COURT OF APPEAL FOR ONTARIO

CITATION: BH Frontier Solutions Inc. v. 11054660 Canada Inc. (Canadian Choice Supply), 2024 ONCA 932
DATE: 20241223
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2024 ONCA 932 (CanLII)

Sossin, Madsen and Pomerance JJ.A.

BETWEEN

BH Frontier Solutions Inc.

Plaintiff (Respondent)

and

11054660 Canada Inc. doing business as Canadian Choice Supply*, 9428364 Canada Corporation*, Kambiz Salami*, Rongze Chai also known as Melinda Chai*, Rumqi Xuhekang Medical Equipment, Jiang Xiaoxian and Jiang Wanyin

Defendants (Appellants*)

Ran He, for the appellants, 11054660 Canada Inc. carrying on business as Canadian Choice Supply, 9428364 Canada Corporation, Kambiz Salami, and Rongze Chai also known as Melinda Chai

David Milosevic, for the respondent

Heard: December 16, 2024

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice dated April 14, 2022, with reasons reported at 2022 ONSC 2293 and the costs endorsement dated June 21, 2022, reported at 2022 ONSC 3707.

REASONS FOR DECISION

2024 ONCA 932 (CanLII)

OVERVIEW

[1] On September 29, 2020, the respondent, BH Frontier Solutions Inc. ("BH Frontier Solutions"), entered into a three-way agreement with Canadian Choice Supply, as distributor, and Shijazhuang Hongray Group ("Hongray"), as manufacturer, for the purchase of 107,600 boxes of medical gloves. Canadian Choice Supply never delivered a significant amount of the medical gloves contracted for. Justice Dunphy granted summary judgment for breach of contract against Canadian Choice Supply in the amount of $509,980 for repayment of all but $7,000 paid by BH Frontier Solutions for the supplies that were contracted but never delivered. This appeal concerns a two-day summary trial before Morgan J. which dealt with BH Frontier Solutions' separate claims of fraud against the appellants.

[2] The agreement for the medical gloves was negotiated by Rongze Chai and Kambiz Salami and signed by Mr. Salami on behalf of Canadian Choice Supply (federally incorporated in Canada) and by Jiang Xiaoxain for Hongray (incorporated in China). Ms. Jiang is a former defendant, but BH Frontier Solutions discontinued their claim against her because the appellants pursued a lawsuit against her in China.

[3] The agreement required BH Frontier Solutions to provide a 50% deposit to Canadian Choice Supply upon signing and the remaining 50% balance following

a successful inspection before the shipment date. As the distributor, Canadian Choice Supply was required to wire the payment to the manufacturer, Hongray. Canadian Choice Supply was also responsible for delivering the medical gloves.

[4] In October 2020, BH Frontier Solutions sent $1,325,546.25 USD as payment for the medical gloves, as directed by Ms. Chai. Of this amount, several orders amounting to $504,980 USD were not delivered to BH Frontier Solutions and no refund was provided. The appellants provided BH Frontier Solutions with a receipt showing the funds they sent to Canadian Choice Supply were sent to Hongray in China. This receipt was fraudulent, and the appellants alleged it was sent to them by Ms. Jiang who, unbeknownst to them, created the false receipt. The evidence at trial showed that the appellants transferred large amounts of BH Frontier Solutions' payments to six different individuals in China whom they did not know, supposedly at Ms. Jiang's direction, instead of Hongray.

[5] At trial, BH Frontier Solutions argued that the agreement for the medical gloves was fraudulent to the extent of the undelivered goods, and that the appellants were the agents of that fraud. In response, the appellants argued they sent BH Frontier Solutions' payment to Ms. Jiang who committed fraud against them, and that any recovery must wait until the outcome of their lawsuit against Ms. Jiang in China.

2024 ONCA 932 (CanLII)

DECISION BELOW

[6] The trial judge found the transaction at issue was composed of two distinct frauds: (a) the fraudulent misappropriation in China, and (b) the fraudulent misrepresentation in Canada.

[7] The trial judge found the appellants perpetrated the fraudulent misrepresentation in Canada, including the personally named parties as shareholders and directing minds of Canadian Choice Supply, and that BH Frontier Solutions suffered a significant loss as a direct result. He awarded $504,980 in damages (joint and severally amongst the appellants) in addition to the $504,980 in damages that Dunphy J. previously granted.

