

**CITATION:** My Lucky Spot v. 2646846 Ontario Inc., 2023 ONSC 2925

**COURT FILE NO.:** CV-22-00682725

**DATE:** May 8, 2023

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE: MY LUCKY SPOT - ENTERTAINMENT LTD. operating as RAMA GAMING**

Plaintiff

**AND:**

**2646846 ONTARIO INC ., DAVID LANZILOTA, V.R.D.C. HOME IMPROVEMENTS DAVID LANZILOTA carrying on business as and/or operating as V.R.D.C. General Contracting and/or V.R.D.C. Home Improvements V.R.D.C. Home Improvements**

Defendants

**BEFORE:** Justice Papageorgiou

**COUNSEL:** *John Sestito*, for the Plaintiff

***jsestito@bianchipresta.com***

**READ:** May 7, 2023

**ENDORSEMENT**

[1] The plaintiff My Lucky Spot—Entertainment Centre Ltd operating as Rama Gaming (“My Lucky Spot”) brings a motion for default judgment in the amount of \$350,135.95 against the defendants, 2646846 Ontario Inc, David Lanzilota, V.R.D.C. Home Improvements, David Lanzilota carrying on business as and/or operating as V.R.D.C. General Contracting and/or V.R.D.C. Home Improvements and V.R.D.C. Home Improvements (hereinafter collectively referred to as, the "Defendants")

[2] The essence of the case is that My Lucky Spot entered into a contract with the Defendants to perform roof repairs, that it paid a significant deposit, and that the Defendants never performed any of the repairs.

**Service Issues**

[3] Lucky Spot issued the Statement of Claim on June 15, 2022

[4] Lucky Spot served the Defendants in accordance with the Rules of Civil Procedure on June 20, 2022.

[5] The Defendants did not respond and were noted in default on July 19, 2022.

[6] In accordance with Justice Centa's endorsement dated February 7, 2023, Lucky Spot served the Defendants with the Motion Record for default judgment on January 31, 2023.

### **Consequences of noting in default**

[7] Pursuant to r. 19.02, having not defended the proceeding, the Defendants are deemed to admit the truth of all allegations of fact made in the Statement of Claim.

[8] However, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[9] As well, the plaintiff must still prove its damages.

### **The test on a motion for default judgment**

[10] The test on a motion for default judgement was set out in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC) as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiffs, as a matter of law to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitled it to judgement on the pleaded claim?

### **The deemed admissions**

[11] The Statement of Claim contains the following deemed admissions relevant to the issue of liability:

- The Defendant 264 is a corporation. The Defendant Mr. Lanzilotto is its directing and controlling mind. The Defendants V.R.D.C General Contracting and V.R.D.C. Home Improvements are registered businesses in the name of the Defendant Mr. Lanzilota or held out by Mr. Lanzilota to be registered in his name. (Statement of Claim, paras 4, 5)
- On March 5, 2021, Lucky Spot entered into a contract with the Defendants (the "Contract") to provide roofing services (the "Work") at Lucky Spot's place of business at 2295 Battleford Road (the "Property") for the sum of \$101,697.70. (Statement of Claim, paras 7, 10)
- Lucky Spot contracted with Mr. Lanzilotta in his personal capacity. (Statement of Claim, para 28)

- Pursuant to the Contract, Lucky Spot paid deposit funds totaling \$91,527.95 (Statement of Claim, para 9).
- Despite ongoing requests from Lucky Spot as to when the work would commence, no services were provided and the Defendants did not reimburse Lucky Spot for its deposit. (Statement of Claim, paras 11, 12, 13, 17, 20)

**The Statement of Claim pleads that all Defendants were contracting parties.**

[12] Although Lucky Spot has asked that 264's corporate veil be lifted to hold Mr. Lanzilota personally liable, in my view this is not necessary because of the deemed admissions.

[13] As noted above, the pleading, whose contents are deemed admitted, specifically states that Mr. Lanzilotta and all other Defendants were contracting parties. It also states that V.R.D.C. General Contracting and V.R.D.C. Home Improvements are registered business names for Mr. Lanzilota. Where an individual adopts a business name and carries on business in that name, the individual who registered the business name is ultimately responsible: *Bears v. Scobie*, 2013 ONSC 5910 at para 20.

[14] Mr. Lanzilota was served with the Statement of Claim and as such he was aware that that is what Lucky Spot claimed and pleaded, and he still did not defend.

**Additional evidence that Mr. Lanzilota entered into the contract personally.**

[15] I add that V.R.D.C. General Contracting and Mr. Lanzilota are both listed on the March 5, 2021 invoice which was sent to Lucky Spot and filed as evidence. Their names appear at the top of the invoice. At the bottom it states that the invoice is being sent to Don James, Lucky Spot's General Manager. The way in which this invoice is prepared is further evidence (apart from the deemed admissions) supporting the conclusion that the Contract was entered into by Mr. Lanzilota personally.

**The deemed admissions are sufficient to lift the corporate veil if necessary.**

[16] In *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, leave to appeal refused, [2018] S.C.C.A. No. 255, at para 65 the Court of Appeal indicated that the corporate veil could be pierced when the court is satisfied that a company is a "mere façade" concealing the true facts.

[17] To establish that it is a "mere façade" the court must be satisfied that: (a) there is complete control such that the corporation is the "mere puppet" of the owner; and (b) the corporation was incorporated for a fraudulent or improper purpose or used by the owner as a shell for improper activity.

