

CITATION: To v. Psonic Inc., 2024 ONSC 4602
COURT FILE NO.: CV-23-00705849-0000
DATE: 20240819

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Ting Hei To, Plaintiff/Moving Party

-and-

Psonic Inc. and Nelson Chi Wan Chan, also known as Chi Wan Nelson Chan also known as Nelson Chan, Defendants

BEFORE: L. Brownstone J.

COUNSEL: Edward Zhou, for the Plaintiff/ Moving Party

No one appearing for the Defendants

HEARD: August 16, 2024

ENDORSEMENT

Introduction

[1] The plaintiff, Mr. To, engaged the corporate defendant, Psonic Inc. (“Psonic”), to build a coach house on his property. Mr. To’s dealings with Psonic about the project were done through the personal defendant, Mr. Chan, who acknowledges in his statement of defence that he is Psonic’s sole director, owner, and controlling mind.

[2] Mr. To made a series of payments to Psonic’s bank account beginning in December 2021. By March 2023, other than the production of some drawings, nothing had been done on the project. The plaintiff was concerned. He asked for confirmation regarding the building permit applications, among other things. He gave the defendants more funds towards the project.

[3] By August 2023 Mr. To was losing patience. He made further inquiries of Mr. Chan. He learned from the City of Markham that no permit application was outstanding in respect of his property.

[4] In conversations between Mr. To and Mr. Chan on August 10, 16, and 23, 2023, Mr. Chan advised Mr. To that Psonic was having difficulties stemming from an audit by the Canda Revenue Agency. Mr. Chan advised Mr. To that Psonic was likely to be “dissolved” and that Mr. Chan would carry on the construction business through a new entity he was in the process of establishing. In the course of these conversations, Mr. Chan advised Mr. To that he would personally guarantee Mr. To’s payments made to date, which amounted to just over \$143,000.

[5] Psonic's trustee report shows it made an Assignment for the General Benefit of Creditors on August 29, 2023. The proceeding against Psonic is stayed. The trustee report shows Psonic has no realisable assets.

[6] Mr. To moves for summary judgment against Mr. Chan. The dates for this motion were scheduled on an urgent basis, peremptory on Mr. Chan. The urgency arises because there is a pending sale of Mr. Chan's residence, believed to be his only Canadian asset. Mr. Chan did not file materials or appear on the motion, despite being aware of the peremptory nature of the date and despite being duly served with Mr. To's materials.

[7] Mr. To bases his motion on three arguments. First, he asks that Mr. Chan's defence be struck for failure to pay a \$500.00 costs award ordered by Associate Justice Abrams and that the matter proceed as a default proceeding. Second, he asks for judgment on the basis of what he claims is Mr. Chan's binding personal guarantee. In the alternative, he asks that Psonic's corporate veil be pierced and Mr. Chan be personally liable for Psonic's debt. In his argument about piercing the corporate veil, Mr. To raises the issues of Mr. Chan's personal misrepresentations.

The test for summary judgment

[8] Under rule 20.04 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary judgment, and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[9] In accordance with *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, in order to be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she can fairly resolve the dispute: at para. 57.

[10] The court must first determine if there is a genuine issue requiring trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring trial if the evidence allows the court to fairly and justly adjudicate the dispute by this proportionate procedure.

[11] If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2). These powers may be used if it would not be against the interests of justice to do so: *Hryniak*, at para. 66.

[12] The moving party bears the evidentiary burden of showing there is no genuine issue requiring a trial. Parties are required to put their best foot forward: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 SCR 372 at para. 11.

[13] Courts may grant partial summary judgment, but only if it is appropriate in the context of the litigation as a whole. If partial summary judgment may lead to inconsistent results, it should not be granted. Partial summary judgment must also serve the goals of proportionality, efficiency and cost effectiveness: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 at para. 38.

[14] With these principles in mind, I turn to Mr. To's arguments.

Issue one: Should Mr. Chan's defence be struck for his failure to pay costs?

[15] Mr. Chan had been required to serve his affidavit of documents by February 16, 2024, and did not do so. He sought an indulgence until March 1, 2024, but did not deliver his documents then either. On March 21, 2024 Associate Justice Abrams ordered on consent that Mr. Chan serve his affidavit of documents by April 19, 2024, and pay costs of \$500.00. He has not paid those costs.

[16] While court orders are to be respected and not flouted, the consequences for failing to obey a court order must be proportionate. In this case, there is a single order in the amount of \$500.00 that is unpaid. While I do not countenance this behaviour, and there may be consequences for it, striking the defence is a disproportionate response and I decline to do so.