[8] The fraudulent misrepresentation in Canada was established because the appellants represented to Ran David Tao, the principal of BH Frontier Solutions, that Canadian Choice Supply had a “factory direct” relationship with Hongray, a world leading manufacturer of medical gloves. This direct relationship with “no middle-men” was also featured prominently on Canadian Choice Supply’s pamphlets. During cross-examination, Mr. Tao stated that this direct relationship was very important to him, and he asked Mr. Salami and Ms. Chai to confirm it five times throughout their discussions. Mr. Tao was concerned about the authenticity of the medical gloves and sought to ensure that the funds he paid would be sent directly to Hongray. Mr. Tao was reassured by a clause in their agreement which

2024 ONCA 932 (CanLII)

stated that Canadian Choice Supply would send BH Frontier Solutions' payments directly to Hongray. However, the Chinese language version of the agreement was slightly different and allowed the payment to be sent to an account "designated by [Canadian Choice Supply]" instead of directly to Hongray.

[9] The trial judge found that, whether or not the appellants knew that the receipt for payment to Hongray was forged, they knew that they did not send BH Frontier Solutions' payment directly to Hongray as provided in the aforementioned clause and as assured to Mr. Tao. Ms. Chai asked BH Frontier Solutions to make their cheques payable to 9428364 Canada Corporation, another company controlled by Mr. Salami and Ms. Chai, because, she alleged, Mr. Tao's first cheque was rejected by Hongray. However, the appellants never sent a cheque to Hongray. The evidence shows the appellants sent BH Frontier Solutions' payments to six different individuals in China instead of Hongray, supposedly at Ms. Jiang's direction. The appellants stated they did not know these individuals but money exchange agents in China required things to be done this way. The appellants also stated they never met Ms. Jiang and only spoke with her over WeChat (a messaging platform).

[10] The trial judge found the appellants' explanations unsatisfactory and illogical. He found the appellants' representation that they had a "factory direct" relationship to be knowingly false and intentionally misleading to BH Frontier Solutions. As a result of this fraudulent misrepresentation, BH Frontier Solutions

2024 ONCA 932 (CanLII)

2024 ONCA 932 (CanLII)

directly suffered losses in the form of payments made for goods which were never delivered.

[11] The trial judge also found that piercing the corporate veil to assign individual liability was appropriate in this case. While Canadian Choice Supply was liable for breach of contract, Mr. Salami and Ms. Chai were personally liable for fraudulent misrepresentation as the two individuals behind Canadian Choice Supply.

[12] The trial judge instructed himself on the two elements required for piercing the corporate veil from *642947 Ontario Ltd. v. Fleischer at al.* (2001), 56 O.R. (3d) 417 (C.A.), and found that they were met: (a) complete domination of the company by its owners, and (b) conduct akin to fraud.

[13] The trial judge found that Mr. Salami and Ms. Chai "hid behind their company… and used deceit to manipulate [Mr. Tao] into entering an Agreement that ultimately caused him financial loss."

[14] The trial judge also analyzed the fraudulent misappropriation of funds in China, but concluded in that context, the evidence fell slightly short of establishing that Mr. Salami and Ms. Chai were "full, intentional participants in the China-based fraud and misappropriation of funds" for which they blame Ms. Jiang. He held this did not negate his finding that they "hid behind their company, [Canadian Choice Supply], and used deceit to manipulate the Plaintiff into entering an Agreement

that ultimately caused him financial loss." On this basis, he found that the appellants engaged in the fraudulent misrepresentation in Canada.

[15] BH Frontier Solutions sought $124,867.43 in costs on a substantial indemnity basis or $82,726.52 on a partial indemnity basis. The trial judge noted that a finding of fraud often results in substantial indemnity costs, but the fraud engaged in by the appellants "was a somewhat less reprehensible form of fraud." He awarded costs at the mid-point amount of $100,000 all-inclusive.

