SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: CV-17-00011854-00CL **DATE:** January 4, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: 1199403 Ontario Inc., et al vs. Saptashva Solar S. A., et al

BEFORE: Mr. Justice Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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CITATION: 1199403 Ont. Inc. et al. v. Saptashva Solar S.A. et al., 2024 ONSC 267
COURT FILE NO.: CV-17-00011854-00CL
DATE: 20240104

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: 1199403 Ontario Inc., 1274442 Ontario Inc., 1034523 Ontario Ltd., and Gulu Thadani, Plaintiffs

AND:

Saptashva Solar S.A., Enriroen Inc., Harshal Gunde, Toronto Hydro-Electric System Limited, and Independent Electricity System Operator (a.k.a. Ontario Power Authority), Defendants

BEFORE: Peter J. Osborne J.

COUNSEL: *Stephen M. Turk,* for the Plaintiffs

Elham Beygi and Allan Morrison, for the Defendants

HEARD: January 3, 2024

ENDORSEMENT

OSBORNE J.

[1] The Defendants seek an adjournment of the full day appointment for the hearing of two motions: their cross-motion together with the motion of the Plaintiffs, which hearing is scheduled for next Tuesday, January 9. The request for an adjournment is opposed by the Plaintiffs.

[2] In the circumstances, I decline to adjourn the hearing of the motions. Both motions will proceed to hearing on their merits next Tuesday, January 9, as scheduled.

[3] The Plaintiffs have brought a motion seeking an order lifting the temporary stay of the enforcement of a Writ of Seizure and Sale dated March 23, 2018, and an order permitting the sale of real property owned by the Defendant, judgment debtor, Harshal Gunde ("Mr. Gunde"). Mr. Gunde is the guarantor of the indebtedness of the corporate Defendant, Saptashva Solar S.A., a company he owns and controls, but which is currently in receivership. The Plaintiffs sued on the guarantee.

[4] Mr. Gunde did not defend this action, was noted in default, and default judgment was granted on March 16, 2018 against him on the personal guarantee. It was further to that judgment that the Writ of Seizure and Sale was issued on March 23, 2008.

[5] As a result of subsequent asset dissipation in the company, a receiver was appointed in 2022. It is the expectation of the receiver that the assets of the company will not be sufficient to satisfy the indebtedness owing to the Plaintiffs given transfers of assets out of the company that apparently occurred prior to the appointment of the receiver. The Defendants currently have outstanding costs awards against them made in the receivership proceeding.

[6] The hearing date of January 9 for these motions was scheduled by me on the consent of all parties on October 30, 2023, as reflected in my Endorsement made on that date.

[7] That attendance had been brought about by the Defendants who were then requesting an adjournment of the motion of the Plaintiffs at the last minute just as they do again today.

[8] The Plaintiffs' notice of motion was originally served on August 25, 2023. The motion record and factum were served on September 1, 2023. The motion was originally scheduled to be heard on September 11, 2023.

[9] On September 5, 2023, counsel for the Defendants requested an adjournment of the Plaintiffs' motion. That adjournment was granted, on the consent of the Plaintiffs. With the agreement of counsel for all parties, the motion was adjourned to October 30, 2023.

[10] I pause to observe that in requesting (and receiving) the adjournment of the September 11 motion date, and as reflected in their motion brief filed in support of the September 30 adjournment request, the Defendants sought the earlier adjournment of the September 11 hearing date "in light of the complex issues and the need to cross-examine [the Plaintiffs' affiant]".

[11] At the September 30 attendance, there was a disagreement between counsel for the parties as to whether, in seeking and receiving the earlier adjournment, the Defendants had made any reference to a proposed cross-motion. In any event, the adjournment was granted on consent as noted above.

[12] The Plaintiffs requested (through counsel) that any responding motion materials from the Defendants be received no later than September 22, 2023. Counsel for the Defendants replied to the effect that they "would like to accommodate the Plaintiffs' request".

[13] On October 23, 2023, one week before the scheduled hearing date for the Plaintiffs' motion, counsel for the Defendants delivered by email to counsel for the Plaintiffs a proposed Notice of Cross Motion. They subsequently delivered a supporting affidavit of Mr. Gunde sworn October 23, 2023.

