CITATION: Wayne Safety Inc. v. Gendelman, 2023 ONSC 2478
COURT FILE NO.: CV-23-697221-00CL
DATE: 20230405

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Wayne Safety Inc.

BEFORE: Osborne J.

COUNSEL: *Mark Ross, Eric Brosseau and Sara Romeih,* on behalf of the Plaintiff

HEARD: April 4, 2023

ENDORSEMENT

JUSTICE OSBORNE:

[1] Yesterday, on April 4, 2023, I granted three orders following an urgent hearing with a brief endorsement stating that further reasons would follow. These are those reasons.

[2] The Plaintiff, Moving Party, Wayne Safety Inc. sought Mareva, Anton Piller and Norwich relief together with certificates of pending litigation (CPLs) on title to certain properties. The Plaintiff also seeks an order amending the Notice of Action.

[3] Unless otherwise indicated, defined terms in this Endorsement have the meaning given to them in the motion materials. The Plaintiff relies on the affidavit of Aaron Nisker sworn April 3, 2023 together with exhibits thereto, the affidavit of Evelin Wong sworn April 3, 2023 with exhibits thereto, the affidavit of Mr. Jeffrey Haylock sworn April 3, 2023 (the proposed independent supervising solicitor with respect to the Anton Piller order) and the affidavit of Amanda Hostrawser affirmed April 4, 2023 together with exhibits thereto.

[4] In this action, the Plaintiff, Wayne Safety, alleges a very significant and apparently ongoing fraud by its longtime bookkeeper employee, the defendant Diana Gendelman ("Gendelman"). Wayne Safety imports and distributes industrial protective equipment. It is a family enterprise run by the daughter of the founder, Ms. Arlene Nisker together with her husband Mr. Aaron Nisker.

[5] Gendelman has worked for the company since 2002, and has occupied the position of head bookkeeper since approximately 2007.

[6] The evidence in the record before me demonstrates a *prima facie* case that Gendelman has misappropriated or stolen at least $5.2 million from the Plaintiff. The investigation remains ongoing, with the result that the actual amount she has taken is likely significantly higher.

[7] The scheme is, in many respects, simple. Gendelman has changed supplier information contained in the accounting records and software (Masterworks) of her employer, Wayne Safety. As the company's bookkeeper, she has access to all of the accounting records.

[8] Once she changes the supplier information, Gendelman then sends electronic fund transfers to companies she owns and bank accounts controlled by her. Once the funds transfers are complete, she changes the information back in Masterworks to conceal the true identity of the recipient of the funds and to give the appearance that the payments have been made to legitimate suppliers for legitimate invoices.

[9] The evidence further shows that Gendelman has, together with her husband, Natan Gendelman, funneled the proceeds of this fraud into various properties that she and her husband own directly or indirectly through numbered companies to which they are associated. The two principal companies are 12069253 Canada Inc. and Best Showa Inc. which appear to be central to the fraudulent scheme. Those properties include the ten in respect of which CPLs are sought. Mr. Gendelman co-owns numerous properties with his wife and is a guarantor on mortgages pursuant to which funds were advanced to several of the numbered company defendants.

[10] In the circumstances, and having just uncovered this fraud and as its investigation continues, the Plaintiff seeks this relief on an urgent *ex parte* basis to preserve evidence and funds that may very well otherwise dissipate and disappear.

[11] Gendelman earns $60,000 or less annually. Her husband is an osteopath.

[12] As noted, the Plaintiff is literally still in the process of uncovering the extent of the fraud. Early last month, it hired a CPA (Ms. Wong) to assist in the organization of the company's accounting records. Wong met with Gendelman to gain familiarity with the books and records and, upon observing some irregularities shortly after she commenced the project in or about March 21 – 23, made inquiries of Gendelman.

[13] Gendelman requested a list of the transactions about which she was inquiring and was seeking supporting documentation. On March 28, Gendelman told Wong that she had cancelled the cheques on the list because they were "wrong". No other explanation was given. Wong expressed to management concerns about other transactions in respect of which credits and debits did not match.

[14] These concerns led to a search of the software, Masterworks, which revealed the amendments and changes to existing supplier profiles to temporarily change the bank account information and email addresses referred to above.

[15] The specific steps by which the fraudulent scheme was implemented are set out in the Plaintiff's factum beginning at paragraph 21. I have not repeated it all here. The evidence reflects that Gendelman disguised payments to her own companies which received funds inappropriately through transfers to three bank accounts mainly involved.

