

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Roy D. Macgillivray	)	Zachary Rosen, for the Plaintiff
	)	
– and –	)	
	)	
Ronald J. Poirier and Tullio Provenzano	)	Ronald J. Poirier in person
	)	Jack N. M. Jamieson for Tullio Provenzano
	)	
Defendants	)	
	)	HEARD: October 14, 31, 2025 and
	)	April 21, May 1, 2026

DECISION ON MOTION

CORNELL J.

Introduction

[1] This is a motion for summary judgment brought by the defendants, Ronald J. Poirier (“Mr. Poirier”), and Tullio Provenzano (“Mr. Provenzano”) to have the action brought by Roy D. Macgillivray (“Mr. Macgillivray”) dismissed. Although there was no cross-motion brought by the plaintiff, it was argued that a boomerang judgment should issue in favour of the plaintiff. In accordance with the reasons that follow, a judgment in favour of the plaintiff shall issue in an amount to be determined.

Background

[2] Mr. Macgillivray and Mr. Poirier are lawyers. They practiced litigation in a law partnership for 20 years until 1998 when Mr. Poirier left such partnership to focus on a criminal practice.

[3] In 1982, Mr. Poirier and Mr. Macgillivray agreed to purchase property known municipally as 395 Fort William Road. (“395 Property”). The 395 Property was purchased through a corporation in which shares were issued to the spouses of Mr. Poirier and Mr. Macgillivray.

[4] In 1990, Mr. Poirier and Mr. Macgillivray purchased property known municipally as 384 Fort William Road (“384 Property”) as tenants in common. The cost of acquiring and renovating the 384 Property was shared equally by Mr. Poirier and Mr. Macgillivray. They proceeded to occupy the 384 Property to operate their law firm and rented out other portions of the property to various tenants.

[5] The evidence is clear that the properties were operated as a partnership. Monthly balance sheets and income statements were prepared. Profits and losses were shared equally.

[6] Mr. Provenzano is a businessman who owns and operates a real estate development and management company. Although Mr. Macgillivray and Mr. Poirier both participated in the general management of the partnership, Mr. Provenzano was hired from time to time to deal with property management issues.

[7] In the fall of 2015, Mr. Macgillivray's son made it known that he and his law partners were interested in purchasing the 384 Property. In order to avoid any conflict of interest, Mr. Macgillivray referred the matter to Mr. Poirier and was not otherwise involved in the negotiations. The prospective purchasers obtained an appraisal of the 384 Property showing a value of \$840,000. A copy of this appraisal was provided to Mr. Poirier. No agreement was reached as Mr. Poirier insisted on a purchase price of \$1,600,000.

[8] Up until 2016, Mr. Poirier had been paying the sum of \$2000 per month as rent for his occupation of his portion of the 384 Property. For reasons unknown, these payments stopped in 2016. When Mr. Poirier continued to refuse to pay any rent, Mr. Macgillivray commenced a Small Claims Court action in May of 2018 that was defended by Mr. Poirier. Mr. Macgillivray's claim was dismissed by the deputy judge who concluded that, despite the existence of a partnership between Mr. Poirier and Mr. Macgillivray, there was no express agreement between them to pay rent on a month-to-month basis.

[9] Between August 24, 2016, and March 28, 2017, Mr. Macgillivray and Mr. Poirier exchanged a number of letters regarding possible transfers or the sale of the partnership property.

[10] On January 30, 2018, Mr. Macgillivray received a telephone call from Mr. Provenzano regarding a potential sale of the 384 Property. At the time of this call, Mr. Poirier had received an offer to purchase the 384 Property from the Nokiiwin Tribal Council (the "Tribal Council") in the amount of \$1,175,000. The offer was addressed to both Mr. Macgillivray and Mr. Poirier who were the registered owners. On January 29, 2018, a second offer in an amount of \$1,250,000 was received by Mr. Poirier.

