



January, 2015 which began negotiations that concluded with the signing of the Franchise Agreement effective June 1, 2015.

[5] In addition, the plaintiff, with input from the defendant, retained an accounting firm, Ledgers Canada which compiled a comprehensive three year financial plan including balance sheet, statement of earnings and retained earnings. The projections were positive and the plaintiff admits he would not have bought the franchise had the contrary occurred.

[6] The plaintiff also retained, at his bank's request, a boutique financial and legal firm, TVH Group. On or about April 30, 2015 the plaintiff borrowed approximately \$250,000 to finance the purchase and operation of the franchise.

[7] During negotiations and principally between March – May, 2015, the plaintiff admits receiving the following material:

- a) a Dealer Application form by email March 16, 2015;
- b) an overview brochure sent by email in March, 2015;
- c) a disclosure statement given to Mendoza personally at a meeting with Deslisle March 17, 2015 and signed by (only) at page 15 Rita Chiodo-Diamantakos, the Franchisee Development Manager with the other officers and directors identified on pages 8 and 9.;
- d) an estimate of investment and costs given to Mendoza at the March 17, 2015 meeting;
- e) a Confidentiality Agreement given to Mendoza at the March 17, 2015 meeting;
- f) Tire, Labour and Parts Expenses Report on a monthly basis for the years 2009 to 2014 given to Mendoza at a meeting on April 1, 2015;
- g) an Application for Dealer Agreement setting out the key payment franchise obligations given to Mendoza at the meeting on April 1, 2015;
- h) a letter with respect to signing an HST Joint Election Form from Active Tire's Marketing Manager, Andrew Chiodo;
- i) a letter from Active Tire's, Mary Vespa enclosing franchise related agreements that Active Tire would require Mendoza to execute at a meeting on May 7, 2015;
- j) a letter from Ms. Vespa with respect to the rent and equipment-lease monthly payments required for the closing of the purchase transaction given to Mendoza at the meeting on May 7, 2015;
- k) a schedule of payments that Active Tire required to complete the purchase of the franchise totaling \$99,841.69, in addition to a \$50,000 letter of credit, given to Mr. Mendoza at the meeting on May 7, 2015;

- l) Tire Inventory Assistance Program documents given to Mendoza at a meeting on May 14, 2015;
- m) Pre-Authorized Debit Agreement given to Mendoza at the meeting on May 14, 2015;
- n) Consent for Release for Information from Third Parties given to Mendoza at the meeting on May 14, 2015;
- o) Business Consent for the Release of Information to Canada Revenue Agency given to Mendoza at the meeting May 14, 2015;
- p) an HST Joint Election Form given to Mendoza at a meeting on May 28, 2015;
- q) a draft Dealer Agreement and Addendum to Dealer Agreement given to Mendoza at the meeting on May 28, 2015 (and signed by Mendoza);
- r) an Automobile Repair Equipment Lease and Personal Guarantee given to Mendoza at the meeting on May 28, 2015 (and signed by Mendoza);
- s) a Guarantee given to Mendoza at the meeting on May 28, 2015 (and signed by Mendoza);
- t) a Security Agreement given to Mendoza at the meeting on May 28, 2015 (which Mendoza signed);
- u) a Sign Lease given to Mendoza at the meeting on May 28, 2015 (which Mendoza signed);
- v) a Sublease attached to the head lease dated April 2, 2014 given to Mendoza at the meeting on May 28, 2015 (which Mendoza signed).

[8] As part of the negotiation, Mendoza provided Active Tire with a cheque for \$25,000 as security on or about May 15, 2015. Mendoza also provided Active Tire with an irrevocable line of credit in the amount of \$50,000 on or about May 21, 2015. Mendoza provided Active Tire with a cheque in the amount of \$99,841.69 on or about May 28, 2015 as part of completing the Franchise Agreement.

[9] During the negotiation process, Mr. Deslisle suggested to Mr. Mendoza that he go to other Active Tire locations as a mystery shopper to familiarize himself with the franchise and see if he could envision himself operating one. On March 24, 2015 Mendoza met with Active Tire's Operations Manager, Greg Lawrence and Senior Director of Franchise Development, Rita Chiodo-Diamantakos as well as the Chief Executive Officer (CEO) and Director, Ralph Chiodo.

[10] Mendoza began operating the franchise June 1, 2015. He was unsuccessful and advised Active Tire by August 24 he did not want to continue and was experiencing physical and mental health problems. On August 31, 2015 Active Tire received Mendoza's Notice of Rescission.

[11] On September 9, 2015 Active Tire took over operation of the 73 Bridgeland Avenue location. On September 30, 2015 a Statement of Claim was issued and on November 6, 2015 the Statement of Defence and Counterclaim was served. The parties have agreed that the quantum of damages have been determined and need not be addressed by me.

