IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wistom Capital FP LP v. Fountana Plaza LP,*
2023 BCSC 2018

Date: 20231019
Docket: S229900
Registry: Vancouver

Between:

Wistom Capital FP Limited Partnership

Plaintiff

And

Fountana Plaza Limited Partnership, Fountana Plaza GP Corp., Mason Link Development Ltd., 1055082 B.C. Ltd., and Chia-Hwei Lin also known as Jackey Lin

Defendants

Before: The Honourable Justice McDonald

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	W. Stransky A. Dhawan
Counsel for the Defendants:	J. Wagner B. Wu
Place and Date of Trial/Hearing:	Vancouver, B.C. October 16 and 18, 2023
Place and Date of Judgment:	Vancouver, B.C. October 19, 2023

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Introduction

[1] **THE COURT:** The plaintiff seeks a *Mareva* injunction preventing the defendants from dissipating their assets pending the hearing of the plaintiff's summary trial application. The summary trial application concerning the plaintiff's claim is set for hearing on November 6, 2023.

Background

[2] The plaintiff and the defendant, Fountana Plaza LP ("Fountana LP"), are limited partnerships established in British Columbia. The corporate defendants are corporations incorporated under the laws of British Columbia. The defendant Mr. Lin is a director of each of the corporate defendants.

[3] The plaintiff, Fountana Corp., and the numbered company are all parties to the limited partnership agreement of Fountana LP dated November 30, 2018 (the “Agreement”). Under the Agreement, Fountana Corp. is the general partner, while the plaintiff and the numbered company are limited partners.

[4] The legal title to property is located at 5820 Marine Drive, Burnaby, British Columbia (the “Property”). The Property is held by the numbered company as bare trustee for Fountana LP.

[5] Mr. Lin and the defendant, Mason Link, are guarantors of Fountana LP's obligations to the plaintiff.

[6] In addition to the Agreement, Fountana LP and the plaintiff are parties to an advisory services agreement (the “Service Agreement”), dated November 30, 2018. The Service Agreement provided for certain payments to the plaintiff in exchange for advisory services.

[7] The purpose of the Agreement and the Fountana LP was to acquire, build, and sell residential and commercial strata units on the property. A ground-breaking ceremony for the planned project on the Property took place in mid-June 2019.

However, the development of the project has encountered challenges, including due to the COVID-19 pandemic and the market downturn.

[8] Mr. Lin, in his affidavit #1 dated August 8, 2023, describes the defendants' efforts to search for further funding to inject into the project. Mr. Lin describes that the parties continued working together to develop the project on the property. In an effort to continue their plans, he states the parties agreed to amend the Agreement as recently as August 27, 2020.

[9] The agreement required the plaintiff to subscribe for a certain number of units in Fountana LP at a certain price. Ultimately in 2019, the plaintiff paid the subscription price of approximately $15 million for the units.

[10] The Agreement provided the plaintiff with the ability to redeem certain units in the Fountana LP at certain points in time. The plaintiff exercised its right to redeem units but alleges it was not paid as required by the Agreement.

[11] The plaintiff alleges that there has been a default under the Agreement. The plaintiff made formal demand for payment on October 6, 2020.

[12] On November 13, 2020, the plaintiff commenced an arbitration pursuant to the Agreement. On February 1, 2021, the plaintiff commenced an action in BC Supreme Court against the defendants under action no. S210989, claiming sums owing under the Agreement (the “First Action”).

[13] On August 10, 2021, the parties negotiated a settlement agreement to the arbitration proceeding and the First Action (the “Settlement Agreement”). Following the settlement, the arbitration was discontinued on November 2, 2021. Mr. Lin concedes that the settlement payments due to the plaintiff under the Settlement Agreement were not paid in accordance with the schedule.

[14] On February 28, 2022, the plaintiff filed a notice of application in the First Action seeking a summary trial to enforce the Settlement Agreement.

[15] The parties engaged in further negotiations which resulted in the parties signing a "memorandum of understanding" dated March 11, 2022 (the “MOU”). The defendants refer to this as another settlement agreement, and their counsel submits that it replaces all other agreements between parties.

