IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jenor Steel Incorporated v. 466372 B.C. Ltd.,* 2025 BCSC 648

Date: 20250409
Docket: S209046
Registry: Vancouver

Between:

Jenor Steel Incorporated

Petitioner

And

466372 B.C. Ltd. and Sonic Holdings Ltd.

Respondents

Before: The Honourable Justice Hamilton

Reasons for Judgment

Counsel for the Petitioner:	E. Aitken
Counsel for the Respondents:	E.B. Clavier
Place and Dates of Hearing:	Vancouver, B.C. March 12 and 13, 2025
Place and Date of Judgment:	Vancouver, B.C. April 9, 2025

Table of Contents

Overview

[1] This is an application by the respondents, 466372 B.C. Ltd. ("466") and Sonic Holdings Ltd. ("Sonic") to further amend their amended response to the amended petition filed by Jenor Steel Incorporated ("Jenor"). Jenor opposes the application to the extent that it involves withdrawal of an admission made by the respondents that payments were not made on a certain mortgage since June 2015.

[2] 466 and Sonic are related companies. 466 and Sonic's principal is Ray Roussy. Jenor's principal is Tom Savage. Jenor and 466 used to operate a business together called Sonic Drill Systems Inc ("SDSI"). 466, Sonic and Mr. Roussy previously brought litigation against Jenor, Mr. Savage and some of Mr. Savages' family members for breach of fiduciary duties and misappropriation of funds relating to SDSI, which was dismissed: *Roussy v. Savage*, 2019 BCSC 1669, aff'd 2021 BCCA 441; leave to appeal to the S.C.C. refused.

[3] This petition relates to Jenor and 466's purchase of a commercial property located on Progress Way in Chilliwack (the "Chilliwack Property") that was owned by Jenor and 466 equally. Jenor seeks partition and sale of the Chilliwack Property, an accounting and a declaration that enforceability of the mortgage relating to the Chilliwack Property described in further detail below is statute barred as of June 2017 due to no payments being made since June 2015.

[4] There was a two-day hearing before Justice Kirshner in May 2022. Justice Kirshner ordered the sale of the Chilliwack Property and adjourned the issue regarding enforceability of the mortgage and the accounting generally, to be addressed at a later date. His reasons can be found at *Jenor Steel Incorporated v. 466372 B.C. Ltd.*, 2022 BCSC 1135.

[5] Nearly everything is contentious between the parties, and there have been seven different applications since the May 2022 hearing, which have related to issues such as the sale of the Chilliwack Property and disclosure.

[6] The Chilliwack Property sold in May 2023. Jenor and 466 each received a $1 million advance on the sale proceeds, leaving approximately $2.5 million in trust pending resolution of the outstanding issues.

Background Facts

[7] 466 and Jenor purchased the Chilliwack Property for $2.5 million. They contributed equally and financed the balance with a mortgage from the BDC (the "Mortgage").

[8] By late 2013, the SDSI business had failed and a receiver was appointed. 466 and Jenor listed the Chilliwack Property for sale at that time. However, they disagreed about offers and counteroffers. Essentially, Mr. Savage on behalf of Jenor was motivated to sell the Chilliwack Property, whereas Mr. Roussy on behalf of 466 was not. As a result of such disagreements, Mr. Savage advised Mr. Roussy that Jenor would not be contributing further to the Mortgage.

[9] In March 2014, SDSI was assigned into bankruptcy. Mr. Roussy then arranged for his related company Sonic to make the payments on the Mortgage. However, in 2015 the BDC learned of SDSI's bankruptcy and called the loan. To avoid foreclosure, in mid-June 2015 Mr. Roussy caused Sonic to pay out the balance of the Mortgage of $1,892,814.10 to BDC in exchange for receiving an assignment of BDC's security which included an assignment of rents which was registered against title to the Chilliwack Property.

[10] This petition was commenced by Jenor in 2020.

[11] In its response to petition filed on October 6, 2020, 466 and Sonic stated that neither 466 nor Jenor had made any payments toward the Mortgage since the assignment to Sonic in June 2015 and the balance as of October 2020 was approximately $2.2 million.

