IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Nickerson v. Collins, 2014 NSSM 71

Claim No: SCCH 423670

BETWEEN:

Name Derek Nickerson and Erika Leal **Claimants**

Name Jeff Collins **Defendants**
K-9 Orthotics & Services Inc.
K-9 Orthotics & Prosthetics Inc.

Editorial Notice: Addresses and phone numbers were removed from the electronic version of this judgment.

DECISION

This claim concerns the relationship of the Claimants with two separate corporations, K-9 Orthotics & Services Inc. ("Services") and K-9 Orthotics & Prosthetics Inc. ("Prosthetics"). Both companies were founded and developed, though not incorporated, by Jeff Collins. The Claimants, Derek Nickerson and Erika Leal are husband and wife. Derek Nickerson is a former employee of Services.

Initially, the Claimants sought the maximum amount allowed by the *Small Claims Court Act*, $25,000. However, they have since filed an amended Notice of Claim seeking $20,000 – namely, $10,000 in breach of contract for the purchase of shares in Prosthetics, which they claim were not delivered to them; and $10,000 from the transfer of assets from Services to Prosthetics, without notice to them in a way that adversely affects their interests as shareholders of Services.

For his part, Mr. Collins disputes this claim submitting there was no loan or purchase of shares of Services. Notwithstanding that, he claims the transfer of assets from Prosthetics to Services was a *bona fide* transaction as the company still has assets. With respect to their shares in Prosthetics, he submits their purchase was also a *bona fide* transaction and the Claimants are suffering from what he describes as "buyers' remorse".

This decision has been filed beyond the sixty days required by the *Small Claims Court Act*. The particular time line has been held to be directory rather than mandatory, as noted most recently by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260. Nevertheless, the parties have doubtlessly been anticipating this decision, and their patience is appreciated.

The Facts

Mr. Nickerson and Mr. Collins met in 2005 through a mutual friend. At the time, Mr. Nickerson and Ms. Leal owned a dog that required orthotics. Mr. Nickerson was sufficiently impressed with the product provided by Services that he accepted a position with the company and eventually decided to invest in the business. While he worked there, Services experienced legal problems with several former shareholders in Prince Edward Island. Consequently, the company sold its assets to Prosthetics and offered shares to new investors including the Claimants. Nickerson and Leal invested in that company and received 12,500 common shares each. The Claimants are not registered as having any shares of Services. Services' assets consist of $247,411 in redeemable preferred shares of Prosthetics. Prosthetics is the operating portion of the business.

Limitations of Actions

The Defendants have not specifically pleaded a limitations defence and the issue was not raised at the hearing. However, reference is made to s. 2(1)(e) of the *Limitation of Actions Act* which states as follows:

2(1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

(e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

This matter arises from a contract. I have not found there to have been fraud. I have found the initial transaction was the purchase of shares in 2006. The transfer of assets took place in 2007. They were issued shares in October 2007. The parties discussed an investment of subsequent shares in late 2007. This matter was not commenced until January 2014. I find the matter has been commenced beyond the limitation period as prescribed by s. 2(1)(e) above. Thus, I find this Court is without jurisdiction to hear the matter. Even if I am incorrect in the application of this section to this case, I find the Claimants have not proven their claim on a balance of probabilities.

Issues

The issues in this claim are as follows:

- How many transactions took place regarding the investment into Services and Prosthetics?

- What, if anything was the impact of the transfer of assets from Services to Prosthetics?

The Evidence

Both parties tendered significant amounts of documentary evidence. By Order of this Court dated May 1, 2014, I ordered Mr. Collins and by extension, the corporate defendants, to produce various documents to the Claimants' solicitor prior to the hearing. This apparently has been done. Mr. Ward has compiled these documents and entered them into evidence as Claimants' Exhibit #1. Mr. Collins submitted several other exhibits as well. While I have not referred to all of the exhibits, I have considered all evidence in preparing this decision and weighed it for relevance and credibility.