[16] The Gendelmans' company, Best Showa, has the same name as an entity that was a legitimate supplier to Wayne Safety until 2014 when legitimate payments to it stopped. The evidence shows that Gendelman incorporated a company by that name in November 2020, some six years later, and immediately began diverting inappropriate payments to that entity.

[17] The information uncovered to date, summarized largely at Exhibit 35 to Wong's affidavit, reflects that payments made by Gendelman to 120 Canada (her company) total $2,873,789.45, and additional payments to her company Best Showa total another $2,308,881.63, for a grand total of 5,182,671.08.

[18] All of those payments are made by way of EFT but recorded as payments made to different legitimate suppliers.

[19] For 2023, the current fiscal period, the Plaintiff can trace the exact timing of the changes made by Gendelman to supplier profiles, all as against the timing of the EFTs. That is summarized at paragraph 28 of the factum of the Plaintiff.

[20] The stolen funds appear to have largely been sent to bank accounts at CIBC, RBC and BMO respectively.

[21] The ten properties in respect of which the Plaintiff seeks a CPL are those identified during its investigation. They are summarized at paragraph 35 of the factum.

[22] In respect of seven of those, the Plaintiff has discovered direct evidence of funds taken by Gendelman during the month prior to the closing date for the purchase of each property, in material and significant amounts (see para 37). Many transactions cluster temporally in the month prior to the purchase of those properties. These properties carry badges of fraud.

[23] For example, with respect to 55 More Park, the three purchasers, of which one is Gendelman's company, all list 84 Ravel Drive (Gendelman's home) as their address for service. The mortgage, registered on title on the day of closing, is in the amount of $2,159,150, or 150% of the closing price. Moreover, the mortgage is granted to parties related to the purchasers.

[24] Gendelman guaranteed a mortgage in excess of $1 million for 159 Sunset Beach held by the same mortgagee as 55 Moore Park.

[25] With respect to 126 Rose View, 266 Ontario registered a mortgage on the date of purchase in the principal amount of $1,940,000 even though the purchase price was $1,320,000. Gendelman personally guaranteed the mortgage which was given to the same mortgagee as the mortgagee at 55 More Park.

[26] Other examples are set out in the motion materials.

[27] Of the other three properties, one is the Gendelmans' residence and the other two are co-owned by the Gendelmans.

[28] Even separate and apart from the timing of the transfers of funds from Wayne Safety immediately prior to the purchase of these properties, it is difficult to imagine how Gendelman and her husband could afford some of these assets given their known income and sources of funds.

[29] All of the corporate defendants are connected with one or both of the Gendelmans.

[30] The affidavit evidence of the Plaintiff shows there is good reason to believe that Gendelman stores relevant documents on the removable portable drive. Upon learning of this, one of the principals of the business, Mr. Nisker, attempted unsuccessfully to access these documents. It is in part for these reasons that Anton Piller relief is sought.

[31] The Gendelmans are originally from Russia, have lived abroad in other countries where the currently have family, and the Plaintiff is concerned about a risk that they will leave the jurisdiction and that funds already have been, or will be, transferred out of the jurisdiction beyond the reach of this Court.

[32] While not in evidence, Plaintiff's counsel was advised literally during argument on these motions that Gendelman had just requested next week as vacation (i.e., on three business days' notice).

[33] As to the relief sought, I am satisfied that the Notice of Action should be amended to add the three new defendants given what the materials show is their involvement in the fraud.

[34] The test for a Mareva injunction is well established. This Court has jurisdiction to grant an interlocutory injunction, including a Mareva injunction, pursuant to section 101 of the *Courts of Justice Act*, where it appears just or convenient to do so. Pursuant to Rule 40.01, an interlocutory injunction or mandatory order under section 101 may be obtained on motion to a judge. The order may include such terms as are just, and may be sought on motion made without notice for a period not exceeding 10 days.

[35] That said, the relief is extraordinary. As numerous courts have observed, the harshness of such relief, usually issued *ex parte*, is mitigated or justified in part by the requirement that the defendant have an opportunity to move against the injunction immediately.

[36] The factors to be considered in determining whether to grant Mareva relief include whether the moving party has established the following:

a. a strong *prima facie* case;

b. particulars of its claim against the defendant, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the defendant;

c. some grounds for believing that the defendant has assets in Ontario (although this requirement has been modified by more recent jurisprudence discussed below, such

that it is perhaps better expressed as: some grounds for believing that the defendant has assets within the jurisdiction of the Ontario Court);

d. some grounds for believing that there is a serious risk of defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied;

e. proof of irreparable harm if the injunctive relief is not granted;

f. the balance of convenience favours the granting of the relief; and

g. an undertaking as to damages.

