SUPREME COURT OF NOVA SCOTIA
Citation: *Lin v. Song,* 2024 NSSC 41

Date: 20240206
Docket: 520469
Registry: Halifax

Between:

Haiyan Lin Lin and 3340435 Nova Scotia Limited

Applicants

v.

Mingming Song and Eman Beauty Inc.

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written correspondence
Final Written Submissions:	October 16, 2023, and October 19, 2023
Written Decision:	February 6, 2024
Counsel:	Michael Blades and Grace Levy, for the Applicants Ziad R. Lawen, for the Respondents

By the Court:

[1] I do not propose to reiterate the pertinent background to this matter. It is set out in detail in *Lin v. Song*, 2023 NSSC 265 ("the decision"). Within the decision, the following directions were provided to the parties:

> [47] I have mentioned earlier that Song shall immediately pay $11,900 directly to counsel for the Applicants to be held in trust pending further order of this court. She shall also present to the court and to counsel for the Applicants, within 30 days of this decision, an accounting with respect to the balance of the outstanding funds. In the event there are other expenses that were caused to be paid on behalf of Landlord Corp, she should have the opportunity to establish same. The accounting shall be up to and including the date that it is made.
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> [48] The Respondent Song shall be required to personally repay to Landlord Corp, by way of special damages, any monies for which she cannot satisfactorily account. If the parties are unable to agree as to the sufficiency of the accounting presented, and or the amount to be paid by the female Respondent thereafter, the parties can have the matter set down before me for a further hearing, or it may be heard merely by written submissions, depending on counsel's perception of the complexity of the remaining issues. The payment shall also be made to counsel for the Applicants in trust and shall also be held pending further order of this Court.
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> …
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> [51] Landlord Corp will be wound up and dissolved by a liquidator appointed by the Court in accordance with the Act. This shall be subject to the option that will be granted to Ms. Song under Section 6 of the Act to purchase Ms. Lin's 50% shareholding in Landlord Corp for fair value to be assessed by an appraiser, in accordance with Section 6(3) thereof.
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> [52] Given that Turner Drake & Partners Limited performed a valuation approximately three years ago and returned a market value assessment of $350,000 (*Lin Affidavit, Exhibit 7*) they would appear to be the most logical and cost-effective entity to perform an updated present day market value appraisal of the condo unit.
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> [53] Upon receipt of the appraisal noted above, the parties shall retain the services of a Chartered Business Valuator ("CBV") to prepare an assessment of the fair value of Ms. Lin's 50% shareholding in Landlord Corp having regard to, among other things, the updated Turner & Drake appraisal referenced in the previous paragraph.
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> [54] Ms. Song shall have 45 days after receipt of the results of the fair value assessment noted in the previous paragraph to exercise for option and purchase Ms. Lin's shares in Landlord Corp by paying the CBV fair value assessment.
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> [55] If Ms. Song does not exercise a buyout option on the foregoing terms, the result is that the Landlord Corp shall be wound up and dissolved and all assets

> liquidated, and the net proceeds divided between Song and Lin. As the Court directed, the parties are to agree on the CBV to be utilized for the purposes of the above paragraph within 30 days, failing which the Court will receive written submissions with respect to same.
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> [56] Costs (including the allocation of costs of appraisal and valuation) will be assessed at the same time and in the same manner as punitive damages are addressed: by written correspondence after the share purchase has been agreed to, or upon the winding up of the company, as the case may be. In the meantime, the costs of the appraisal and valuation may be paid out of the funds to be held in trust by counsel for the Applicants, or otherwise as agreed to by the parties, pending the overall allocation of these expenses at the conclusion of this matter.

[2] In accordance with the above, the following actions have taken place to date:

(a) The Respondents have delivered (to counsel for the Applicants) the Louis Vuitton box, together with the $11,900 enclosed therein.

(b) An updated valuation of the condominium unit was prepared by Turner Drake and Partners Limited. It provides an assessed market value of the unit in the amount of $400,000.

