

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Eagle Mountain Investments Inc. v.
Promerita Real Estate Capital Corp.*,
2024 BCSC 1141

Date: 20240613
Docket: S138509
Registry: Kelowna

Between:

**Eagle Mountain Investments Inc., Byron Jaromir Dafoe,
Kimberly Ann Dafoe and Scott Michael Wilshaw**

Petitioners

And

**Promerita Real Estate Capital Corp. and The Point 3P Limited Partnership,
by its general partner, The Point 3P Holdings Corp.**

Respondents

Before: The Honourable Justice Hardwick

Oral Reasons for Judgment

Counsel for the Petitioners:

C. Elkin

Counsel for the Respondents, Promerita
Real Estate Capital Corp.:

L. Backman, K.C.

Place and Date of Trial/Hearing:

Kelowna, B.C.
February 7, 2024

Place and Date of Judgment:

Kelowna, B.C.
June 13, 2024

[1] **THE COURT:** These are my oral reasons of judgment in respect of the hearing of the petition to this Court filed October 20, 2023 and heard by me earlier this year (the “Petition”).

[2] The specific relief sought has been articulated by counsel for the petitioners in the draft form of order contained at Tab 10 of the petition record. It is consistent with the relief sought in the Petition, but it is helpfully defined for the Court. The relief sought is opposed in its entirety by the respondent. In the event a transcript of these oral reasons is ordered, I will append the draft order at Tab 10 as Appendix A to these reasons. Counsel need not hear me read them into the record verbatim orally, as they are both obviously aware of what is being sought.

[3] I will further start by acknowledging that the Petition concerns somewhat discrete issues in what can best be described as a larger series of related disputes. I am not and will not be, making findings on these broader issues.

[4] It is clear there are independent theories of how events unfolded over a significant period of time.

[5] The relief sought importantly includes, amongst other things, a permanent injunction, along with declaratory relief that certain defined security documents are of no force and effect.

[6] This is, as the very experienced and capable counsel in this case will acknowledge, final relief being sought. There has already been an interim effectively “stop gap” solution put into place pending these reasons, first by Justice G.P. Weatherill and continued by myself pending the release of these reasons. However, the legal analysis for the granting of a final order is notably different than the interim stop gap relief, as I have described it.

[7] For the reasons I will now articulate, I have concluded, despite my best efforts, that this matter simply is not suitable for final determination on the basis of the petition record as it presently stands. I used my best efforts as I acknowledge that this is not a situation where I could conclude that the petitioner’s claimed relief

was without merit, frivolous, or vexatious. Where the case turns, at present, is on certain contradictions in the petition record, which I simply find that I cannot resolve in accordance with the Supreme Court of Canada jurisprudence regarding contractual interpretation as articulated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (the generally leading cited case) and *Corner Brook (City) v. Bailey*, 2021 SCC 29, which is a more recent articulation of the *Sattva* form of the analysis required by the Supreme Court of Canada. These are binding upon me.

[8] The result, as I will return to, is my decision to order that this matter be remitted to the trial list, in accordance with R. 22-1(7)(d) of the British Columbia *Supreme Court Civil Rules* [*Rules*].

[9] I do so with some regret, as I tried to craft a hybrid process in accordance with the principles set forth by our Court of Appeal in *Cepuran v. Carlton*, 2022 BCCA 76, but concluded there may be relevant and probative evidence from other parties in this dispute which, given the relief sought, cannot properly be ascertained by the trier of fact simply by ordering some formal disclosure of documents and directing cross-examination of the existing affiants.

[10] It may well be that the parties, through their experienced counsel, present a plan at a trial management conference which limits the trial time required, due to admission of certain facts, time limits on cross-examination, and so forth. In other words, good case planning. However, my ultimate conclusion remains that this matter needs to be remitted to the trial list in accordance with the *Rules* having regard to the contested factual matrix and the relief sought.

[11] Having already disclosed my ultimate conclusion, I will go through the background facts to support same, for the benefit of the record.

Facts

[12] The Petition centres upon the interpretation and possible enforcement of an assignment and assumption of loan and security agreement dated effective as of March 18, 2022 (“AALSA”).

[13] According to the petitioners, pursuant to the AALSA, it was agreed, *inter alia*, that all indebtedness and obligations owed by the petitioners to the respondent, Promerita Real Estate Capital Corp. (PREC) in connection with a loan agreement dated November 21, 2021 (as amended) (the “Loan”), were absolutely assigned to and assumed by the respondent, The Point 3P Limited Partnership (“LP”), by general partner, The Point 3P Holdings Corp. (“GP”) (hereinafter the “Assignment Agreement”).