[11] Instead of providing a copy of these offers to Mr. Macgillivray, Mr. Poirier retained Mr. Provenzano to act as his agent with instructions to get Mr. Macgillivray to agree to sell his interest in the 384 Property for the sum of \$450,000. Mr. Provenzano was successful in bringing this about with the result that an agreement was prepared, the terms of which are as follows:

AGREEMENT

THIS AGREEMENT made this 31st day of January 2018

B E T W E E N

ROY DUNCAN MACGILLIVRAY, of the City of Thunder Bay,
District of Thunder Bay

(hereinafter referred to as "Roy")

- and -

RONALD JOSEPH POIRIER, of the City of Thunder Bay,
District of Thunder Bay

(hereinafter referred to as “Ron”)

WHEREAS Ron and Roy are the owners of the property municipally know as 384 Fort William Road, Thunder Bay, Ontario and legally described as: PIN No 62126-0035 being Lots 3-4, Plan 827 Port Arthur City of Thunder Bay (the “Property”)

AND WHEREAS Roy has given to Ron a limited and specific power of attorney on January 31st, 2015 (the “Power of Attorney”) and Ron has full power and authority under this Power of Attorney to undertake and perform only the following acts on Roy’s behalf.

Signing of documents required to sell the Property to a third party
and ancillary documents to effect such sale.

NOW THEREFORE in consideration of the mutual covenants and agreements contained herein and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows

1. Roy will receive \$450,000.00 from the sale of his interest in the Property regardless of the sale price to a third party. Payment of such amount to be received by Roy from the solicitors for the sellers. Cheadles LLP, on the date of closing of the sale to the third party, which closing date is April 2nd, 2018 (Easter Monday) which will mean the closing will be Tuesday April 3rd, 2018.
2. There is a potential sale of the Property presently contemplated to a third party.
3. Notwithstanding the sale to the third party, Roy will only receive \$450,000.00 for his interest in the Property and no more.

IN WITNESS WHEREOF, the parties hereto have executed this agreement this 31st day of January, 2018.

Witness – Tullio Provenzo

ROY DUNCAN MACGILLIVRAY

Witness – Tullio Provenzo

RONALD JOSEPH POIRIER

[12] In addition to the agreement, Mr. Provenzano arranged for Mr. Macgillivray to sign a power of attorney in favour of Mr. Poirier in order to allow Mr. Poirier to sign the sale documentation on behalf of Mr. Macgillivray.

[13] On or about April 3, 2018, Mr. Macgillivray attended at Mr. Provenzano's office at which time he was provided with a cheque in an amount of \$450,000. Unbeknownst to Mr. Macgillivray at that time, Mr. Poirier had received the sum of \$769,147.02 as a result of certain adjustments being made at the time of sale. It was not until November of 2018 that Mr. Macgillivray discovered that the purchase price for the 384 Property was \$1,220,000.

Issues

[14] The following issues are raised:

- (a) Is there a triable issue regarding whether Mr. Poirier and Mr. Macgillivray were still partners in January 2018 when the 384 Property was sold?
- (b) If they were partners at that time, did Mr. Poirier breach the fiduciary duties owed by him to Mr. Macgillivray?
- (c) Is there a triable issue regarding whether Mr. Provenzano's statements to Mr. Macgillivray during the January 30, 2018 phone call constitutes deceit or negligent misrepresentation?
- (d) Is there a triable issue regarding whether Mr. Poirier and Mr. Provenzano are liable to Mr. Macgillivray for an unlawful means conspiracy?

Admission

[15] It was acknowledged by counsel acting for Mr. Provenzano that he was acting as Mr. Poirier's agent during the time in question.

Analysis

The test for summary judgment

Rule 20.04 (2) (a) provides that the court shall grant a motion for summary judgment if "the court is satisfied that there is no genuine issue requiring a trial in respect of the claim or defence". There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination of the merits on a motion for summary judgment. This will be the case when the process allows the judge to make any necessary findings of fact, apply the law to the facts and where the motion is a proportionate, expeditious and less expensive means to a joint result. See *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hyrniak*").

[16] In approaching the matter, I must first determine if there is a genuine issue requiring a trial based only on the evidence filed on the motion without regard to the fact-finding powers described in r. 20.04 (2.1). If the matter cannot be determined based only on the evidence filed on the motion, resort can be had to the enhanced fact-finding powers set out in r. 20.04(2.1).

[17] It is the position of Mr. Poirier that this motion can be decided at the first stage as the issues that present themselves can be determined based only on the evidence filed on the motion. I agree. I am of the opinion that I am able to determine whether a partnership existed on January 30, 2018, whether Mr. Poirier owed Mr. Macgillivray a fiduciary duty at that time and the validity or invalidity of the January 30, 2018, agreement based solely on the evidence filed on the motion.

