CITATION: Sproule v. Tony Graham Lexus Toyota, 2016 ONSC 2220
COURT FILE NO.: 14-61172
DATE: 2016/05/12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DARREN SPROULE Plaintiff/Respondent on the Motion	Andrew B. Lister, Chantal Beaupré for the Plaintiff/ Respondent on the Motion
– and –	
TONY GRAHAM LEXUS TOYOTA; GRAHAM AUTOMOTIVES SALES INC.; TONY GRAHAM MOTORS (1980) LIMITED; TONY GRAHAM KANATA LIMITED; TONY GRAHAM MOTORS LIMITED, 1618507 ONTARIO LIMITED; 1180632 ONTARIO LIMITED; 1180633 ONTARIO LIMITED; 1514532 ONTARIO LIMITED; 1618508 ONTARIO LIMITED; MAUREEN GRAHAM and ELIZABETH GRAHAM Defendants/ Moving Party	Jim Anstey, for the Defendants/Moving Party **HEARD: March 8, 2016**

REASONS ON SUMMARY JUDGMENT MOTION

MARANGER J.

Introduction

[1] This was a motion for a summary judgment by eight of the named defendants to have the claims dismissed by reason of there being no cause of action against them.

[2] The motion arises in the context of a wrongful dismissal action.

[3] The plaintiff was the manager of one of the car dealerships owned and operated by the Tony Graham automotive companies, namely the Nissan Infiniti automotive dealership.

[4] The fundamental issue to be determined on this motion is whether the evidence presented supports the proposition that the eight moving defendants were never at any time during the course of the plaintiff's employment "common and related employers".

Summary judgment motions:

[5] Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 stipulates that a defendant may, after delivering his or her statement of defence, move with appropriate affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. The court is mandated to grant summary judgment if it is satisfied that there is no genuine issue requiring a trial respecting a claim or defence.

[6] Rule 20.04 (2.1) provides that:

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

[7] The Supreme Court of Canada in the case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, set out the governing principles to be applied by trial judges respecting the

determination of rule 20 summary judgment motions. At paras. 47, 49-51 and 66 Justice Karakatsanis indicated the following:

> [47] Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.
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> …
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> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
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> [50] These principles are interconnected and all speak to whether summary judgment will provide fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost-effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve the dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
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> [51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.
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> …
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> [66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided

> by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Position of the Defendants/moving parties:

[8] The moving party submits that the two individuals named as defendants, Maureen and Elizabeth Graham, were at all material times directors of Graham Automotive Sales Inc., and as such were not employers. There is no justification in any of the evidence for piercing the corporate veil.

[9] The moving party further submits that six of the companies named in the statement of claim are simply holding companies and as such have nothing to do with the employment of the plaintiff. Consequently, no cause of action exists against them.

Position of the Plaintiff/respondent in the motion

[10] The plaintiff submits that all of the corporate defendants are, in essence, one in the same: their assets are intermingled, they hold the same directing minds and the same shareholders, they share common employees and they are all operated as one inseparable business endeavor, known as “Tony Graham Automotive”.

[11] Furthermore, the named individuals Maureen and Elizabeth Graham are the sole directing minds of all of the corporate defendants. They manage the day-to-day affairs of the Companies and have the final say on all major decisions involving these companies.

[12] The plaintiff takes the position that Maureen and Elizabeth Graham made the decision to terminate his employment.

Findings of fact:

[13] After considering the pleadings, the affidavit of Darren Sproule, the affidavit of Geoff Colley, all of the exhibits attached thereto, the transcripts of the cross-examinations on the affidavits, and the factums filed, I am able to confidently make the following findings of fact:

- In 1998 Darren Sproule (the plaintiff) was first employed by Tony Graham, the patriarch of the Graham family at two of his dealerships.
- In 2006 the plaintiff was promoted to General Manager of the Graham family's Nissan and Infiniti dealership, which operated under the corporate name of Graham Automotive Sales Inc.
- The plaintiff's employment ended in May 2014. At that point in time Maureen and Elizabeth Graham were the directors and operating minds of all of the companies. They decided to sell Graham Automotive Sales Inc. (the Infiniti Nissan dealership).
- Maureen Graham and Elizabeth Graham are the daughter and wife of Tony Graham; they were at all material times the controlling and operating minds of the Graham family companies. They were the directors of all of the companies in May 2014 and remain the directors of these companies today.
- The companies were/are divided into two groups: operating companies, and holding companies.
- The operating companies and their function at the relevant times were as follows:

