

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sanghera v. Danger Figure Centre (Burnaby) Ltd.*,
2007 BCSC 1308

Date: 20070830
Docket: S056466
Registry: Vancouver

Between:

Harvinder Sanghera and Natural Touch Beauty Spa Ltd.

Plaintiffs

And

**Danger Figure Centre (Burnaby) Ltd. d.b.a. Orient Retreat
and Annie Lin**

Defendants

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for Plaintiffs

G.E. Sourisseau
S.K. Sheena

Counsel for Defendants

M. Frost

Date and Place of Trial/Hearing:

June 11-15, 18-21 & 27, 2007
Vancouver, B.C.

1. INTRODUCTION

[1] The plaintiffs paid approximately \$490,000 to purchase from the defendants, as a going concern, the assets of the corporate defendant's beauty spa. The plaintiffs allege in this action that the defendants made a number of fraudulent representations about key components of the beauty spa business and that those representations were calculated to, and did, induce them to purchase the business. The plaintiffs say those representations were false and the defendants knew them to be false. The business failed and was closed by the plaintiffs within six months of the purchase. The plaintiffs recovered only a small fraction of the purchase price by selling the business's assets. The total loss claimed in this action is \$563,001.17 plus court order interest and costs.

[2] The defendants deny misleading the plaintiffs. The defendants say that the written agreement for purchase embodies the entire agreement between the parties and that any alleged false representations were not intended by the defendants to be relied on by the plaintiffs, but rather were the result of negotiations as to certain aspects of the transaction.

2. THE LAW

[3] In their closing submissions, the defendants state the following:

While the plaintiffs claim fraud, it is submitted that it is impossible for them to point to any evidence of intent. Perhaps (and only perhaps) there was inaccuracy in the numbers of pre-pays. But [the defendant Ms. Lin] was not basing her price on those numbers ... And perhaps the plaintiffs will say that the loss of some staff or some undisclosed "illnesses" was fraudulent or reckless. But it has never been suggested that [the defendant, Ms. Lin] prevented the plaintiffs from seeing the records. Had the plaintiffs shown sufficient diligence (examining files or talking to the staff) they could not complain of misrepresentations. But they chose not to do so.

[4] I will set out the legal principles that I consider to be applicable to this case of fraudulent misrepresentation. These authorities explain that it is no defence to a claim of fraudulent misrepresentation to say (as the defendants do here) that the plaintiffs failed to make sufficient enquires. That defence has no merit. It may be a defence to say that it was not the intention of the defendants that the plaintiffs rely on statements made by them and which are now alleged to have been made fraudulently. Below, I will examine the evidence on the question of intent.

[5] The plaintiffs sue also for rescission even though they are not now in a position to return the assets to the vendors. The defendants counterclaim for the cost of servicing the plaintiffs' clients at its continuing business in Richmond after the closure of the Burnaby location.

The law of fraudulent misrepresentation

[6] In *United Shoe Machinery Co. v. Brunet*, [1909] A.C. 330 (PC) Lord Atkinson held that to establish a case of false or fraudulent misrepresentation the following had to be established: (1) that the representations complained of were made by the wrongdoer to the victim; (2) that these representations were false in fact; (3) that the wrongdoer, when he made them, either knew that they were false or made them recklessly without knowing whether they were false or true; (4) that the victim was thereby induced to enter into the contract in question.

[7] Following the leading English decision *Redgrave v. Hurd* (1882), 20 Ch. D. 1 (CA), the Supreme Court of Canada held in *Sager v. Manitoba Windmill and Pump Co.* (1914), 23 D.L.R. 556 that the plaintiff's own negligence will not be a defence to an allegation that the defendant was fraudulent. As well, neither an exemption or exclusion clause, nor a disclaimer, can preclude an action for fraudulent misrepresentation: *1018429 Ontario Inc. v Fea Investments Ltd.* (1999), 179 D.L.R. (4th) 268 (Ont. C.A.). Even a term in the contract that each party will rely on his own judgment will not excuse a fraudulent party: *Campbell v. Hamill*, [1925] 4 D.L.R. 958 (Sask. C.A.). Furthermore, a clause which purports to exclude liability for fraud is not operative; fraudulent statements vitiate the whole contract, including the exclusion clause: *Ballard v. Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.). Thus where fraud is established, the fault lies squarely on the guilty party.

[8] Where there is a written agreement, no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing. However, where fraud is established, there is sometimes a need to qualify this approach as noted in Fridman, *The Law of Contract in Canada* (Toronto: Thomson Carswell, 2006), 5th ed. at page 445, where the author states:

One obvious situation arises where a party alleges that the written contract was obtained by fraud, misrepresentation, mistake, or other vitiating conduct on the part of the other party; he may adduce

evidence to establish his allegation, so as to have the written contract nullified at common law, or perhaps, if this would aid him, to have it rectified in accordance with equitable principles evidence admitted: rectification)]. In such circumstances the party in question is not so much seeking interpretation of the written contract by extrinsic evidence as proving its invalidity, or at least its incorrectness as an expression in writing of the intentions of the parties as manifested in their oral negotiations of which the written contract purports to be the result. The admission of parol evidence in cases in which fraud, misrepresentation, and other reasons for upsetting a transaction may be alleged is not a true exception to the parol evidence rule. [internal citations omitted]

[9] (See also *Bank of Montreal v. Wilder* (1983), 149 D.L.R. (3d) 193 at 214 (B.C.C.A.), aff'd (1986) 32 D.L.R. (4th) 9 (S.C.C.)).

[10] A fraudulent misrepresentation of fact "can occur by words, or be written, or by conduct intended to induce the representee to believe the existence of a non-existent fact" (*Amertek Inc. et al. v. Canadian Commercial Corporation et al.* (2003), 229 D.L.R. (4th) 419 at para. 375 (Ont. Sup. Ct. J.), rev'd on factual grounds (205), 256 D.L.R. (4th) 287 (Ont. C.A.)).

[11] A statement of future intention, if false, can be treated as a fraudulent misrepresentation. Waddams in *The Law of Contract*, 5th ed. (Toronto: Canada Law Book, 2005) says at para. 418 (footnotes omitted):

[A]lthough a promise as to the future conduct of the promisor or a third party is not a misrepresentation, it has been held that such a promise implies a statement that the present intention of the promisor is to carry out the promise, or that the promisor's belief is that the third party will act as stated, and this statement of fact, if false, can be treated as a misrepresentation.

