COURT OF APPEAL FOR ONTARIO

CITATION: 6071376 Canada Inc. v. Khedmatgozar, 2024 ONCA 248
DATE: 20240408
DOCKET: COA-23-CV-0886

Pepall, Sossin and Dawe JJ.A.

BETWEEN

6071376 Canada Inc.

Applicant (Appellant)

and

Mahmood Khedmatgozar, 3966305 Canada Inc., Capital Dentistry Group Limited, Demetrius Dalios, Mary Beresford and John Doe

Respondents (Respondents)

G. James Thorlakson and Maggie Sullivan, for the appellant

Carolanne Cabana and Ian Houle, for the respondents Mahmood Khedmatgozar, 3966305 Canada Inc. and Mary Beresford

Alyssa Tomkins and Romina Hassanzadeh, for the respondents Capital Dentistry Group Limited and Demetrius Dalios

Heard: March 12, 2024

On appeal from the judgment of Justice Heather J. Williams of the Superior Court of Justice, dated July 10, 2023.

REASONS FOR DECISION

[1] The appellant, 6071376 Canada Inc. (“607”), is a judgment creditor of the respondent, Dr. Mahmood Khedmatgozar. It brought an application seeking a declaration that Dr. Khedmatgozar had transferred shares in several dental practice corporations he co-owned to the respondent, Capital Dentistry Group Limited (“CDG”), in exchange for cash and shares in CDG, as a “result of a conspiracy by unlawful means amongst the [r]espondents”. The unlawful means was alleged to have been a fraudulent conveyance. 607 also sought other forms of relief against the respondents, including damages for the tort of unlawful conduct conspiracy.

[2] The application judge dismissed 607’s application, and 607 now appeals to this court. In oral submissions, counsel submitted that the appellant’s focus on the appeal was on the respondent CDG, not Dr. Khedmatgozar, against whom it already has obtained judgment in its original action.

[3] Dr. Khedmatgozar and the respondent, Dr. Demetrius Dalios, are both dentists who were previously shareholders in several Ottawa dental practice corporations. The respondent 3966305 Canada Inc. (“396”) is a corporation controlled by Dr. Khedmatgozar, and the respondent Mary Beresford is Dr. Khedmatgozar’s spouse.

[4] In February 2019, MCA Dental Group Limited (“MCA”), which is not a party to this litigation, approached Dr. Khedmatgozar and Dr. Dalios to discuss a

possible acquisition of their dental practices. Several months later, in June 2019, 607 obtained judgment for more than $1.5 million against Dr. Khedmatgozar and his corporation, 396, in a lawsuit relating to an investment property.

[5] In October 2020, MCA completed its purchase of Dr. Khedmatgozar and Dr. Dalios's dental practices, along with 14 other dental practice corporations. These dental practices were acquired by a new corporation that MCA set up for that purpose, the respondent CDG. On closing, Dr. Khedmatgozar received cash and a minority shareholding interest in CDG. The appellant does not challenge the value the transaction attributed to Dr. Khedmatgozar and Dr. Dalios's practices.

[6] As Goudge J.A. explained in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 26, the tort of unlawful conduct conspiracy has five essential elements:

a) the alleged conspirators must "act in combination, that is, in concert, by agreement or with a common design";
b) their conduct is unlawful;
c) their conduct is directed towards the plaintiff;
d) the alleged conspirators "should know that, in the circumstances, injury to the [plaintiff] is likely to result"; and
e) their conduct causes injury to the plaintiff.

[7] The application judge found that 607 had established the first element but had failed to establish any of the last four.

[8] On appeal, 607 argues that the application judge erred by finding that the transaction was not fraudulent and therefore not unlawful. 607 concedes that the application judge correctly set out the elements of unlawful conduct conspiracy, but argues that she "erred in law, or committed palpable and overriding error in her application of the 'badges of fraud' developed by the Court in determining whether an inference of intent to defraud should be drawn". 607 lists a number of factors that it says supports its position that the transaction was fraudulent, which it contends the application judge "failed to properly consider".

