CITATION: Nedaneg Financial Corporation v Talebzadeh, 2023 ONSC 5209
COURT FILE NO.: CV-22-00684974
MOTION HEARD: 20230802, 20230828

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nedaneg Financial Corporation, Plaintiff

AND:

Pedram Talebzadeh, Arman Talebzadeh, Behnaz Aliabadi, Forest Hill Real Estate Inc., Diamond Realty Developers Inc., Mehdi Gol Mohammadi Darian, Kamran Mahdi, Iraj Mahdi, Canadian Imperial Bank of Commerce, Winona Park Towns Ltd., Moshe Eichorn, Winona Park Developments Limited and 2819152 Ontario Corporation, Defendants

BEFORE: Associate Justice L. La Horey

COUNSEL: Stefanija Savic and Behrouz Amouzgar, for the moving party plaintiff

Christopher J. Somerville and Adam Casey, for responding parties defendants Pedram Talebzadeh, Arman Talebzadeh, Behnaz Aliabadi, Diamond Realty Developers Inc. and Winona Park Towns Ltd.

HEARD: August 2 and 28, 2023

REASONS FOR DECISION

NATURE OF THE MOTION AND OVERVIEW

[1] The plaintiff, Nedaneg Financial Corporation ("Nedaneg" or the plaintiff), brings this motion for certificates of pending litigation ("CPL") over four properties: (i) 464 Winona Drive, North York ("464 Winona"), (ii) 466-468 Winona Drive, North York, Ontario ("468 Winona") (collectively the "Winona Properties"); (iii) 171 Cedric Ave, York, Ontario (the "Cedric Property"); and, (iv) 139 Denlow Blvd, North York (the "Denlow Property"). All four properties are collectively referred to as the "Properties". In the alternative, the plaintiff seeks a preservation order in respect of the Properties.

[2] The plaintiff obtained a judgment against the defendant Pedram Talebzadeh ("Pedram")[1] that has been partially satisfied. The plaintiff then commenced this new proceeding against Pedram, his son, Arman Talebzadeh ("Arman"), his wife Behnaz Aliabadi ("Behnaz"), and two development companies Winona Park Towns Ltd. ("Winona Towns") and Diamond

[1]I am referring to individual defendants by their first names given that there are common surnames.

Realty Developers Inc. ("Diamond Developers") (collectively the "Defendants"). The plaintiff asserts that Pedram is the beneficial owners of the Properties. The plaintiff also claims that mortgages over the Properties in favour of the defendants Mehdi Gold Mohammadi Darian, Kamran Mahdi, Iraj Mahdi, Canadian Imperial Bank of Commerce, Moshe Eichorn, Winona Park Developments Limited, and 2819152 Ontario Corporation (collectively the "Mortgagees") are fraudulent conveyances.

[3] As set out below, the plaintiff is no longer pursuing its claims against the Mortgagees.

[4] For the reasons that follow, the plaintiff's motion is dismissed.

BACKGROUND

Judgment against Pedram and Sale of Grangemill Property

[5] Pedram granted a mortgage over property owned by him known municipally as 8 Grangemill Crescent, Toronto (the "Grangemill Property") to the plaintiff and Vault Capital Inc. Pedram defaulted on this mortgage in early 2019.

[6] The plaintiff and Vault Capital Inc.[2] commenced mortgage proceedings in or about May 2019 (Court File No. CV-19-0620555) and obtained judgment on consent against Pedram on September 12, 2019 in the sum of $3,707,455.90 plus costs of $8,000 together with possession of the Grangemill Property (the "Judgment"). A writ of seizure and sale was issued on November 14, 2019.

[7] The Grangemill Property was sold pursuant to power of sale proceedings on March 19, 2020. The plaintiff alleges that it realized the sum of $3,415,653.42 on the sale, an amount insufficient to pay off the Judgment. In his counterclaim in this action, Pedram alleges that this was an improvident sale.