[12] For example, in *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167 (S.C.C.), the plaintiff contracted to buy shares in an insurance company on condition that within a fixed time the company would be in business in Vancouver and the plaintiff would be made the medical examiner of the company for that city. When this did not happen, it was held that the contract could be rescinded for fraudulent misrepresentation. Fitzpatrick C.J. said at p. 171:

The existence or non-existence of that intention is a fact, and, if [the plaintiff] signed the application and parted with his cheques and notes on the faith of the statements made with respect to it, his position is the same as if he acted on a representation of the existence of any other fact.

[13] Bowen L. J. puts it most vividly in *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459 at 483 (C.A.):

... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

[14] See also *Prather v. King Resources Co.* (1972), 33 D.L.R. (3d) 112 (Alta. C.A.); and *Free Ukranian Society (Toronto) Credit Union Ltd. v. Hnatkiw et al.* (1964), 44 D.L.R. (2d) 633 (Ont. C.A.).

[15] In summary, the applicable legal principles provide that an oral fraudulent misrepresentation can be used to nullify a written contract even if the written contract contains a clause stipulating that no terms other than those in the written contract are to be considered. When a fraudulent representation is made to induce the other party to enter the contract, the contract cannot then be used as protection for the fraudulent party. Moreover, although parol evidence is generally not admissible to contradict the terms of a written contract, in the case of fraudulent misrepresentations parol evidence is not used to determine the terms of the contract, rather, it is used to determine the intentions of the parties and why they entered into the contract. This deals with the validity of the contract as a whole. An oral statement as to future intentions may also be found to be a fraudulent misrepresentation if the defendant is proven to have falsely stated his future intention.

3. BACKGROUND FACTS

[16] The following narrative of facts is largely undisputed.

[17] Ms. Annie Lin is a qualified esthetician. She became so qualified at a school operated in Taiwan by Meina Wang. In 1993, Ms. Lin immigrated to Canada and eventually obtained her British Columbia qualifications to work as an esthetician.

[18] Meina Wang owned and operated a chain of spas known as Orient Retreats. The Orient Retreat spas were owned by related companies using variations of the name Danger Figure Centre. Ms. Wang offered Ms. Lin an Orient Retreat franchise in Richmond. In 1995, Ms. Lin purchased an Orient Retreat franchise that had been operating in Richmond since May 1994. The business was successful. She then opened another spa in Burnaby operated by the defendant Danger Figure Centre (Burnaby) Ltd., Ms. Lin was the manager and major shareholder of the corporate defendant.

[19] In 1998, Ms. Lin's sister Amy became the manager of the Burnaby Orient Retreat. Her other sister Anna also became involved in running the Burnaby spa.

[20] Ms. Lin and Amy Lin testified that in January 2005, Amy advised Ms. Lin she intended to return to Taiwan to look after her ailing father-in-law and that she would do so by the end of 2005. The plaintiffs take issue with the truth of this fact.

[21] The manager of the Richmond spa was about to go on maternity leave and Ms. Lin testified that she decided she would have to sell the Burnaby spa because she could not manage both spas herself.

[22] Both spas catered to an almost exclusively Chinese clientele. Ms. Lin was referred to an agent, Mr. Stellakis, and she listed the business for sale with his company. He introduced her to the individual plaintiffs as interested purchasers in May 2005. A series of meetings took place between the parties and Mr. Stellakis. On June 24, 2005, the parties signed an Agreement to Purchase the assets of the corporate defendant.

[23] The purchasers, Tarlochin and Harvinder Sanghera, known as Harvey and Tara Sanghera were recent immigrants from England at the time of the purchase. They had successfully operated a number of businesses in England although they had no experience with beauty spas.

[24] Harvey Sanghera incorporated Natural Touch Beauty Spa Ltd. to operate the Burnaby spa. He negotiated with Ms. Lin a sub franchise of her Orient Retreat Franchise agreement because he wanted to continue to operate the spa as an Orient Retreat spa.

[25] The transaction closed and possession transferred on August 9, 2005.

[26] The "Contract of Purchase and Sale for Business Assets" was dated June 24, 2005, and included the following provisions that are relevant to the defendants' assertion that the plaintiff had opportunity to discover the true state of affairs of the business:

3. Purchaser's Conditions:

The Purchaser's offer set forth above is subject to the satisfaction or waiver in writing by the Purchaser not later than July 15, 2005 with respect to conditions (a), (b), (c) (d), (e) and (f), and July 29, 2005 with respect to conditions (g), (h), (i) and (j) (the "Due Diligence Period") of the condition that the Purchaser, acting reasonably, is satisfied that the Business and the Business Assets being purchased and assumed pursuant to this Contract conform in all material respects to the Business and the Business Assets represented to the Purchaser prior to the date hereof, including, without Limitation, the Purchaser being satisfied with the following (whether or not previously provided to the Purchaser):

(a) the financial statements for and financial condition of the Business;

...

(e) enter into a management contract with the current store manager, satisfactory to both parties;

(f) satisfactory review by the Purchaser of the amount of Pre-Sold packages;

...

- (h) the ability of the Purchaser to obtain an assignment of the franchise agreement of Orient Retreat;
- (i) all employees, including the school instructor, intent to continue their employment with the Purchaser.

This Contract embodies the entire agreement and understanding between the parties and supersedes all prior agreements, representations, warranties and understandings, whether oral or written, relative to the subject matter of this Contract.

Ms. Lin was a party to the Agreement.

[27] Mr. Sanghera closed the business at the end of December 2005, because it was losing money. The plaintiffs say the business was doomed to fail because the defendants fraudulently misrepresented their intentions, including among other things, the promise to train and assist the plaintiffs in the operation of the business, in the amount of pre-paid treatments they would have to honour, in transferring the computer records, and in overcharging them for supplies.

Analysis

[28] I find it convenient to consider the alleged fraudulent misrepresentations in the following categories:

1. Misrepresentations about the number and value of pre-paid treatments sold by the defendant, which became a liability of the plaintiff.
2. The ability of the staff to run the business, and the agreement of the defendants to provide training both to the plaintiffs and to staff on an ongoing basis.
3. The agreement of the defendants to provide supplies to the plaintiff at their cost.
4. The failure of the defendants to provide access to the plaintiffs' computerized client records.

