

**CITATION: Eastwood Home Inc. v. Procopio et al., 2023 ONSC 5522**

**COURT FILE NO.: CV-18-00611317-0000**

**DATE:**20231003

# ONTARIO

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

EASTWOOD HOME INC

Plaintiff

*Matthew Armstrong* for the plaintiff

– and –

ELAINE PROCOPIO, FEDERICO  
PROCOPIO and DAVID ISSONBORG

*Marshall Reinhart* for the defendants Elaine Procopio and Frederico Procopio

No one appearing for the defendant David  
Issonborg

## Defendants

**HEARD: September 18 -22, 2023**

**KOEHNEN J.**

## REASONS FOR JUDGMENT

## Overview

- [1] This is an unfortunate case that requires the court to determine which of two innocent parties should bear the risk of loss caused by a third, apparently fraudulent party.

- [2] The issue arises out of an agreement pursuant to which the plaintiff agreed to reconstruct a residential property that the defendants Elaine Procopio and Frederico Procopio owned.
- [3] The Procopios made out 14 cheques to the plaintiff for payment of its services. They also made out 14 cheques to the defendant David Issonborg who was somehow associated with Eastwood. In addition, the Procopios paid Issonborg \$5,000 in cash. They paid a total of \$85,640 to Issonborg. Issonborg did not pass any of that money on to Eastwood but appears to have kept it for himself. Issonborg did not defend the action. In addition, to the funds paid to Issonborg, Eastwood also claims from the Procopios a further amount of \$10,200 owing but unpaid on the contract.
- [4] While it is never an agreeable task for the court to allocate, between two innocent parties, a loss caused by an apparent fraudster, the law imposes a fairly clear-cut rule which, in the circumstances of this case leads me to require that the Procopios bear the loss imposed by Issonborg's fraud. As a result, for the reasons set out below, I grant judgment against the Procopio's in favour of Eastwood in the amount of \$95,840.
- [5] The Procopios also claim a right of set off against any judgment Eastwood might obtain because of alleged deficiencies in Eastwood's work. On the record before me, I am not prepared to grant any right of set off for alleged deficiencies.
- [6] In addition to the foregoing, I grant both Eastwood and the Procopios judgment against Issonborg in the amount of \$85,640.

## **The Facts**

- [7] There is relatively little dispute about the facts material to the case. The dispute centres more on whether the law holds the plaintiff or the Procopios liable in light of those facts.
- [8] Eastwood is an Ontario Corporation in the business of renovating and building homes and commercial properties. Its sole shareholder, director, and officer is Tony Lin. Mr. Lin is a Chinese immigrant whose English is limited. He testified at trial through a Mandarin translator.
- [9] The defendant Frederico Procopio is the registered owner of 281 Christie St. in the city of Toronto (the "Property"). He did not testify at trial.
- [10] The defendant Elaine Procopio is Frederico's spouse. She testified on behalf of herself and her husband at trial because she was the one with primary carriage of the construction project.
- [11] For ease of reference I will refer to Mr. Lin and the Procopios by their first names as counsel and the parties did at trial. I mean no disrespect by doing so.
- [12] The Procopios operated the Property as an investment property. October 3, 2015 the Property was largely destroyed by fire. The Procopios' insurer offered \$300,000 for its

reconstruction and offered to reconstruct the Property through one of its approved contractors. Instead of using one of the insurer's contractors, the Procopios preferred to deal with their own small business contractor. As a result, Elaine reached out to three contractors. She no longer recalls the names or telephone numbers of the people she approached. The first did not respond. The second told her that the job was too large for them. The third telephone number was answered by Isssonborg.

