

Robinson v. Daewoo Canada Ltd.

Between

Nadine Robinson, plaintiff (responding party)
Daewoo Canada Ltd., Daewoo Corporation, Daewoo Electronics
Canada Inc., Daewoo International (America) Corp., Daewoo
Electronics Co. Ltd., Daewoo Electronics Corporation of
America, and Daewoo Group, defendants (moving parties)

[2000] O.J. No. 3591
Court File No. 95-CQ-60575

Ontario Superior Court of Justice
Swinton J.

Heard: August 28 and 29, 2000.
Judgment: September 28, 2000.
(59 paras.)

Counsel:

J. Gardner Hodder, for the plaintiff/responding party.
Benjamin Zarnett and Jessica Kimmel, for the defendants/moving parties.

¶ 1 **SWINTON J.**— The defendants, except Daewoo Group, have brought a motion for summary judgement seeking an order dismissing this action. Prior to the oral argument, the parties agreed to the dismissal of the action against the defendants Daewoo Canada Ltd., Daewoo Electronics Canada Inc., and Daewoo International (America) Corp. With respect to Daewoo Group, it was agreed that no determination would be made of its legal status and capacity to be sued, although if any claims were dismissed or narrowed against the moving parties, the claims would be dismissed or narrowed against Daewoo Group as well.

¶ 2 The plaintiff, Nadine Robinson, claims against the defendants for damages of \$11,172,434.00 based on allegations of partnership, alter ego liability, and inducing breach of contract. She asserts that she has received an assignment of the claims in this action from Scarsdale Technologies Inc. ("STI") and Scarsdale Industries Inc. ("SII"). Her husband, William Robinson, was the president, director and sole directing mind of these companies. The plaintiff has never been personally involved in the business of the companies, other than guaranteeing some corporate indebtedness. She claims to be a shareholder as well, although no share certificates or share register has been produced.

¶ 3 The plaintiff's claims against the defendants derive from a default judgment obtained on a counterclaim against Cordata Technologies Inc., formerly Corona Data Systems Inc., ("Corona") on January 18, 1994. The defendants were not parties in the proceedings against Corona. In that action, the plaintiff, as assignee of the claims of STI and SII, claimed that Corona was in breach of its contract with SII. Damages and costs were assessed in the amount claimed in the present action from the Daewoo defendants.

Factual Background

¶ 4 On April 9, 1983, Corona, a California company, agreed to appoint William Robinson or his assignee to distribute Corona computer products on a non-exclusive basis in Canada. This agreement was later assigned to STI with Corona's consent. Subsequently, Robinson alleged that Corona breached the agreement, and litigation ensued. In settlement of that litigation, Corona entered three new, inter-related agreements with STI and SII on January 25, 1985.

¶ 5 Both Robinson and Loren Eltiste, former Chief Financial Officer of Corona, confirmed that the restructuring of STI's outstanding debt to Corona was one of the objectives of these agreements. One of the agreements (Ex. 7) contains an acknowledgement by STI of its outstanding debt to Corona of \$450,120.99, which was to be repaid according to a schedule.

¶ 6 The manufacturing agreement between Corona and SII provided that Corona was to pay SII \$450,000.00 within 30 days in exchange for a promissory note and a schedule. STI was simultaneously to settle its account with Corona by payment of \$450,000.00 to Corona. Neither of these amounts was ever paid. Ultimately, the manufacturing agreement was breached, although there is a dispute as to whether Corona or STI/SII was the party in breach. For purposes of this motion, I need not determine that question.

¶ 7 From April, 1984, Corona had had a written supply agreement with Daewoo Electronics Co. Ltd. ("DECL"). That agreement stated that the parties were to be independent contractors, and nothing in the agreement made them partners for each other. William Robinson's affidavit indicates that he was aware, before the January, 1985 agreements, that Daewoo was beginning to do Corona's manufacturing and to provide financing. He claims to have been told by Dan Carter, president and chief executive officer of Corona, that Daewoo would likely become the partner or joint venturer or owner of Corona.

