

CITATION: Chicago Title Insurance Company v. Nova Diamonds Inc. et al., 2023 ONSC 6971
COURT FILE NO.: CV-22-00682646-0000
DATE: 20231211

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Chicago Title Insurance Company, Plaintiff

-and-

John Doe, William Suriani, Austin Persico, a.k.a. Agostino-Austin Persico a.k.a. Agostino Persico carrying on business as AAP Law, Marcello Codispoti, a.k.a. Marcel Codispoti, 2723217 Ontario Inc., Lynx Equity Limited, Lynx Equity International Inc., Armoured Security Canada Inc., Odaniel Campbell, Berkshire Enterprises Inc., Dao My Vuong, Elaine Persico, Astoro Persico, First Canadian Aluminum Ltd., Dung Hue Thai, KTI Corporation, Nicholas Discola, a.k.a. Nick Discola, David Collia, a.k.a. Dave Collia, Peter Collia, Ya Ping Wang, Max Ma, Ma Wan Min, 9898565 Canada Inc., Express Gold Refining Ltd., Chris Garofalo, Kosmos Gate Inc., Georgios Galanos, Demetrious Toris, Nova Diamonds Inc., 1271470 Ontario Inc., Jeremy Wiltshire, Maria Anna Babiolakis, Georgios Babiolakis, Annette Babiolakis, Toronto Reserve Gold Inc., The Gold Spot Refinery Ltd., 2733287 Ontario Inc., Edi Sapir, and Master Logistics Canada Corp., Defendants

BEFORE: Robert Centa J.

COUNSEL: Michael Katzman for the plaintiff (responding party)

Matthew P. Gottlieb, Agatha Wong, and Dale Denis for the defendant (moving party) Nova Diamonds Inc.

Andrew Ostrom for the defendant (moving party) Toronto Reserve Gold Inc.

HEARD: November 22, 2023

ENDORSEMENT

[1] Civil fraud is a serious crime and an enormous problem in Ontario. Plaintiffs rightly expect that the courts will be available to assist them to avoid devastating financial losses from fraudulent misconduct. *Mareva* injunctions are an important tool that plaintiffs can use to try and recover their losses stemming from fraud and theft. Freezing funds before the fraudsters can dissipate them remains a “vital arrow in the civil law’s quiver to address

serious fraud.”¹ *Mareva* injunctions are, however, an exception to the common law’s resistance to granting pre-judgment execution.

- [2] Plaintiffs most often seek *Mareva* injunctions from courts without notice to the affected party. This makes sense because notifying the perpetrators of a fraud in advance would significantly diminish the effectiveness of the remedy. The *ex parte* nature of a motion to obtain a *Mareva* order is another exception to common law norms. Hearing from only one side of a dispute places the court in a difficult position as it is deprived of the adversarial presentation that normally informs the court’s decisions. For this reason, the court requires the plaintiff to make full and frank disclosure of all material facts that could affect the exercise of the court’s discretion.
- [3] The situation becomes even more fraught when plaintiffs seek to freeze funds not in the hands of the fraudsters themselves, but in the hands of third parties to whom the fraudsters have apparently transferred the plaintiffs’ funds. *Mareva* injunctions can wreak havoc on the lives of those subject to the terms of the order. A *Mareva* order also provide the plaintiff with a powerful chip in negotiations with parties subject to its terms. As a *Mareva* order reaches beyond the original fraudsters to third party recipients, the need for plaintiffs to demonstrate clearly and compellingly the basis for such extraordinary relief is further heightened.
- [4] In this case, the allegedly defrauded plaintiff, Chicago Title Insurance Company, obtained an *ex parte Mareva* injunction that extended beyond the persons alleged to have committed the fraud to Nova Diamonds Inc. and Toronto Reserve Gold Inc. In November 2022, Chicago Title advised the court that these two entities received a portion of the proceeds from a fraudulent mortgage and that there was a serious risk that they would dissipate those assets without a *Mareva* injunction.
- [5] For the reasons that follow, I set aside the *Mareva* order and the subsequent modifications of that order as against Nova Diamonds and Toronto Reserve Gold. I find that Chicago Title failed to make full and frank disclosure of material facts that would have affected the decision of the motion judge to grant the order.
- [6] First, Chicago Title failed to advise the court that it had not conducted a tracing exercise to establish that the fraudulent mortgage proceeds were received by Nova Diamonds and Toronto Reserve Gold. Second, Chicago Title failed to advise the court that it had done no investigation of either company before concluding that there was a risk that either was at risk to dissipate its assets. Chicago Title did not fairly present its case to the court. Indeed, the court could only have been left with the impression that Chicago Title’s case for a *Mareva* injunction against Nova Diamonds and Toronto Reserve Gold was much stronger than it was.

¹ 2092280 *Ontario Inc. v. Voralto Group Inc.*, 2018 ONSC 2305, at para. 28

- [7] Chicago Title may be able to prove its claims against Nova Diamonds and Toronto Reserve Gold at trial, but based on its failure to make full and frank disclosure to the court, it is not entitled to the extraordinary relief of a *Mareva* injunction.

Facts

- [8] For the purposes of this motion, it is not necessary to get into the details of the underlying fraud pleaded by Chicago Title. The following brief summary of the facts will permit the determination of the issues on this motion.