Pre-paid Treatments

[29] During the negotiations between the parties, Ms. Lin disclosed to the plaintiffs that some customers pre-paid for their treatments. This liability was not disclosed on the financial statements of the corporate defendant. The plaintiffs knew it was not disclosed on the financial statements. During the negotiations between the parties Ms. Lin made the following notation on the Contract for Purchase and Sale:

Pre-sold treatment

about 2883 V treatments x 6.5 (Average [one time] treats Fee) = 18739.5

[30] Clause 20 of the Terms and Conditions of the Agreement of Purchase and Sale provides as follows:

The Purchaser acknowledges that the Vendor has pre-sold beauty and treatment packages to customers. The Purchaser shall honor all packages that have not expired as of completion, subject to Purchaser's condition 3(f). For purpose of clarity, pre-sold packages do not include tuition fees received in advance for students at Protégé School. Those fees should be prorated and adjusted accordingly on completion date.

[31] There is no dispute on the evidence that Ms. Lin intended the notation to mean that she had sold about 2,883 pre-paid treatments and that the average cost per treatment to the spa (that is, not the retail cost) was \$6.50 per treatment for a total liability of \$18,739.50. After some negotiation the parties agreed to

adjust the purchase price by \$50,000. The negotiation concerned the cost to the spa to honour the pre-paid treatments. They agreed to an average cost to the spa of \$20.00 per treatment.

[32] Ms. Lin said that this calculation could not be obtained from her computerized records but only from the paper files kept on the approximately 900 clients of the business. Ms. Lin told the plaintiffs that each client had, on average, pre-paid for three treatments.

[33] After the plaintiffs took possession of the spa they learned that most clients bought pre-paid packages of treatments, many for several thousand dollars, and in addition some clients bought coupons which could then be redeemed for various treatments. After the plaintiffs closed the business they carefully reviewed every client paper file and determined that the value of pre-paid treatments and coupons, at the date of the purchase, was far in excess of the \$50,000 adjustment. Mr. Sanghera calculated that the number of pre-paid treatments and the number of treatments represented by the pre-paid coupons was 8,613. This calculation is considerably higher than the 2,883 disclosed by Ms. Lin during the negotiations to purchase the spa. At an assumed average cost of \$75.00 per treatment this represented a retail value of \$645,975. Assuming an average cost to the spa of \$20 per treatment it would have cost the plaintiffs \$172,260 to honour the pre-paid treatments and coupons.

[34] After the plaintiffs closed the spa, Ms. Lin honoured some of the pre-paid treatments and coupons at her Richmond Orient Retreat spa. The defendants counter-claim for the cost of these treatments, even though the treatments were actually honoured by the Richmond spa. In her testimony on the counter-claim Ms. Lin estimated the average retail cost per treatment at \$137.43, and the cost to carry out the treatments at \$402,508.85 or \$45.00 per treatment.

[35] The actual liability carried by the defendant at the date of the sale to the plaintiffs is difficult to calculate exactly. Some customers pre-paid but did not use their treatments. Many pre-paid treatments and coupons expire after one year and the spa would routinely roll the unused portion into a new package or coupon sale. The spa offered numerous different types of treatments, so the cost per treatment is necessarily an average cost. Notwithstanding these inherent uncertainties, there is no doubt that the statement that Ms. Lin made during negotiations that there was an average of 2,883 pre-paid treatments was a gross misrepresentation. In her testimony she admitted that the total liability could be close to \$1,000,000. She therefore must be taken to have admitted the misrepresentation. She testified that she told Mr. Sanghera during their negotiations that the liability may be around \$1,000,000.

[36] Mr. Sanghera testified that he relied on the representation made by Ms. Lin and would not have purchased the spa if he had known the true calculation of the pre-paid treatments because the volume was too great to sustain the business.

[37] I believe that Ms. Lin's defence to this allegation is that the adjustment was a negotiation and she did not intend the plaintiffs to rely on her advice about the number of treatments or the cost of treatments. Her counsel also made the point that this liability was a rolling liability insofar as the business would expect to continue selling treatments on a pre-paid or coupon basis. The plaintiffs testified that they sold 657 pre-paid treatments and \$40,410 worth of coupons during their operation of the business. In his written submissions, counsel for the plaintiffs says:

"[I]t is fantasy to suggest that Harvey and Tara [Sanghera] would have agreed to an adjustment of \$50,000 if Annie had told him the pre-paid treatments exceeded \$1,000,000.00. That proposition was not put to them in cross-examination. That is a fundamental point and the only explanation is that Annie had never told her counsel that."

[38] I agree with this submission. The amount is too large for Mr. Sanghera to have agreed that it could be easily absorbed by the company, whose annual net profit according to the defendant, Ms. Lin, was \$200,000. I conclude that the pre-paid treatments and coupons did amount to something in the range of \$650,000 to \$1 million dollars in retail value. I do not believe Ms. Lin's testimony that she disclosed this to Mr. or Mrs. Sanghera. She disclosed 2,883 treatments and she intended the plaintiffs to rely on this number. That evidence is completely inconsistent with her written notation on the purchase agreement. I accept Mr. Sanghera's evidence that he would not have agreed to purchase the spa on the terms he did had

he known the extent of the pre-paid liability. Below I will comment on Ms. Lin's credibility and give further reasons why I prefer the testimony of Harvey and Tara Sanghera where it conflicts with that of Ms. Lin.

[39] I therefore find that the defendant Ms. Lin fraudulently misrepresented the number and value of pre-paid treatments sold by the corporate defendant before August 9, 2005, both on her own behalf and on behalf of the corporate defendant. This finding alone is sufficient to dispose of this case but I shall consider the other principal allegations of fraud, because doing so further supports my adverse credibility finding against Ms. Lin.

Staff and Training

[40] It is common ground that the plaintiffs, although experienced business people, had no experience in the spa business. The plaintiffs allege Ms. Lin agreed both orally and in writing to assist the plaintiffs to learn what was necessary to operate the spa. Part of that assurance to them was that they could rely on the existing staff. One further point needs to be made and that is that Orient Retreat provides specialized treatments; it has its own equipment and products; it is unique to the market and requires its staff to be knowledgeable about the Orient Retreat methods and treatments. One of the ways in which Ms. Lin had assured herself of a supply of adequately trained staff was to operate at both the Richmond and Burnaby locations, an esthetician school staffed by an Orient Retreat trainer.