¶ 8 During the course of 1985, Corona was in worsening financial circumstances. Indeed, Carter states, in his affidavit, that by early 1985, Corona was in a state of insolvency due to its significant indebtedness to Daewoo.

¶ 9 On May 16, 1985, Eltiste, as chief financial officer, wrote to STI confirming the latter's failure to deliver certain documents, including a promissory note for \$10,000.00 for a payment due on May 23, 1985, and demanding payment in order to keep that deal intact. It is undisputed that this payment was never made.

¶ 10 In June, 1985, G.B. (Joseph) Song began work at Corona. At some time, he was given the title of Vice President of Finance. Company records show that he was hired as an employee

in September, 1985. Song was a former employee of Daewoo Corporation and DIAC, and a recent MBA graduate. According to the evidence, he was hired as a result of a request from Mr. Kim of Daewoo Electronics, who wanted someone on site at Corona to oversee its finances because of the extent of Corona's indebtedness to DECL. Song's main function was to negotiate the amounts payable to vendors and to help turn Corona around financially. It was Song's evidence that he reported to Eltiste and Carter, who managed the company on a day to day basis. They gave evidence that Song had to approve payments made by Corona.

¶ 11 On July 18, 1985, Dan Carter wrote to Robinson, STI and SII notifying them of Corona's intention to terminate the distribution and manufacturing agreements unless their breaches were cured in the time frame set out in the letters. As the demands were not met, both agreements were terminated by Corona.

¶ 12 The evidence of Melvin Demoff, then general counsel and Vice President of Operations for Corona, was that he drafted the letters. In his view, Corona did not proceed with the agreements with SII and STI because of defaults and breaches of those agreements by STI and SII. Carter, on cross-examination, indicated that he probably wrote the letters terminating the agreements because of the defaults.

¶ 13 On July 17, 1985, the board of directors of Corona had given approval to a stock purchase agreement involving Daewoo indirectly, made effective as of August 16, 1985. Daewoo International America Corp. (DIAC) would become the indirect owner of approximately 72% of the outstanding common shares of Corona effective August 1, 1985 through its ownership of 90.3% of the shares of Conejo Associates Limited Partnership. DIAC's indirect holdings in Corona were subsequently acquired by Daewoo Corporation on May 8, 1996.

The Plaintiff's Claims

¶ 14 The plaintiff based her claim for damages on three grounds: the defendants were a partner of Corona and so liable in contract; they were the alter ego of Corona at the time of the repudiation of the agreements and subsequently; and there was intentional interference with contractual relations by Daewoo.

¶ 15 Other relationships between Corona and the defendants are alleged in the Statement of Claim - for example, that Daewoo was a related company, a holding company and a shareholder (paragraph 29 of the Statement of Claim). These do not make Daewoo legally liable for Corona's debt.

¶ 16 Other claims found in paragraphs 31, 34 and 35 of the Statement of Claim allege that there was a diversion of Corona's funds by Daewoo. These allegations have been conceded by the plaintiff to be factually unsupported, and therefore, they can not be a basis for liability.

Summary Judgement Jurisprudence

¶ 17 In *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161, 156 D.L.R. (4th) 222 (C.A.), the Court of Appeal held that a motions judge should not grant summary

judgment under Rule 20.04(2) without a clear demonstration that there is no genuine issue for trial. In coming to that determination, the motions judge is not to assess credibility, make findings of fact, nor weigh the evidence (at 235-6 D.L.R.). However, where a motions judge is satisfied that the only issue is a question of law, he or she may determine the question (Rule 20.04(4)).

¶ 18 The onus is on the moving party to put forward evidence that, in conjunction with all the material filed, shows that there is no genuine issue of fact that requires a trial for resolution. However, the responding party can not rest on allegations or denials in the pleadings, but must also provide evidence from which the judge can conclude that there is a genuine issue for trial (Rule 20.04(1)). The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial (*Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank* (1999), 173 D.L.R. (4th) 468 (Ont. C.A.) at 482-83). Ultimately, the purpose of the summary judgment motion is, in the words of Borins J.A. in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 111 O.A.C. 201 (C.A.) at 207, "to isolate, and then terminate, claims and defences that are factually unsupported".