[9] As Laskin J.A. explained in *FL Receivables Trust 2002-A v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561, at paras. 39-40:

> The crucial question in any fraudulent conveyance action is whether the plaintiff has proved the fraudulent intent of the debtor. While the legal burden to prove fraudulent intent remains on the plaintiff throughout the trial, the plaintiff can raise an inference of fraud sufficient to put a "burden of explanation" on the defendant debtor. The plaintiff typically raises an inference of fraud by putting forward "badges of fraud". These "badges of fraud" vary from case to case. They are no more than typical and suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor. See C.R.B. Dunlop, Creditor-Debtor Law in Canada, 2nd ed. (Toronto: Thomson Canada, 1995) at 613-15.
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> The court, however, is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff. See *Koop v. Smith* (1915), 51

> S.C.R. 554, at pp. 558-59. The court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence.

[10] To the same effect, as noted in in *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406, 351 O.A.C. 241, at para. 72, leave to appeal refused [2016] S.C.C.A. No. 361:

> An inference of intent may arise from the existence of one or more badges of fraud. However, the presence of such indicia does not mandate a finding of intent. Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance: see *Re Fancy* (1984), 46 O.R. (2d) 153 (H. Ct. J.), at p. 159.

[11] The application judge explained why, on the evidence as a whole, she was not prepared to find fraudulent intent. In particular, she noted that the purchase of the dental practices was initiated by MCA, not by Dr. Khedmatgozar or Dr. Dalios; the form of the transaction was “consistent with how MCA had structured deals in the past”; “the combination of cash and shares on closing was MCA’s idea, not that of Dr. Khedmatgozar”; MCA first proposed the acquisition several months before 607 obtained its judgment against Dr. Khedmatgozar; and the purchases were part of a larger transaction in which CDG also acquired more than a dozen other unrelated dental practices.

[12] In our view, the application judge’s factual conclusions relating to fraudulent intent were supported by the evidence and were ones that she was entitled to

reach on the record. We cannot conclude that she failed to properly consider the evidence merely because she drew different conclusions than the ones 607 was urging on her.

[13] Since it was 607's burden to establish each of the essential elements of the tort of unlawful conduct conspiracy, our conclusion on fraudulent intent is sufficient on its own to dispose of 607's claim. Accordingly, there is no need to address 607's remaining arguments.

[14] That said, we make two further observations. First, as the application judge noted, there was "no evidence that MCA was anything but an arm's length and *bona fide* purchaser". Indeed, MCA is not a party to the application.

[15] Second, 607's counsel was aware well before the sale closed that Dr. Khedmatgozar was contemplating selling his dental practices, and also knew that the proposed transaction would involve Dr. Khedmatgozar receiving a combination of cash and shares. However, when 607 conducted a judgment debtor examination of Dr. Khedmatgozar in August 2020, a few months before the transaction closed, its counsel chose not to question him about the pending sale. In this regard, we would also note that, through their respective counsel, 607 struck an agreement with Dr. Khedmatgozar confirming that the judgment was stayed and he would undertake to pay the cash proceeds of sale into the trust account of his lawyer, less a deduction for his lawyer's fees. Initially the quantum of the

proceeds was not stipulated, but a few months later 607's counsel was advised that Dr. Khedmatgozar expected to receive approximately $200,000 in cash. Ultimately, just over $50,000 was paid to the appellant. There is no suggestion that CDG was aware of the arrangements Dr. Khedmatgozar's lawyer had made to pay the cash proceeds of the sale to 607.

[16] 607 also suggests in its factum that the application judge erred by not converting its application into an action. To the extent that 607 is raising this as a ground of appeal, it can be disposed of summarily. It was 607 that chose to frame its lawsuit as an application in the first place, and it never asked the application judge to convert the proceedings to an action. The application judge can hardly be faulted for failing to do something she was never asked to do. In any event, decisions under r. 38.10(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to order that an application proceed to trial are discretionary in nature.

[17] The appeal is accordingly dismissed. As agreed, the appellant shall pay each of the respondents $15,000 in costs on a partial indemnity scale inclusive of disbursements and applicable tax.

"S.E. Pepall J.A."
"L. Sossin J.A."
"J. Dawe J.A."