[41] The plaintiffs allege that they were told by Ms. Lin that the Burnaby spa was staffed by experienced, loyal employees, knowledgeable about Orient Retreat methods, and who could be relied upon to continue operating the business seamlessly when the plaintiffs took over. Ms. Lin does not deny this allegation.

[42] The plaintiffs say they were told that Ms. Lin's sister Amy managed the Burnaby spa and that she "knew everything" and they could rely on her. They were told that Amy planned to move to Taiwan in about six months but that in the interim Amy and Ms. Lin would train them in the operation of the spa. Ms. Lin does not deny this allegation.

[43] The plaintiffs discovered that the staff they expected to be present on closing the transaction were not adequate to the task and that Ms. Lin did not assist them as promised.

[44] Amy Lin is the defendant, Annie Lin's sister. Her job was to manage the spa's sales and to ensure that the clients were well looked after. She was not a trained esthetician and she was not able to supervise or train staff in the Orient Retreat methods of treatment. As already noted, the plaintiffs say that Annie Lin told them Amy knew everything and that was the reason they could rely on her until they had learned enough to operate the spa themselves. Ms. Lin testified that she told the plaintiffs they did not have to worry about staff because the school was a source of trained employees.

[45] Within a few days of taking over the spa the plaintiffs found out that two staff members, Sandi and Tina, worked up to the day they took over and then left. Sandi had sprained her wrist. Ms. Lin justified Tina's departure by telling the plaintiffs that Tina was a "trouble maker".

[46] Another employee, Lisa, was away for the first month, returned for two or three weeks, and then left. Annie said that Lisa was lazy and was not a satisfactory employee.

[47] Bonnie and Winnie, the two remaining estheticians, had only two months of experience, and did not know how to do all the specialized Orient Retreat treatments.

[48] Susan, the receptionist, also had a medical problem that was known to Ms. Lin before the sale, requiring her to take several months off work.

[49] June, the massage therapist, had a repetitive strain injury and had told Ms. Lin before the transaction closed that she could not continue to work. She left her employment after the plaintiffs took over. Ms. Lin says she explained to the plaintiffs that June could work only part-time.

[50] Ms. Lin says that she explained to Mr. Sanghera that an employee, Michelle, was a trainer and that she was on leave until September.

[51] The plaintiffs were told that there were eleven employees but in fact there were only eight or nine and as already noted several of them were about to leave. The plaintiffs found themselves short of qualified

estheticians. Because the plaintiffs could not train new staff, and because Ms. Lin would not assist them to train new staff, they found themselves understaffed.

[52] I accept the plaintiffs' evidence that they were assured that sufficient staff were in place at the date the plaintiffs took over the operation of the spa to operate it in the way it had been operated by Ms. Lin. The plaintiffs could not expect any guarantees (other than with respect to Amy, which I will discuss below) that staff would remain, but this representation combined with the defendants' promise to assist with training was relied upon by the plaintiffs to induce them to purchase a business about which they knew nothing at all.

[53] I now turn to the evidence concerning Amy and Anna Lin. Amy and Anna Lin are the defendant Annie Lin's sisters. As already mentioned, Amy was the manager of the Burnaby spa. Anna was responsible for purchasing supplies. She was not knowledgeable about the spa treatments.

[54] The plaintiffs said they had no problem communicating in English to Amy and Anna.

[55] The plaintiffs testified that they were told Amy could operate the business. However when they took over on August 9th, they discovered the true situation was totally opposite to what they had been told. Amy advised them that she was just a salesperson, she did not know how to do any treatments and could not train Tara Sanghera or potential new employees.

[56] On November 30, 2005, Mr. Sanghera faxed a letter to Ms. Lin. This letter described the numerous ways in which he considered Ms. Lin had misrepresented the status of the employees and had breached her contractual commitments to train the plaintiffs and assist them in the operation of the spa. I set out this letter in its entirety because it illustrates Mr. Sanghera's frustration, and it fully describes the difficulty he experienced in staffing and training:

30 November 2005

URGENT VIA FAX FOR ATTENTION OF ANNIE LIN

Dear Annie,

It has been a few months since we purchased the business from you. As you agreed that you shall give us all the information and help we need we are writing this letter so that you can tell us what we need to know and give us the training we need to operate the Burnaby branch independently.

1, Please could you provide us with a full list of suppliers including addresses and phone numbers for all the equipment in the spa (to include all service and parts department contact details). This is to include the recent machines that you have delivered, the Infa Red Sauna and all the other equipment. Also we need the same for all the small items for example Golden Spoons, Water kettles, oil burners/lamps etc.

2, We need a full list of suppliers including names and addresses for all supplies for the spa. This is to include small items such as face masks, disposable panties, slippers, gowns etc.

2a, Also full list as above required for all the product suppliers to include all products sold at the spa, products used for treatments, oils, all products for the putting together of the school kit to include the bags, wax warmers, hair brush, towels etc and any other products used at the spa.

2b, The list as requested in 2 and 2a, should be the direct suppliers and if for products that you have supplied to us previously through your own company Lin Enterprises Ltd we require the copies of invoices to ensure we are paying the same as you are.

When we bought the business from you we were not made aware that you are going to be the exclusive supplier for all spa products. There has been overcharges from day one which we told you about and you said it was a mistake and adjusted the prices.

We are not happy with this and we need to make sure that we are paying the same as you are or we can buy our own products directly.

When we bought the business from you (one week before completion) we asked for your previous accounts and invoices which at first you said you would give.

One night before completion your daughter phoned and said you changed your mind and it was your property and you do not need to give us the information. I said it was around 11pm and we shall discuss this tomorrow at the spa. On arrival I told you that I wanted the suppliers details and I had no other interest in the accounts. I said if you do not trust us then give us the information we require. You said no problem just take your time and learn a little more about the spa and you will give us everything we need. A lot of time has passed and you have not given us any information. So please forward the above requested information straight away.

3, Everytime we ask Amy Lin to give us some information she tells us to ring you and nine times out of ten you are busy or not at the office. Within the first month of taking over the business we called you many times and you did not respond as you were taking some people from Toronto head office on trips. This caused us many problems as we were not trained in any aspects of the spa and you were not there to train or help us. When anything breaks down at the spa or runs out Amy tells us to phone you and you take a long time to respond or you say you will find out and nothing happens.

