

2014 ONSC 7184  
Ontario Superior Court of Justice

Mishev v. Shah

2014 CarswellOnt 17564, 2014 ONSC 7184, 247 A.C.W.S. (3d) 967

**Ivan Mishev, Margarita Platov, Borislav Mishev and Paul Kimber,  
Plaintiffs and Yogesh Shah, Rita Shah, Kemit Investments Ltd., 9099575  
Ontario Ltd., 2033447 Ontario Ltd., 401 Meadow Holdings Ltd., 1039350  
Ontario Ltd., JSM Group, YSM Group, Suresh Shah, Chiman Mistry,  
Surya Kant Shah, Kandavel Palantivel and Bharati Shah, Defendants**

Moore J.

Heard: November 12, 2013; November 13, 2013; November 14, 2013; November  
15, 2013; November 18, 2013; November 19, 2013; November 20, 2013;  
November 21, 2013; November 22, 2013; March 17, 2014; March 18, 2014

Judgment: December 15, 2014

Docket: CV-10-401105

Counsel: Robert A. Klotz, for Plaintiffs  
Richard J. Worsfold, for Defendants

***Moore J.:***

1 Ivan Mishev ("Ivan") is 68 years of age. He came to Canada in 1983 as an immigrant from Bulgaria. Ivan was a musician and held mechanical skills of a handyman. He worked as a labourer in construction and as a mover when he came to Canada and opened a garage on the Kingston Road property that he bought in 1988. He did auto body work there as well as home renovations and he made kitchen cabinets.

2 He brings this action together with his brother, Borislav ("Bobby"), his wife, Margarita Platov and Paul Kimber claiming damages from the named defendants arising from a series of mortgage and other financial transactions negotiated over the course of the decade before trial between Ivan and Yogesh Shah ("Yogesh").

3 Ivan casts himself as an un-sophisticated, gullible victim who, despite having received independent legal advice, was repeatedly taken advantage of. Ivan did not, however, live up to his own billing.

4 Perell J. fairly described the plaintiffs' claims saying: the plaintiffs make very serious allegations against the defendant, Yogesh Shah, who they allege is a coercive, Svengali-like fraudster, who has overstated the mortgage indebtedness and, in numerous ways, deceived the plaintiffs. <sup>1</sup>

5 At its essence, this is a credibility case; it turns on the credibility of the principal actors, Ivan and Yogesh. Ivan's credibility was tested at trial and found wanting. Lined up against the evidence heard from Yogesh, Bobby and Margarita, there were many and serious inconsistencies. Ivan was vague, argumentative and un-responsive in his answers. He strove to control questioning. He displayed a persistent tendency, despite warnings from his counsel and the court, to speak out while Yogesh was testifying expressing jeers, taunts and sighs of derision and contempt. His antics were disruptive and disrespectful of the witness, the process and the court; they reflected poorly upon Ivan and his case.

6 While Yogesh spoke quickly and was often difficult to understand, he comported himself with dignity and confidence throughout the trial and was a fine witness on his own behalf. He demonstrated clarity and consistency in his evidence and I credit his recollections of his dealings with Ivan. Where their evidence differs, I prefer Yogesh's testimony.

7 Although three plaintiffs are named, only Ivan pursued claims at trial. Ivan's claims were directed solely against Yogesh. As such, Bobby's claims and those of Margarita Platov and Paul Kimber are dismissed and Ivan's claims against defendants other than Yogesh are also dismissed.

8 It is important to note that Ivan has, to his detriment, ignored the crucial distinction between him and corporate entities that contracted with Yogesh in many of the transactions referred to in the evidence.

9 The evidence demonstrated that the property at 1386 Kingston Road in Toronto was owned by a corporation, not by Ivan. The car repair business operated from that property was likewise operated by a corporation, not by Ivan. So too was the property in Port Colborne purchased by a company, not by Ivan; indeed this latter company was one owned solely by Mr. Kimber. These companies have not brought suit but that affords Ivan no right to stand in their shoes and recover damages for them.