The fraud, the original statement of claim, and the fruits of the Norwich order

- [9] Chicago Title asserts that in March 2020, Mr. Persico (then a lawyer) facilitated a mortgage fraud and then dissipated the proceeds of that fraud.
- [10] On June 14, 2022, Chicago Title issued a statement of claim naming Mr. Persico, William Suriani, Marcello Codispoti, 2723217 Ontario Inc., Lynx Equity Limited, and Lynx Equity International Inc. as defendants.
- [11] On July 22, 2022, Chicago Title obtained an *ex parte Mareva* injunction and a *Norwich* order in relation to the defendants from Koehnen J. The court subsequently extended this order four times.²
- [12] On October 14, 2022, Chicago Title received bank records pursuant to the *Norwich* order, which indicated that Mr. Persico transferred over \$1.5 million of the fraudulent mortgage proceeds to a company called KTI Corporation in July 2020. Chicago Title also received copies of invoices that reflected that KTI sold face masks and hand sanitizer to Mr. Persico.
- [13] The bank records also indicated that after it received the \$1.5 million from Mr. Persico, KTI transferred money and wrote cheques to a variety of individuals and entities. For the purposes of this motion, the most important payments are as follows:
- a. September 5, 2020: KTI wrote a cheque to Nova Diamonds in the amount of \$75,000, which Nova Diamonds cashed on September 15, 2020;
 - b. December 5, 2020: KTI wrote a \$6,000 cheque to Toronto Reserve Gold; and
 - c. February 26, 2021: KTI wired \$289,150 to Toronto Reserve Gold.

The Mareva injunction obtained on November 2, 2022

- [14] On November 2, 2022, Chicago Title moved *ex parte* to amend its statement of claim to add 32 defendants (including Nova Diamonds and Toronto Reserve Gold), and to extend

² Extended by the orders of Vermette J. on August 2, 2022, Black J. on dated August 12, 2022, Myers J. on September 7, 2022, and October 6, 2022. All of these orders pre-date Chicago Title seeking any relief against Nova Diamonds or Toronto Reserve Gold.

the *Mareva* order against the new defendants (including Nova Diamonds and Toronto Reserve Gold) up to certain monetary limits. In support of its motion, Chicago Title relied on the material filed on its earlier motions and an affidavit sworn by Francesca Ditullio, a law clerk at the firm representing Chicago Title, on November 1, 2022.

- [15] Justice Myers granted the relief sought by Chicago Title and issued the following endorsement:

The plaintiff continues to trace funds taken from its insured by a fraudulent mortgage. Tracing efforts to date have produced evidence of numerous recipients of purloined funds. The plaintiff asks to amend the title of proceeding and the statement of claim in order to add all recipients for tracing purposes (at minimum).

Recognizing that not all recipients of funds are necessarily parties to the fraud, the plaintiff seeks to freeze the new defendants' accounts only to the limit of the funds they received. This is a more of a freezing order rather than expressly a *Mareva* injunction. In light of the source of funds and the [sheer] number of parties, I am content that giving notice to the recipients would be inconvenient and would risk loss of the funds. Anyone prejudiced can come back to court quickly. I am also satisfied that a few of the new defendants are sufficiently identified as participants in the material already filed so as to justify a full *Mareva* injunction against them. The limit of the relief sought against each of the defendants is identified in an appendix to the order that I will sign.

The motion will be returnable before me on December 19, 2022 to be spoken to.

- [16] As a result of the order of Myers J. dated November 2, 2022, Nova Diamonds and Toronto Reserve Gold were named as defendants in Chicago Title's amended statement of claim and were made subject to the *Mareva* or freezing order. The amended statement of claim, unhelpfully in my view, used the defined term "Defendants" to include all of the defendants to the action. This meant that all of the defendants were included in almost every allegation, regardless of whether or not that made sense in context. In any event, as Chicago Title explained in its factum on this motion, it asserted a large number of claims and sought many forms of relief against both Nova Diamonds and Toronto Reserve Gold:

18. The Amended Statement of Claim sought relief and made allegations which, *inter alia*, included

- (a) civil conspiracy to defraud;
- (b) unjust enrichment;

- (c) violations of the *Fraudulent Conveyances Act* and *Assignments and Preferences Act*;
- (d) participation in transactions which were intended to defeat, hinder or delay creditors;
- (e) orders setting aside reviewable transactions;
- (f) accounting of funds received directly or indirectly;
- (g) a tracing Order;
- (h) a declaration that the Defendants, including Nova [and Toronto Reserve Gold], hold funds on a resulting and/or constructive trust to the benefit of the Plaintiff;
- (i) breach of trust;
- (j) disgorgement of profits;
- (k) that the compliance with the Norwich Order disclosed that the Defendants, including Nova [and Toronto Reserve Gold], were party to the fraudulent activities alleged;
- (l) that the Defendants, including Nova [and Toronto Reserve Gold] were parties to transactions involving the proceeds of the fraudulent mortgage, directly or indirectly;
- (m) that the Defendants, including Nova [and Toronto Reserve Gold], were liable to account for funds which were obtained directly or indirectly;
- (n) that but for the actions of the Defendants, including Nova [and Toronto Reserve Gold], funds against which the Plaintiff makes claim would be available for collection;
- (o) that the Defendants, including Nova [and Toronto Reserve Gold], coordinated their efforts;
- (p) that portions of the fraudulent mortgage proceeds were received by the Defendants, including Nova [and Toronto Reserve Gold];
- (q) that the Defendants, including Nova [and Toronto Reserve Gold], coordinated their efforts to effect improper transactions with non-arm's-length parties for no or insufficient consideration with the specific intention of

putting the fraudulent mortgage proceeds out of reach of the Plaintiff;

(r) that the Defendants diverted funds from themselves to others for no or insufficient consideration, thereby depleting funds and assets owned by them, which funds and assets ought to be applied to the debt owed to the Plaintiff, and which transfers were effected with the intention of defeating hindering or delaying creditors; and

(s) orders setting aside transactions of a reviewable nature as between the Defendants.

- [17] I note that Chicago Title's statement of claim is a pleading. It is not evidence of anything, and, without evidence in support of its allegations, the pleading would not justify any relief, much less a *Mareva* injunction.

