

Dispute over purchase of Canadian Art results in unjust enrichment claim

Litigation | Litigation & Dispute Resolution

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While it may be tempting to purchase expensive artwork directly from a private seller without the involvement (and associated costs) of a reputable art gallery, care should be taken to ensure that the terms of the transaction, including the price and specific pieces involved, are put into writing.

In *Huntjens et al v. Obradovic*, 2022 ONSC 2629 (CanLII), the plaintiffs were art collectors for many years, with a special interest in Canadian art. After retirement, they operated a small business, purchasing and selling artwork.

In May 2018, they came across the defendant who said that he had artwork for sale. The defendant was not an artist and had never owned an art gallery. The parties first met on 22 May 2018, in the parking lot of a pawn shop in Mississauga. The defendant advised that he was “downsizing” his grandparents’ antiques slowly, painting-by-painting. After the sale of paintings to the plaintiffs, the defendant did not sell artwork to anyone else.

The plaintiffs purchased a number of paintings from the defendant and exchanged at least one item from their personal collection. All the paintings were attributed to purportedly renowned Canadian artists and had the expected markings, stamps and signatures.

Three cheques were delivered by the plaintiffs to the defendant, one for \$30,000 (dated 31 May 2018), and two for \$50,000 (one dated 31 May 2018, and one dated 2 June 2018).

The parties subsequently became embroiled in a dispute over the agreed-upon purchase price for the artwork. The plaintiffs claimed that the agreement was actually for \$80,000, and that they had only paid the additional \$50,000 by way of a replacement cheque for one the defendant reported as having “bounced,” but which had actually cleared.

The defendant claimed that the price was \$130,000, being the amount the plaintiffs actually paid. There was no written agreement which set out the specific price or paintings that were being purchased for what amounts. However, the plaintiffs had contemporaneous email correspondence in which they indicated that they had only provided the second cheque for \$50,000 because they understood the first cheque had not been cashed.

The plaintiffs sued when the defendant failed to reimburse the \$50,000 overpayment and stopped responding to their communications.

It turned out that the defendant had entered into an agreement of purchase and sale to purchase a property in Toronto for \$368,000, with a deposit of \$20,000 delivered on 2 June 2018, that was paid out of the same bank account into which the plaintiffs’ cheques had been deposited. As a result of this discovery, the plaintiffs sought a constructive trust over the property.

On a motion for summary judgment brought by the plaintiffs, the court determined that the plaintiffs had clearly attempted to put a stop payment on the first \$50,000 cheque and that the second \$50,000 was intended to be a replacement thereof.

In the [Reasons for Decision](#), the motion judge found the defendant’s evidence to be largely untruthful, unreliable, and fabricated, in support of his overall litigation strategy to deny, delay and obstruct the plaintiffs’ claims. He had failed to answer proper questions on cross-examination and failed to provide documentary disclosure, leading the court to make adverse inferences. In the motion judge’s view, the defendant had what is sometimes called “selective memory syndrome”.

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As a result, there was no triable issue regarding the plaintiffs' claim that they had only agreed to pay \$80,000 rather than \$130,000, and the defendant was liable for the overpayment. The court further awarded \$10,000 in punitive damages as a result of the defendant's conduct.

As for the constructive trust claim, the motion judge relied on the well-established three-part test for unjust enrichment affirmed in *Kerr v. Baranow*, 2011 SCC 10 and other cases, pursuant to which a plaintiff must establish: (i) an enrichment to the defendant; (ii) a corresponding deprivation to the plaintiff; and (iii) an absence of juristic reason for the enrichment.

The overpayment by the plaintiffs to the defendant constituted an enrichment to the defendant and corresponding deprivation to the plaintiffs. There was no agreement or gift involved and accordingly there was no "juristic" reason for the accidental overpayment.

The trickier question was whether the plaintiffs could obtain a trust interest over the property that had been purchased by the defendant rather than a monetary award. A monetary unjust enrichment claim may be extended to property in certain circumstances, including where there is a close connection between the property and the benefit received and where the funds can be traced to the property: *HarbourEdge Mortgage Investment Corporation v. Community Trust Company*, 2016 ONSC 448, at para. 50; and *Jacobs v. Yehia*, 2015 BCSC 267, at para. 30.

In addition, a monetary award may be insufficient when there is good reason to doubt that it would be voluntarily paid. Here, the defendant had reported being unemployed and had resisted paying a prior cost award until his defence was in danger of being struck.

Further, based on the defendant's litigation strategy and conduct leading up to the trial, the court found that this was one of "the strongest cases for an adverse inference". The defendant avoided disclosure regarding how the property was purchased, and the court referred to an email that he had sent to the plaintiff in which he said that he had sold the paintings at a great price "in order to cover the price of the house".

As a result of this finding, the plaintiffs established the close connection of their funds to the property and were entitled to a proprietary award, namely a declaration of constructive trust in the property in the amount of \$50,000, and for the sale of the property to satisfy their judgment in the event the defendant fails to pay.

The motion decision did not determine whether the artwork that had been sold by the defendant to the plaintiffs was authentic. The plaintiffs had initially sought rescission of the entire transaction on the basis that the artwork was not authentic. However, the plaintiffs served notice that they were not pursuing those claims before the summary judgment motion and the judge did not consider any evidence regarding the authenticity of the artwork in reaching the decision. A PDF version is available to download [here](#).

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