

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF section 243(1) of the *Bankruptcy And
Insolvency Act*, RSC 1985, C B-3, as amended and section 101 of
the *Courts of Justice Act*, RSO 1990 C C-43, as amended**

BETWEEN:

**COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST
COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS
INC., 59365 ONTARIO LTD., 1031436 ONTARIO INC., ALRAE
INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE,
DAVID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778
ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE
INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY
GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M.
HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL
CONSULTANTS INC., YERUSHA INVESTMENTS INC., MIHAL
TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE
BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR BAILEY
LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN
TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA
INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY
GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP
INC., MAXOREN INVESTMENTS, 2227046 ONTARIO LIMITED, DAST
PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUCKONIC, and
B. & M. HANDELMAN INVESTMENTS LIMITED**

Applicants

- and -

**ANNIE YERETSIAN, 2399029 ONTARIO INC., 2457674 ONTARIO INC.
MOSS DEVELOPMENT LTD. and TERRY WILSON**

Respondents

**FACTUM OF THE RESPONDING PARTY,
MORTEZA KATEBIAN A.K.A. BEN KATEBIAN
(Re: Motion to Strike returnable October 18, 2018)**

October 15, 2018

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TO: **SERVICE LIST**

**ONTARIO
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**FACTUM OF THE RESPONDING PARTY,
MORTEZA KATEBIAN A.K.A. BEN KATEBIAN
(Re: Motion to Strike returnable October 18, 2018)**

I. OVERVIEW

1. This Motion is brought in the context of a Receivership application.
2. The Respondent, 2399194 Ontario Inc. (“**194**”), claims an interest in a number of the properties at issue in the Receivership. In particular, 194 holds a 75% interest in the second mortgage on the property municipally known as 7 High Point Road, in the City of Toronto (“**High Point**”).
3. The Moving Party, Canada Capital Corporation (“**CCC**”), holds a first mortgage on High Point (the “**First Mortgage**”). The central issue in this proceeding, from 194’s perspective, is the quantum of the principle and interest due and owing to CCC on the First Mortgage. 194 pleads that the amount that CCC claims to be owed on the First Mortgage is vastly inflated; and that the Mortgage Statement relied upon by CCC is false and misleading.
4. 194 relies on two affidavits in this proceeding, both sworn by its sole officer and director, Morteza (Ben) Katebian, the first affirmed on June 26, 2018 (the “**First Katebian Affidavit**”) and the second affirmed on August 28, 2018 (the “**Second Katebian Affidavit**”, together, the “**Katebian Affidavits**”). The Katebian Affidavits set out the basis for Mr. Katebian’s information, knowledge and belief with respect to this central issue; namely, that the principals and associates of the Moving Parties have a long history of fraud and dishonesty, which includes swearing false affidavits and involvement in mortgage fraud, and in relation to which they face numerous criminal charges.
5. The Moving Parties understandably wish to conceal the history of their principals and associates from this court. This history is so extensive, and so unpleasant, that any references to it might well appear scandalous on their face. However, this history is also

highly relevant, material, and probative to a central issue in this Receivership. Accordingly, the Motion should be dismissed with costs.

II. Statement of Facts

6. 194 concurs with the procedural history set out in the Moving Parties' factum.
7. 194 notes that the Katebian Affidavits were sworn with the intention that they would be relied upon in two related proceedings, in addition to the within proceeding:
 - a. *B&M Handelman Investments Limited, et al. v. Christine Drotos*, Superior Court of Justice (Commercial List) Court File No. CV-594590-00CL (the "**Drotos Proceeding**"); and
 - b. *2399194 Ontario Inc. v. Morteza Katebian and Payam Katebian*, Superior Court of Justice Court File No. CV-18-00603185-000 (the "**Alizadeh Application**").¹
8. The within proceeding, the Drotos Proceeding, and the Alizadeh Application concern substantially overlapping parties and issues. Justice Dunphy is case managing both the within proceeding and the Drotos Proceeding, and is accordingly apprised of the issues therein. While the Second Katebian Affidavit deals with some matters beyond the strict scope of the within proceeding, 194 pleads that it is neither desirable, nor in the interests of justice, to artificially separate out the evidence on these proceedings.

