ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: BK-24-00208707-OT31 **DATE: October 17, 2024**

NO. ON LIST: 2

TITLE OF PROCEEDING: In the matter of the Bankruptcy of Attesta International Safety Certification Inc. Of the City of Mississauga, In the Province of Ontario

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Joël Turgeon	Counsel for ZCS Akia Engineers Inc.	jturgeon@perlaw.ca

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Rajesh Nayyar	Self-Represented Respondent on behalf of Attesta International Safety Certification Inc	rnayyar6@gmail.com

ENDORSEMENT OF JUSTICE PENNY (Released November 12, 2024):

[1] ZCS Akia Engineers Inc. (Applicant) applies to the court for a bankruptcy order against Attesta International Safety Certification Inc. (Debtor). The Applicant is a 50% shareholder of the Debtor. The Applicant is also a creditor of the Debtor, having made nine unsecured loan advances totaling the principal amount of $148,885.

[2] The other 50% shareholder of the debtor is Rajesh Nayyar. Mr. Nayyar, on behalf of the Debtor, seeks to oppose the bankruptcy order.

[3] There are two basic questions for determination before the court:

1) does Mr Nayyar have standing to represent the Debtor? and

2) should the bankruptcy order be made?

Background

[4] The Debtor was in the business of performing electrical safety certifications. It was founded by Messrs. Kumar, Kerstens and Nayyar in 2022. The founders all have an engineering background. Mr. Kerstens eventually left the business and his shares were divided equally between Mr. Nayyar and Mr. Kumar, via their respective holding companies – Zonar Technologies for Mr. Nayyar and the Applicant, ZCS, for Mr. Kumar.

[5] Mr. Kumar and Mr. Nayyar were both directors and officers of the Debtor but Mr. Nayyar resigned as both an officer and a director in July 2024. Accordingly, Mr. Kumar is the only remaining officer and director of the Debtor.

[6] The Debtor's business required accreditation from the Standards Council of Canada. In 2023, the Council began an investigation into the Debtor. In January 2024, the Council withdrew the Debtor's accreditation. The Council determined "that there is sufficient evidence of fraudulent activity" to warrant withdrawal of the Debtor's accreditation. The Debtor has had virtually no business activities or revenues since then.

[7] The Debtor, Mr. Kumar and Mr. Nayyar jointly retained counsel to pursue an appeal of the Council's decision. Both an appeal and a complaint were filed with the Council. The affidavit filed in support of the appeal/complaint, prepared in consultation with Mr. Nayyar and filed by appeal counsel in accordance with joint instructions, states: "the vast majority if not all of the concerns identified in Attesta's quality systems throughout the period from September 2023 until the decision to withdraw Attesta's accreditations stem from Raj Nayyar's work while he acted as technical manager."

[8] The Council dismissed the Debtor's complaint on June 20, 2024. The Council found that the actions it had taken "were reasonable for addressing fraudulent behaviour by an SCC accredited client." Although the appeal remains outstanding, it is common ground that the Debtor does not have the financial means to continue the appeal. Mr. Nayyar has confirmed that he has no intention of funding the appeal. Neither does the Applicant or Mr. Kumar.

[9] The Attesta shareholders are parties to a unanimous shareholders' agreement as well as other relevant agreements. The unanimous shareholders' agreement provides that "any action of

the Corporation" taken on the matter of "the winding-up, dissolution or termination of the existence of the Corporation" requires 100% shareholder approval". Mr, Nayyar refused his consent to Attesta making a voluntary assignment into bankruptcy. As a result, the shareholders are deadlocked. This is why the applicant, *qua* creditor, brought this application for a bankruptcy order.

Analysis

Standing

[10] As noted earlier, Mr. Kumar, who supports the bankruptcy order, is the only officer and director of the Debtor. Mr. Nayyar, who opposes the bankruptcy order, resigned as both officer and director in July 2024.

[11] Individuals, including shareholders and other corporate insiders who are not lawyers, must obtain leave of the Court to represent a corporation in a legal proceeding: Rule 15.01(2). Any action taken by an individual on behalf of a corporation without leave having been granted is liable to be set aside. The decision to permit a non-lawyer to represent a corporation is a discretionary decision that must be made having regard to all of the circumstances in a particular case.

[12] Although no formal motion has been brought, Mr. Nayyar seeks leave of this court to represent the Debtor.

