

## Ontario Court Dismisses a Claim of Vicarious Liability Against a Franchisor

*Eric Mayzel*

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In *Jogia v. RE/MAX Ontario*<sup>1</sup>, the Ontario Superior Court of Justice granted partial summary judgment in favour of a franchisor and its officers and directors, dismissing allegations that they were vicariously liable for the alleged misconduct of a franchisee.

### Facts

In *RE/Max*, the plaintiff homeowner alleged that the franchisor, RE/MAX Ontario-Atlantic Inc., and two of its officers and directors, were vicariously liable for the alleged misconduct of its franchisee, a real estate brokerage. The claims against the franchisee included allegations of breach of contract, breach of fiduciary duty and negligence relating to services provided by the franchisee in connection with the purchase and sale of properties for the plaintiff.

The plaintiff claimed that the franchisor was vicariously liable for the franchisee's conduct based on the theory that it exercised substantial control over the franchisee and that the franchisor had knowledge of the plaintiff's complaints but failed to intervene. The plaintiff further argued that the franchisee was a "mere alter ego" of the franchisor.

### Decision

The Court noted that vicarious liability most often arises in an employer-employee or principal-agent context, where one party exercises significant control over the activities of another.<sup>2</sup> By contrast, a franchisor/franchisee relationship "is more akin to an owner/independent contractor relationship, such that the franchisor is not typically exposed to vicarious liability for alleged wrongs committed by the franchisee."<sup>3</sup>

The Court readily concluded that the franchisor and franchisee's contractual relationship is "clearly not an employer/employee relationship."<sup>4</sup> The Court also held that there was no evidence of an agency relationship based on the following considerations:

- The franchise agreement identified the franchisee as an independent contractor and provided that the franchisee may not act as the franchisor's agent. Although the language of an agreement is not

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determinative, it is a relevant factor.<sup>5</sup>

- The franchisee was not authorized to bind the franchisor to agreements with third parties, and there was no evidence that the franchisee held itself out as an agent of the franchisor.<sup>6</sup>
- The franchisee ran an independent business, for its own profit, and maintained substantial control over its day-to-day operations. The franchisor's involvement was limited to the right to intervene in matters relating to the protection of the brand of the franchise system.<sup>7</sup> There was no evidence that the franchisor directed or supervised the activities of the franchisee, notwithstanding that some supervision was contemplated by the franchise agreement.<sup>8</sup>

However, the Court cautioned that the classes of relationship that give rise to vicarious liability are not closed, and there may be exceptional circumstances in which a franchisor should be held vicariously liable for the acts or omissions of its franchisee based on policy considerations. Such circumstances could arise "where the franchisor exercises a significant degree of control over the franchisee's day-to-day operations and stands to profit from those operations."<sup>9</sup>

The Court also dismissed the allegations against the individual officers and directors of the franchisor, confirming that corporate officers will typically not be found civilly liable for the actions of a company except in special circumstances.

Based on the above, the Court granted partial summary judgment dismissing the claims against the franchisor and its representatives. In granting partial summary judgment, the Court noted that those claims could be readily bifurcated and dismissed without making any findings on the merits of the claims against the franchisee, such that there was no material risk of duplicative proceedings or inconsistent findings at trial.

## Key Takeaways

The decision is an important confirmation of the principle that, absent exceptional circumstances, a franchisor will typically not be found to be liable for the conduct of its franchisees. Franchisors may wish to consult with counsel to ensure that the relationship they have with franchisees does not give rise to any such exceptional circumstances, if there is any uncertainty in that regard.

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1 *Jogia v. RE/MAX Ontario et al*, 2020 ONSC 733.

2 *Ibid*, para. 36.

3 *Ibid*, para. 44.

4 *Ibid*, para. 38.

5 *Ibid*, para. 41

6 *Ibid*, paras. 42-43.

7 *Ibid*

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8 *Ibid*, para. 48.

9 *Ibid*, para. 45.

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