[18] The following deemed admissions, are sufficient to lift the corporate veil and hold Mr. Lanzilota personally liable in accordance with the test in *Chevron*:

- Mr. Lanzilota intentionally incorporated and/or utilized an insolvent and/or shell company knowing full well that the said company could not and/or would not abide by its contractual and/or monetary obligation to Lucky Spot.(Statement of Claim, para 21)
- Mr. Lanzilotta intentionally set out and conspired to set up the corporate affairs of the corporate defendant to induce the plaintiff to provide deposits and payments to the Defendants without any intention to provide the goods and services so contracted for, nor to reimburse the funds back to the plaintiff. (Statement of Claim, para 27)

**Additional evidence in support of lifting the corporate veil.**

[19] Lucky Spot paid the required deposits by April 1, 2021.

[20] The parties agreed that the work would commence on April 5, 2021. However, the Defendants did not attend.

[21] Thereafter, Lucky Spot made written inquiries as to the start date on April 9, 2021, June 3, 2021, and June 13, 2021.

[22] In or around June 13, 2021, Mr. Lanzilotta advised that he would not commence the work unless the price was increased to \$140,000 which was \$38,302 more than the original amount.

[23] Lucky Spot said it would agree to the increased price, but would only provide an additional check in the amount of \$25,000 once the roofers and materials arrived. The Defendants refused to negotiate the increased price on this basis.

[24] On June 16, 2021 Mr. Lanzilota advised that Lucky Spot will never recover the deposit moneys it paid because those monies are no longer in 264's account and it has no assets.

[25] Lucky Spot has pleaded that Mr. Lanzilota is the controlling and directing mind of 264 and this is deemed admitted. (Statement of Claim, paras 4 & 6) The fact that the deposit funds were removed from 264's account rendering it judgment proof, shortly after Lucky Spot paid them, and shortly after Mr. Lanzilota communicated that the Defendants would only do the work for an increased contract price together with a further \$25,000 deposit, is evidence which supports the conclusion that 264 was a mere façade and puppet of Mr. Lanzilota, used for an improper purpose, although as I have said, the deemed admissions are sufficient.

**Damages**

[26] Lucky Spot is entitled to be compensated for its loss of bargain which means it is entitled to be put in the same position it would have been in had the Contract been performed.

**Return of deposit**

[27] There is no question that Lucky Spot is entitled to be reimbursed for the deposit that it paid in the amount of \$91,527.95: *Speers v. Solar Logix Inc.*, 2016 ONSC 6421 at para 8.

### **Loss of revenue**

[28] Lucky Spot's business was closed due to COVID up until July 16, 2021. At that time it was permitted to open.

[29] Had the work been commenced on April 5, 2021 as agreed, it would have been completed by the time Lucky Spot was permitted to reopen.

[30] Because the roof was not repaired and was leaking, Lucky Spot, who operates a casino, was unable to install 32 games in an affected area and thus operated at a reduced capacity after it opened on July 16, 2021.

[31] The materials originally submitted on this issue claimed \$238,464 in lost revenues. I sought clarification on this issue and the Plaintiff submitted revised calculations in support of lost revenues in the amount of \$450,933.12 which was based upon 44 games with revenues of \$213.51 per unit per day for 48 days during which machines could not earn revenue.

[32] The sum claimed in the Statement of Claim for lost revenues is specified to be \$236,464.

[33] Although the evidence in the supplementary materials supports the amount claimed, it has not been pleaded and as such I am only prepared to award the specific amount claimed in the Statement of Claim under this head in the amount of \$236,464.

[34] I find these lost revenues reasonably foreseeable: See *Bre-Ex Ltd. v Hamilton*, 2012 ONSC 147 at paras 99 and 108 regarding claims for lost revenues as a result of delayed work.

### **Mitigation costs**

[35] In an effort to mitigate this loss, Lucky Spot incurred costs in the amount of \$18,414 to temporarily fix the roof which was completed as of September 1, 2021. See *Redpath Industries Ltd. v. Cisco* [1994] 2 FC at para 94 and *Paradise Homes North West Inc. v Sidhu*, 2019 ONSC 1600 at para 31 regarding entitlement to be reimbursed for mitigation costs.

### **Increased cost of new contract to fix the roof.**

[36] Lucky Spot has also claimed \$139,555 to conduct the repairs which the Defendants had agreed to do. It has provided an estimate in that regard for the amount of \$139,555. In my view, it is not entitled to the full cost of performing the work, but only any increase which it must pay over the contract price which it negotiated with Lucky Spot.

[37] The initial contract which Lucky Spot negotiated with the Defendants was for \$101,697.70. Although there were discussions about increasing the contract price to \$140,000, I find that this amendment was never finalized since terms regarding the increased deposit were not finalized.

[38] Furthermore, there was no consideration for this increased price since the Defendants were already obligated to do the work for \$101,697.70. Lucky Spot is entitled to the difference between the new cost which it must pay to fix the roof which is \$139,555 and the price which the Defendants had agreed to. This amounts to \$37,857.30.

[39] Therefore, I am awarding total damages as follows: a) lost deposit: \$91,527.95; b) lost revenue: \$236,464; c) mitigation costs: \$18,414; and d) \$37,857.30 = \$384,263.25.

[40] Lucky Spot has claimed costs in the amount of \$2,805.03. I have reviewed the time spent and the rates charged which I find fair and reasonable and I award these costs.

[41] Lucky Spot may submit an Order for my execution.

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Justice Papageorgiou

**Date: May 8, 2023**