Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. and
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF *THE COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C..43, AS AMENDED

FACTUM OF THE RECEIVER RE DMA/CMA CLAIM

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FACTUM OF THE RECEIVER RE DMA/CMA CLAIM

PART I - INTRODUCTION

1. Mizrahi (128 Hazelton) Inc. (**Hazelton**) is a joint venture between two shareholders, formed for the purpose of developing a luxury condominium project in Toronto's Yorkville neighbourhood. The two shareholders are Constantine Enterprises Inc. (**CEI**) and Mizrahi Developments Inc. (**MDI**), a company ultimately owned and controlled by Sam Mizrahi.

2. The condominium development did not go according to plan. Hazelton defaulted on its financial obligations before completing the project. On the application of CEI, KSV Restructuring Inc. was appointed as the Receiver and Manager (the **Receiver**) of Hazelton's property, assets and undertakings including the condominium project. The Receiver is now in the process of maximizing recoveries for Hazelton's creditors.

3. The Receiver has identified two claims which Hazelton has against Mr. Mizrahi and Mizrahi Inc., another corporation owned and controlled by Mr. Mizrahi. Both claims are for liquidated amounts and neither claim requires a trial. In this motion, the Receiver seeks judgment against Mr. Mizrahi and Mizrahi Inc. in the total amount of $1,564,322.

4. The first claim arises from a Development Management Agreement (**DMA**) between Hazelton, Mizrahi Inc. and Mr. Mizrahi. Pursuant to the DMA, Mizrahi Inc. was to manage the development of the condominium project. Mizrahi Inc. was paid $2 million but agreed that it would be required to return $500,000 of this amount if the DMA was terminated "for any reason" prior to the "Project Completion Date." Mr. Mizrahi personally guaranteed this repayment.

5. The Receiver terminated the DMA prior to the Project Completion Date. The only issue in dispute is whether that termination was permitted. If it was, there is no dispute that Mizrahi Inc. and Mr. Mizrahi are obligated to pay $500,000 to Hazelton.

6. The second claim arises from a Construction Management Agreement (**CMA**) between Hazelton and Mizrahi Inc., pursuant to which Mizrahi Inc. was to manage the construction of the condominium project. Mizrahi Inc. ultimately retained a third party, CLM General Enterprises Ltd. (**CLM**), to provide some labour.

7. Mizrahi Inc. billed Hazelton for the labour provided by CLM, but at rates that were significantly higher than the rates charged by CLM. Mizrahi Inc. prepared time sheets that falsely ascribed hourly rates that were more than double the rates charged by CLM. Mizrahi Inc. also charged overtime rates when a worker's hours exceeded 44 hours in a week, even though CLM itself never charged an overtime rate. Over the course of the project, Mizrahi Inc. billed Hazelton $1,064,322 more for CLM's services than CLM itself had charged – a mark-up equivalent to 166% of CLM's actual cost.

8. Mizrahi Inc. and Mr. Mizrahi admit that they inflated CLM's costs in this manner. There is no dispute that Mizrahi Inc. reaped a profit of $1,064,322 by ascribing inflated rates to CLM's workers. Instead, Mr. Mizrahi claims that CEI had agreed to this practice and thus the mark-ups were appropriate.

9. Based on its review of the matter, the Receiver does not agree that Mizrahi Inc. was entitled to charge this large "mark-up" on CLM costs. Nothing in the CMA allows for such a mark-up. Further, the method through which Mizrahi Inc. billed for these amounts – by preparing time sheets with false hourly rates and overtime charges – indicates an intent to conceal the mark-up. These efforts to hide the mark-up are inconsistent with the theory that the mark-up was the subject of agreement.

PART II - SUMMARY OF FACTS

A. The Hazelton Project

10. Hazelton is owned 50% by CEI and 50% by MDI. Each shareholder nominated a director: CEI nominated Robert Hiscox and MDI nominated Mr. Mizrahi. Mr. Mizrahi also served as Hazelton's president. Mr. Mizrahi resigned from his positions on May 13, 2024, shortly before the appointment of the Receiver.

> First Report of the Receiver, s. 2.1.3-2.1.4 **(Receiver's Motion Record, Tab 2E, p. 103)**

11. The condominium project, located at 126 and 128 Hazelton Avenue, is a nine-story luxury condominium, with retail premises on the ground floor. The project was not finished at the time the Receiver was appointed.

> First Report of the Receiver, s. 2.1.1 **(Receiver's Motion Record, Tab 2E, p. 103)**

12. Hazelton's known secured creditors include CEI, Aviva Insurance Company of Canada and various lien claimants. Hazelton's known unsecured creditors are owed approximately $4.2 million.

