CITATION: Sigma Convector Enclosure Corp. v. Fluid Hose & Coupling Inc., 2022 ONSC 4371
COURT FILE NO.: CV-21-00665329-0000
DATE: 20220726

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
SIGMA CONVECTOR ENCLOSURE CORP. Plaintiff	*Robert C. Harason* for the Plaintiff
- and –	
FLUID HOSE & COUPLING INC., JOE PASTERNAK also known as JOSEPH PASTERNAK, BARBARA PASTERNAK AND TAIZHOU CHUANGJU VALVE CO. LTD., also known as 台州创巨阀门有限公 Defendants	*Dana L. Eichler* for the Defendants Fluid Hose & Coupling Inc., Joe Pasternak and Barbara Pasternak **In writing**

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Sigma Convector Enclosure Corp. sues Fluid Hose & Coupling ("Fluid Hose"), Joe Pasternak, Barbara Pasternak, and Taizhou Chuangju Valve Co. Ltd. ("Taizhou") for $3.0 million. The Statement of Claim asserts claims of: (a) breach of contract; (b) misrepresentation; (c) inducing breach of contract; (d) negligence; (e) piercing the corporate veil; and (f) an oppression remedy pursuant to s. 248 of the Ontario *Business Corporations Act*.[1]

[2] Pursuant to Rule 21 of the *Rules of Civil Procedure*,[2] the Pasternaks and Fluid Hose move to have the oppression claim struck and the personal claims against the Pasternaks struck for not showing a reasonable cause of action.

[3] For the reasons that follow: (a) except for the oppression remedy claim, I strike all the personal claims against the Pasternaks without leave to amend; and (b) I dismiss the request to

[1] R.S.O. 1990, c. B.16.
[2] R.R.O. 1990, Reg. 194.

strike the oppression remedy claim against Fluid Hose and the Pasternaks.

B. Procedural and Evidentiary Background

[4] On **July 9**, **2021**, Sigma commenced this action. Sigma Converter seeks damages of $3.0 million and related relief.

[5] On **July 14**, **2021**, Sigma served its Statement of Claim. In its Statement of Claim, Sigma advances an oppression remedy against Fluid Hose and the Pasternaks. As against the Pasternaks, Sigma advanced claims of: (a) breach of contract; (b) misrepresentation; (c) negligence; (d) inducing breach of contract; and (e) piercing the corporate veil.

[6] After being served, Fluid Hose and the Pasternaks retained counsel. Sigma's counsel granted the Pasternaks an indulgence until the end of September 2021 to deliver their Statement of Defence. However, on **August 30**, **2021**, Fluid Hose and the Pasternaks served a notice of change of lawyer. At that time, Robert Harason was acting for Sigma and Dana Eichler was acting for Fluid Hose and the Pasternaks.

[7] The lawyers spoke on **October 1**, **2021** and also subsequently. Mr. Harason demanded the delivery of a Statement of Defence by October 31, 2021, and he refused requests for any further indulgence since he had already granted several to the lawyer previously acting for the Pasternaks.

[8] On **October 31**, **2021**, Fluid Hose and the Pasternaks delivered a Statement of Defence and Crossclaim accompanied by a letter in which Ms. Eichler stated that the Defendants were reserving the right to proceed with a motion to strike the Statement of Claim for failure to show a cause of action. A notice of motion was concurrently served with the pleading. The Statement of Defence and Crossclaim expressly reserves the Defendants' right to move to strike the Statement of Claim.

[9] On **November 9**, **2021**, Fluid Hose and the Pasternaks delivered an Amended Statement of Defence and Crossclaim.

[10] By emails dated **November 18**, **2021**, and **December 14**, **2021**, Sigma's counsel provided Fluid Hose's and the Pasternaks' counsel with additional particulars of the claims against the Pasternaks for inducing breach of contract, negligence, and for the oppression remedy. He provided a copy of the Supreme Court of Canada's decision in *Wilson v. Alharayeri*,[3] which is a leading case about the tort of inducing breach of contract. Fluid Hose and the Pasternaks did not respond to this correspondence.

[11] On **April 22**, **2022**, Fluid Hose and the Pasternaks delivered their Motion Record for their motion to strike.

[12] On **May 5**, **2022**, Sigma withdrew the claims of: (a) breach of contract; and (b) misrepresentation as against the Pasternaks.

