

CITATION: Web Objective, Inc. v. Socialabra, Inc., 2024 ONSC 1308
COURT FILE NO.: CV-17-572336-00CP
DATE: 20240304

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
WEB OBJECTIVE, INC.)	<i>Andrew J. Morganti</i> for the Plaintiff
Plaintiff)	
)	
- and -)	
)	
SOCIALABRA, INC., STEWART DAVIS, and JOSEF ZANKOWICZ)	
)	
Defendants)	
)	
Proceeding under the <i>Class Proceedings Act, 1992</i>)	HEARD: In writing
)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a default judgment in this action, which has been certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*.¹

[2] In 2017, Web Objective Inc. sued Socialabra Inc., Stewart Davis, Josef Zankowicz, Ryan Pinto, and Jeffrey Chong.

[3] On January 29, 2018, the action was discontinued as against Messrs. Pinto and Chong and certified as a class action as against Socialabra Inc., Mr. Davis, and Mr. Zankowicz.²

[4] In 2024, Web Objective moves for a default judgment as against Socialabra Inc. and Mr. Davis.

[5] Web Objective seeks a judgment of \$701,549.71 for breach of contract damages plus costs of \$30,000. In the alternative, it seeks judgment of \$360,100 comprised of damages of \$277,000 plus Class Counsel’s fee of \$83,100 and costs of \$30,000.

[6] For the reasons that follow, I grant Web Objective and the Class Members a judgment for \$701,549.71 plus costs of \$30,000. Class Counsel may move pursuant the *Class Proceedings Act*,

¹ S.O. 1992, c. 6.

² *Web Objective, Inc. v. Socialabra, Inc.*, 2018 ONSC 664.

1992 for approval of its Class Counsel fee.

B. Evidentiary Background

[7] On a motion for a default judgment, the evidentiary record is comprised of the material facts of the Statement of Claim, which are deemed to be admissions, and if so advised additional evidence proffered by the plaintiff.

[8] In the immediate case, in addition to the deemed admissions from the Fresh as Amended Statement of Claim, Web Objective has provided the affidavit of Daniel Pallag dated January 11, 2024 in support of its motion for a default judgment. Mr. Pallag is a licensed paralegal with the law firm Berger Montague (Canada) PC, who are lawyers for Web Objective.

[9] Mr. Pallag's affidavit includes court documents, documentary evidence, and the affidavits of Mr. Pinto dated October 31, 2017 and of Mr. Chong dated January 11, 2018.

[10] The motion record also includes the transcripts of the examination for discovery of the Defendant Josef Zankowicz and of Tom Douramakos, who is the principal of the Plaintiff, Web Objective.

[11] It should be appreciated that the following description of the factual background and findings of fact are not binding on the defendant Mr. Zankowicz who is disputing the causes of action and the factual allegations being made against him. Mr. Zankowicz has defended the action and this motion is solely against Socialabra and Mr. Davis.

C. Factual Background

[12] Web Objective, Inc., is an Ontario corporation owned and operated by Tom Douramakos, of the City of Toronto.

[13] Socialabra is an Ontario corporation that carries on business in Toronto as a technology developer focused on social networks.

[14] Socialabra was founded by Mr. Zankowicz and Mr. Davis. Mr. Zankowicz presented himself as the CEO ("Chief Executive Officer") of Socialabra and Mr. Davis presented himself as the COO ("Chief Operating Officer").

[15] On **April 21, 2014**, Socialabra agreed to issue debentures.

[16] On **May 8, 2014**, the agreement was announced by a press release statement on SEDAR (System for Electronic Document Analysis and Retrieval).

[17] On **May 21, 2014**, Socialabra released an offering memorandum with respect to the debentures. The offering memorandum set out the terms of the debentures and represented, among other things, that the founders of Socialabra; i.e., Messrs. Zankowicz and Davis, would be investors in the debenture offering.

[18] In the following weeks, Mr. Davis repeated the representation that he would purchase a \$100,000 debenture.

[19] In May of 2014, Mr. Zankowicz provided potential investors with an Investor Presentation that included, among other things, a Debenture Term Sheet and a Subscription Agreement for an interim financing between "a minimum" of \$400,000 to a "maximum of" \$600,000 in the form of

a “10% Convertible Debenture.”