B. First Report of Receiver, s. 3.0 (Receiver's Motion Record, Tab 2E, pp. 104-107)The DMA

13. Hazelton, Mizrahi Inc. and Mr. Mizrahi entered into the DMA on June 19, 2015. Pursuant to that agreement, Mizrahi Inc. agreed to "do all that is required to complete the Project through to the Project Completion Date." The Project Completion Date was defined as "final closing of the sale of all the Units and the completion of all other aspects of the Project."

> DMA, ss. 4(a)(ii) and 6 **(Receiver's Motion Record, Tab 2F, pp. 117-118)**

14. Hazelton paid Mizrahi Inc. $2 million as compensation for its work under the DMA. Half of that amount was paid in advance, deemed to be earned only upon completion of certain

milestones. If those milestones were not met, Mizrahi Inc. was required to return any unearned portion of the fee. Mr. Mizrahi personally guaranteed the return of those amounts.

DMA, ss. 4 and 16 **(Receiver's Motion Record, Tab 2F, pp. 117 & 123)**

15. Section 13 of the DMA provided that Hazelton "acting reasonably, may, at its election, declare this Agreement at an end" in the event of, among other things, the failure of Mizrahi Inc. to perform any of its contractual obligations, subject to an opportunity to cure if applicable.

DMA, s. 13(i) **(Receiver's Motion Record, Tab 2F, pp. 121)**

16. As detailed below, the Receiver terminated the DMA on June 21, 2024. At that time, building permits had been issued and the project was advanced but the Project Completion Date had not been achieved. Accordingly, unless the termination was improper, Mizrahi Inc. and Mr. Mizrahi were obligated to repay $500,000.

DMA, s. 4(c) **(Receiver's Motion Record, Tab 2F, pp. 117)**

C. The CMA

17. Hazelton and Mizrahi Inc. entered into the CMA on March 13, 2017. It sets out a long list of services Mizrahi Inc. was to provide as construction manager, throughout all stages of the project. Mizrahi Inc. essentially acted as the general contractor for the project.

CMA, Schedule A1 **(Receiver's Motion Record, Tab 2G, pp. 136-140)**

18. As compensation for its services under the CMA, Mizrahi Inc. was to receive:

(a) a fee equal to 5% of the "construction cost" of the Project; plus

(b) agreed-upon monthly fees for certain specified Mizrahi Inc. employees.

CMA, s. 5.2 and Schedule C **(Receiver's Motion Record, Tab 2G, pp. 132 & 144)**

19. Mizrahi Inc. was also entitled to reimbursement of certain specified expenses, supported by receipts or invoices, plus an administrative charge of 15%. Mizrahi Inc. was not entitled to an administrative charge on the amounts it paid to CLM.

CMA, s. 5.3 and Schedules A2 and B2 **(Receiver's Motion Record, Tab 2G, pp. 132, 141 and 143)**

20. Section 5.1.3 of the CMA's General Conditions provided that any change to Mizrahi Inc.'s compensation was to be recorded in writing. There is no written amendment to Mizrahi Inc.'s compensation under the CMA.

CMA, General Conditions, s. 5.1.3 **(Receiver's Motion Record, Tab 2G, p. 149)**

Hiscox Affidavit, at para. 16

D. Mizrahi Inc. Delegates Work to CCM

21. In July 2017, Mizrahi Inc. retained Clark Construction Management (**CCM**) to provide construction management and labour services to the project. The services to be provided by CCM largely overlapped with the services to be performed by Mizrahi Inc. under the CMA. CCM was to be compensated by way of a fee equal to 2% of the "construction cost" (which came out of Mizrahi Inc.'s 5% fee) plus time-based rates for a variety of classes of labourers.

Mizrahi Affidavit, at paras. 16-17 **(Mizrahi Record, Tab 2, p. 14)**

CCM Agreement, at Supplementary Conditions and Appendix A **(Mizrahi Record, Tab 2F, pp. 185-201 & 216)**

22. Although the CMA did not envision Mr. Mizrahi delegating its work to another entity in this manner, CEI agreed to it. Mr. Mizrahi told Mr. Hiscox that subcontracting construction management and labour to a third-party was Mizrahi Inc.'s standard practice and would help meet timelines and budget. Mr. Hiscox thus agreed the engagement of CCM.

Hiscox Reply, at para. 6

23. During the project, Mizrahi Inc. invoiced Hazelton for amounts due to CCM as "reimbursable expenses" under the CMA, without any markup. Mizrahi Inc. provided Hazelton with complete copies of the CCM invoices as support for the reimbursement requests.