- [13] Isssonborg met Elaine the same day at the Property. He told Elaine that he worked with someone named Tony with whom he would have to confer but he was sure that Tony could complete the work. When Elaine asked Isssonborg for a ballpark cost of reconstruction, he responded that he could not provide any number without first speaking with Tony. Isssonborg told Elaine that Tony's work was very good and that Tony had a group of people who "were really good workers." Elaine also asked Isssonborg questions about insurance coverage. He could not answer those questions but said he would set up a meeting with Tony.
- [14] Elaine heard back from Isssonborg who took her to a construction site to introduce her to Tony. The site was that of a house that Tony was building. During this first meeting with Tony, Elaine became aware of Eastwood and became aware that Tony "had some say" in Eastwood. Elaine did not know whether Isssonborg had an ownership interest in Eastwood. She says the issue did not cross her mind.
- [15] Elaine met Tony three times before the contract for the construction of the Property was signed. During these meetings, she also advised Tony that an insurer was involved. Tony said that he was familiar with insurers, had worked with them before and that this would not pose any difficulties. Elaine also asked Tony if he had liability insurance because the insurer insisted on it. Tony assured her that he did.
- [16] Neither Tony nor Isssonborg ever discussed the ownership of Eastwood with Elaine. Nor did Tony or Isssonborg discuss with Elaine the details of their relationship.
- [17] According to the agreed statement of facts, in December of 2015, the Procopios met with Tony and awarded the contract to Eastwood on the basis of a verbal agreement on the material terms of the project, namely that, Eastwood would supply certain materials and services to renovate the property for \$315,000.00, including HST.
- [18] Isssonborg subsequently prepared a written contract which he signed on behalf of Eastwood and which Federico signed on behalf of himself and his wife. The contract bears the letterhead of Eastwood in printed form with Tony's residential address as the Eastwood address and a telephone number for Eastwood which is Tony's cell phone number.
- [19] At trial there was some disagreement about how frequently Elaine met Tony during the course of construction, if at all. Elaine says she never met him during construction. Tony says he met Elaine several times during construction. I do not view that issue as material because both sides agree that the primary contact between Eastwood and the Procopios during the course of construction was between Elaine and Isssonborg.

- [20] According to Elaine, she saw Issonborg frequently. She says Issonborg regularly visited her with floor, cabinet and paint samples and that he called her approximately twice a week to update her on what was currently being done and what was coming down the pike.
- [21] Elaine agrees that the contract was with Eastwood and admits that she knew she had to pay Eastwood. During the course of the contract she wrote 14 cheques in favour of Eastwood. She handed those cheques to Issonborg. Relatively early on, she also began making out cheques to Issonborg personally. She made out a total of 14 cheques to Issonborg totaling \$80,640. In addition, at Issonborg's request, she paid him \$5,000 in cash "a couple of days" after the contract was signed. Issonborg explained that he needed the cash to pay demolition and fencing workers because Tony was not around to pay them.
- [22] When Issonborg first asked Elaine to make out a cheque to him personally, she asked why she should not be making the cheque out to Eastwood. Issonborg explained that Tony was out of the country and that Issonborg did not have access to Eastwood's bank accounts. As a result, Issonborg explained, that he could not pay the workers on site and there would be delays in construction if Elaine did not make cheques out to Issonborg personally. Tony was in China between December 18 and December 30, 2015; during the week of February 7, 2016 and between March 5 and April 6, 2016.
- [23] Elaine says she was initially uncomfortable paying Issonborg personally unless she could get a receipt for those funds from Eastwood. Issonborg indicated that that was not a problem and that he would provide receipts from Eastwood for the cheques that Elaine made out to him personally.
- [24] The receipts were hand written documents onto which Issonborg had written the name Eastwood Homes by hand at the top of the page. Sometimes Tony's residential address followed the name Eastwood, also handwritten by Issonborg. Elaine received similar receipts from Issonborg for the cheques she made out to Eastwood.
- [25] Although Issonborg wanted personal cheques because he claimed Tony was out of the country, several of the cheques to Issonborg were dated the same day as cheques to Eastwood. For example, there are cheques made out to both Eastwood and Issonborg dated January 22, January 29, April 2, and August 3, 2016.
- [26] Elaine never phoned the number at the top of her contract to confirm that whoever answered the phone approved of making cheques payable to Issonborg. Elaine never otherwise verified with Tony whether it was acceptable to make cheques payable to Issonborg.
- [27] Elaine admitted on discovery that she knew that writing a cheque to a person was not the same as writing a cheque to a company. She says that is why she insisted on receipts from Eastwood for cheques she made out to Issonborg. Elaine also admitted on discovery that the insurer would not reimburse her for cheques she made out to Issonborg which is why she required a receipt from Eastwood for those cheques.
- [28] Elaine says she was not alarmed by Issonborg's request for personal cheques because Issonborg had signed the contract for Eastwood and she had seen him pay workers with

cash on the jobsite. In addition, Elaine explained that she and her husband were the sole shareholders of three corporations. In two of those corporations, she had sole authority over the corporate bank accounts even though her husband was a shareholder.