[13] In **May 2022**, Sigma delivered its Responding Motion record including the affidavit dated **May 11**, **2022** of Noreen Dillon, a legal assistant at Beard Winter LLP, lawyers for Sigma.

[14] On **May 20**, **2022**, Fluid Hose and the Pasternaks delivered an Amended Motion Record including an Amended Notice of Motion and the affidavit dated April 28, 2022 of Athina Ionita, a

[3] 2017 SCC 39.

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lawyer with Rogers Partners LLP, lawyers for Fluid Hose and the Pasternaks.

[15] On **June 3**, **2022**, Fluid Hose and the Pasternaks delivered their Factum.

[16] In **June 2022**, Sigma delivered a Responding Factum.

[17] On **June 24**, **2022**, Justice Ramsey adjourned the motion to July 8, 2022 because the parties had not properly uploaded the motion materials to Ontariocourts.caselines.com.

[18] On **July 8**, **2022**, I was assigned to hear the motion, but I was working remotely and when the Internet connection went down, the motion was unable to proceed with oral submissions. Since I was fully briefed by the motion material and the parties' factums, I am treating the motion as a motion in writing, and these are my reasons for Decision.

C. Facts

[19] Sigma manufactures components of heat pumps in heating and cooling units for condominiums, apartments, and hotels.

[20] Fluid Hose is a distributor and supplier of hydraulic hoses, hydraulic hose fittings, industrial hoses, industrial hose fittings and the shut-off valves for heat pumps. Fluid Hose is supplied some of its components for its heat pumps from the defendant Taizhou Chuangju Valve Co., Ltd., a Chinese corporation that manufactures and exports shut-off valves.

[21] The Pasternaks are the owners and principals of Fluid Hose. They are its directors, officers, and employees. They manage the business operations of Fluid Hose. Sigma alleges that the Pasternaks and Fluid Hose are alter egos. Sigma alleges that Fluid Hose was used by the Pasternaks as a vehicle to deprive Sigma of the moneys to which it was entitled.

[22] Fluid Hose supplied Sigma with 15,995 shut-off valves. The valves were manufactured by Taizhou.

[23] On **August 27**, **2019**, a shut-off valve that Fluid Hose had supplied to Sigma and that Sigma had installed into a heat pump at the Marriott Residence Inn in Mississauga failed. Hot water escaped, and there was ensuing property damage and personal injuries. Subsequently, valves at six other properties that had been serviced by Sigma failed with ensuing property damage and personal injuries.

[24] On **July 23**, **2020** and **September 4**, **2020**, Fluid Hose issued a recall notice of the shut-off valves.

[25] With the recall, Fluid Hose authorized Sigma to inspect and replace the shut-off valves. Further, Fluid House agreed to indemnify Sigma for the costs incurred and to indemnify it for the damages claims from the failure of the values, and from the expense of the recall and replacement.

[26] Pursuant to Fluid Hose's authorization, Sigma incurred costs of $519,087.32. Fluid Hose agreed to pay $10,000 per month until these costs were paid in full. However, Fluid Hose reneged on this agreement.

[27] Sigma alleges that:

> a. The Pasternaks caused Fluid Hose to agree to pay for the costs of replacing the shut-off values when they knew or ought to have known or were recklessly indifferent or wilfully blind to the fact that Fluid Hose would not pay or would be stripped of the ability

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to pay Sigma.

b. The Pasternaks caused Fluid Hose to withhold payments and induced Fluid Hose to breach its agreement to pay Sigma for the costs associated with the removal and replacement of all the shut-off valves and the repair or replacement of damaged property.

c. The Pasternaks caused Fluid Hose not to pay Sigma and divert moneys from Fluid Hose and this conduct was oppressive, or unfairly prejudicial conduct that unfairly disregarded the interests of Sigma entitling Sigma to an oppression remedy pursuant to the Ontario *Business Corporations Act*.

d. The Pasternaks had a duty of care to Sigma to design, manufacture, supply and distribute shut-off valves that: (i) were merchantable, (ii) were fit for the purpose intended, (iii) were of high quality and free from defects and deficiencies, (iv) would operate properly and not fail during their life expectancy of more than seventy years, and (v) would not fail and thereby cause personal injury or property damage or pose a health or safety hazard to the occupants of the buildings in which the shut-off valves were installed and of adjacent areas and structures.