Mizrahi Affidavit, at paras. 19-20 **(Mizrahi Record, Tab 2, p. 15)**

Hiscox Reply, at para. 7

24. In August 2020, Mizrahi Inc. proposed terminating the CCM agreement and having Mizrahi Inc. perform all of the construction management work itself. Mizrahi Inc. advised CEI that the goal was to reduce labour costs and accelerate the schedule. Mizrahi Inc. advised that it expected the change to save Hazelton approximately $1.1 million. CEI agreed, and CCM was terminated effective October 2020.

Hiscox Reply, at paras. 8-14

Mizrahi Affidavit, at para. 23 **(Mizrahi Record, Tab 2, p. 16)**

E. Mizrahi Inc. Engages CLM; Inflates Invoices

25. Following CCM's termination, Mizrahi Inc. began contracting with CLM to provide general labour for the project. CLM invoiced Mizrahi Inc. for that work. Each of CLM's invoices attached time sheets showing the number of hours each labourer worked. Mizrahi Inc. paid CLM's invoices directly.

Mizrahi Affidavit, at para. 47 **(Mizrahi Record, Tab 2, p. 21)**

CLM Invoices **(Receiver's Motion Record, Tab 2I, pp. 161-629)**

26. Although Mizrahi Inc. had provided all of CCM's invoices to Hazelton when seeking reimbursement, it did not provide the CLM invoices to Hazelton. Instead, Mizrahi Inc. prepared its

own versions of time sheets for the CLM labourers, without any reference to CLM, and ascribed hourly rates for each labourer that were far larger than what CLM charged:

(a) CLM billed between $35 and $45 per hour for its employees, but Mizrahi Inc. billed $96.35 per hour for each CLM employee- well more than double the real cost;

(b) CLM charged the same rate for its workers regardless of how many hours they worked, but Mizrahi Inc. applied an "overtime" rate of $144.53 when hours exceeded a certain threshold, resulting in 826 "overtime" hours, compared to zero overtime hours billed by CLM; and

(c) Mizrahi Inc. "estimated" the number of hours CLM's labourers would work, and ultimately billed for 41 more hours billed than CLM had actually worked.

Fifth Report of the Receiver, ss. 2.3.4-2.3.6 **(Receiver's Motion Record, Tab 2, p. 20)**

27. In total, Mizrahi Inc. billed Hazelton $1,064,322 more for CLM's work than CLM billed Mizrahi Inc. – mark-up equal to 166% of CLM's true cost. This entire amount was additional profit for Mizrahi Inc., over and above the compensation contemplated by the CMA.

Fifth Report of the Receiver, s. 2.3.7 **(Receiver's Motion Record, Tab 2, p. 20)**

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

28. Mizrahi Inc. and Mr. Mizrahi resist this motion both procedurally and substantively. Procedurally, they argue that it is improper for the Receiver to seek relief by way of motion and insist that it commence a new civil claim to address these issues. Substantively, they argue that the DMA was wrongly terminated and that Mizrahi Inc. was entitled to charge increased rates for CLM's work.

29. As detailed below, the Receiver submits that it is appropriate and in keeping with the goals of a receivership to determine these issues by way of this motion. The Receiver also submits that the DMA was properly terminated and that Mizrahi Inc. had no entitlement to charge Hazelton inflated amounts for the work performed by CLM.

A. Motion Properly Before this Court

30. Insolvency proceedings strongly favour the "single proceeding model." It is preferable that all litigation concerning an insolvent company occur within a single proceeding, rather than be fragmented into different proceedings. The model promotes efficiency and maximizes returns for creditors. This principle applies not just to claims against a debtor, but also to claims a debtor has against a third party, so long as the third party is not a "stranger" to the insolvency.

Mundo Media Ltd. (Re), 2022 ONCA 607, at paras 6, 40-42, 52

31. The case law does not set out a specific test for determining whether someone is a "stranger" to an insolvency. It requires a holistic consideration of all relevant connections between the third party, the claim and the insolvency. The Court of Appeal has recently affirmed that the "determining factor… is the degree of connection of the claim to the insolvency proceedings." This approach has also been adopted in Québec.

Mundo Media Ltd. (Re), 2022 ONCA 607, at para 25

Arrangement relatif à Rising Phoenix International Inc., 2023 QCCS 3707, at para 16

32. In *Sam Lévy*, the Supreme Court of Canada held that a third party was not a stranger when it was a major creditor and debtor. In *Alderbridge*, the third parties were found not to be

strangers because they were the economic stakeholders or controlling minds of the debtors, or were otherwise involved in the debtor's business operations prior to insolvency.