(See *Aetna Financial Services Ltd. v Feigelman*, [1985] 1 S.C.R. 2 ("*Aetna*") at paras. 26, 30; *Chitel v. Rothbart*, 1982 CANLII 1956 (ONCA) at para. 60; and *Lakhani et al v. Gilla Enterprises Inc.* et al, 2019 ONSC 1727 at para. 31).

[37] A strong case that a defendant has committed fraud against the plaintiff can be important evidence in support of the relief sought. The "reluctance" of the common law toward allowing execution before judgment has recognized exceptions, including circumstances where the relief is necessary for the preservation of assets, the very subject matter in dispute, or where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute. (See *Aetna*, at para. 9).

[38] The test as to whether a strong prima facie case exists has been expressed by the courts as the question of whether the Plaintiff would succeed "if the court had to decide the matter on the merits on the basis of the material before it" (See *Petro-Diamond Inc. v. Verdeo Inc.*, 2014 ONSC 2917 at para. 25).

[39] The following elements are required for the tort of civil fraud:

a. a false representation by the defendant;

b. some level of knowledge of the falsehood of the representation by the defendant (i.e., knowledge or recklessness);

c. the false representation caused the plaintiff to act; and

d. that the plaintiff's actions resulted in a loss.

See *Bruno Appliance and Furniture, Inc. v Hryniak,* 2014 SCC 8 at paras. 17-21.

[40] Applying the test to this case, I am satisfied that the Mareva injunction should be granted.

[41] The evidence discloses a strong *prima facie* case of fraud by Gendelman to the extent of at least $5.2 million and counting, including $625,000 in the last three months alone.

[42] The evidence also establishes a *prima facie* case of conspiracy. The tort of conspiracy, by unlawful conduct, requires that the defendants:

a. acted in combination, by agreement or with a common design;

b. their conduct was unlawful;

c. their conduct was directed at the plaintiff;

d. the defendants knew that, in the circumstances, injury to the plaintiff would likely result; and

e. the conduct caused injury to the plaintiff.

[43] The evidence is clear that Gendelman, and her husband Natan, together with others, misappropriated the funds and then used some of those funds to purchase properties.

[44] The elements of deceit and unjust enrichment are also made out for the purposes of this motion for the above reasons, as are the claims of knowing assistance and knowing receipt.

[45] It is clear that the Defendants own assets in Ontario, including the ten properties owned by them directly or indirectly through numbered companies, all of which are Ontario corporations. An additional nine properties were purchased between June 2016 and March, 2023

[46] At least $624,175.89 has been transferred to the three bank accounts referenced above, even in the last few months.

[47] I can and do infer from the conduct of the Defendants referred to above that there is a risk of dissipation of assets and the Defendants will likely frustrate or attempt to frustrate the enforcement of any judgment: *OPFFA v. Paul Atkinson, et al*, 2019 ONSC 3877 at para. 6.

[48] For all of the above reasons, I am satisfied that the Plaintiff will suffer irreparable harm if the assets are not tied up, the balance of convenience weighs in favour of granting the relief and the other factors are met.

[49] Wayne Safety has provided the undertaking as to damages.

[50] For the same above reasons, I am satisfied that CPLs should issue in respect of each of the ten properties for which they are sought pursuant to Rule 42.01 and section 103 of the *Courts of Justice Act*.

[51] The claims of the Plaintiff to an interest in the properties through constructive trusts are made out on the evidence described above. Moreover, the evidence is clear about the misappropriation of funds, in large amounts and within a very short time period, immediately prior to the purchase of at least three of those properties. Further evidence about the source of funds for

the purchase of these properties and the servicing of the mortgages, can likely be uncovered once the banking records and other documents are obtained.

[52] Even where there is no direct evidence linking funds to the purchase of properties, that can be sufficient to justify a CPL where it is sufficient to put an onus of explanation on the respondents: *iTrade Finance Holdings Inc. v. Ramsackal*, 2009 CanLII 9366 (ONSC) at para. 11.

[53] For the reasons set out below, I am satisfied that a Norwich order should be granted. The Plaintiff seeks this relief to preserve evidence, and the relief is appropriate in the circumstances of what appears to be fraudulent conduct here.