[28] In so far as the Statement of Claim seeks an oppression remedy the relevant paragraphs are as follows:

> 29. In each case, including by its product recall notifications … and by its letter … delivered by Fluid Hose to Sigma, among other means, Fluid Hose (i) authorized Sigma to remove and replace the shut off valves on all projects where they were installed, … (ii) admitted its responsibility to pay Sigma for all costs incurred and damages suffered as a result of the shut off valve failure, including all costs incurred and damages suffered in the repair, removal and replacement of the failed … and all remaining shut off valves … and (iii) agreed to pay Sigma for all of its costs incurred and damages suffered.
>
> {***}
>
> 32. Pursuant to Fluid Hose's authorization, Sigma has, to date, incurred the costs of the repair, removal and replacement of the failed shut off valves and the removal and replacement of all remaining shut off valves at the … projects in the sum of $519,087.32, which Fluid Hose has agreed to pay Sigma and accordingly, Fluid Hose is indebted to Sigma for those costs in the sum of $519,087.32.
>
> {***}
>
> 36. […] Fluid Hose agreed to pay Sigma the sum of $10,000.00 per month until all moneys due and owing by Fluid Hose to Sigma were paid in full.
>
> 37. […] Fluid Hose […] paid Sigma, on account, the first monthly payment of $10,000.00 […]
>
> 38. Subsequently, […] Fluid Hose has failed and refused to make any further payments to Sigma […]
>
> 39. […] the personal Defendants caused Fluid Hose to agree to pay the Plaintiff as aforesaid, when they knew or ought to have known that or were recklessly indifferent or willfully blind to the fact that (i) [Sigma] would not be paid, (ii) they would drain Fluid Hose of all moneys with which to pay [Sigma] and (iii) Fluid Hose would be unable to pay [Sigma] the money that Fluid Hose agreed to pay and for which Fluid Hose is indebted to [Sigma].
>
> 40. […] the personal Defendants have caused Fluid Hose to withhold payment to [Sigma] of the moneys due and owing to it …

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41. By their wrongful conduct, the personal Defendants have acted in bad faith and not in the best interests of Fluid Hose […]

42. […] Fluid Hose was used by itself and by the personal Defendants as a vehicle to deprive [Sigma] of the moneys to which it was entitled …

43. Fluid Hose, by reason of its failure to pay the Plaintiff the moneys due and owing to it, the costs that it has incurred and the damages that it has suffered, has acted or omitted to act in a manner that effects or threatens to effect a result and the business or affairs of Fluid Hose are, have been or are threatened to be carried on or conducted in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiff …

44. The powers of the personal Defendants, as officers and directors of Fluid Hose, by reason of their failure to pay and their failure to cause Fluid Hose to pay the Plaintiff the moneys due and owing to it, the costs that it has incurred and the damages that it has suffered, and their diversion of moneys from Fluid Hose, are being, have been and are threatened to be exercised, in a manner that is oppressive, or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiff […]

{***}

53. The Defendants' [Fluid Hose, Joe and Barbara Pasternak] improper conduct as aforesaid, was calculated by them to make a profit which would exceed the amount due and owing to the Plaintiff and was committed for the purpose of increasing the Defendants' [Fluid Hose, Joe and Barbara Pasternak] revenues and profits and obtaining benefits, irrespective of the effect of [their conduct] on the Plaintiff.

[29] As noted above, in the email messages of November 18, 2021, and December 14, 2021, Sigma's counsel provided proposed amendments to the Statement of Claim to address Fluid Hose's and the Pasternak's objections to the pleading. In so far as they are relevant to the oppression remedy claim, those amendments are set out below:

SUGGESTED AMENDMENTS TO THE STATEMENT OF CLAIM

As common shareholders [Joe and Barbara Pasternak] received dividends, the ability of Fluid Hose to pay them dividends was maintained or increased and the value of their shares was maintained or increased as the value of the assets and retained earnings of Fluid Hose was maintained or increased. As employees or agents they received salary and bonus or fees and the ability of Fluid Hose to pay them salary, bonus and fees was maintained or increased.

This conduct was not in the best interests in Fluid Hose which were to comply with its recall notices and agreement to pay, to stand behind its products, to promote a reputation for compliance with its agreements, to promote a reputation that it stood behind its products and to promote and not damage the reputation of Sigma as a manufacturer of quality products who stands behind its products and replaces those of its products that are defective because Fluid Hose is paying for the cost.