(c) Turner Drake's account for its services, in the amount of $3,450, was paid out of the funds noted in (a) above; the remainder of these funds continues to be held by the Applicants' counsel in trust.

(d) The Respondents have filed, albeit tardily (on October 16, 2023), documents which purport to offer an accounting as directed in the decision (paras. 47-48).

[3] These documents are attached to an affidavit of the female Respondent. That affidavit reads, in part:

> 5. I have retrieved all the following information, banking details, receipts of payments made by myself, the Respondent, that reflect payments made towards all the shared expenses outstanding in regards to debts and expenses owed against the shared numbered company.
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> 6. I have submitted updated evidences of payments for months since March 2023 as exhibits 1a through 15a. I have included some payments that date before the dispute but are relevant to the accounting of the shared numbered company's outstanding balance. These payments have been solely accomplished by me since the dispute commenced in and around April 2022, through the hearing date in May 2023 to today's date and will be continued to be managed in the singular by myself until an order is provided by the courts.

> 7. The rent payments for September 2023 and October 2023 remain outstanding – as accounted in the submitted document. They were not paid for personal cash flows reasons in these two months.
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> 8. The mortgage payment for September 2023 has been paid but no mortgage statement is yet available.
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> 9. The mortgage payment for October 2023 will be retrieved October 20th 2023, and therefore; I have included it because it will be form part of the on-going expenses.
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> 10. On a monthly basis, I have placed a round number of and around $1,800.00 into the CUA account to account for the monthly fluctuation that may arise in the mortgage withdrawals. This amount is to be acknowledged as more then necessary but in favor of satisfying the mortgage monthly.

[4] A short brief has been provided by counsel for the Respondents, to which documents described as "net rent accounting" and "expense accounting" have also been appended. The Respondents take the position that, in addition to the $11,900, which has been provided to counsel for the Applicants already, they need only provide another $1,508.62 to square things up.

[5] The Applicants identify several concerns with respect to the documents that the Respondents have provided, beside the fact that they were filed late.

[6] These concerns include the fact that the exhibits attached to Ms. Song's affidavit are not individually identified, in contravention of CPR 39.08 (2) c, are not attested to be true and accurate copies "of whatever they might purport to be" and are incomplete. Moreover, the "net rent" and "expense accounting" tables provided with Ms. Song's affidavit do not provide any indication whatsoever as to who had authored these documents. Nor did Ms. Song swear that these documents are true and accurate to the best of her knowledge and belief. (Applicant's brief, paras. 12-13)

[7] The Applicants contend that the filings do not disclose any evidence that the respondent Eman Beauty Inc. has made any monthly rent payments to the applicant numbered company ("Landlord – Corp.") in recent months. They also point to what they have referenced as the incomplete corporate respondent bank account statements, which had historically operated at levels as high as almost $50,000, being systematically depleted to as low as $7,940.36, and the troubling fact that no explanation for this anomaly has been provided. This is despite the fact that the corporate respondent is now subject to the Court's direction to account for missing Landlord Corp. funds, along with Ms. Song.

[8] The two issues with which this Court must deal with are as follows:

A. Have the Respondents provided an adequate accounting of the missing funds?

B. If no, what is the amount of money that they must pay to the Applicants?

Discussion and Analysis

A. Have the Respondents provided an adequate accounting of the missing funds?

(i) The Louis Vuitton box and the $11,900

[9] This is a convenient place at which to begin. Those funds, along with the box, were delivered by the Respondents to counsel for the Applicants on August 28, 2023, as noted above. These funds continue to be held by counsel for the Applicants in trust, less the amount which was needed to pay Turner Drake and Partners for its services in providing an updated valuation of the condominium unit, as referenced in para. 56 of the decision. Obviously, the Applicants have reserved the right to submit that the Respondents should ultimately be required to bear all of the appraisal and valuation costs incurred to facilitate the purchase option which they requested (and received) as a result of the decision.