[54] A Norwich order is equitable in nature and provides for discovery of third parties who, through no fault of their own, have been, in the words of Pattillo, J., "mixed up in the tortious acts of others and who may have information concerning those tortious acts. It is an intrusive, extraordinary remedy which must be exercised with caution." (See *Bluemoon Capital Ltd. v. Ceridian HCM Holding Inc.*, 2022 ONSC 301 at para. 28, affirmed 2022 ONCA 868). As observed by the Court of Appeal in the same case, "the purpose of a Norwich order is to facilitate access to justice by victims of suspected or unknown wrongdoers" (para. 13).

[55] Norwich relief is appropriate to obtain the identity of a wrongdoer, to evaluate whether a cause of action exists and/or to plead a known cause of action, to trace assets and to preserve evidence or property: *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575 [*Leahy*], para 106, aff'd *Alberta Treasury Branches v. Ghermezian*, 2002 ABCA 101, leave to appeal to SCC ref'd.

[56] Jurisdiction to issue a Norwich order is found in section 96 of the *Courts of Justice Act*.

[57] In considering whether to grant a Norwich order, the Court should make an overarching assessment of whether it would be in the interests of justice to grant the extraordinary remedy requested, properly informed by the Court's consideration of the bona fides and strength of the moving parties case, as well as its need for the information. The Court should consider whether the moving party has:

a. provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;

b. established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

c. established whether the third party from whom the information is sought is the only practicable source of the information;

d. whether third-party can be indemnified for costs which it may be exposed because of the required disclosure; and

e. whether the interests of justice favour the obtaining of the disclosure sought.

(See *GEA Group AG v. Ventra Group Co.*, 2009 96 O.R. (3d) 481 at paras. 62 and 91; *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780, 2007 CanLII 14629 at para. 40; and *Bluemoon v. Ceridian*, 2022 ONSC 301 at paras. 28-31, affirmed 2022 ONCA 868).

[58] The claims asserted here are *bona fide* and reasonable. They are not frivolous or vexatious. That is sufficient. (See *Isofoton*, supra.)

[59] The parties from whom the information and records are sought are "more than mere witnesses" and the evidence amply connects them to the acts complained of. The entities against which this relief is sought here are the only practicable sources of that information since they alone have possession or control of the materials.

[60] The costs which the responding parties will incur are to be covered by the Plaintiff, which has undertaken to pay the costs of compliance.

[61] I am satisfied that the interests of justice in this case favour the preservation of the information sought. The interests of justice include in this case an evaluation of the claims asserted on the basis of a full record.

[62] The potential prejudice arising from the granting of the relief sought is that to be suffered by the alleged wrongdoers from the disclosure of confidential information. The right to confidentiality of banking records is not absolute, but rather is qualified: *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575 at paras. 161-163.

[63] Here, the banking records are clearly required to understand and discover the extent of the fraud and to attempt to recover funds and identify those involved.

[64] The Norwich order is granted.

[65] Anton Piller relief is exceptional. It should be granted only on clear and convincing evidence. The moving party must establish:

a. a strong *prima facie* case;

b. the damage, potential or actual, must be very serious for the plaintiff;

c. there must be convincing evidence that the defendant has in his or her possession incriminating documents or objects; and

d. there is a real possibility that the material may be destroyed or secreted before the parties may put their respective rights before the court.

See *1805753 Ontario Inc. v Feldman*, 2020 ONSC 5601.

[66] The first two factors are satisfied by the evidence as set out above. Preservation of the contents of the relevant email accounts are critical. Gendelman clearly changed legitimate supplier information in the software of the Plaintiff in connection with the cover-up of the EFTs. At least two email addresses appear to be frequently used and associated with her two companies and these activities (bestshowa5@gmail.com and c12069253@gmail.com).

[67] There is also evidence of recently opened documents on Gendelman's work computer relating to the subject property she owns. In addition, the corporate records and correspondence (including email text messages etc. with other parties involved with the relevant properties, including but not limited to mortgagees), is clearly relevant and likely exists.

[68] In all the circumstances, I am also satisfied that the fourth element has been satisfied here and that there is a real possibility that the material may be destroyed or hidden.

[69] The proposed independent supervising solicitor has provided an affidavit and is experienced in the execution of such orders.

[70] For all of the above reasons, the relief sought was granted.

[71] This matter is returnable before me in one week, and well within the 10 day period, on **April 11, 2023 at 12 PM noon via Zoom**.

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Osborne J.

Date: April 5, 2023