This conduct was oppressive or was unfairly prejudicial to or it unfairly disregarded the interests of Sigma, for Joe and Barbara, as employees or agents, shareholders, officers and directors of Fluid Hose, to:

(a) cause Fluid Hose to reach that agreement in order to induce Sigma to incur expense to replace the valves which Fluid Hose directed it to replace so that the owners of those projects did not advance claims against Fluid Hose (thereby eliminating the risk of greater loss to Fluid Hose);

(b) cause Fluid Hose, after making one payment, to breach its agreement and make no more payments;

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(c) benefit personally from this. As common shareholders they received dividends, the ability of Fluid Hose to pay them dividends was maintained or increased and the value of their shares was maintained or increased as the value of the assets and retained earnings of Fluid Hose was maintained or increased. As employees or agents they received salary and bonus or fees and the ability of Fluid Hose to pay them salary, bonus and fees was maintained or increased;

(d) cause Fluid Hose to fail to comply with the recall notices and agreement to pay;

(e) cause Fluid Hose to fail to stand behind its products;

(f) cause Fluid Hose to fail to promote a reputation for compliance with its agreements and that it stood behind its products;

(g) fail to promote, and damage, the reputation of Sigma as a manufacturer of quality products who also stands behind its products and replaces those of its products that are defective because Fluid Hose is paying for the cost.

The personal benefit to Joe Pasternak and Barbara Pasternak as a result of their conduct as aforesaid was as follows. As common shareholders Joe Pasternak and Barbara Pasternak received increased dividends, the ability of Fluid Hose to pay them dividends was maintained or increased and the value of their shares was maintained or increased as the value of the assets and retained earnings of Fluid Hose was maintained or increased. As employees, independent contractors and/or agents, they received increased salary, bonus and/or fees and the ability of Fluid Hose to pay them salary, bonus and/or fees was maintained or increased.

The conduct of Joe Pasternak and Barbara Pasternak pleaded was not in the best interests of Fluid Hose which were to comply with its recall notices and agreement to pay, to stand behind its products, to promote a reputation for compliance with its agreements, to promote a reputation that it stood behind its products and to promote and not damage the reputation of Sigma as a manufacturer of quality products who stands behind its products and replaces those of its products that are defective because Fluid Hose is paying for the cost.

It was oppressive or was unfairly prejudicial to or it unfairly disregarded the interests of Sigma, for Joe and Barbara, as employees, independent contractors, agents, shareholders, officers and directors of Fluid Hose, to:

(a) cause Fluid Hose to reach the agreement with Sigma to pay for the cost of shut off valve replacement and all other damages suffered in order to induce Sigma to incur expense to replace the valves which Fluid Hose directed it to replace so that the owners of those projects did not advance claims against Fluid Hose (thereby eliminating the risk of greater loss to Fluid Hose);

(b) cause Fluid Hose, after making one payment, to breach its agreement and make no more payments;

(c) benefit personally from this. As common shareholders they received dividends, the ability of Fluid Hose to pay them dividends was maintained or increased and the value of their shares was maintained or increased as the value of the assets and retained earnings of Fluid Hose was maintained or increased. As employees, independent contractors and/or agents they received salary and bonus or fees and the ability of Fluid Hose to pay them salary, bonus and fees was maintained or increased;

(d) cause Fluid Hose to fail to comply with the recall notices and agreement to pay;

(e) cause Fluid Hose to fail to stand behind its products;

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> (f) cause Fluid Hose to fail to promote a reputation for compliance with its agreements and that it stood behind its products;
>
> (g) fail to promote, and damage, the reputation of Sigma as a manufacturer of quality products who also stands behind its products and replaces those of its products that are defective because Fluid Hose is paying for the cost.
>
> The Plaintiff states and the fact is that the personal Defendants caused Fluid Hose to agree to pay the Plaintiff as aforesaid, when they knew or ought to have known that or were recklessly indifferent or willfully blind to the fact that (i) the Plaintiff would not be paid, (ii) they would drain Fluid Hose of all moneys with which to pay the Plaintiff and (iii) Fluid Hose would be unable to pay the Plaintiff the money that Fluid Hose agreed to pay the Plaintiff and for which Fluid Hose is indebted to the Plaintiff.
>
> […]

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D. Discussion and Analysis

1. The Timing of a Pleadings Motion

[30] Normally, when a defendant brings a motion to challenge a plaintiff's statement of claim, the defendant should do so before delivering a statement of defence, because the delivery of the statement of defence may be taken as a further step waiving any irregularity with respect to the statement of claim,[4] and the filing of a statement of defence signifies that the claim contains recognizable causes of action to which the defendant can respond.[5]