> *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 SCR 978, at para 49
>
> *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718, at paras 72-73

33. Mr. Mizrahi and Mizrahi Inc. are intimately connected to Hazelton and the insolvency. They are both specifically named in the Order appointing the Receiver. Mr Mizrahi was Hazelton's president and one of its two directors. He was an economic stakeholder and a controlling mind of Hazelton and has been represented by counsel in this proceeding since its inception. Mizrahi Inc., of which Mr. Mizrahi is the directing mind, was responsible for the development and construction of the condominium project, which was Hazelton's sole business. The failure to accomplish that task resulted in Hazelton's insolvency.

> June 4, 2024 Order of Justice Cavanagh, s. 7 **(Receiver's Motion Record, Tab 2B, p. 39)**

34. Mizrahi Inc. also claims to be a creditor of Hazelton. On May 10, 2024, when it terminated the DMA, Mizrahi Inc. alleged that Hazleton owed it $453,847.56 and demanded payment. This claim, which Mizrahi Inc. continues to assert, is based on a series of invoices for site labour, presumably delivered pursuant to the CMA.

> May 10, 2024 letter from Mizrahi Inc. to Hazelton **(Receiver's Motion Record, Tab 2N, p. 874)**
>
> Mizrahi Affidavit, at para. 114 **(Mizrahi Record, at Tab 2, p. 37)**

35. Separately, Mr. Mizrahi and Mizrahi Inc. also argue that it is improper for this dispute to be resolved by way of a process akin to an application, as there are material facts in dispute that require a trial. As detailed below, the Receiver believes that there is no need for a trial and that the issues may properly be determined on the existing record. In the event the Court finds that it requires oral evidence, the most efficient approach would be to schedule a further date for such

examinations before the Court within this proceeding, rather than mandating the commencement of a separate action.

B. The Development Management Agreement

36. The language of the DMA is unambiguous – if it is terminated "for any reason" after building permits but prior to the Project Completion Date, Mizrahi Inc. must repay $500,000. The only dispute is whether the Receiver was entitled to terminate the DMA.

37. Mizrahi Inc. was obliged to "do all that is required to complete the Project through to the Project Completion Date." Mr. Mizrahi concedes that completing the project was Mizrahi Inc.'s overarching task. It did not complete that task. The project failed before the Project Completion Date because Hazelton was insolvent and unable to continue. This receivership was the result.

DMA, s. 6 **(Receiver's Motion Record, Tab 2F, p. 118)**

Mizrahi Cross, at p. 9, qq. 31-32

38. The Order appointing the Receiver gave it the express power to disclaim any contracts of Hazelton's in respect of the property. The Receiver did so. It terminated the DMA and sought out alternative methods to finish the balance of the project. Given the failure of the project and termination of the DMA, Mizrahi Inc. never earned the final $500,000 of its payment and must return it.

June 4, 2024 Order of Justice Cavanagh, s. 3(c) **(Receiver's Motion Record, Tab 2B, p. 34)**

39. Even if the Receiver was required to terminate the DMA pursuant to one of the contractual termination provisions – which it was not – there were grounds for such termination. The DMA

could be terminated if Mizrahi Inc. failed to perform any covenant or obligation thereunder. Mizrahi Inc. failed to perform two obligations:

(a) it failed to exercise its duties such that all costs and expenses were within and in accordance with the project budget; and

(b) it failed to exercise its duties in a reasonable commercial manner in Hazelton's best interests.

DMA, ss. 7(a) and (b) **(Receiver's Motion Record, Tab 2F, p. 120)**

40. Mizrahi Inc. failed to keep costs and expenses within the project budget. Hazelton was placed in receivership before it could complete the project. The "budget" against which Mizrahi Inc.'s performance under the DMA was to be evaluated was a budget issued by Altus Group on April 24, 2015, as amended thereafter with CEI's prior written approval.

DMA, s. 5 **(Receiver's Motion Record, Tab 2F, p. 117)**

41. Costs dramatically exceeded the budget over the course of the project. As of May 31, 2017, Altus identified a project budget of $62.8 million. By the time of Altus' last report as of June 30, 2022, the project budget had ballooned to $85.9 million. Despite the increase, the Receiver understands that at no time did CEI provide prior written approval for budget increases. While Mr. Mizrahi claims that CEI did approve of the $85.9 million budget, he has not produced any written document to that effect. Mizrahi Inc. thus exceeded the approved contractual budget by more than $20 million.