[8] Pedram's lawyer wrote to plaintiff's counsel in December 2021 requesting a final statement of account for the sale of the Grangemill Property and advising that Pedram's credit bureau report incorrectly reflected the original Judgment amount.

[9] Pedram was aware of the sale of the Grangemill Property around the time of the sale because of his access to MLS. However, he was not provided with an accounting until January 2022.

Alleged domestic agreement between Pedram and Behnaz

[10] Pedram's evidence is that he put all of his personal capital of about $1,000,000 into the development of the Grangemill Property project against the wishes of his wife Behnaz and lost virtually all of this money. His evidence is that as a result, Behnaz would not agree to Pedram owning any property or making any financial decisions with respect to their

[2] Vault Capital Inc. later assigned its interest in the Judgment to the plaintiff.

businesses. He says that they entered into a verbal agreement that he would act as the general contractor for the family's real estate businesses but that Behnaz would own all future real estate businesses and that Behnaz would make all financial and ownership decisions. Under this agreement Pedram receives money for his living expenses from his wife and is entitled to the use of a luxury office, luxury vehicle and positions at the Development Corporations.

The Properties

Cedric Property

[11] Arman is the registered owner of the Cedric Property. He purchased it on January 18, 2001, from arms' length parties for $970,000. The existing home was demolished and a new home was constructed on the property.

[12] Arman has filed an affidavit on this motion and was cross-examined. His evidence is that he became interested in purchasing a luxury property with a land price of about $1,000,000 and spoke to his father about retaining Pedram Pearl Palace Inc. to design and build a home. Pedram is an officer and director of this company but says that he transferred ownership to Behnaz in October 2018 according to their domestic agreement. Arman deposes that construction was complete in March 2022 and that he moved into the Cedric Property temporarily with a view to selling it and gifting the profit to his mother to assist her in purchasing the Denlow Property (described below). The newly constructed home was substantially damaged in an explosion that occurred in December 2022.

[13] Arman granted a number of mortgages over the Cedric Property. Pedram is a guarantor of these mortgages. There is no dispute that at least one of the mortgages on the Cedric Property is in default and a construction lien has been registered against title to the Cedric Property. Arman denies that he holds title for the benefit of Pedram or anyone else.

[14] The plaintiff registered two sequential cautions against the Cedric Property. The Defendants assert that these registrations were improper.

Denlow Property

[15] Behnaz purchased the Denlow Property on May 19, 2022, for the sum of $4,700,000 from Farah Gol Mohammadi Dariani. Behnaz and Pedram live in the residence on the Denlow Property. Behnaz granted a first mortgage in favour of CIBC in the sum of $3,025,000, a second mortgage in favour of Iraj Mahdi in the sum of $800,000 (Arman, Pedram and Diamond Developers are guarantors) and a third mortgage in favour of Medhi Gol Mohammadi Darian (Pedram and Diamond Developers are guarantors) in the sum of $1,000,000 (this mortgage is a cross-collateral mortgage on the Cedric Property). The face value of the mortgages amounts to $4,825,000.

[16] The plaintiff registered two successive cautions against the Denlow Property which the Defendants contend were improper.

Winona Properties

[17] The Winona Properties are the site of a 16 unit luxury condominium townhouse complex project that is being constructed in west Toronto. The registered owner of the Winona Properties is Winona Towns which purchased the properties on March 2, 2021 for a combined total purchase price of $5,700,000. Winona Towns was incorporated on August 19, 2020. The corporate profile report indicates that Arman is an officer and Pedram is a director. Arman's evidence is that Winona Towns is owned by Diamond Developers and that Behnaz is the sole owner of Diamond Developers. The corporate profile report indicates that Diamond Developers was incorporated on October 24, 2019 and that Pedram and Behnaz are the directors and officers.

[18] There are three mortgages registered against the Winona Properties with a total face amount of $10,300,000. At the hearing it was agreed that at least one of the mortgages is in default.