[31] In the immediate case, Sigma submits that Fluid Hose's and the Pasternaks' motion should be dismissed because they delivered a comprehensive Statement of Defence and Counterclaim. However, the delivery of a statement of defence does not always preclude a motion to assert that the plaintiff's claim does not disclose any reasonable cause of action, as for instance where the statement of defence clearly reserves the right to dispute the existence of a cause of action.[6]

[32] In the immediate case, it is in the interests of justice to resolve the challenge to the pleadings brought by Fluid Hose and the Pasternaks. There has been no unconscionable delay in bringing the motion to challenge the Statement of Claim, and the Defendants made it clear in the pleading that they were reserving the right to challenge the legal viability of the causes of action, particularly the causes of action against the Pasternaks.

[33] I, therefore, shall not dismiss the Defendants' motion on technical grounds and shall decide it on its merits.

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[4] *Polytainers Inc. v. Armstrong*, 2011 ONSC 4807; *Tribar Industries Inc. v. KPMG LLP*, [2009] O.J. No. 959 (S.C.J.); *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 (S.C.J.).

[5] *Canadian National Railway v. Holmes*, 2014 ONSC 6390, leave refused, 2014 ONSC 6390 (Div. Ct.); *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 (S.C.J.).

[6] *TyCorra Investments Inc. (c.o.b. Wabash Canada Inc.) v. PNC Equipment Finance, a Division of PNC Bank Canada Branch*, 2022 ONSC 159; *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618; *Hanfeng Evergreen Inc. (Receiver of) v. Xinduo*, 2017 ONSC 5911; *Tancho-Defyrus (GP) Inc. v. Masotti*, 2013 ONSC 2043; *Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (S.C.J.); *Deemar v. College of Veterinarians of Ontario*, [2007] O.J. No. 3933 (S.C.J.); *Seale & Associates Inc. v. Victor Aerospace Corp.*, [2007] O.J. No. 1192 (S.C.J.); *Markeljevic v. Financial Services Commission of Ontario*, [2005] O.J. No. 2098 (S.C.J.).

2. Striking Claims for Failure to Show a Reasonable Cause of Action

[34] Fluid Hose's and the Pasternaks' motion is brought in part pursuant to rule 21.01 (1)(b) of the *Rules of Civil Procedure*, which states:

> WHERE AVAILABLE
>
> *To any Party on Question of Law*
>
> 21.01 (1) A party may move before a judge,
>
> (a) […]
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion, …
>
> (b) under clause (1)(b).

[35] Where pursuant to rule 21.01 (1)(b), a defendant submits that the plaintiff's pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim.[7] Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike a claim is exercised only in the clearest cases.[8]

[36] In *R. v. Imperial Tobacco Canada Ltd*.,[9] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[37] In *Atlantic Lottery Corp. Inc. v. Babstock*,[10] the Supreme Court of Canada stated that the

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[7] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.).
[8] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[9] 2011 SCC 42 at paras. 17-25.
[10] 2020 SCC 19 at para. 87–88.

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test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial.

[38] On a pleadings motion, the court accepts the pleaded allegations of material fact as proven, unless they are patently ridiculous or incapable of proof.[11] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a pleadings motion.[12] In making findings of fact and in applying the law to those facts the court is not obliged to accept as necessarily true allegations of fact that are rhetorical conclusions or that are inconsistent with the documents incorporated by reference.[13] Documents referred to in a pleading are incorporated by reference into the pleading, and on a motion to determine whether the plaintiff has pleaded a legally viable cause of action, the court is entitled to consider any documents specifically referred to and relied on in a pleading.[14]

[39] The failure to establish a cause of action usually arises in one of two ways: (a) the allegations in the statement of claim do not come within a recognized cause of action; or (b) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action.[15] If a material fact necessary for a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.[16]

3. The Rule in *Said v. Butt*

[40] The present motion does not concern Sigma's causes of action as against the defendant Taizhou. Rather it focuses on: (a) the oppression claim against both Fluid Hose and also the Pasternaks; and (b) the causes of actions against the Pasternaks personally. In this section of my Reasons for Decision, I shall consider the claims that are made against the Pasternaks personally, except the oppression remedy claim.