[10] The accounting which Ms. Song was directed to provide had critical significance. This was because, as para. 48 of the decision stipulates, Ms. Song (who removed the funds from the corporate applicant) has been required to "personally repay to Landlord-Corp, by way of special damages, any monies for which she could not satisfactorily account".

[11] The Respondents have claimed that, on the basis of the accounting provided, they only owe an additional $1,508.62. This is said to result from the "expense accounting" and "net rent" documents attached to Ms. Song's affidavit filed on October 16, 2023, the latter of which are reproduced in her counsel's brief of that date. (Parenthetically, I note that, somewhat confusingly, Ms. Song's affidavit is referred to therein as the "Lin accounting".)

[12] The Applicants have raised procedural and substantive issues (noted earlier) with respect to the information contained in Ms. Song's affidavit. They have pointed out that she does not individually identify the exhibits that she has attached, contrary

to *Civil Procedure Rule* 39.08 (2)(c), nor does she swear that they are true and accurate copies of whatever she is saying they purport to be, nor has she reproduced, in all cases, the entire document.

[13] For example, upon reviewing these documents, what she has referred to as Exhibit 1A seems to be a Bank of Montréal (BMO) statement for "business account # XXXX- XXXX-567, for the period ending March 31, 2023". It clearly has "page 1 of 3" in the bottom left-hand corner. As the page is flipped over, the reverse has "page 2 of 3" at the bottom. Nothing purporting to be page 3 of 3 can be identified.

[14] The earlier referenced portions of Ms. Song's affidavit, which purport to provide her explanation with respect to the significance of the payments noted in the BMO and CUA statements which she has attached as "exhibits" oscillate, in many instances, between various extremes of "unintelligibility". Some predate the decision, without explaining how they correspond to what Ms. Song was purporting to explain and for which she was obliged to account. For ease of reference, the shortfall was referenced in the decision as such:

> [44] There appears to be general consensus as to Landlord Corp's recurring monthly expenses. They consist of the CUA mortgage payment ($1,525.83, condo fees of $391.20, and $92.00 Eastlink charge). (*Lin Affidavit, para. 21; Song Affidavit, para. 21*). One must consider, in addition, the "catch up" payments which Ms. Song admittedly made after the directors meeting which purported to evict Eman from the premises, as well as the full ongoing monthly rental payments which the female Respondent indicates that she has caused Eman to make to Landlord Corp ever since.
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> [45] <u>As a consequence, I accept the Applicants' submission that the amount of funds that should have been contained in the latter's account (whether at BMO, or CUA) as of May 31, 2023 is the amount of $25,078.49</u>. This is simply the cumulative amount rendered carrying forward the "monthly surpluses" after payment of Landlord Corp's recurring monthly expenses, less those additional expenses paid on behalf of the Landlord Corp that have been revealed by the Respondents to the Applicants and the Court, such as property taxes (*Lin Affidavit, paras. 53 - 57*) and/or additional interest and principal payments upon the mortgage (*Lin Affidavit, Exhibit 11 and Song Affidavit, Exhibits 14 and 16*).
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> [46] After May 31, 2023, one would expect the cumulative amount contained in the corporate Applicant's account to increase by an increment of $1,904.51 by the end of each succeeding month. As has earlier been pointed out, the $11,900 brought by the female Respondent to court in the Louis Vuitton box amounts to less than half of what is owed.
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> [Emphasis added]

[15] The "expense accounting" and "net rent" documents provide virtually no indication as to who prepared them, and the affidavit is utterly bereft of anything suggesting that Ms. Song considers the information in these (annexed) documents to be true and accurate.