[16] Mr. Lin states in his affidavit that the MOU was meant to resolve all disputes under the Settlement Agreement, as well as another investment dispute involving the parties over a property located at 2302 and 2306 King George Boulevard in Surrey called the "Voyager Investment."

[17] Importantly, Mr. Lin alleges that the parties understood that the defendants' obligations under the MOU were "subject to Fountana parties’ ability to raise funds while continuing operations and ongoing efforts to develop the project." In other words, the MOU only required the defendants to use their best efforts, and their obligations were contingent on raising funds on the accepted terms.

[18] The defendants say that they have applied their best efforts, and despite doing so, they could not raise the funds, which has hampered their ability to make the payments due under the MOU. However, the defendants submit that their failure to fully perform is not a breach. In fact, the defendants submit it is the plaintiff that has breached the MOU when it failed to withdraw its claim in action no. S210989 upon receiving a second payment of $5 million on June 14, 2022.

[19] The notice of discontinuance of action no. S210989 was not filed until December 8, 2022. On December 13, 2022, the plaintiff filed the present notice of civil claim (the “Current Action”)

[20] On January 13, 2023, the defendants filed a response. The defendants have apparently also filed a counterclaim, but there is no copy of it in the record. On July 25, 2023, the plaintiff filed an application in the Current Action, seeking a summary trial. On August 8, 2023, the defendants filed a response to the summary trial application.

[21] The summary trial application was originally set for hearing on August 11, 2023, but it did not proceed on that date because no judge was available. As mentioned, the summary trial application of the Current Action is now scheduled for November 6, 2023.

[22] In the notice of application before me, the plaintiff seeks a *Mareva* injunction largely in the same form as the model order. The main points are that the plaintiff seeks to restrain the defendants from removing from BC or in any way disposing of or dealing with or diminishing the value of their assets in British Columbia, unless assets having a fair market value of at least $15,657,266.50 net of all secured interests remains in BC and are not dealt with. The $15,657,226.50 is the current amount that the plaintiff claims is owing to it by the defendants.

Legal Principles

[23] In *Kepis & Pobe Financial Group Inc. v. Timis Corporation,* 2018 BCCA 420 [*Kepis*], our Court of Appeal considers an appeal concerning the legal test and the application of that test for granting a *Mareva* injunction. The court traces the development of the law related to the development of and the articulations of the test for *Mareva* injunctions in Canada and, more specifically, British Columbia.

[24] After reviewing the relevant authority, the court sums up the legal principles that apply to determining whether to grant a *Mareva* injunction in the following way:

> [14] Whether applying the two-part or the three-part test for conventional interlocutory injunctions, the overarching consideration in determining whether to grant a *Mareva* injunction in this province is the balance of justice and convenience between the parties. Since *Aetna*, that element of the test now embraces many additional factors that previously may not have been considered: *Silver Standard* at paras. 19–20. Those factors include the relative strength of the parties' cases, evidence of irreparable harm or a real risk of dissipation of assets, whether the defendant's assets are inside or outside the jurisdiction, the potential effects on third parties, and factors affecting the public interest. As Newbury J.A. observed in *Silver Standard*:
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> > [23] … It may be that the cautious approach to *Mareva* injunctions favoured in Aetna now requires some refinement almost 15 years later in light of the globalization of business transactions and the speed with which assets may now be moved across borders. As

> *Mooney v. Orr* indicates, the law is moving incrementally in that direction.

[15] However, she also cautioned that:

> [21] … in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

[16] In *Tracy*, a five-member division of this Court affirmed this approach to *Mareva* injunction applications. The Court also clarified that these orders remain "a species of interlocutory injunction with special requirements" (at para. 44) and may vary depending on the nature of the exceptions to the rule against execution before judgment (from *Aetna*). Writing for the Court, Justice Saunders stated:

> [44] … While the term "*Mareva* injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.
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> [45] Unlike a *quia timet* injunction, in which the issue is removal of assets from the jurisdiction, an injunction to protect the processes of the court may not involve extraterritorial considerations but may engage issues of dissipation. But at its root, the issue is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach.
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> [Emphasis added.]