III. Issues and the Law

9. Justice Cullity summarized the law on a motion to strike out portions of an affidavit in *Albert v. York Condominium Corp No. 46*, approvingly citing the decision of Dambrot J. in *876502 Ontario Inc. v. IF Propco Holdings (Ontario) 10 Ltd.*, (1997), 37 O.R. (3d) 70 (G.D.) as follows:
 - a. Irrelevance is not *per se* a ground for striking parts of an affidavit under the rule;

¹ Second Katebian Affidavit, paragraph 4

- b. Nothing that is relevant can be scandalous or vexatious; and
- c. Questions of relevance should ordinarily be left to the judge dealing with the merits of the proceedings. [Emphasis added].²

10. With respect to the latter point, Justice Cullity went on to cite Justice Dambrot as follows:

Our system ordinarily reserves that function to the judicial officer hearing the merits of the matter. I view that as desirable for two reasons. First, such rulings are better left to the person charged with acquiring a full understanding of the matter, who is then best positioned to balance the competing arguments and rule wisely. Second, encouraging interlocutory rulings and appeals on admissibility can only serve to fragment proceedings and encourage delay [...] without appreciably assisting the ultimate decider of the matter in his or her task.³

11. 194 submits that, given the complexity of this proceeding and its related proceedings, a determination on the relevance of the Impugned Passages in the Katebian Affidavits should be left to the ultimate trier of fact.

12. This factum will address each of the issues on this Motion in the order proposed by the Moving Parties.

ISSUE 1: ALLEGATIONS OF CRIMINAL CHARGES, REGULATORY OR CRIMINAL PROCEEDINGS INVOLVING OTHERS, AND CIVIL ACTIONS NOT YET DECIDED ON THE MERITS

13. The Moving Parties seek to have a number of passages struck from the Katebian Affidavits which deal with criminal and regulatory proceedings involving principals of the Moving Parties and their associates.⁴ These passages are relevant, probative, and should be left to stand in their entirety.

14. Rule 39.01(5) governs the contents of an affidavit on a motion. It provides as follows:

² *Albert v. York Condominium Corp No. 46*, [2002] OJ No 1798 [“York Condominium”] at para. 26, Book of Authorities of the Responding Party, 2399194 Ontario Inc. [“194BOA”] Tab 1

³ *Ibid.* at para 27, 194BOA Tab 1

⁴ Factum of the Moving Parties, paras 13-20

An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

15. In the case of the impugned passage from the First Katebian Affidavit, Mr. Katebian affirms as follows:

- a. That the Affidavit of Troy Wilson sworn June 25, 2018 on behalf of the Moving Parties Canada Investment Corporation and CCC contains false and misleading statements whose effect, amongst other things, is to overstate the principal and interest due and owing to CCC by approximately \$7,869,239.96;⁵
- b. That Mr. Katebian believes that Mr. Wilson, along with his accomplices, Ara Missaghi (“**Missaghi**”) and Missaghi’s wife, Laila Alizadeh (“**Alizadeh**”) are attempting to deceive the court;⁶ and
- c. that both Missaghi and Alizadeh have charges pending against them in relation to mortgage fraud and money laundering.⁷

16. In short, the First Katebian Affidavit states Mr. Katebian’s belief (that the Wilson Affidavit is an attempt to mislead the court with respect to a fraudulent mortgage); and the source of that belief (that Mr. Wilson and his accomplices have mortgage fraud charges pending against them). While the Moving Parties may dispute the relevance of the latter to the former, this is a determination more appropriately left to the judge dealing with the merits of the proceeding.

17. Similarly, the allegations of criminal charges at paragraphs 33, 35, 36, 37, 65, and 75 of the Second Katebian Affidavit (items 80, 81, 82, 83, 89 and 90 of the Moving Parties’ Schedule “A”) all provide context for Mr. Katebian’s prior relationship with the principals and associates of the Moving Parties; and the basis for his knowledge and belief with respect to the Moving Parties’ allegations in the within proceeding. They “provide a

⁵ First Katebian Affidavit, para. 4

⁶ First Katebian Affidavit, para. 5

⁷ First Katebian Affidavit, para. 6

relevant part of the factual context in which the issues in the application arose”,⁸ and should accordingly be left to stand.