[14] I pause again to observe that the affidavit of Mr. Gunde had been sworn subsequent to the cross-examination by counsel for the Defendants of the affiant who swore the affidavit relied upon by the Plaintiffs in support of their motion.

[15] The Defendants also delivered an affidavit from a proposed expert, Himanshu Shah, dated October 23, 2023.

[16] The Defendants' cross-motion seeks an order dismissing the action, a declaration that the default judgment has already been satisfied (on the basis, as advanced by the Defendants, that the present value of certain income streams resulting from the solar business underlying the main dispute in the action was apparently sufficient in quantum so as to satisfy the amount owing pursuant to the default judgment previously granted). In the alternative, the Defendants seek an order setting aside the noting in default, setting aside the default judgment, vacating the Writ of Seizure and Sale, and extending the time for service and filing of a Statement of Defence.

[17] As noted above, the motion of the Plaintiffs was scheduled for hearing on the merits on October 30, 2023. At the commencement of the hearing, however, counsel for the Defendants requested an adjournment of both motions on the basis that they should be heard together, and given that their cross-motion had just been served on the Plaintiffs, the Plaintiffs would require an opportunity to file materials in order that both motions could be fully briefed for determination on the merits.

[18] Counsel for the Plaintiffs reluctantly agreed that an adjournment would likely facilitate the most efficient use of court resources since, while the Plaintiffs wanted their motion heard without further delay, counsel agreed that it was most efficient that the motion of the Plaintiffs be heard together with the cross-motion of the Defendants.

[19] However, Plaintiffs took the position that a term of that adjournment should be the payment by the Defendants of the outstanding costs awards made against them in the receivership proceeding that totalled in the aggregate $41,800. The Plaintiffs submitted that, given the conduct of the moving party Defendants to date and what the Plaintiffs alleged were continuing efforts by them to delay this matter and erect roadblocks to impede the efforts of the Plaintiffs to enforce the guarantee and default judgment, it was appropriate that those costs be paid as a term of the adjournment.

[20] As reflected in my endorsement of September 30, counsel for the Defendants candidly acknowledged that the cross-motion was served very late, and that none of the outstanding costs awards had been paid. However, counsel for the Defendants submitted that some of those costs awards were made against the corporate defendants and not against Mr. Gunde personally.

[21] In my Endorsement, I expressed my frustration when motions such as the cross-motion of the Defendants are served at the last minute, as a result of which a pre-existing timetable is frustrated and a full day of Commercial List court time is lost and not available to other litigants.

[22] However, I was satisfied in the circumstances that an adjournment was appropriate, in order that both motions could be heard at the same time, on their merits. I directed that, as a term of the adjournment, the scheduling of the cross-motion of the Defendants was conditional upon them paying two of several outstanding costs awards in respect of which Mr. Gunde had personal liability. Those two awards totalled $8000 in the aggregate. (The other costs awards were made against the corporate Defendants).

[23] I directed that both motions shall be heard together on January 9, 2024 commencing at 10 AM continuing as necessary for one full day. I reflected in my Endorsement the fact that all counsel were agreed that one day was sufficient for both motions, and, given that motion materials were already served and filed for both motions, counsel would ensure that remaining issues, such as the exchange of facta, were completed to allow for a disposition of both motions as scheduled on January 9.

[24] Counsel for the Defendants requested that they be given one month to pay the $8000 in outstanding costs. I also granted that request, with the result that those costs were due no later than November 30. Given that the payment of those costs was a precondition to the hearing of their cross-motion, I further directed that the matter would be spoken to at a very brief case conference before me on December 1, 2023 at 9 AM for 15 minutes at which time the parties could advise Court whether the costs had been paid which would in turn determine whether both motions would be heard on January 9, or only the motion of the Plaintiffs would proceed.

[25] On December 1, 2023, the parties attended at the case conference and advised me that the costs had been satisfied the day before, with the result that both motions were confirmed to proceed on January 9.

[26] The parties advised that a cross-examination of the independent expert of the Defendants was scheduled for later in December, and they requested advice and directions with respect to a dispute about the production of documents.