[20] The debenture had a three year term with compound interest at 10% *per annum*. The debenture was secured against all of Socialabra’s assets and would rank superior over all other debt obligations with the exception of statutory priorities.

[21] The debenture was conditional on the satisfaction of certain preconditions, such as Mr. Zankowicz and Mr. Davis signing employment contracts and there being a minimum lending of \$400,000, failing which the investor’s funds would be refunded without deductions and without interest.

[22] The Debenture Term Sheet stated that each holder of at least \$40,000 in Debentures would have access to unaudited financial statements, quarterly financial statements, and an annual business plan.

[23] The Debenture Term Sheet stated that the Founders (Messrs. Zankowicz and Davis) would transfer all their relevant intellectual property to Socialabra and would have employment contracts with Socialabra.

[24] The Subscription Agreement indicated, among other things that: (a) JM Capital II Corp. intended to acquire Socialabra if certain criteria were met, including Socialabra raising a minimum of \$400,000; (b) None of the loan would be used towards salaries or other fees owing to the founders; (c) one of the capital would be allocated to selling or promotional expenses incurred in connection with the issuance of the Debenture; and (d) if the minimum capital of \$400,000 was not raised, Socialabra would promptly refund the investment without interest or deductions.

[25] On **June 16, 2014**, Web Objective and the Class Members (the other investors) purchased debentures with a value of \$277,000. However, notwithstanding their representations, Messrs. Zankowicz and Davis made no investment. The Class Members were not told that Messrs. Zankowicz and Davis had not authorized the release of their investment funds.

[26] Apart from the \$277,000 invested by the Class Members, there were no other investors. \$400,000 was not raised. In these circumstances, the Class Members were entitled to a refund of their investments. This did not occur.

[27] Moreover, Web Objective and the Class Members were not told that Mr. Zankowicz had not transferred his software copyright (intellectual property) to Socialabra and that he did not have an employment contract with Socialabra.

[28] Following the advance of funds by Web Objective and the Class Members:

a. The Defendants did not repay the Debentures from money received from Socialabra’s intellectual property, customer agreements, employee agreements and accounts receivable, or from a SR&ED (Scientific Research and Experimental Development) Refund from the Federal and Ontario governments.

b. The Defendants Socialabra and Mr. Davis did not account for how the raised capital was spent.

[29] On **January 19, 2017**, Web Objective and the Class Members, the other debenture holders, served a notice of default of the debentures and demanded immediate payment plus interest.

[30] The Class Members relied on the representations of Socialabra and Mr. Davis and were induced to invest in the Debentures. The representations were false. But for the false

representations, Web Objective and the Class Members would not have invested in the Debentures.

[31] As noted above, the Class Members were not repaid, and they lost their entire investment.

D. Damages

[32] Web Objective on behalf of itself and the Class Members claims damages of **\$701,549.71**, calculated as follows:

Payment Date	Amount	Monthly Interest	Months from Payment Date to March 1, 2024	Total Interest	Damages (Principal + Interest)
June 16, 2014	\$277,000	0.8333%	117	\$424,549.71	\$701,549.71

E. Procedural Background

[33] On **March 28, 2017**, Web Objective commenced a proposed class action on behalf of all purchasers of Socialabra's debentures in its June 2014 offering.

[34] On **May 1, 2017**, Mr. Davis (representing himself and Socialabra), served an Intent to Defend.

[35] On **August 22, 2017**, Arnold Zweig advised Web Objective's lawyer of record that he had been retained by Socialabra and Mr. Davis. Mr. Zweig, however, did not formally get on the Record.

[36] In the **fall of 2017**, Web Objective's counsel determined that Messrs. Pinto and Chong were not directors, officers, or managers of Socialabra and that they were not responsible for any representations made to investors.

[37] On **October 20, 2017**, Socialabra and Mr. Davis consented to certification of the action.

[38] On **November 5, 2017**, Web Objective and Messrs. Pinto and Chong reached a settlement agreement pursuant to which: (a) the action would be dismissed against Messrs. Pinto and Chong with prejudice but without costs; and (b) Messrs. Pinto and Chong would swear an affidavit attesting that they were not responsible for the management of Socialabra nor responsible for the representations.

[39] On **January 18, 2018**, Mr. Zankowicz consented to the certification of the action.

