Court File No. 17-63599

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARINKO VRBANIC

Plaintiff

- and -

STEVENS ET AL

Defendants

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE A. SKARICA
on January 31, 2019, at HAMILTON, Ontario

APPEARANCES:

J. B. Eakins — Counsel for the Plaintiff

B. Singh Bal — Counsel for Defendants

THURSDAY, JANUARY 31, 2019

R E A S O N S F O R J U D G M E N T

SKARICA, J. (Orally):

In the matter of Marinko Vrbanic and John Stevens, Jacqueline Kay Stevens, Burloak Auto Electric Limited, and Marmac CNC Machining Limited.

Overview

The plaintiff, Marinko Vrbanic, who I will refer to as "Vrbanic", was originally the sole shareholder, officer and director of the defendant Marmac CNC Machining Limited. I will refer to it as "Marmac". Marmac was a machining company. In the years 2012 through 2015, Marmac sales declined dramatically from a high of approximately $1.2 million in 2012 to a low of approximately $450,000 in 2015. In the summer of 2015, the defendants, John and Jacqueline Stevens agreed that they and their company, Burloak Auto Electric Limited, I will refer to it as "Burloak", would take over the operation of struggling Marmac. The arrangement was not successful. Vrbanic left or was dismissed from Marmac. Marmac's assets were sold and by 2018, Marmac had no revenues at all. Vrbanic sues the defendants for a variety of damages arising from their business arrangements.

Issue

Is Vrbanic entitled to summary judgment for damages

arising from (a) breach of contract; (b) anticipatory breach of contract; (c) value of share redemptions; (d) constructive dismissal or unlawful dismissal; (e) unpaid mileage and auto expenses

(f) breach of indemnity regarding CIBC and TD Visa debts; (g) repayment of an alleged $25,000 loan to John Stevens, made by Vrbanic; and (h) interest.

Facts

The plaintiff, Vrbanic was the sole shareholder, officer, and director of Marmac, originally. From 2012 to 2015, Marmac's gross sales were as follows: 2012, approximately $1.2 million; 2013, $774,000 approximately; 2014, approximately $465,000; 2015, approximately $452,000.

Vrbanic says in the summer of 2015, John Stevens, who I will refer to as "Stevens", the president of Burloak, a customer of Marmac, approached Vrbanic, regarding Stevens purchasing shares in Marmac. Typical in this dispute, Stevens disagrees with this version of events. Stevens says Vrbanic advised that Marmac had one client and that gross sales were steadily declining from 2010 to 2014.

According to Stevens, Vrbanic told Stevens, Vrbanic took no salary or wages from Marmac in 2014. Vrbanic was living on a $2000 net income from a Stoney Creek property. Vrbanic advised he was involved in a multi-year litigation with his ex-

wife and additional salary would result in him, Vrbanic, paying her more money. Vrbanic advised that he wanted to shelter as much income and potential income from exposure to his ex-wife. According to Stevens, in February, 2017, Vrbanic advised that his ex-wife had won the lawsuit and according to Stevens, Marmac received a notice of garnishment, which in fact, is a support deduction order from FRO, the Family Responsibility Office.

According to Stevens, Vrbanic, in July 2015, approached Robert Bell, who I will refer to as "Bell", and inquired whether they would be interested in purchasing Marmac. Vrbanic advised Bell and Stevens that Vrbanic was tired of operating Marmac by himself.

During the period 2013 to 2016, according to Vrbanic's cross-examination conducted on August 8, 2018, Vrbanic was in mediation with his ex-wife for the period 2013 until October 2016. A final order for child support was made in October 2016, according to Vrbanic's testimony. It was agreed that his wife would go through FRO, and this took months. In February 2017, Marmac received a support deduction order from FRO. This had the effect of cutting Vrbanic's income in half.