Altus Monthly Report No. 1, s. 2.2 & No. 31, s. 1.2 **(Mizrahi Record, Tab 2I1, p. 402 & Tab 2I31, p. 3858)**

Hiscox Reply, at para. 74

Mizrahi Affidavit, at para. 113 **(Mizrahi Record, Tab 2, p. 36)**

42. Even if the increased budgets contained in the Altus reports were treated as new budgets for the purposes of the DMA, Mizrahi Inc. did not comply with the final budget either. The project was not completed and, at the time of the appointment of the Receiver, Hazelton had secured debt of more than $63 million and unsecured debt of at least $10 million. It had no cash and was forced to borrow money under receiver's certificates just to continue construction. A failure of this magnitude is, on its face, a failure to keep costs and expenses within budget.

> First Report of the Receiver, at ss. 3.1-4.1 **(Receiver's Motion Record, Tab 2E, pp. 14-17)**
>
> Hiscox Reply, at para. 75

43. Mr. Mizrahi concedes that Mizrahi Inc. did not meet its obligations under the DMA. However, he asserts that this was "owing to the actions and conduct of CEI (and therefore Hazelton)." The thrust of Mr. Mizrahi's argument is that CEI improperly refused to accept a potential financing that would have kept the project afloat. Mr. Mizrahi has commenced a separate civil proceeding in which he alleges that CEI and its principals breached fiduciary duties owed to him by refusing this financing.

> Mizrahi Affidavit, at paras. 94-105 **(Mizrahi Record, Tab 2, pp. 32-34)**

44. Whether or not Mr. Mizrahi has a valid claim against CEI for not agreeing to a specific debt package is not an issue to be resolved in this proceeding. It is irrelevant to Mizrahi Inc.'s liability under the DMA. Mizrahi Inc. committed to complete the project according to budget and failed to do so. CEI is not a party to the DMA and there is nothing in the DMA that requires Hazelton to take on additional debt or to increase the budget at Mizrahi Inc.'s request. If Mr. Mizrahi has a valid claim against CEI, then CEI might be liable to pay to Mr. Mizrahi the $500,000 he owes under the DMA. But the existence of a possible claim over by Mr. Mizrahi in no way lessens the liability of Mizrahi Inc. or Mr. Mizrahi to Hazelton under the DMA.

45. Given the clear failure of the project, Mizrahi Inc. never earned the final $500,000 due under the DMA and must repay that money. Mr. Mizrahi is also personally liable for that sum. Resolution of Mr. Mizrahi's dispute with CEI is not necessary to determine Hazelton's entitlement in this motion.

46. In addition, by falsely inflating CLM's costs and seeking payment for those amounts from Hazelton, Mizrahi Inc. failed to act in a commercially reasonable manner or in the best interests of Hazelton. Details of that conduct is described below in the context of the CMA but also justifies the termination of the DMA.

C. The Construction Management Agreement

i) Liability of Mizrahi Inc.

47. Mizrahi Inc. radically inflated the actual cost of labour provided by CLM when billing Hazelton for those expenses. CLM billed Mizrahi Inc. a total of $640,989 for the labour it provided to the project. Mizrahi Inc. billed Hazelton $1,705,310 for that work. Mizrahi Inc. made $1,064,322 simply by inflating CLM invoices.

> Receiver's Summary of Invoices **(Receiver's Motion Record, Tab 2K, p. 844)**

48. Nothing in the CMA remotely supports this profit. The CMA provided for three different types of compensation: (i) a flat fee of 5% of the "construction cost"; (ii) time-based rates for certain specified personnel; and (iii) a 15% administrative charge on certain specified reimbursable expenses.

49. None of these categories support the CLM markups. The markups did not come out of the flat fee, the CLM workers are not among the specified personnel for whom time-based rates are paid, and payments to third parties such as CLM are not included among the reimbursable expenses for which Mizrahi Inc. was entitled to levy a 15% administrative charge. Further, the

CLM markup amounted to a markup of approximately 166%, dramatically more than the 15% contemplated by the CMA.

50. Mizrahi Inc. is liable to return this overpayment on any of three different bases:

(a) **Breach of contract**: The CMA does not permit Mizrahi Inc. to mark up the CLM invoices, but it did so anyway. That was a breach of the CMA. Further, Mizrahi Inc. had an obligation to reduce costs as much as was possible for the project, an obligation entirely inconsistent with a unilateral mark-up of third-party labour.

Mizrahi Cross, at p. 22, qq. 86-88

(b) **Unjust enrichment:** Mizrahi Inc. was enriched by $1,064,322, and Hazelton suffered an exactly corresponding deprivation. There was no juristic reason for this- it was not authorized by contract or ever agreed to by Hazelton. It was simply a concealed mark-up.