Position of Mr. Poirier

[18] It is the position of Mr. Poirier that on January 30, 2018, no partnership existed between Mr. Poirier and Mr. Macgillivray insofar as the 384 Property is concerned. If it were to be found that Mr. Poirier and Mr. Macgillivray were partners at that time, it is the position of Mr. Poirier that he did not owe Mr. Macgillivray any fiduciary duties. Finally, it is the position of Mr. Poirier that the agreement is a complete answer to any claim that Mr. Macgillivray may have.

Position of Mr. Provenzano

[19] Mr. Provenzano shares the position of Mr. Poirier that the matter can be determined based only upon the evidence that has been put forward on the motion.

[20] It is the further position of Mr. Provenzano that the agreement is valid and enforceable and that Mr. Macgillivray received the sale proceeds that he bargained for.

Position of Mr. Macgillivray

[21] It is the position of Mr. Macgillivray that he and Mr. Poirier were partners at the time the agreement was entered into and at the time that the 384 Property was sold. It is the further position of Mr. Macgillivray that Mr. Poirier owed fiduciary duties to Mr. Macgillivray at the time in question and that such duty was breached as a result of the failure to disclose the offers to purchase that were addressed to the both of them.

[22] It is the further position of Mr. Macgillivray that as a result of the breach of the fiduciary duty and the deceit engaged in by Mr. Poirier and Mr. Provenzano, that the agreement is invalid and cannot be relied upon.

[23] As will be later detailed, it is the position of Mr. Macgillivray that a boomerang judgment should issue in his favour despite the fact that no cross-motion for such relief has been brought.

Did a partnership exist?

[24] There is no dispute that a property partnership existed between Mr. Macgillivray and Mr. Poirier for a great many years. The question that arises is whether the property partnership had ended as some point in time. I will now address this question. In undertaking this exercise, I will, among other things, review correspondence that took place between Mr. Poirier and Mr. Macgillivray from 2016 until March of 2017.

April 11, 2016

[25] Mr. Macgillivray writes to Mr. Poirier indicating that if Mr. Poirier does not wish to acquire Mr. Macgillivray's interest for \$700,000, it would be necessary to sue for partition and sale which Mr. Macgillivray described as an "unfortunate development after an almost 40 year personal and business relationship".

September 1, 2026

[26] Mr. Poirier counters with a proposal involving a property exchange.

September 7, 2016

[27] Mr. Macgillivray responds by saying that he and his wife no longer wished to be involved in the ownership of these properties but was prepared to sell his interest to Mr. Poirier failing which they should be listed for sale.

November 8, 2016

[28] Mr. Macgillivray indicates that if Mr. Poirier is not prepared to purchase his 50 percent interest in the 384 Property for \$700,000, then it will be necessary to list the property for sale.

February 14, 2017

[29] By letter, Mr. Macgillivray asks Mr. Poirier whether he is interested in purchasing Mr. Macgillivray's interest in either or both of the properties. If not, the properties must be listed for sale.

March 13, 2017

[30] Mr. Poirier writes to Mr. Macgillivray suggesting that given their respective ages, they should be doing some estate planning. Mr. Poirier indicates that Mr. Macgillivray was his "only partner left" and that "for both our interests, we should separate what we own" and again proposed that they each take one of the properties. Mr. Poirier also suggested for the first time that "our partnership [had] dissolved in [his] eyes, 9 months ago", namely in June of 2016.

March 21, 2017

[31] Mr. Macgillivray replies to Mr. Poirier's letter of March 13, 2017, indicating that if an agreement could not be reached, the properties must be sold and the proceeds divided between them. Mr. Macgillivray repeated his previous offer to sell his interest in the 384 Property for \$700,000. and went on to outline other potential options.

March 28, 2017

[32] Mr. Poirier writes to Mr. Macgillivray indicating that the properties needed to be put up for sale to “see what they are worth on the open market”. Mr. Poirier goes on to say that given the current state of affairs, “any communications between us is likely to be fruitless” and accordingly asks that Mr. Macgillivray deal with Mr. Provenzano going forward.

[33] This indeed comes to pass and it is such interaction that results in the creation of the agreement that is so heavily relied upon by Mr. Poirier and Mr. Provenzano.

