

Court File No. CV-09-390024

ONTARIO
SUPERIOR COURT OF JUSTICE

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 933

Plaintiff

- and -

BROOKFIELD RESIDENTIAL SERVICES LTD., CHRISTINE MAITLAND, and
HELEN KENNERNEY

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: October 28 2009

Issued by:


Local Registrar

Address of

court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: BROOKFIELD RESIDENTIAL SERVICES LTD
3190 Steeles Avenue East
Suite 200
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L3R 1G9

AND TO: CHRISTINE MAITLAND
590 Wilson Road North
Oshawa, ON
L1G 6E9

AND TO: HELEN KENNERNEY
38 Elm Street
Suite 101
Toronto, ON
M5G 2K5

CLAIM

1. The plaintiff claims:
 - (a) damages in the amount of \$306,549.07;
 - (b) further special damages for legal, accounting and other fees, disbursements, and other expenses and liabilities incurred, which special damages continue to accrue, the full particulars of which shall be provided at least ten days prior to trial;
 - (c) punitive or exemplary damages in the amount of \$50,000 as against the defendants Christine Maitland and Brookfield Residential Services Ltd.;
 - (d) costs on a substantial indemnity as against all or some of the defendants and/or costs on a partial indemnity basis against some or all of the defendants;
 - (e) Goods and Services Tax on all costs awarded;
 - (f) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*; and
 - (g) such further, alternative or other relief as to this Honourable Court seems just.

The Parties

2. The plaintiff Metropolitan Toronto Condominium Corporation No. 933 ("MTCC 933") is a condominium corporation, created pursuant to the *Condominium Act, 1998, S.O. 1998, c. 19*, located at 38 Elm Street, Toronto Ontario.

3. The defendant Brookfield Residential Services Ltd. ("Brookfield") is a corporation duly incorporated in the province of Ontario. Brookfield is in the business of providing property management services to condominium corporations and other building owners in the province of Ontario.

4. The defendant Christine Maitland ("Maitland") was an employee of Brookfield at all material times, and was Brookfield's on-site property manager and agent managing the affairs of MTCC 933, located at 38 Elm Street and managed by Brookfield (the "property") from about December 1, 2005 to April 30, 2008. Her title was that of Property Manager and her specific duties as such included contract administration, financial control, control of all spending by MTCC 933, ensuring that all non-emergency expenditures were approved by the board of MTCC 933, ensuring that a purchase order control system is maintained, ensuring that all suppliers are approved by Brookfield, are properly qualified, and capable of completing any contracts or tasks assigned.

5. The defendant Helen Kennerney ("Kennerney") was an employee of Brookfield and held the position of Regional Property Manager with Brookfield at all material times. Kennerney was also Maitland's supervisor and Brookfield's agent at all material times. Her specific duties as Regional Property Manager included supervising and advising Maitland, reviewing and approving all invoices, checking expenditure validity, scrutinizing cheques, supervising the tendering process for major repair jobs, and ensuring proper purchasing authority and proper issuance of purchase orders. Furthermore,

Kennerney had cheque signing authority at all material times over MTCC 933's operating account.

6. At all material times, both Maitland and Kennerney held themselves out to MTCC 933 as having considerable personal experience, skill and expertise in property management, and MTCC 933 therefore relied on each of them personally to take reasonable steps to protect its interests at all material times.

Condominium Management Agreement

7. On December 1, 2005 the parties entered into a Condominium Management Agreement with MTCC 933 identified as the "Corporation", and Brookfield identified as the "Manager" (the "Management Agreement"). The Management Agreement includes the following material provisions:

[From recitals]:

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AND WHEREAS the Corporation desires the Manager to manage the affairs, the Property and the assets of the Corporation, and the Manager desires to do so, in accordance with the terms and conditions of this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants and agreements herein contained and other valuable consideration, the Corporation appoints the Manager and the Manager hereby accepts appointment as the exclusive manager of the affairs, the Property and the assets of the Corporation on the terms and conditions hereinafter set forth:

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III. Role of Management

The Manager fully accepts that its function is to assist the Board of Directors (hereinafter called the "Board") in the operation and administration of the Corporation and of the Property and assets of the Corporation and accepts the relationship of trust and confidence established between itself, the Board and the Owners by virtue of entering into this Agreement. ...