The consequences of the Mareva order and the subsequent order dated December 19, 2022

- [18] Nova Diamonds learned of the *Mareva* order on or about November 8, 2022. Although Nova Diamonds' bank account held over \$500,000, and the order was intended to freeze only \$75,000, the implementation of the freeze disrupted two payments totalling over \$400,000 to Nova Diamonds' suppliers. When Nova Diamonds contacted its bank, the bank told them to contact counsel for Chicago Title. On November 9, 2023, Nova Diamonds' counsel contacted counsel for Chicago Title and provided a copy of the cheque from KTI dated September 5, 2020.
- [19] Similarly, Toronto Reserve Gold learned of the *Mareva* order on November 22, 2022, when it was suddenly unable to process transactions through its bank account, which left it unable to carry on any business. Counsel for Toronto Reserve Gold provided the documents in its possession to Chicago Title. Toronto Reserve Gold ultimately agreed to provide an undertaking not to dissipate its assets or to engage in any transactions outside its ordinary course of business. In exchange, Chicago Title agreed to release the freeze on Toronto Reserve Gold's bank accounts. The parties agreed that this arrangement was temporary and without prejudice to either party's position.
- [20] Chicago Title scheduled a further motion for December 19, 2022, to extend the interim preservation, *Mareva*, and *Norwich* orders. Chicago Title relied on all of the material it had filed on the earlier motions, as well as a further affidavit of Ms. Ditullio.
- [21] Both Toronto Reserve Gold and Nova Diamonds knew about the December 19 motion. Mr. Denis, counsel for Nova Diamonds, attempted to serve and file an affidavit and factum the day before the motion, but the court did not accept these late-arriving materials. Nevertheless, Mr. Denis did appear and advise the court that Nova Diamonds intended to move to set aside the *Mareva* order. Counsel for Toronto Reserve Gold, having reached its non-dissipation agreement with Chicago Title, did not oppose the extension of the order.

[22] Chicago Title did not seek to extend the *Mareva* order against Nova Diamonds. Instead, it requested that Nova Diamonds be prohibited from dissipating its assets and engaging in any transactions outside of the ordinary course of business except after giving 30 days notice to Chicago Title. Justice Myers accepted Chicago Title's submissions and imposed the non-dissipation obligations on Nova Diamonds until the return of any motion to set aside the *Mareva* injunction or the non-dissipation order.

The process leading to this motion

[23] In January 2023, Nova Diamonds retained Mr. Gottlieb and Ms. Wong as co-counsel with Mr. Denis. The new counsel team advised Chicago Title that they intended to move to set aside the orders of Myers J. dated November 2 and December 19, 2023. Counsel advised Nova Diamonds would be seeking to recover its costs of the proceeding in the amount of \$224,414.27, the majority of which was referable to the work of Mr. Denis.

[24] On March 2, 2023, counsel for Chicago Title wrote to counsel for Nova Diamonds on a with prejudice basis. Chicago Title indicated that it would resist any motion to set aside the orders of Myers J., but offered to settle the motion on the following terms:

- a. Prior to March 10, 2023: set aside paragraph 4 of the order of Myers J. dated December 19, 2022, and costs of the motion shall be fixed by the trial judge, payable in the cause; and
- b. After March 10, 2023, set aside paragraph 4 of the order of Myers J. dated December 19, 2022, and Nova Diamonds shall pay to Chicago Title its costs of the motion on a partial indemnity scale from March 10 to the date of acceptance of the offer.

[25] On April 5, 2023, Nova Diamonds rejected Chicago Title's offer. Counsel noted that Chicago Title made its offer on a with prejudice basis, which counsel argued meant that the *Mareva* order was never necessary to protect Chicago Title's interests and should be discharged immediately. Counsel for Nova Diamonds provided the following counterproposal:

In the event your client wishes to avoid the additional costs it will have to pay, please let us know if your client agrees to:

- (i) a withdrawal of the order,
- (ii) a dismissal of the action against Nova, and
- (iii) payment of Nova's costs incurred to date.

[26] On July 27, 2023, Chalmers J. appointed me to case manage this proceeding. I scheduled this motion to be heard and set a timetable for the exchange of materials.

Legal principles

[27] The court has jurisdiction to grant interlocutory injunctions pursuant to s. 101 of the *Courts of Justice Act*.³ An interlocutory injunction may be obtained on a motion to a judge pursuant to rule 40.01.⁴ A party may move for an interlocutory injunction without notice to the other party, but that injunction shall not exceed ten days without a further order of the court.⁵

[28] Where a party wishes to prevent a defendant from dissipating assets its assets before a final determination of the dispute, that party may bring a without-notice motion for a *Mareva* injunction. A *Mareva* injunction is an extraordinary remedy that is granted only sparingly and in the clearest of cases. As Perell J. explained:

Since the general principle of the common law is that there shall not be execution before judgment, a *Mareva* injunction is both an exception to a general rule and an exceptional exercise of the court's jurisdiction to grant interlocutory relief. A *Mareva* injunction is granted only sparingly and in the clearest cases. A *Mareva* injunction is an extraordinary remedy because as a general policy of civil procedure, a remedy that allows prejudgment execution against the defendant's assets is not favoured, but where there is a strong case that the defendant has defrauded the plaintiff the law's reluctance to allow prejudgment execution yields to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct.⁶

[29] To obtain a *Mareva* order, the moving party must meet very stringent requirements and demonstrate:

- a. a strong *prima facie* case;
- b. irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial;
- c. the balance of convenience favours granting an interlocutory injunction;
- d. the defendant has assets in the jurisdiction; and
- e. that there is a serious risk that the defendant will remove property or dissipate assets before judgment.⁷

³ R.S.O. 1990, c. C.43.