Therefore as agreed please could you train Tara and myself in all aspects of running the spa as agreed to include all procedures for the school. To include the forms that need to be filled and sent to you and all other aspects of taking in and graduating students. Please train us in all the treatments that are carried out so we are in a position to train any new staff we recruit. Please train us in all aspects of using the equipment for treatments.

3a, There has been many incidents where you or your head office has a new promotion of which you phone your sister Amy or Anna and you tell them about it and discuss it with them. You are supposed to discuss any changes, promotions etc with Tara which has not been happening so how can she learn?

4, We were not made aware that there is a web site email facility where customers can ask us to call them to make an appointment. The first we heard was last week you phoned Amy that we need to phone this person. You should have told us about this facility and trained us so we can check any response from customers. The customer had sent the email about 1 or 2 weeks before. We need training on this aspect as well.

5, There has been many staff members leaving within the first month and up to now. I informed you of this and you sent me a email explaining how we need to be nice to our staff and keep them. You also said it was easy for you to get and train staff. How do you expect us to train and hire staff when you did not tell us which is the best place to advertise and you have not trained us so we can train our own staff?

Furthermore you have now informed us that if we hire new staff we have to send them to Richmond for training for which you will charge \$600 per person. Also you have informed us that your teacher is away for a month until end of December 05 so no new staff can be trained in any event. If we incur any costs to train new staff by any means necessary then we shall bill you accordingly until you do not train us.

The staff members that are leaving or have left have told us they already told you that they would leave after they complete 1 year and the other have some have physical problems such as broken or sprained wrists, these staff members have also informed us that you knew they would leave soon. So how can it be our fault.

You should have told us about these problems in the first place so we could make alternative arrangements. If we hire staff and you cannot train us to train them or train them yourself then what do you suggest we do?

6, You also in a recent conversation with Tara said we have lost many customers because they knew that you and Amy were no longer the owners in Burnaby. How can this be as we have kept the same staff since takeover unless you or Amy told the customers. Also before taking over the business you said that us buying the business will not affect the customers so why the change of thought?

What could have affected the customers was that when we met you on Saturday 6th August at Burnaby you informed us that you had cancelled appointments for the last few days including Saturday and Monday the 8th August 2005 which was the day we were taking over the business.

Your daughter also informed us in your presence that you would sometimes charge invoices from suppliers and services i.e. advertising from Burnaby to Richmond as the profit was greater in Richmond and it balanced the books. Is this why the costs seem to be higher in certain areas than at first?

You present us with various bills for promotions and advertising that we have neither been consulted with or agreed to. We should be working together to promote the business in the best way possible. When you met with Tara at the beginning of November she told you the sales are in rapid decline over the last few months and asked you for your advice to which you said you told her that we should do our own advertising in English and Indian newspapers so we can get more clients. You originally told us we were obliged to advertise through you. So we kept paying bills and we did not know what they were for. We have now realised they were for advertising in newspapers not directories. What contracts are current and which have you renewed without notice to us?

There were many other items that you did not tell us about before we took over the business. You actually informed us on the day we took over or after that point. This includes \$100/month staff allowance, parking for 3 staff members, medical/life insurance for your two sisters and one other staff, you did not explain all the commission structures apart from we pay on sales. It was only when the first salaries were due you told us about all the additional bonuses you were paying. We have no way of knowing if this is right or wrong as you have never given us any employee agreements or applications which set out the commission and pay structure. You did not tell us about how the posters and other small items have to be paid for, this amongst many other items. Why did you not tell us about all the above beforehand so that we knew of all expenditures?

Please remedy the above by the date listed below and start our training immediately

Please give us your urgent reply by 7th December 2005 by post to the above address or fax to 604 599-5809.

Regards

H Sanghera
Natural Touch Beauty Spa Ltd

[57] On December 1, 2005, Ms. Lin sent a letter to the plaintiffs in which she said that she would reply to the November 30, 2005, letter, but first she wanted to deal with a number of invoices that were outstanding. On December 2, 2005, Mr. Sanghera responded concerning the accounts.

[58] On December 3, 2005, Ms. Lin responded to Mr. Sanghera's letter concerning the training and staff. Those parts of her letter that dealt with staff and training are set out below:

In order to be a trainer, one must be approved and certified by the Head Office. You cannot choose just anyone to train new staff. I have never said that I will not help you train new staff, but you are responsible

for finding your own estheticians that are willing to work for you and each of them would have to pay a \$600.00 training fee. You asked me to train Tara, but she is not a qualified esthetician, so you need to understand that I cannot give her any training. It is key that she must become a good model first to assert quality control during training sessions.

Aromatherapy requires a lot of product knowledge. There are lots of benefits for the user but if used incorrectly, it can have harmful effects as well. I have taken courses for aromatherapy before, so I am able to blend the oils, but I am not certified to teach this technique. Therefore, I cannot teach Tara but there is a one-year course at Douglas College if she is interested.

[59] On December 1, 2005, both Amy and Anna left their employment with the plaintiffs. The plaintiffs say that they quit and ask this court to infer that they quit on instructions from Ms. Lin as a consequence of Mr. Sanghera's letter of November 30, 2005. Ms. Lin, Amy and Anna say that the plaintiffs fired them.

[60] Mr. Sanghera testified about the events of that day. At about 9:30 a.m. on December 1, he sent the November 30 letter by fax to Ms. Lin. About one hour later Amy and Anna quit. When he arrived at the spa, they both had their coats on and said, "We are quitting." He said he called them into the office. They then asked him to write a letter saying he had fired them. They said that they had not quit but rather they had had to go to the doctor. Mr. Sanghera testified that he had not fired them and he refused to give them a letter saying he had done so.

[61] Mrs. Sanghera testified that when she arrived at work at 10 a.m. on December 1, both Amy and Anna had their coats on. They threw her their keys saying they were leaving and not working for her. She testified that they returned to the spa at about 11:30, they were talking to clients, she asked them to come into the office and they said they wanted a letter saying the plaintiffs had fired them. They told her they had been to the doctor which I understood her to mean as an explanation for their absence at the spa.