The manager agrees to furnish efficient business administration and supervision and to perform its responsibilities, including administrative, financial and advisory, in the best manner, consistent with effective management techniques and in the most expeditious and economical manner consistent with the best interests of the Corporation. ...

IV. Specific Duties of the Manager

The Manager shall perform the following specific duties, subject to the direction of the Board:

(a) Corporation Funds

Collect and receive on behalf of the Corporation all monies payable by the Owners or others to the Corporation and deposit the same forthwith in a separate bank account, designated as the "General Operating Account", in the name of the Corporation with a Canadian Chartered Bank or Trust Company subject to the overall control of the Board with signing authority to be as directed by the Board from time to time. All such funds shall thereafter be held in the General Operating Account and administered by the Manager and used to:

- (i) pay for insurance coverage and any appraisals in connection therewith required of the Corporation in accordance with the provisions of the Act, the Declaration and By-Laws, including Director's Liability Insurance and Fidelity Bond covering the Corporation's signing officers;
 - (ii) pay the expenses of operating, maintaining and repairing the Property as provided in this Agreement. ...
-
- (iv) pay such other costs or expenses properly chargeable to a bank account of the Corporation as are contemplated in the other provisions of this Article IV; and

- (v) prepare cheques for the payment of all expenses properly incurred by or on behalf of the Corporation.

(b) Maintenance and Repair of Property

Arrange, subject to Article XII hereof, for the effective and economical operation, maintenance and repair of the Property and the assets of the Corporation in accordance with the Agreement Documents, including, without limiting the generality of the foregoing:

- (iii) maintain and repair, or cause to be maintained and repaired, those parts of the property and the assets of the Corporation which require maintenance and repair in accordance with the Act and the Agreement Documents;
- (iv) carry out the foregoing duties by means of employees of the Manager of the Corporation and/or independent contractors, in each instance, as may be more effective or economical for the corporation; and

(g) Inadequate Performance by Contractors

Use reasonable diligence, by direct inspection or giving direction to the Superintendent or Maintenance Supervisor, if any, to ensure that contracts and agreements between the Corporation and any supplier of materials, goods and/or services are performed in accordance with their terms; inform the board and hold back payment in the event performance is considered by the Manager to be inadequate or contrary to the agreed terms; and take advantage of all trade discounts by prompt payment of trade invoices where services are properly performed and/or materials provided in accordance with the contract.

X. Indemnification

... The manager shall, during and after the termination of this agreement, indemnify and save the Corporation completely free and harmless from any and all claims, actions, obligations, liabilities, cost, expenses and fees arising out of the default of the Manager in complying with the provisions of this Agreement or any negligence, fraud, illegal or dishonest act or intentional harm caused by the Manager, its employees or agents.

Thefts by Maitland

8. During the course of managing the property, Maitland used MTCC 933 credit cards, petty cash belonging to MTCC 933, and cheques drawn on MTCC 933's operating account in order to purchase goods and services for her own benefit, including renovation materials for her home. Maitland concealed her activities by fraudulently misrepresenting the purposes for which items appeared in credit card statements, entering false information into petty cash expense records, misrepresenting temporary staffing expense allocations, and diverting cash payments for employees of MTCC 933 that ought to have been paid as Christmas bonuses and gratuities. The total amount stolen by Maitland from MTCC 933 in this manner was \$28,591.53.

9. Kennerney signed cheques presented to her by Maitland to pay the credit card debts and supposed staffing expenses incurred in the course of Maitland's fraud. Kennerney did not properly review the expenses or records relating to same herself and did nothing to ensure that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, to review the expenses incurred by Maitland. Had she ensured that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, or had she properly reviewed the expenses incurred by Maitland and the records relating thereto herself, Maitland would not have stolen from MTCC 933 at all or, alternatively, Kennerney would have discovered Maitland's fraud at an early stage so that most of the thefts would not have taken place.

Payroll Overpayment

10. During the course of managing the property, Maitland, either intentionally as a personal favour to the employee or negligently, adjusted the remuneration of one of MTCC 933's employees without any authorization at all from MTCC 933, contrary to the Management Agreement. In the result the employee was overpaid \$4,942.37. Maitland concealed relevant facts and made misrepresentations respecting this remuneration adjustment as well.

11. Kennerney did not properly review the records relating to the said overpayment herself and did nothing to ensure that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, to review them. Had she ensured that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, or had she properly reviewed the payroll adjustment being recommended by Maitland and the records relating thereto herself, the payroll overpayment would not have taken place at all.

