

CITATION: Simpson v. Wilson et al. 2020 ONSC 633
OSHAWA COURT FILE NO. 297/18
DATE: 2020302

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Simpson v. Wilson

BETWEEN:

Joel Simpson and Kelly Simpson

AND:

Dianne M. Wilson and Larry Jones

BEFORE: The Honourable Justice S. E. Lavine

COUNSEL: H. Sarros, for the Applicants/Moving Parties, Joel Simpson and Kelly Simpson
R. Reynolds, for the Responding Party/Respondent, Dianne M. Wilson
M. Pretsell, for the Respondent, Larry Jones

HEARD: October 17, 2019

Endorsement

Nature of the Application

[1] The applicants, Joel and Kelly Simpson (“the Simpsons”), and the respondent, Dianne Wilson, in her cross-application, all seek a declaration that their business partnership known as Never Enough Chrome Shop was dissolved on July 31, 2017; and, an order winding up the affairs of the partnership and directing the distribution of its assets.

[2] The business bank account is the only remaining asset of the partnership. The Simpsons seek an order directing that they are entitled to two thirds of the funds in the business bank account. Ms. Wilson’s position is that the funds should be split equally between the Simpsons and herself.

[3] The Simpsons further seek a declaration that Dianne Wilson breached her fiduciary obligation to the partnership. They claim that Ms. Wilson commenced operation of a competing business prior to the dissolution of Never Enough Chrome Shop. The Simpsons seek an order requiring that Ms. Wilson account for and pay over to the Simpsons all profits made by her from Chrome Supply Warehouse and directing a reference to determine the amount of those profits; or in the alternative, an order directing a trial of this issue.

[4] The Simpsons also seek a declaration that the respondent, Larry Jones, breached his fiduciary obligation to the partnership. They claim that Mr. Jones, who had been an employee of Never Enough Chrome Shop, breached his obligations to them by accepting employment at Chrome Supply Warehouse; and further, allege that Mr. Jones engaged in misconduct in relation to Never Enough Chrome Shop. The Simpsons seek an order requiring Mr. Jones to disgorge the wages he received from Never Enough Chrome Shop between May 23, 2017 and September 2, 2017, and an award of punitive damages or equitable compensation. In the alternative, the Simpsons seek an order directing a trial of this issue.

Background Facts

[5] A few background facts, which are undisputed, will place the issues in context.

[6] In or about 2006, the Simpsons and Paul and Dianne Wilson (“the Wilsons”) established Never Enough Chrome Shop, in the area of Loyalist Road and the 401, in Belleville. The shop, located near a truck stop, operated at the retail level, selling chrome, stainless steel and plastic accessories directly to truck drivers of highway transport trucks.

[7] At the time of the inception of Never Enough Chrome Shop, the Simpsons already operated, and thereafter continued to operate, a similar retail shop in the Oshawa area, Never Enough Chrome.

[8] In 2012, the Wilsons set up Chrome Supply Warehouse, a wholesale enterprise to supply retailers, across the street from Never Enough Chrome Shop.

[9] In December 2014, Mr. Wilson died. The operation of Never Enough Chrome Shop continued, essentially unchanged.

[10] On July 31, 2017, Ms. Wilson notified the Simpsons that the landlord required the space, that Never Enough Chrome Shop would close, and their business relationship was at an end.

[11] Ms. Wilson took the retail operation of Never Enough Chrome Shop into Chrome Supply Warehouse.

[12] As will be further addressed, at issue, is whether Ms. Wilson carried Never Enough Chrome Shop’s business over to Chrome Supply Warehouse prior to the termination of the business partnership with the Simpsons.

[13] Ms. Wilson offered Mr. Jones, a manager at Never Enough Chrome Shop, a position as a manager of her new retail chrome shop, which Mr. Jones accepted. Mr. Jones commenced that employment on September 1, 2017.

Issues and Analysis

The Dissolution and Winding Up of the Partnership

[14] As stated at the outset, the Simpsons and Ms. Wilson agree that a declaration should be made that the partnership known as Never Enough Chrome Shop was dissolved as of July 31, 2017, and that an order be made winding up the affairs of the partnership.

[15] The only remaining partnership asset is the partnership bank account with funds of approximately \$60,000.

[16] There was no written partnership agreement. It is common ground that, in the absence of a written partnership agreement, by operation of s. 33(1) of the *Partnerships Act*, on the death of Paul Wilson in December 2014, the original partnership was dissolved.

[17] It is also common ground that, thereafter, the composition of the partnership and the allocation of the profits amongst the partners, is a question of fact, to be determined in light of all the circumstances.