[27] The Plaintiffs had requested production of the expert's file, including his engagement letter from counsel for the Defendants. Defendants claimed that such was solicitor client or litigation privileged. Given that the correspondence in dispute was comprised of instruction and engagement letters to an independent expert, I observed that I would expect those to be produced. Three other categories of documents in dispute were resolved on the consent of the parties.

[28] The cross-examination of the Defendants' expert proceeded.

[29] The matter came back on before me today, on an urgent and unscheduled basis. The Defendants requested an adjournment of the motions, yet again. They seek an adjournment of approximately three months given that they seek to file a new, additional expert report which they submit will take 60 days, followed by cross examinations and the preparation of new or supplemental facta, with the result that the motion could not realistically proceed before March or April, 2024.

[30] The Defendants filed a new affidavit of Mr. Gunde sworn yesterday, January 4, in support of their new adjournment request. In that affidavit, Mr. Gunde states, among other things, the following:

a. the Defendants' expert was cross-examined on December 7, 2023;

b. there is "legitimate concern that Himanshu Shah's affidavit may fall short of court expectations. Since the cross-examination of Himanshu Shah, I was advised by my lawyer, Allan Morrison, and I believe it to be true that Himanshu Shah's affidavit and expert opinion may be inadequate. Thus, I have been actively seeking to find

another expert who could provide an accurate valuation with regard to the present value of future cash flows on the revenue generated from the Solar Projects";

c. despite efforts, Gunde could not secure such a report primarily as a result "of the holiday break"; and

d. "on January , 2024", Gunde retained the services of a new proposed expert who could deliver report in "8 to 10 weeks", and since it would be "highly prejudicial to [Gunde] if the adjournment is not granted", the adjournment was requested.

[31] The engagement letter of the new proposed expert, attached to the affidavit as an exhibit, reflects that the date missing in the affidavit excerpted referred to above was in fact yesterday, January 3.

[32] The Defendants also delivered a factum, in which the Defendants further submitted that they had a "legitimate concern that … [their expert's] affidavit may fall short of court expectations".

[33] The Defendants rely on Rule 52.02 which gives a judge discretion to postpone or adjourn a trial on such terms as are just, and further rely on jurisprudence to the effect that the same discretion applies to the adjournment of the hearing of an application. The cases on which they rely our not in dispute and reflect the factors that a court should consider on an adjournment motion.

[34] In submissions made in support of the adjournment request, counsel for the Defendants observed that it had become apparent during the cross-examination of the Defendants' expert that he was a good financial expert but that a further expert opinion from a technical expert was required.

[35] The Plaintiffs oppose the request for an adjournment, and submit that it is yet another attempt to delay and obfuscate their efforts to enforce on the guarantee and the default judgment. Their position is that there are no new facts or events that have transpired. Rather, the Defendants were dissatisfied following the cross-examination of their own expert, and now seek to "cooper up" what they perceive as challenges in their case, with yet another expert.

[36] The Plaintiffs submit that this third adjournment request should be denied and that parties should not be permitted to continue a never-ending cycle of new rounds of affidavits after the affiant on whose evidence they have chosen to rely has been cross-examined, following which counsel seek to augment the record with new evidence to address perceived weaknesses in their position.

[37] I agree with the position of the Plaintiffs both generally and in the particular circumstances of this case.

[38] This action is very stale already. The Plaintiffs served their motion materials almost 5 months ago. The first adjournment was granted on request. I granted the second adjournment, at the request of the Defendants, on the date that had been scheduled for the hearing of the motion of the Plaintiffs, for the reasons set out above. That adjournment request was brought about by the

last-minute service of the Notice of Cross Motion by the Defendants. In setting the January 9 hearing date for both motions, I specifically sought and received the assurance of counsel for all parties that the motion materials had been filed and the motions would be ready to proceed. That was reflected in my Endorsement of October 30, 2023.

[39] The Commercial List set aside the full day on January 9. Now, again at the last minute, the Defendants requested an adjournment, this time to file another expert report. There are no new facts. All that has happened, as plainly and candidly reflected in both the affidavit of Mr. Gunde and in the written and oral submissions made on behalf of the Defendants, is that subsequent to the cross-examination of their expert, they decided they would like to file an additional expert report.