Partnership

¶ 19 The plaintiff alleges that DECL and Corona held themselves out as a partnership, and the Daewoo Group, of which DECL is a part, held itself out as a single enterprise.

¶ 20 In oral argument, counsel stated that he was not pressing this argument strenuously - and for good reason. A partner is liable only for debts and obligations incurred while a partner (Partnerships Act, R.S.O. 1990, c. P.5, ss. 10, 18). Therefore, in order to hold Daewoo liable for Corona's contractual obligations, a partnership would have had to exist on January 25, 1985 when the manufacturing and distribution agreements were signed. There is no evidence in the material filed to support a conclusion that Daewoo was a partner of Corona at that date. There is no direct or indirect evidence that Daewoo had an ownership interest in Corona at that time, while the 1984 supply agreement between DECL and Corona expressly disclaimed a partnership relationship. Moreover, Carter and Demoff gave evidence that Corona intended to carry out the agreement itself, and so they make no allegation of a partnership.

¶ 21 Section 15 of the Partnerships Act also imposes liability on those who hold themselves out as partners to those who extend credit on the faith of such representations. There is no evidence that Daewoo held itself out as a partner in January, 1985. The strongest evidence of partnership is found in the statement in Mr. Robinson's affidavit that he learned in 1988 that Daewoo formed a "financial partnership" with Corona in August, 1985. The August date is well after the critical January, 1985 date on which the rights and obligations under the contract crystallized. Moreover, no credit was extended on the basis of any representation of partnership.

¶ 22 Therefore, there is no factual basis to support a claim that Daewoo was a partner of Corona and so should be held liable for the obligations under the agreements signed in January, 1985.

Alter Ego Liability

¶ 23 The plaintiff also argues that Daewoo should be held liable on the basis that it is an alter ego of Corona. Relying on both American and Canadian case law, counsel argues that there was such close control of Corona by Daewoo, both before and after the indirect purchase of the Corona stock, that Daewoo should be held liable for Corona's obligations.

¶ 24 The Canadian and American cases relied upon do not create a separate cause of action for alter ego liability (see, for example, *Matthews Construction Co. v. Harvey* (1990), 796 S.W. (2d) 692 (S.C. Tex.) at endnote one.). In cases where a court has found it appropriate to pierce the corporate veil and attach liability on the basis that some individual or some corporation is an alter ego, there appears to have been an underlying cause of action or statutory basis for liability. A number of cases operate on a theory of agency, assigning liability for a contractual obligation to a shareholder or owner of a corporation because this entity or individual appears to be the real contracting party, rather than the nominal party to the contract (see, for example, *Kristian Equipment Ltd. v. Campbell West Ltd.* (1991), 104 Sask. R. 309 (Q.B.)). Other cases impose liability to prevent conduct akin to fraud. For example, in *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.), Laskin J.A. stated (at 536):

Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights

¶ 25 Counsel for the plaintiff placed great emphasis on the reasons of Rand J. in *Aluminum Co. of Canada Ltd. v. The Corporation of the City of Toronto*, [1944] S.C.R. 267. There, in determining whether the business of a parent company should include the business of subsidiary corporations for purposes of municipal assessment, Rand J. stated at 271:

... the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate facade of the latter and becomes itself the manifesting agency. In such a case it is not accurate to describe the business as being carried on by the puppet for the benefit of the dominant company. The business is in fact that of the latter. This does not mean, however, that for other purposes the subsidiary may not be the legal entity to be dealt with.

¶ 26 This case was discussed in *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.) at 84-85, where the Ontario Court of Appeal set out a number of factors to consider in determining whether one corporation was an agent for purposes of service of another corporation under the rules of civil procedure: capitalization of the subsidiary, the degree of observance of corporate formalities, the extent of the relationship and dealings between the business of parent and subsidiary, the corporate histories of parent and

subsidiary, the relationship of their boards of directors and senior management, and the extent of the ownership interest of the parent in the subsidiary.