- [29] Elaine did not discover that Tony was the sole owner of Eastwood until Issonborg's fraud came to light.
- [30] Tony met Issonborg long before the Procopio project and had worked with him on between seven and nine projects before beginning work on the Property. Tony described his working relationship with Issonborg as good but said that the friend who had introduced Issonborg to Tony had told him that "you have to watch out this guy" (*sic*). Tony agreed that he did not specifically do anything to watch him.
- [31] As Tony described it, Issonborg would present Tony with a potential job and ask for a quote. In this particular instance Issonborg approached Tony and said there was a project for him. Tony said he needed to see the site which Issonborg showed him, after which Issonborg introduced Tony to the Procopios. According to Tony, Issonborg could not do the job on his own because he had no workers and no money to carry the job. In addition, Tony did not believe that Issonborg had a renovator's license or liability insurance. Issonborg told Tony what the specific requirements of the rebuild were. Tony's arrangement with Issonborg was that Issonborg would receive 10% of the total project amount. Tony also asked Issonborg to "keep an eye on the project." Although Tony usually signs contracts for Eastwood, he believes Issonborg signed this one because Tony was in China tending to his elderly, ill mother.
- [32] Tony agreed that he did not discuss the details of the project with the Procopios because Issonborg was doing that. Tony did not tell the Procopios that he was the sole owner of Eastwood. Nor did he explain his relationship with Issonborg to the Procopios.
- [33] According to Tony, it was Issonborg's job to oversee the project. Issonborg would have to "check how Tony's work was" and would also have to "check on the Procopio side." Tony in turn would have to ensure that Issonborg was satisfied with what needed to be done.
- [34] The fraud ultimately came to light when Elaine noticed that work on the house was slowing down. She spoke with Issonborg who said that Tony was not paying the workers. Elaine asked for Tony's phone number and spoke with him. During those discussions, Tony explained that Elaine had not been paying what she owed. Elaine explained that she had in fact paid the outstanding amounts to Issonborg. Both Tony and Elaine then sent text messages to Issonborg to arrange a meeting to discuss the issue. Issonborg initially assured Elaine that he would speak with Tony and clear up the entire matter. Issonborg never did so. After several text exchanges with Tony and Elaine, Issonborg stopped responding. Issonborg has not responded to either Eastwood's claim or the Procopio's cross-claim and has been noted in default.

## **Application of the Legal Principles**

- [35] The parties agree on the legal rule that applies to the circumstances of this case. It is a long-standing rule which was summarized conveniently by Addy J. in *C.P. Ships v. Les Industries Lyon Corduroys Ltée.*<sup>1</sup> as follows:

Where a debtor, instead of paying his creditor, chooses to pay a third party, he does so at his peril. Where the money is not turned over to the creditor, the onus is then on the debtor to establish either:

- (1) that the creditor actually authorized the third party to receive the money on his behalf, or
- (2) that the creditor held the third party out as being so authorized, or
- (3) that the creditor by his conduct or otherwise induced the debtor to come to that conclusion, or
- (4) that a custom of the trade exists to the effect that in that particular trade and in those particular circumstances, both the creditor and the debtor normally would expect the payment to be made to the third party.

- [36] The Procopios rely on the second and third exceptions quoted in the previous paragraph, that is to say, that Eastwood held Issonborg out as being authorized to receive payment or that Eastwood by its conduct or otherwise induced the Procopios to conclude that the Procopios could pay Issonborg.

- [37] I agree that the evidence establishes that Eastwood held out Issonborg as being authorized to collect payments on behalf of Eastwood in the sense that the Procopios were authorized to deliver to Issonborg cheques payable to Eastwood. In my view, the evidence set out above does not, however, authorize the Procopios to make cheques out personally to Issonborg.

- [38] As the court in *C.P.* set out immediately following the quotation reproduced in paragraph 35 above:

Even where it is established that a person who is an agent of the principal, has acted on his behalf and is entitled to remuneration for his services, this does not mean that the agent is necessarily authorized to receive the payments which are due to the principal from the other party to the contract.