On September 12, 2015, Vrbanic and Stevens entered into a memorandum of agreement; I will refer to it as the "first agreement", that, for consideration of $187,000 plus 15 per cent of the shares of

Burloak, Vrbanic would sell to Stevens, 85 per cent of the shares of Marmac. Vrbanic was required to pay back, in full, prior to December 23rd, 2015, $62,000. An 84-month pay schedule was agreed to, which allowed for Vrbanic to receive $4800 in 2016; $6,000 in 2017; $7200 in 2018; $10,800 in 2019; $18,000 in 2020; $24,000 in 2021, and finally $54,200 in 2022. This pay schedule pays very little for the first three years; that is 2016 through 2018; a total of $18,000, but pays $96,000 in the last three years. This schedule is consistent with Stevens' claim that Vrbanic told Stevens that Vrbanic wanted to shelter as much income and potential income from exposure to his ex-wife.

A second agreement was signed on November 26, 2015. This agreement superseded the first agreement; I will refer to as the "second agreement". It was agreed that Marmac was valued at $185,000. It retained the arrangement whereby Vrbanic was to provide 85 per cent of Marmac's shares to the defendants. Vrbanic was still to receive 15 per cent of Burloak's shares. It was acknowledged that Stevens paid over to Vrbanic, $70,621.49 on or about November 2015. After considering the value of the Burloak shares, a net balance of $31,128.51 was still due to Vrbanic. This was to be paid in cash, over 60 months at 7.25 per cent interest, with the first payment of $706.87 commencing December 15, 2015. $1400 was paid to Vrbanic on February 29, 2016 and a further $8,000 was paid on

March 18th, 2016, to Vrbanic. Stevens claims that these payments were made in furtherance of the second agreement.

As indicated earlier, Vrbanic admits that in October 2016, Vrbanic, by way of a final Family Court order, was ordered to pay child support. Vrbanic admits in his cross-examination, that when Marmac received the support deduction order in February 2017, his income was cut in half. His child support was $1,355 per month, which, according to Vrbanic is, quote, "basically half of my pay check", unquote.

Also, on October 12th, 2016, a third agreement was entered into; I refer to as the "Jazvac agreement". According to Stevens, Vrbanic had stated he needed legal clarification regarding his employment and income. The Jazvac agreement was signed late at night with Mr. Jazvac, Vrbanic's prior solicitor, now acting for Burloak. The Jazvac agreement acknowledged the second agreement and maintained the same share split arrangement. Marmac was now valued at $400,000. Burloak was valued at $800,000. These new valuations meant that $149,378.51 was now owing to Vrbanic, instead of the much lower amount of $31,000, approximately, owing after the signing of the second agreement in November 2015. The $149,378.51 was to be paid in 10 equal instalments on the first days of November and May, commencing November 1st, 2016.

The Jazvac agreement stipulates that Burloak was to assume the CIBC and TD Visa debts of Marmac. The Jazvac agreement provided that Vrbanic was to continue to be employed as president at a base salary of $45,000 per annum, as president of Marmac. Vrbanic was to work from 7:00 a.m. to 3:30 p.m., Monday to Friday and was to receive a mileage reimbursement.

No payments were ever made regarding the $149,378.51 pursuant to the Jazvac agreement, which was owing to Vrbanic as stipulated by the Jazvac agreement. Further, Vrbanic's employment ceased in April of 2017, with the record of employment, the ROE, filled out by Jackie Stevens, indicating that he was dismissed; that is, Vrbanic was dismissed.

The Law. Summary Judgment

The leading case is the well-known *Hryniak v. Mauldin*, [2014] SCC 7. The Court stated at Paragraphs [57] through [60] and [66] as follows: And the cases I am referring to are all paragraphs that I have considered in reaching my conclusions in judgment. [As read]

> [57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she; in this case, he, can fairly resolve the dispute. A documentary record, particularly when supplemented by the

new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in various rules in Rules 20 can provide an equally valid, if less extensive, manner of fact finding.

[60] The quote, "interest of justice", unquote, inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before him or her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment

> process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

The Ontario Court of Appeal in *Baywood Homes Partnership v. Haditaghi*, spelled H-A-D-I-T-A-G-H-I, reported at [2014] OJ No 2745, cautioned as follows, at Paragraphs [44] and [45]: [As read]

> [44] What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability

> especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.
> [45] Judges are aware that the process of preparing summary judgment motion materials and cross-examinations, with or without a mini-trial, will not necessarily provide savings over an ordinary discovery and trial process, and might not, quote, "serve the goals of timeliness, affordability and proportionality". Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly.