¶ 27 The plaintiff also relied on a number of American cases, where alter ego liability was an issue. The overriding concern underlying the doctrine, as set out in those cases, is to prevent the use of the corporate form to divert funds in order to avoid liabilities or to avoid obligations where it is inequitable to do so (Matthews, *supra*; Amedeo v. Bakara Furniture Inc. (1994), 35 Cal. Rptr. 2d 348, 29 Cal. App. 4th 1828 (C.A. Cal.); Davenport v. Quinn, [1999] CT-QL 236 (C.A. Conn.)). As stated in Davenport, such relief is exceptional, and rests either on an "instrumentality" or an "identity" test. The instrumentality test rests on complete domination of one corporation by another, which has permitted the dominant corporation to commit fraud or a wrong in contravention of the plaintiff's legal rights. The identity test is used when there is "such a unity of interest and ownership that the independence of the corporations had in effect ceased or never begun" (paragraphs 49-50).

¶ 28 The defendants take the position that the rationale for alter ego liability lies in agency. Therefore, they argued that the key date for determining whether there is a case for alter ego liability is January 25, 1985, the date of the manufacturing agreement, because a court must determine if Corona was acting as Daewoo's agent in assuming the contractual obligations.

¶ 29 If the plaintiff had rested her case on the argument that Daewoo was the alter ego of Corona at the time that the contractual obligations were assumed in January, 1985, she could not succeed. There is no evidence that could support a finding that Corona was under such close control of Daewoo at that date that it could be regarded as a puppet. When Corona assumed its contractual obligation to STI and SII, Daewoo held no shares in the company. At most, the evidence shows that DECL was a major supplier of goods and a significant creditor of Corona at the time. It was not until shortly after the termination of the contract, in August of 1985, that DIAC acquired an indirect control of Corona. Moreover, Carter and Eltiste gave evidence that when Corona signed the agreements with the Scarsdale companies, Corona intended to carry out the agreements itself.

¶ 30 However, counsel for the plaintiff, both in argument and in his factum, emphasized that the key dates for purposes of the alter ego claim were the time of termination of the agreements and subsequently (see, for example, paragraph 26 of the factum). Counsel argued that there was evidence from which it could be inferred that there was such close control of Corona by Daewoo at the time of the termination and after as to justify the imposition of alter ego liability. In short, the argument rests not on an argument of agency, but rather squarely on a theory of alter ego liability.

¶ 31 There are a number of problems with this argument. First, there appears to be no underlying cause of action to support this claim. On the facts, there can be no liability in contract. In many cases where liability has been imposed on a party because of its ownership and control of another corporation, there has been a concern about conduct akin to fraud, especially where there has been diversion of funds from the subsidiary. Here, it is conceded by the plaintiff that there is no evidence that Daewoo diverted funds from Corona or sought to conceal Corona's assets at any time. At most, the plaintiff accuses Daewoo of operating Corona

so that it would not earn a profit. Therefore, the element of fraud or conduct akin to fraud that underpins alter ego liability is not present here.

¶ 32 Moreover, even if all the facts favourable to the plaintiff's case were accepted as true for purposes of this motion, they are not sufficient to prove the degree of ownership and domination necessary to support a finding of alter ego liability. There is no evidence that Corona was a "puppet" of Daewoo at the time of the alleged wrong to SII - that is, at the time of the termination of the STI and SII agreements. Most significantly, Corona was not yet owned by Daewoo at the time of termination, even indirectly. Furthermore, as discussed in greater detail in the discussion which follows on the tort of inducing breach of contract, the evidence does not show that Corona was tightly controlled by Daewoo at the time of the termination decision. Clearly, the factors set out in cases such as Aluminum Company and Canada Life require a very close link between the two corporations, both in terms of ownership and control. Even were a trial judge to accept the evidence relied upon by the plaintiff, it does not support a claim for alter ego liability.