Derek Todd Nickerson

Derek Nickerson testified that he met Mr. Collins through a mutual friend when his dog required orthotics. He was subsequently invited to invest in Services and he and Ms. Leal paid $10,000 for either preferred shares or a loan. Mr. Collins described his company to Mr. Nickerson as not really a company but rather just himself in his basement. He had no employees, other than Mr. Nickerson, who worked two years for Mr. Collins for free. At the time that he paid the $10,000, it was not intended to be a loan. He was issued a receipt for a share purchase on December 17, 2006. He was to be given $10,000 in preferred shares for a new company. He was provided with a schedule containing the conditions of the preferred shares, with a different rate, namely par value plus 20%. This was the redemption value of the shares.

He identified tab 10 as the Schedule to the preferred shares he was issued. He was shown a second Schedule A, which contained conditions that were different from the initial shares. (Following, a more fulsome review of the evidence, I find these conditions were part of the preferred shares held by the Nova Scotia Cooperative Council.). Mr. Collins advised him that he had picked up an investor and wanted money to be turned over to his partners for marketing the shares. He advised Mr. Nickerson that he created a new company. Mr. Nickerson suggested to Mr. Collins that he felt he was being "cut out" to which Mr. Collins replied that it was merely an oversight. He paid $10,000 to purchase common shares. He tendered into evidence a withdrawal of $10,000 from his line of credit to his deposit account which he testified was for the subsequent purchase of the shares. He testified that he was not aware that the companies were changing and

that he and Mr. Collins only discussed further investment in additional shares. He testified that on October 15, 2007, he was issued the shares of Prosthetics.

Mr. Nickerson testified Mr. Collins constantly described the sales projections as not meeting expectations. Mr. Nickerson worked for the companies for approximately two years. Towards the end of his tenure, he found the working conditions were "out there" as he was not getting along with Mr. Collins. He had paid a lot of money for a small percentage of the company. He felt as if he had been scammed. Initially, he testified that the $10,000 investment in Prosthetics

was not intended to be a loan, but rather a purchase of 5% of the common shares of the company. He believed there were to be tax credits for its investment.

Under cross examination he testified that he was aware that Services was revoked by the Companies' Office. He acknowledged having applied for his tax credit for the shares of both companies. Further, the $20,000 came from the joint funds of himself and Ms. Leal. He made the investment in 2006 and received the certificate in December 2007. He acknowledged receiving the Investors Proposal contained in Tab 8, which was provided to both claimants.

Erika Leal testified that she first heard of Services through a colleague of Derek's and friend of Mr. Collins. They had an animal with difficulties and met with him for the purchase of some orthotics equipment for their dog. She had learned of his involvement with Dr. Runyon in PEI and viewed her endorsement as "a good thing". She and Mr. Nickerson liked the product and wanted to be a part of investing in its future. They paid $10,000 for what she believed was 5% of the company for which they would receive preferred shares within a 12 month period. Mr. Collins advised that they should have received common shares, sometime in 2007. They made a second investment in Prosthetics which they paid from their line of credit. She identified the investors' proposal letter in Tab 8 which she first saw in 2006 that made her interested in investing in the companies. She saw the document before the investment was made. She understood it to mean that they could either opt for a loan agreement or receive a tax credit, in a way similar to an RRSP. They opted for shares in hopes of receiving the Equity Tax Credit provided by the Province of Nova Scotia.

They recalled receiving a letter from Donald Cleveland and Mr. Collins concerning the investment in the company by Dr. Caroline Runyon and Jessie Wheatley. In that letter, they advised that Dr. Runyon and Ms. Wheatley were terminating the relationship with them. Further, Mr. Collins was setting up a new company, namely, Prosthetics. When making their investments, the Claimants received the common share certificate of Prosthetics dated October 15, 2007. As a result, she believed they owned a combined total of 10% of Prosthetics. She indicated that she believed in Mr. Collins' projections.

Under cross examination, Ms. Leal testified that she believed when she made her investment she was receiving common shares in exchange for her preferred shares certificate in Services which Mr. Collins had asked her to surrender. She believed she was able to use the shares in both companies to qualify for the Equity Tax Credit.