Issue Two: Has Mr. To established that there is no genuine issue requiring a trial with respect to whether Mr. Chan provided a legally enforceable guarantee?

[17] The evidence demonstrates that Mr. To paid some amounts to Psonic and some to Mr. Chan personally. The total amounts Mr. To paid for the construction contract and for furniture is \$143,472.48.

[18] Mr. To claims that in a series of conversations and text messages, Mr. Chan provided a personal guarantee of those amounts and agreed to refund, personally, all of the money paid by Mr. To. Mr. Chan in his statement of defence claims that at all material times, he was acting in the official capacity of Psonic and never in his personal capacity, that "there is no basis in law or in fact as pleaded against him personally", and that Mr. To has no cause of action against Mr. Chan personally.

[19] Counsel for Mr. To conceded that prior to August 10, 2023, Mr. Chan had provided no personal guarantee to Mr. To. He relies on transcripts of taped telephone conversations and text messages in support of the guarantee's existence.

[20] On August 10, 2023, the parties had a conversation in which Mr. Chan advised Mr. To that his money "will not go missing. You will not be scammed out of your money.... if you need me to personally prepare a document, one with legal force, I can do that for you, OK? So you are not going to lose your money, that's for sure, OK?"

[21] Mr. To asked for a document confirming the guarantee, and Mr. Chan stated:

"It's the company that's having issues, but the owner -- to be frank, if I were not looking out for my clients, I got some money that's paid to the company, if the company is having problems, you will not get a penny. However, I will do this, personally, I will do the document for you, And it's not going to be just one piece of paper that says "I owe you", it will [be] a complete document in it, okay? It will be in there."

[22] Mr. Chan advised it would just take a couple of days, and went on to explain that the company was having problems with the CRA, who suspected that the company had significant funds in cash and had paid too little tax. Mr. Chan told Mr. To that the simplest solution was to dissolve Psonic which would take care of the tax issue. Once the tax issue was resolved, Mr. Chan said he intended to open a new company and have the new company carry on Mr. To's construction project. Mr. Chan stated that there would be no loss to Mr. To. He explained "...that's why I'm using this personal approach, to guarantee your money." Numerous times during this conversation, Mr. Chan gave assurances such as the following:

"My personal assets, the value of the assets is more than sufficient to cover yours. We are talking about 100k and change, it's not that much, okay? That's number one. Number two, the company is dissolved, as I said earlier, without my guarantee, when the company is gone, you won't get a penny back. But I will not do that, so the first thing, I am giving you the guarantee and I will be responsible for taking care of this matter."

[23] The document did not materialise.

[24] On August 23, 2023, Mr. To and Mr. Chan had a second conversation in which Mr. To advised he had not yet seen the personal guarantee, and asked when he would receive it. Mr. Chan repeated his promise that Mr. To would receive a full refund.

[25] During the course of the conversations, the parties agreed on the amount owing. Mr. Chan did not plead the *Statute of Frauds* RSO 1990 c. S. 19 in respect of the guarantee.

[26] The difficulty for Mr. To is that on the record before me I am unable to find any consideration for Mr. Chan's promise. By August 10, 2023, the first time the issue of the personal guarantee was raised, Mr. To had advanced all of the funds he seeks to have refunded, some to Mr. Chan personally and some to Psonic.

[27] There is no evidence of promised or actual forbearance as consideration, nor did Mr. To plead or argue forbearance.

[28] I also see no evidence that Mr. To relied on this promise to his detriment.

[29] Mr. To submits that the materials reveal that Mr. Chan received items from Psonic after his conversation with Mr. To. There is a suggestion in the record that Mr. Chan received funds from Psonic's account. There is reference to Mr. Chan personally holding some construction materials meant for Mr. To's project in Mr. Chan's home.

[30] All of those issues are unclear on the record before me. Counsel asks that I find, directly or by inference, that Mr. Chan received funds from Psonic after August 10, 2023. I am unable to make that finding or inference on the record before me. Even if I were able to, it is not clear to me how that would constitute consideration from Mr. To for Mr. Chan's guarantee.

[31] On the record before me, I am unable to find that Mr. Chan's comments amounted to anything more than a gratuitous promise.

Issue Three: Has Mr. To established that there is no genuine issue requiring a trial as to whether the corporate veil should be pierced?

[32] Mr. To argues that Mr. Chan's conduct warrants a lifting of the corporate veil, and a finding that Mr. Chan is personally responsible for Psonic's debt to Mr. To. He argues that Mr. Chan's conduct in "dissolving" Psonic to avoid a CRA audit is of a nature that warrants imposing personal liability, as Mr. Chan has abused the boundaries between his personal and corporate selves.