[14] Despite this alleged assumption and assignment and novation, the record confirmed that PREC delivered notice of its intention to enforce the original security given by the petitioners. It is this notice and the enforcement of the security that is at the crux of what I acknowledge is a broader dispute.

[15] PREC is controlled by Ernest Lang and Rizwan Gehlen, who are also the directors of GP, one of the limited partners and another creditor.

[16] The petitioners Byron Dafoe and Kimberly Dafoe (the “Dafoes”) are spouses and are principals of Eagle Mountain Investments Inc. (“Eagle Mountain”).

[17] The petitioner Scott Wilshaw (“Mr. Wilshaw”) is a business associate of the Dafoes.

[18] I do accept that commencing in or about 2006 the Dafoes, Mr. Wilshaw, and their former business associates, it is asserted, sought to rezone, service, and subdivide an approximately 25-acre site in Peachland, British Columbia, into single-residential family lots and a hospitality lot, on the lands owned by Eagle Mountain and its business partner (hereinafter referred to as the “Lands” and the “Project”, as there is some distinction).

[19] By Fall of 2022, the Project required working capital to fund site improvements and preparation.

[20] The Lands was initially held in clear title, or in other words debt-free.

[21] Each of Eagle Mountain and 1239466 Alberta Ltd. (owned by a prior business partner Richard Dudlezak), owned 50 percent of the Project.

[22] After being introduced to Messrs. Lang and Gehlen at the Promerita organization, Promerita sought and secured an agreement to buy out Mr. Dudlezak's interest. I use the term Promerita organization in a general sense, as again there is a distinction from the PREC.

[23] Consequently, Eagle Mountain and Promerita Investment Corp. entered into a memorandum of understanding, effective November 24, 2021 (the "MOU"), pursuant to which, *inter alia*, they agreed to enter into a limited partnership to develop the Lands. This was intended to be the Project. Hence, the distinction in my defined terms.

[24] The intention, I believe from the evidence, was that there would be bridge financing obtained using security outside of the Project, and the bridge loan financing was to be repaid from the loan proceeds financing the acquisition of the 50 percent interest. This point in and of itself is not determinative but it is consistent with the gaps in the otherwise complicated web.

[25] Contemporaneously, Eagle Mountain executed a loan agreement with PREC, with the Dafoes and Mr. Wilshaw as guarantors, in connection with the non-revolving loan of some \$350,000. Interest on the loan was payable monthly.

[26] The Loan matured in June of 2022. Interest rates were set at nine percent per annum, pursuant to the maturity date, namely June 19, 2022, and 12 percent thereafter.

[27] As security for the Loan, Eagle Mountain signed a general security agreement ("GSA"), the Dafoes and Mr. Wilshaw signed a guarantee, and the Dafoes signed a pledge of their shares in Eagle Mountain and accompanying powers of attorney (these are what I referred to above as the "Security Documents").

[28] This is where, in my conclusion, the facts in the petition record, more appropriately, as presently before the Court, start to get very convoluted.

[29] On November 24, 2021, PREC registered security interests against the Dafoes.

[30] On February 11, 2022, PREC and Eagle Mountain agreed to amend the loan agreement and a further advance of \$250,000 be made.

[31] PREC is one of several affiliated “Promerita” companies involved in this dispute, each of which is controlled by the directors Mr. Ernest Lang and Mr. Rizwan Gehlen. Promerita Investments Corp. had no further involvement after the MOU. Promerita Peachland Development Corp. Ltd. (“PPDC”), was incorporated to be the limited partner and the shareholder in the GP. Promerita Peachland Holdings Corp. (“PPHC”) was later incorporated and became a lender to the project.

[32] Effective February 14, 2022, Eagle Mountain and PPDC entered into a limited partnership agreement (“LPA”) pursuant to which, *inter alia*, they formed the LP, created the GP, and agreed to initial capital contributions. By this time, it is asserted that no Promerita entity had paid 1239466 Alberta Ltd. for its acquisition through the vendor take-back financing in place (“VTB”).

[33] The limited partnership was registered on March 11, 2022.

[34] Further to the formation of the LP, the parties to the Petition executed an assignment and assumption of loan and security agreement, effective March 18, 2022, (as above, the “Assignment Agreement”) with PREC defined as “Lender”, the LP, as represented by the GP defined as the “Assignee”, Eagle Mountain defined as “Debtor”, and and the personal petitioners defined as the “Guarantors”.