[12] On July 14, 2021, presumably in light of the statement in the response that no payments being made toward the Mortgage since June 2015, Jenor filed an

amended petition to seek a declaration that Sonic is statute-barred from enforcing the Mortgage against Jenor, such that the Mortgage had expired by June 2017, pursuant to the *Limitation Act*, S.B.C. 2012, c. 13, two years after the last payments to the Mortgage.

[13] The respondents filed their amended response to petition 8 days later on July 22, 2021, and in specific response to Jenor's claim that the Mortgage was statute-barred stated "the loan is a good and valid charge". The respondents did not however delete or amend the statement at the start of the same paragraph that no payments were made to the Mortgage after June 2015. Thus, both the original and amended response contain the same statement that neither 466 nor Jenor made any payments towards the Mortgage since June, 2015.

[14] The respondents retained new counsel, Mr. Clavier, in September 2021. Mr. Clavier immediately advised Jenor's counsel that the respondents' pleadings were wrong and required amendments to correct the statement that no payments had been made on the Mortgage since June 2015. However, it took Mr. Clavier several months to come up to speed on the file so the respondents' application to amend was not filed by Mr. Clavier until March 2022.

[15] Mr. Clavier set this application to be heard in May 2022 at the same time the petition was scheduled to be heard. As mentioned, Justice Kirshner heard the petition and addressed the sale but adjourned this application, the enforceability of the Mortgage issue generally and the accounting, all to be addressed later.

[16] In preparation for this application, Jenor's counsel Mr. Aitken sought further disclosure of documents that may be relevant to any alleged payments to the Mortgage after June 2015.

[17] On November 15, 2023 Associate Judge Hughes ordered that the respondents produce their financial statements and various communications between Mr. Thompson, Mr. Roussy and Mr. Montgomery. On January 18, 2024,

Justice Hori ordered the respondents produce additional documents including Sonic's tax returns for 2015-2023.

[18] Jenor also sought to cross-examine Mr. Roussy and the respondents' accountant Mr. Montgomery in preparation for this application. Mr. Aitken cross-examined Mr. Roussy in April 2024 and Mr. Montgomery in November 2024.

[19] Once the cross-examinations were completed, the respondents re-set this application for December 17, 2024, however, there was no judge available to hear the application. It was then re-set for March 12 and 13, 2025.

Specific Amendments Opposed

[20] The respondents' proposed further amended response to the amended petition is attached to their notice of application. It contains a large number of amendments, however, many of them are stylistic. Jenor does not take issue with the vast majority of the amendments. However, Jenor takes issue with the following of the proposed amendments, all of which relate to the respondents' statement that no payments were made to the Mortgage since June 2015:

a) The deletion of paragraph 13 of Part 4 of the further amended response;

b) The addition of paragraphs 27, 48 and 65-66 of Part 4 of the further amended response; and

c) The addition of paragraphs 18-20 and 25 of Part 5 of the further amended response.

Preliminary Issue Regarding Late-filed Affidavit

[21] Before I address whether or not to grant the respondents' application to amend, I must address a preliminary issue relating to a late-filed affidavit.

[22] Jenor objects to the admission of affidavit #8 of Ray Roussy sworn March 11, 2025 and relies on Rule 8-1(14) which provides that unless the parties consent or

the court otherwise orders, a party must not serve any affidavits additional to those served under sub-rules (7), (9) or (13).

[23] The affidavit was provided to Jenor's counsel just two days before the hearing of this application. As mentioned, Sonic was previously ordered to produce its income tax statements. In response, Mr. Roussy on Sonic's behalf provided completely redacted tax statements on which he and Mr. Montgomery were cross-examined by Jenor's counsel in preparation for this application.

[24] Mr. Roussy's affidavit #8 now attaches tax statements for Sonic which reveal certain figures that were previously redacted. Mr. Roussy explains the reason for the late filed affidavit and attachments containing previously redacted information is that the cross-examination of Mr. Montgomery jogged his memory and he realized that certain portions of the previously redacted information was actually relevant to the issue regarding payments to the Mortgage.