[33] Mr. To also asks the court to find that Mr. Chan converted the full amount of the funds Mr. To paid to his own use. He asks the court to find that Mr. Chan is in possession of the entirety of the funds and to make other inferences about how the funds were used. The record does not support those inferences.

[34] The court will lift a corporate veil where it is satisfied that a corporation is a mere facade concealing the true facts or if it was incorporated for a fraudulent or improper purpose. Corporations cannot be used to shield fraudulent or improper conduct: *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, 237 A.C.W.S. (3d) 390, 23 B.L.R. (5th) 26, 314 O.A.C. 341, 372 D.L.R. (4th) 90 at para. 43.

[35] There is no broad authority permitting the court to pierce the corporate veil solely on the basis that it would be just and equitable to do so: *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472 at para. 65.

[36] I am unable to determine on the record before me whether Mr. Chan has used the corporation to shield fraudulent or improper conduct. The inferences Mr. To asks me to make about where Psonic's money went depend on accepting parts of what Mr. Chan says (that he purchased materials and has them in his house, for example), and disbelieving other parts (that he was honestly and in good faith engaged in managing Psonic's affairs). I am not able to do that on the paper record.

[37] However, in support of his argument regarding piercing the corporate veil, Mr. To raises the issue of Mr. Chan's misrepresentations to him. This was also pleaded in Mr. To's statement of claim.

[38] The record clearly demonstrates the following:

- Mr. Chan told Mr. To that he required \$56,839.00 amount for a City of Markham development charge;
- Mr. Chan told Mr. To that he required \$3,500.00 for grading;
- Mr. Chan told Mr. To that he required \$756.50 for insurance for Mr. To's property;
- Mr. Chan asked that these monies be sent to him personally, not to Psonic;
- Mr. To wired these sums to Mr. Chan's personal account;

- Mr. Chan did not remit the funds to the City of Markham. He told Mr. To he had applied for a permit but he never did.
- Mr. Chan did not purchase insurance for Mr. To's property.
- Mr. Chan did not use the funds towards grading.
- Mr. Chan kept these wired funds in his personal bank account, where they remained as of the date of his examination for discovery on May 20, 2024.

[39] On this issue, I am able to find the necessary findings on the record before me. Those facts can be readily applied to the law and it is a proportionate, expeditious and less expensive way to deal with this portion of the claim.

[40] The record is clear that the representations were untrue. I am able to infer from the record that Mr. Chan knew they were not true. The City of Markham neither requested nor received the funds. No funds were used for grading and there is no evidence any grading was every intended. No insurance was purchased. Mr. Chan intended that Mr. To act upon the misrepresentations and Mr. To did so – he provided the funds to Mr. Chan on the basis of the misrepresentations, to Mr. To's detriment.

[41] I therefore find that Mr. Chan is personally liable to Mr. To for \$61,095.50 on the basis of these fraudulent misrepresentations. This is not a question of piercing the corporate veil, as the funds were paid to and kept by Mr. Chan personally, on the basis of his personal misrepresentations.

[42] The issues of whether Mr. Chan is also liable to Mr. To for the remaining amounts, largely paid to Psonic, cannot be determined on the basis of the record before me. However, the issues in respect of those funds are separate. They are not the subject of misrepresentation. There is no risk of inconsistent findings, as I have made no findings on the remaining issues of the guarantee and the piercing of the corporate veil. As stated above, the plaintiff was put in the position of bringing this motion quickly given that Mr. Chan's single Canadian asset is for sale. The plaintiff should have the opportunity to avail himself of the usual litigation tools to determine if further evidence is available to support his remaining bases for liability.

Disposition

[43] The motion is granted in part. Mr. Chan shall pay to Mr. To the amount of \$61,095.50 plus pre-judgment interest from June 30, 2023 (the date on which the bulk of the funds were wired to him). The remainder of the claim shall proceed to trial in the ordinary course.

Costs

[44] Mr. To seeks \$29,018.25 in substantial indemnity costs. He argues that Mr. Chan has been uncooperative and caused substantial delay, causing Mr. To to incur unnecessary expenses. Mr. To has been partially successful. In exercising my discretion to fix costs under s. 131 of the *Courts of Justice Act*, RSO 1990 c. C. 43 and taking into account the factors set out in Rule 57, I must ultimately fix an amount that is proportionate and reasonable. Given Mr. To's partial success, the importance of the issue to him, and the actions of Mr. Chan that have caused delay, I fix those costs at \$12,500, payable forthwith.

L. Brownstone J.

Date: August 19, 2024