CITATION: Grabenheimer v.Lala, 2019 ONSC 2811
COURT FILE NO.: CV-18-593076
DATE: 20190503

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
STEVEN PAUL GRABENHEIMER	)	*Jamie Spotswood*
	)	for the Plaintiff
Plaintiff	)	
– and –	)	
	)	
PUNIT LALA a.k.a. PETER LALA a.k.a. PATRICK LANDO a.k.a. PAT LANDO AND LEADGENCY INC.	)	No one appearing for the Defendants
	)	
Defendants	)	
	)	**HEARD:** January 8, 2019

FAVREAU J.:

Introduction

[1] The plaintiff, Paul Grabenheimer, seeks default judgment against the defendants Punit Lala a.k.a. Peter Lala a.k.a. Patrick Lando a.k.a. Pat Lando ("Mr. Lala") and Leadgency Inc ("Leadgency").

[2] Mr. Grabenheimer claims that Mr. Lala misappropriated funds from a partnership they both founded, and that Mr. Lala improperly took business away from the partnership through Leadgency.

[3] For the reasons that follow, I find that Mr. Grabenheimer is entitled to default judgment against Mr. Lala in the amount of $317,720.35, which includes amounts for aggravated and punitive damages. However, I find that Mr. Grabenheimer has not established that he is entitled to an accounting or damages from Leadgency.

Background

[4] On a motion for default judgment, the facts pleaded in the statement of claim are deemed to be true. In this case, in addition to the statement of claim, Mr. Grabenheimer has sworn an

affidavit setting out the circumstances leading to his claim. In combination, the statement of claim and Mr. Grabenheimer's affidavit establish the following facts.

[5] On June 21, 2012, Mr. Grabenheimer and Mr. Lala formed a general partnership under the business name The Lead Boutique. The partnership was in the business of advertising and marketing.

[6] The partners agreed that they would share equally in the profits of the business.

[7] As part of his responsibilities in the partnership, Mr. Lala performed a number of financial functions, such as managing the payroll, paying the partnership's expenses and preparing financial reports. As such, Mr. Lala had access to the partnership's bank account at TD Canada Trust.

[8] Between 2012 and 2015, Mr. Lala represented to Mr. Grabenheimer that the partnership's profits were poor and that it had generated the following revenue in each year:

a. Revenue of $21,804.37 in 2012;

b. Revenue of $44,027.64 in 2013;

c. Revenue of $66,867.10 in 2014; and

d. Loss of $1,536.35 in 2014.

[9] During this time period, Mr. Grabenheimer received $40,228.00 as compensation for his share of the partnership's profits. Mr. Grabenheimer's evidence is that he believed this was an accurate amount given Mr. Lala's representations about the company's revenues.

[10] In October 2016, Mr. Grabenheimer started noticing that the partnership was generating significant revenue that was not reflected in the business's bank account. He then reviewed the bank account, and discovered that $751,659.88 had been deposited between 2012 and 2016, from which Mr. Lala had diverted $460,818.68 to himself through deposits to personal bank accounts, payments to credit cards, ATM withdrawals and e-transfers.

[11] After making this discovery, Mr. Grabenheimer confronted Mr. Lala, who claimed that the amounts were repayments for loans he had made to the partnership. However, Mr. Lala refused to provide any documents to Mr. Granbeheimer in support of this position.

[12] After this confrontation, Mr. Lala stopped performing his responsibilities in the partnership. He failed to pay salaries to employees and rent for the business premises. He also changed the passwords to some of the partnership's accounting programs and removed some of the partnership's furniture and computers.

[13] Mr. Lala refused to agree to a dissolution of the partnership, after which Mr. Grabenheimer unilaterally dissolved the partnership on December 9, 2016.

[14] Mr. Grabenheimer claims that, in April 2017, he discovered that Mr. Lala had established Leadgency as a competitor to The Lead Boutique.

[15] Mr. Grabenheimer also claims that, since he discovered Mr. Lala's financial improprieties, he has developed anxiety and depression, for which he requires medication.

History of proceedings

[16] The statement of claim was issued on March 1, 2018.