[25] As mentioned, this application was previously set for hearing on December 17, 2024, following the completion of the cross-examinations of Mr. Roussy and Mr. Montgomery. As mentioned, Mr. Montgomery's cross-examination completed in November 2024. Even taking Mr. Roussy's explanation at face value that his memory was jogged by Mr. Montgomery's cross-examination, Mr. Roussy gives no explanation as to why the unredacted material was not provided earlier, say in November or December 2024 or even in advance of March 2025.

[26] I agree with Jenor that there would also be significant prejudice to Jenor if the late affidavit is admitted. Mr. Aitken prepared for this application including cross-examining Mr. Roussy and Mr. Montgomery based on the tax return information previously provided. Due to Mr. Roussy's own choice to redact information that he now admits was redacted in error, Mr. Aitken cross-examined Mr. Roussy and Mr. Montgomery based on incomplete information. Jenor's counsel should have been able to cross examine Mr. Roussy and Mr. Montgomery on the attachments to Mr. Roussy's affidavit #8 in advance of this application.

[27] For these reasons, it is not fair for me to admit Mr. Roussy's late filed affidavit on this application. Neither Affidavit #8 or Jenor's responsive affidavit (which was provided in case Mr. Roussy's 8th affidavit was admitted) are admissable for the purpose of this application.

Application to Amend/withdraw Admission- Applicable Law

[28] The respondents submit that the proposed amendments do not represent a withdrawal of an admission. In the alternative, if the amendments sought count as a withdrawal of an admission, the respondents submit that it would be in the interests of justice to permit them to withdraw the admission and file the proposed further amended response to the amended petition.

[29] It is clear to me that the respondents seek to withdraw an admission that no payments were made by either 466 or Jenor toward the Mortgage since June 2015. I find that the statement is clearly and unambiguously a concession made about a matter of substance. The statement is a concession that would tend to narrow the issues in the proceeding and precisely the kind of concession contemplated by Rule 7-7(5) (c): see for example, *Lam v. University of British Columbia*, 2012 BCSC 670 at para. 29.

[30] Rule 7-7(5) (c) provides that a party may not withdraw an admission made in a pleading, petition or response to petition except by consent or with leave of the court.

[31] The Court of Appeal in *Sidhu v. Hothi*, 2014 BCCA 510 [*Sidhu*] sets out the test for withdrawal of an admission as "whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact." When applying the test, the court considers all of the circumstances, including such factors as:

a) Whether the admission was made inadvertently, hastily or without knowledge of the facts;

b) Whether the admission is one of fact, whether it is or may be untrue;

c) Whether the "fact" admitted was or was not within the knowledge of the party making the admission;

d) Whether and to the extent the withdrawal of the admission would prejudice a party and

e) Whether there has been delay in the application to withdraw the admission and any reason offered for the delay.

[32] None of the factors are mandatory or pre-conditions to granting leave. The overarching consideration is whether it is in the interests of justice to permit the withdrawal of the admission: *Sidhu* at para. 25.

[33] The parties agree that the above represents the test that applies to withdrawal of admissions. They disagree as to the application of the law to the facts of this case. I will now turn to address each parties' position in this regard.

Positions of the Parties

[34] The respondents submit that it is in the interests of justice to grant leave to permit them to withdraw their previous admission that no payments were made to the Mortgage since June 2015 for the following reasons:

(1) This application was not sprung on Jenor by surprise. The respondents retained new counsel in September 2021 who immediately advised Jenor's counsel that the respondents' pleadings were wrong and required amendments in relation to the statement that no payments were made to the Mortgage;

(2) The application was also made promptly as opposed to last-minute. The application was filed in March 2022 and originally set to be heard in May 2022.The 6.5-month delay between September 2021 and the filing of the application in March 2022 is not inordinate considering the long and

somewhat complicated history of the file and the need for counsel to come up to speed;

(3) Jenor did not raise the issue of the Mortgage being statute-barred in its original petition;

(4) The statement itself that there were no Mortgage payments since June 2015 is untrue. The respondents maintain that after Sonic made the assignment agreement with BDC on June 12, 2015, Sonic became entitled to collect any rents for the Chilliwack Property on behalf of the owners, 466 and Jenor. The respondents claim that Sonic collected rent and attributed such rent to the owners equally. The respondents maintain that Sonic applied the rent it collected to the Chilliwack Property's expenses including the Mortgage.