2024 ONCA 932 (CanLII)

ISSUES

[16] The appellants raise the following issues on appeal:

1. Did the trial judge apply the wrong test for piercing the corporate veil?
2. Did the trial judge err by "artificially splitting" the fraud between the fraud that occurred in Canada and the fraud that occurred in China? Did this create a novel theory of liability not contemplated by the parties?
3. Did the trial judge err in awarding costs of $100,000?

ANALYSIS

[17] The standard of review is not in dispute. Correctness review applies on a question of law or mixed fact and law that raises an extricable legal issue; or review on the basis of a palpable and overriding error on a question of fact or a mixed

finding of fact and law that does not arise from an extricable legal error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 7, 25, 34 and 37.

(1) The trial judge did not err in piercing the corporate veil

2024 ONCA 932 (CanLII)

[18] The appellants argue that the trial judge erred in equating the legal test for fraudulent misrepresentation with the test for "conduct akin to fraud" in piercing the corporate veil. They contend that fraudulent misrepresentation does not include fraudulent intent or malice, while piercing the corporate veil does. We disagree.

[19] The trial judge properly directed himself on the test for piercing the corporate veil, set out by Laskin J.A. in *Fleischer*, at para. 68:

> [68] Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": *Clarkson Co. v. Zhelka* at p. 578. Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

[20] On the record, he found:

> [26] The Plaintiff's losses in the form of payments made for PPE never delivered were a direct result of the fraudulent misrepresentations made by Mr. Salami and Ms. Chai on behalf of CCS. That company, in turn, was entirely controlled by Mr. Salami and Ms. Chai, who were its only directors, officers, and shareholders. It had no

> other business interests, and was completely dominated by the personal interests of its two principals.

[21] Subsequently, with respect to the conduct of individual appellants, he found:

> [36] Without evidence that Mr. Salami and Ms. Chai shared in the misappropriated funds that were sent to the mysterious individuals, I would be hesitant to conclude that they were in on the fraud for which they blame Ms. Jiang. There is at least a possibility that they were hungry for a deal with the Plaintiff and that they let down their guard and allowed themselves to be preyed upon by Ms. Jiang.
>
> [37] But the fact that the evidence falls slightly short of definitively establishing Mr. Salami and Ms. Chai as full, intentional participants in the China-based fraud and misappropriation of funds, does not counter the fact that the evidence fully supports a finding that Mr. Salami and Ms. Chai perpetrated a Canada-based fraudulent misrepresentation. Either way, the two of them hid behind their company, CCS, and used deceit to manipulate the Plaintiff into entering an Agreement that ultimately caused him financial loss.

[22] These findings were available to him on the evidence and are entitled to deference.

[23] The appellants, of course, are correct that the test for fraud and fraudulent misrepresentation differ. We do not accept the appellants' argument, however, that fraudulent misrepresentation would not be considered "conduct akin to fraud." This court has confirmed that the scope of "conduct akin to fraud" includes, as Sharpe J. set out in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, at pp. 433-34 (Gen. Div.), aff'd [1997] O.J. No. 3754

2024 ONCA 932 (CanLII)

2024 ONCA 932 (CanLII)

(C.A.): where a corporate entity that is controlled by the individual defendants is being used as a shield for "fraudulent or improper conduct." Further, in subsequent case law, this court has emphasized that "fraudulent or improper conduct" should not be given a narrow interpretation: see *Mitchell v. Lewis*, 2016 ONCA 903, 134 O.R. (3d) 524, at paras. 17-19.

[24] In his costs endorsement, the trial judge characterized his finding at trial this way, at para. 5: "While Plaintiff's counsel is correct that the finding in the trial was fraud, it was not the egregiously fraudulent conduct that the Plaintiff attempted to prove." (Emphasis added.)

[25] In these circumstances, we see no basis on which fraudulent misrepresentation would not constitute "fraudulent or improper conduct" for purposes of piercing the corporate veil.

[26] We reject this ground of appeal.

(2) The trial judge did not err in distinguishing between the fraud in China and the fraud in Canada

[27] The appellants argue that the motion judge erred in "splitting" his analysis of the allegations of fraud between the Canada-based fraud and the China-based fraud. In making this argument, the appellants rely on the principle that judges should not decide matters on grounds which were not advanced by the parties.