[17] The plaintiff evidently had difficulties serving the claim on the defendants. On July 20, 2018, Master Abrams made an order validating service, requiring that the order be served on the defendants by mail and email, and setting August 31, 2018, as the deadline for service of a statement of defence.

[18] The defendants did not deliver a statement of defence, and were noted in default on September 14, 2018.

[19] The plaintiff served the defendants with notice of this motion. In addition, a few weeks before the date of the motion, the plaintiff's lawyer sent a letter to the defendants confirming the date on which the motion was proceeding.

[20] The defendants did not appear on the motion.

Position of the plaintiff

[21] On this motion, the plaintiff seeks the following relief:

a. Payment of $475,668.68, representing the $460,818.68 Mr. Lala took from the partnership's account plus $14,850 for the value of the assets Mr. Lala removed from the partnership after Mr. Grabenheimer confronted him;

b. An accounting of all profits made by Leadgency, and payment of half of those profits to the plaintiff;

c. General damages for pain and suffering in the amount of $40,000;

d. Aggravated damages in the amount of $50,000; and

e. Punitive damages in the amount of $100,000.

[22] In support of these claims, the plaintiff advances the following causes of action:

a. Breach of fiduciary duty;

b. Breach of contract;

c. Wrongful interference with economic relations;

d. Conversion;

e. Unjust enrichment;

f. Fraudulent and/or negligent misrepresentation;

g. Breach of the *Partnership Act*, R.S.O. 1990, c. P.5; and

h. Intentional infliction of mental suffering.

[23] In support of the claim for the payment of $475,668.68, the plaintiff purports to elect the waiver of tort remedy.

Test for default judgment

[24] While Rule 19.02(3) of the Rules of Civil Procedure does not require that defendants noted in default be given notice of a motion for default judgment, the case law makes clear that it is a best practice to do so: see *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 (Sup. Ct.), at para.10, and *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083 (Sup. Ct.), at para. 16. In this case, as reviewed above, the defendants were served with the notice of motion and I am therefore satisfied that they have had notice of this motion.

[25] When a defendant is noted in default under Rule 19.01 of the Rules of Civil Procedure, Rule 19.02(1) provides that the party "is deemed to admit the truth of all allegations of fact made in the statement of claim". Under Rule 19.05(1), where the claim is for unliquidated damages and the motion for default judgment is brought before a judge, the motion is to be supported by an affidavit. Rule 19.06 requires the judge to inquire into whether the deemed factual admissions resulting from the default support a judgment on liability as well as damages. As held by Himel J. in *Fuda v. Conn*, [2009] O.J. 188 (Sup. Ct.) at para 16:

> [A]lthough the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and damages. If the court finds the evidence to be lacking in credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of fault.

Analysis

[26] While the plaintiff purports to seek all relief against both defendants, in my view, it is clear that the plaintiff does not have a claim against Leadgency for any relief other than the claim for accounting and disgorgement of profits. The allegation against Mr. Lala is that he misappropriated funds from the partnership while the allegation against Leadgency is that,

through Mr. Lala, it improperly lured business away from the partnership. Accordingly, I start with an analysis of the claims against Mr. Lala that arise from the alleged misappropriation, and then deal with the claim against both Mr. Lala and Leadgency for an accounting and disgorgement of profits.

[27] Starting with the claims that arise from allegations that Mr. Lala misappropriated funds from the partnership, based on the record before me, there is no doubt that Mr. Lala took funds from the partnership's bank account for his own benefit. The real issue with respect to this aspect of the claim are the damages to which Mr. Grabenheimer is entitled.

[28] I address each claim for damages separately below.

Claim for $475,668.68

[29] As indicated above, Mr. Grabenheimer seeks to recover $475,668.68 from Mr. Lala, which represents the $460,818.69 Mr. Lala took from the partnership's bank account plus $14,850.00 for the value of the assets taken from the partnership by Mr. Lala. As recognized by Mr. Grabenheimer, this would be a windfall because it is more than the share of profits he would have received if the partnership's profits had been shared equally. In the alternative, Mr. Grabenheimer seeks his portion of the profits taken by Mr. Lala.