[35] The four directors of the GP were Mr. Dafoe, Mr. Wilshaw, Mr. Lang and Mr. Gehlen. A shareholder’s agreement between Eagle Mountain and PPDC provided for unanimous shareholder approval for refinancing decisions.

[36] Eagle Mountain transferred beneficial interest in the additional improvements to the Lands to the LP pursuant to a declaration of bare trust agreement, dated as of March 18, 2022.

[37] Herein comes one of the key issues as to why I have concluded that this matter cannot be determined summarily.

[38] The indebtedness and liability was allegedly, and I quote directly from the record, “to be repaid from the proceeds of a refinancing by the LP - responsibility for that refinancing lay primarily with Messrs. Lang and Gehlen whose Promerita organization was brought in primarily due to representations that they could secure such financing. Instead, shortly before closing, the LPA was amended by slip sheet to eliminate the requirement that the Loan be repaid paid from closing proceeds.”

[39] The key portions of that quotation is the statement, “primarily due to representations”.

[40] Further complicating matters, a loan of three million dollars was secured through Prospera Credit Union (the “Prospera Loan”). There was thus, as of the spring of 2022,, the Prospera Loan, the VTB and, I accept, some need for additional working capital.

[41] There were attempts to refinance, but nothing ever came to fruition.

[42] Eventually, Prospera made demand on the Prospera Loan.

[43] The petitioners allege Messrs. Lang and Gehlen made representations to Mr. Dafoe that they would, “handle it”. This is another key disputed point in the evidentiary record. It is further alleged that despite assurances by Messrs. Lang, Mr. Dafoe was not updated, despite repeated requests.

[44] Instead, it is alleged that Mr. Lang and Mr. Gehlen, “secretly” arranged to take out the Prospera debt and had it assigned to a company they control, Promerita Peachland Holdings Corp. (already defined as “PPHC”).

[45] PPHC very shortly thereafter made demand for payment, as against the Dafoes, Eagle Mountain, and others. This included a notice of intention to enforce security pursuant to s. 244 of the *Bankruptcy Insolvency Act*, R.S.C. 1985, c. B-3.

[46] On this point, I have placed the term “secretly” in quotes intentionally, as this is yet another point of controversy in the evidence in the petition record. The fact that this demand was made is not disputed. That is established through the most basic of affidavit evidence.

[47] There are two letters, dated September 22, 2023 and September 25, 2023 (the latter correcting an error in the former) (the “Demands”). The Court’s concern is not with the correction—such errors can occur in the practice of law, and one was identified very quickly, and there was no prejudice from the two days between the two correspondence issued making the Demands—the Court’s concern is with the conflicting evidence about circumstances giving rise to the assignment.

[48] By a letter dated October 3, 2023, counsel for Eagle Mountain and the Dafoes responded to the Demands and requested that PREC cease enforcement and return all of the afore defined Security Documents.

[49] Approximately one week later, on October 10, 2022, PREC renewed its enforcement notice efforts and sent further letters dated October 13, 2023 purporting to make demands on the Dafoes, but not Eagle Mountain. There is also a letter dated October 11, 2023 addressed to the LP that was forwarded. This again is where I must make clear that I am not making these findings of fact on a final basis—I am highlighting these points in the petition record to underscore why I have concluded that I cannot determine this matter summarily.

[50] In this regard, I must note the October 13, 2023 correspondence attached a payout statement which included a calculation of interest from June 2022, at a rate of 24 percent. This significant change in interest, it is asserted, is not permitted by the relevant loan documents. Again, this is a contested point in the evidence.

[51] Further, I do accept that even on the basis of the existing record that there are potentially very serious consequences to enforcement of the Loan and Security Documents against the petitioners, including the risk to the shares in Eagle Mountain.

[52] Those consequences, which may or may not be ultimately appropriate, underscore the basis of my decision as to why this matter must be remitted to the trial list, in accordance with R. 22-1(7)(d).

[53] Before turning to the issue of ancillary orders, I will state that this case shares some quite common ground with the decision of Justice Hyslop in *Safeway Holdings (Alberta) Ltd. v. Cactus Ridge Estates*, 2014 BCSC 2237 (see in particular para. 36 wherein Justice Hyslop remits that matter to the trial list).