In *Butera v. Chown, Cairns LLP*, reported at [2017] ONCA 783, the Court of Appeal further cautioned at Paragraph [34]: [As read]

> [34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

In *Nicolaou v. Sobhani*, reported at [2017] ONSC 7602, Justice Charney indicated as follows and provided useful guidelines for a summary judgment judge to follow. [As read]

> [20] To defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations or denials of the party's pleadings, but must set out -- in affidavit material or other evidence -- specific facts establishing a

genuine issue requiring a trial.

[21] The motion judge is entitled to assume that the record contains all of the evidence that would be introduced by both parties at trial. A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial.

[22] Pursuant to Rule 20.02(1), affidavits may be made on information and belief, but the court may, if appropriate, draw an adverse inference from a party's failure to provide evidence of any person having personal knowledge of contested facts.

[23] Where summary judgment is refused or is granted only in part, Rule 20.05 provides that "the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and order that the action proceed to trial expeditiously" and give directions or impose such terms as are just.

[24] It is now well settled that "both parties on a summary judgment motion have an obligation to put their best foot forward". Given the onus placed on the moving party to provide supporting affidavit or other evidence under Rule 20.01, quote, "it is not just the responding party who has an obligation to, quote, 'lead trump or risk losing'", unquote.

[25] A plaintiff bringing a motion for

> summary judgment does not thereby reverse the onus of proof or alleviate his onus to prove the elements of the breach of contract alleged or damages claimed. See for example, *Sanzone v. Schechter*, confirming the initial evidentiary obligation borne by the moving party (in that case the defendant) on a summary judgment motion.
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> [26] While Rule 20.04 provides the court hearing a summary judgment motion with "enhanced forensic tools", unquote, to deal with conflicting evidence on factual matters, the court should employ these tools and decide a motion for summary judgment only if it can do so fairly.

Conclusion Regarding The Summary Judgment Case Law Referred To

It is a common theme in all of these cases, that summary judgment should only be granted where the judge is satisfied on the materials before him or her, that he or she can fairly and justly adjudicate a dispute.

Wrongful Dismissal And Summary Judgment

In *Johar v. Best Buy Canada*, [2016] ONSC 5287, Justice Belobaba indicated that summary judgment can apply to wrongful dismissal cases, stating at Paragraphs [11], [12], and [14] as follows: [As read]

[11] There is no dispute about the applicable law. Firing or terminating an employee for cause is the "capital punishment" of employment law. The onus is on the employer to establish just cause for the dismissal. Not every incident or misconduct justifies termination for cause. Dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. Whether or not termination for cause was justified requires a factual inquiry into the context and circumstances of the misconduct.

[12] I begin by noting that summary adjudication on the facts herein is wholly appropriate. Tracking the language in *Hryniak v Mauldin,* I am satisfied that summary adjudication is "a proportionate, more expeditious and less expensive means to achieve a just result." I am satisfied that I can make the necessary findings of fact, apply the law to the facts and achieve a fair and just adjudication of the case on the merits.

[14] For the reasons that follow, the motion for summary judgment is granted. Neither of the two grounds justifying termination for cause -- conflict of interest or dishonesty -- has been established on the evidence before me. The defendant has not shown that the plaintiff was operating an in-home repair

> service in competition with the defendant or reselling purchased products for a profit. Nor has the defendant established the allegation of dishonesty. The plaintiff was wrongfully dismissed. He is entitled to damages in lieu of notice.