Mr. Provenzano Negotiations

[34] On January 30, 2018, Mr. Provenzano contacted Mr. Macgillivray to indicate that Mr. Poirier had asked Mr. Provenzano to contact Mr. Macgillivray concerning a potential sale of the 384 Property.

[35] In his affidavit, Mr. Macgillivray outlines what transpired after receiving Mr. Provenzano’s telephone call.

- (a) I asked Mr. Provenzano whether there was a specific purchaser contemplated for the 384 property, to which he responded that he could not provide any such information. I understood from this that there was no pending offer to purchase the 384 Property.
- (b) Mr. Provenzano then asked me what amount I would accept in exchange for my interest in the property. I advised Mr. Provenzano that I would be prepared to accept \$600,000 for my interest in the property, to which Mr. Provenzano indicated that amount was “not available”.
- (c) In response, I indicated that I would agree to the sale of the property as long as I received the same amount as Mr. Poirier. In my mind, this reflected our equal ownership interests in the 384 Property.
- (d) Mr. Provenzano then referred to the 2015 appraisal of the 384 Property at \$840,000 and suggested that I agree to take the amount of \$450,000 (i.e., slightly more than half of that appraised value) in exchange for my interest in the 384 Property.
- (e) I responded to Mr. Provenzano that I was prepared to accept no less than \$450,000, as long as that was what Mr. Poirier was receiving in exchange for his interest in the Property. Mr. Provenzano then indicated that he would communicate that to Mr. Poirier.
- (f) I understood that Mr. Provenzano was acting as a go-between for Mr. Poirier and me for the purposes of the negotiations over the sale of the 384 Property, and as such was acting as our joint agent for the completion of any transaction for the sale of the 384 Property.

- (g) Mr. Provenzano did not during that call or otherwise suggest to me that he was not in a position to bind Mr. Poirier, indicate that he and/or Mr. Poirier had received any offers, firm or otherwise, for the 384 Property, or indicate that I should retain independent legal counsel or obtain real estate advice. He also did not indicate that Mr. Poirier had insisted on a condition that I would need to accept no more than \$450,000.00 for the sale of my share of the 384 Property.

[36] The evidence of Mr. Macgillivray is not contradicted by Mr. Provenzano except to the extent that he does not recall Mr. Macgillivray indicating that he was prepared to accept \$600,000 for his interest in the property.

The test for partnership

[37] Section 2 of the *Partnerships Act*, R.S.O. 1990, c. P.5 states, “[p]artnership is the relation that subsists between persons carrying on a business in common with a view to profit...”.

[38] Whether or not a partnership exists is a question of fact.

[39] There was no partnership agreement or partnership registration. Accordingly, it is necessary to look to the actual conduct and intention of the parties to consider this question. After doing so, I am of the opinion that Mr. Poirier and Mr. Macgillivray were in a partnership for both properties. I base my opinion on the following:

- (a) They shared equally in the capital, profits, losses, and expenses of the properties.
- (b) They both participated directly in the management of the properties, including securing and negotiating with tenants.
- (c) They jointly employed an office and building manager to handle routine property management issues and prepare monthly balance sheets for the properties,
- (d) They both regularly engaged the services of Mr. Provenzano’s company, Red River Holdings, to conduct maintenance and repairs at the two properties.
- (e) Until 2016, each at various times occupied units in one or the other of the Properties, and – until June 2016 – paid rent for their use of space.

[40] Quite apart from this factual background, there are admissions by Mr. Poirier that he and Mr. Macgillivray were partners.

[41] In the dispute filed by Mr. Poirier in connection with Mr. Macgillivray’s Small Claims Court action to recover rent from Mr. Poirier for his occupation of the 384 Property, Mr. Poirier pleaded that he “has been partners with the plaintiff and his wife Karyn Macgillivray since 1979 in two properties, 384 and 395 Fort William Road”. It is to be noted that the Dispute is dated June 20, 2018, some months after the events in question.

[42] In his letter of February 14, 2017, Mr. Macgillivray indicated to Mr. Poirier that if they could not agree on how to dispose of the Properties, they should “continue on as partners”.

[43] As previously mentioned, Mr. Poirier stated that Mr. Macgillivray was “his only partner left” in his letter of March 13, 2017.

[44] These are admissions against interest which carry significant weight.