⁴ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

⁵ Rule 40.02.

⁶ *Wang v. Feng*, 2023 ONSC 2315, at para. 129.

⁷ *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Div. Ct.); *Wang*, at para. 127.

- [30] To demonstrate a strong *prima facie* case, the moving party must show a strong likelihood on the law and the evidence presented that, at trial, the moving party will be ultimately successful in proving the allegations set out in the statement of claim.⁸
- [31] A party seeking a *Mareva* injunction will often, but not always, bring the motion without notice to the other side. Where a motion is made without notice, the moving party must make full and fair disclosure of all material facts, and the failure to do so is in itself sufficient grounds for setting aside any order obtained on the motion.⁹ A material fact is one that, viewed objectively, the judge may need to know in coming to his or her decision and that, if not disclosed, may affect the outcome of the decision.¹⁰ The plaintiff must disclose all matters that are relevant to the court's consideration of whether or not to grant the order.¹¹
- [32] A party moving without notice must be fair both to the absent opposing party and to the court hearing its request for extraordinary relief.¹² The moving party must fairly present both its case and the material facts that may favour the absent party.¹³ This is because there is an obvious risk of injustice to the absent party. This risk of injustice compels the moving party to make a balanced presentation of the facts and the law. The moving party must advise the court of any points of fact or law known to it that favour the absent party. In *Friedland*, Justice Sharpe described the duty on a party moving without notice as follows:

That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts [and] law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

If the party seeking [ex] parte relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would

⁸ *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, at paras. 17-18.

⁹ Rule 39.01(6).

¹⁰ *An v. Ko*, 2005 CanLII 16572 (Ont. S.C.); *Pazner v. Ontario* (1990), 74 O.R. (2d) 130 (Ont. H.C.J.).

¹¹ *Waters Estate v. Henry*, 2022 ONSC 5485, at para. 44.

¹² *Moses v. Metro Hardware and Maintenance Inc.*, 2020 ONSC 6684, at para. 26, leave to appeal denied, 2021 ONSC 877 (Div. Ct.).

¹³ *Wang*, at para. 131.

be empty and the law would be powerless to protect the absent party.¹⁴

- [33] The moving party is, therefore, under a duty to place before the court all material facts that, viewed objectively, are relevant to the court's assessment of the motion.
- [34] The duty of full and frank disclosure is especially important with respect to *Mareva* injunctions because, by their very nature, they are liable to cause substantial prejudice to the parties that are subject to their terms.
- [35] I do not accept Chicago Title's submissions that the requirements of *Friedland* have been relaxed over time. Parties seeking *ex parte* relief must meet *Friedland's* strictures in order to avoid injustice to the absent party. That does not mean that the duty of full and frank disclosure is to be imposed in a formal or mechanical manner. In *Friedland*, Justice Sharpe noted that an *ex parte* order will not be set aside due to mere imperfections in the affidavit or because inconsequential facts have not been disclosed:

The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C. L.R. 2d 335; *Rust Check v. Buchowski* (1994) 58 CPR 3d 324.¹⁵

- [36] The test on whether to set aside an *ex parte* order for non-disclosure of material facts is whether the omitted disclosure might have had an impact on the decision to issue the original order.¹⁶ In a case where the court finds that such a matter of non-disclosure was not material, it may decline to vacate the injunction.¹⁷
- [37] The parties prepared a significant amount of material for use on the motion before me. By my estimate, Chicago Title uploaded over 12,000 pages to CaseLines, Nova Diamonds uploaded over 6,000 pages to CaseLines, and Toronto Reserve Gold uploaded approximately 400 pages to CaseLines.
- [38] As I explain below, I am setting aside the orders made on November 2 and December 19, 2022, as against Nova Diamonds and Toronto Reserve Gold because Chicago Title failed

¹⁴ *United States v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.), at paras. 27-28.

¹⁵ *Friedland*, at para. 31; *Two-Tyme Recycling Inc. v. Woods*, 2009 CanLII 64803 (Ont. S.C.), at para. 21.

¹⁶ *Hazelton Homes Corporation v. Mehta*, 2020 ONSC 849, 63 E.T.R. (4th) 147, at para. 21; *Two-Tyme*, at para. 20; *Yemec*, at para. 35; *Wachsmann v. Zahler*, 2002 CarswellOnt 3594 (Ont. S.C.), at para. 8.

¹⁷ *Alberta (Securities Commission) v. Maitland Capital Ltd.*, 2008 CarswellOnt 4141 (Ont. S.C.).

to make full and frank disclosure to the motion judge on November 2, 2022. I will refer to the material subsequently generated by the parties, and in particular the cross-examination of Ms. Ditullio, only to the extent necessary to demonstrate the omissions in Chicago Title's material on that date.

- [39] I do not think it is fair or appropriate to allow Chicago Title to bolster its case by advancing arguments and evidence that it did not put before the court on November 2, 2022.¹⁸ That material would be relevant to my *de novo* consideration of whether or not the injunction should be continued. However, in my view, this case turns on whether or not Chicago Title breached its duties to the court when the *Mareva* was obtained such that the order should be vacated.
- [40] I would be reluctant to create incentives for plaintiffs to obtain *Mareva* orders on a less than candid presentation of their case and to then use that order to collect further evidence to backfill the weaknesses in their case.
- [41] In any event, having considered the additional evidence, I am satisfied that Chicago Title is not entitled to any relief against Nova Diamonds or Toronto Reserve Gold. Chicago Title has not met the test to obtain the extraordinary relief of a *Mareva* injunction.