[30] In support of his position for payment of the full amount taken by Mr. Lala, Mr. Grabenheimer relies on the waiver of tort remedy.

[31] While the Supreme Court of Canada and the Court of Appeal for Ontario have recognized the existence of waiver of tort in Canada, Mr. Grabenheimer's lawyer did not point to any cases in which a plaintiff has in fact been awarded damages on this basis in Ontario or elsewhere in Canada, nor have I been able to identify any such cases. In fact, while the courts consistently recognize that waiver of tort can be pleaded, there remains some uncertainty as to whether waiver of tort is a standalone cause of action or a parasitic remedy, and what a plaintiff must prove in order to receive waiver of tort damages.

[32] In *Pro-Sys Consultants Limited v. Microsoft Corporation*, 2013 SCC 57, the Supreme Court considered whether waiver of tort was a valid cause of action in the context of an appeal from a class action certification decision. At para. 93, the Court described the cause of action as follows:

> As an alternative to the causes of action in tort, *Pro-Sys* waives the tort and seeks to recover the unjust enrichment accruing to Microsoft. Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus, at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the

> theory that "in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that "it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

[33] As part of its analysis, at para. 97, the Court noted that the issue of whether the underlying tort must be proven remains an outstanding issue. Therefore, the Supreme Court recognized that waiver of tort may be available as a remedy in Canada, but it did not fully address the requirements for making out such a claim.

[34] In *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 37445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980, at para. 63, the Court of Appeal for Ontario held that waiver of tort may allow a plaintiff to claim disgorgement damages in the context of a claim for conversion. The Court also held that a plaintiff must decide between compensatory damages and disgorgement damages, finding at para. 65 that the trial judge had erred in awarding both types of damages and ultimately finding that disgorgement damages were not appropriate in that case.

[35] Accordingly, while it appears that an award of damages based on waiver of tort may be available in Ontario, awarding damages on such a basis in this case would be novel. I am reluctant to make such an award given that the argument before me on this issue was not fully developed and that I did not have the benefit of an adverse position from the defendants. More importantly, I am not persuaded that waiver of tort would entitle the plaintiff to the full amount claimed. In *Pro-Sys*, as referred to above, the Supreme Court stated that waiver of tort damages are analogous to damages for unjust enrichment, which are meant to deprive a defendant of any benefits accrued as a result of wrongful conduct. In this case, Mr. Lala's wrongful conduct led him to take more than his share of the profits. However, awarding the full amount of funds taken by Mr. Lala to Mr. Grabenheimer would have the effect of depriving Mr. Lala of his share of the profits while overcompensating Mr. Grabenheimer.

[36] In addition to waiver of tort, I have considered whether I can award the damages sought by Mr. Grabenheimer on the basis of his claim for breach of fiduciary duty.

[37] In *Rochwerg v. Truster*, [2002] O.J. No. 1230 (C.A.), at paras. 36-37, the Court of Appeal for Ontario held that partners owe each other a fiduciary duty, which includes a requirement that they not misuse the assets of the partnership:

> 36 It has long been established that partners owe a fiduciary duty to each other, and that equitable principles hold fiduciaries to a strict standard of conduct, encompassing duties of loyalty, utmost good faith and avoidance of conflict of duty and self-interest. These are well recognized, core principles of the law of partnership.

> 37 In the early case of *Dean v. MacDowell* (1876), 8 Ch. D. 345 (C.A.) James, L.J. described the operative principles as follows (at pp. 350-351):
>
> > [I]t is quite clear also that in partnership matters there must be the utmost good faith, and that there is to that extent a fiduciary relation between the parties. That is to say, one partner must not directly or indirectly use the partnership assets for his own private benefit. He must not, in anything connected with the partnership, take any profit clandestinely for himself, nor must he carry on the business of the partnership or any business similar to the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership.