ISSUE 2: HEARSAY EVIDENCE

18. The Moving Parties suggest that the claims process ordered by Justice Dunphy is a “bespoke legal process” “more akin to a hybrid trial”.⁹ In consequence, they suggest that all affidavits relied upon in the context of the proceeding should be required to comply with Rule 4.06(2) of the *Rules*; and that all instances of hearsay in the affidavits filed in the proceeding to date should accordingly be struck.¹⁰

19. This argument is specious. This proceeding was commenced as an application, and it continues as such. Had Justice Dunphy wished to exclude hearsay evidence, and require all affidavits to comply with Rule 4.06(2), he would have ordered as much. He did not, and the procedural orders that he did make do not alter the essential character of this proceeding.

20. Accordingly, the exception to Rule 4.06(2) found in Rule 39.01(5) applies. The hearsay statements which the Moving Parties seek to strike from the Katebian Affidavits state both the source of the information, and the fact of the belief, as required by Rule 39.01(5). Accordingly, they should be permitted to stand.

ISSUES 3 AND 4: ALLEGEDLY SCANDALOUS, FRIVOLOUS OR VEXATIOUS STATEMENTS IN THE KATEBIAN MATERIALS

21. The Moving Parties submit that the Katebian Affidavits (and in particular, the Second Katebian Affidavit) are unique in this proceeding, in that they are “so scandalous,

⁸ *York Condominium* at para. 30, 194BOA Tab 1

⁹ Factum of the Moving Parties, para. 26

¹⁰ *Ibid*, para. 27

frivolous, irrelevant and prejudicial that they ought to be struck out almost in their entirety”.¹¹

22. What the Moving Parties do not disclose is that the Second Katebian Affidavit was affirmed in explicit response to the scandalous and prejudicial allegations of their own instructing principal, Ms. Alizadeh.

23. As discussed above, the Second Katebian Affidavit was sworn with the intention that it would be relied on in three related proceedings between overlapping parties.¹² In particular, the Second Katebian Affidavit was sworn in response to the Affidavit of Ms. Alizadeh sworn August 10, 2018 (the “**Alizadeh Affidavit**”), in the context of the Alizadeh Application.¹³

24. The Alizadeh Affidavit levels a number of scandalous, false and inflammatory allegations against Mr. Katebian, many in the form of hearsay, including the following:

- a. That Mr. Katebian stole inventory and falsified financial statements;¹⁴
- b. That Mr. Katebian embezzled money;¹⁵
- c. That Mr. Katebian committed fraud and breached fiduciary and contractual obligations he owed as a director;¹⁶
- d. That Mr. Katebian’s embezzlement placed his business in financial jeopardy;¹⁷ and
- e. That Mr. Katebian filed a fraudulent Form 1 purporting to appoint himself as director of 194.¹⁸

¹¹ Factum of the Moving Parties, para. 37

¹² Second Katebian Affidavit, para. 78

¹³ Responding Motion Record of 194 [“**194MR**”], Tab 1C

¹⁴ Alizadeh Affidavit, para. 7, 194MR Tab 1C

¹⁵ *Ibid*, para. 12, 194MR Tab 1C

¹⁶ *Id.* para. 13, 194MR Tab 1C

¹⁷ *Id.* para. 14, 194MR Tab 1C

¹⁸ *Id.* para. 21, 194MR Tab 1C

25. The Alizadeh Affidavit also makes a series of allegations respecting the within proceeding.

In particular, it alleges as follows:

24. [Mr. Katebian] has sought to intervene in [the within proceeding] and is attempting to defraud the court and [194] by purporting to instruct counsel on behalf of [194]. He is trying to intercept monies owing to [194] from the sale of [High Point]. The [First Katebian Affidavit] is attached hereto as Exhibit "I".

25. The lawyer that I retained to act for [194] and other companies that I own in [the within proceeding], Catherine Fell of Brauti Thorning Zibarass LLP ("BTZ"), has notified [Mr. Katebian's] lawyers who purport to act for [194], that [Mr. Katebian] is not a director of [194] and has no authority on behalf of [194.]

26. Nevertheless, [Mr. Katebian] continues to falsely assert that (1) he lawfully controls [194] as its director, and (2) that [194] is owed monies from the proceeds of sale of properties subject to the receivership that he should be given control over[...]