Chicago Title neither made full and fair disclosure nor presented its case fairly

- [42] For the reasons that follow, I find that Chicago Title did not make full and frank disclosure of the material facts to the motion judge on November 2, 2022. Chicago Title did not fairly present its case and fairly present the material facts that may favour Nova Diamonds and Toronto Reserve Gold. I find that these omissions were material and might well have affected the decision to issue the *Mareva* order on November 2, 2022.
- [43] To repeat, in order to obtain a *Mareva* injunction, Chicago Title needed to demonstrate on the evidence presented to the court:
- a. a strong *prima facie* case;
 - b. irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial;
 - c. the balance of convenience favours granting an interlocutory injunction;
 - d. the defendant has assets in the jurisdiction; and
 - e. that there is a serious risk that the defendant will remove property or dissipate assets before judgment.¹⁹

¹⁸ *Lee v. Chang*, 2018 ONSC 930, at paras 40 to 41; *Pricewaterhousecoopers LLP v. Phelps*, 2010 ONSC 1061

¹⁹ *Aetna Financial Services Ltd.; Yemec; Wang*, at para. 127.

Chicago Title's notice of motion

[44] To assess the adequacy of Chicago Title's disclosure, it is helpful to start with the relief it sought on the motion. Chicago Title requested leave to amend its statement of claim to add 32 defendants, including Nova Diamonds and Toronto Reserve Gold. Chicago Title advanced the following grounds for its request:

(g) Production recently obtained in compliance with the Norwich Orders disclose transactions in which considerable amounts of the Fraudulent Mortgage Proceeds are transferred to individuals and corporations not previously known to the Plaintiff ("the Proposed Added Defendants"); [emphasis added]

(h) The circumstances of each such transaction are highly suspicious and the Plaintiff wishes to advance allegations that all such recipients are liable to it for damages as a result of the underlying fraudulent mortgage scheme;

[45] Chicago Title also sought an order that "the *Mareva* Injunction previously granted as extended shall apply to freeze and prevent any removal or transfer of monies or assets of" Nova Diamonds and Toronto Reserve Gold up to the monetary limits for each.²⁰ Chicago Title advanced the following grounds for that relief:

(d) The most recent productions have disclosed transactions in which portions of the Fraudulent Mortgage Proceeds were transferred to other individuals and corporations the identities of whom and which were not previously known to [Chicago Title];

...

(j) To the extent that leave to amend is granted, [Chicago Title] seeks an Order that the previously issued *Norwich* and *Mareva* Orders are to apply to [Nova Diamonds and Toronto Reserve Gold, among others] but that such restrictions shall apply only up to the monetary limits as set out for each respective proposed added Defendant at Schedule "B" hereto;

(k) [Chicago Title] has a strong prima facie case;

(l) [Chicago Title] would suffer irreparable harm which cannot be adequately compensated by damages if the injunction and tracing Order sought herein are not granted;

²⁰ The monetary limits set out in the order were \$75,000 for Nova Diamonds and \$295,200 for Toronto Reserve Gold.

(m) The balance of convenience favours the granting of injunctive relief;

...

(r) The expansion Order and extension Order sought will allow [Chicago Title] to trace and potentially preserve the Fraudulent Mortgage proceeds and to identify and preserve evidence of wrongdoing in respect of the same, and accordingly, the interests of justice favour the granting of the Order; [emphasis added]

[46] In my view, read fairly, Chicago Title represented to the court that the *Mareva* injunction should be extended to Nova Diamonds and Toronto Gold because they had received portions of the fraudulent mortgage proceeds and that Chicago Title wanted to preserve those very same funds.

The evidence filed in support of Chicago Title's request for a Mareva injunction

[47] On its motion, Chicago Title relied on the affidavit of Ms. Ditullio, which was sworn on November 1, 2022. Ms. Ditullio explained that, based on a review of the bank records obtained through the *Norwich* order, Chicago Title learned that Mr. Persico had transferred over \$1.517 million of the fraudulent mortgage proceeds to KTI Corporation in July 2020. She affirmed as follows:

51. Persico caused the following transactions and funds to be directed to KTI Corporation:

- i. On July 2, 2020, a bank draft in the amount of \$195,750.00 to be issued to KTI Corporation, a company incorporated pursuant to the laws of Ontario;
- ii. On or about July 13, 2020 a wire transfer in the amount of \$158,000.00;
- iii. On or about July 16, 2020, a wire transfer in the amount of \$392,500.00;
- iv. On or about July 22, 2020, a wire transfer in the amount of \$378,274.50;
- v. On or about July 29, 2020 a wire transfer in the amount of \$392,500.00;

[48] Ms. Ditullio then advised the court that her office had determined that Nova Diamonds and Toronto Reserve Gold, among others, received portions of the fraudulent mortgage proceeds. Ms. Ditullio affirmed that after KTI received the fraudulent mortgage funds from

Mr. Persico in July 2020, KTI issued a cheque to Nova Diamonds for \$75,000 and issued a cheque and a wire transfer to Toronto Reserve Gold. Her evidence was as follows:

3. ... In particular, certain financial productions which our office has received from non-party financial institutions served with the previous Orders issued by this Honourable Court has disclosed that [Nova Diamonds and Toronto Reserve Gold, among others] were party to transactions in respect of which amounts forming part of the subject fraudulent mortgage proceeds were transferred.

...

41. Further to the financial productions previously produced by the non-parties served with the Orders obtained to date as contained in the previous Affidavits sworn in support of the relief sought in this Motion, and further to the financial productions appended to this my Affidavit, I can advise this Honourable Court that our office has determined the names of a number of additional individuals and corporations which have been the recipients of transfers of portions of the fraudulent mortgage proceeds as particularized below....

Nova Diamonds Inc.

76. On September 5, 2020, a cheque in the amount of \$75,000.00 was issued to Nova Diamonds Inc, a copy of which is attached hereto as Exhibit “GGG”.