Ancillary Orders

[54] As a corollary to my primary order remitting this matter to trial in accordance with R. 22-1(7)(d), I make the follow ancillary orders:

- a) Unless otherwise ordered, the petitioners shall file a notice of civil claim within 30 days of these reasons;
- b) Unless otherwise agreed, the respondents shall file a response to civil claim within 45 days of these reasons;
- c) Thereafter, the *Rules*, as previously defined, shall govern this proceeding as an action, with the accompanying rights of disclosure and discovery, and so forth;
- d) A notice of trial, on a date reached by mutual agreement and confirmed with Supreme Court Scheduling shall be filed within 60 days of these reasons; and
- e) The interim order of Justice G.P. Weatherill, as continued by myself, shall continue to be in force until trial, unless otherwise varied by agreement or further order of this Court.

Costs

[55] Costs are always awardable at the discretion of the court, based upon the application of R. 14-1 of the *Rules* and the governing case law. This applies in petitions as well as actions.

[56] The general principle is that costs are awarded to the successful party.

[57] “Success”, as it is defined for the purposes of costs, means substantial success.

[58] This is a somewhat more unusual situation, where the Court has not genuinely decided who is substantially successful. Rather, the Court has concluded it cannot make that determination, so it stands on the present petition record, and has placed the matter back in the parties’ hands to bring it before this Court to address the issues in the evidence which may, or may not, be limited to the points that I have articulated in these oral reasons for judgment.

[59] Accordingly, in my discretion, the appropriate order is that the parties shall bear their own costs of the appearances before me, regardless of the ultimate conclusion. All other costs of the proceeding shall be at the discretion of the trial judge at due course, if not agreed.

[60] Madam Clerk, when I was reading out the ancillary orders, I think I said in paragraph 54(a) “unless otherwise ordered” but it should be consistent with subparagraph (b), which is “unless otherwise agreed”. And the intention, for the benefit of counsel, is that you are welcome to come up with a different schedule as between you, depending on work load and so forth, but I think I might have said “otherwise ordered”.

“Hardwick J.”

Appendix A

No. 138509

Kelowna Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**EAGLE MOUNTAIN INVESTMENTS INC., BYRON JAROMIR DAFOE
KIMBERLY ANN DAFOE and SCOTT JOHN MICHAEL WILSHAW**

Petitioners

AND

**PROMERITA REAL ESTATE CAPITAL CORP. and
THE POINT 3P LIMITED PARTNERSHIP, by its general partner,
THE POINT 3P HOLDINGS CORP.**

Respondents

ORDER

BEFORE _____ FEBRUARY 2024

ON THE PETITION coming on for hearing at Kelowna on _____ the ___ day of February, 2024, and on hearing Clive Elkin, counsel for the Petitioners, and Lyle Backman, K.C., counsel for the Respondent Promerita Real Estate Capital Corp., no-one appearing for the Respondent The Point 3P Limited Partnership, by its general partner, The Point 3P Holdings Corp., although duly served:

THIS COURT ORDERS that:

1. The Respondent Promerita Real Estate Capital Corp., and its agents and assigns, are permanently restrained from taking or continuing any and staying any enforcement steps against the Petitioners in connection with a loan agreement dated November 17, 2021, as amended ("Loan"), including pursuant to the Security Documents as set out in paragraph 3 herein;

2. The Petitioners owe no indebtedness nor have any obligations or liabilities to Promerita Real Estate Capital Corp. or its assigns in connection with the Loan;
3. Promerita Real Estate Capital Corp., and its agents and assigns, shall forthwith return to the Petitioners all security documents executed by the Petitioners in connection with the Loan (“Security Documents”), including
 - a. General Security Agreement, executed by Eagle Mountain Investments Inc. on or about November 24, 2021;
 - b. Guarantee(s), executed by Byron Jaromir Dafoe, Kimberly Ann Dafoe and Scott John Michael Wilshaw, on about November 24, 2021;
 - c. Pledge(s) of Shares, executed by Byron Jaromir Dafoe and Kimberly Ann Dafoe, on or about November 24, 2021;
 - d. Power(s) of Attorney, executed by Byron Jaromir Dafoe and Kimberly Ann Dafoe, on or about November 24, 2021;
4. The Security Documents are of no force and effect;
5. Promerita Real Estate Capital Corp., and its agents and assigns, shall forthwith discharge PPR registration 388650N;
6. Promerita Real Estate Capital Corp. shall pay the Petitioners’ costs of this proceeding in the amount of \$____, inclusive of fees, disbursements and taxes, payable forthwith;

7. The requirement that the Respondent The Point 3P Limited Partnership, by its general partner, The Point 3P Holdings Corp., approved this Order is hereby dispensed with; and

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:

Signature of Lawyer for the Petitioners
Clive Elkin

Signature of Lawyer for the Respondent
Promerita Real Estate Capital Corp.
Lyle Backman, K.C.

By the Court