Law Regarding Set Off

The defendants rely on Section 111(1) of the *Courts of Justice Act*, R.S.O. 1990, Chapter 43, as the basis for his claim for a legal set off against the plaintiff. The defendants ask for an equitable set off. In *Algoma Steel Inc. v. Union Gas Limited*, reported at [2003] O.J. No. 71, a decision of the Ontario Court of Appeal, Justice Rosenberg indicated as follows, at Paragraph [26]: [As read]

> [26] Equitable set-off is available where there is a claim for a sum whether liquidated or unliquidated. In *Telford v. Holt*, Wilson J., speaking for the court, approved a statement of the applicable principles for equitable set-off found in *Coba Industries Ltd. v. Millie's Holdings.* Those principles can be summarized as follows:
> 1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
> 2. The equitable ground must go to the very root of the plaintiff's claim.
> 3. A cross-claim must be so clearly connected

with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims.

Application Of The Law To The Facts. Dealing With Breach Of Contract, Anticipatory Breach Of Contract, Value Of Share Redemption

The plaintiff seeks to enforce the Jazvac agreement and in turn, to enforce the payment of $149,378.51 and $120,000 in share redemption, based on the higher values of the companies involved in the Jazvac agreement. No payments were made regarding the amounts listed in the Jazvac agreement.

In the statement of defence, at paragraphs 9 through 11, the defendants indicate that the plaintiff induced the defendants to enter into the Jazvac agreement by making material misrepresentations. Is there any evidence of such misrepresentations? The affidavit of Tio Galovic indicates that in September 2017, a machine worth $57,000 was sold by Marmac. In April of 2018, two lathe machines worth $30,000 to $40,000 were sold. Accordingly, after the plaintiff was no longer employed by Marmac, approximately $110,000 to $130,000 of machinery was sold in 2017 to 2018.

The affidavit of Sanyer Srdic confirms these sales plus another $10,000 sale of a saw worth approximately $10,000. Accordingly, assets of Marmac estimated to be worth some $120,000 to $140,000 were sold by the defendants in 2017 to 2018. However, Marmac's worth was raised in the Jazvac agreement in October 2016, to $400,000, up significantly from the Marmac valuation in the second agreement where 85 per cent of Marmac shares were valued at $157,250, meaning that Marmac was valued at $185,000.

In the second agreement, the defendant has paid Vrbanic $70,621.49 in cash, provided $55,500 worth of Burloak shares and this left $31,128.51 owing to the plaintiff, which was to be paid over 60 months. Accordingly, Marmac was valued in the second agreement in November 26, 2015, at $185,000. This was basically a relatively small percentage above the asset sales of $120,000 to $140,000 in 2017 to 2018. Vrbanic, in his reply affidavit, dated July 25, 2018, says that Stevens convinced him to put a lower price on paper, quote, "So that I did not have to pay so much tax at once", unquote. At paragraph 89 of the same reply affidavit, Vrbanic states that, quote, "The real price of the company was $400,000", unquote.

In Vrbanic's 2015 tax notice of assessment, his total income is listed as $135,112. It appears that Vrbanic, in the notice of assessment, claimed a capital gains deduction of $95,287, but this

reduction was reduced by the CRA, that is the Canada Revenue Agency, to $65,005. These amounts are consistent with the values and payments made pursuant to the second agreement in November of 2015. The $65,005 capital gain deduction reduced Vrbanic's 2015 taxable income to $70,107. Had the company in 2015, been sold at the quote, unquote, "real price" of $400,000 instead of the $185,000 valuation, Vrbanic's taxable capital gains would have been approximately $200,000 higher. This would have created a sizeable 2015 total income, which would clearly have had a dramatic impact on the amount of child support that Vrbanic would have had to pay. The $185,000 valuation in 2015, not only lowered Vrbanic's tax in April 2015, but also would have been beneficial to Vrbanic in his ongoing family litigation and would have been beneficial to minimize support payments, consistent with Stevens' claim that all of Vrbanic's actions were coloured by his Family Court litigation for the period 2013 to 2016, and this, again, is relevant to Vrbanic's credibility and reliability.

Marmac's asset sales were in the $120,000 to $140,000 range in 2017 to 2018. The 2015 Marmac balance sheet lists the net 2015 book value of equipment at $215,635 and shareholders' equity at $203,062. In 2015, there was a $27,000 loss from operations, but with tax credits and other tax considerations factored in, there was a modest net income of $14,000 approximately.