[40] On **January 29, 2018**, the action was discontinued as against Messrs. Pinto and Chong and certified as a class action as against Web Objective, Mr. Davis, and Mr. Zankowicz.

[41] The Certification Order provided as follows:

ORDER
(CERTIFICATION)

[...]

Certification

2. THIS COURT ORDERS that the proceeding is certified as a class proceeding as against the Defendants Socialabra Inc., Stewart Davis and Joseph Zankowicz pursuant to the *Class Proceedings Act, 1992*.

Class Definition and Representative Plaintiff

3. THIS COURT ORDERS that the class definition for the purposes of the action is:

All purchasers who acquired Socialabra Inc.'s Debentures offered under its June 2014 Debenture Offering.

4. THIS COURT ORDERS that Web Objective, Inc. is appointed the representative plaintiff on behalf of the Class.

5. THIS COURT ORDERS that Morganti & Co., P.C. is appointed as counsel for the Class.

Nature of the Claims and Common Issues

[...]

8. THIS COURT ORDERS that the common issues are as found in Schedule "A" appended hereto.

[...]

SCHEDULE "A" – COMMON ISSUES

[...]

Cause of Action No. 2: Negligent Misrepresentation

1. Did the Defendants owe a duty of care to the Plaintiff and the members of the Class to ensure that the final offering memorandum did not contain any misrepresentations and otherwise made full, true, and plain disclosure of all material facts?
2. What is the standard of care applicable to the Defendants?
3. Did the final offering memorandum contain any misrepresentations or otherwise fail to make full, true, and plain disclosure of all material facts?
4. If so, did any of the Defendants breach the applicable standard of care? If so which Defendants(s)?

Cause of Action No. 3: Breach of Contract

1. Is the Debenture agreement, [...] a binding contract (the "Contract")?
2. Does the Contract require [Socialabra] repay each subscriber the amount invested plus interest at 10% per annum, compounded annually?
3. Are the Individual Defendants personally liable for the performance of the Contract?

4. Have the Defendants or any of them breached the contract for failure to repay the amounts owing under the Contract or [...]?
5. Can the amount of the Company's aggregate liability to the Class Members be determined?
6. If so, what is the Company's aggregate liability to the Class Members?

[42] On **February 12, 2018**, the Defendants were served with Web Objective's Fresh as Amended Statement of Claim.

[43] On **July 3, 2019**, Socialabra and Mr. Davis were noted in default for failure to file a Statement of Defence.

[44] On **January 27, 2020**, Mr. Zankowicz was examined for discovery.

[45] On **October 21, 2022**, Mr. Douramakos was examined for discovery on behalf of Web Objective.

[46] Socialabra and Mr. Davis have refused to attend examinations for discovery or to provide documentary discovery.

[47] On **March 2, 2023**, Socialabra and Mr. Davis served a notice that they had discharged Mr. Zweig and that Mr. Davis was going to represent them both.

[48] On **March 6, 2023**, by File Direction, I scheduled a summary judgment motion as against Messrs. Davis and Zankowicz for October 26, 2023. As events transpired, this motion did not proceed.

[49] At a case management conference on **April 14, 2023**, I directed that Web Objective may bring a default judgment motion as against Socialabra and Mr. Davis on October 26, 2023, the date returnable for the already scheduled summary judgment motion.

[50] The motions scheduled for October 26, 2023 were adjourned to December 18, 2023.

[51] The motions, however, did not proceed on December 18, 2023, and on **December 18, 2023**, there was a case management conference at which I made the following file direction:

FILE DIRECTION

1. This is a case management conference in this primary market securities class action.
2. At the case management conference, I was advised that the self-represented Defendant Mr. Davis had requested an adjournment because of illness and a hospital admission. I did not adjourn the case management conference because it was entirely for scheduling purposes and Mr. Davis will be given notice of this File Direction.
3. As appears, a variety of motions were scheduled for October 26, 2023. However, those motions were adjourned, and they were rescheduled for today.
4. Then the situation changed yet again and instead of today being a motion day, it became a case management conference for scheduling purposes.
5. The current situation is that the Defendants Davis and Socialabra have not defended, and they have been noted in default of the Amended Statement of Claim that was served on them. The Plaintiff seeks a default judgment as against these Defendants.