[18] There is some evidence about the original partnership; specifically, documentation which refers to the two partners as Joel Simpson and Paul Wilson. Prior to Mr. Wilson's death, the partnership income, as reported in their respective income tax returns, was allocated 50/50 between Joel Simpson and Paul Wilson. In any event, it is not disputed that, over the years, the Simpsons and Wilsons operated as a business partnership between two couples who split the profits of Never Enough Chrome Shop equally.

[19] There is no evidence, other than the Simpsons' bald assertion in their affidavit of March 19, 2018, that, following Mr. Wilson's death, Joel Simpson, Kelly Simpson and Dianne Wilson, viewed themselves as a partnership of three equal partners. Indeed, despite this assertion, Joel Simpson, in cross-examination, confirmed that, after Mr. Wilson's death, the partnership income was divided 50/50 between he and Dianne Wilson, and he never suggested that the profit should be allocated in any other manner.

[20] I am satisfied, based on the totality of the evidence, that the only conclusion available on the evidence is that, after Mr. Wilson's death, the partnership effectively continued with Dianne Wilson taking the position formerly held by her husband, or by her and her husband together.

[21] There has been no evidence, or any basis advanced by the Simpsons, to support an allocation of the funds in the bank account in any manner other than 50/50.

[22] It is directed that the funds in the partnership bank account be allocated 50/50.

Allegation of Breach of Fiduciary Duty by Dianne Wilson

[23] A partner has a duty not to carry on a business of the same nature as, and competing with that of the firm, without the consent of the other partners: s. 30 of the *Partnerships Act*, R.S.O. 1990, C.P.5.

[24] It is not disputed that, after the dissolution of the partnership, both the Simpsons and Ms. Wilson each tried to set up a retail enterprise continuing the same business as Never Enough Chrome Shop in Belleville.

[25] As already stated, Ms. Wilson does not contest that she took the retail operation of Never Enough Chrome Shop into Chrome Supply Warehouse. Ms. Wilson also does not dispute that initiating steps to take the retail business prior to July 31, 2017 would have been a breach of her fiduciary duty to the Simpsons. Ms. Wilson urges that the applicants have advanced no evidence that she did so. Ms. Wilson's position is that the applicants either have no such evidence, or failed to put their best foot forward, and their application should be dismissed.

[26] Dianne Wilson, attests, in her affidavit, that she decided to dissolve her business partnership with the Simpsons in late July 2017, when Never Enough Chrome received notice from its landlord. Ms. Wilson states that she did not pursue Chrome Supply Warehouse's retail sales business until after she gave notice to the Simpsons on July 31, 2017.

[27] The applicants rely on the following evidence to contradict Ms. Wilson's evidence, and support a finding that Ms. Wilson and Chrome Supply Warehouse made efforts to, and did, start Chrome Supply Warehouse's retail sales business prior to July 31, 2017:

- (i) Dianne Wilson and Brett Akey, her partner in the retail business of Chrome Supply Warehouse, applied for, and obtained a registrant business number for Chrome Supply Warehouse as a retail GST/HST Sales Tax Registrant, effective January 5, 2017. The application had to have been made prior to January 5, 2017. It is undisputed that this is the registrant business number used by Chrome Supply Warehouse's retail business enterprise.
- (ii) Dianne Wilson provided a first rent cheque, dated January 1, 2017, in her answer to an undertaking to produce the first rent cheque;
- (iii) Dianne Wilson's Statement of Business Activity for Chrome Supply Warehouse. The statement lists Chrome Supply Warehouse's main product for the year 2017 as retail.
- (iv) Chrome Supply Warehouse's business banking account into which Chrome Supply Warehouse business revenues were deposited, shows unredacted deposits during the period of January 1 to July 31, 2017. Ms. Wilson has explained the redaction of these banking statements, as redacting "any identifying entries in relation to wholesale supplier transactions have been redacted". In other words, the applicant submits, it is, therefore, reasonable to infer that the unredacted entries between January and July 31, 2017 may pertain to receipts or revenues from retail transactions.

- (v) Chrome Supply Warehouse's Sales by Customer Summary for each month in year 2017, commencing September 2017. Chrome Supply Warehouse Retail's aggregate sales from September to December 2017, were reported to be \$138,135.17. Chrome Supply Warehouse's gross sales for 2017, as reported in its Statement of Business Activity, were \$349,078.74, inclusive of HST. The applicants suggest that the difference of approximately \$200,000 may include retail sales. The respondent argues that greater gross sales in 2017 could be equally consistent with all sales prior to July 31, 2017 relating to Chrome Supply Warehouse's wholesale sales business.

[28] I am not persuaded, as urged by the applicants, that the above-listed business and financial information constitutes an abundance of clear, unequivocal evidence upon which a finding of fact can be made, on a balance of probabilities, that Ms. Wilson had taken steps toward or was carrying on a retail business prior to July 31, 2017, in breach of her fiduciary duty to the business partnership, Never Enough Chrome Shop.