### Analysis

[12] The plaintiff seeks rescission on the basis of the defendant's failure to strictly comply with the statutory requirements set out in the *Wishart Act*. In various decisions, reference had been made to the summary of Justice Mesbur in 1159607 *Ontario Inc. v. Country Style Food Services Inc.*, 2012 ONSC 881 at paragraph 71 where she states:

“The *Arthur Wishart Act* came into force in 2000. It is a franchisee-friendly piece of legislation designed specifically to protect the interests of franchisees, particularly when it comes to the issue of disclosure. The Court of Appeal described the purpose of the Act in this way in *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)*:

It is clear, therefore, that the focus of the *Act* is on protecting the interests of franchisees. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance.”

[13] The argument before me was that Section 6(2) of the *Wishart Act* provides for rescission “without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.” Section 5(4) of the *Wishart Act* regulation describes the contents of the disclosure document which includes “all material facts” which is defined as any information about the business, operations, capital or control of the franchisor that could reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise.

[14] Similarly, reference is made to the reasons of Justice MacFarland in 1490664 *Ontario Ltd. v. Dig This Garden Realtor's Ltd.* [2015] O.J. No. 3040 (C.A.) where she states, (at paragraph 15):

“It is perfectly clear from the language used in s.5 of the Act that disclosure is to be made in one “disclosure document.” All the required and prescribed information is to be included in that one document and it is to be accurate, clear, and concise – and all delivered at one time.”

[15] The plaintiff focused on five aspects of how the defendant's disclosure document was deficient.

[16] The first deficiency was the failure by the franchisor to have the disclosure certificate signed by the requisite two officers and directors. In this regard, the disclosure statement given to Mendoza personally at the meeting with Delisle on March 17, 2015 was signed by only (at page 19), Rita Chiodo Diamantakos. It should be noted the disclosure document provided

contains an index identifying six different parts including various Appendices "A" through "J" and is 175 pages in length. The defendant's response is that Part II provides the background of the company and the business background of the officers and directors with all six identified, including Ms. Chiodo Diamantakos. Further, as noted above, Mr. Mendoza met with most if not all of these individuals. In addition, in cross-examination, Mr. Mendoza acknowledged not reading all of the disclosure document provided to him and refused to answer (on the grounds of relevance) whether this was important. Similarly, ancillary questions about showing the document to others or specific portions of the document not being read were also refused on the same basis.

[17] The second disclosure failure is with regard to the financial statements of Active Tire prepared on an "audited" or "review engagement" basis contrary to Section 3(1) of the *Wishart Act* regulation. As known to those with some accounting experience, this is the second and third highest level of scrutiny of the financial records of a business and thus believed to be more thorough and reliable. The material provided in the disclosure document (at Appendix "A" of Part III describes them as "Audited Financial Statement of Active Tire & Auto Centre Inc. for most recent year" and are on two pages under the headings Asset, Liabilities and Shareholders' Equity along with the Revenue and (not detailed) Expenses with the resulting income before amortization and income taxes, Income Taxes, Net Income and Retained Earnings for 2013 (beside the figure for 2012). The figures provided are identical to those contained in the actual 19 page financial statement which includes the cover letter of the accounting firm attesting to the auditing of the statement. The defendant responds by noting Appendix "A" of the March 17, 2015 franchise disclosure document contains the audited financial statement of Active Tire for the year end August 31, 2013.

[18] The third deficiency is that the defendant failed to deliver all of the requisite documents at one time (in accordance with the specific requirement of Section 5(3) and as repeated by Justice MacFarland). To the contrary, and as submitted by the defended, the plaintiff acknowledges each document required was provided but that same was done separately and at different times (as noted above where the material received is detailed).

[19] The fourth deficiency described by the plaintiff was with regard to the irrevocable letter of credit described in paragraph 5 of the Application for Dealership which states it would be "in the minimum amount of Fifty Thousand (\$50,000.00) Dollars (subject to increase if required) to secure payment of inventory purchases from time to time." The plaintiff submitted this varied significantly from that actually signed effective May 20, 2015 which appears to be in the form provided by and under the letterhead of TD Bank Group without any specific limitations as to its use. It was the defendant's position that this was either adequately referenced in the Letter of Credit (and I note it does state "obligations in connection with an agreement between the Customer and Active Tire & Auto Centre Inc.) or was not required to be part of the disclosure document.

[20] The fifth deficiency put forward by the plaintiff was the failure to disclose the required assumptions and information as part of the financial projections. The defendant disputed that position referencing disclosure document and Appendix "B" of Part III which contained in it Section III three revenue scenarios between \$750,000.00 to \$1,500,000.00 noting the financial

information was “for illustrative purposes only, actual results will vary significantly by franchisee and location.” Specific sales results for the 73 Bridgeland Avenue location were provided to Mendoza for January, 2009 – December, 2014 at the April 1, 2015 meeting and the disclosure document contains sales results of other franchisees.