6. Mr. Zankowicz now has counsel. Mr. Zankowicz has now delivered answers to undertakings. He has also delivered a motion for leave to late deliver his response to the Plaintiff's Notice to Admit. He also delivered a response to the Plaintiffs' Rule 34.15 motion, which is being adjourned *sine die*.

7. What is required in the immediate circumstances is a new timetable as follows: [...]

[52] In the timetable, I fixed March 1, 2024 as the date for a motion in writing for Web Objective's motion for a default judgment as against SocialLabra and Mr. Davis.

[53] On **January 10, 2024**, my judicial assistant received an email message from Mr. Davis requesting a stay in this action because he has had a series of health problems. He had or was going to obtain appointments with cardiologists and a kidney specialist. He requested a delay until he was healthy again. The email message was brought to my attention. I did not respond to the email message.

[54] In compliance with the File Direction timetable for the default judgment motion, Web Objective delivered its material for a motion in writing.

F. Motions for a Default Judgment

[55] When a defendant has been noted in default, the plaintiff may make a motion for judgment.

[56] On a motion for a default judgment, the court undertakes a three-step inquiry; namely: (a) what deemed admissions of fact flow from the Statement of Claim? (b) do the deemed admissions of fact entitle the plaintiff as a matter of law to judgment? and (c) if the deemed admissions are insufficient for judgment, has the plaintiff adduced admissible evidence that when combined with the deemed admissions entitles it to judgment on the pleaded claim?³ Where the pleaded facts are not sufficient to establish liability, the court may consider the affidavit evidence to determine whether the plaintiff is entitled to judgment or whether the evidence disentitles the plaintiff to judgment.⁴

G. Discussion and Analysis

[57] Based on the findings of fact set out above in the factual and procedural background, I conclude that SocialLabra and Mr. Davis are jointly and severally liable for the tort of negligent misrepresentation.⁵ The offering memorandum and the associated documents misrepresented and did not make full, true, and plain disclosure. Mr. Davis has not accounted for the proper use of the investors' funds and I draw the adverse inference that the funds, which should have been refunded in any event, were used for unauthorized purposes contrary to the promises made by SocialLabra to the Class Members.

[58] Mr. Davis made representations about investing in the Debenture which were false. SocialLabra and Mr. Davis breached their standard of care to Web Objective and the Class Members who relied on the representations of SocialLabra and Mr. Davis, which representations were false. But for the false representations, Web Objective and the Class Members would not

³ *Gillespie v. Fraser*, 2023 ONSC 537; *Kaur v Virk*, 2022 ONSC 6697; *Elekta Ltd. v Rodkin*, 2012 ONSC 2062.

⁴ *Martin v. Hurst*, 2023 ONSC 2606 (Div. Ct.); *Salimijazi v. Pakjou*, [2009] O.J. No. 1538.

⁵ *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789; *Deloitte & Touche v. Livent Inc (Receiver of)*, 2017 SCC 63.

have invested in the Debentures.

[59] As a result of the false representations of Socialabra and Mr. Davis, Web Objective and the Class Members lost their investment in the debentures and suffered damages of \$701,549.71 comprised of the principal amount invested plus compound interest at 10% per annum.

[60] Based on the findings of fact set out above in the factual and procedural background, I find Socialabra – but not Mr. Davis – also concurrently liable for breach of contract.

[61] Mr. Davis is not liable in contract for want of privity in contract with Web Objective or the Class Members. The Class Members contracted with Socialabra not Mr. Davis.

[62] Socialabra breached the Debenture contract by failure to repay the amounts owing. The damages suffered by Web Objective and the Class Members is again \$701,549.71.

[63] I therefore concluded that Web Objective and the Class Members are entitled to judgment in the amount of \$701,549.71 as against Socialabra and Mr. Davis plus costs of \$30,000 as requested.

[64] Class Counsel may apply to the Court for approval of its contingency fee agreement and Class Counsel fee.

H. Conclusion

[65] There shall be a default judgment of the common issues in accordance with the above Reasons for Decision.

Perell, J.

Released: March 4, 2024

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BETWEEN:

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Plaintiff

- and -

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JOSEF ZANKOWICZ**

Defendants

REASONS FOR DECISION

Released: March 4, 2024