[19] Two purchasers of townhouse units are suing for the return of their deposits in the total sum of $630,000. They have registered CPLs against the Winona Properties. A construction lien has been registered in the sum of $254,609.75. There is no evidence that any of these parties are not arms-length to the Defendants.

[20] Diamond Developers registered a construction lien on the Winona Property in the sum of $6,780,000. Pedram was the agent of the lien claimant authorizing the lien. There is a further lien registered by Diamond Demolish & Excavation in the sum of $24,860. Although the name suggests it is related to Diamond Developers there is no evidence that it is not arms-length.

[21] The plaintiff registered three sequential sets of cautions against the Winona Properties. The Defendants argue that all of these cautions were improper. As noted below, the last two cautions were deleted from title by the Land Registrar as improper.

This action

[22] This action was commenced on August 3, 2022. In this action the plaintiff claims, *inter alia,*:

a. leave to register CPLs against the Properties;

b. a *Mareva* injunction restraining the defendants from dealing with the Properties, and any bank accounts that are owned by Pedram, Arman and Behnaz or held in trust for Pedram;

c. in the alternative to a *Mareva* injunction, a preservation order pursuant to Rule 45 of the Rules of Civil Procedure regarding the Properties;

d. an order that mortgages over the Properties are void as fraudulent conveyances, or in the alternative do not take priority over the Judgment; and,

e. declarations that the Pedram is the beneficial owner of the Properties.

[23] The day prior to the commencement of the action, Pedram's lawyer sent a demand letter to plaintiff's counsel, *inter alia*, claiming that the sale of the Grangemill Property was improvident such that the sale ought to have generated sufficient monies to pay the Grangemill mortgage in full. It is also alleged that the delay in producing a statement of account in relation to the sale of the Grangemill Property is in breach of the mortgagee's duty to carry out the sale in good faith and accordingly, Pedram is not liable for accruing interest on any deficiency.

[24] The Defendants have defended the action. Pedram has asserted a counterclaim for improvident sale. I am advised that Pedram has also commenced a separate action against the lenders for improvident sale of the Grangemill Property.

[25] This motion was scheduled for January 13, 2023. The Mortgagees were initially respondents on the motion, as the plaintiff was seeking priority over the Mortgagees. The motion was adjourned for the reasons set out in my January 13, 2023 endorsement.

[26] Before the return of the motion, the plaintiff settled the action as against some of the Mortgagees and discontinued the action against the other Mortgagees. At a case conference on May 25, 2023, the plaintiff advised of its intention to proceed with the action and CPL motion only against the Defendants.

LAW AND ANALYSIS

Preliminary Issue

[27] Behnaz is the registered owner of the Denlow Property. She swore an affidavit in response to this motion on November 4, 2022. In that affidavit she deposes that she is the sole owner of the Denlow Property and pays for all carrying costs associated with maintaining and living there. She denies that Pedram is the beneficial owner of the Denlow Property. She also deposes that she is the owner of Diamond Developers and Pedram has no ownership interest in the company although he is a director, officer and employee of Diamond Developers. She further deposes that Diamond Developers is the sole shareholder of Winona Towns and therefore she is the sole owner of Winona Towns, the registered owner of the Winona Properties.

[28] Behnaz was scheduled to be cross-examined on her affidavit on November 29, 2022. On November 25, 2022, the Defendants' then counsel wrote to plaintiff's counsel to say that Behnaz would not be available to be cross-examined because of her anxiety. Counsel delivered an undated doctor's note from a family doctor that counsel advised his client obtained the week of November 14, 2022. The letter from the family doctor addressed to "To whom it may concern" states:

> This letter, as requested by patient, is to inform you that the above-mentioned patient has a history of Anxiety disorder and it is escalated by the anxiety provoking situations. Therefore, it is strongly advised to avoid these situations.

[29] The Defendants requested that the plaintiff provide questions in writing for Behnaz as it had done for CIBC's representative. The plaintiff refused.