    I. Graham Automotive Sales Inc. (GAS) operated a Nissan and Infiniti dealership located at 2185 Robertson Road in the city of Ottawa;

    II. Tony Graham Luxury Automobiles Ltd. operated a Lexus dealership located at 299 W. Hunt Club Road in the city of Ottawa;

    III. Tony Graham Motors (1980) Ltd. operated a Toyota dealership at 1855 Merivale Road in the city of Ottawa;

    IV. Tony Graham Kanata Ltd. operated a Toyota dealership at 2500 Palladium Drive in the city of Ottawa.

- The holding companies and their respective functions at the relevant times were as follows:

    I. Tony Graham Motors Ltd. (TGM) holds the majority of, or a significant number of, the shares of the operating companies and is the umbrella company for all of the operating companies;

    II. 1180632 Ontario Ltd. holds certain of the Graham family real estate investments. The real estate includes property upon which some businesses are operated and/or are linked to business operations.

    III. 1180633 Ontario Ltd. also holds certain of the Graham family real estate investments.

    IV. 1514532 Ontario Ltd. holds other investments. The majority of the shares are held by the operating companies.

    V. 1618507 Ontario Ltd. is a holding company. The shares are mainly held by Patrick Graham. It is in the nature of a trust. It holds a significant number of the shares in TGM.

    VI. 1618508 Ontario Ltd. is a holding company like 1618507; however, the shares are mainly owned by Maureen Graham.

- The Plaintiff was at all times material paid by GAS.

- The holding companies and the operating companies are intermingled. The entire group of companies is/was commonly referred to as the Tony Graham Automotive Group.

- The defendants treated the corporate group as a common enterprise from a human resource, financing and promotional perspective.

- The holding companies did not engage in any of the operations of the dealership that employed the Plaintiff.

- It cannot be said that the holding companies had any control over the Plaintiff's employment.

- The two personal Defendants did not act outside of their roles as directors nor did they commit a tortious act on any evidence presented at this motion.

Analysis: Personal Defendants

[14] Maureen and Elizabeth Graham are the directing minds of the operating companies that form part of the Tony Graham automotive companies. In order to attract personal liability for their actions as corporate officers there would have to be certain specific available findings on the evidence. In *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), at para. 25, the Ontario Court of Appeal indicated:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see *Ontario Store Fixtures Inc. v. Mmmuffins Inc*. (1989), 1989 CanLII 4229 (ON SC), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

[15] The two personal defendants in this case carried out all of their corporate responsibilities with the authority vested in them. The Plaintiff simply asserts that because they were the controlling minds on all relevant matters involving the running of the companies they are correctly named as party defendants. I disagree with this proposition. There is no allegation of fraud, deceit, dishonesty or a want of authority regarding the two personally named defendants. The pleadings do not allege facts, nor is there any evidence before the court, to support piercing the corporate veil in the circumstances of this case.

[16] There is no genuine issue for trial in relation to this issue, and for all of the above reasons the summary judgment motion to dismiss the claim against the personal defendants is granted.

Analysis: Holding Companies as Common Employers

[17] The plaintiff alleges that the 10 corporate defendants named in the statement of claim are common employers by virtue of the fact that the operating and holding companies are intermingled from the perspective of finances, human resources, accounting records, and that the accounting records list all of the companies as "Tony Graham Automotive Group". He submits that the issue of the application of the doctrine of "common employers" is something that should be determined only after trial.

[18] In *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), the Court of Appeal set out following principles respecting the application of the common employer doctrine at paragraphs 30-33:

> [30] The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably *Sinclair v. Dover Engineering Services Ltd.* (1987), 1987 CanLII 2692 (BC SC), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 1988 CanLII 3358 (BC CA), 49 D.L.R. (4th) 297 (B.C.C.A.) ("Sinclair"). In that case, Sinclair, a professional engineer, held himself out to the public as an employee of Dover Engineering Services Ltd. ("Dover"). He was paid by Cyril Management Limited ("Cyril"). When Sinclair was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:
>
> > The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only

> contract for employment with a single employer and that, in this case, that single entity was obviously Dover.
>
> I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
>
> There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.
>
> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.
>
> …

[31] In Ontario, the common employer doctrine has been considered in several cases. In *Gray v. Standard Trustco Ltd.* (1994), 1994 CanLII 7472 (ON SC), 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22 (Ont. Gen. Div.), Ground J. said, at p. 47 C.C.E.L.:

> . . . it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.

