose of the defendants' unlawful conduct be to cause injury to the plaintiff, but there must be a "constructive intent" derived from the fact that the defendants knew or should have known that injury to the Plaintiff would ensue and damages would be suffered: *Agribrands*, at para. 24.

The Court of Appeal found that the evidence amply supported the trial judge's conclusion that both Khan and Qureshi were personally liable for tortious conduct in conspiring to defraud the Plaintiff. In this regard:

- Khan and Qureshi created the false impression that Bama was an active, successful electrical supply company in order to obtain funds from the Plaintiff to give to ET Zone, where both had invested money;
- They obtained funds in the name of Bama, knowing or constructively knowing the Plaintiff was likely to lose his money;
- They acted in furtherance of this plan; and
- The Plaintiff suffered damages as a result.

As a result, the Court of Appeal confirmed that Qureshi, Khan and Bama were jointly and severally liable to the Plaintiff in the total amount of \$210,000 plus interest.

The decision may provide useful guidance for a plaintiff seeking to recover funds lost due to the actions of a party with whom they have never had direct communication, provided that such party knew or ought to have known that their unlawful conduct was likely to cause harm to the plaintiff.

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