[41] The Pasternaks are sued for the torts of (a) negligence; and (b) inducing breach of contract. As noted above, the causes of action for misrepresentation and breach of contract have been

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[11] *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para 12, aff'd aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22; *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (CA); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (CA); *Canada v. Operation Dismantle Inc*., [1985] 1 S.C.R. 441; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[12] *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114 at para 51; *Das v. George Weston Ltd.*, 2017 ONSC 4129 at paras. 14–29, aff'd 2018 ONCA 1053, leave to appeal refused [2019] S.C.C.A. No. 69; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39–40 (SCJ), aff'd 2010 ONCA 613, leave to appeal refused [2010] S.C.C.A. No. 438.

[13] *Das v. George Weston Limited*, 2017 ONSC 4129 at paras. 27, 79-80, aff'd 2018 ONCA 1053.

[14] *Das v. George Weston Limited*, 2018 ONCA 1053 at paras. 31, 71, 74 and 78; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32; *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 at para. 31, aff'd 2013 ONCA 474; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at paras. 160-162, aff'd 2013 ONSC 1169 (Div. Ct.); *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (CA), leave to appeal dismissed, [1999] S.C.C.A. No. 460.

[15] *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).

[16] *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (S.C.J.); *Regional Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Gen. Div.); *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Master), appeal dismissed (1985), 52 O.R. (2d) 586n (H.C.J.).

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abandoned. I shall say no more about these two causes of action, and they must be struck from the Statement of Claim in any event.

[42] At common law, the owners, managers, and employees of a corporation are not liable for what they do within their authority and on behalf of their corporation, but subject to the rule in *Said v. Butt*,[17] they are liable if there is some conduct on their part that is either tortious in itself or is independent misconduct from that of the corporation.[18] However, a pleading against the owners, managers or employees must address specifically the cause of action asserted against the personal defendant and why he or she is being sued separately from the corporation.[19]

[43] The exceptional and narrow rule in *Said v. Butt* concerns the tort of inducing breach of contract, and the rule is that in the absence of separate conduct which is *mala fide* and against the best interests of the corporation, a corporate officer or employee may not be sued for inducing breach of contract where a claim for breach of contract is available against the corporation.[20]

[44] The policy behind the *Said v. Butt* principle was discussed by Justice Carthy in *ADGA Systems International Ltd. v. Valcom Ltd.*,[21] where he stated:

> … That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left intact the general liability of any individual for personal conduct.

[45] Applying this law about the liability of owners, managers, and employees to the circumstances of the immediate case, insofar as negligence is concerned, the Pasternaks could be liable for negligence if their conduct was tortious in itself or was independent misconduct from that of the corporation. A reading of the Statement of Claim, however, discloses that the alleged negligent misconduct of the Pasternaks is nothing more than the activities of Fluid Hose.

[46] The allegations in the Statement of Claim do not provide any particulars of tortious conduct separate from that of Fluid Hose. The allegations pleaded against the Pasternaks do not include claims of fraud, deceit, or dishonesty and the claim of misrepresentation has been withdrawn. Putting aside the tort of inducing breach of contract, there is no conduct by the Pasternaks that is independent of Fluid Hose's alleged misconduct. Sigma may be unhappy as to what the Pasternaks did, but the Pasternaks' acts and omissions were the acts and omissions of Fluid Hose and not

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[17] [1920] 3 K.B. 497.
[18] *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649; *Lobo v. Carleton University*, 2012 ONCA 498; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 40; *Schembri v. Way*, 2012 ONCA 620; *McDowell v. Fortress Real Capital Inc.*, 2017 ONSC 4792; *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.).
[19] *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649; *Immocreek Corp. v. Pretiosa Enterprises Ltd.*, [2000] O.J. No. 1405 at para. 35 (C.A.); *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 at para. 8 (C.A.).
[20] *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329 at para. 23.
[21] (1999), 43 O.R. (3d) 101 at para. 15 (C.A.).

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independent negligent acts of the owners, managers, and employees of Fluid House.[22]

[47] Turning then to the tort cause of action against the Pasternaks that they induced Fluid Hose to breach its several contracts with Sigma, the tort of inducing breach of contract by its very nature, is conduct independent of the Fluid Hose, which becomes a target of interference, but in the immediate case, this tort claim is caught by the Rule from *Said v. Butt*.

[48] To repeat the Rule is that in the absence of separate conduct which is *mala fide* and against the best interests of the corporation, a corporate officer or employee may not be sued for inducing breach of contract where a claim for breach of contract is available against the corporation. In the immediate case, there is a claim for breach of contract against Fluid House and there is no separate conduct by the Pasternaks that is *mala fide* and against the best interests of the corporation. It is not *per se* against the best interests of Fluid Hose to direct that it resist the claims being made against it.