[30] The plaintiff asks that I give Behnaz's affidavit little weight in these circumstances.

[31] In *Ozerdinc Family Trust v Gowling Lafleur Henderson LLP*, Master MacLeod (as he then was) considered what would be required for a defendant to be excused from oral discoveries stating:[3]

> In *Ferrara v. Roman Catholic Episcopal Corp. for the Diocese of Toronto in Canada* this court held that it was insufficient that discovery was upsetting or stressful. The court ruled that, in the absence of discovery abuse, the onus was on the party resisting oral discovery to establish by persuasive medical evidence the party was unable to attend for discovery. …
>
> It is hard to quarrel with the need for cogent medical evidence. Where such evidence is persuasive, "unable to attend" should be interpreted to include "unable to attend without risk of serious harm". …
>
> I adopt the view of Master Muir in *Mohanadh v. Thillainathan* where he concludes that the court may excuse a party from oral discovery where the medical evidence clearly shows a real potential that the party to be examined will suffer harm as a result of the procedure and where there is a reasonable alternative available..

[32] This case is useful in determining what kind of evidence should be tendered to excuse a witness from being orally cross-examined.

[33] In my view, the short undated doctor's note that does not speak specifically to the ability of Behnaz to testify is not sufficient to exempt her from being orally cross-examined on her affidavit, particularly in the context where Behnaz was well enough to provide an affidavit on the motion a few weeks prior. The Defendants have not provided persuasive medical evidence on this point. Accordingly, I agree that Behnaz's affidavit should be given little weight. I have not relied on her affidavit in reaching my decision on the motion.

[34] Indeed, at the hearing counsel for the Defendants said that he did not disagree that little weight should be given to Behnaz's affidavit and the Defendants were not relying upon that affidavit.

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[3] 2015 ONSC 2366 at paras 24 - 26

Whether CPLs Should be Granted

Test for CPL

[35] Section 103 of the *Courts of Justice Act*[4] authorizes the registration of a CPL. It provides:

> The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection.

[36] The test for a CPL is well known. Master Glustein (as he then was) summarized the applicable principles in *Perruzza v Spatone*[5] as follows:

(i) The test on a motion for leave to issue a CPL made on notice to the defendants is the same as the test on a motion to discharge a CPL (*Homebuilder Inc. v. Man-Sonic Industries Inc.*, 1987 CarswellOnt 499 (S.C. - Mast.) ("*Homebuilder*") at para. 1);

(ii) The threshold in respect of the "interest in land" issue in a motion respecting a CPL (as that factor is set out at section 103(6) of the *Courts of Justice Act, R.S.O. 1990, c. C.43*) is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed (*1152939 Ontario Ltd. v. 2055835 Ontario Ltd.*, 2007 CarswellOnt 756 (S.C.J.), as per van Rensburg J., citing *Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300 (Gen. Div. - Comm. List) at para. 62);

(iii) The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking the CPL has "a reasonable claim to the interest in the land claimed" (*G.P.I. Greenfield Pioneer Inc. v. Moore*, 2002 CarswellOnt 219 (C.A.) at para. 20);

(iv) Factors the court can consider on a motion to discharge a CPL include (i) whether the plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the intent of the parties in acquiring the land, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty in calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of a willing purchaser, and (viii) the harm to each party if the CPL is or is not removed with or without security (*572383 Ontario Inc. v. Dhunna*, 1987 CarswellOnt 551 (S.C. - Mast.) at paras. 10-18); and,

(v) The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated (*931473 Ontario Ltd. v. Coldwell Banker Canada Inc.*, 1991

[4]RSO 1990, c C.43
[5] 2010 ONSC 841 (Master) at para 20

CarswellOnt 460 (Gen. Div.); *Clock Investments Ltd. v. Hardwood Estates Ltd.*, 1977 CarswellOnt 1026 (Div. Ct.) at para. 9).