[13] In *GlycoBioSciences Inc. v Industria Farmaceutica Andromaco, S.A., de C.V.*, 2024 ONCA 481, the Court of Appeal held that "a corporation's authorization of an individual to represent it is a necessary condition for an order under r. 15.01(2)". Although Mr. Nayyar seeks leave of this court to represent the Debtor, he has not been, nor can he be, authorized by the Debtor itself to do so. I say this because Mr Nayyar is neither the directing mind of the Debtor not its sole officer and director. The only officer and director of the Debtor, Mr. Kumar, opposes Mr. Nayyar's purported representation of the Debtor and the Debtor's purported opposition to a bankruptcy order being made.

[14] On this ground alone, I would have been inclined to deny leave, set aside the notice of objection and grant the bankruptcy application.

[15] The real issue underpinning this dispute and Mr. Nayyar's purported opposition to the bankruptcy order is Mr Nayyar's allegation that he has been oppressed in various ways by the conduct of Mr. Kumar and the Applicant, ZCS. Part of the problem with this argument is that there is no extant proceeding under the "oppression remedy" is being sought. An application for a bankruptcy order is not the forum in which to seek findings of oppression.

[16] However, in the event that I am wrong in these conclusions, and because Mr. Nayyar has made submissions on the merits of the bankruptcy application, I will proceed to consider the second issue.

Bankruptcy Order

[17] This application for a bankruptcy order is made under s. 43 of the BIA. There are two basic considerations when determining whether a bankruptcy order should be made:

(1) the "technical" requirements under s 43(1) to (6); and

(2) whether, under s. 43(7), there is "other sufficient cause" that no order should be made.

The Technical Requirements

[18] The two primary requirements for an order under s. 43(1) are proof that: (a) a debt of at least $1,000 is owing; and (b) the debtor has committed an act of bankruptcy within the previous six months.

[19] The Applicant has established through sufficient evidence that it is owed $148,885.

[20] In addition, the evidence establishes the following facts.

[21] In September, 2023, a Certified Business Valuator issued a report stating that (i) the value of the Debtor's equity was equal to or less than the value of its net tangible assets, meaning that the Debtor had no going-concern value or goodwill beyond the value of its assets; and (ii) the value of the Debtor's equity was nil given that its debt to the Applicant was higher than the value of its assets.

[22] The situation worsened after the Council's decision, despite operational costs being reduced by 58% between 2023 and 2024. The Debtor has not carried on business and has had virtually no revenues since the Council withdrew its accreditations over 10 months ago.

[23] The Debtor's employees have all left except one who has limited tasks and is seeking alternative employment.

[24] The Debtor's net income for the period between January 1, 2024 and September 1, 2024 was negative $374,580.49.51.

[25] The Debtor defaulted on payments totaling $63,624.48 since June 2024, including source deductions ($10,205.10), Canada Pension Plan remittances ($3,652.60), salaries and vacation pay to ex-employees ($26,940.41), and professional fees ($4,500.48).

[26] The Debtor further failed to make rent payments totaling $6,473.26 to its landlord. The Debtor also failed to pay an additional $11,852.63 for third party administration services.

[27] As of September 17, 2024, the Debtor's liabilities total $248,063.09 and its assets have a total book value of $59,209.31. The Debtor's liabilities thus exceed the value of its assets by $188,853.78.

[28] All of the above facts have been verified by the affidavit of Mr. Kumar. There is no contrary evidence.

[29] I am satisfied on the basis on this evidence that the Debtor has: debts of over $1,000; and committed an act of bankruptcy within the last six months. The "technical" requirements for an order under s. 43 have been met.

Other Sufficient Cause

[30] The real issue in this case is the question of whether "other sufficient cause" has been shown as to why no bankruptcy order should be made.

[31] Mr. Nayyar advances essentially five arguments:

(1) Mr. Kumar is circumventing internal corporate governance because the shareholders' agreement requires unanimous consent to wind up or terminate the Debtor's operations

(2) Mr. Kumar and the Applicant have engaged in oppression and breaches of fiduciary duty

(3) Mr. Kumar has conflicts of interest by virtue of his dual role as a director and officer of the Debtor, and a director and officer of creditors

(4) Mr. Kumar has misused the Debtors funds

(5) There are alternatives to a bankruptcy, i.e., resolve the shareholder dispute and proceed with the appeal of the Council's revocation of the Debtor's certifications.

[32] I do not find any of these arguments persuasive.

[33] During the course of Mr. Nayyar's submissions, he asked to submit addition material, which I understood he received by way of freedom of information application from the Council. I declined to receive that material. I did so on two grounds. First, in my scheduling endorsement, I made it clear that the timetable must be adhered to. There was no supporting

affidavit explaining why the material should be admitted into evidence in contravention of that order. Second, based on Mr. Nayyar's description of the material, I concluded it was not relevant to the core issue of "sufficient cause". While potentially relevant to allegations of oppression, there is no oppression proceeding and, as I discuss in more detail below, allegations of shareholder oppression involve the relations of shareholders *inter se*. In a bankruptcy application, the focus is necessarily on the creditors because among other things, if the company is insolvent, shareholders no longer have an economic interest.