[62] Amy testified about the events of December 1. She said that she had arrived at the spa at about 9:20 a.m. She felt a pain in her left chest so she took a painkiller but the pain became worse. She told Susan, the receptionist, that she needed the day off to go to the doctor. She went to the doctor without first booking an appointment. While she was waiting to see the doctor she began to feel better so she left the doctor's office and returned to the spa. Upon returning to the spa she met Mr. Sanghera who was very angry with her and wanted her to leave. She said "you are firing me". He said "no you are quitting". She did not testify that Anna accompanied her to the doctor.

[63] Anna did not testify.

[64] Both Anna and Amy filed complaints at the British Columbia Ministry of Labour in which they claimed wages owing to them. Both complaints are almost identical, and both were dismissed by the Ministry.

[65] Anna says in her complaint:

On Dec 1, 2005 I arrived work [sic] before 9:20 am. I felt sick and left work with the permission of Tara (Harvinder's wife) around 11:00 am. After an hour and half, I felt better and returned to work. Around 1:00 pm, Harvinder came to the office and with a very bad attitude he told me to leave my job permanently. They also wrongly accused me of quitting my own job and they refused to give me any notice of termination or compensation salary.

[66] Amy says in her complaint:

On Dec 1, 2005 I arrived work [sic] at 9:10 am. I felt sick (stomach) and left work with the permission of Tara (Harvinder's wife) around 11:30 am. After half an hour, I felt better and returned to work. Around 1:00 pm Harvinder came to the office and with a very bad attitude he told me to leave my job permanently. They wrongly Accused me of quitting [sic] my own job, and they refused to give me any notice of termination or compensation salary.

[67] The written complaints are inconsistent with Amy's evidence. Anna did not testify but quite apart from the improbability of them both falling ill at exactly the same moment, Amy did not testify that Anna also became ill and had to go to the doctor. Without hesitation, I accept the evidence of Tara and Harvey Sanghera on this point.

[68] Ms. Lin was asked about a letter she wrote to Mr. Sanghera on December 6, regarding Amy and Anna. Ms. Lin denied that she told them to quit. She said the only knowledge she had about their leaving their employment was what she was told after the events, which was that Amy "went to emergency for an illness."

[69] As I have said, I prefer the evidence of the plaintiffs to that of Amy on this point because of the inconsistencies in her testimony compared to the version given in her complaint to the Ministry. I do not believe Amy that she was ill. There is no evidence of any other event that could have triggered Amy and Anna's decision to quit aside from Mr. Sanghera's letter. I have no difficulty in inferring that Amy and Anna quit on the instructions of Ms. Lin in response to Mr. Sanghera's letter of November 30.

[70] Under cross-examination, Ms. Lin said that she trained the plaintiffs as was required by the contract. I do not accept her evidence on this point. Other than a few isolated training sessions Ms. Lin did not provide the training and support she agreed to provide. She knew that there would not be any staff member present at the Burnaby spa capable of training Tara Sanghera and new employees. She did not put in place any procedure to assist with training and then demanded \$600 to train employees, a task she had already agreed to do without additional compensation.

[71] In summary, I conclude that Ms. Lin agreed orally that she would provide sufficient training either herself or by making trainers available to enable the plaintiffs to operate the spa. The plaintiffs relied on her assurances in this regard, otherwise, I find, they would not have purchased the spa. They were completely reliant on Ms. Lin to assist them because, as I have already said, they knew nothing about the business. I prefer the evidence of the plaintiffs to that of Ms. Lin. Ms. Lin was not a forthright or truthful witness. She was evasive when giving her testimony. Amy's evidence about the circumstances of her departure from the plaintiffs' employment cannot be believed. I do infer that Ms. Lin was involved in Amy and Anna's decision to quit. The plaintiffs both gave their evidence in a logical and consistent manner. Neither of them was successfully challenged on cross-examination, whereas Ms. Lin was shown to have given numerous inconsistent, untruthful, or evasive answers. I conclude that Ms. Lin promised to train the plaintiffs. She breached that promise by her failure to adequately train the plaintiffs so that they could run the spa, and by failing to provide them with access to a trainer to train new employees when the existing employees had left. The few occasions on which Ms. Lin did train the plaintiffs on specific equipment does not amount to a performance of her contractual obligations.

[72] I conclude that the defendants breached the terms of the written agreement of purchase and sale by failing to provide training and familiarization so as to enable the plaintiffs to operate the business. I conclude that the defendants were reckless in agreeing to do so when it was obvious by their conduct following the completion of the sale that Ms. Lin had no intention of providing training. I find that she intentionally misled the plaintiffs about the capabilities of Amy and the availability of a trainer to familiarize Tara Sanghera or new employees with the treatments offered by the spa. She also intentionally misled the plaintiffs about the adequacy of the staff. These statements about Amy's abilities, and the number and competence of the staff constitute fraudulent misrepresentations. The commitments by the defendants to provide adequate training to the plaintiffs were statements of intention of the vendors of this business. I conclude that Ms. Lin never had any intention to honour this commitment. From the date the plaintiffs took over the operation of the Burnaby spa, she failed to assist them. She was unavailable, failed to return their calls, refused to assist, and demanded extra fees. This evidence leads me to conclude that at the date the agreement was made, Ms. Lin had no intention of assisting the plaintiffs and that her promises to do so were false and fraudulently made.

[73] In addition to the oral representations I have mentioned, the Agreement of Purchase and Sale, Terms and Conditions provided as follows with respect to Ms. Lin's obligation to assist in the training and familiarization. At clause 13:

The Purchaser, as indicated in his subject condition 3(e), intends to enter into a management contract with the current store manager, which, amongst other conditions, will include training and familiarization to the day-to-day operation of the business. Furthermore, Annie Lin, as principal of the Vendor shall remain available for consultations, either by phone or in person, without compensation for a period of six (6) months after completion, as may be reasonable required by the Purchaser from time to time. It is further agreed that, if the Purchaser fails to enter into a management contract with the current store manager, then the Vendor and the Principal, without compensation, shall familiarize and acquaint the Purchaser with all material aspects of the Business for a period of four (4) weeks (at 36 hours per week during normal business hours) commencing upon the Completion Date.

[74] The defendants breached clause 13.