[17] As well, in *ICBC v. Patko*, Chief Justice Finch, writing for the Court, again endorsed the approach from *Mooney v. Orr No. 2* to applications for *Mareva* injunctions, stating:

> [25] Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong prima facie or good arguable case on the merits. Second, the interest of the parties must be balanced, having regard to all the relevant factors, to reach a just and equitable result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at para. 44. [Emphasis added.]

[18] In sum, British Columbia has forged a flexible approach to applications for *Mareva* injunctions from the more stringent rules-based approach in *Aetna*. Under this approach, "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the

> circumstances of the case": *Mooney v. Orr No. 2* at para. 43. The legal test requires an applicant to establish: (1) the threshold issue of a strong *prima facie* or good arguable case; and (2) in balancing the interests of the parties, to consider all the relevant factors, including (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

Analysis

Strong *prima facie* case

[25] As a threshold issue, the plaintiff must establish a strong *prima facie* or good arguable case. The test is to be applied flexibly, focusing on what is just and convenient, while considering the balance of convenience and justice between the parties, as long as the applicant has shown a good arguable or strong *prima facie* case: *Shakeri-Saleh v. Estate of Ahmadi-Niri*, 2022 BCSC 700 at para. 17 [*Shakeri-Saleh*].

[26] A strong *prima facie* case and good arguable case is more than just an arguable case, and it may be satisfied by something that does not reach the level of "bound to succeed": *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 54 [*Tracy*]. Further, a good arguable case may even arise when there is a possibility that either side might win.

[27] Here, the plaintiff submits it has provided ample evidence establishing a strong *prima facie* case that the defendants owe it sums of money under the Settlement Agreement.

[28] The defendants submit that had the application been limited to an allegation of a strong *prima facie* case in respect of the $5 million payment due to the plaintiff around May 31, 2022, they might have conceded the existence of a strong *prima facie* case. However, since the plaintiff alleges that it is entitled to payments of more than $15.6 million, which the defendants deny as contrary to the MOU, they deny the existence of a strong *prima facie* or good arguable case.

[29] In my view, the plaintiff has established a good arguable case or strong *prima facie* case that the defendants are indebted to the plaintiff. While the parties disagree as to the amount owing and whether it is owing under the Settlement Agreement or the MOU, each party submitted that an amount was due and it was not paid.

[30] While I appreciate that there are disputes as to what is owing and under what circumstances, this application does not require me to engage in a "finely parsed analysis of the evidence": *Shakeri-Saleh* at para. 16. The parties' disagreement as to the amount owing or the timing of when it is due does not, in my estimation, detract from the existence of a good arguable, strong *prima facie* case.

Balance of Convenience

[31] Having established a strong *prima facie* case, the next step for courts in British Columbia is to take a flexible approach with the fundamental question being, "whether the granting of an injunction is just and equitable in all of the circumstances of the case": *Kepis* at para. 18.

[32] To reach a just and equitable result, the interests of the parties must be balanced, having regard to all of the relevant factors. As the court states in *Kepis*, citing *Tracy*: "Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment".

[33] The plaintiff submits the relevant factors include the history of the conduct of the defendants, which includes failing to abide by the Settlement Agreement and the MOU and continuing to encumber the Property, as well as other real estate owned by the defendants, while not using the loan proceeds to repay the plaintiff. The plaintiff alleges that the evidence shows a real risk of dissipation, including the previously mentioned factor of encumbering the Property.

[34] There is also evidence of a proliferation of foreclosure proceedings against the Property, as well as other real estate owned by the defendants. For example, in one foreclosure proceeding involving the Property commenced on June 8, 2023,

under the Vancouver Registry file no. H230192, the court granted the petitioner an *order nisi* with a one-month redemption period and immediate conduct of sale.

[35] I find it is reasonable to infer that this short redemption period and order for immediate conduct of sale reflect the court's recognition of the risk faced by those secured creditors who were the petitioners.

[36] The plaintiff says this type of evidence demonstrates that there is a real risk of dissipation of assets that would render nugatory any potential judgment in favour of the plaintiff.

[37] The defendants submit that the balance of justice and convenience favours them. The defendants deny failure to meet their obligations under the Settlement Agreement or the MOU. They also submit that granting the *Mareva* injunction would make it extremely difficult, if not impossible, to refinance or borrow further against the Property. They rely on the evidence of foreclosure proceedings as reflecting their urgent need to refinance the Property.