10 To the extent that Ivan can claim damages in his own right, his claims are based upon facts and circumstances that he fully knew more than 2 years before this action was started. In addition to the fact that many of the transactions Ivan asserts that he discussed with Yogesh he also had the benefit of legal advice upon, on one occasion, in 2006, Ivan spoke with his lawyer about suing Yogesh but he chose not to sue then or for four more years. Ivan has established no credible basis upon which to avoid the tolling of his claims by operation of the Limitations Act.<sup>2</sup>

11 Yogesh counterclaims<sup>3</sup> for the unpaid balance of principal and interest due under a mortgage loan. Trial Exhibit 12 contains the expert evidence of valuation of the loan as of November 12, 2013 and which I accept totals \$218,135. Ivan asserts that he made payments against the loan that are not reflected in the expert's report but I reject that position. Yogesh has accepted Ivan's claimed amounts paid on account of this loan to the date of commencement of the trial. I have no credible evidence of payments made thereafter. As such the counterclaim quantum is set at \$218,135 plus interest accruing between November 12, 2013 and the date of judgment.

12 Yogesh submits that Ivan's claims in the main action are brought solely in an effort to delay payment on the outstanding mortgage; while that may be so, having brought those claims forward, Ivan bears the onus of establishing his entitlement to recover upon them but he has failed to do so.

13 Quite apart from the corporate veil and *Limitations Act* defences established by the defendants, Ivan has not established a contractual or other basis for his personal claims for the value of car repairs, home maintenance or other services he insists he rendered for Yogesh over the years. And he has not demonstrated, on balance of probabilities, the cost of materials supplied or work done. Bobby, Margarita and Ivan testified about this matter but their evidence was inconsistent and lacked specificity as to the nature of the work they did, the time and place involved.

14 Neither Ivan nor Yogesh are land developers, commercial property builders or real estate entrepreneurs. Ivan testified that he created an opportunity for Yogesh to partner with him to develop properties on Kingston Road and that Yogesh agreed to fund the project. But it makes no sense to accept Ivan's evidence as reflecting reality. Absent appropriate education, training or experience in a project such as this, Ivan could not be expected to succeed and I must accept Yogesh's testimony that he did not in fact agree to fund the project.

15 In support of this claim, Ivan pointed to a September 10, 2003 letter that he produced shortly before trial. It is a letter written on the letterhead of GFPK Commodities S.A., apparently written (but not signed) by Jan Belica. Yogesh questions the authenticity and the truth of the contents of this letter.

16 The letter is not evidence. It is a hearsay document that fails to meet either of the twin tests for admissibility: necessity and reliability. Jan Belica did not testify. No reason for his absence was provided at trial. Ivan offered no affidavit evidence from Jan Belica or anyone else for GFPK Commodities S.A.. He made no application to have such evidence heard via electronic means from Switzerland. Necessity for receiving the letter as evidence was not established.

17 There is good reason to doubt the reliability of the letter and its contents as well. Ivan performed no due diligence on Mr. Belica or GFPK Commodities S.A. to confirm that they were able to meet the terms set out in the letter and/or see the project through to fruition. He was not aware, until confronted at trial with an internet search of the company, that it declares itself to be engaged in the wine and beer business. It declared no experience in commercial construction projects anywhere, let alone in Toronto. The reliability of this hearsay evidence must be tested by cross examination before it can be admitted.

18 Ivan has not established that the project was viable, that he personally lost an opportunity to profit from its completion or that Yogesh acted in any way so as to interfere with that opportunity. I accept the position advanced by Yogesh: if Ivan and Bobby had an interest in developing property on Kingston Road, they could have done so without Yogesh. Their failure to develop the property was caused by their lack of experience and the fact that they were chronically short of funds.

19 The corporate owner of the property at 1386 Kingston Road was in jeopardy of losing title due to non-payment of obligations on a second mortgage extending over six months by September of 2003. Yogesh agreed to purchase the property in trust to help prevent foreclosure. Ultimately, Ivan's company benefited to the tune of \$227,650 from the transaction, allowing it to retire the outstanding, over-due mortgage debt and retain \$90,000 (less legal fees).