[40] In the circumstances, I am not prepared to grant a further adjournment. In my view, the Defendants have had ample opportunity (indeed multiple ample opportunities) to put forward the case as they elected to do. It is unfair to the Plaintiffs, and causes a waste of judicial resources, for the Defendants to, yet again at the very last minute, request an adjournment on the basis of circumstances that are of their own making.

[41] The whole purpose of the adjournment of the motions on October 30, sought at the very last minute by the Defendants, was to give the parties - all parties - another few months to serve and file all required materials. Indeed, not only did counsel for the Defendants confirm that such was sufficient, they confirmed that all the evidence had been filed and all that was required was the completion of cross examinations and the preparation of facta. The Defendants succeeded in the request for an adjournment on that date. It is now time for these matters to be heard and determined on the basis of the record.

[42] The Plaintiffs also rely on the observations of Black, J. in *799969 Ontario Limited and Frez v. Greenspan Partners LLP*, 2022 ONSC 3653, with which I agree. That case involved a motion by the respondent to strike certain evidence delivered by the applicants, in the context of an application in which the former client (applicant) of the law firm sought to assess the law firm's accounts. Black, J. stated the following with respect to the proposed delivery by a party of supplementary evidence after being cross-examined on their original affidavit.

> [45] Greenspan expresses a concern, which I share, about the propriety and implications of a party delivering supplementary evidence after being cross-examined on their original affidavit. While not technically caught by operation of Rule 39.02(2), which only prohibits delivering new evidence after having cross-examined the party opposite, the potential mischief associated with allowing a party to deliver correcting or supplementary evidence after itself being examined is self-evident.
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> [46] As Greenspan argues, allowing a party to deliver new affidavit evidence to "patch up" their position after being cross-examined is contrary to the spirit if not the letter of Rule 1.04, and could lead to an endless loop of supplementary materials and cross-examinations.
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> [47] In my view, subject to very rare exceptions, it is the expectation that once a party has delivered their evidence and been cross-examined on it, they get no further "kicks at the can". The rare exceptions I can imagine are circumstances in which new and significantly material information emerges following cross-

examination that alters the landscape of a given proceeding. Generally speaking, however, this will not be the case, and in my view attempts to supplement evidence after cross-examination in most cases should not be permitted.

[48] There is no attempt in this case to suggest that the material encompassed by the supplementary motion record or the Second Supplementary Affidavit is new or was previously unavailable. To the contrary, as the above-noted paragraph from Tzvi Erez's April 5, 2021 affidavit confirms, it is information from the timeframe up to December of 2014, about which Tzvi Erez purports to have been reminded during Ms. Tourgis' cross-examination of him in early 2021.

[49] Greenspan also argues, pointing to this same evidence, that Erez is effectively splitting their case. That is, by withholding the material and allegations contained in the supplementary motion record until after being cross-examined, in particular the tape recordings, Erez deliberately waited until Greenspan's response was in place and Greenspan's cross-examination strategy had been conceived and spent. Erez then delivered materials — some 1229 pages — onto a battlefield where the battle lines had already been drawn and set.

[50] As stated in the Supreme Court of Canada's decision in *R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 S.C.R. 466 (at page 473), the rule against case-splitting:

> "…prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is to put in part of its evidence — as much as it deemed necessary at the outset — then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response."

…

[52] Greenspan also argues that Erez ought to have sought leave to file the additional evidence. While recognizing that this is not the precise circumstance covered by Rule 39.02(2) — where leave would be required to file additional material — it is sufficiently similar in spirit and effect that leave ought to have been sought.

[43] I agree with the approach of Black, J. and his analysis of the issue. In my view, this is precisely what is being proposed in the present case, and it is not appropriate. In particular, I share his concern expressed at paragraph 46 of the judgment in that case reproduced above.

[44] For all of these reasons, the adjournment request is denied. Both motions will proceed, as scheduled on the basis of the record as it now exists, on January 9, 2024.

Osborne J.