[38] In this case, there is no doubt that Mr. Lala owed a fiduciary duty to Mr. Grabenheimer, and that he breached that fiduciary duty by misappropriating the partnership's profits. By doing so, he preferred his financial interests over the interests of the partnership, and his actions ultimately led to the dissolution of the partnership and to significant losses to Mr. Grabenheimer. The issue then becomes whether the breach of fiduciary claim can form the basis for awarding the damages Mr. Grabenheimer seeks.

[39] In circumstances where there has been a breach of fiduciary duty, the court has the authority to order an equitable remedy. In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, at para. 74, the Supreme Court emphasized that equitable remedies are at the discretion of the court. In the context of that case, at para. 75, the Court stated that disgorgement of profit as a remedy can serve two equitable purposes, namely a prophylactic purpose and a restitutionary purpose. In the context of discussing the prophylactic purpose of equitable remedies, at para. 77, the Court recognized that disgorgement may at times lead to a windfall but that the remedy may nevertheless be appropriate:

> … Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[40] As a matter of first impression, the principles in *Strother* suggest that I could order Mr. Lala to pay the full amount he diverted to himself to Mr. Grabenheimer. However, there is a distinction in the case law between the profits to which the misbehaving partner is entitled to and those which he or she misappropriated. In *Olson v. Gullo*, [1994] O.J. No. 587 (C.A.), the Court of Appeal dealt with precisely this issue and found that, in the context of a partnership, the partner who breached his fiduciary duties should not be deprived of his share of the profits because there is no connection between the breach and the profits to which he would have been entitled:

> 36 I have no doubt that stripping the wrongdoing partner of the whole of the profit, including his or her own share in it, is a strong disincentive to conduct

> which breaches the fiduciary obligation. Further, as a host of equity decisions have shown for at least two centuries, the fact that this would result in a windfall gain to the plaintiff cannot, in itself, be a valid objection to it.
>
> 37 I do not, however, think that it can accurately be said that the defaulting partner does profit from his wrong when he receives his pre-ordained share of the profit. With respect to this share, the partner's conduct in the impugned transaction does not involve any breach of duty. Under the terms of the relationship, with respect to this share, it was expected that the partner would act in his own interest. To the extent that there is a dilemma, I resolve the issue, in accordance with what I consider to be the more appropriate principles and authorities, against the forfeiture of the wrongdoing partner's interest in the profit.

[41] Accordingly, I find that Mr. Grabenheimer is only entitled to his share of the profits misappropriated by Mr. Lala. As addressed below, the seriousness of Mr. Lala's misconduct can nevertheless be addressed through an award of aggravated and punitive damages.

[42] In terms of the quantum of damages to which Mr. Grabenheimer is entitled, the evidence is that the partners agreed to share the profits equally. Mr. Grabenheimer claims that he only received $40,228.00 of the partnership's revenue whereas Mr. Lala took $460,818.68 out of the partnership. Therefore, awarding damages on the basis that Mr. Grabenheimer is entitled to an equal share leads to the following calculation:

$460,818.68 minus $40,228.00 =	$420,580.68[1]
$420,580.68 divided by 2 =	$210,295.35

[43] In addition, based on the same principles, I find that Mr. Grabenheimer is entitled to half of the value of the assets removed by Mr. Lala, which leads to the following calculation:

$14,850.00 divided by 2 = $7,425

[44] Accordingly, Mr. Grabenheimer is entitled to damages of $217,720.35 in relation to the claim for breach of fiduciary duty. Given that the claims for breach of contract, conversion, unjust enrichment, intentional interference with economic relations and negligent/fraudulent misrepresentation all relate to the same conduct and damages sought, in my view it is not necessary to separately assess whether these causes of action are made out.

[1] I have deducted $40,228.00 to reflect that Mr. Grabenheimer has already received this amount and Mr. Lala is therefore entitled to receive credit for an equivalent amount.

Claim for intentional infliction of mental distress

[45] As indicated above, Mr. Grabenheimer seeks damages in the amount of $40,000 for mental distress. In making this claim, he relies on the tort of intentional infliction of mental distress.

[46] In order to establish a claim for intentional infliction of mental distress, the plaintiff must prove that the defendant's conduct was 1) flagrant and outrageous, 2) calculated to harm the plaintiff, and 3) caused the plaintiff to suffer a visible and provable illness: *Strudwick v. Allied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, at para. 78.