For this company to be valued at $400,000, it is obvious that the future profit potential of the company would have to be taken into account. I conclude that for a $400,000 valuation for Marmac, to be arrived at in October 2016, consideration would have to be given to both current revenues and potential future revenue potentials. In his cross-examination of August 8th, 2018, the plaintiff, Vrbanic, indicates that from 2015 through 2017, General Kinetics was 70 per cent of Marmac's business.

At paragraph 71 through 79 of his affidavit of July 18th, 2018, the defendant, Stevens, indicates that prior to the first and second agreement, Vrbanic made it clear that with the new partnership and increased production, General Kinetics would double its order volumes. After the October 12th, 2016 Jazvac agreement, valuing Marmac at $400,000, Stevens indicates -- this is at paragraph 72 of his affidavit; that he met with key management from General Kinetics in November 2016. Joe Fernandes, a top executive, advised that prior to Stevens' involvement, Marmac's record for quality and delivery was abysmal and Marmac was considered a quote, unquote, "exit account", since before November of 2015.

According to Stevens, David Hinder (ph) was hired by Stevens as a consultant in January 2018 and Hinder's analysis was that General Kinetics was not worth keeping as a client, as over a 10-year

period, General Kinetics would not accept a price increase. Hinder recommended that Marmac would have to increase prices by a minimum of 45 per cent, just to break even, according to Stevens. David Hinder's affidavit, dated July 18th, 2018, confirmed these details and added that, quote, "General Kinetics was 90 per cent of sales volume", unquote, and quote, "General Kinetics took up 95 per cent of available machining time", unquote, and prices to this company had to increase by at least 45 per cent, to reach viability, but General Kinetics refused to accept any price increases. It is obvious that, given this state of affairs, there was no possibility of doubling business from General Kinetics.

As indicated in the Robert Bell affidavit, Marmac had very little value with just one client. It is obvious that if the above facts are true, the defendants had been induced by the plaintiff, by the plaintiff's misrepresentations regarding the true state of affairs regarding their main client, Kinetic, to enter the Jazvac agreement to their detriment. Vrbanic, in his reply affidavit, at paragraph 3, disputes most of Stevens' evidence as outlined above. At paragraph 71 of his affidavit, Vrbanic denies suggesting General Kinetics would double its order.

Vrbanic denies that Marmac was an exit account. The result therefore, is that the defendants give evidence about a material misrepresentation which

induced them to sign the Jazvac agreement. The plaintiff denies making these misrepresentations.

This, then becomes a matter of credibility. Which side do I choose? It would be helpful to have input from General Kinetics regarding whether they told the defendants that Marmac was an exit account and they told the plaintiff as well. Neither party produced an affidavit from General Kinetics.

Regarding credibility, the documentation is consistent with the defendants' claim that the plaintiff coloured all his actions, in order to minimize support payments to his wife, during the litigation period of 2013 to 2016. For example, in 2012, Marmac -- this is just prior to the litigation, had $1.2 million revenues. Once the litigation started and from 2013 to 2015, revenues plummeted during the litigation period.

In the first agreement, the bulk of the payments were backloaded well into the future, at a time when the litigation would be expected to be over. The valuation of Marmac in 2015 was well under the valuation set out in the Jazvac agreement in October 2016, when the Family Court proceeding was finalized.

Vrbanic's 2015 tax return, obviously relevant to the ongoing family dispute, reflected the lower 2015 Marmac valuation, which is well under the $400,000 fair value which was confirmed by the

plaintiff, himself, in his affidavit.

A fair inference can be made that during the 2013 to 2016 time period, the plaintiff was prepared to arrange his financial affairs in a manner that would deprive his child of a fair child support award. This conclusion tells unfavourable towards the plaintiff's reliability and credibility. In my opinion, there is a genuine issue requiring a trial with regard to whether the plaintiff made material misrepresentations which induced the plaintiff to enter into the Jazvac agreement.

The $25,000 Loan

Vrbanic alleges that he loaned $25,000 to Stevens. Stevens says that Vrbanic provided the funds to be reinvested in Marmac and Vrbanic did not expect the funds to be returned. There is no documentation or promissory note substantiating this loan. Basically, it is the plaintiff's word against Stevens' word. There is a genuine issue requiring a trial in the circumstances.