77. The corporate profile report for Nova Diamonds Inc. is attached hereto as Exhibit “HHH”.

...

Toronto Reserve Gold Inc.

85. On December 4, 2020, KTI caused a cheque to be issued to Toronto Reserve Gold Inc. in the amount of \$6,000.00. On February 26, 2021, KTI caused a wire transfer to be sent to Toronto Reserve Gold Inc. in the amount of \$289,200.00. A copy of the cheque and evidence of the wire transfer are collectively attached hereto as Exhibit “QQQ”. The total amount paid to Toronto Reserve Gold Inc. was \$295,200.00

86. The corporate profile report for Toronto Reserve Gold Inc. is attached hereto as Exhibit RRR.

94. I do believe the above transactions disclose that [Nova Diamonds and Toronto Reserve Gold, among others] all received

portions of the Fraudulent Mortgage Proceeds from either Mr. Persico or the proposed Defendant KTI Corporation after the Fraudulent Mortgage Proceeds to it [*sic*] by Mr. Persico. [emphasis added]

- [49] The paragraphs set out above were the only parts of Ms. Ditullio's affidavit that related to Nova Diamonds and Toronto Reserve Gold. Ms. Ditullio represented to the court that Chicago Title had determined that Nova Diamonds and Toronto Reserve Gold received portions of the fraudulent mortgage proceeds from KTI in the three transfers described above. On this basis, Ms. Ditullio advised the court that the *Mareva* order should be extended to Nova Diamonds and Toronto Reserve Gold in order to prevent the further transfer of the fraudulent mortgage proceeds. She put it this way in her affidavit:

95. It is on that basis that the Plaintiff respectfully requests leave to amend its Statement of Claim in the form annexed to the Notice of Motion as Schedule, and requests an Order that the proposed added Defendants be made subject to both the previously granted Norwich Orders and the Mareva Orders (the latter only up to the limits set out at Schedule B to the Notice of Motion).

96. I do believe that the requested amendments and expansion of the Mareva injunctive relief to the proposed added Defendants is necessary to ensure that the Fraudulent Mortgage Proceeds are not further transferred with a view towards placing the same outside of the Plaintiff's reach.

- [50] In my view, the motion judge relied on Chicago Title's assertion that it had determined that Nova Diamonds and Toronto Reserve Gold had received a portion of the fraudulent mortgage proceeds. This is clear from the endorsement issued on November 2, 2022:

The plaintiff continues to trace funds taken from its insured by a fraudulent mortgage. Tracing efforts to date have produced evidence of numerous recipients of purloined funds. The plaintiff asks to amend the title of proceeding and the statement of claim in order to add all recipients for tracing purposes (at minimum).

Recognizing that not all recipients of funds are necessarily parties to the fraud, the plaintiff seeks to freeze the new defendants' accounts only to the limit of the funds they received. This is a more of a freezing order rather than expressly a *Mareva* injunction. In light of the source of funds and the [sheer] number of parties, I am content that giving notice to the recipients would be inconvenient and would risk loss of the funds. Anyone prejudiced can come back to court quickly. I am also satisfied that a few of the new defendants are sufficiently identified as participants in the material already filed so as to justify a full Mareva injunction against them. The limit of

the relief sought against each of the defendants is identified in an appendix to the order that I will sign.

The motion will be returnable before me on December 19, 2022 to be spoken to.

- [51] I find that Chicago Title did not fairly describe the material facts underpinning its request to extend the *Mareva*, did not fairly describe the strength of its case, and it did not fairly raise what Nova Diamonds and Toronto Reserve Gold would have said in response, had they been present.
- [52] First, Chicago Title represented to the court that it had determined that Nova Diamonds and Toronto Reserve Gold received a portion of the fraudulent mortgage proceeds from KTI. In fact, Chicago Title had no basis for that conclusion and provided the court with no evidence to support its assertion.
- [53] On cross-examination, Ms. Ditullio admitted that at the time she swore her affidavit, her office had not attempted to trace the fraudulent mortgage funds from the KTI account to Nova Diamonds or Toronto Reserve Gold. Absent such a tracing analysis, in my view, it was inaccurate to advise the court that Chicago Title had “determined the names of a number of additional individuals and corporations which have been the recipients of transfers of portions of the fraudulent mortgage proceeds.” [emphasis added]
- [54] The only thing that Chicago Title knew at the time it requested the extraordinary relief of a *Mareva* injunction was that Nova Diamonds and Toronto Reserve Gold received money from KTI at some time after KTI received the fraudulent mortgage proceeds from Mr. Persico. The actual state of affairs provides a much less compelling case for a *Mareva* injunction, especially one sought two years after the transactions at issue. Chicago Title had a duty to highlight this weakness to the court.
- [55] Second, the bank records attached to Ms. Ditullio’s affidavit further undermine Chicago Title’s representation to the court that Nova Diamonds and Toronto Reserve Gold received proceeds of the fraudulent mortgage proceeds.
- [56] According to Ms. Ditullio’s affidavit, KTI received the final tranche of the fraudulent mortgage proceeds on July 29, 2020, which increased the balance in the KTI’s account to \$393,237.21. Thereafter, KTI dissipated the fraudulent mortgage proceeds to a group of recipients that did not include Nova Diamonds and Toronto Reserve Gold and, by August 7, 2020, there was only \$313.12 left in the account.
- [57] Between August 7 and September 15, 2020, when Nova Diamonds cashed the KTI cheque, there were ten different deposits to the KTI account and approximately 19 withdrawals. The balance in the account rose to \$86,360.67, then dropped to \$775.72, then rose to \$110,718.47, and then dropped to \$268.47, then rose to \$76,450. All of these transactions took place before Nova Diamonds cashed the \$75,000 cheque from KTI. There were even more transactions and balance swings before Toronto Reserve Gold received any funds from KTI.