In redirect, she testified to having paid $10,000 for the preferred shares of Services and $20,000 for the common shares of Prosthetics.

Donald Ross Cleveland is the chairman of an advisory board appointed by Mr. Collins to provide business advice for his companies. He is the president of Professional Directors Inc. which was hired by the Atlantic Canada Opportunities Agency ("ACOA"), to consult with and advise Mr. Collins in the operations of his businesses. He testified that the parties had no shareholders agreement and was advised by Collins that there was no such document in his possession. The shareholders ledger for Services shows no shares issued to the Claimants. There is also no loan document from that company. He testified to the arrangements with Dr. Runyon and Ms. Wheatley, claiming their involvement was perceived as fraudulent or, at a minimum, a difficult arrangement. I need not comment on the details of this arrangement as there is insufficient evidence to determine if it was fraudulent or otherwise. Suffice it to say that the arrangement proved impossible for Mr. Collins and Mr. Cleveland, and, consequently, it was felt to be in their best interests to terminate that relationship. Mr. Cleveland testified that Prosthetics was originally a numbered company he once owned but was without assets at that time. Mr. Collins subsequently subscribed for shares in it.

Under cross examination, Mr. Cleveland testified that he is not an employee of either "K-9" company. He is a registered consultant of ACOA and is hired to do corporate organization work for Prosthetics. He testified that he is not a shareholder (although the Shareholder's Register for Prosthetics indicates otherwise.) He has never had anything to do with Services other than writing to Dr. Runyon and Ms. Wheatley regarding their interest in the companies and to settle the matter. He testified that the sale of Services' assets to Prosthetics was to avoid the necessity of legal action arising out of the relationship with the shareholders in PEI.

Mr. Cleveland reviewed the Shareholders Register and indicated that The Nova Scotia Cooperative Council is a registered shareholder of one preferred share of Services which pays dividends of 0.5%. He also prepared the minutes of both companies. As part of the minutes, he prepared an entry showing that the shares were canceled on their books. He acknowledges the documentation transferring the technology from Services to Prosthetics. He assisted in the preparation of the document.

Kirk Jeffrey ("Jeff") Collins is the president of both Services and Prosthetics. He testified that he met Mr. Nickerson and Ms. Leal through a mutual friend at a time when he was just establishing the company. He was advised to bring in investors to assist with the development of the company. He was advised that due to the old lawsuit against Services to create a new company. He established Prosthetics to separate new investors from Services, while allowing them to use the Equity Tax Credit available in Nova Scotia. In return they would receive common shares with voting rights.

He testified that in his mind, as far as the common shares were concerned, Mr. Nickerson and Ms. Leal knew what they were getting into. He also disputes that Services is a shell company as it actually holds $247,411 in assets in the form of preferred shares of Prosthetics.

Under cross examination, he acknowledged that Services was incorporated in 2004. The shares are showing as 90% of those issued owned by Jeff Collins and 10% by the Nova Scotia Cooperatives Council. The incorporation was not undertaken by a lawyer. He acknowledged a letter of intent which was tendered into evidence. It was signed by Dr. Runyon to receive 10 shares as an honorarium and to purchase an additional five shares for $10,000. A subsequent proposal was received from Jessie Anne Wheatley of Yippee Inc. for the purchase of additional shares. Her company was to provide consulting services to assist in the development and marketing of Services. It is unnecessary to get into the details of the arrangement for, as noted,

the relationship subsequently broke down. In Tab 2 of the book of exhibits, Mr. Collins is showing as the sole shareholder. The minute book had been retained by his lawyer, but it had not been updated. He assumed (incorrectly) that his lawyer at the time would make the necessary corrections. With respect to the licensing arrangement, Prosthetics has guaranteed the obligations of Services. Tab 13 contains a Technology Sale and Transfer agreement for a transfer of all assets to Prosthetics in exchange for $247,411 of Class B preferred shares issued by Services to Prosthetics. He testified that Mr. Collins determine what the shares were worth. Essentially, he acknowledged that 12,500 common shares were issued to each of Mr. Nickerson and Ms. Leal. He acknowledged receiving $10,000 from the parties in 2007. He feels the claim of $20,000 was not correct.