¶ 33 In the alternative, the defendants argued that this argument of alter ego liability must fail in law because of the doctrine of merger. Specifically, they argued that the plaintiff elected to accept Corona as the debtor of the company whose claim was assigned to her. Having obtained judgment for breach of contract against Corona in the earlier action, the election precludes an action against Daewoo, as only one of Daewoo or Corona can be responsible for the contract on which the plaintiff sued. This argument is relevant only if the plaintiff rests on a theory of agency to found her theory of alter ego liability. As she has not done so, I need not deal with this argument further.

¶ 34 In sum, there is no genuine issue for trial with respect to the alter ego liability claims.

Inducing Breach of Contract

¶ 35 The elements of the tort of inducing breach of contract or intentional interference with contractual relations are: an enforceable contract, knowledge by the defendant of the existence of the contract, an intentional act on the part of the defendant to cause a breach of that contract, wrongful interference on the part of the defendant, and resulting damage (*Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.) at 44).

¶ 36 The key date here for purposes of imposing liability is July 18, 1985, the date of the termination letters. In order to establish that the defendants are liable in tort, the plaintiff must prove that there was an intentional act by the defendants that caused the breach of Corona's contract with SII.

¶ 37 All of the direct unchallenged evidence affirms that Corona's performance and ultimate termination of the Scarsdale agreements were not the result of any act or interference by the defendants. Demoff and Carter gave evidence that Corona terminated the contracts on July 18, 1985 because of STI's and SII's breaches. Demoff was the one who prepared the letters of termination, as internal counsel for Corona, and he denied that the defendants or Song had anything to do with the termination decision.

¶ 38 Carter, as president, chief executive officer and a director, signed the letters on behalf of Corona. There is no direct evidence from Carter that the defendants were directly or indirectly involved in the decision to terminate the agreements. In cross-examination, he responded to the following question "... the reason I assume why Corona did not proceed with the agreements that are referred to in these letters is because of the breaches by the Scarsdale companies that you indicate in these letters; right?" He answered, "I would presume that was true, yes."

¶ 39 Song, as well, gave evidence that he had no role in the termination of the Scarsdale agreements. This position did not change on cross-examination. He also stated that he did not consult persons outside Corona in exercising his authority. Nevertheless, the plaintiff makes much of the fact that Song was in control of the company's payables and in charge of managing cash flows around the time of the termination of the agreements. The question is whether those facts, along with other evidence, create a genuine issue requiring a trial to determine whether the defendants intentionally caused the breach of the contract between Corona and SII.

¶ 40 The plaintiff argues that there is evidence from which it can be inferred by a trial judge that Daewoo caused the termination of the agreements. Specifically, the plaintiff argues that an inference of intentional interference can be drawn from the combination of the timing of the termination (the day after the board meeting approving the indirect Daewoo takeover, and following Daewoo's due diligence from April through July, 1985), the affidavit of Eltiste, and the role of Song, whom counsel claimed to be a poor witness. Essentially, he argued that a trial judge could infer that DECL forced Corona to give Song complete de facto financial control of Corona one month prior to Corona's repudiation of the manufacturing agreement with SII and two months prior to Daewoo's acquisition of Corona, and this caused the termination of the agreements.

¶ 41 On a motion for summary judgment, the motions judge is entitled to assume that all the evidence that would be available at trial is before him or her. Here, there is no direct evidence that Daewoo caused the termination of the agreements. Significantly, there is evidence from Demoff and Carter that Corona decided to terminate the agreements as a result of the breaches by SII and STI. While there may seem to be a coincidence in the timing of the termination after the board meeting approving the indirect takeover by Daewoo, neither Carter nor Eltiste, who were present at the board meeting, were ever asked whether Daewoo made a suggestion or demand that the Scarsdale agreements be terminated.