Threshold Issue

[37] Courts have held that an action to set aside a fraudulent conveyance is an action in which an interest in land is brought into question.[6]

[38] In *Fernandes v Khalid,* Justice Doi noted that there are two lines of authorities that have developed in relation to the test for a CPL where a fraudulent conveyance is alleged stating:[7]

> 34 A CPL may issue in an action to set aside a fraudulent conveyance, even if the plaintiff has no interest in the land and is not yet a judgment creditor. The standard to meet for obtaining a CPL in an action to set aside a fraudulent conveyance is a *prima facie* case of fraud: *Thomsen v. O'Callaghan*, 2019 ONSC 6947 (Master) at para 12; *Financialinx* at para 28; *Nordic Insurance Co. of Canada v. Harkness*, [2001] O.J. No 1123 (SCJ) at para 17; *Vettese v. Fleming*, [1992] O.J. No 1013 (Gen Div).
>
> 35 A separate line of cases seems to require a plaintiff to meet a higher threshold in order to obtain a CPL in a fraudulent conveyance action, where the plaintiff has not yet obtained judgment for damages and claims no interest in the land in the main action. This jurisprudence adopts the following test for obtaining a CPL: (i) the claimant must satisfy the court that there is a high probability that judgment will be successfully recovered in the main action; (ii) the claimant must introduce evidence to show that the transfer was made with the intent to defeat or delay creditors, with this burden being lightened by evidence that the transfer was for less than fair market value; and (iii) the claimant must demonstrate that the balance of convenience favours issuing a CPL in the circumstances of the particular case: *Grefford v. Fielding* (2004), 70 OR (3d) 371 (SCJ) at para 26; *Botiuk v. Campbell*, 2015 ONSC 694 (Div Ct) at para 18; *Jodi L. Feldman Professional Corporation v. Foulidis*, 2018 CanLII 121633 (ONSC) at para 11.

[39] Whether the plaintiff must establish a "prima facie case of fraud" or a "high probability" that the plaintiff will be successful, the court must consider the balance of convenience and equities in exercising its discretion in the second stage of the CPL test.

[40] The plaintiff submits that Pedram has an interest in the Properties and that he has intentionally taken steps to defeat, hinder and delay the plaintiff as creditor. It argues that there are multiple badges of fraud and that it has satisfied the threshold question.

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[6] *Fernandes v Khalid*, 2021 ONSC 190 at para 33
[7] *Fernandes* at para 34 - 35

[41] The Defendants contend that there is no triable issue in respect of a fraudulent conveyance. They submit that there was no conveyance of real property that can be the subject of a CPL motion which requires an interest in land to be issue. The Defendants submit that alleged fraudulent conveyances of personal property, such as funds for mortgage payments or shares in a corporation holding title to property, is not sufficient for a court to grant a CPL. In such a case, they submit that the creditor's recourse is to a *Mareva* injunction. In any event, they submit that there is no triable issue with respect to the alleged fraud.

[42] Because of the conclusion that I have come to regarding the equities, I do not need to decide whether the threshold has been crossed.

Consideration of the Equities and Balance of Convenience

[43] On the issue of the balance of convenience, the plaintiff argues in its factum:

> On a balance of convenience, more serious harm would follow if the CPL were not granted, rather than if the CPL were granted. The Plaintiff is a corporation that possesses a triable issue regarding Pedram's interest in the Properties, and the Plaintiff would be deprived of its ability to seek relief if Pedram were permitted to deal with the Properties as he desires, including disposing of any one of the Properties, while the litigation is pending.

