

CITATION: Nahra v. Orange Transport, 2024 ONSC 1134
COURT FILE NO.: CV-18-76724
DATE: 20240223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joe Nahra

Plaintiff

AND:

Orange Transport Inc. Charbel Matar, Maroun Aoun, 6794491 Canada Inc. o/a
MTC Auto Sales, and Wantcar Inc.

Defendants

AND BETWEEN

Orange Transport Inc., Charbel Matar and Maroun Aoun

Plaintiffs by Counterclaim

AND:

Joe Nahra, Wadih Matar and Gladiator Auto Transport Inc.

Defendants to the Counterclaim

BEFORE: A. Kaufman J.

COUNSEL: Martin Z. Black, Counsel for the Defendants and Plaintiffs by Counterclaim

Zohaib Ahmed, Counsel for the Plaintiff, Joe Nahra, and for the Defendants by
Counterclaim, Joe Nahra, and Gladiator Transport Inc.

Emily McMurtry, Counsel for Wadih Matar, Defendant by Counterclaim

HEARD: February 13, 2024

ENDORSEMENT

[1] Orange Transport Inc., Charbel Matar and Maroun Aoun bring this motion for a Mareva injunction and a certificate of pending litigation. They seek orders enjoining the plaintiff Joe Nahra (“Nahra”) from transferring or encumbering his property at 71 Flowertree

Crescent, and to register a certificate of pending litigation (CPL) on title to this property. Additionally, they seek injunctions against Nahra and Gladiator Transport, restraining them from disposing of any assets or reducing their value.

- [2] The history of this litigation is complicated and, despite having commenced in June of 2018, examinations for discoveries have not yet been completed. The moving parties attribute the delay to Mr. Nahra.
- [3] By way of brief background, Messrs. Nahra, Aoun and C. Matar are long time acquaintances and business partners. Aoun and C. Matar serve as directors and hold equal shares in MTC, a used car dealership. In 2012, Aoun and C. Matar offered Nahra a position as a sales agent and finance manager at MTC. Subsequently, in 2013, the trio jointly established Orange Transport, an automobile transport company, with equal shareholding.
- [4] Nahra asserts that Matar and Aoun presented him with an ultimatum in January 2017. He was to either accept a salary reduction or have C. Matar and Aoun buy out his shares in Orange Transport for \$300,000. If he declined both options, they would terminate his employment with MTC and Orange Transport. Nahra contends that he would have agreed to sell his shares but insisted on obtaining their fair market value. Allegedly, Aoun and C. Matar excluded Nahra from Orange Transport's operations and management, terminated his directorship, thus, infringing upon his rights as a shareholder.
- [5] Nahra contends that he initiated an appraisal of Orange Transport through a business valuator and expressed his desire to be bought out. However, Aoun and Matar allegedly failed to respond to his request. According to Nahra, Aoun and C. Matar proceeded to sell a significant portion of Orange's assets at an auction without his consent. He further alleges that Aoun and C. Matar wrongfully appropriated Orange Transport's assets for their own gain and for the benefit of their respective corporations, MTC and Wantcar.
- [6] The moving parties present an alternative narrative. They claim that Nahra violated his fiduciary responsibilities as a director of Orange, engaged in misappropriation of funds, and defrauded the corporation, causing harm to their interests.
- [7] They assert that Nahra obtained advances from Orange Transport without their consent. When confronted about these transactions, they claim that Nahra resigned from his position as an employee of Orange Transport. Subsequently, they uncovered that, during his tenure at Orange Transport, Nahra engaged in undisclosed cash transactions with customers. Additionally, they learned that Nahra, along with the defendant by counterclaim Wadih Matar, established Gladiator, a company whose activities directly competed with those of Orange Transport.
- [8] Aoun and C. Matar assert that Nahra enlisted employees from Orange Transport to join Gladiator. They claim that, during the examination for discovery, Nahra confessed to taking a computer hard drive with him upon leaving Orange Transport. This hard drive purportedly contained confidential and valuable information such as Orange's customer lists, asset lists, employee roster, and other business-related data.

- [9] Aoun and C. Matar contend that Nahra's conduct has inflicted harm on Orange Transport's business, compelling them to sell most of its fleet of trucks. They estimate Orange Transport's losses to amount to \$2,834,605 as of December 31, 2022.
- [10] The moving parties claim to have recently discovered evidence indicating that Nahra was transferring assets out of the jurisdiction. They became aware that Nahra recently sold his previous primary residence at 71 Flowertree Crescent in Ottawa, with a scheduled closing date of March 8, 2024. Although the sale price is \$574,000, the net proceeds of the sale are currently unknown.
- [11] Aoun and C. Matar also rely on the fact that Nahra has relocated to New Hampshire, USA. This fact is not disputed. Furthermore, they claim that Gladiator is in the process of selling one of its trucks, a statement Nahra confirms, acknowledging that the mentioned truck has indeed been sold.