Kerr v. Baranow, 2011 SCC 10, at para 32

(c) **Negligent and/or fraudulent misrepresentation:** Mizrahi Inc. falsely represented the hourly rates for the labourers provided by CLM. Mizrahi Inc. knew what the real rates were but presented grossly inflated rates to Hazelton anyway. Mizrahi Inc. had a special relationship with Hazelton, as it was in charge of construction and development of the condominium project and its directing mind was Hazleton's President. Hazelton paid the inflated invoices in reliance on Mizrahi Inc.'s misrepresentations.

Carom v. Bre-X Minerals Ltd., 2000 CanLII 16886 (ON CA), at para 43

51. In response, Mizrahi Inc. asserts that it was entitled to charge the very same rates that CCM had charged because it was taking over CCM's role. In his own words, Mr. Mizrahi asserts

that CEI (and, by extension, Hazelton) agreed that Mizrahi Inc. would "step into CCM's role and provide the same services to Hazelton that CCM provided at the same time-based labour rates as CCM."

Mizrahi Affidavit, at para. 54 **(Mizrahi Record, Tab 2, p. 22)**

52. Mr. Mizrahi has not produced any documents which support his assertion that CEI agreed that Mizrahi Inc would charge the same rates that CCM had charged. Nor does he provide any details of this alleged agreement – he does not say when it was made, the specific individuals who were involved in creating the agreement, or any other details. He simply asserts that Mizrahi Inc. was permitted to charge the same rates as CCM. Mr. Hiscox denies any such agreement, and the contemporaneous data does not support its existence.

Hiscox Reply, at para. 28

53. As noted above, when Mr. Mizrahi proposed that CCM be terminated, the rationale was cost savings – that Hazelton would save approximately $1.1 million if Mizrahi Inc. performed the duties then allocated to CCM. Mizrahi Inc. allocated approximately $740,000 of those savings to reduced costs for "Site Labour." The fact that Mizrahi Inc. recommended terminating CCM in order to save costs on site labour flatly contradicts Mr. Mizrahi's assertion that Mizrahi Inc. was going to charge the very same rates that CCM had charged.

August 2020 General Expense Budget Side-by-Side **(Hiscox Reply, Ex C)**

54. Similarly, in an email from CEI's VP of Development in October 2020, in the context of replacing CCM, CEI confirmed that Mizrahi Inc. would "continue to seek all opportunities to improve schedule and cost savings to substantial completion." Nearly trebling the cost of site labour is inconsistent with the commitment to seek to reduce costs.

October 28, 2020 email from David Ho **(Mizrahi Record, Tab 2J, p. 4037)**

55. Discussions between Mizrahi Inc. and CEI later in the project further refute the existence of an agreement that Mizrahi Inc. could charge the same rates as CCM. In May 2022, CEI asked Mizrahi Inc. to disclose the "contracted rates and the contract for 128 which shows the rates for labour." Mizrahi Inc. staff discussed the matter internally, noting that they were using the same rates as CCM had used, and asked Mr. Mizrahi what he "want(ed) to share?"

May 5, 2022 emails **(Mizrahi Record, Tab 2P, pp. 4057-4058)**

56. Mr. Mizrahi has not produced any response to the question as to what he wanted to "share" with CEI. But Mizrahi Inc. refused to share the CLM invoices at that time, which would have shown the contracted rates. Instead, Mizrahi Inc. provided a summary of the rates it was using and stated that it had "always charged these rates whether it was CCM doing the work or now."

57. CEI was not satisfied with this response and responded that it would now be challenging claimed expenses due to a concern that Mizrahi Inc. was making a profit on these labour expenses. Neither Mizrahi Inc. nor CEI has located any further emails discussing this point, but the discussion makes clear that there was no existing agreement permitting Mizrahi Inc. to apply a markup to third party labour costs.

May 6, 2022 emails **(Mizrahi Record, Tab 2R, pp. 4064-4065)**

58. Mr. Mizrahi's assertion that Mizrahi Inc. was entitled to charge a 166% markup on CLM's invoices is not supported by the CMA, has no documentary support, is contrary to the contemporaneous documents and is, on its face, implausible. CEI had no reason to support terminating CCM only to have Mizrahi Inc. charge the very same rates. Nor would CEI have any reason to approve Mizrahi Inc. making an additional $1 million profit over and above what it was already entitled to under the CMA. Mizrahi Inc.'s inflated timesheets were done in secret, were not agreed to, and were improper.

ii) Personal Liability of Mr. Mizrahi

59. Mr. Mizrahi is not personally a party to the CMA. However, he is personally liable for Mizrahi Inc.'s overcharges as they were the result of breaches of the fiduciary duties Mr. Mizrahi owed to Hazelton.