Toilet Purchase Order

12. In about early 2007 MTCC 933 determined that it would be in the best interests of the individual condominium owners (the "owners") and in the interest of economically and efficiently operating the property to replace all of the toilets in the owners' units with more water-efficient toilets that would be paid for out of surplus funds in the

operating account belonging to MTCC 933, plus toilet replacement/retrofit subsidies from the City of Toronto.

13. While members of the board of MTCC 933 confirmed the participation of the various owners who agreed to take part in the toilet replacement program, Maitland obtained quotes for the purchase of the toilets.

14. One of the quotes obtained by Maitland was from AGG Alliance Contracting Group ("AGG") a company operated by Gregory Chatzisavvas, also known as Greg Hatsisavvas and Greg Hataasisavvas ("Chatzisavvas").

15. Maitland strongly recommended that MTCC 933 purchase the toilets from AGG. Her recommendation included false advice that if the quote from AGG was not soon accepted the price offered would no longer be available.

16. MTCC 933, relying on Maitland as having experience, skill and expertise in property management, and under pressure from her, therefore authorized Maitland to enter into an agreement with AGG to purchase 395 toilets and associated hardware for \$142,276.65 including taxes. The agreement was confirmed by Maitland on behalf of MTCC 933 by a purchase order dated July 12, 2007 that was signed by Maitland and appeared to have been initialed by Chatzisavvas (the "toilet purchase order").

17. Maitland recommended the toilet purchase order even though:

- (a) it required that MTCC 933 pay the entire amount for the toilets immediately;

- (b) there was no formal written contract proposed by AGG and Chatzisavvas;
- (c) there were no terms that would protect MTCC 933 in the event of non-performance by AGG and Chatzisavvas;
- (d) Chatzisavvas did not consistently spell his own last name on various material documents;
- (e) AGG and Chatzisavvas had no apparent experience whatsoever in performing a contract with the value of the toilet purchase order; and
- (f) there was nothing to suggest that AGG and Chatzisavvas had any credit-worthiness whatsoever.

18. Without making any consultation with MTCC 933 or inquiry into terms of the toilet purchase order, Kennerney then signed a cheque drawn on the plaintiff's operating account dated July 17, 2007 in the amount of \$142,276.65 payable to AGG. The president of MTCC 933, Leo Seto, relying upon the representations and purported experience, skill, and expertise of Maitland and Kennerney, thereupon also signed the cheque.

19. On July 23, 2007, Chatzisavvas attended a board meeting of MTCC 933 to propose that AGG be hired to install the toilets AGG was supposed to deliver to MTCC 933. His proposal included a proposition to store the toilets at AGG's alleged warehouse and to deliver them to the property as they were being installed at an installation charge of \$50.00 per toilet. There was no date set for the commencement of the installation, however Chatzisavvas suggested it would take place in the fall of 2007. MTCC 933 thereupon accepted AGG's proposal to install the toilets at \$50.00 per toilet.

20. At a MTCC 933 board meeting held on October 3, 2007, Maitland informed MTCC 933 that the toilet installation would begin the week of October 23, 2007.

21. At the end of October 2007, Maitland reported delays related to alleged difficulties transporting the toilets over the border, and she confirmed a rescheduled start date for the toilet replacement of November 7, 2007. Subsequent to this, Maitland reported an alleged rescheduled start date of November 14, 2007, then November 20, 2007, then February 18, 2008, then April 15, 2008.

22. In the end no toilets were ever delivered by Chatzisavvas or AGG. Although judgment was obtained against them, Chatzisavvas cannot be found and AGG is without any apparent assets. AGG and Chatzisavvas thus succeeded in perpetrating a fraud upon MTCC 933. Maitland assisted in perpetrating this fraud upon MTCC 933, either knowingly as a party to AGG and Chatzisavvas's fraud and in exchange for a payment from them in an amount unknown to the plaintiff, or by her negligence.

23. Kennerney's duties included supervising Maitland's conduct in respect of the toilet purchase order, but even though she was present and available to supervise she failed to do so in any way whatsoever. Her presence and availability included being on site at the property from time to time during the material period, and attendance at some or all of the board meetings referred to herein, as well as at other formal and informal meetings at which the toilet replacement program was discussed. Her presence caused MTCC 933 to rely upon her to ensure that Maitland's conduct would not cause harm to MTCC 933.