[44] The plaintiff alleges that the Defendants have been dissipating their assets since the motion was first brought, including by registering a $6,780,000 construction lien against the Winona Properties. There is nothing before me to suggest that the lien is in any way improper. In any event, the plaintiff has the ability to bring a *Mareva* injunction. As Justice Doi stated in *Bains v Khatri*:

> Should the moving Plaintiffs have concerns about the dissipation of assets, it is open for them to seek relief by way of a *Mareva* order. A certificate of pending litigation is intended to protect an interest in land in situations where other remedies would be ineffective.[8]

[45] Courts have held that a CPL effectively acts like an injunction in that it is a cloud on title and deters potential purchasers and mortgagees from dealing with the land in question.[9]

[46] The plaintiff argues that as the Properties are already encumbered, the CPLs sought by it would not cause further harm to the Defendants. However, given that there is no dispute that at least one mortgage on each of the Cedric and Winona Properties is in default, I accept the Defendants' argument that the CPLs if granted, would harm the Defendants in their efforts to refinance.

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[8] 2019 ONSC 1401 at para 37. See also *2254069 Ontario Inc. v. Kim*, 2017 ONSC 5003 at para 38

[9] *Middlesex Centre (Municipality) v McRobert*, 2017 ONSC 3880 at para 12; *Suntower Developments Limited v Studios of America Corp*., 2023 ONSC 2703 at para 57

[47] Pedram testified that the registration of the cautions on the Winona Properties has prevented Winona Towns from securing necessary construction financing for the condominium development project and delayed the project. A CPL will likewise have a detrimental effect on the project.

[48] Arman deposed that a CPL would have a detrimental effect on his ability to sell the Cedric Property. Since his evidence was taken, the house on the Cedric Property has been substantially destroyed. At least one mortgage on the Cedric Property is in default and a construction lien has been registered. I accept that a CPL will have a detrimental effect on Arman's ability to refinance, rebuild and/or sell the Cedric Property. Given that there is a million dollar mortgage that is secured by both the Cedric Property and the Denlow Property, the Denlow Property is negatively affected as well.

[49] The Defendants argue that the registration of the cautions against the Properties is an abuse of process and was meant to pressure Pedram's family into paying an inflated debt to the plaintiff. The issue of the validity of the first and second set of cautions against the Properties was not fully briefed and I make no comment on the propriety of those cautions. However, it is not disputed that the Land Registry Office ordered the deletion of two cautions registered against title to the Winona Properties on October 20, 2022 pursuant to subsection 158(2) of the *Land Titles Act*[10] as "invalid" documents. For the purpose of this motion only, I accept that the plaintiff's registration of these two cautions was improper. The plaintiff's wrongful action in this regard is a factor that weighs against it being granted equitable relief in the form of CPLs.

[50] The plaintiff argues that its undertaking as to damages weighs in favour of granting the CPLs. The plaintiff was incorporated in 2015 and is in the business of providing private mortgages. The plaintiff has provided a list of its mortgages as at December 12, 2022, and their principal value which amounts to $4,570,000. The Defendants contend that this will not be sufficient to cover potential losses, particularly if the Defendants cannot obtain sufficient construction financing required to complete the development of the Winona Properties. The Winona Properties were appraised as of October 2020 at $9,800,000 in their pre-development state and $23,530,00 based on a complete sell-out of the proposed townhomes.

[51] The Defendant further notes that the plaintiff refused to provide copies of its financial statements and tax returns. I accept that the plaintiff is not a shell corporation but it is unclear as to whether the plaintiff has sufficient assets to cover the full award of a potential damages claim in the event that the plaintiff is ultimately unsuccessful, particularly in respect of the Winona Properties. Therefore the plaintiff's undertaking as to damages is not a significant factor in favour of the plaintiff on this motion.

[52] The plaintiff submits that the Defendants do not come to court with clean hands in that Behnaz refused to submit to oral cross-examination. As noted above, I accept the plaintiff's

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[10] RSO 1990, c. L.5

argument that the Defendants did not provide sufficient medical evidence to explain Behnaz's refusal to be cross-examined orally. I have not relied on Behnaz's affidavit for this reason. However, I do not accept the plaintiff's proposition that this means that the Defendants do not come to court with clean hands.