[49] Therefore, there are no sustainable tort claims against the Pasternaks personally in the immediate case. No purpose would be served by granting leave to amend, and, therefore, I turn to the matter of keeping the Pasternaks in the action because of Sigma's pleading to pierce the corporate entity and to treat Fluid Hose as in effect their personal avatar or alter ego.

4. The Matter of Piercing the Corporate Veil.

[50] The separate legal personality of the corporation is not lightly disregarded and a shareholder can be sued for the wrongs of the corporation only in very limited circumstances.[23]

[51] In the Court of Appeal decision *Montreal Trust Co. of Canada v. ScotiaMcLeod*,[24] Justice Finlayson stated at paragraph 26:

> 26. […] A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.

[52] The corporate veil may be pierced when the corporation is incorporated for an illegal, fraudulent or improper purpose, or where respecting the separate legal personality of the corporation would be flagrantly unjust.[25] The separate existence of a corporation may be ignored

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[22] *Piedra v. Copper Mesa Mining Corp*, 2011 ONCA 191.

[23] *Yaiguaje v. Chevron Corp.*, 2018 ONCA 472; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2; *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.).

[24] (1995), 26 O.R. (3d) 481, (C.A.), leave to appeal to the S.C.C. ref'd [1996] S.C.C.A. No. 40.

[25] *Mitchell v. Lewis*, 2016 ONCA 903; *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (c.o.b. Energyshop Consulting Inc./Powerhouse Energy Management Inc.)*, 2014 ONCA 85, rev'g 2012 ONSC 5167; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 at paras. 49–54; *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance*

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when the corporation is under the complete control of the shareholder and its existence is being used as a means to insulate the shareholder from responsibility from fraudulent or illegal conduct.[26] There is, however, no stand-alone just and equitable standard for piercing the corporate veil, and it is important that courts be rigorous in enforcing the principle that, absent extraordinary circumstances, a corporation is a separate legal entity distinct from its shareholders and from its subsidiary corporations.[27]

[53] In the immediate case, there is no pleading of the material facts of a fraudulent activity. There is no pleading of material facts of extraordinary circumstances. The Statement of Claim in the immediate case focuses on the activities of the Pasternaks as the operating mind of Fluid Hose and there is an absence of extraordinary circumstances and material facts that would justify ignoring the separate legal personality of Fluid Hose.

[54] In the immediate case, the Pasternaks stand behind the corporate veil and whatever they said or did, they did on behalf of their corporation. I conclude that with the exception of the oppression remedy claim, which is discussed next, all of the claims against the Pasternaks personally should be struck from Sigma's Statement of Claim, including the allegation that the corporate veil should be ignored.

5. Oppression Remedy

[55] The Ontario *Business Corporations Act* provides a scheme for relief for "complainants" against a corporation and its directors for any act or omission that is oppressive, unfairly prejudicial, or unfairly disregards the interests of that person. In assessing a claim for oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[28]

[56] In determining whether a reasonable expectation exists, the court may consider, among other things: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. "Oppressive conduct" is that which is burdensome, harsh and wrongful and is a fact-specific inquiry. Conduct is "unfairly prejudicial" if the conduct prejudices rights or disregards interests unfairly, and it is not necessary that there be an element of *mala fides*.[29]

Co. (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2.

[26] *Mitchell v. Lewis*, 2016 ONCA 903; *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (c.o.b. Energyshop Consulting Inc./Powerhouse Energy Management Inc.)*, 2014 ONCA 85, rev'g 2012 ONSC 5167; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *Alumimun Co. of Canada v. Toronto (City)*, [1944] S.C.R. 267.

[27] *Yaiguaje v. Chevron Corp.*, 2018 ONCA 472.

[28] *1658586 Ontario Inc. v. Can-Am Lubricants Inc.*, 2014 ONSC 2673 at para. 61 (Div. Ct.); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 68.

[29] *Abbasbayli v Fiera Foods Company*, 2021 ONCA 95; *Wilson v. Alharayeri*, 2017 SCC 39; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69; *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 at para. 65 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 77; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R.