24. Even though Kennerney knew or ought to have known that MTCC 933 was relying upon her, she did not properly review the toilet purchase order with AGG that was recommended by Maitland, the payment of the cheque for same, and the alleged delays that were being encountered in respect of the subsequent agreement with AGG to install the toilets, and she did nothing to ensure that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, in the alternative to reviewing these events and transactions directly herself. Had she ensured that there was an administrative or supervisory system in place, or other proper and adequate internal controls or procedures in place, or had she properly reviewed the events and transactions directly, MTCC 933 never would have paid \$142,276.65 to AGG.

Losses of MTCC 933

25. MTCC 933 was deprived of \$28,591.53 due to Maitland's thefts.

26. MTCC 933 lost \$4,942.37 due to the payroll overpayment.

27. MTCC 933 lost \$142,276.65 due to the payment made to AGG.

28. MTCC 933 states that but for the acts and omissions pleaded herein, MTCC 933 would have completed the toilet replacement program by November 2007. Due to the conduct described herein, MTCC 933 was unable to replace the toilets at the property until June 2009. From December 2007 to May 2009 MTCC 933 incurred \$130,738.52 in

charges for water usage that were in excess of the amount that it would have incurred for this period had the acts and omissions pleaded herein not taken place.

29. MTCC 933 also incurred costs for legal and other expenses, including but not limited to costs for accounting and legal advice, and legal costs associated with pursuing AGG and Chatzisavvas. Full particulars of the amounts claimed for these special damages, which continue to accrue, shall be provided prior to trial.

Liability

30. At all material times all three defendants held themselves out to MTCC 933 as experienced, knowledgeable property managers who could be relied upon and trusted with the assets and affairs of MTCC 933. MTCC 933 did, in fact and quite reasonably, rely on and trust each of the defendants to take care of its assets and affairs. The duties of each of the defendants to MTCC 933 included the following responsibilities set out in the Management Agreement:

- (a) to furnish efficient business administration and supervision and to perform its responsibilities, including administrative, financial and advisory, in the best manner consistent with effective management techniques, and in the most expeditious and economical manner consistent with the best interests of MTCC 933 (Article III);
- (b) to pay the expenses of operating, maintaining and repairing the property (Article IV(a)(ii));

- (c) to pay such other costs or expenses only as properly chargeable to a bank account of MTCC 933 (Article IV(a)(iv));
- (d) to prepare cheques for the payment of all expenses only as properly incurred by or on behalf of the Corporation (Article IV(a)(iv));
- (e) to arrange for the effective and economical operation, maintenance and repair of the Property and the assets of MTCC 933 (Article IV(b));
- (f) to maintain and repair, or cause to be maintained and repaired, those parts of the property which require maintenance and repair (Article IV(b)(iii));
- (g) to carry out the foregoing duties by means of independent contractors where advisable (Article IV(b)(iv));
- (h) to ensure that contracts and agreements between MTCC 933 and any supplier of materials are performed in accordance with their terms (Article IV(g)); and
- (i) to ensure that contracts and agreements between MTCC 933 and any supplier of materials included clauses to hold back payment or otherwise protect funds belonging to MTCC 933 in the event performance was inadequate (Article IV(g)).

31. In addition, MTCC 933 says that the defendants' duties included a general duty to act with reasonable care and caution in all matters having to do with its affairs and property, and that this duty and all of the duties pleaded herein arise in both equity and law. In respect of the defendants' equitable duties, MTCC 933 says that the defendants or some of them:

- (a) had scope for the exercise of discretion or power in respect of MTCC 933's assets and affairs, such as, for example, over credit cards and petty cash;
- (b) could exercise this power or discretion unilaterally; and that
- (c) MTCC 933 was particularly vulnerable or at the defendants' mercy as its board members and the owners of the individual units had little or no experience, skill, and expertise in matters of property management and building construction, which lack of experience, skill, and expertise was known to the defendants.

32. In respect of Brookfield, a "relationship of trust and confidence" is affirmed by Article III of the Management Agreement as existing between Brookfield and MTCC 933, thus confirming the fiduciary relationship. This statement in the Management Agreement also accurately describes the fiduciary relationship between MTCC 933 and Maitland and Kennerney in their personal capacities.