[75] I also conclude that Ms. Lin knew that there were problems with the staff and she intentionally failed to disclose those known staff shortages to the plaintiffs. She also misled the plaintiffs about Amy's ability to train the staff.

Supplies

[76] There is no dispute that to operate the spa under the Orient Retreat brand, the plaintiffs were required to use mostly Orient Retreat branded products and equipment. There is also no dispute on the evidence that Orient Retreat sold supplies and equipment through Everal Inc., a company operated out of Ontario. Steve Wang, who worked for Everal, is the son of Meina Wang. Meina Wang is the founder and owner of the Orient Retreat franchise. There is no dispute that Everal would not sell supplies directly to the plaintiffs. The plaintiffs were required to order supplies through the Richmond Orient Retreat. Anna Lin, Ms. Annie Lin's sister, was responsible for ordering the supplies for the Burnaby Orient Retreat. The plaintiffs were aware of, and agreed to, this arrangement when they agreed to purchase the spa.

[77] The plaintiffs say that Ms. Lin told them she would charge them exactly what she paid for the products. The plaintiffs say that after the purchase they were informed that all purchasing was done through another company called Lin Enterprises Ltd. and they were never provided with any documentation proving that they paid the same price that Lin Enterprises paid to Everal.

[78] The defendants deny the allegations. In their written submissions on closing the defendants say:

There was no evidence led to show that requisite supplies were denied the Plaintiffs' business; tabs 24 to 30 of Exhibit 3 show quite the contrary. Further, Mr. Sanghera was advised to set up his own supply chain for a number of products with Everal. He did not do so and no explanation was provided for his failure to establish a credit line. Mr. Wang indicated that Everal preferred to deal with one franchisee within each operational area, but that this did not prevent Natural Touch from doing so. And Mr. Sanghera loudly complained about being charged too much by Lin Enterprises. No evidence was led to establish any over-charging. Annie Lin also said that her prices were dictated by the list of prices in her computer; for that reason she would not know of any mark-up. And Mr. Wang stated that when two purchase orders were sent from Richmond and Burnaby, the pricing was the same for each.

[79] Lin Enterprises is a British Columbia corporation. Its registered office is Ms. Lin's residence. The only director and officer is Heng Chih Chen. His English name is James Chen. James Chen also resides at Ms. Lin's residence. The plaintiffs understood that he was Ms. Lin's husband but she denies this. She says he is a close family friend. She says he used to be a priest and that after he left the priesthood, she assisted him to become involved in business.

[80] On March 21, 2007, Mr. Justice Sigurdson ordered the defendants to produce copies of all documentation related to the supply of products or goods to Danger Figure (Burnaby) Ltd. for the period

June 26, 2003, to June 26, 2005, including but not limited to the origin and cost of the products or goods whether that supplied by Everald Incorporated, Danger Figure Enterprises Taiwan, Lin Enterprises Ltd. or otherwise.

[81] The defendants have not produced any documentation from Everald or Lin Enterprises that documents the cost of supplies paid by Lin Enterprises to Everald, even though Steve Wang of Everald testified that invoices were sent from Everald Inc. to the Richmond Orient Retreat. Ms. Lin was asked if she charged a mark up on the goods purchased by Lin Enterprises from Everald and sold to the plaintiff corporation. She gave conflicting answers. At various times she said Lin Enterprises did not take a mark-up, she did not know it charged a mark-up, she did not know how much of a mark-up it charged, or she did not want to know how much of a mark-up it charged. She admitted in her evidence that based on the agreement she made with the plaintiffs it would be improper for her to charge the plaintiffs a mark-up.

[82] The Agreement of Purchase and Sale is silent on the question of supplies. Mr. Sanghera testified that he was told supplies would be sold to him at the cost to the Richmond Orient Retreat. The plaintiffs testified that they were not taught how to order the products and supplies and had to rely on Amy and Susan to order from the computer system, which was in Chinese.

[83] To return to the above quoted paragraph of the defendants' closing submissions, the evidence of Steve Wang was quite clear that he would not supply products directly to the plaintiffs. The defendants cannot complain that the plaintiffs led no evidence to establish any over-charging when they refused, despite a court order, to produce the purchase order.

[84] I infer from the confusing and contradictory evidence of Ms. Lin on this question that Lin Enterprises did mark up the price of goods sold to the plaintiff. Ms. Lin acknowledged that it would be "improper" to do so. Her failure to disclose the existence of Lin Enterprises prior to the sale and her obfuscation about the pricing leads me to conclude that she was reckless and dishonest in the representation she made to the plaintiffs at the time of the purchase in which she assured them they would be charged the same price she paid for supplies. She knew they relied on this representation as part of the whole sale package. They did rely on this representation and I find it was fraudulently made.

Computer Access

[85] The Agreement for Purchase and Sale provided that the vendor would sell to the purchaser all included assets. "Included assets" was a defined term in the agreement which included "Business Records":

Business Records. All customer lists, brochures, samples, price lists, access to accounting and other books and records (howsoever recorded or stored), and all other information, correspondence, documents, data and material relating to the Business ("Business Records").

[86] The computer at the Burnaby spa was remotely connected to another database away from the Burnaby spa. The plaintiffs could only access the payroll records. They could not use their own computer at their own business to access client records, or to order supplies. Even if they could, the computer records were mostly in Chinese. The defendant promised to provide access to its business records and it is alleged by the plaintiffs that it failed to do so.

[87] The defendants' position on this point, as stated in their written closing, is that the "evidence on the point was confusing. But what was clear is that there was no nexus established between that unavailability and economic losses or the collapse of the Burnaby Spa."

[88] The evidence was confusing. It is puzzling to me how the defendant could sell a business but maintain control over the computer and thus all the business records, which in turn were maintained by Ms. Lin's sisters at the Burnaby spa. At her discovery testimony Ms. Lin admitted that she remained able to access the computer records of the Burnaby spa up until December 2005. She denied this on cross-examination at trial. Tara Sanghera found Susan's password eventually and thus gained access to the client files.

[89] I can only conclude that the defendants' refusal to grant access to the plaintiffs' own client records was intentional on the part of the defendants. The plaintiffs ask the court to infer that this was part of an orchestrated scheme to sell the business assets but to keep all the customers by eventually having them attend the Richmond spa. I do not think there is sufficient evidence to find such a scheme. I do not know what the defendants' motives were but I do find that Ms. Lin breached the agreement to provide access to the business records. It was a deliberate breach. I infer that she never intended to pass along the records to the plaintiffs. This is a fraudulent misrepresentation as to her future intentions. The defendant gave no explanation at all as to why she failed to grant the plaintiffs access to the records of a business she had sold.