The Conversion Of Scrap

Stevens says Vrbanic took the scrap metal to the scrapyard. Stevens says Vrbanic retained all the money made on scrap, even though it was properly due and owing to Marmac. Stevens estimates Vrbanic made $20,000 from Marmac's scrap. Vrbanic denies he solely retained the scrap money. Vrbanic says

it was split between Stevens, Bell, and himself. Bell's affidavit does not deal with this issue. Apparently, Bell appeared for a cross-examination which did not proceed with respect to him. There is no documentation to back up either side's version of events. Accordingly, again, there is a genuine issue that requires a trial regarding the scrap metal issue.

Unlawful Dismissal

The plaintiff's version is that on or about March 2017, the plaintiff raised the issue of nonpayment regarding the November 1st, 2016 payment, due under the Jazvac agreement. The plaintiff indicates there was a meeting in April 2017, at which time the Stevens, defendants, advised the plaintiff they had no money; that he should go to his counsel; that he was terminated and Vrbanic was escorted from the building. Michael Snaidero, in his affidavit, indicated he was at the meeting, and he confirms the plaintiff's version that the plaintiff was terminated and did not resign. The ROE, record of employment, issued by Marmac, by Jackie Stevens, dated May 15th, 2017, states Vrbanic was dismissed. Ms. Stevens said she made a mistake; a somewhat dubious claim in these circumstances. Assuming Vrbanic was dismissed; was this dismissal justified in law?

Vrbanic, in his cross-examination of August 8th, 2018, indicates that General Kinetics is 70 per

cent of Marmac's business and the next largest customer was Wheel Monitor, contributing 15 to 20 per cent of sales. According to Vrbanic, in his cross-examination, in October 2016 and January 2017, 85 to 90 per cent of Marmac's business came from General Kinetics, Wheel Monitor and Romet, R-O-M-E-T. In January and February 2018, the plaintiff operated a new company, Blue Star CNC, and as of February 2018, Wheel Monitor and General Kinetic became his customers, according to the plaintiff. The defendants contend that at least Wheel Monitor became a private client of the plaintiff well before January and February of 2018. The plaintiff says there is no evidence before me, supporting that allegation.

Stevens, in his affidavit of July 18th, 2018, at paragraphs 105 through 113, indicates that from November 2016 onwards, Vrbanic was dealing directly with Wheel Monitor, under the trade name Blue Star CNC Machining, from his Stoney Creek Property. Stevens indicates in and around November of 2016, Vrbanic began to service Wheel Monitor from another external machining shop. Stevens indicates he saw the unique shape of a product that Wheel Monitor orders, at another machining shop.

Wheel Monitor bought $96,836 worth of Marmac product in 2016 and this plummeted to $22,236.99 in 2017. Frank Paschert, the plant manager at Marmac, spelled P-A-S-C-H-E-R-T, received an email from Shannon Bell of Wheel Monitor on July 24th, 2017,

indicating that Marmac was receiving only 25 percent of her business; that is Wheel Monitor's business. Ms. Bell insinuated that the plaintiff was still getting their business, although Frank did not know how. Ms. Bell indicated she thought what Stevens did to the plaintiff was horrible and she did not like him at all. There is no affidavit from Shannon Bell, but given her adversity and/or hostility to the defendants as expressed by her, I am not prepared to take an adverse inference against the defendants for not having an affidavit from her.

Robert Bell is the technical manager of Burloak and a Burloak shareholder. In June or July 2017, Mr. Bell stumbled inadvertently on Vrbanic's email account. He saw an email from Vrbanic to an engineer at Wheel Monitor and it was obvious to him that Vrbanic was taking clients from Marmac, including Wheel Monitor. As indicated, Mr. Bell was never cross-examined. As also indicated, there is no affidavit from Wheel Monitor. Accordingly, there is uncontradicted credible evidence before me, that reasonably could lead to the conclusion that the plaintiff was diverting Marmac's second best customer away from Marmac and privately, to himself, as early as November 2016. November 2016 was the time when the plaintiff was a director, president, employee and shareholder of Marmac.