29. I believe that [Mr. Katebian] is trying to interfere in [the within proceeding] to impede the distribution of the proceeds of sale of various properties owed to companies controlled by me and Troy – companies which I own. I believe he is trying to cause damage to us and to [194] and he is abusing the court's process and filing false affidavits in order to do so.¹⁹

26. Even though, as the Alizadeh Affidavit concedes, Ms. Alizadeh both controls the Moving Parties and instructs their counsel in the context of the within proceeding, the Alizadeh Affidavit is mentioned nowhere in the Moving Parties' materials. In essence, Ms. Alizadeh has made a series of scandalous, false and inflammatory allegations against Mr. Katebian in her personal capacity in a related proceeding, and now hides behind her corporations in an effort to have Mr. Katebian's rebuttals struck. This court should not reward this strategy.

27. While some of the language employed in the Second Katebian Affidavit is admittedly colourful, this is not in itself a basis for striking the Impugned Statements. As this court found in *Fulcher v. Fulcher Estate*:

¹⁹ *Id.* paras 24-29, 194MR Tab 1C

While it is certainly arguable that the language employed in the affidavits, particularly in Michael's affidavit is overly colourful and at times borders on being inflammatory, I agree with the views of Dambrot J. in 876502 *Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.*, (1997), 37 O.R. (3d) 70 wherein he found that such rulings are better left to the person charged with acquiring a full understanding of the matter and who is better positioned to balance the competing arguments and rule wisely. I further agree with his comment that encouraging interlocutory rulings on admissibility can only serve to fragment the process and encourage delay.²⁰

28. Lastly, the Moving Parties baldly state that the Impugned Statements “are not similar in fact to the issues in the Receivership, which deal with alleged real estate frauds”.²¹ In fact, the Impugned Statements establish the involvement of Ms. Alizadeh, her husband, and the Moving Parties in a long-running and sophisticated criminal enterprise, engaged in, *inter alia*, mortgage fraud. As the Court of Appeal noted in *R v. McNamara (No. 1)*:

Although it may be questionable if it could be said that the acts were strikingly similar, there was undoubtedly an underlying unity which manifested a general scheme and which in these circumstances made them admissible as similar acts. Moreover, we do not think it is necessary to find "striking similarity" in order for the evidence to be admissible [emphasis added].²²

ISSUE 5: THE IMPUGNED STATEMENTS DO NOT UNDULY LENGTHEN OR DELAY THE HEARING OF THE CLAIM ON THE MERITS

29. The Moving Parties suggest that permitting the Impugned Statements to stand will unduly lengthen the within proceedings, as the Moving Parties will be required to respond to them.²³ Notably, this concern did not dissuade Ms. Alizadeh from leveling a number of scandalous, false and inflammatory allegations against Mr. Katebian in her own Affidavit, to which the Second Katebian Affidavit is the response.

30. In any event, that the Moving Parties would be inconvenienced by the requirement that they respond to the Impugned Statements is no basis to strike same. The long history of

²⁰ [2012] O.J. No. 2760, 2012 ONSC 3289, at para 19, 194BOA Tab 2

²¹ Factum of the Moving Parties, para. 42

²² *Regina v. McNamara (No. 1)*, [1981] O.J. No. 3254, 56 C.C.C. (2d) 193 at para. 175, 194BOA Tab 3

²³ Factum of the Moving Parties, paras 43-45

dishonesty and criminality of by the Moving Parties, their principals, and their associates forms a relevant part of the factual context in which the issues in the application arose.

31. Determination of these issues should be left to the ultimate tryer of fact. Justice Dunphy has thus far taken a proactive approach in crafting a procedure for the within application which is focused, proportionate, and efficient. To the extent that he determines the Impugned Statements, and any responses to same by the Moving Parties, are extraneous or irrelevant, he will no doubt disregard same.

IV. ORDER REQUESTED

32. 194 asks that this motion be dismissed with costs. In the alternative, 194 requests leave to amend the Katebian Affidavits as necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of October, 2018.



Peter Smiley

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Lawyers for the Responding Party,
Morteza Katebian aka Ben Katebian

SCHEDULE "A"
LIST OF AUTHORITIES

TAB

1. *Albert v. York Condominium Corp No. 46*, [2002] OJ No 1798
2. *Fulcher v. Fulcher Estate*, [2012] O.J. No. 2760, 2012 ONSC 3289
3. *Regina v. McNamara (No. 1)*, [1981] O.J. No. 3254, 56 C.C.C. (2d)

SCHEDULE "B"

RELEVANT STATUTES

1. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01 (5)

An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

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- and - ANNIE YERETSIAN, ET AL.

RESPONDENTS

Court File No. CV-18-592103-00CL

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