Preliminary Findings

The first of the two issues is a question of fact, namely the number of transactions that have taken place.

In reviewing the evidence, I find that neither the Claimants' nor Defendants' version of events is fully corroborated by the documentary evidence. The transactions took place over six years ago, so recollections are suspect. Both Claimants and Mr. Collins struck me as poorly organized and exhibited sloppy record keeping, and in some cases, no record keeping at all. In making this observation, I do not suggest any of them were trying to be deceptive. Rather, I do not find the evidence sufficient to persuade me to fully accept either version of events. I add one caveat, namely Mr. Collins' records and record keeping improved once Mr. Collins became involved.

The Claimants allege there were three transactions: (i) the purchase of shares of Services; (ii) the purchase of common shares of Prosthetics before November 2, 2007 (the date of the withdrawal from the line of credit) and (iii) the purchase of common shares of Prosthetics after November 2, 2007.

In determining the relationship, the Court is being asked to consider if the transfer to Prosthetics was a sham or a fraud or some other transaction to justify piercing the corporate veil and finding liability against both companies and Mr. Collins in his personal capacity.

(i) Investment in K-9 Orthotics & Services Inc.

The evidence is clear the Claimants invested $10,000 in Services during 2006. They were induced into doing so based on their experience with the company's products as well as the initial involvement of the PEI investors. The documents in evidence suggest they could either invest as a loan or purchase shares. They were of the view the latter option may have qualified for an Equity Tax Credit but a loan would not. They were provided with a receipt dated December 17, 2006 for $10,000 for "the purpose of causing to be issued 10,000 Preferred shares with a par value of one dollar ($1.00) each and having the attached initialled provisions of K-9 Orthotics & Services Inc. Preferred shares or Preferred shares with the same provisions in a new company to be formed with myself as Chief Executive Officer and principal shareholder having the same business objectives as K-9 Orthotics & Services Inc."

I find the initial investment in Services was $10,000 in shares. As indicated, while the Investors Proposal described it as a loan, it was equivocal in its language and provided the option for the investors to treat the investment as shares. The shares have not generated income or provided growth. There are currently no share certificates or replacements for the preferred shares.

(ii) Investment in K-9 Orthotics & Prothetics Inc. before November 2, 2007

There is nothing in evidence to demonstrate the payment of funds from the Claimants prior to November 2, 2007, when the debit was shown as made from the line of credit. However, all parties acknowledge the payment of $10,000 in 2007 prior to the issuance of the shares.

Accordingly, I find this payment was made but the transaction does not form part of the subject matter of this proceeding.

(iii) Investment in K-9 Orthotics & Prothetics Inc. after November 2, 2007

The Claimants allege they have paid an additional $10,000 after the initial investment for the purchase of Prosthetics shares. The Claimants have tendered into evidence the bank's print screen of a debit from their Line of Credit account at TD bank and subsequent deposits into their bank account on November 2, 2007. The share certificates for the common shares of Prosthetics were issued on October 15, 2007. Mr. Collins disputes that any funds were received. He described the transactions as two-tiered which have not yet been completed. He denies receiving the funds.

There is nothing in evidence to show a subsequent payment to Mr. Collins or either K-9 company from either of the Claimants. The payment from a line of credit into one's bank

account without description could be for any personal expenditure. As noted above, I have found the Claimants' record keeping poor and their powers of recollection lacking. While I find there were discussions of investments, I am not satisfied the Claimants have proven on the balance of probabilities this debit from their line of credit was for the purchase of shares. This portion of the Claim is dismissed.

The balance of this decision deals with the state of the Claimants' investment in Services and the impact of the transfer of assets from Services to Prosthetics.

