

Court file no.

CV-12-455650

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN HEARN

Plaintiff

and

JOSEPH BERTRAM MCLEOD and MASLAK-MCLEOD GALLERY INC.

Defendants



(Court seal)

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$2500 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

Date June 8, 2012

Issued by [Signature] Local registrar

Address of court office: 150 Bond Street East
Oshawa ON L1G 0A2

[Handwritten initials]

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TO

JOSEPH BERTRAM MCLEOD
118 Scollard St. Toronto, Ont.
M5R 1G2 Canada
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AND TO:

MASLAK-MCLEOD GALLERY INC.
118 Scollard St. Toronto, Ont.
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Tel: 416-944-2577
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THIS ACTION IS BROUGHT AGAINST YOU UNDER THE SIMPLIFIED PROCEDURE PROVIDED IN
RULE 76 OF THE RULES OF CIVIL PROCEDURE.

CLAIM

1. The plaintiff claims as against both defendants:
 - (a) The sum of \$20,000.00 representing the purchase price of the Painting (as described below);
 - (b) The sum of \$25,000.00 representing the loss of investment return on the Painting (as described below);
 - (c) The sum of \$50,000.00 in punitive damages;
 - (d) pre-judgment and post-judgment interest on the sums claimed in subparagraph (a) pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (e) post-judgment interest on the sums claimed in subparagraphs (b), (c) and (d) pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (f) costs on a substantial indemnity basis; and
 - (g) such further and other relief as to this Honourable Court seems just.

The Parties

2. The plaintiff is an individual who resides in the City of Toronto in the Province of Ontario, and is a member of the famous Canadian music group *Barenaked Ladies*.
3. The defendant Joseph Bertram McLeod ("McLeod") is an individual who resides in the City of Toronto in the Province of Ontario, and who from time to time has carried on business as Maslak-McLeod Gallery and through Maslak-McLeod Gallery Inc., a corporation acting as his personal agent, for which he is the sole officer, director and shareholder.

4. The defendant Maslak McLeod Gallery Inc. ("MMGI") is an Ontario corporation carrying on business as an art gallery, one location of which is located in the City of Toronto, in the Province of Ontario.

Background

5. Long prior to his dealings with the defendants, the plaintiff had a deep admiration for the art of Norval Morrisseau, the Native Canadian artist known as "The Picasso of the North". It was his long-standing desire to own one of Morrisseau's paintings, both for his personal pleasure, and for its investment value.
6. Beginning in the 1990's, the plaintiff's fame grew, as he performed as a member of, *inter alia*, such internationally-known groups as *Corky and the Juice Pigs*, *Barenaked Ladies*, and *The Rheostatics*. In recent years, he has performed with *Barenaked Ladies*, *The Tragically Hip*, Lou Reed's band, and *Kevin Hearn and Thin Buckle*, his own band. He is an active celebrity, performing at many important Canadian events, including, most recently, at Jack Layton's state funeral.

Purchase of the Painting

7. On or about May 3rd, 2005, the plaintiff visited the defendants' art gallery, which advertises to the public that it is a gallery specializing in the works of Native artists and, especially, that of Norval Morrisseau. The plaintiff advised the defendants that he was a novice collector, and was interested in the works of Norval Morrisseau. The plaintiff also told the defendants who he was, and they expressed their awareness of his celebrity status.
8. The defendants hold themselves out to be experts who thoroughly and critically investigate the provenance of the works they sell. Furthermore, they hold themselves out as trustworthy agents to their clients on whose expertise such clients may comfortably rely.

9. At the defendants' gallery, the defendant McLeod showed the plaintiff several alleged Norval Morrisseau paintings, including a painting titled "Spirit Energy of Mother Earth" which was dated 1970 (the "Painting"). The price of the Painting was \$20,000.
10. Prior to committing to the purchase of the Painting, the plaintiff asked the defendant McLeod about the Painting's provenance. McLeod responded by assuring the plaintiff that the painting was an authentic Norval Morrisseau, and that his gallery was the best and safest place to purchase a Norval Morrisseau work. McLeod also represented that if the plaintiff purchased the Painting, a written statement describing the Painting's provenance could be provided to substantiate his claim that it was authentic.
11. Relying on and believing the defendants' representations regarding the authenticity of the Painting, the plaintiff purchased the Painting on or about May 4th, 2005. The Painting was delivered to the plaintiff by the defendants on or about May 24, 2005.
12. At the time of the Painting's purchase, the plaintiff's reasons for buying it were that he admired Norval Morrisseau's work and he believed that such works represented a sound financial investment. Prior to purchasing the Painting, he communicated these reasons to the defendants. The defendants then advised the plaintiff that Norval Morrisseau was very ill and was expected to die shortly, at which time the Painting's value would increase significantly.
13. In or about early 2009, at the plaintiff's request, the defendants provided some basic documentation regarding the Painting which included information about value, date and a few other details.
14. At no time did the defendant disclose to the plaintiff certain other critical information relevant to the Painting that was within the defendants' knowledge, which information included, *inter alia*, the facts that the Painting is of a species of Morrisseau painting that is the subject of significant and persistent disagreement regarding authenticity, and that the defendants were specifically prohibited by Morrisseau himself from acting as

authenticators of his work on the basis that the defendants had, *inter alia*, allegedly been selling and authenticating large quantities of fake and/or forged Morrisseau paintings as a part of a fraud scheme.