[53] There is no dispute that the properties are not unique. The plaintiff does not have a specific interest in the Properties. Its only interest is recovering the balance of its money judgment. The plaintiff's damages are easy to quantify and damages are a satisfactory remedy. These factors militate against the granting of CPLs.

[54] In *2254069 Ontario Inc. v Kim*, Justice Peterson held that whether the moving party has prosecuted the proceeding with diligence is a relevant factor in the exercise of the court's discretion to issue or refuse a CPL.[11] Delay in enforcing a judgment founding a fraudulent conveyance action is analogous and the plaintiff's delay in enforcing the balance of its outstanding Judgment is relevant to the exercise of my discretion.

[55] In the case at bar, the plaintiff obtained its Judgment in September 2019, filed a writ of possession shortly thereafter and sold the Grangemill Property under power of sale in March 2020. The plaintiff did not take any steps to arrange a judgment debtor examination of Pedram until late June 2022. No other steps were taken to collect on the outstanding balance of the Judgment until this action was commenced on August 3, 2022.

[56] The plaintiff also did not provide a statement of account in respect of the power of sale and an up-to-date accounting of amounts owing under the Judgment until January 2022, almost two years after the closing of the sale and only after prompting from Pedram's counsel because the whole amount of the Judgment was showing on Pedram's credit reports. Pedram testified that in his experience, if the lender is intending on pursuing the balance of the debt after power of sale proceedings, it will send an accounting. Because the lender did not do this in this case, he thought that the lender may have written off the balance of the debt.

[57] During the time the plaintiff did not pursue collection on the balance of the Judgment, interest was accruing at a rate of 11.99% such that the outstanding balance now is significantly higher than in March 2020.

[58] In a late filed affidavit,[12] Mahmood Ghiam, a director of the plaintiff, deposed that in October 2019 he underwent open heart surgery and was advised to avoid all stress. He also deposed that because of his health status, he was in a high-risk group for severe COVID-

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[11] *2254069 Ontario Inc.* at para 31. Delay in prosecuting the action is specifically set out as a ground to discharge a CPL in s. 103(6)(a)(iii) of the *Courts of Justice Act*.

[12] The affidavit was sworn on June 15, 2023, well after the completion of cross-examinations and well after the motion was originally scheduled to be argued on January 13, 2023. While this affidavit addressed in part events subsequent to the January 13, 2023 motion date (in respect of encumbrances on the Properties), Mr. Ghiam's evidence of his health and the alleged impact on the plaintiff's ability to take steps to collect the shortfall on the Judgment could have been raised much earlier. Although the plaintiff did not seek leave to introduce this evidence in advance of the hearing, the Defendants did not object to my receiving this evidence.

19. However, Mr. Ghiam's health issues did not preclude the plaintiff proceeding with its power of sale proceedings for the Grangemill Property. Mr. Ghiam's personal attendance was not required for counsel to provide a statement of account to Pedram, arrange for Pedram to be examined in aid of execution or take other steps to collect on the Judgment. The plaintiff's delay is a factor against the granting of CPLs.

Conclusion on the equities

[59] Having considered and balanced the equities, I have concluded that it is just and equitable to refuse the plaintiff's motion for CPLs.

Whether a preservation order should be granted

[60] The plaintiff also moves for a preservation order under Rule 45.01 which provides:

> Interim Order for Preservation or Sale
>
> 45.01 (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.

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[61] The plaintiff contends that in determining whether or not to grant a preservation order, the court should apply the three-part test set out in *Taribo Holdings Ltd. v Storage Access Technologies Inc.*: (1) the asset sought to be preserved constitutes the very subject matter of the dispute; (2) there is a serious issue to be tried regarding the plaintiff's claim to that asset; and (3) the balance of convenience favours granting the relief sought by the applicant or moving party.[13]

[62] Justice B.A. Conway recently considered the applicability of a preservation order in *Shanghai Lianyin Investment Co. v. Lu.*[14] In that case, the plaintiff brought an action seeking judgment recognizing an arbitral award. In the action, the plaintiff also sought declarations that real properties registered in the name of the debtor's wife were beneficially owned by the husband or held by the wife in trust for the husband and thus were available to satisfy the arbitral award. The plaintiff sought a preservation order against the properties that were registered in the wife's name.