(5) As such, the respondents submit that while it is true that neither 466 nor Jenor made *direct* payments to Sonic for the Mortgage, it is wrong that there were *no* payments made to the Mortgage after June 2015 because Sonic collected rent payments for 466 and Jenor that were applied to the Mortgage.

(6) Similarly, Mr. Roussy states that his first affidavit is also wrong or at least worded incorrectly in that he should have stated 'there were no payments by 466 or Jenor to the Mortgage since 2015 *other than the rent payments that Sonic collected on behalf of 466 and Jenor and applied to the Mortgage*' (i.e. the underlined portion should have been added).

(7) A key issue to be determined in this proceeding on the merits is whether the enforceability of the Mortgage is statute barred. The respondents submit that allowing the application will enable the parties to get on with the hearing of the matter on the merits. On the other hand, if the amendment is denied, the respondents submit that the court will not have access to all the facts in determining whether the Mortgage is enforceable.

(8) There is no actual prejudice to Jenor. This is not like a case, for example, where there is a trial date that will need to be adjourned. Here, the hearing is not yet set nor has the accounting been addressed. This is not a case where a witness has died or information has become harder to ascertain.

[35] Jenor submits that the interests of justice do not support granting the respondents leave to withdraw their admission that no payments were made toward the Mortgage since June 2015 for reasons that can be summarized as follows:

(1) The admission was not made inadvertently, hastily or without knowledge of the facts. Mr. Roussy admitted on cross-examination that he was aware that the amended response to petition was a formal document, had reviewed the document before it was filed, thought it was truthful and accurate and was aware that Jenor had amended its petition to claim that enforcement of the Mortgage was statute barred. The admission was also made after the respondents, their previous counsel and Mr. Montgomery "investigated" the expenses associated with the Chilliwack Property including the Mortgage.

(2) The respondents' principal Mr. Roussy had knowledge of the facts admitted. The pleading that contains the admission is a response petition which is not just a pleading akin to a notice of civil claim. A petition is a pleading supported by affidavit material, in this case, Mr. Roussy's 1st affidavit sworn based on his personal knowledge in which he states that no payments were made towards the Mortgage since June 2015.

(3) Mr. Roussy has offered two competing, inconsistent explanations regarding the admission: (a) in his notice of application, he says the admission that there were no payments toward the Mortgage was "wrong"; and (b) in his 2nd affidavit he states that he 'expressed himself poorly' in his 1st affidavit which should have stated there were no payments made to the Mortgage "in addition to rent."

(4) The delay of 6.5 months from new counsel being retained in September 2021 until the filing of the application in March 2022 and two further months until the application was first set for hearing in May 2022 is “not insignificant”;

(5) Allowing the withdrawal of the admission would prejudice Jenor as it may necessitate a trial and thereby further delay matters and also continue to expose Jenor to two forms of ongoing financial prejudice: (a) the remaining $2.5 million of the sale proceeds continue to be held as security for the Mortgage and are unavailable to Jenor; and (b) the Mortgage has accrued more than $100,000 already in contractual interest since May 2023, to Jenor’s detriment.

(6) In considering all the circumstances in determining whether to exercise discretion in the respondents’ favour, the court should consider the respondents’ conduct such as delaying of the sale of the Chilliwack Property even after appearing before Justice Kirshner, making several subsequent court appearances necessary.