Issues

- [12] This application raises two issues:
- a. Should a Mareva injunction be granted?
 - b. Should the moving parties be granted leave to register a CPL?

Principles pertaining to Mareva injunctions

- [13] A Mareva injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings.
- [14] To be granted a Mareva injunction, the plaintiff must fulfill the following criteria: (1) a strong *prima facie* case; (2) irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial; (3) the balance of convenience favours granting an interlocutory injunction; (4) the defendant has assets in the jurisdiction; and (5) that there is a serious risk that the defendant will remove property or dissipate assets before judgment. Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.¹

Analysis

- [15] The moving parties contend that Nahra confessed to taking a hard drive containing confidential information related to Orange Transport and, during his tenure as a director,

¹ *Carbone et al v Boccia et al*, 2023 ONSC 3625 at para 16.

established Gladiator, a direct competitor. They assert that these actions provide a strong basis for a breach of fiduciary duty in their case.

- [16] A strong prima facie case is one that will probably prevail at trial or is likely to succeed at trial.² When conducting an initial examination of the case, the motions judge must be convinced that, based on the law and evidence presented, there is a substantial likelihood that the moving party will ultimately succeed in proving the allegations outlined in the originating notice during the trial.³
- [17] In this instance, the Court cannot arrive at this determination based on the presented record. A director owes a fiduciary duty to the corporation and must ensure that the corporation's interests are paramount. Initiating a competing business while serving as a director would indeed pose a clear conflict of interest. In this particular case, Nahra contends that he was divested of his directorial authority following a dispute with Messrs. Aoun and C. Matar. While he acknowledges incorporating a competing business, he asserts that its operations did not commence until August 2017, several months after he was effectively relieved of his directorial responsibilities.
- [18] Fiduciary obligations may extend beyond the termination of the relationship for a reasonable duration. The length of time will be governed by the specific circumstances.⁴ The Court is unable to make this determination based only on the parties' competing versions of events. The moving parties raise a strong arguments, but Mr. Nahra raises triable defences.
- [19] Moreover, this Court has held that a Mareva injunction will be more easily justified when the rights of the moving party are specifically related to a particular asset.⁵ For example, in *Meintjies v. John Doe*, the plaintiff pursued an action to reclaim the specific funds that had been unlawfully obtained from her.⁶ In the present case, the majority of the damages sought from Mr. Nahra pertain to alleged breaches of trust, unjust enrichment, and conspiracy to injure the moving parties. These claims are yet to be determined.
- [20] The case for a Mareva injunction is weaker in such cases, as it is akin to obtaining execution before judgment. A Mareva injunction is considered an extraordinary remedy due to the policy against remedies that permit pre-judgment execution against the defendant's assets. Nonetheless, when a plaintiff makes a compelling that the defendant has defrauded it, the reluctance to allow pre-judgment execution gives way to the overarching objective of

² *Neville v. Sovereign Management Group Corp.*, 2022 ONSC 3466, at para 33.

³ *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, at para 17.

⁴ *Aquafor Beech Ltd. v. Whyte*, at paras. 118-119; *Icecorp International Cargo Express Corp. v. Nicolaus*, 2002 BCSC 1625, at para. 23.

⁵ *Original Traders Energy Ltd.*, 2023 ONSC 1887 (Ont. S.C.J. [Commercial List]) at para 31.

⁶ *Meintjies v. John Doe*, 2024 ONSC 842.

ensuring that the civil justice system delivers a fair and enforceable remedy against such serious misconduct.⁷