Dismissal is warranted when a person's misconduct is sufficiently serious that it strikes at the

heart of the employment relationship. See *Johar v. Best Buy* at Paragraph [11]. Further, the Jazvac agreement stipulates that Vrbanic work hours would normally be 7:00 a.m. to 3:30 p.m., Monday to Friday. Both Mr. Bell and Stevens indicate that the plaintiff was in violation of the Jazvac agreement shortly after the signing of the Jazvac agreement. Mr. Bell indicates that in late 2016, the plaintiff's life issues started to conflict with business responsibilities. Within days of signing the Jazvac agreement, on October 12th, 2016, Vrbanic was constantly taking unapproved time away from work and just going through the motions. Production was affected and deadlines were not met. By Christmas 2016, Vrbanic's absenteeism was so bad that Vrbanic might as well have not been there, and in February 2017, Vrbanic was looking blankly at a computer screen. Vrbanic stated he had lost his legal battle and his ex-wife now gets half his income.

Stevens, in his affidavit, communicates that after February 17th, 2017, when the final support payments were deducted, Vrbanic went around the Marmac facilities stating, quote, "I, the president and founder am now the least paid employee of Marmac", unquote. This had a negative effect on staff morale. From December 2016 to March 2017, Vrbanic advised he could only start work at 9:00 a.m. and had to go home at 2:30 p.m., to drop off and pick up his daughter from school.

At a meeting in late March 2017, Vrbanic advised he did not want to continue working at Marmac. According to Stevens, Vrbanic resigned. According to Robert Bell, Vrbanic said that Vrbanic's solicitor had told Vrbanic to go through the motions. Stevens asked Vrbanic if he, quote, "wanted to work here or not", unquote, and Vrbanic replied, no. On the evidence before me, I would conclude that Vrbanic was, in fact, dismissed from his job; however, given the evidence of diverting Marmac's clients to himself during Vrbanic's employment, combined with Vrbanic's deliberate and repeated violation of his work obligations under the Jazvac agreement, there is a genuine issue for trial, as to whether Vrbanic's dismissal was, in fact, unlawful dismissal.

Set Off

As indicated in the affidavit of Stevens at paragraph 141 through 155, the defendants allege that they suffered considerable damages with respect to Vrbanic's claims. From the evidence before me, it is clear that the defendants invested considerable time, effort, and money into the Marmac operation. I agree that the defendants' claims and damages are inseparable with the plaintiff's claims and would meet the criteria for equitable set off, as outlined in the *Algoma Steel* case at Paragraph [26].

As an example, if indeed the plaintiff was

diverting Marmac's clients to his own private business while at the same time, acting as director, president, employee of Marmac, an equitable set off would be available to the defendants. I conclude again, that the equitable set off issue is yet again, a genuine issue for trial.

Unpaid Mileage And Auto Expenses And Breach Of Indemnity Regarding CIBC, TD Visa Debts

These claims are relatively minor and would be mixed in with the other more significant claims and damages. In my opinion, it would be in the interest of justice to resolve these matters in the context of the litigation as a whole, and these issues should be resolved at trial, along with the other material issues and claims. See *Hryniak* at Paragraphs [60] and [66].

Conclusion

For the reasons outlined, there are numerous genuine issues for trial in this matter. The plaintiff's motion for summary judgment is dismissed with costs payable to the defendants.

For all reasons provided, the plaintiff's motion for summary judgment is dismissed. Costs awarded to the defendant is fixed at $30,000, payable forthwith. Thank you.

FORM 2

CERTIFICATE OF TRANSCRIPT

***Evidence Act*, Subsection 5(2)**

I, Wendy Ponka, certify that this document is a true and accurate transcript of the recording of *Marinko Vrbanic v. Stevens et al* in the Superior Court of Justice held on Thursday, January 31, 2019, at HAMILTON, Ontario, taken from Recording No. 4799_608_20190131_093627__6_SKARICT.dcr, which has been certified in Form 1.

Date: February 21, 2019

ELECTRONIC TRANSCRIPT

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