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<sup>1</sup> *C.P. Ships v. Les Industries Lyon Corduroys Ltée*, 1982 CanLII 5157 (FC), [1983] 1 FC 736

[39] Here, the Procopios knew that the contract was with Eastwood. It was therefore Eastwood that had to be paid. The question then is whether Eastwood somehow led the Procopios to conclude that they could pay Issonborg personally. The evidence at trial does not make that out. Tony never told the Procopios that they could pay Issonborg personally instead of Eastwood. The only request to pay Issonborg came from him. Elaine admitted that Issonborg told her he had no access to the Eastwood bank accounts. As a result, whatever Elaine may have thought about Issonborg's authority vis-à-vis Eastwood, she knew he had no financial authority over it.

[40] If, for example, Elaine had been dealing with a car dealership, there would be no doubt that she could not pay for a car by making a cheque out to the sales manager of the car dealership personally even though all of her dealings may have been with the sales manager or his/her subordinates. The dealings with Eastwood and Issonborg are not materially different. Indeed, the one material difference is that Elaine knew that Issonborg had no financial authority over Eastwood. In those circumstances the legal rule is clear, Elaine makes payments to someone other than Eastwood at her peril.

[41] The law of agency also requires the question of authority to be established vis-à-vis the particular act that is being done. For example, in *Potvin v. Glen Falls Insurance Co.*<sup>2</sup> the court held:

But the onus lies upon the person dealing with the agent to prove either real or ostensible authority, and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable.<sup>3</sup>

[42] As a result, the Procopios must establish that Issonborg had ostensible authority to receive cheques made out to him personally instead of to Eastwood.

[43] The strictness of the principle is illustrated by the facts of the cases applying it. In *C. P.* for example, the defendant wished to ship goods. It approached a freight forwarder, named Ketra. Ketra invoiced the defendant and the defendant paid Ketra. The bill of lading described the plaintiff, C.P., as the carrier, the defendant as the shipper, and Ketra as the "agent." The president of the defendant testified that he believed Ketra was the agent of C.P. and was authorized to receive payment on its behalf. When Ketra was assigned into bankruptcy without having paid C.P. for the shipment, C.P. sued the defendant. In finding for C.P., the court stated:

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<sup>2</sup> *Potvin v. Glen Falls Insurance Co* [1931] WWR 380; 1931 CanLII 573 (ABKB)

<sup>3</sup> *Potvin v. Glen Falls Insurance Co* [1931] WWR 380 at 392; 1931 CanLII 573 (ABKB)

The bill of lading indicates clearly that the contract was between the plaintiff as carrier and the defendant as shipper. Normally, the payment must be made to the carrier as the other party to the contract and the person who has actually supplied the services. There is nothing in the bill of lading to indicate that Ketra was authorized to receive payment on behalf of the plaintiff nor was there any other evidence that the plaintiff had so authorized Ketra to act.<sup>4</sup>

[44] Applying a similar analysis to the facts before me, the contract that the Procopios entered into was clearly with Eastwood. Normally, payment must be made to Eastwood. There is nothing in the contract that authorized the Procopios to pay Issonborg personally nor was there any other evidence that Eastwood had authorized Issonborg to receive cheques made out to him personally instead of cheques made out to Eastwood.

[45] The Procopios admit that they assumed that Issonborg had authority to receive cheques made out to him personally. Paragraph 10 of their statement of defence states:

At a time when Lin was in China, Issonborg requested that a number of cheque payments be made to him directly because he had to pay the Plaintiff's workers in cash, and, in the absence of Lin, he was unable to cash cheques or bank drafts made payable to the Plaintiff. As requested by Issonborg, these Defendants made a number of cheques payable to him personally. **These Defendants assumed that the payments, which totaled \$80,640.00, were collected by Issonborg on behalf of the Plaintiff.** (Emphasis added)

[46] The case law, however, requires more than an assumption. It requires something from the creditor to induce the debtor to believe it could pay a third party. In *Potvin*, the court applied the law of agency and stated:

The general rule is that a person dealing with an agent must make reasonable inquiry as to his authority and not merely assume that the agent has authority because he says so.<sup>5</sup>