[45] The Deputy Judge who conducted the Small Claims Court proceedings made no less than 11 references to the partnership relationship between Mr. Poirier and Mr. Macgillivray and used such factual findings to confirm the existence of a partnership relationship between them.

[46] There is one other piece of evidence that shows that even after the completion of the sale of the property and the distribution of the sale proceeds, Mr. Poirier expected Mr. Macgillivray to pay one-half of the partnership expenses. As a result of Mr. Poirier not paying any rent for his occupancy of the property, a debt in an amount of \$22,000 had accrued on a line of credit. After the property had sold, Mr. Poirier contacted Mr. Macgillivray to require him to pay one-half of the amount that was outstanding. This is yet further evidence that Mr. Poirier considered Mr. Macgillivray to be his partner following the sale of the property and accordingly was liable for one-half of this partnership loss.

[47] The only evidence in support of the suggestion that the partnership had ended prior to the events in question consists of the comment made by Mr. Poirier in his letter of March 13, 2017 “In his eyes the partnership dissolved nine months earlier”. No reference is made to any event that had in fact taken place nine months earlier and the statement is contradicted in the same letter where Mr. Poirier states that Mr. Macgillivray is his “only partner left”.

[48] I find as a fact that the property partnership between Mr. Poirier and Mr. Macgillivray in connection with the properties, and in particular, the 384 Property, was in existence at the time that the offers to purchase the 384 Property were made and, as I have previously set out, continued to exist after the sale of that property.

Partner fiduciary duties

[49] It is trite law that partners owe each other fiduciary duties. These include duties of loyalty, utmost good faith, and avoidance of conflict of duty and self-interest. This includes a duty of disclosure which provides that partners must disclose to one another “any facts which are material to the partnership and its business” and “refrain from concealment of such information”. A partner must never “take any profit clandestinely for himself” in any dealings relating to the partnership or its property: see *Rochweg v. Truster*, 2002 CanLII 41715 (ON CA), [2002] O.J. No. 1230.

[50] The evidence before me makes it clear that Mr. Poirier breached the fiduciary duties that he owed to his partner, Mr. Macgillivray. Mr. Poirier never made Mr. Macgillivray aware of the offers to purchase that were provided by the Tribal Council.

[51] The failure of Mr. Poirier to disclose the existence of the offers to purchase from the Tribal Council was part of a plan created by Mr. Poirier to enable him to receive \$800,000 from the sale proceeds despite the fact that Mr. Macgillivray was an equal owner and partner. During the course of submissions, Mr. Poirier indicated that he needed to be compensated because he had been burdened by the bulk of the management decisions involving the Property after Mr. Macgillivray vacated the premises. He went on to say that he liked having his office in the Property where he was not paying any rent and that he wanted to be compensated for the problems he would face once he had to relocate. It would be necessary for him to arrange for the other tenants to leave so that vacant possession of the property could be provided to the purchaser. He stated that he wanted to be compensated for his inconvenience. Mr. Poirier concluded by saying, “I deserved more and I got it. He (Mr. Macgillivray) was getting out clean and I wasn’t”.

[52] Mr. Poirier ended these comments by saying that no fiduciary duty was owed as each was bargaining for the value of their share. In support of this proposition, Mr. Poirier relied heavily on the decision in *Simkeslak Investments Ltd. v. Kolter Yonge LP Ltd.*, 2011 ONSC 7134, [2011] O.J. No. 5598 (“*Simkeslak*”), where the court concluded that while a fiduciary relationship previously existed between the partners, it ended when both parties started negotiations designed to maximize their own interests. The court stated:

[59] There is no dispute between the parties that as partners in Nastapoka, Kolter and the Class A Partners stood in a fiduciary relationship to each other... However, what is in dispute is whether their fiduciary duties ended when the Class A Partners made the Offer to sell their partnership interest to Kolter.

.....

[61] The fact that fiduciary duties exist in a particular category of relationship, such as a partnership, does not mean that the fiduciary duties inherent in that relationship will necessarily continue unaffected throughout the course of the parties’ relationship. It will be “the facts surrounding the relationship” and the expectation of the parties that will determine the existence and nature of any fiduciary duties. [Citations omitted.]

[53] Mr. Poirier submitted that “there is no substitute in this branch of the law for a meticulous examination of the facts” quoting Lord Scarman in *National Westminster Bank v. Morgan*, [1985] 1 All E.R. 821. Mr. Poirier then goes on to reference the exchange of correspondence between the parties as evidence that the partnership had been terminated and each of the parties were clearly acting on their own self interest with the knowledge that the partnership was coming to an end.