- [58] In my view, these transactions are all material facts that Chicago Title should have brought to the court's attention on its *ex parte* motion for a *Mareva* injunction. These facts significantly undermine Ms. Ditullio's assertion that Nova Diamonds and Toronto Reserve Gold had received portions of the fraudulent mortgage. Viewed objectively, these facts are material. The disclosure of these facts might well have affected the motion judge's decision to issue the *Mareva* injunction against Nova Diamonds and Toronto Reserve Gold.²¹
- [59] Although this failure to disclose was material, I am satisfied that it was inadvertent. Indeed, Chicago Title seemed unaware of the fatal flaw in its analysis as late as the October 5, 2023, affidavit of Hoken Aldridge, Senior Recoupment Counsel, and associate vice-president of Chicago Title. Only during the cross-examination on his affidavit did Mr. Aldrich finally concede that he could not say with certainty that the funds KTI transferred to Nova Diamonds and Toronto Reserve Gold originated from the fraudulent mortgage proceeds.
- [60] Accepting that this oversight was inadvertent, however, does not excuse the failure to place these material facts before the court. It is important to recall that Chicago Title sought to extend the *Mareva* order in November 2022, which was about two years after the transactions involving KTI, Nova Diamonds and Toronto Reserve Gold. It is difficult to see the urgency of this motion, and, in any event, Chicago Title should not have come to the court seeking such extraordinary relief without having done a basic tracing of funds. A party coming to court *ex parte* must provide accurate information to the court or run the risk of having that order set aside. It is no answer to say that the bank records were included as an exhibit to Ms. Ditullio's affidavit and, therefore, Chicago Title met its disclosure obligations. The court does not have the resources to scrutinize the evidence at that level of detail or to conduct the tracing analysis that should have been conducted by the plaintiff. That is why the law places the burden on the plaintiff to make full and frank disclosure and to present fairly its case to the court.
- [61] Third, Chicago Title had no evidence to implicate either Nova Diamonds or Toronto Reserve Gold in the fraud. On cross-examination, Ms. Ditullio admitted that the only evidence she had was that each corporation received funds from KTI:

Q. Okay. The basis upon which Chicago Title sought to obtain the *Mareva* order against Nova on November 2 was the cheque that we referred to earlier, the \$75,000 cheque. Correct?

A. Yes, that's correct.

Q. And no other evidence with respect to Nova. Correct?

A. That's correct.

²¹ *Hazelton Homes*, at para. 21; *Two-Tyme*, at para. 20; *Yemec*, at para. 35; *Wachsmann v. Zahler*, at para. 8.

[62] Ms. Ditullio also admitted that, at the time she swore her affidavit, she did not bother trying to determine whether or not the cheque was for a legitimate business transaction:

Q. You did nothing between October 14 and November 1, at the time you swore your affidavit, to determine whether that cheque was for a legitimate business transaction for the delivery of goods bought and sold?

A. That's correct.

[63] Chicago Title did not explain the weaknesses in its evidence or the frailty of its conclusions to the motion judge on the motion for *Mareva* injunction. Chicago Title had no evidence, much less a strong *prima facie* case that Nova Diamonds or Toronto Reserve Gold committed fraud. Chicago Title did not make this clear in the materials it filed with the court.

[64] There can be no doubt that, had they been present, Nova Diamonds and Toronto Reserve Gold would have pointed to these additional facts in response to Chicago Title's request for a *Mareva* injunction.

[65] In my view, Chicago Title failed to disclose material facts and significantly oversold the strength of its case against Nova Diamonds and Toronto Reserve Gold on material issues that might well have had an impact on the decision to issue the original order.²²

Chicago Title's evidence on the risk of the dissipation of assets

[66] As stated above, to obtain a *Mareva* injunction, Chicago Title needed to demonstrate to the motion judge that there was a serious risk that Nova Diamonds and Toronto Reserve Gold would remove property or dissipate assets before judgment. I find that Chicago Title did not fairly present the material facts underpinning its submission that there was a risk that Nova Diamonds and Toronto Reserve Gold would dissipate their assets.

[67] Ms. Ditullio's affidavit contained the following facts on which Chicago Title relied to demonstrate a risk of dissipation of assets:

105. Given that complete financial production remains outstanding and additional financial production respecting the proposed added Defendants is now requested, and given that productions that are central to the matters in issue in the Action have not yet been provided to our office, I do believe that there is a substantial risk that disclosure of the Order and underlying Action will result in the

²² *Hazelton Homes Corporation v. Mehta*, 2020 ONSC 849, 63 E.T.R. (4th) 147, at para. 21; *Two-Tyme*, at para. 20; *Yemec*, at para. 35; *Wachsmann v. Zahler*, 2002 CarswellOnt 3594 (Ont. S.C.), at para. 8.

further dissipation of assets such that the Plaintiff is left without meaningful recourse. [emphasis added]

106. I can advise this Honourable Court that the Plaintiff respectfully request that the extension Order proceed on an *ex parte* basis, and that the balance of the within Motion be adjourned to a date to be spoken to such that this Honourable Court may be updated as to the status without a fresh Motion and renewed Notice of Motion being required.

[68] In fact, Ms. Ditullio had no basis for her stated belief. She admitted on cross-examination that she had done no investigation about Nova Diamonds or its business prior to forming her belief that there was a risk of dissipation of assets:

Q. As it applies to Nova, Ms. Ditullio, you did no investigation whatsoever to determine whether there was any risk of dissipation of assets from Nova. Correct?

A. That's correct.

...