¶ 42 The plaintiff describes Eltiste's and Carter's evidence as the best evidence of the defendants' interference with Corona and Corona's lack of corporate independence. Yet the affidavit of Eltiste does not support the plaintiff's case on this essential point of causation of the breach. In paragraph ten, Eltiste states that he did not believe that Song would approve the payment of \$450,000.00 to Scarsdale for two reasons: first, concern about the debt owing from STI, and secondly, there was no benefit to Daewoo investing in a manufacturing arrangement competitive to its activities, and Eltiste "did not believe that Mr. Song would ever approve such a payment". In paragraph eleven, Eltiste states that "With increased involvement by Daewoo, the second of the two above-stated reasons became the predominant reason that Daewoo would not proceed to invest in Scarsdale Industries Inc." Nowhere does Eltiste make reference to the repudiation of the agreement by Corona or any role of Daewoo in that decision to repudiate. Nor

does he say that anyone from Daewoo was ever asked for approval to make the payment of which he speaks - a payment, I note, that was initially due within 30 days after the agreement was signed and before Song entered the picture. Finally, Eltiste does not say that Song refused such a payment or interfered with Corona's performance of the agreements.

¶ 43 Similarly, while Carter's affidavit states that all financial decisions at Corona were required to go through Song, he never states that Song demanded or even suggested the termination of the Scarsdale agreements. In fact, Carter's main reference to the agreement comes at the end of his affidavit, when he states that the agreement with SII ran counter to Daewoo Group's intention to penetrate the North American markets with its own manufactured goods. The time frame contemplated by this statement is not clear, since much of what immediately preceded this paragraph is a discussion of actions after Daewoo had acquired indirect and then direct control - in other words, after the termination of the agreements in issue here.

¶ 44 After considering all the evidence on this issue, I am satisfied that there is no genuine issue for trial with respect to this cause of action. In reaching this conclusion, I am not weighing the evidence. Even if all the evidence of Carter and Eltiste is accepted as true, the plaintiff has failed to prove an essential element in the tort of inducing breach of contract - that Daewoo caused the breach of the contract or interfered with its performance.

Limitation Period

¶ 45 Given my findings above, it is not necessary to deal with the limitation period defence, but I do so in the alternative.

¶ 46 Absent the application of the discoverability rule, the limitation period for tort and contract claims would have expired in July, 1991 (Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g)). The discoverability rule postpones the running of the limitation period until the material facts underlying the cause of action are known to or reasonably discoverable by the plaintiff (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at 562, 566).

¶ 47 When this action was commenced in 1995, it did not contain a tort claim for inducing breach of contract. Nevertheless, there was a claim that the defendants had stripped Corona of its assets and that the defendants were an alter ego of Corona because Corona was used as a conduit to avoid liability, as well as a partnership claim.

¶ 48 The plaintiff concedes in her factum that the factual basis for the action, as originally framed to claim a diversion of Corona's assets, turned out to be largely erroneous. However, she states, relying on Mr. Robinson's affidavit, that she became aware of potential claims against Daewoo when served with the defendants' Affidavit of Documents in late 1996. Specifically, she learned about Daewoo's intentions to operate Corona so that it would not make a profit and its possible interference with the manufacturing agreement. This led to the amendment of the Statement of Claim to add the tort claim on October 30, 1996. Then, in 1997, Mr. Robinson had conversations with Carter and Eltiste in which he learned further information about Daewoo's involvement with Corona that, in his view, supported the tort claim against Daewoo.

¶ 49 The onus is on the plaintiff to show that she did not know, and could not have known with reasonable diligence, of the existence of causes of action against the Daewoo defendants within the limitation period.

¶ 50 The defendants point out that Mr. Robinson's affidavit indicates that by 1984 Carter had informed him that Daewoo might become a partner, and by 1988, he had received information of a financial partnership between Daewoo and Corona in 1985.

¶ 51 In *Aguonie*, *supra*, the Court of Appeal dealt with the discoverability rule in the context of a motion for summary judgment. There, Borins J. stated (at 233):

The application of the discoverability rule is premised on a finding of these facts: when the appellants learned they had a cause of action against the respondents; or, when, through the exercise of reasonable diligence, they ought to have learned they had a cause of action against the respondents. These facts constitute genuine issues for trial and, in resolving them, the motions judge assumed the role of a trial judge.