[34] To place the s. 43(7) "sufficient cause" proviso in its legal context, it should be noted that, as the Court of Appeal for Ontario held in *Medcap Real Estate Holdings Inc. (Re)*, 2022 ONCA 318, para. 23:

> In my view, a debtor who has (a) committed an act of bankruptcy consisting of not paying debts as they generally come due, and (b) failed to lead evidence to satisfy the court that it has the ability to pay its creditors, *bears a very heavy onus* to show that a bankruptcy would nonetheless serve no purpose. [emphasis added]

[35] In this case, Mr. Nayyar's alternative to a bankruptcy is for Attesta to prosecute the appeal of the Council's decision, restore Attesta's accreditations and carry on with Attesta's electrical safety certification business.

[36] This is not a viable plan. Mr. Nayyar's plan will take both time and money. Attesta has neither. There is no source of funding to carry Attesta's debts, maintain its capacity to carry on business and pay the significant costs of retaining counsel and prosecuting its appeal. There is no evidence that the appeal is even *prima facie* meritorious. Indeed, the basis upon which the Council seems to have terminated Attesta's accreditations is the very conduct to which Mr. Nayyar admitted when he approved the affidavit in support of the appeal. In any event, Mr. Nayyar has made it clear he is either unwilling, or unable, to fund the appeal or any of Attesta's other ongoing costs and obligations pending the outcome of the appeal. He has no plan or explanation for how these expenses will be funded.

[37] Mr. Nayyar is nevertheless asking that matters be left in Attesta's hands and that Attesta be left to sort out its problems on its own. There is simply no basis for this request.

[38] While it is true that the shareholders' agreement requires unanimity for an act like a voluntary assignment in bankruptcy, that is not the end of the matter. There are creditors. Creditors rank in priority to shareholders. In a bankruptcy application, the key consideration is the creditors. As is often said, shareholders have no economic interest in an insolvent enterprise. In an insolvency situation, there is nothing unfair or unreasonable about the court ordering fundamental changes to the debtor without the consent or agreement of the shareholders.

[39] The shareholders are in deadlock. Mr. Nayyar has resigned as a director and officer. Attesta has no revenues, no operations, no accreditation and no going-concern value. Mr.

Nayyar himself argues in favour of an “orderly” liquidation. That is exactly what a bankruptcy trustee will ensure. There is no “circumvention” of the shareholders’ agreement.

[40] The allegations of oppression against the Applicant and Mr. Kumar are nothing more than untested allegations at this point, unsupported by any reliable evidence. In any event, those questions are among the shareholders *inter se*. The prosecution of a shareholder oppression application will also take time and money. The creditors will not, and cannot be made to, wait until all of Attesta’s internal problems can be worked out.

[41] There is no conflict of interest arising from being both a shareholder and a creditor. This happens all the time. As noted above, the debt owed to the Applicant has been proven. The Applicant, not Mr. Nayyar, advanced funds to set up and support Attesta’s operations. Creditor claims have priority over shareholder claims. Likewise, the other conflicts alleged by Mr. Nayyar (that the landlord is another company in which Mr. Kumar has an interest, and that another company in which he has an interest provides back office support on a fee for service basis) are the subject of bona fide commercial contracts which Mr. Nayyar approved at the time.

[42] The alleged misuse of funds has not been established on any proper evidence. In any event, if funds were improperly taken out of Attesta, the Trustee will be in a position to investigate and to take action if warranted. In addition, if Mr. Nayyar is not satisfied with the Trustee’s assessment of any potential claim, he has the ability to seek an assignment of that claim under s. 38 of the BIA.

[43] Finally, as noted above, Mr. Nayyar has not put forward a remotely viable alternative to a bankruptcy.

Conclusion

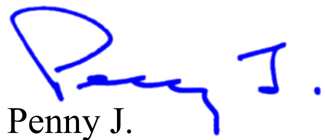
[44] For all these reasons, the bankruptcy order is granted.

Costs

[45] The Applicant seeks costs against Mr. Nayyar personally.

[46] Mr. Nayyar is not represented by counsel. Nevertheless, he prepared material in accordance with earlier orders of the court. His submissions were rational, respectful and heartfelt. Attesta was his livelihood. The fact that he was unsuccessful is not an indication that there was anything irrational or vexatious about his opposition to the bankruptcy order being sought.

[47] In all of the circumstances, I make no order as to costs.



Penny J.