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<sup>4</sup> *C.P. Ships v. Les Industries Lyon Corduroys Ltée*, 1982 CanLII 5157 (FC), [1983] 1 FC 736 at p. 738

<sup>5</sup> *Potvin* at p. 392 quoting *MacGillvary on Insurance Law*



- [47] In *C.P.* the court also noted that the defendant “appears to have assumed” that Ketra had authority to receive payment on behalf of *C.P.*<sup>6</sup>
- [48] In the case before me, not only did Tony not tell the Procopios that they could pay Isssonborg instead of Eastwood, Isssonborg told Elaine that he had no authority over Eastwood’s bank accounts and could not even give Elaine a ballpark price for the project without speaking to Tony first. In those circumstances, the law as set out in *C.P.* requires the Procopios to receive authority from Eastwood to pay Isssonborg or assume the risk of paying Isssonborg.
- [49] To the extent there was any ambiguity about who had authority to give instructions for Eastwood, the principle in *C.P.* requires Elaine to have made the cheques out to Eastwood. In my view there was not enough evidence for Elaine to do otherwise, especially given that she knew Tony had “some say” in Eastwood and that she knew Isssonborg had no authority over its bank accounts or pricing.
- [50] The Procopios ask me to take judicial notice of the fact that it is not uncommon for payments in the construction industry to be made in cash. Whether I do or do not take judicial notice of that is beside the point. The issue is whether Eastwood led the Procopios to believe that Isssonborg could accept cash on behalf of Eastwood.
- [51] As noted, Tony never made any such statement. Elaine paid Isssonborg the cash a few days after the contract was signed. While the evidence at trial does not disclose that Isssonborg had told Elaine by that point that he did not have access to the Eastwood bank accounts, that conclusion was implicit in Isssonborg’s request. Isssonborg said he was asking for cash because Tony was not around to pay workers. That must mean that Isssonborg had no access to Eastwood’s financial assets, otherwise he could pay the workers from Eastwood’s accounts.
- [52] Although the Procopios did not advance this argument at trial, I should also address the fourth exception in *C.P.*, namely that there is a custom of the trade to the effect that the creditor and debtor would expect payment to be made to the third party. It might be suggested by some that there is such a custom here in that Isssonborg should be characterized as a general contractor and that the custom in the construction industry is to pay the general contractor. As noted, the Procopios did not advance this argument nor would the facts support it. If this custom had applied, the general contractor is the one who contracts with the homeowner. Even if the Procopios believed that Eastwood was the

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<sup>6</sup> *C.P. Ships v. Les Industries Lyon Corduroys Ltée*, 1982 CanLII 5157 (FC), [1983] 1 FC 736C.P. at p. 737. There is one further aspect of the passage at p. 737 that warrants mention. In noting that the defendant assumed Ketra had authority, the court also stated that Ketra did not tell the defendant that it had authority but that the defendant assumed this. For an agent to have told the debtor that it had authority should not make any difference. The critical point is not what the agent says about his authority but what the creditor tells the debtor about the agent’s authority. If it were otherwise, the principle we are discussing would not be necessary because the moment any third party told a debtor, fraudulently or otherwise, that it had authority, the debtor would have the right to pay the third party.

general contractor, they were still obliged to pay Eastwood as the general contractor and not Issonborg personally.

- [53] While some may find the result harsh, the principle has been applied in other circumstances against individuals in circumstances where one might have some sympathy for the debtor.<sup>7</sup>
- [54] Although sympathy should be irrelevant to the outcome, here Eastwood and the Procopios are similarly situated. Both Tony and Elaine struck me as honest, honourable witnesses. Neither stretched the truth. Both readily admitted points against them. Neither took opportunities to provide self interested answers even when questions were structured to give them that opportunity.
- [55] Both appeared similar in level of sophistication. Elaine had run her own small business in the past and the Property was held as an investment property. Eastwood appears to be a “one man shop”. It’s book keeping and record keeping are quite basic with a rudimentary hand written ledger keeping track of transactions. Eastwood does not bear the hallmarks of any sort of sophisticated corporate or accounting processes. My sense is that this is the product of a simple, one person business and not the product of any design to manipulate or hide financial transactions.