60. Mr. Mizrahi was a director and senior officer of Hazelton. He owed fiduciary duties to the company and was required to act in its best interests. He admits that Hazelton's interest was completing the project as profitably as possible, and thus for as low a cost as possible. He breached those duties by preferring his own interests, concealing the true cost of labour provided to the project and receiving a secret profit at Hazelton's expense.

Mizrahi Cross, at pp. 7-8, qq. 22-25

61. A finding that Mr. Mizrahi breached his fiduciary duties does not require a finding of bad faith or malice on Mr. Mizrahi's part. As a fiduciary, Mr. Mizrahi was obligated not to put himself in a conflict of interest. His duty to act in Hazelton's best interests was flatly inconsistent with his interest in maximizing Mizrahi Inc.'s profits. Mr. Mizrahi could only have avoided this conflict by transparently disclosing CLM's pricing to Hazelton and left it to Hazelton's non-conflicted director to determine whether Hazelton was willing to pay any mark-up on the CLM invoices. Instead of doing that, Mr. Mizrahi unilaterally applied a remarkable 166% mark-up. Even if he honestly believed such a mark-up was "market" or appropriate, it was a breach of his fiduciary duty to act in the face of his obvious conflict.

Cataraqui Cemetery Company v. Cyr, 2017 ONSC 5819, at paras 184-185

iii) Limitation Argument

62. Mizrahi Inc. and Mr. Mizrahi also argue that the claim relating to the CMA is statute barred. They assert that Hazelton knew of its potential claim against Mizrahi Inc. by May 2022. The relevant evidence is as follows.

63. In Mr. Hiscox's first affidavit, he affirms that when CEI challenged amounts being charged by Mizrahi Inc. for labour, Mr. Mizrahi represented that Mizrahi Inc. was charging CEI its actual cost for labour, without mark-up, and that the labourers were Mizrahi Inc.'s employees. CEI agreed to pay the invoices on that basis.

Hiscox Affidavit, at paras. 21-22

64. Similarly, in Mr. Hiscox's reply affidavit, he affirms that Mizrahi Inc. concealed that it was subcontracting labour from CLM, charging rates equivalent to what CCM charged even though CLM charged less and charging overtime when CLM charged none.

Hiscox Reply, at para. 28

65. Mr. Hiscox also affirmed that Mizrahi Inc. "did not disclose that it was marking up labour rates until May 2022", in response to an email request from CEI for a copy of the contract showing the labour rates. Mizrahi Inc. employees discussed this request internally but ultimately declined to provide CEI with copies of the CLM invoices. Instead, Mizrahi Inc. gave CEI a copy of the old CCM rate sheet and stated that it had "always charged these rates whether it was CLM doing the work or now." The correspondence produced by Mizrahi Inc. and CEI does not contain any express concession from Mizrahi Inc. that it was subcontracting the labour or applying a mark-up.

Hiscox Reply, at paras. 33-34

May 5-6, 2022 emails between CEI and Mizrahi Inc. **(Mizrahi Record, Tabs 2P-2Q, pp. 4057-4061)**

66. After receiving the CCM rate sheet, CEI's CFO, Chris Donlan, complained about Mizrahi Inc.'s refusal to provide the invoices or contract showing the actual labour costs. In doing so, Mr. Donlan suggested that Mizrahi Inc. "won't engage on this particular expense because you make a profit here on the back of back of a project with epic losses."

May 6, 2022 emails between CEI and Mizrahi Inc. **(Mizrahi Record, Tabs 2R, pp. 4064-4065)**

67. During cross-examination, Mr. Hiscox was asked whether he knew by May 2022 that Mizrahi Inc. was marking-up the labour costs. He initially responded that there was "supposed to be a cost savings these labourers when he took over." He was then directed to Mr. Donlan's email and asked again whether CEI knew there was a mark-up as of May 2022. Mr. Hiscox responded "According to Chris's e-mail, yes."

Hiscox Cross, at p. 14, q. 28 and pp. 16-17, q. 35

68. Mizrahi Inc. continued to refuse to disclose the CLM invoices following these May 2022 discussions. It was not until March 2023 that Mizrahi Inc. first provided CEI with a copy of a CLM invoice. On March 22, 2023, CEI again challenged the rates Mizrahi Inc. was charging and requested copies of the underlying invoices for the labourers. In response, Mr. Mizrahi provided CEI with a single CLM invoice dated February 22, 2023. This was the first time that CEI saw an example of the rates being charged by CLM, in contrast to what Mizrahi Inc. was charging.