[54] The decision in *Simkeslak* does nothing more than confirm the principle that the court must consider the relationship that exists between the parties to determine what fiduciary duties existed between them: see *Simkeslak*, at para. 61.

[55] The facts in *Simkeslak* were distinguished in *Ioannidis v. Ioannidis*, 2022 ONSC 3942, at para. 27. Counsel for Mr. Macgillivray provided a very helpful chart outlining the factual matrix in *Simkeslak*, *Ioannidis* and this case:

<i>Simkeslak</i>	<i>Ioannidis</i>	<i>Mr. Macgillivray</i>
The Plaintiff was or must have been aware that each partner was acting in their own self interest and that there was no trust between them.	The Plaintiff trusted and was vulnerable to the defendant, and honestly believed that any wind-up of the business would only happen based on a joint decision.	Mr. Macgillivray continued to trust Mr. Poirier implicitly as his partner and did not believe he would take any steps to deprive him of his rights.
Both partners were separately negotiating a purchase and sale of their respective partnership interests to third parties.	The Plaintiff was not informed who the bidder for the property was, had no opportunity to have any discussions with them, and did not take any steps to find a purchaser on his own.	Mr. Macgillivray had not undertaken efforts to secure a purchaser for the 384 Property, and was never informed of the Offers to Purchase or the identity of the purchaser.
The Plaintiffs could divest their partnership interest at any time pursuant to the terms of the partnership agreement.	The Plaintiff had no power or authority to force or activate a sale of the property on his own; the partners were required to do it in concert	Mr. Macgillivray was a co-owner of the 384 Property, and could not divest his interest in the property without the agreement of Mr. Poirier.
The Plaintiffs engaged a prospective purchaser on their own, informing them of the price a purchaser may have been willing to pay.	The Plaintiff did not take any steps to find a purchaser, and therefore had no knowledge of the price a purchaser may have been willing to pay.	Mr. Macgillivray had no knowledge of what a third party may have been willing to pay, other than the 2015 Appraisal, which was significantly lower than the Signed Offer.
The partners behaved in a fashion analogous to the way the parties would act in the context of a triggered shotgun buy/sell provision.	The Plaintiff wished or believed that they were going to wind up the business of the firm, including the sale of any property, based on decisions made jointly.	Mr. Macgillivray understood that he and Mr. Poirier were maintaining the status quo of their partnership, and that any wind-up would be on mutually agreed terms.

[56] At the risk of repetition, it is clear that the significant facts in *Simkeslak* and this case are substantially different. Unlike *Simkeslak*, there is no suggestion that each partner was acting in their own self interest. Mr. Macgillivray was not separately negotiating a purchase and sale of his partnership interest. There was no partnership agreement in this case that would allow either partner to divest their partnership interest in accordance with the terms of such an agreement. It is clear that *Simkeslak* can be distinguished on the facts and accordingly is of no assistance to Mr. Poirier.

Survival of Fiduciary Duties

[57] The good faith duties that partners owe to each other continue upon the winding up of a partnership.

[58] Section 38 of the *Partnerships Act* deals with the obligations that exist following the dissolution of the partnership:

After the dissolution of a partnership, the authority of each partner to bind the firm and *the other rights and obligations of the partners continue despite the dissolution* so far as is necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution... [Emphasis added.]

[59] In *Ioannidis v. Ioannidis*, 2022 ONSC 3942, at para. 37, MacNeil J. found that “the fiduciary duties owed by the partners continued until the Partnership’s business was wound up and the Property was sold.”

[60] Even if I had not found that partnership duties were present as a result of the continued existence of the partnership, the statutory provision and the case law indicates that the other rights and obligations and the fiduciary duties owed by partners would have continued until the business was wound up and the Property was sold.

The Agreement

[61] Both Mr. Poirier and Mr. Provenzano rely upon the agreement as a full answer to the claims that Mr. Macgillivray has presented. After careful consideration, I am of the opinion that any reliance upon this agreement must fail.