[38] The defendants submit that the whole point of the MOU was to allow the defendants to repay the amounts to the plaintiff and to permit them to conduct normal, day to day, business for Fountana LP. They submit the normal business activities included having total autonomy to borrow additional funds to pursue the development plans without the need to keep the plaintiff informed of any of its activities.

[39] As I mentioned, there is conflicting evidence as to what amounts are owing to the plaintiff and when the amounts were due. However, I find the evidence for both parties indicates that at least some of the payments stated in the MOU have not been made by the defendants to date.

[40] The plaintiff seeks a *Mareva* injunction for an amount in excess of $15 million, and the basis for that amount is explained in the evidence, including in a spreadsheet prepared by an affiant for the plaintiff. In effect, the amount reflects the amount due under the Agreement as reflected in the Settlement Agreement.

According to the plaintiff, the MOU did nothing more than provide a period of forbearance and they provided new dates for which the same amounts due under the Settlement Agreement were to be paid. Again, Mr. Lin for the defendants says the spreadsheet contains incorrect calculations, and he says it seeks payments for amounts already paid or amounts that were never payable by the defendants.

[41] In the present case, I find the following factors are especially significant in weighing the interest of the parties based on the particular circumstances: presence of assets in British Columbia, the evidence of foreclosure proceedings on the Property, and the risk of dissipation of assets.

[42] Regarding the presence of assets in BC, there is evidence concerning the state of the Property in British Columbia. The defendants are granting mortgages, including for the Property. For example, there is a title search on the Property as of September 15, 2023, indicating that several mortgages were registered against the Property in April 2022.

[43] Mr. Lin for the defendants provides evidence that “since October 1, 2022, until January 3, 2023, the Fountana parties sought financing with private and institutional lenders”, but he states due to various unfavourable conditions, the searches for financing have been challenging and unsuccessful.

[44] Mr. Lin made a second affidavit on October 12, 2023, that was not served on the plaintiff in a timely fashion. That affidavit was objected to by the plaintiff, and counsel for the defendants concedes it could have been made earlier and served with the other responding material.

[45] The defendants seek to rely on this affidavit because they say it shows how most of the net proceeds of the borrowed funds related to the mortgages registered on the Property in April 2022 were used to pay the plaintiff amounts due under the MOU.

[46] In my view, it is not appropriate to consider this affidavit as it was not served in time, and there is no opportunity to respond to it. However, I am also disregarding

submissions made by the plaintiff's counsel concerning additional foreclosures and mortgages that were discovered by the plaintiff during the hearing because that information is also not in the evidentiary record.

[47] In my view, the foreclosure proceedings, including the order for conduct of sale granted to a secured creditor of the Property, indicates that there is a real risk of dissipation that may result in any judgment the plaintiff may ultimately obtain being dry.

[48] I do not agree that the risk of dissipation must be part of the deliberate attempt to avoid judgment or evade creditors by, for example, transferring assets out of the province.

[49] When I consider and weigh the alleged conduct on the part of the defendants, namely, granting mortgages and facing numerous foreclosure proceedings without informing the plaintiff of those events, along with the assets involved and all of the relevant circumstances, I find the balance of convenience favours the plaintiff.

[50] There is an undertaking as to damages but the defendants point out that there is no supporting evidence regarding the plaintiff's assets. I find it unreasonable for the defendants to delayed raising this point until the hearing. Had this matter been raised earlier, for example, in the application response, it might have been dealt with.

[51] Even though there is no evidence of the plaintiff's assets related to satisfying the undertaking as to damages, there are reasonable inferences that may be drawn from evidence that is before me. For example, the MOU includes a statement that the plaintiff will consider "re-investing" its profit into the defendants' projects. In my view, this raises a reasonable inference that the defendants expect the plaintiff has the means to make further investments.

Disposition

[52] I therefore grant the injunction sought by the plaintiff on the terms set out in the draft order, which is appended to the notice of application.

[53] The costs shall be in the cause as no costs were sought in respect of this application.

"E. McDonald J."