33. The defendants' conduct both individually and collectively simultaneously offended many of MTCC 933's legal and equitable rights and the defendants are therefore liable to MTCC 933 pursuant to several alternative causes of action:

- (a) The conduct described above was in breach of the various duties in the Management Agreement that have been set out above and was therefore in breach of the said contract;
- (b) Maitland's thefts and participation in the fraud of Chatzisavvas were simultaneously conversion, fraudulent misappropriation, and in breach of fiduciary duty;

- (c) Kennerney and Brookfield, as well as Maitland to the extent that any of her participation in the material events is found to have been due to negligence rather than fraud, are also liable for failing to exercise a reasonable care in carrying out the duties pleaded. Particulars of their negligence include:
- (i) recommending a contract with a contractor that had no apparent experience whatsoever in performing a contract with the value of the toilet contract;
 - (ii) recommending a contract with a contractor in respect of whom there was no evidence of credit-worthiness whatsoever;
 - (iii) recommending a contract that required MTCC 933 pay the entire amount for the toilets immediately;
 - (iv) recommending a contract that would not be reduced to formal written terms and without the existence of a draft agreement to be considered and reviewed;
 - (v) recommending a contract that contained no terms that would protect MTCC 933 in the event of non-performance by AGG and Chatzisavvas;
 - (vi) recommending a contract with a contractor whose principal inconsistently spelled his surname;
 - (vii) entering into the contract on behalf of MTCC 933 despite the above facts;
 - (viii) recommending the signing and delivery of a cheque to pay the entire amount for the toilets immediately despite the above;

- (ix) signing the cheque to pay the entire amount for the toilets immediately despite the above;
- (x) failing to properly review the toilet purchase order with AGG at any material time;
- (xi) failing to properly review Maitland's expenditures allegedly on behalf of MTCC 933, and records relating thereto, as pleaded herein;
- (xii) failing to properly review before signing the cheque that was paid to AGG;
- (xiii) failing to properly review the alleged delays in respect of the subsequent agreement with AGG to install the toilets,
- (xiv) failing to supervise Maitland's conduct as pleaded herein;
- (xv) failing to supervise Kennerney's conduct as pleaded herein;
- (xvi) failing to have any administrative or supervisory system in place to review these events and transactions pleaded as they occurred;
- (xvii) failing to have any proper and adequate internal controls or procedures in place to review these events and transactions pleaded as they occurred; and
- (xviii) such further and other particulars as that become known to the plaintiff as these proceedings continue.

34. MTCC 933 states that the aforesaid particulars of breaches of the standard of care were also in breach of the defendant's fiduciary duty.

35. In addition to the above alternative bases of liability, Brookfield is also concurrently liable for all conduct for which Maitland and Kennerney are or could be held individually liable, both on the principle of *respondeat superior* and under Article X of the Management Agreement, which provides that Brookfield is required to indemnify and save MTCC 933 completely free and harmless from any and all claims, actions, obligations, liabilities, cost, expenses and fees arising out of any negligence, fraud, illegal or dishonest act or intentional harm caused by the Brookfield or its employees or agents.

36. MTCC 933's losses related to increased costs for water usage, legal fees, and other damages pleaded were all reasonably foreseeable and therefore all three defendants are liable for them. Brookfield is alternatively liable for all consequential losses under the terms of Article X, as set out above, otherwise MTCC 933 would not be saved free and harmless.

37. In order to save MTCC 933 completely free and harmless as provided in Article X, furthermore, Brookfield is also liable to pay MTCC 933 its costs of these proceedings on a substantial indemnity basis. Maitland is jointly and severally liable for costs on the aforesaid scale given her conduct. Kennerney ought to be held jointly and liable for the said costs, as well, but only as assessed on a partial indemnity scale.

38. In respect of liability relating to the toilet purchase order, MTCC 933 additionally pleads and relies upon the doctrine of *res ipsa loquitur*.

39. Maitland stole money from MTCC 933 while in a position of trust and confidence. Brookfield has refused to indemnify MTCC 933 in spite of the extreme betrayal of trust and negligence that took place, despite its clear liability in contract, tort and fiduciary duty to do so and the gist of the Management Agreement which is that all risks and responsibilities associated with the management of the property was Brookfield's. Their conduct was high-handed, callous, and shocking to the conscience, and these two defendants should be deterred from such conduct in the future by an award of punitive or exemplary damages.

The plaintiff proposes that this action be tried at the City of Toronto, in the Province of Ontario.

October ²⁸, 2009

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Court File No. CV-09-390 024

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at:
TORONTO

STATEMENT OF CLAIM

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