15. Had the plaintiff known that the Painting was a fake or forgery, or had he known all of the relevant facts regarding the Painting's lack of provenance, the disputes over the provenance of the Painting, and the prohibition and complaints made by Morrisseau against the defendants, he never would have purchased the Painting in the first place.

The AGO Show

16. In or about April of 2010, the Art Gallery of Ontario (the "AGO") invited the plaintiff to act as a celebrity guest curator for an AGO art show (the "AGO Show"). The AGO Show would feature works from the plaintiff's art collection, some of his own drawings, and works similar to the art in his collection, drawn from participating galleries and from the AGO's own collection. The plaintiff agreed.
17. The defendants were made aware of the AGO Show and encouraged the plaintiff to display the Painting at that show. The defendants also made arrangements to have two alleged Norval Morrisseau paintings from their own collection displayed at the AGO Show.
18. On June 11, 2010 the AGO Show opening took place, and was well attended, but approximately one week later the AGO advised the plaintiff that numerous individuals, including the head curator of the AGO, had suggested that the Painting was most likely a fake. For these reasons, the Painting was removed from the AGO Show by the AGO. As a result of similar concerns, the two paintings provided by the defendants to the AGO Show were also removed.
19. The removal of the Painting from the AGO Show caused the plaintiff great humiliation and embarrassment.

20. Following the AGO Show, the plaintiff contacted the defendants and demanded that the defendants provide him with the Painting's provenance. The defendants advised that the painting had been sold on consignment and so the defendant's files would have to be searched. The defendants offered to refund the plaintiff's purchase price for the Painting if, after evidence of provenance was provided, the plaintiff was still unhappy with the Painting.
21. A few days later, the defendants furnished the plaintiff with several documents purporting to provide the provenance for the Painting. The documents provided failed to establish such provenance, and actually contradicted previous statements that the defendants had made to the plaintiff about same.
22. The plaintiff then demanded that the defendants refund his money for the purchase of the painting, but the defendants responded that they would only refund the plaintiff's money if he obtained a letter from the AGO apologizing and confirming the Painting's authenticity, or stating that it is a fake or forgery.
23. The plaintiff subsequently engaged experts to provide their opinions as to the authenticity of the Painting, with the result that such experts concluded that either it was a fake or forgery and/or that its authenticity could not be established.

The Plaintiff's Position

24. The plaintiff states that the Painting is a fake or forgery, and that the defendants knew at all material times that such is the case.
25. Given that the Painting is a fake or forgery, the value of the Painting at the time of purchase was approximately \$300, which is \$19,700 less than what the plaintiff paid. If the Painting were an authentic Morriseau, it would, as of the date of this pleading, be worth approximately \$45,000, which would represent an investment return of \$25,000. Accordingly, the plaintiff claims said loss of purchase price and said loss of investment return.

26. In the alternative, the plaintiff states that if the defendants did not know that the Painting is a fake or forgery (which is denied) then such lack of knowledge has been the result of their negligence in failing to properly investigate the provenance of the Painting, and/or their wilful and/or reckless disregard for the truth, and such negligence resulted in their failure to fully advise the plaintiff of the lack of solid provenance for the Painting.
27. In the further alternative, the plaintiff states that in the event that the Painting is an authentic Morrisseau (which is denied), then the defendants failed to advise the plaintiff at the time of the Painting's purchase of all of the critical facts relevant to the plaintiff's decision to purchase the Painting, which facts included, *inter alia*, disclosure to the plaintiff that the Painting is of a species of Morrisseau painting that is the subject of significant and persistent disagreement regarding authenticity, and that the defendants were specifically prohibited by Morrisseau himself from acting as authenticators of his work.
28. The plaintiff states that the defendants' actions constitute, *inter alia* and in the alternative, deceit, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, breach of contract, innocent misrepresentation, and/or mistake.
29. The plaintiff states that as a result of the defendants' actions he is entitled to be awarded the relief claimed herein.
30. The plaintiff states that the plaintiff's embarrassment and humiliation that resulted from the withdrawal of the Painting from the AGO Show was the direct result of the defendants' fraudulent, deceitful, and negligent conduct, and that such result was foreseeable by the defendants as a result of their knowledge of the plaintiff's celebrity status and of his intention to place the Painting in the AGO Show.
31. The plaintiff states that the defendants have persisted in perpetrating their fraud upon the plaintiff, and have even attempted to improperly and illegally enlist the assistance of the plaintiff to obtain a letter from the AGO in order to

further such fraud so that said fraud could be perpetrated upon other unsuspecting persons. Because of this, and because of the deceptive and fraudulent behaviour of the defendants, the plaintiff states that the defendants have acted in a manner that is properly described as high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour, and which justifies the claim of punitive damages herein.

32. The plaintiff states that the failure of the defendants to supply an authentic Norval Morrisseau painting as promised constitutes, *inter alia*, a breach of warranty.
33. The plaintiff pleads and relies upon the provisions of the *Sale of Goods Act*, R.S.O. 1980, c. 462 and, without limitation, sections 15 and 51 thereof.

The plaintiff proposes that this action be tried in the City of Toronto.

June 8, 2012

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AND TO:

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KEVIN HEARN and **JOSEPH MCLEOD**
(plaintiff) (defendant)

(Court file no.)

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SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO**

STATEMENT OF CLAIM

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