#### **Issue – Nature and Consequences of Deficiencies**

[21] I conclude that there are deficiencies in the disclosure document provided by Active Tire to Mendoza, principally the absence of the second signature of an officer or director and the abbreviated, most recent financial statements. However, the extensive nature of the material provided by Active Tire to Mendoza which led Mendoza to executing the dealer (or franchise) agreement May 28, 2015 and the refusal to answer questions about any misleading or deficient portion of the 175 page disclosure document provided, also makes it clear and I conclude Mendoza made an informed decision to enter into the franchise (or here dealer) agreement. It does not appear that the previous decisions of this court or the Court of Appeal, have dealt with this situation.

[22] In *6792341 Canada Inc. v. Dollar It Limited*, 2009 ONCA 385, Justice MacFarland sets aside the Judgment at trial dismissing the franchisee’s request for rescission under Section 6(2) noting disclosure under the *Act* “is not optional” (at paragraph 16). Justice MacFarland states that “calling something a disclosure document doesn’t make it one” (at paragraph 74) but also conducts an analysis of what documents were provided (and what was not provided) to conclude (at paragraph 74) “the stark and material deficiencies in the disclosure document in this case do not meet the requirements of the *Act*”). The deficiencies led to an uninformed decision (at paragraph 20) to enter into the franchisee agreement and thus the conclusion was no disclosure document had been provided. As a result, Section 6(2) of the *Act* applied and rescission was available.

[23] In *2337310 Ontario Inc. v. 2264145 Ontario Inc.*, 2014 ONSC 4370, Justice Stinson summarizes the state of the law and identifies the issue to be whether the disclosure provided was “so deficient as to trigger the two year right of rescission under S. 6(2) of the *Wishart Act*” (at paragraph 22), Justice Stinson then proceeds to evaluate the key deficiencies in what was (or not) provided to conclude the disclosure did not qualify as a “disclosure document” for the purposes of the *Wishart Act*” (at paragraph 50) and the franchisee was entitled to rescission. For me, an analysis of the nature and extent of the deficiencies is required as part of reaching a conclusion as to whether the “disclosure document” exists. As stated, I have concluded the defendant franchisor provided the Mendoza franchisee with sufficient documentation to permit it to make an informed decision about whether or not to enter into the franchise/dealer agreement.

[24] The disclosure document provided was not in full compliance with the *Wishart Act* but the deficiencies were not significant or misleading. As a result, my conclusion is rescission is not available to Mendoza under Section 6(2).

[25] I am reinforced in this conclusion by the decision in *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236 where Justice Epstein, on behalf of the Court, reviewed the Section 5 disclosure document obligations including the broad definition of “material facts”.

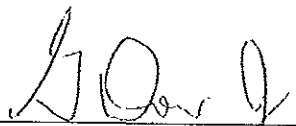
Two of the three deficiencies accepted by the motion judge involve the absence of confirmed audited or review engagement financial statements of the franchisor and a second officer/director's signature on the disclosure document. At paragraph 48, Justice Epstein states:

"The motion judge had to be satisfied that the Disclosure Document was so defective that it effectively amounted to no disclosure. If, on the other hand, the disclosure deficiencies merely amounted to imperfect disclosure, it was too late for the respondents to rescind the franchise agreement".

#### Costs

[26] Counsel for Mendoza submitted the Bill of Costs in the amount of \$17,132.50 for fees at a partial indemnity rate. Disbursements, principally photocopying were claimed in the amount of \$1,553.75. This is not actually compliant with Rule 57.01(6) and Form 57B but better than the position of counsel for Active Tire who did not have either available. Counsel for Active Tire acknowledged the amounts being sought by Mendoza were reasonable which implied his claim for costs in the event his client was successful were similar, if not greater.

[27] Given Active Tire was successful, it should be awarded costs. However, the failure to comply with the Rules should not be encouraged and merits sanction. As a result, in accordance with the discretion permitted under rule 57.01 and section 131 of the *Courts of Justice Act* R.S.O. 1990 c. C.43, I award costs payable by Mendoza to Active Tire in the (reduced) amount of \$17,000.00 inclusive of fees, HST and disbursements.

  
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Mr. Justice G. Dow

Released: September 29, 2016

**CITATION:** Mendoza v. Active Tire & Auto Centre Inc., 2016 ONSC 3009  
**COURT FILE NO.:** CV-15-537540  
**DATE:** 20160929

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

FRANCISCO YAO MENDOZA and FRANCIS  
MENDOZA INC.

Plaintiffs/Defendants by Counterclaim

-and-

ACTIVE TIRE & AUTO CENTRE INC.

Defendant/Plaintiff by Counterclaim

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**REASONS FOR JUDGMENT**

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Mr. Justice G. Dow

Released: September 29, 2016