2024 ONCA 932 (CanLII)

[28] The principle cited by the appellants is ordinarily invoked when a judge decides a case based on grounds where no evidence was led and where no relevant arguments were made: see *Asco Construction Ltd. v. Epoxy Solutions Inc.*, 2014 ONCA 535, 32 C.L.R. (4th) 1, at para. 8.

[29] We are not persuaded that the trial judge made findings based on grounds with no evidence or argumentation. The respondent's amended statement of claim specifically pleaded that "Salami and Chai knew they were engaged in a fraudulent scheme, and specifically knew that … [t]heir only alleged allegation through Hongray was through an individual whom they had never met or verified … [and] Hongray did not sell its products through unauthorized middlemen". Further, the trial judge determined there was fraudulent misrepresentation based largely on the appellants' knowledge they did not have a factory direct relationship with Hongray. This was asserted in the pleadings and there is no basis to conclude that the appellants did not know the case they would have to meet on this point.

[30] It was open to the trial judge to consider the conduct in Canada and the conduct in China as two distinct aspects of the allegations in the pleadings. The respondent highlights that the summary judgment motion judge also distinguished between ongoing investigations into activities by parties to the action in China, as opposed to the allegedly fraudulent activity of the appellants in Canada: *BH Frontier Solutions v. 11054660 Canada Inc.*, 2021 ONSC 8224, at para. 2.

2024 ONCA 932 (CanLII)

[31] The trial judge concluded that the evidentiary record did not reveal what happened to the respondent's funds once they were sent to the unknown individuals by the appellant, Ms. Chai. By approaching the allegations in this way, the trial judge could consider squarely the appellants' argument that they may have themselves been victims of a fraudster in China, while nonetheless concluding that there was liability for fraudulent misrepresentation in Canada on the part of the appellants, in light of their representations to the respondent.

[32] We do not accept that the trial judge exceeded the pleadings in his analysis and reject this ground of appeal.

(3) The threshold for leave to appeal the trial judge's award of costs is not met

[33] The appellants seek leave to appeal the trial judge's award of $100,000 all-inclusive, in costs in favour of the respondent.

[34] The appellants argue that the respondent inflated its costs between the summary judgment motion and the trial, and highlights that the trial was a 2-day summary trial following the extensive summary judgment motion on similar issues.

[35] The trial judge exercised his discretion under s. 131(1) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, to award costs of $100,000, roughly at the mid-point between the partial indemnity amount of costs submitted by the respondent ($82,726.52) and its costs on a substantial indemnity basis ($124,867.43). The trial

judge justified this approach on the basis that the respondent was successful in establishing the appellants' liability for fraudulent misrepresentation, but not in establishing the appellants' participation in the "egregious fraud" that it had sought to prove.

[36] While the costs that the appellants would have claimed if successful could be a further point of reference, in this case, the trial judge found the $20,000 in costs proposed by the appellants would be "surprisingly low."

[37] The awarding and fixing of costs have been recognized as highly discretionary and is afforded a high level of deference on appeal: *Pennyfeather v. Timminco Limited*, 2017 ONCA 369, at para. 122. An appellate court may interfere only where it finds that the judge in the court below misdirected himself or herself on the law or made a palpable error in the assessment of the facts: *Walker v. Ritchie*, 2006 SCC 45, [2006] 2 S.C.R. 428, at para. 17, citing *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 43. Leave to appeal a costs order is granted sparingly, where there are strong reasons to believe that the lower court erred: *Colistro v. Tbaytel*, 2019 ONCA 197, 145 O.R. (3d) 538, at para. 65; and *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597, 95 O.R. (3d) 365, at paras. 23-27.

2024 ONCA 932 (CanLII)

[38] In this case, the trial judge's award of costs was based on factors that it was open to him to consider, and does not reveal any legal error.

[39] We therefore deny leave to appeal costs in these circumstances.

DISPOSITION

[40] For the reasons above, the appeal is dismissed and leave to appeal the costs award is denied.

[41] The respondent is entitled to costs of this appeal in the amount of $10,000 all-inclusive.

"L. Sossin J.A."
"L. Madsen J.A."
"R. Pomerance J.A."

2024 ONCA 932 (CanLII)