(7) The respondents have not actually proven that the admission is wrong. For example, according to Mr. Roussy’s evidence, the Mortgage increased from approximately $1.892 million in June 2015 to approximately $ 2.2 million in 2020. Further, the respondents’ accountant Mr. Montgomery has previously stated in correspondence that the Mortgage was “unfunded” and there were only “notional” not actual payments made to the Mortgage after the assignment.

(8) The respondents do not need the withdrawal of the admission to argue that the Mortgage was acknowledged on the books of 466 and Sonic. Jenor denies that such acknowledgments constitute partial payments toward the Mortgage or that there have otherwise been any full or partial payments toward the Mortgage;

(9) There is no triable issue raised even if the admission were allowed to be withdrawn. Relying on *Richmond* v. *White,* 2017 BCCA 330, Jenor submits that it is the law in British Columbia that one party's partial payments toward debt is not sufficient to extend the limitation period for the co-debtor.

Analysis

[36] While I am sympathetic to the petitioner, after considering and weighing the various relevant factors in this case, I find that it is in the interests of justice to grant the respondents leave to withdraw the admission and file their proposed further amended response to the amended petition. I have considered various factors.

[37] First, I agree with Jenor that this is not a situation where the admission was made hastily. Mr. Roussy admitted he reviewed the original response before instructing his previous counsel to file it with the admission contained in paragraph 13 and he understood that it was a formal document. He also admitted to reviewing the draft amended response before instructing his previous counsel to file it and recognizing that the amended response was being filed in response to the petitioner's claim that the Mortgage was statue barred.

[38] At the same time, it appears to me that when Mr. Roussy authorized the statement in the original response regarding no "payments", he was likely focussed on there being no *direct* payments made by 466 or Jenor to Sonic by cheque or direct transfer, for example as 466 and Jenor had each previously made direct payments to BDC for the Mortgage before Mr. Savage and Mr. Roussy had a falling out regarding the sale of the Chilliwack Property. Jenor then ceased making any direct payments. Sonic then took over making the Mortgage payments to BDC until the assignment. Then after the assignment, as mentioned, Sonic claims to have continued to make partial payments on 466 and Jenor's behalf.

[39] In these circumstances, it seems likely that at the time of both the filing of the original response and the amended response, Mr. Roussy was focussed on there being no direct payments to Sonic for the Mortgage. At the time of filing each

response or swearing his first affidavit, it seems unlikely that Mr. Roussy actually turned his mind to the idea that Sonic may have been applying collected rent towards the Mortgage or that this might count legally as a "payments" by Jenor or 466 to the Mortgage.

[40] After the amended petition was filed and claimed that the Mortgage was statue-barred, Mr. Roussy was required to instruct his previous counsel in relation to whether or not to amend Paragraph 13 of the response. Paragraph 13 of the amended response to the petition filed in response to the amended petition reads:

> 13. No payments have been made by Jenor or 466 on the [Mortgage] assigned to [sonic]. The principal and interest that is owing to [sonic] on the [Mortgage] is estimated to be in the approximate amount of $2,200,000. The [Mortage] is a good and valid charge against the Chilliwack Property.
>
> [Emphasis in original.]

[41] Clearly, in adding the underlined amendment, the respondents' position was that the Mortgage was enforceable as opposed to being statute barred.

[42] It seems odd that despite reviewing the amended petition and preparing an amended response, that the respondents' previous counsel did not delete or revise the first sentence in paragraph 13 of the response to take into account any rent that may have been applied to the Mortgage *on behalf of* 466 and Jenor. However, I still find it unlikely that Mr. Roussy himself fully understood the potentially broad legal meaning of the term "payments" or the significance of the admission in light of the petitioner's own amendment to claim that the Mortgage was statute barred. Mr. Roussy clearly instructed previous counsel to claim that the Mortgage remained a "good and valid charge". Further, given that nearly everything in this proceeding (and the previous proceeding) has been contested, it seems unlikely that Mr. Roussy understood that he was making a concession that would narrow the legal issues between the parties. The respondent's subsequent counsel noticed immediately that there was an issue with the pleadings and that they needed to be amended and the application was brought.