[29] I, however, am also not persuaded that it can be concluded that Ms. Wilson's sworn statement that she took no steps to initiate take-over of the retail business prior to July 31, 2017, stands uncontradicted.

[30] This part of the application is not brought under the *Partnerships Act*, but as an application, under Rule 14.05, on the basis that it is in respect of a matter where it is unlikely that there will be any material facts in dispute. While the contradictory evidence is slim, I am satisfied that the issue of whether Ms. Wilson initiated taking over the retail business prior to July 31, 2017 is a matter in dispute, and involves an assessment of credibility and a resolution of conflicting evidence which cannot be resolved without a trial.

[31] I direct a trial of this issue.

Allegation of Breach of Fiduciary Duty by Larry Jones

[32] The Simpsons seek an order requiring Larry Jones to disgorge to Never Enough Chrome Shop the wages and bonus he received in the period May 23, 2017 through September 2, 2017, and pay punitive damages or equitable compensation for breach of his fiduciary obligation.

[33] Larry Jones became an employee of Never Enough Chrome in 2007. At all times thereafter, he was a manager and the person in the shop who dealt directly with the customers, and maintained the customer list. Mr. Jones acknowledged that he was "the face" of Never Enough Chrome Shop. Mr. Jones had access to the computer, maintained the customer list, and managed and operated Never Enough Chrome Shop's Facebook page.

[34] Mr. Jones, in his affidavit, explains that following the dissolution of the Never Enough Chrome Shop partnership, Joel Simpson offered him a job at a new chrome shop which the Simpsons were considering opening in Belleville. Ms. Wilson then offered him the job at Chrome Supply Warehouse, which he accepted, and he commenced employment at Chrome Supply Warehouse on September 1, 2017.

[35] Both parties agree and rely on the governing legal principles, as set out and summarized in *GasTOPS Ltd. v. Forsyth*, [2009] OJ No 3969, at paras. 77-79, 81-84, to determine whether an employee owes a fiduciary duty to his or her employer, above the general duty of good faith and fidelity. The court must look at the nature of the relationship between the parties, the job function and the responsibilities being performed, not simply the title held by the employee. With respect to lower level employees, courts have extended fiduciary obligations where the individual is found to be a key employee. An important consideration is whether the employee's position and responsibilities are essential to the employer's business, such that the employer is vulnerable to the employee's actions in the workplace and left vulnerable to competition on that employee's departure.

[36] It is clear that Mr. Jones, by his own description, was an important employee who had a direct relationship with, and knowledge of, the customers, and the day to day operation of the business. That this knowledge would greatly assist the initiation of a competing retail business, or continuation of the same retail business, is self-evident from the fact that both the applicants and the respondent, Ms. Wilson, both wished to hire Mr. Jones for precisely this reason. There was no evidence, however, that he was irreplaceable. The applicants have adduced no evidence that Mr. Jones had the type of discretion or power that he could unilaterally exercise. In the particular circumstances, I am not satisfied that the factors that made him an important employee, alone, are sufficient to find that Mr. Jones owed a fiduciary duty to the partnership.

[37] Further, even if Mr. Jones owed a fiduciary duty to the partnership, the vast majority, if not all, of the applicants' allegations of breach of that duty have been answered by Mr. Jones with evidence and explanations of those allegations that are equally consistent with his conduct not being a breach of any fiduciary duty. Based on the evidence before me, I am not satisfied on a balance of probabilities that Mr. Jones did any act that can be found to be a breach of any fiduciary duty prior to the dissolution of the partnership.

[38] Accordingly, the applicants have not discharged their onus to prove that Mr. Jones was a fiduciary. Further, even if he was a fiduciary, they have not discharged their onus to prove that he breached any fiduciary duty owed to them.

Summary

[39] For all of these reasons:

- (1) a declaration be made that the business partnership Never Enough Chrome Shop dissolved as of July 31, 2017;
- (2) the partnership bank account shall be divided 50% to the applicants and 50% to the respondent;
- (3) there shall be a trial of the issue about whether there was any breach of fiduciary duty by Dianne Wilson and resulting damages therefrom. Counsel shall contact the

trial coordinator to schedule a hearing before me to make submissions about exactly how this trial shall be conducted;

- (4) Larry Jones has not been proven to be a fiduciary of the partnership. Further, even if he was a fiduciary, the applicants have not proven that he breached any fiduciary duty owed to them;
- (5) except as ordered herein, the balance of the relief claimed is dismissed; and
- (6) if the parties cannot agree on costs, they shall contact the trial coordinator to schedule a costs hearing before me.

Order to go accordingly.



The Honourable Madam Justice S. Lavine

DATE RELEASED: March 2, 2020