The Law

The Claimants submit this is a proper case to pierce the corporate veil. In other words, they contend that Prosthetics is in reality a puppet or shell corporation of Services and the corporation was established to evade creditors. In support of this principle, Mr. Ward has cited two cases, *Le Car GmbH v. Dusty Roads Holdings Ltd.*, 2004 NSSC 138 (S.C.) and *Lockharts Ltd. v. Excalibur Holdings Ltd. and Baron Developments Ltd.* (1987), 83 N.S.R. (2d.) 181. The former case has been cited with approval by the Nova Scotia Court of Appeal in *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167. In that decision, Saunders, J.A. dealt extensively with this issue. In the interests of brevity, I have included the most relevant passages of his Lordship's decision:

> [48] The concept that corporations are separate legal entities, despite the fact they may have the same shareholders, has been fundamental to the common law since the House of Lords decision in **Salomon v. Salomon & Co.**, [1897] A.C. 22 (H.L.). A more recent commentary on this principle can be found in the Supreme Court of Canada decision in **Kosmopoulos v. Constitution Insurance Co. of Canada**, [1987] 1 S.C.R. 2, where Wilson, J. stated at para. 12:
>
> > As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too
> >
> > flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in **American Indemnity Co. v. Southern Missionary College supra**, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
>
> 49 At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law....

....51 In **Le Car GmbH v. Dusty Roads Holdings Ltd.**, [2004] N.S.J. No. 140, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:
(a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";
(b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and
(c) where the corporation is merely acting as the controlling shareholder's agent.
(My emphasis)

Furthermore, I find the words of Justice Davison in *Lockhart's* to be helpful as well:

> "If a company is formed for the express purpose of doing a wrongful or unlawful act, or, if when formed, those in control expressly direct or [*sic*] wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed.
>
> In such cases, or where the company is the mere agent of a controlling corporator, it may be said that the company is a sham, cloak or alter ego, but otherwise it should not be so termed."

Justice Davison then states at page 188:

> "The purpose of the corporate entity was not to defraud or mislead creditors and shareholders and in my opinion, where a company is being used for this purpose the "veil" should be lifted and a remedy made available to the victims of such conduct."

In looking at the facts of this case, I find the Claimants contracted for either the purchase of shares in Services or a loan to Services. Ultimately, they invested in preferred shares. I find this was the initial contract. From there it is not clear what was intended.

According to Ms. Leal's testimony, the Claimants were issued share certificates but were advised by Mr. Collins that an exchange of shares was to take place so he took the share certificates from her. Mr. Nickerson's evidence does not make any reference to a share certificate or the prospect of an exchange. Thus, it is not clear to me whether an exchange was intended or what the exchange would be. It is true, Mr. Collins' record keeping is faulty and incomplete. However, the Claimants maintained no written records of any transactions, no copies of electronic or written correspondence seeking these shares or any other attempt to follow this up. Mr. Nickerson testified that he did not know of any transfer of assets to a new company, yet he also testified they learned of the involvement of Prosthetics in 2007. However, he subsequently discussed investing in it and, if I accept their submissions, have claimed to have actually invested in it. Further, I find they took no further action to deal with this issue until the commencement of this claim, over six years later. I find as a fact they knew of the transactions not long after they took place and took no further action. As a result, I find they consented to them. Thus, I do not find any liability by any of the Defendants to the Claimants.

Had I found the transaction to have taken place without the Claimants' notice or consent, I would have had no difficulty "piercing the corporate veil" and finding both companies liable along with

Mr. Collins personally. I find the assets were transferred to head off the efforts of the PEI investors. To allow such a transaction to take place would have yielded a result too flagrantly opposed to justice and awarded the return of $10,000 from both Services and Prosthetics. However, as noted, the facts do not lead me to that conclusion.

Conclusion

For all of these reasons, the claim is dismissed. Normally, costs would follow the event but given the success of the Claimants in seeking disclosure and a lack of any findings of costs to have been expended, I am satisfied that this is a proper case for each party to bear their own costs.

Order accordingly.

Dated at Halifax, NS,
on December 10, 2014;

_____

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)