[47] In this case, while Mr. Grabenheimer has put forward some evidence that Mr. Lala's actions have caused him to develop depression and anxiety for which he requires medical treatment, I am not satisfied that he has proven the second element of the cause of action.

[48] The cases put forward by Mr. Grabenheimer's lawyer where courts have awarded damages for intentional infliction of mental distress involved situations where the plaintiff was harassed or purposefully humiliated, and they have generally arisen in the employment context: see, for example, *Strudwick; Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.); and *Fitzpatrick v. Orwin*, 2012 ONSC 3492 (Sup. Ct.).

[49] In this case, while there is no doubt that Mr. Lala's conduct was flagrant and outrageous, there is no evidence that it was calculated to harm Mr. Grabenheimer. Rather, Mr. Lala's behaviour was surreptitious and directed at benefitting himself. Many cases of fraud will lead to mental distress but, in my view, based on the existing case law in this area, the tort of intentional infliction of mental distress is not meant to capture the emotional collateral effects of a defendant's bad behaviour, but rather is aimed at those cases where the defendant purposefully seeks to harm the plaintiff emotionally through flagrant and outrageous behaviour. There is no evidence to support a finding that this is what occurred here.

[50] However, again, as reviewed below, Mr. Lala's conduct and its effect on Mr. Grabenheimer may well justify aggravated and punitive damages.

[51] Accordingly, I do not find that this is an appropriate case for damages based on the tort of intentional infliction of emotional distress.

Claim for aggravated damages

[52] Mr. Grabenheimer seeks aggravated damages in the amount of $50,000.

[53] In *Nissen v. Durham Regional Police Services Board*, 2017 ONCA 10, at para. 55, the Court of Appeal for Ontario described the purpose of aggravated damages as follows:

> … Aggravated damages aim not at punishing wrongful behaviour, but at compensating the injured plaintiff for the full extent of the plaintiff's loss. Very often, aggravation of the plaintiff's loss will be caused by outrageous or

> reprehensible conduct, as it is that quality of the defendant's conduct that causes additional distress or humiliation that calls for compensation not captured by a purely conventional award. I am not persuaded, however, that a trial judge can only take aggravating features into account where there has been outrageous or reprehensible conduct…

[54] Unlike the claim for intentional infliction of emotional distress, the plaintiff is not required to prove that Mr. Lala intended to harm him. In my view, this is an appropriate case for aggravated damages given Mr. Lala's behaviour and its serious financial and emotion impact on Mr. Grabenheimer. Over the course of four years, Mr. Lala consistently misrepresented the partnership's income, while taking money out of the partnership for his own benefit. Once Mr. Lala confronted him, Mr. Lala made things worse by not paying employees or expenses, and by taking some of the partnership's furniture and equipment. This had serious financial consequences for Mr. Grabenheimer, who had to dissolve the partnership and found himself personally obligated to pay many of the partnership's outstanding expenses. In addition, there is evidence that he has suffered from anxiety and depression as a result of Mr. Lala's conduct.

[55] Accordingly, I find that Mr. Grabenheimer is entitled to aggravated damages. He seeks $50,000, which I find to be reasonable in the circumstances.

Claim for punitive damages

[56] Mr. Grabenheimer seeks $100,000 in punitive damages.

[57] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at paras. 36-37, the Supreme Court explained the purpose of punitive damages as follows:

> 36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).
>
> 37 Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law…

[58] At para. 72, in *Whiten*, the Court also stated that "it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others".

[59] In my view, this is an appropriate case for punitive damages. As reviewed above, Mr. Lala's misconduct was deliberate and outrageous. While waiver of tort or breach of fiduciary damages may not be available to deprive Mr. Lala of his share of the partnership's profits, requiring Mr. Lala to pay punitive damages is a way of ensuring that the consequences of Mr. Lala's misconduct are more significant than simply having to pay back the share of the partnership's profits to which he was not entitled.