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[57] "Complainant" is defined to include shareholders, directors, officers and any other person who, in the discretion of the court, is a proper person to make an application for an oppression remedy.[30] A creditor of the corporation at the time of the oppressive conduct may have the status to bring an application as a complainant.[31] However, the creditor must show more than its interest in being paid and the oppression remedy is not to be used simply as a debt collection mechanism;[32] rather, to be a complainant, a creditor must show that it has a reasonable expectation that a company's affairs will be conducted with a view to protecting its interests.[33]

[58] To impose personal liability on a director or officer of a corporation, there must (1) be oppressive conduct that is properly attributable to the director's or officer's implication of the oppression; and, (2) the imposition of personal liability must be fit in all the circumstances.[34]

[59] When a corporate officer depletes the assets of the corporation to render it judgment-proof or diverts assets for his or her benefit that could be used to pay a judgment, the court may use the oppression remedy to make the officer personally liable for the debt owed to the creditor.[35] Paying dividends or redeeming shares when a corporation is unable to pay its liabilities may constitute unfairly prejudicial conduct and unfairly disregards a creditor's interests.[36]

[60] In the immediate case, although pleaded somewhat verbosely and ineloquently, it is certainly not plain and obvious that Sigma does not have an oppression remedy claim against Fluid Hose and the Pasternaks. The material facts as they have been pleaded take the case at bar beyond the use of the oppression remedy just as a debt collection mechanism.

E. Conclusion

[61] For the above reasons, (a) except for the oppression remedy claim, I strike all the personal claims against the Pasternaks without leave to amend; and (b) I dismiss the request to strike the oppression remedy claim against Fluid Hose and the Pasternaks.

[62] Sigma shall have thirty days to deliver a Fresh as Amended Statement of Claim in accordance with these Reasons for Decision; *i.e.*, removing the claims it is not pursuing, deleting the personal claims against the Pasternaks other than the oppression remedy claim, deleting the piercing the corporate veil allegations, and adding the oppression remedy allegations contained in

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(3d) 563 (C.A.); *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.); *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.).

[30] Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 245(c).

[31] *Churchill v. Aero Auction Sales Inc.*, 2019 ONSC 4766; *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172; *Cohen v. Cambridge Mercantile Corp*., [2007] O.J. No. 2305 (S.C.J.); *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp*. [2003] O.J. No. 2647 (S.C.J.), aff'd [2003] O.J. No. 5128 (C.A.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.).

[32] *Waiser v. Deahy Medical Assessments Inc*. [2006] O.J. No. 224 (S.C.J.); *Royal Trust v. Hordo* (1993), 10 B.L.R. (2d) 86 (S.C.J.).

[33] *Cohen v. Cambridge Mercantile Corp*., [2007] O.J. No. 2305 (S.C.J.); *Waiser v. Deahy Medical Assessments Inc*. [2006] O.J. No. 224 (S.C.J.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.).

[34] *Wilson v. Alharayeri*, 2017 SCC 39, at paras. 47-48.

[35] *Churchill v. Aero Auction Sales Inc.*, 2019 ONSC 4766; *Unique Lighting & Control Corp. v. Green Services Canada Ltd.*, 2019 ONSC 4438 (S.C.J.); *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp*. [2003] O.J. No. 2647 (S.C.J.), aff'd [2003] O.J. No. 5128 (C.A.); *Tropxe Investments Inc. v. Ursus Securities Corp*., [1993] O.J. No. 1736 (Gen. Div.).

[36] *R. v. Sands Motor Hotel Limited* (1984), 28 B.L.R. 122. (Sask. Q.B.).

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the email messages of November and December 2021.

[63] If the parties cannot agree about the matter of costs, then they may make submissions in writing beginning with Sigma's submissions within twenty days of the release of these Reasons for Decision followed by the Defendants submissions within a further twenty days. I alert the parties that given the divided success on the motion, my present inclination is to order costs in the cause.

Perell, J.

Released: July 26, 2022

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CITATION: Sigma Convector Enclosure Corp. v. Fluid Hose & Coupling Inc., 2022 ONSC 4371
COURT FILE NO.: CV-21-00665329-0000
DATE: 20220726

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SIGMA CONVECTOR ENCLOSURE CORP.
Plaintiff

- and –

FLUID HOSE & COUPLING INC., JOE PASTERNAK also known as JOSEPH PASTERNAK, BARBARA PASTERNAK AND TAIZHOU CHUANGJU VALVE CO. LTD., also known as 台州创巨阀门有限公

Defendants

REASONS FOR DECISION

PERELL, J.

Released: July 26, 2022