[62] Having already determined that Mr. Poirier and Mr. Macgillivray were partners at all times during the events in question and having concluded that the ordinary partnership fiduciary duties continued, it was incumbent upon Mr. Poirier and his agent to disclose the Tribal Council offers to Mr. Macgillivray. Mr. Macgillivray’s unchallenged evidence is that if he had been made aware of the existence of such offers, he never would have signed the agreement or granted Mr. Poirier the Power of Attorney.

[63] The agreement was obtained as part of a plan by Mr. Poirier to utilize his agent, Mr. Provenzano, to deceive Mr. Macgillivray so that Mr. Poirier could be compensated for the reasons previously outlined.

[64] The following facts are not in dispute:

- Mr. Poirier knew that the offers from the Tribal Council were addressed to both he and Mr. Macgillivray;

- Mr. Poirier chose to involve Mr. Provenzano as part of his plan to receive an unequal share of the sale proceeds;
- It has been admitted that Mr. Provenzano was acting as Mr. Poirier's agent throughout;
- Mr. Provenzano knew that Mr. Poirier and Mr. Macgillivray were equal owners of the Property;
- Mr. Poirier knew that Mr. Provenzano would need to mislead Mr. Macgillivray in order to bring about his objective of receiving an unequal share;
- Mr. Macgillivray asked if there was an interested purchaser, but Mr. Provenzano declined to provide this information despite being well aware of the offers by the Tribal Council;
- Mr. Poirier instructed Mr. Provenzano to get Mr. Macgillivray to agree to accept the sum of \$450,000 and that in order to bring about this objective, Mr. Poirier told Mr. Provenzano to "run the show";
- Mr. Provenzano told Mr. Macgillivray that \$600,000 was not available in the full knowledge that this was not true;
- Mr. Macgillivray told Mr. Provenzano that he would only accept \$450,000 if Mr. Poirier was to receive the same amount. Mr. Provenzano did not tell Mr. Macgillivray that Mr. Poirier intended to take an unequal share;
- Mr. Provenzano agreed to communicate to Mr. Poirier that Mr. Macgillivray's agreement to take \$450,000 from the sale proceeds was conditional upon Mr. Poirier receiving the same amount.

[65] The uncontradicted evidence of Mr. Macgillivray is that he relied on these false representations to enter into the agreement.

[66] This factual background makes it abundantly clear that Mr. Macgillivray's signature to the agreement was obtained by deceit and false and misleading representations. Where an agreement has been obtained in such a manner, the deceived party has a right to the remedy of rescission: see *Deschenes v. Lalonde*, 2020 ONCA 304 at para. 29.

[67] Having been obtained by deceit, the agreement is of no assistance to the defendants.

Civil Conspiracy

[68] Mr. Poirier and Mr. Provenzano are jointly and severally liable to Mr. Macgillivray based upon unlawful means conspiracy. All of the requirements exist: see for example *6071376 Canada Inc. v. Khedmatgozar*, 2024 ONCA 248, at para. 6.

Concerted Action

[69] Mr. Poirier and Mr. Provenzano were both aware of the factual background. They were both aware of the intention to deceive Mr. Macgillivray in order to allow Mr. Poirier to receive an unequal share of the sale proceeds despite the fact that Mr. Poirier and Mr. Macgillivray were each equal owners of the property. They had a common design to act together as it has been acknowledged that Mr. Provenzano was acting as Mr. Poirier's agent.

Unlawful Act

[70] Actionable civil wrongs can constitute the unlawful act. The actionable civil wrong in this case is the breach of the fiduciary duties that have been extensively discussed.

[71] There is no difference between civil fraud and tort of deceit. The tort of fraudulent misrepresentation comes from the older cause of action called the tort of deceit. Today, the terms "tort of deceit", "tort of fraudulent misrepresentation" and "civil fraud" are used interchangeably by the courts. See *Halsbury's Laws of Canada* – "Misrepresentation and Fraud", (Toronto: LexisNexis Canada, 2023 Reissue). See also *Bozzo* (bankruptcy), Re, 2005 CanLII 17919 (ON SC), at para. 23.

[72] The tort of civil fraud and fraudulent misrepresentation refer to the same concept. In *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, the Supreme Court set out the legal test to establish the tort of civil fraud:

1. A false representation made by the defendant;
2. Some level of knowledge of the falsehood of the representation on the part of the defendant;
3. The false representation caused the plaintiff to act;
4. The plaintiff's actions resulted in a loss.