### **The Amount at Issue**

- [56] The plaintiff claims \$95,840 being the difference between the contract price of \$315,000 and the cheques of \$219,160 that the Procopios paid to Eastwood.
- [57] The Procopios say that they should receive credit for the \$85,640 they paid to Issonborg which would leave \$10,200 owing. The Procopios submit that \$5,000 of that amount should be offset for work that Eastwood did not do that it was supposed to do. The Procopios claim an offset because they allege that the Eastwood work included several items that were not done including: a survey; a missing steel door; two or three new vinyl windows in the basement; a plumbing back up valve in the basement; and cleanup of the property after construction was complete.
- [58] I am not prepared to grant a set off for three reasons.
- [59] First, text exchanges between Tony and Elaine make it clear that Tony was anxious to finish all work. On February 1, 2018 Tony sent a message to Elaine asking her to identify what still needed to be done at the property. Tony followed that up with several other messages trying to speak or meet with Elaine. Elaine admits that she never answered Tony’s question asking her to identify what still needed to be finished and never met to discuss those issues.

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<sup>7</sup> See for example *Potvin v. Glenn Falls Insurance Company* [1931] WWR 380 where an individual was deprived of insurance for a home destroyed by fire and *Singh v. Brar* 2019 ABCA 270.

[60] Second, during examinations for discovery counsel for Tony asked for several undertakings relating to the cost and other evidence about the unfinished items. Those undertakings were never answered.

[61] Third, the Procopios had asserted a counterclaim against Eastwood for the alleged deficiencies. On February 1, 2023, counsel for the Procopios sent an email to counsel for Eastwood stating:

Please be advised that our expert witness Ray Bakch will not be testifying at trial. My clients will not be pursuing their counterclaim in as far as it relates to remedial work required to be done as a result of the negligent performance of the contract.

[62] Paragraph 16 of the counterclaim included a claim for incomplete work. The incomplete work alleged in the counterclaim included failing to provide a survey of the property; installing incorrect doors; failing to replace basement windows; failing to apply a plumbing credit; failing to waterproof the basement; and failing to clear backyard debris. These are all items in respect of which the Procopios raised complaints at trial. In my view, a fair reading of the email of February 1, 2023 would have led Eastwood to conclude that those complaints were now off the table. That in turn deprived Eastwood of the opportunity to defend itself against those allegations at trial.

### **Judgment Against Issonborg**

[63] Both the plaintiff and the Procopios seek default judgment against Issonborg. Issonborg was served with the statement of claim but did not defend. In addition, consistent with the principles set out in *Casa Manila Inc. v. Iannuccilli*,<sup>8</sup> Issonborg was served with a motion for default judgment returnable on the first day of this trial as appears from the affidavit of service of Jaclyn Didiano sworn on August 23, 2023.

[64] The statement of claim contains the material allegations against Issonborg as set out in these reasons. Although that is in and of itself sufficient to warrant default judgment, those allegations were also established at trial through the evidence of Tony and Elaine.

[65] In addition, the Procopios have asserted a cross-claim against Issonborg for contribution and indemnity for any amounts in respect of which they may be found liable at trial.

### **Conclusion and Costs**

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<sup>8</sup> *Casa Manila Inc. v. Iannuccilli*, 2018 ONSC 7083

- [66] As a result of the foregoing, I grant judgment in favour of Eastwood against Elaine Procopio and Frederico Procopio in the amount of \$95,840. In addition, I grant judgment in favour of Eastwood, Elaine Procopio and Frederico Procopio against Issonborg in the amount of \$85,640. The total judgment enforceable against Issonborg by Eastwood or the Procopios shall not exceed the principal amount of \$85,640 plus prejudgment interest, post judgment interest and costs. Issonborg should also be liable for the costs of both Eastwood and the Procopios because it was his conduct that led to the action and the trial.
- [67] Any party seeking costs as a result of these reasons may make submissions within three weeks of their release. Any responding party shall have two weeks to respond with a further one week for reply.

A handwritten signature in blue ink, appearing to be 'J. Koehnen', written above a horizontal line.

Koehnen J.

**Released:** October 3, 2023

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**BETWEEN:**

EASTWOOD HOME INC

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– and –

ELAINE PROCOPIO, FEDERICO PROCOPIO and  
DAVID ISSONBORG

Defendants

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**REASONS FOR JUDGMENT**

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Koehnen J.

**Released: October 3, 2023**