Remedy

[90] The plaintiffs primarily rest their case on the allegations of fraudulent misrepresentation. There are numerous additional allegations that I have not mentioned. It is not necessary to do so. The main allegations are proven and are sufficient for the plaintiffs to succeed on the basis of fraud. The measure of damages for fraudulent misrepresentation is set out in *Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd.* (1990), 49 B.L.R. 237 (B.C.C.A.): the plaintiff is entitled to damages for loss of the purchase money and consequential loss.

[91] Any one of the four main categories of fraudulent misrepresentation would be sufficient to vitiate the contract, that is the misrepresentations concerning the pre-paid treatments, the staff and training, the cost of supplies, or the access to the business is computer records.

[92] It is not therefore necessary for me to consider the alternative causes of action.

[93] The plaintiff is entitled to the return of the amount it paid, after deducting the proceeds of sale of the equipment. The plaintiffs also claim actual business losses in operating the business. Their calculation, (corrected as to the addition), is as follows:

Purchase price and costs of purchase:

(a) the purchase price (net of \$50,000.00 credit for pre-pays):	\$470,000.00;
(b) rent adjustments	\$8,674.15
(c) damage deposit	\$6,147.50
(d) PST	\$6,086.36
(e) legal fees:	\$2,091.00

Total cost of purchase: \$492,999.01

(See statement of adjustments, Exhibit 1, Tab 7)

Actual business loss:

July – September 2005	<6,943.80>
October – December 2005	\$56,711.09
January – March 2006	\$20,234.87
Actual Business Loss	\$70,002.16

Recovery at Auction:

Amount recovered at auction June 23, 2006	\$10,423.75
Amount recovered at auction July 15, 2006	\$756.50
Total recovery at auction	\$11,180.25

Total losses:

Purchase price and related costs	\$492,999.01
Actual business losses	\$70,002.16

Less recovery at auction <11,180.25>

TOTAL LOSS CLAIMED: \$561,820.92

[94] The defendants argue that the plaintiff failed to mitigate its damages by failing to list the business for sale with Mr. Stellakis or another agent.

[95] The plaintiffs instructed their solicitors to write to the defendants and advise them that they could take the business back in exchange for a return of the purchase price. This letter, initially written '*without prejudice*' was confirmed later on a '*with prejudice*' basis. The defendants did not respond to the letter. Mr. Sanghera had no alternative but to give up the lease, which expired on January 31, 2006, otherwise he would have incurred further losses. I do not agree with the defendants that the plaintiffs had any other reasonable course of action open to them, particularly as the defendants ignored the offer to rescind the sale.

[96] Ms. Lin is a signatory and party to the Agreement of Purchase. No submissions were made that her personal liability should be different than the corporate defendant. I find both defendants liable for the amount claimed.

Counterclaim

[97] The defendants claim by counter-claim the cost of honouring pre-paid treatments and coupons at the Richmond Orient Retreat. Para 8 of the counterclaim reads:

The corporate Plaintiff was credited the sum of \$50,000.00 on the purchase price for pre-paid treatment plans and pre-paid tuition fees. However, the Plaintiffs closed down the business of Orient Retreat since on or about January 1, 2006 with no arrangements made or notice to the students of Protégé School and the customers of Orient Retreat, in particular those students who have examinations scheduled for the month of January, 2006 and customers with pre-paid treatment plans. In order to protect the franchise system and the name "Orient Retreat", the Defendants had to make arrangements with the Richmond Orient Retreat and the Protégé School at that location to provide on-going tuition and treatment plans for those students and customers of the Orient Retreat operated by the Plaintiffs.

[98] The prayer for relief at para (c) reads:

(c) Damages to be assessed against the Plaintiffs for payments made by the Defendants to third parties including but not Limited to payments made to honour pre-paid treatment plans and pre-paid tuition fees;

[99] The plaintiffs by counterclaim are Annie Lin and Danger Figure Centre (Burnaby) Ltd. There was no evidence that either of these parties incurred any damages to honour the pre-paid treatments. Rather it was the Richmond spa operated as Danger Figure Centre (Vancouver) Ltd. that incurred the loss. Moreover, even if it was the plaintiffs by counterclaim that did sustain the loss to honour the pre-paid treatments, that

loss was occasioned by the closure of the Burnaby Orient Retreat which in turn was the result, (as I have already found) of the defendants' fraud. The plaintiffs by counterclaim cannot recover a loss occasioned by their own fraud.

Disposition

[100] The plaintiffs are entitled to judgment for damages against both defendants in the amount claimed, \$561,820.92 plus court order interest and costs.

[101] The counterclaim is dismissed.

[102] If the parties wish to make submissions concerning costs they may make arrangements to do so by contacting the registry.

The Honourable Madam Justice Garson

October 11, 2007 – *Revised Judgment*

Corrigendum to the Reasons for Judgment issued advising that in paragraph 93 the total loss claimed should be corrected to read as follows:

Purchase price and costs of purchase:

(a) the purchase price (net of \$50,000.00 credit for pre-pays):	\$470,000.00;
(b) rent adjustments	\$8,674.15
(c) damage deposit	\$6,147.50
(d) PST	\$6,086.36
(e) legal fees:	\$2,091.00

Total cost of purchase: \$492,999.01

(See statement of adjustments, Exhibit 1, Tab 7)

Actual business loss:

July – September 2005	<6,943.80>
October – December 2005	\$56,711.09
January – March 2006	\$20,234.87
Actual Business Loss	\$70,002.16

Recovery at Auction:

Amount recovered at auction June 23, 2006	\$10,423.75
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Amount recovered at auction July 15, 2006	\$756.50
Total recovery at auction	\$11,180.25
<i>Total losses:</i>	
Purchase price and related costs	\$492,999.01
Actual business losses	\$70,002.16
Less recovery at auction	<11,180.25>
TOTAL LOSS CLAIMED:	\$551,820.92

Paragraph 100 should read as follows: "The plaintiffs are entitled to judgment for damages against both defendants in the amount claimed, \$551,820.92 plus court order interest and costs.