> [32] In *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) ("Jones"), Adams J. reviewed many of the leading authorities and observed, at p. 249:
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> > The true employer must be ascertained on the basis of where effective control over the employee resides . . . I stress again that an employment relationship is not simply a matter of form and technical corporate structure.

[19] In *Asselin v. Gazarek et al*., 2011 ONSC 5871, Conway J. set out some of the key principles on the issue of finding a group of companies to be common employers. At paragraphs 22-24 of that decision she indicates:

> [22] The Ontario Court of Appeal approved the common law doctrine as articulated in *Dover*, as well as in subsequent other cases, in *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (ON CA), 2001 CarswellOnt 1680, 200 D.L.R. (4th) 289 (C.A.). In *Downtown*, the plaintiff was terminated from his employment at a nightclub called *For Your Eyes Only*. He had originally sued the company that served as a "paymaster" for the employees but in later proceedings sought to recover from a number of other related companies involved in the nightclub operation - one company owned the premises, one owned the trademark and licenses, one owned the chattels and equipment, and one acted as paymaster.
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> [23] The court held that there was a "highly integrated or seamless group of companies which together operated all aspects of the *For Your Eyes Only* nightclub" (para. 34). It held that the whole consortium operated the nightclub and that all of the companies could be regarded as common employers and liable for the plaintiff's claim. The court's concern was that a complex corporate structure not be permitted to defeat the legitimate entitlements of wrongfully dismissed employees: *Downtown*, at para. 36.
>
> [24] The issue in the common employer cases, and what the courts look at, is "where effective control over the employee resides" (*Downtown*, at para. 33). If the plaintiff's employment is controlled by more than one company, or by a group of companies, then in the appropriate case all of those companies may be viewed as his collective employer, regardless of who the actual employer is: see *Downtown*, at paras. 30 to 40.

[20] The defendants have conceded that there is a potential for a finding at the conclusion of the trial that the operating companies were one "common employer". The evidence may potentially lead to the conclusion that they all had "effective control over the employee".

However, the defendants' position with respect to the holding companies is that there is no genuine issue for trial, in that there is no evidence that could possibly give rise to a finding that the holding companies are common employers.

[21] I agree with the position advocated by the defendants. The fact that these companies are intermingled financially, even to a great extent, will not result in a finding that they had effective control over the employee. They are holding companies – nothing more, nothing less. They do not exercise directly or indirectly any control over the employees. The doctrine of common employer has no application to them on any analysis of the evidence. As such there is no genuine issue for trial.

[22] Therefore, for all of the above reasons the summary judgment motion dismissing the claims against the six referenced holding companies and the two personally named defendants is granted.

Costs:

[23] If the parties are unable to agree on the issue of costs, I will accept two pages of written argument within 15 days of release of this judgment from the moving party (defendants) and the responding party will be allowed seven days thereafter to file their written argument on this issue.

The Honourable Mr. Justice Robert L. Maranger

Released: May 12, 2016

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARREN SPROULE

Plaintiff/Defendant by Counterclaim

– and –

TONY GRAHAM LEXUS TOYOTA; GRAHAM AUTOMOTIVES SALES INC.; TONY GRAHAM MOTORS (1980) LIMITED; TONY GRAHAM KANATA LIMITED; TONY GRAHAM MOTORS LIMITED, 1618507 ONTARIO LIMITED; 1180632 ONTARIO LIMITED; 1180633 ONTARIO LIMITED; 1514532 ONTARIO LIMITED; 1618508 ONTARIO LIMITED; MAREEN GRAHAM and ELIZABETH GRAHAM

Defendants/Plaintiffs by Counterclaim

REASONS FOR SUMMARY JUDGMENT MOTION

Maranger J.

Released: May 12, 2016