

Indexed as:
Noldin v. Prince

Between
Else Noldin, First Elnor Holdings Limited, and 541907 Ontario
Limited, (plaintiffs), and
Jonas Prince, Bruno J. Arnold, Akimbo Enterprises Corp.,
Carlton/Wood Holdings Limited, Euromart Realty Ltd., Euromart
Realty Corp., Euromart International Ltd., Greater Canada
Finance Corporation, Thomson, Rogers, Woolley, Dale &
Dingwall, and Fenningwood Enterprises Limited, (defendants),
and
Sheldon Fenton, Rene Gareau, and Geoffrey Wayne Squibb, (third
parties (respondents))

[1999] O.J. No. 2148
Docket No. C30666

Ontario Court of Appeal
Toronto, Ontario
Austin, Laskin J.J.A. and MacPherson J. (ad hoc)

Heard: April 20, 1999.
Judgment: June 11, 1999.
(4 pp.)

Practice — Pleadings — Striking out pleadings — Grounds, failure to plead material facts — Grounds, evidentiary or subordinate facts.

This was an appeal by the law firm from an order striking out its third party claim and cross-claim. The case management judge struck out the claims on the basis that the claims were not substantiated by any facts.

HELD: The appeal was dismissed. The case management judge did not err in striking out the claims. The law firm did not plead any facts giving rise to a claim. The law firm was granted leave to amend its claims, as its theory may have been viable had it been properly pleaded.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 29.01.

Appeal from:

On appeal from Ground J.

Counsel:

Bernard Chernos, Q.C. for the appellant, Thomson Rogers.
Thomas Dunne, Q.C. and Duncan C. Boswell, for the respondent/third party, Geoffrey Wayne Squibb.
Keith M. Landy and Samuel S. Marr, for the respondents, Sheldon Fenton and Rene Gareau.
Colin P. Stevenson, for the defendants/respondents, Bruno J. Arnold, Euromart Realty Ltd., Euromart Realty Corp., Euromart International Ltd. and Greater Canada Finance Corporation.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— This is a large and complex action which is under case management by Ground J.

¶ 2 In a decision dated October 2, 1998, Ground J. held that the third party claims advanced by the appellant defendant Thomson, Rogers against Sheldon Fenton, Rene Gareau and Geoffrey Squibb should be struck out because they disclosed no reasonable cause of action. Ground J. also held that the appellant's cross-claim against the defendants Bruno Arnold, Euromart Realty Ltd., Euromart Realty Corp., Euromart International Ltd. and Greater Canada Finance Corp. should be struck out on the same basis.

¶ 3 Given how the third party claim and cross-claim were pleaded, in our view Ground J. did not err in striking out these claims. The third party claim is set out in paragraphs 23, 24 and 25 of the appellant's pleadings. There is virtually nothing in those paragraphs setting out the alleged relationship or nexus between the appellant and the third parties. Nor is there anything about the factual background or activities of the third parties which, according to the appellant, anchor its claim.

¶ 4 In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), Finlayson J.A. said at p. 102:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: See *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 at p. 491 ... In the statement of claim in appeal, there is no factual underpinning to support an allegation that the personal defendants were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds. [Emphasis added]

¶ 5 The appellant's pleadings against the third parties suffer from the same defect. There is simply an absence of facts, conduct or activities in paragraphs 23, 24 and 25. It is impossible for the third parties to know what it is that the appellant alleges they did that is wrong and that gives rise to their liability to the appellant.

¶ 6 The cross-claim against Arnold and the Arnold group of companies is slightly better, even though it is set out in only a single paragraph. The appellant does plead in paragraph 21: "Thomson Rogers adopts the plaintiffs' allegations against Arnold and the Arnold corporate defendants". This pleading provides, albeit only inferentially, some framework for the cross-claim. However, paragraph 21 is such

a brief and indirect allegation that we are not persuaded Ground J. was wrong to strike it out.

¶ 7 However, we think that the appellant should have been given leave to amend its claims. The appellant's claims, as submitted by Mr. Chernos in oral argument, rest on a theory of disgorgement. In brief, that theory is as follows: The plaintiffs allege they are victims of a fraud perpetrated by the individual defendants and their corporations. The appellant is innocent of any wrong-doing and is sued on the basis of vicarious liability for the actions of Prince. If the appellant must answer to the plaintiffs, it would be unfair to preclude the appellant from recovering from those who benefited by their wrong-doing. The appellant's theory, if properly pleaded, may be viable and give rise both to cross-claims, and under Rule 29.01(a) to third party claims against the defendants and their corporations.

¶ 8 Accordingly, in our view the appropriate order is to dismiss the appeal but give the appellant leave to amend. Indeed, the respondents agree that the appellant should be given the opportunity to attempt to redraft its pleadings to set out, in more detail and with greater precision, its claims against them. Further motions on the amended pleadings should be heard by the case management judge.

¶ 9 We observe that there is already an Amended Statement of Claim in this action and we are informed that further amendments to the statement of claim are imminent. Since all pleadings, including cross-claims and third party claims, flow, at least in part, from the initial statement of claim, our strong suggestion would be that all other parties wait for the final version of the statement of claim and then finalize their own pleadings.

¶ 10 The appeal is dismissed. The appellant shall have leave to amend its pleadings within such time as agreed to by the parties or as determined by the case management judge. There shall be no order as to costs.

AUSTIN J.A.
LASKIN J.A.
MacPHERSON J. (ad hoc)

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