[73] The test has been met. Mr. Provenzano made a false representation when he told Mr. Macgillivray that \$600,000 was not available. Mr. Provenzano knew this not to be true.

[74] The uncontradicted evidence of Mr. Macgillivray is that he agreed to accept the sum of \$450,000, provided that Mr. Poirier was receiving the same amount. Mr. Poirier and Mr. Provenzano knew that this was not true. This false representation caused Mr. Macgillivray to enter into the agreement and to provide the Power of Attorney. In doing so, Mr. Macgillivray suffered a financial loss in an amount of approximately \$160,000.

Knowledge of Unlawfulness

[75] The uncontradicted evidence shows both Mr. Poirier and Mr. Provenzano knew of the facts that rendered their conduct unlawful.

Intention to Injur

[76] The uncontradicted evidence shows that the primary purpose of the conspiracy was to cause an unequal division of the sale proceeds and thereby cause economic harm to Mr. Macgillivray.

Resulting Damage

[77] Mr. Macgillivray has clearly established that the concerted unlawful acts factually and legally caused him measurable economic loss.

[78] I am of the opinion that in addition to liability being found based upon the breach of fiduciary duties owed by Mr. Poirier and Mr. Macgillivray to each other, Mr. Poirier and Mr. Provenzano are jointly and severally liable to Mr. Macgillivray based upon the finding of an unlawful means conspiracy.

Boomerang Judgment

[79] A boomerang judgment (the colloquial term for a reverse summary judgment) occurs when the party that brought a motion for summary judgment ends up with a summary judgment order against itself without a cross-motion from the respondent: see *1062484 Ontario Inc. v. McEnergy*, 2021 ONCA 129, at para. 36. In this case, I am satisfied that a boomerang judgment in favour of the plaintiff against both Mr. Poirier and Mr. Provenzano is warranted from the record in that it is in the interest of justice and proportionate to do so: see *Asghar v. Dial and Process Servers Inc.*, 2019 ONSC 4344, at para. 18.

[80] The responding plaintiff has asked for and met the requirements established to obtain a boomerang judgment for the reasons previously set out..

Damages

[81] In the factum filed on behalf of Mr. Macgillivray, it is submitted that the appropriate remedy for Mr. Poirier's serious breach of fiduciary duty is that he be ordered to disgorge all profits earned by him from the sale in an amount of \$769,147.02. Alternatively, Mr. Macgillivray seeks disgorgement of the lesser amount of \$319,147.02 representing the profit gained by Mr. Poirier above the \$450,000 received by Mr. Macgillivray. At a minimum, Mr. Macgillivray asks that Mr. Poirier account to Mr. Macgillivray for his excess profit and to equalize the proceeds of sale in the amount of \$160,000.

[82] At all times, Mr. Provenzano was acting as Mr. Poirier's agent. Mr. Provenzano is liable based upon his role in the deceit, negligent misrepresentation, and unlawful means conspiracy.

[83] In the statement of claim, general damages are claimed as well as punitive damages. At best, Mr. Macgillivray's submissions on damages can be described as cursory given the time constraints that existed at the end of the day. The fact of the matter is that the two defendants did not have an opportunity at all to respond to damages flowing from a boomerang judgment awarded against them.

[84] I will require written submissions from the plaintiff and the defendants in connection with the proper measure of damages and, if the parties cannot agree, the proper measure of costs.

[85] The plaintiff shall have 30 days from the release of this decision to deliver such submissions. The defendants shall have 30 days from the receipt of such submissions to respond. The plaintiff shall have 10 days to deliver any reply material if so advised.

Conclusion

[86] In accordance with the reasons provided, the motion for summary judgment by both defendants to have the plaintiff's action dismissed is hereby dismissed.

[87] The plaintiff is awarded a boomerang judgment in an amount to be determined after further submissions have been received.

[88] The plaintiff is awarded costs of these proceedings in an amount yet to be determined.

The Honourable Mr. Justice R. Dan Cornell

Released: July 8 2026

CITATION: Mr. Macgillivray v. Mr. Poirier, 2026 ONSC 3637
COURT FILE NO.: CV-19-255
DATE: 2026-07-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Roy D. Mr. Macgillivray

Plaintiff

– and –

Ronald J. Mr. Poirier and Tullio Mr. Provenzano

Defendants

DECISION ON MOTION

R. Dan Cornell

Released: July 08, 2026