[16] To the extent that some explanations may be (tentatively) assigned to some of the numbers in the bank records provided by Ms. Song (and even if I were to overlook her non-compliance with the *Rules* and admit her affidavit into evidence):

i. Ms. Song appears to be attempting to raise the issue of leasehold improvements claimed to have been made in the amount of $5,175 (Affidavit, October 16, 2023). In fact, she attempted to assert the same issue in advance of the hearing of this matter (Affidavit, April 3, 2023, para. 18, Ex. 9-10). On cross-examination she admitted that these were leasehold improvements for Eman, and consequently, the proper responsibility of the corporate respondent, rather than that of Landlord-Corp.

ii. What had previously been a $92/month Eastlink charge is now asserted to be a recurring $454/month Bell Aliant charge. No explanation for this change in providers, or why this expense had to be raised to this extent, is apparent.

iii. An attempt to assert that Landlord-Corp. has Nova Scotia Power expenses, after having previously acknowledged that Landlord-Corp, in fact, has none (Song Affidavit, April 3, 2023, Ex. 31).

iv. Attempting to raise (and deduct) historical property insurance and HRM property taxes, including some made during 2020, 2021, and 2022. It is very unclear how this can affect the Court's earlier finding as to the total which should have been in the Landlord's account after May 31, 2023.

[17] The amount missing as of May 31, 2023 was determined in the decision to be $25,078.49. This is the amount for which the Respondents must account. The Applicants appear to have accepted that condominium fees have remained constant at $391.20/month after May 31, 2023, and that monthly mortgages payments had actually fluctuated upward in March 2023 by an extra $98.71 over the figure that had been provided to the Court for the purpose of calculating the missing monies. In April, May, June, July and August the upward fluctuation was $162.71, $34.71, $98.71, $98.71 and $98.71, respectively. If the latter figure was to have remained constant for September and October 2023, this would account for $789.68 as of October 31, 2023.

[18] Ms. Song's affidavit does appear to show an HRM property tax payment made on June 19, 2023, for $5,874.50 (Song Affidavit, October 16, 2023, Ex. 15A). Notwithstanding the irregularities in her affidavit, I am prepared to accept that this payment was, in fact, made. The Applicant does not contest this (Applicant's brief, paras. 23-24).

[19] Therefore, I give effect to the income and expense figures referenced in the earlier decision. I adjust them to account for the mortgage payment variations noted above, the tax payment of June 19, 2023, and the $11,900 "Louis Vuitton" money.

[20] As near as may be determined based upon the information that has been provided, I agree with the Applicant that the figure of $16,036.86 appears to be the net amount (over and above the "Louis Vuitton" money) that ought to have been in the Landlord-Corp.'s bank account as of October 31, 2023.

[21] Next, at para. 46 of the decision, I noted that:

> After May 31, 2023, one would expect the cumulative amount contained in the corporate Applicant's account to increase by an increment of $1,904.51 by the end of each succeeding month. As has earlier been pointed out, the $11,900 brought by the female Respondent to court in the Louis Vuitton box amounts to less than half of what is owed.

This figure must be modified to account for the increased mortgage figure, $98.71/month, discussed above. The monthly increase is therefore set at $1,805.80.

[22] The figure owed by the Respondents, as of January 31, 2024, is set out below:

$16,036.86 (as of October 31, 2023)

\+ $5,417.40 ($1,805.80 x 3)

$21, 454.26

This is based upon the expectation that all of Landlord Corp's other monthly recurring expenses (mortgage payments, condo fees, etc.) have been paid post October 2023. If this expectation is incorrect, those expenses which were not paid shall be added to the above figure.

[23] Assuming no additional unpaid expenses need to be added, the sum of $21,454.20 shall be immediately paid by the Respondents to counsel for the Applicants in trust to be held pending the final outcome of this matter.

[24] Alternatively, if there are any recurring monthly expenses, due and owing by the Landlord-Corp., which were due and not paid by the Respondents after October 31, 2023, the amount of such unpaid recurring charges, plus accrued interest and any other penalties, shall be added to the $21,454.20 noted above and also paid to the counsel for the Applicants in trust. In such event, Applicant's counsel shall pay these expenses on behalf of Landlord-Corp., the balance shall remain held in trust.

[25] Costs shall be assessed as previously noted in para. 56 of the decision.

Gabriel, J.