Q. Ms. Ditullio, are you aware of Nova's business today?

A. No.

Q. So you've never done any investigation of Nova or its business. Correct?

A. Yeah, that's correct.

Q. Okay. The basis upon which Chicago Title sought to obtain the Mareva order against Nova on November 2 was the cheque that we referred to earlier, the \$75,000 cheque. Correct?

A. Yes, that's correct.

Q. And no other evidence with respect to Nova. Correct?

A. That's correct.

[69] Ms. Ditullio stated that she believed there was a risk that Nova Diamonds and Toronto Reserve Gold would dissipate their assets absent a *Mareva* injunction. Although Ms. Ditullio correctly stated the test Chicago Title had to meet, there was no evidentiary basis underpinning her belief. A belief that is uninformed by the facts of the case is not reasonable. It is an assumption, nothing more. It is certainly not the type of evidence that justifies the court issuing a *Mareva* injunction.

- [70] I accept that Chicago Title is not required to adduce direct evidence showing that Nova Diamonds and Toronto Reserve Gold are actively dissipating their assets. A serious risk of dissipation is sufficient, and the risk may be inferred in appropriate cases from the surrounding circumstances of the fraud.²³ The availability of that inference, however, depends on the strength of the demonstrated connection of the target of the *Mareva* to the commission of the fraud.
- [71] Chicago Title appears to have strong evidence that Mr. Persico was involved in the fraud. That evidence may well justify an inference that there is a serious risk that Mr. Persico might dissipate his assets.
- [72] As noted above, however, on November 2, 2022, Chicago Title placed no strong evidence before the motion judge that either Nova Diamonds or Toronto Reserve Gold participated in the fraud. The only evidence Chicago Title placed before the motion judge was that Nova Diamonds and Toronto Reserve Gold received payments from KTI. That is insufficient to support an inference that Nova Diamonds or Toronto Reserve Gold were involved in the fraud or that they would dissipate their assets.²⁴
- [73] The weaknesses in Chicago Title's evidence with respect to dissipation were masked by Ms. Ditullio's statement that she believed there was a risk of dissipation. In my view, this statement did not fairly present Chicago Title's case or the material facts that were relevant to the exercise of the motion judge's discretion to grant a *Mareva*. Chicago Title ought to have drawn these matters to the attention of the motion judge.

Conclusion

- [74] In my view, the *Mareva* order issued against Nova Diamonds and Toronto Reserve Gold should be set aside. Chicago Title failed to make full and frank disclosure of material facts that could well have affected the decision of the motion judge. Chicago Title did not make a balanced presentation of the fact to the motion judge.
- [75] Although I accept that it was unintentional, I find that Chicago Title made a very serious misstatement when it represented to the court that it had determined that Nova Diamonds and Toronto Reserve Gold had received proceeds of the fraudulent transaction when it had conducted no analysis to support that conclusion.
- [76] I also find that it was a very serious oversight for Chicago Title not to advise the motion judge of the extremely limited evidence justifying its conclusion that there was a risk of dissipation of assets. The risk of dissipation of assets drives the court's willingness to grant the extraordinary relief of a *Mareva* order. Chicago Title failed to make full and fair disclosure of material facts relevant to risk of the dissipation of assets.

²³ 2092280 *Ontario Inc. v. Voralto Group Inc.*, at para. 23.

²⁴ *Shaw Communications Inc. v. Young et al.*, 2021 ONSC 7918, at paras. 47 to 48; *HZC Capital Inc. v. Lee*, 2019 ONSC 4622, at para. 83.

- [77] I have no doubt that the omitted disclosure and the unbalanced presentation of the evidence might have had an impact on the decision to issue the *Mareva* order and it must be set aside. That is the price that Chicago Trust must pay for breaching its duties to the court.²⁵
- [78] For these reasons, I set aside the *Mareva* order obtained by Chicago Title on November 2, 2022, only as against Nova Diamonds and Toronto Reserve Gold.

December 19, 2022, modification of the *Mareva* order

- [79] In my view, once the November 2, 2022, order is set aside, the non-dissipation agreement and the order dated December 19, 2022, must also be set aside as against Nova Diamonds and Toronto Reserve Gold.
- [80] Toronto Reserve Gold only agreed to not dissipate its assets in order to escape the grasp of the *Mareva* order Chicago Title had improperly obtained. The negotiations between the parties took place against the backdrop of an injunction to which Chicago Title was not entitled. Chicago Title was no more entitled to require Toronto Reserve Gold to agree to a non-dissipation order than it was to obtain the *Mareva* order. Therefore, I set aside Toronto Reserve Gold's undertaking not to dissipate its assets.
- [81] Chicago Title moved to continue its injunction against Nova Diamonds but only sought a non-dissipation order in place of the *Mareva* order. On December 19, 2022, Myers J. granted the relief sought by Chicago Title.
- [82] Chicago Title, however, continued to rely on the affidavit of Ms. Ditullio sworn on November 1, 2022. It also relied on a second affidavit sworn by Ms. Ditullio on December 16, 2022. That affidavit recounted conversations between counsel for Chicago Title and Nova Diamonds regarding whether or not the *Mareva* order should be set aside and the action dismissed against Nova Diamonds, but it did not repair the problems in Ms. Ditullio's affidavit provided on November 2, 2022.
- [83] Chicago Title failed to make full and frank disclosure on the motion that resulted in the December 19, 2022 non-dissipation order against Nova Diamonds. I set that order aside as against Nova Diamonds.

Costs

- [84] If the parties are not able to resolve costs of this action, the moving parties may each email its costs submission of no more than three double-spaced pages to my judicial assistant on or before December 15, 2023. Chicago Title may deliver its responding submission of no more than three double-spaced pages on or before December 22, 2023. No reply submissions are to be delivered without leave.

²⁵ *Friedland*, at paras. 27-28.

Robert Centa J.

Date: December 11, 2023