20 The property was re-sold in January of 2006 and Ivan profited thereby by a further \$144,949.78.

21 Ivan also received \$44,783.24 from the November 2006 sale of property located at 1378 Kingston Road. He did not own that property but he assisted Yogesh's company to buy it in October 2003 and to sell it three years later.

22 In relation to the Port Colborne property, again leaving aside for the moment the corporate veil and Limitation Act issues, Ivan has not made out personal claims against Yogesh. I reject his revisionist view of the history surrounding his involvement in that property in favour of the evidence heard from Yogesh.

23 Yogesh sold that property to a numbered company following power of sale proceedings in 2005. Ivan has not established an ownership interest in the numbered company involved in that purchase. On his discovery, Ivan testified that the numbered company was owned by Paul Kimber. Corporate documents filed with the province confirm that.

24 The property was later sold for \$259,000. Ivan has not established what he invested in or recovered from the property with particularity sufficient to meet his onus of proof. Nor has Ivan established a basis in law to claim any losses related to the Port Colborne property from Yogesh.

25 Far from being an innocent dupe in dealings with Yogesh, Ivan has shown himself to be a careful and capable negotiator. He faced personal and corporate indebtedness in the years 2001 through 2006 that he was unable to manage from his income earning activities. He chose to borrow from and through Yogesh. Throughout, he knew what he was getting himself, his companies and his family into and he understood his rights and obligations.

26 He was not obliged to deal with Yogesh at any time, yet he did so willingly, repeatedly and without complaint. He had every opportunity in those years, and later, to institute legal proceedings but he chose not to. In my view, he held no belief that he had been mistreated by Yogesh. His explanation that he feared being thrown out of his home with his family onto the street is simply untenable. He well knew that legal action upon mortgage default takes time to process and is not an over-night event. Beyond that, I do not accept that Yogesh threatened him in those terms.

27 Furthermore, the mantra that Ivan repeated throughout the trial that he paid in cash and that Yogesh refused to provide him with receipts is simply incredible. Ivan could have demanded receipts but chose not to. He could have kept his own records to track payments he claims to have made but he chose not to. To say now that Yogesh promised an accounting or a reconciliation at some unspecified future date is just not credible.

28 I agree with Yogesh that Ivan's position cannot be reconciled with the correspondence Yogesh's lawyer sent Ivan in 2007 demanding payment of arrears owing then under the mortgage. Had Ivan felt that that he was entitled to a reconciliation, he could have protested or sued but he did not.

29 Ivan needed to pay the mortgage debt pursuant to the terms of the mortgage document or negotiate a different agreement with Yogesh in writing. His claim to relief based upon an unproven oral agreement for a future reconciliation fails.

30 In the result, all claims in the main action are dismissed with costs in amounts to be agreed upon or fixed following a process to be discussed before me on an attendance that counsel will arrange with the trial coordinator.

31 And, the plaintiffs by counterclaim shall have judgment against the defendants by counterclaim for \$218,154.52, plus mortgage interest accrued between November 12, 2014 and the date of judgment.

32 In the event that the parties cannot agree upon terms for the enforcement of the mortgage, they may arrange with the trial coordinator to attend before me to make submissions.

33 The plaintiffs by counterclaim shall recover their costs of the counterclaim in amounts to be agreed upon or fixed on the basis described above.

*Action dismissed; counterclaim granted.*

#### Footnotes

1 *Mishev v. Shah*, 2011 ONSC 1672 (CanLII), at para.5.

2 *Limitations Act*, 2002, S.O. 2002, c.24

3 The mortgage was originally granted by Yogesh, Rita and Bharati Shah in 2004. Bharati Shah later transferred his interest in the mortgage to Yogesh and Rita Shah. The mortgage encumbers 48 Brian Avenue and 285 Birchmount Road. Ivan was and remains a guarantor of the mortgage.