[63] Conway J. refused the plaintiff's motion for a preservation order. She held that the plaintiff was in essence seeking a *Mareva* injunction stating:[15]

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[13] *Taribo Holdings Ltd., v Storage Access Technologies Inc*., [2002] OJ No. 3886 (S.C.) at para 5. In *BMW Canada Inc. v Autoport Ltd*., 2021 ONCA 42 the Court of Appeal discusses the Rule 45 and, in particular, when the *Taribo* test is appropriate.
[14] *Shanghai Lianyin Investment Co. v. Lu*, 2023 ONSC 399
[15] *Shanghai* at para 9

> I agree that Rule 45.01 is not the appropriate Rule for several reasons. First, what [the plaintiff] is really seeking on this motion is an order to prevent [the debtor's wife] from dissipating her assets pending this court's determination of whether she holds the Properties in trust for [the debtor]. The case law supports the use of a *Mareva* injunction, not a preservation order, as the means of restraining defendants from dissipating their assets before judgment: *Hadaro v. Patten*, 2019 ONSC 4574, at para.14; *Campbell v. Campbell*, 2018 ONSC 6336, at para. 64; *Sunlodges Ltd. v. The United Republic of Tanzania*, 2020 ONSC 8201. The higher test applicable to a *Mareva* order recognizes that execution before judgment constitutes a serious interference with the defendant's property rights. That is precisely what [the plaintiff] wishes to do here. It should be required to meet the higher test to justify interference with [the debtor's wife's] property rights prior to judgment.

[64] As noted above, although the plaintiff seeks a *Mareva* injunction in its claim, it has not brought a motion for a *Mareva* injunction. As an associate judge, I have no jurisdiction to grant a *Mareva* injunction.

[65] In *Shanghai*, Justice Conway also held that Rule 45 is to be used for limited purposes such as preserving evidence prior to trial or where the plaintiff asserts a legal right to the asset it is pursuing in the litigation.[16] She noted that courts distinguish between asserting a legal right to a specific assets and looking to those assets as a means of satisfying a judgment.

[66] As in *Shanghai*, the plaintiff has no specific interest in the Properties, rather the plaintiff is looking to the assets generally to satisfy a judgment.

[67] Like Justice Conway in *Shanghai*, I conclude that Rule 45.01 is not the appropriate rule.

[68] If I am wrong, and Rule 45.01 is the appropriate rule in this case, nonetheless I would not exercise my discretion to grant an interim preservation order. For the reasons set out above in my discussion of the equities under the CPL test, I find that the balance of convenience favours the Defendants. In particular, the properties are not unique and the plaintiff's claim is for money, i.e. satisfaction of a money judgment.[17]

DISPOSITON

[69] The plaintiff's motion is dismissed.

[70] The parties are encouraged to resolve the issue of costs. The parties uploaded cost outlines prior to the hearing. At the conclusion of the hearing, I heard brief cost submissions. However, because both sides took significantly longer to argue this motion than their allotted time, there was only a limited amount of time for costs argument at the end of the second day of argument. I am therefore providing the parties the opportunity to deliver brief written submissions of not more than three double spaced pages (12 pt font) each.

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[16] *Shanghai* at para 10 – 11
[17] See *BMW Canada Inc.* at para 43

The defendants shall serve any submissions by October 5, 2023. The plaintiff shall serve any submissions by October 19, 2023. The cost submissions shall be filed on the portal, uploaded to CaseLines and sent by email to my Assistant Trial Coordinator.

L. La Horey, A.J.

Date: September 14, 2023