

Claim Commenced By Special Purpose Vehicle Dismissed As Champertous

Litigation | Litigation & Dispute Resolution

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The Ontario Superior Court of Justice has dismissed a \$2.5 million lawsuit against a number of defendants for fraud and breach of trust on the basis that the claim was champertous and improperly brought in the name of a numbered company that was incorporated solely for the purpose of pursuing the claims in Ontario: *2770095 Ontario Inc. v. Morgan*, 2023 ONSC 1924 (CanLII).

An international corporation based in Mexico, Affinitas, operated as a payment facilitator, helping internet merchants integrate and manage online sales (primarily in online gaming). Affinitas' merchant clients sell products and services online to their own customers who pay for those items via credit and debit cards. The acquiring bank then deducts its fees and remits the payment to the merchants. Affinitas did not have a subsidiary in Ontario.

In Spring 2020, Affinitas was referred to a payment processing brokerage house based in New York, and its affiliate, "ZedPayments", which Affinitas understood to be a payment processor with offices located in the Philippines. Affinitas entered into a written contract with ZedPayments to provide credit card processing services.

However, by the end of July 2020, ZedPayments had not paid over \$1 million that was owed to the Affinitas merchants. The merchant clients did not receive some of the payments that were purportedly sent to them and, in other cases, the amounts owing to the merchant clients were simply never sent.

Affinitas concluded that ZedPayments may have been fictitious and that Affinitas may have been the subject of fraud carried out by various people, including several that lived in Ontario.

In August 2020, an Ontario lawyer incorporated a numbered corporation to commence proceedings against the Ontario defendants. The lawyer was the sole officer, director, and shareholder of the corporation. The lawyer subsequently swore an affidavit in which he explained that he incorporated the plaintiff as a "special purpose vehicle" that was a convenient and appropriate vehicle to pursue payment from the defendants.

To fulfill its "special purpose," the plaintiff entered into a written "Assignment of claim Agreement" with Affinitas on the day after it was incorporated. Pursuant to the agreement, Affinitas assigned its claim against ZedPayments and any of its agents or representatives, and any other individual or entity directly or indirectly responsible for the monies owed, to the plaintiff. The assignment agreement authorized the plaintiff to sue and settle the assigned claims without further input from Affinitas. In exchange, the plaintiff agreed to pay Affinitas 3% of the funds recovered, net of legal fees and costs.

The plaintiff then pursued the claims in the Ontario Superior Court of Justice, during the course of which the plaintiff:

- a. obtained *Norwich* orders that required banks to produce documents from the accounts of the defendants;
- b. obtained and executed *Anton Piller* orders at the homes of the defendants;
- c. obtained world-wide *Mareva* orders freezing the bank accounts of the defendants;
- d. compelled some of the individual defendants to attend out-of-court examinations;
- e. placed certificates of pending litigation on property owned by the defendants;
- f. brought contempt proceedings against two individual defendants and asked the court to incarcerate them for four months; and

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g. issued a statement of claim seeking over \$1 million in damages and \$1.5 million in punitive and aggravated damages.

The plaintiff based its Ontario claims in fraud, breach of trust, conversion, conspiracy and unjust enrichment. There was no claim for breach of contract between Affinitas and any of the defendants.

In February 2023, the defendants brought a motion to dismiss the action on the basis that the assignment agreement between the plaintiff and Affinitas, and the entire Ontario action, were prohibited because they amounted to maintenance and champerty.

"Maintenance" refers to those who become involved with litigation of others, for an improper motive in which the maintainer has no interest, justification or excuse to be involved. "Champerty" is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation: *McIntyre Estate v. Ontario (Attorney General)*, (2002), 2002 CanLII 45046 (ON CA), at para. 26.

The motion judge referred to the current state of the law of champerty, described in *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715 (CanLII), at para 72, as follows:

The elements of a claim of champerty are: (1) the defendant for an improper motive (officious intermeddling) provides assistance to a litigant in a lawsuit against the plaintiff; (2) the defendant has no personal interest in the lawsuit; (3) the defendant's assistance to one of the litigants is without justification or excuse; and, (4) the defendant shares in the spoils of the litigation.^{4F}

In assessing whether or not the assignment was champertous, the court looks at the whole of the transaction.

In some cases, assignments of a contract, an action on a debt, or an action in tort, are permitted. In general, it is permissible to assign "the fruits of the action".

In the case at hand, however, the assignment agreement did not merely assign the "fruits of the action" but rather the action itself, which was issued in the name of the plaintiff and not Affinitas. The plaintiff did not have a pre-existing financial interest in the cause of action and did not acquire it as something ancillary to property rights that it acquired through a legitimate commercial transaction. The assignment agreement did not assign a debt owing to Affinitas to the plaintiff.

Assignments are also permitted where the assignee of a non-personal tort has either a property interest to which the cause of action is ancillary, or a legitimate pre-existing commercial interest in the enforcement of the claim—such as assignments to insurers who have a right to bring a subrogated claim. However, the assignment of a cause of action to a stranger is not permitted.

In the motion judge's view, the assignment agreement between Affinitas and the plaintiff was champertous because it was not prompted by a desire to advance the cause of justice but rather the plaintiff was intermeddling for a collateral reason, namely profits arising from trafficking in litigation in exchange for a payment of 3% of the proceeds recovered to Affinitas.

Further, there was no evidence that Affinitas could not prosecute its own claims in Ontario or that assigning the claim to the plaintiff was necessary to advance the cause of justice. In the motion judge's view, "litigation efficiency or the desire to maximize a claim or to minimize risk is not a legitimate commercial interest sufficient to convert a champertous assignment into one that is valid".

The motion judge therefore **dismissed** the action as being champertous and an abuse to the administration of justice. The motion judge agreed to stay the decision for seven days to permit the plaintiff to seek a stay pending appeal.

While the decision is a harsh result for the plaintiff, the result could have been avoided if Affinitas had retained Ontario litigation counsel to prosecute the claim based on an acceptable contingency fee arrangement, subject to the provisions of the *Solicitors Act* and *Contingency Fee Agreements*. Of note, the contingency fee regulations prohibit lawyers from recovering more in fees under a contingency fee agreement than the amount recovered under an award or settlement, and from obtaining a veto on the abandonment or settlement of an action. The assignment agreement at issue violated these prohibitions.

Affinitas could also have taken the steps taken by the plaintiff in its own name. However, as demonstrated by the decision, what Affinitas could not do is assign its tort claims to a "special purpose vehicle" incorporated for the sole purpose of pursuing the action in Ontario. This amounted to "trafficking in litigation" and is prohibited as champertous. A PDF version is available to download [here](#).

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