¶ 52 In this case, there is a factual issue to be determined as to when Mr. Robinson, on behalf of the Scarsdale companies, was sufficiently informed about Daewoo's involvement in the Corona operations that he knew, or ought reasonably to have known, that the companies had a claim against the defendants in tort. It is his evidence that the information emerged after 1996. To make a determination about his knowledge or what he could have learned at an earlier time would require finding facts with respect to his knowledge and his credibility, which is the role of a trial judge. Thus, there is a genuine issue for trial with respect to the application of the discoverability rule.

Standing to Sue

¶ 53 The defendants argue that the assignment of the claims of the Scarsdale companies to the plaintiff, Nadine Robinson, was the assignment of a bare cause of action. Such an assignment of a claim in tort or contract is not permitted as a matter of public policy, arising out of the doctrines of champerty and maintenance. Only if the assignee can show a legitimate commercial interest in the claims can she proceed (*Royal Bank of Canada v. Woodhouse* (1997), 33 O.R. (3d) 47 (C.A.) at 52-53; *Sherman v. Drabinsky* (1990), 74 O.R. (2d) 596 (H.C.J.)). In *Frederickson v. Insurance Corporation of British Columbia* (1986), 28 D.L.R. (4th) 414 (B.C.C.A.), McLachlin J. stated that an assignment of a cause of action for a non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation - for example, a property interest ancillary to the cause of action or "a genuine pre-existing commercial interest", by which she meant a financial interest (at 424). She emphasized that in determining whether the assignment smacks of champerty and maintenance, one must determine whether the assignee had the requisite financial interest at the time of the assignment. This decision was upheld on appeal to the Supreme Court of Canada, and her reasons were approved ((1988), 49 D.L.R. (4th) 160).

¶ 54 The plaintiff argues that only her tort claim is made as an assignee, as she is a judgment creditor of Corona with respect to her other claims. As for the tort claim, she argues that she has a legitimate commercial interest because she is a judgment debtor of Corona, and given that company's insolvency, she is unable to recover unless she can proceed against Daewoo. Alternatively, she argues that she was a shareholder of the Scarsdale companies, although no share register or certificates have been produced. While she also relies on the fact that she is the wife of William Robinson, the principal of the companies, in my view, this does not give her a commercial interest.

¶ 55 In my view, the plaintiff brings her tort and contract claims as an assignee, as stated in the Amended Statement of Claim in paragraph 44. The fact that she is a judgment creditor of Corona does not change the fact that she brings the action here as assignee of tort and contract claims by the Scarsdale companies against Daewoo. While she received an assignment of the companies' claims against Corona prior to the 1994 judgement, there was no mention in that assignment of claims against Daewoo. The assignment of those claims occurred in February, 1997, when she was assigned all claims which might be brought on behalf of the Scarsdale companies.

¶ 56 In my view, Mrs. Robinson has a genuine commercial interest in this action because of her judgment against Corona, which pre-dated the assignment in February, 1997. She has no feasible way of recovering that judgment without pursuing the alter ego and tort claims against Daewoo.

¶ 57 The defendants have argued that she was an assignee of a bare cause of action in the earlier proceedings as well, and therefore, she does not have a genuine commercial interest which pre-dated the assignment of the causes of action against Daewoo. The validity of the assignment of the Scarsdale companies' claims against Corona was not questioned in the proceedings which resulted in the 1994 default judgment against Corona, and I do not feel that it is appropriate for me now to question the validity of that assignment. Therefore, the defendants' argument that the plaintiff has no standing to sue fails.

Conclusion

¶ 58 For the reasons set out above, the motion for summary judgment is granted, and the action is dismissed against the moving parties, as well as against the Daewoo Group. On consent, the action is dismissed against the defendants Daewoo Canada Ltd., Daewoo Electronics Canada Inc., and Daewoo International (America) Corp.

¶ 59 If the parties wish to make submissions on costs, they may make written submissions or make an appointment with my assistant.

SWINTON J.

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