Hiscox Affidavit, at para. 30

69. The Receiver commenced this motion on December 16, 2024. Mizrahi Inc. and Mr Mizrahi assert that Mr. Hiscox's knowledge of a markup as of May 2022 was sufficient to constitute discovery of a claim against Mizrahi Inc. and Mr. Mizrahi for the inflated invoices and thus the limitation period expired in May 2024, prior to the receivership.

70. For two reasons, the Receiver's position is that the claim was not discovered in May 2022.

71. First, discovery of a claim requires knowledge of an injury, loss or damage. While the claimant need not know the extent of the injury, it must know that the loss is not trivial. Otherwise, claimants would be forced to rashly commence proceedings over disputes that may not be worth the cost and time of a proceeding. While Mr. Hiscox knew of some mark-up to Mizrahi Inc.'s labour costs as of May 2022, he had no insight at all into the scale of those mark-ups. Mr. Hiscox did not

have knowledge that the harm caused by Mizrahi Inc.'s actions was anything but trivial. Mere suspicion is not equivalent to knowledge for limitation purposes.

Limitations Act, 2002, SO 2002, c 24, Sch B, s 5

Gillham v. Lake of Bays (Township), 2018 ONCA 667, at para 22

Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited), 2017 ONCA 16, at para 42

72. Second, limitation periods are suspended when a defendant "fraudulently conceals" the cause of action. This does not necessarily involve fraud in the common law sense. Rather, the fraudulent concealment doctrine applies where the defendant has unconscionably concealed their wrongdoing. The focus is whether it would be inequitable to permit the defendant to take advantage of the limitation period given its conduct.

Pioneer Corp. v. Godfrey, 2019 SCC 42, at paras 52-54

Soetemans v. Design Concrete Systems Ltd., 2022 ONSC 5595, at paras 35-37

73. As described above, Mizrahi Inc. and Mr. Mizrahi hid the true cost of the CLM labour. It refused to share the CLM invoices or disclose the rates being charged by CLM. It prepared time sheets with false rates. These choices prevented Mr. Hiscox from understanding that the mark-up Mizrahi Inc. was applying was well beyond trivial, and in fact completely undermined the suggestion that labour costs would be lower if Mizrahi Inc. terminated CCM.

74. While the law no longer requires that there be a "special relationship" between the parties in order for the fraudulent concealment doctrine to apply, the relationship between Mr. Mizrahi and Mr. Hiscox/Hazelton is "special" and further demonstrates that it would be unconscionable for Mizrahi Inc. to benefit from the passage of a limitation period. Mr. Mizrahi was Hazelton's president and one of its two directors. He owed fiduciary duties to the company, and his company Mizrahi Inc. was in charge of the development and construction of the condominium project**,** which

he ultimately did not complete and has resulted in significant secured and unsecured debts owing to Hazelton's creditors. His positions made it very easy for him to conceal a secret profit that Mizrahi Inc. was enjoying by marking-up CLM's invoices to the detriment of Hazelton's creditors. Given the control Mr. Mizrahi had over Hazelton and the project, it would be inequitable for Mizrahi Inc. to benefit from the passage of the limitation period.

PART IV - ORDER REQUESTED

75. The Receiver respectfully requests an order granting judgment as against Mr. Mizrahi and Mizrahi Inc. in the total amount of $1,564,322, plus pre-judgment interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2026.

James Renihan

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Mundo Media Ltd. (Re)*, 2022 ONCA 607

2. *Arrangement relatif à Rising Phoenix International Inc.*, 2023 QCCS 3707

3. *Sam Lévy & Associés Inc. v. Azco Mining Inc.,* [2001] 3 SCR 978

4. *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718

5. *Kerr v. Baranow,* 2011 SCC 10

6. *Carom v. Bre-X Minerals Ltd.,* 2000 CanLII 16886 (ON CA)

7. *Cataraqui Cemetery Company v. Cyr,* 2017 ONSC 5819

8. *Gillham v. Lake of Bays (Township),* 2018 ONCA 667

9. *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited),* 2017 ONCA 16

10. *Pioneer Corp. v. Godfrey*, 2019 SCC 42

11. *Soetemans v. Design Concrete Systems Ltd.*, 2022 ONSC 5595

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date January 26, 2026

Signature

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Limitations Act, 2002*, SO 2002, c 24, Sch B, s 5:

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Court File No. CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC. Applicant	-and-	MIZRAHI (128 HAZELTON) INC. et al. Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RECEIVER RE DMA/CMA CLAIM

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