[43] I will next address Jenor's submission that the respondents have not proven that the admission is untrue. Jenor points out that the respondents take inconsistent positions in their notice of application which states that the admission is wrong and Mr. Roussy's affidavit which does not state that he was wrong but states that he merely expressed himself poorly. I disagree that these statements are internally inconsistent. The explanation contained in the notice of application and the explanation contained in Mr. Roussy's 1st affidavit both boil down to statements that the admission contained in the amended response is at least partly untrue. That is, it is true that there were no direct payments by 466 or Jenor to Sonic relating to the Mortgage. However, to the extent that Sonic may have made payments on behalf of 466 and Jenor by applying rent collected on their behalves to the Mortgage, the admission is untrue. Furthermore, it is not my role to determine the merits at this stage and decide definitively whether or not payments were made to the Mortgage or that such payments extended the limitation period. However, if the respondents are correct that indirect payments were made by Sonic on behalf of 466 and Jenor, the admission as it stands is factually and/or legally incorrect.

[44] I will now address delay as a factor. Mr. Clavier promptly notified Mr. Aitken that the pleadings were wrong and needed to be amended. While it took several months to file the application to amend the amended response, I accept Mr. Clavier's explanation that it took him some time to review the file and come up to speed. I also accept that he canvassed whether the amendment could go by consent. I do not find the delay unreasonable in the circumstances.

[45] In terms of prejudice, Jenor claims it will be prejudiced by delay. However, there is no trial or hearing date that would be forced to be adjourned. There is no date yet set for the enforceability of the Mortgage issue or the accounting. There are no issues with witnesses being no longer alive or information no longer preserved. The respondents' conduct has been unreasonable in obstructing the sale of the Chilliwack Property, not cooperating to produce documents in a timely manner and then apparently inappropriately redacting documents. However, those are all matters that can be addressed by costs orders.

[46] Jenor submits that it will also continue to suffer financial prejudice because moneys are being held in trust and not available to Jenor while interest on the Mortgage continues to accrue after the property is sold. However, the latter argument presumes that the Mortgage is enforceable. If it is statute-barred as claimed by Jenor, there would be no interest accruing. In terms of moneys in trust being unavailable to Jenor, that presumes that the Mortgage is not enforceable and that a significant portion belongs to Jenor. As mentioned, it is not my role to determine these issues on the merits. Overall, I find that there is no significant prejudice to Jenor in allowing the application that cannot be addressed later by costs orders if Jenor wins at a determination of the Mortgage issue on the merits.

[47] I will now address Jenor's submission that allowing the withdrawal of the admission may make a trial necessary as opposed to a hearing which will further delay matters. While this may be true, the overarching concern is the interests of justice and whether the Mortgage is enforceable or statute barred is the most important issue in this litigation and to the parties. If I do not grant leave to the respondents to withdraw the admission, the court will not have the full facts before it to deal with this primary issue on the merits. In my view, this factor deserves significant weight.

[48] Finally, I will address Jenor's argument that there is no triable issue. As mentioned, Jenor's counsel relies on *Richmond v. White*, 2017 BCCA 330 for the proposition that partial payments towards a debt by one party does not extend the limitation period against a co-debtor. The respondents' counsel disagrees and says in the case at hand, Sonic made payments on *each* of 466 and Jenor's behalf toward the Mortgage, not just one of the co-debtors. Further, the respondents' counsel relies on different case law. Again, it is not my role to determine the merits. However, in my view there is at least a triable issue.

[49] Considering all of the circumstances and weighing the various factors, I find that the overall interests of justice are best served by granting the respondents leave to withdraw the admission and file their proposed further amended response to the

amended petition and I so order. This will allow the parties to get on with a fair determination on the merits of the issue of whether the Mortgage is enforceable and ensure the court considers all the relevant facts and legal arguments.

Costs

[50] My preliminary view is that costs of this application should be in the cause. However, counsel can agree otherwise or if counsel wish to make submission, either counsel may, within 30 days, request a brief further appearance at 9 am via Teams.

"Hamilton, J."