- [21] Although my conclusions on the first factor are decisive, I would like to include the following points, which further argue against granting the Mareva injunction.
- [22] The moving parties contend that there exists a real and genuine likelihood that the net proceeds from the sale of Nahra's residence and Gladiator's truck will be taken out of Ontario with the intention to defraud them. They also express the belief that they would be unable to enforce any judgment against Nahra if he is allowed to relocate his assets from the jurisdiction.
- [23] Nahra acknowledges the sale of his Ottawa residence but disputes any nefarious intent, asserting that he sold it due to high-interest rates. He claims the proceeds are necessary for living expenses, debt repayment, and covering legal fees. Regarding the truck, he argues that its sale was a routine business transaction, prompted by a slowdown in Gladiator's operations and the vehicle's under-utilization. According to Nahra, the proceeds from this truck sale were also directed towards settling debts.
- [24] The Ontario Court of Appeal has indicated that, when evaluating the risk of assets being taken out of the jurisdiction before judgment, the critical question revolves around the defendant's intent. The Court asserted that the better view is that “it is only if the purpose of the defendant when removing assets from the jurisdiction or the dissipating or disposing of them is for the purpose of avoiding judgment that a *Mareva* injunction should be issued”.⁸
- [25] At times, the circumstances of the fraud itself can permit a court to infer that the defendant is involved in actions aimed at thwarting a judgment. In this case, Mr. Nahra has relocated from Ottawa. The sale of a residence where one no longer resides and the disposal of one unused truck (among several) do not, in themselves, provide evidence that Mr. Nahra's intent is to evade judgment.
- [26] In *DiMenza v. Richardson Greenshields of Canada Ltd.*⁹ the plaintiff obtained a Mareva injunction restraining the defendant from removing the proceeds of sale of his Ottawa home from the jurisdiction. The defendant had moved to the State of Maryland, U.S.A. Chadwick J., in overturning the Mareva Order, concluded that the defendant had not engaged in any improper conduct by listing his home for sale under these circumstances. The Court also considered that an Ontario judgment could be enforced in the United States.

⁷ 2092280 *Ontario Inc. v. Voralto Group Inc.*, 2018 ONSC 2305 (Ont. S.C.J.) at para 28.

⁸ *R. v. Consolidated Fastfrate Transport Inc.*, 1995 CarswellOnt 993, [1995] O.J. No. 1855, 125 D.L.R. (4th) 1, 24 O.R. (3d) 564, 27 W.C.B. (2d) 528, 40 C.P.C. (3d) 160, 61 C.P.R. (3d) 339, 6 W.D.C.P. (2d) 330, 83 O.A.C. 1, 99 C.C.C. (3d) 143 (Ont. C.A.) at para 48.

⁹ 1989 CanLII 4138 (Div. Ct.).

- [27] Finally, a Mareva injunction is a discretionary remedy that empowers the court to weigh the respective interests of the parties involved. In this case, the balance of convenience does not favor the moving parties.
- [28] Mr. Nahra's residence was sold for \$574,000. While the net proceeds remain uncertain, his affidavit suggests that the sale was prompted by high-interest rates, which implies that the home is mortgaged. In light of the moving parties' claim that Orange Transport has incurred losses of \$2,834,605 as of December 31, 2022, any funds realized from the house sale would only cover a small portion of a potential award in their favor. Conversely, Mr. Nahra contends that he was compelled to sell his property to finance this litigation, lacking sufficient funds to pursue his case and defend the counterclaim. Granting the order would negatively impact Mr. Nahra more significantly than the potential benefit to the moving parties. Therefore, the balance of convenience militates against granting the order.

Should the Court grant a CPL?

- [29] A CPL may be obtained under rule 42.01 of the *Rules of Civil Procedure*¹⁰ and section 103 of the *Courts of Justice Act*.¹¹ The primary objective of a CPL is to alert interested parties that there is an ongoing legal claim against the property in question.
- [30] Where a motion for leave to issue a CPL is brought on notice, as is the case here, the test is the same as on a motion to discharge a certificate of pending litigation. The party seeking the CPL must establish that their "reasonable claim to the interest in the land claimed" gives rise to triable issues.¹² Additionally, in accordance with *Rule* 42.01(2), the moving party is required to include a claim for a CPL either in the originating process or in the pleading that initiates the proceeding.
- [31] The moving parties fail to satisfy either of these conditions. Their claim against Mr. Nahra does not assert any interest in his property, and their pleading does not incorporate a claim for a CPL.

Disposition

- [32] The moving parties' motion is dismissed.
- [33] In the event that the parties cannot reach an agreement on costs, Mr. Nahra may submit a costs outline along with concise written submissions (not exceeding three pages) within 30 days. The moving parties, in turn, may serve and file their responding submissions, also limited to three pages, within 30 days of receiving Mr. Nahra's costs submissions.

¹⁰ R.R.O. 1990, Reg. 194, (The "Rules").

¹¹ R.S.O. 1990 c. C.43.

¹² *G.P.I. Greenfield Pioneer Inc. v Moore*, 2002 CanLII 6832, (Ont. C.A.), at para 20.

Alexandre Kaufman

Justice A. Kaufman

Date: February 23, 2024