

Commdoor Aluminum v. Solar Sunrooms Inc.

Between
Commdoor Aluminum, plaintiff/respondent, and
Solar Sunrooms Inc., Solar Sunrooms Ltd. and Giuseppe
DeMarco, also known as Joe DeMarco and Marisa DeMarco,
also known as Marisa Romano, defendants/appellants

[2004] O.J. No. 863
Docket No. C40192

Ontario Court of Appeal
Toronto, Ontario
McMurtry C.J.O., Moldaver and Cronk JJ.A.

Heard: March 9, 2004.
Judgment: March 9, 2004.
(3 paras.)

Insolvency law — Trustees — Liability.

Appeal by the defendants, Solar Sunrooms and DeMarco, against a judgment of Justice Loukidelis. Solar Sunrooms and DeMarco conceded that, for the purposes of s. 178(1)(d) of the Bankruptcy and Insolvency Act, DeMarco was acting in a fiduciary capacity. DeMarco submitted that his failure to account for the trust money in issue was due to his incompetence and negligence and not any wrongdoing or misconduct within the meaning of s. 178(1)(d).

HELD: Appeal dismissed. The trial judge found as a fact that DeMarco had failed to adequately discharge his onus as a trustee to account for the relevant trust funds. That finding, which was supported by the evidence, was sufficient to trigger s. 178(1)(d).

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 178(1)(d).

Appeal From:

On appeal from judgment of Justice E. Loukidelis dated May 28, 2003.

Counsel:

Barry A. Percival, Q.C., for the appellants.
Samuel S. Marr, for the respondent.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— The appellant concedes that for the purposes of s. 178(1)(d) of the Bankruptcy and Insolvency Act that the appellant DeMarco was acting in a fiduciary capacity. He agrees that his failure to account for the trust money in issue was due to his incompetence and negligence and not any wrongdoing or misconduct within the meaning of s. 178(1)(d). We disagree.

¶ 2 The trial judge found as a fact that the appellant had failed to adequately discharge his onus as a trustee to account for the relevant trust funds. That finding, which is supported by the evidence, is sufficient to trigger s. 178(1)(d). (See *Simone v. Daley* (1999) [43 O.R. \(3d\) 511](#) at 529.

¶ 3 Accordingly, the appeal is dismissed with costs fixed in the amount of \$6,115.69.

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