[60] In terms of the quantum of punitive damages, in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, at para. 200, the Court of Appeal described the principles underlying the quantification of punitive damages as follows:

> I would stress, however, the following principles that guide the quantification of punitive damages, as outlined in *Whiten*, at para. 94: (1) punitive damages must be assessed "in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant ... having regard to any other fines or penalties suffered by the defendant for the misconduct in question"; and (2) where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence of the defendant and others from similar misconduct in the future, and the community's collective condemnation (denunciation) of what has occurred, punitive damages will be given "in an amount that is no greater than necessary to rationally accomplish" these objectives. As the *Whiten* court indicated, at para. 95, underlying these principles is "the need to emphasize the nature, scope and exceptional nature" of the punitive damages remedy, and "fairness to both sides".

[61] Having regard to these objectives, and other cases in which punitive damages have been awarded, in my view, punitive damages in the amount of $50,000 are appropriate in this case. In combination with the compensatory damages of $217,720.35 and the aggravated damages of $50,000, the total damages awarded will achieve the objectives of condemnation, retribution and deterrence.

Claim for accounting and disgorgement of profits against Leadgency

[62] Mr. Grabenheimer relies on section 30 of the *Partnerships Act*, R.S.O. 1990, c. P.5, in support of his claim for an accounting and payment of half of Leadgency's profits.

[63] Section 30 of the *Partnerships Act* provides as follows:

> If a partner, without the consent of the other parties, carries on a business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by the partner in that business.

[64] In support of this claim, Mr. Grabenheimer has put forward evidence that Mr. Lala is the sole director and officer of Leadgency. He has also put forward some evidence that Mr. Lala represents Leadgency as "a business formerly known as The Lead Boutique". However, the date

of incorporation is December 21, 2016, which is around the time when Mr. Grabenheimer dissolved the partnership. Therefore, based on this evidence, I am not satisfied that Mr. Lala carried on a competing business at the same time as The Lead Boutique was operating, which appears to be what is required by the language in section 30 of the *Partnership Act*. In addition, I was not provided with the partnership agreement or any authorities that would support a finding that carrying on a new business after the dissolution of the partnership agreement amounts to a breach of section 30 of the *Partnerships Act*.

[65] Accordingly, the claim for an accounting and payment of profits from Leadgency is dismissed.

Costs

[66] The plaintiff seeks costs on a full indemnity basis in the amount of $15,163.67.

[67] In making a claim for full indemnity costs, the plaintiff relies on the decision in *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766, where the Court of Appeal upheld an award of costs on a full indemnity scale in a case involving misappropriated funds. In that case, the judge below awarded full indemnity costs. In upholding the decision, the Court of Appeal noted as follows at para. 8:

> While we would not interfere with the costs award made by the motion judge, we would express a cautionary note on this issue. In this case, the motion judge awarded costs on a full indemnity basis. There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances -- where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

[68] In my view, Mr. Lala's conduct is clearly reprehensible and does warrant an award of costs on an elevated scale. However, heeding the Court of Appeal's note of caution, I find that costs on a substantial indemnity scale are sufficient.

[69] Based on Mr. Grabenheimer's bill of costs, his substantial indemnity costs are $13,845.67. I accept that this amount is reasonable given the nature and circumstances of the case.

Conclusion

[70] In conclusion, default judgment is granted against Mr. Lala, but not against Leadgency.

[71] Mr. Lala is to pay damages to Mr. Grabenheimer in the total amount of $317,720.35, representing compensatory damages of $217,720.35, aggravated damages of $50,000, and punitive damages of $50,000. In addition, Mr. Lala is to pay Mr. Grabenhemeir's costs in the amount of $13,845.67 inclusive of disbursements and HST.

[72] The claim against Leadgency is dismissed.

FAVREAU J.

RELEASED: May 3, 2019

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SUPERIOR COURT OF JUSTICE

B E T W E E N :

STEVEN PAUL GRABENHEIMER

Plaintiff

– and –

PUNIT LALA a.k.a. PETER LALA a.k.a. PATRICK LANDO a.k.a. PAT LANDO AND LEADGENCY INC.

Defendants

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: May 3, 2019