

CITATION: *Kozak v. Russo*, 2024 ONSC 4490
COURT FILE NO.: CV-24-00724706-00CL
DATE: 20240813

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: John Kozak, Plaintiff

AND:

Rebecca Russo, Defendant

BEFORE: Peter J. Osborne J.

COUNSEL: *Nathaniel Read-Ellis and Emma Parry*, Lawyers for the Plaintiff

Rebecca Russo – self-represented Defendant

HEARD: August 9, 2024

ENDORSEMENT

1. At the conclusion of this hearing last Friday of this interim preservation of property motion, I granted the relief sought for reasons to follow. These are those reasons.
2. The Plaintiff, moving party, John Kozak (“Kozak”), seeks an order:
 - a. validating service;
 - b. preserving on an interim basis certain property by way of:
 - i. restraining the Defendant, responding party, Rebecca Russo (“Russo”), and those acting on her behalf and anyone with notice of the order sought, from directly or indirectly selling, removing, dissipating, alienating, transferring or encumbering the shares of SolarBank Corporation (“SolarBank”) registered in Russo’s name, or the proceeds thereof;
 - ii. requiring Research Capital Corporation to forthwith freeze and prevent the removal or transfer of money or assets registered in Russo’s name in the specific accounts set out in the Notice of Motion; and
 - iii. requiring Endeavour Trust Corporation to forthwith freeze and prevent any removal or transfers of the shares of SolarBank registered in the name of Russo that Endeavour holds in escrow.
3. Kozak relies on the Pleadings, his affidavit affirmed July 31, 2024, and the affidavits of Sandara Siyamendo sworn August 6, 2024 and August 9, 2024, respectively.
4. Neither Russo nor any counsel on her behalf appeared at the hearing. A court reporter was present.

5. Kozak and Russo were in a romantic relationship that was intermittent from 2016 to 2021, and continuous thereafter until July 15, 2024 when Russo ended the relationship via text message to Kozak.
6. Kozak has been working under a contract with Solar-Flow Through Funds (“SFF”), a renewable energy company, since 2012. Russo is a chef by training and is currently enrolled full-time as a student at the University of Toronto. In particular, she is currently taking a course in Italy.
7. The evidence of Kozak is that in or around September, 2022, he learned of an opportunity to acquire shares in a private company called Abundant Solar Energy Inc. Abundant was a significant contractor to SFF. The president of Abundant wanted to sell a number of common shares and Kozak wanted to buy them.
8. His evidence is that in light of the relationship between Abundant and SFF, he did not want to be registered as the legal owner of the shares and asked Russo whether she would hold the shares in trust for him, to which she agreed.
9. Accordingly, Kozak arranged for Russo to purchase legal title to 1,346,280 common shares of Abundant for \$134,628. The evidence of Kozak is that he arranged for Russo to complete that purchase through an agreement of purchase and sale which she signed at his request and direction.
10. The evidence of Kozak is further to the effect that he prepared a Declaration of Trust that Russo signed effective October 24, 2022. Russo then signed an amended Declaration of Trust to correct a typographical error. He includes both of those Declarations as exhibits to his affidavit.
11. The Declarations provide that Russo acknowledges as trustee that she holds the shares in trust for Kozak as beneficiary, has no interest whatsoever in the shares or in the income or proceeds thereof, and that she will, at the request and expense of Kozak, convey the shares to him as requested.
12. The evidence of Kozak is that he funded the entirety of the purchase price for the shares which were paid via a cheque from him to Russo. His evidence is that he transferred the amount of the cheque, \$134,628, to her bank account on October 25, 2022 before the cheque was drawn from her account and he attaches the receipt for the transfer of funds from him to Russo, as well as the transaction history.
13. Shortly thereafter, Russo opened two brokerage accounts with Research Capital.
14. The issue arises now because in March, 2023, Abundant undertook an initial public offering, changed its name to SolarBank, and the shares now have a very significantly increased value.
15. The accounts in question now hold the shares (together with proceeds of the earlier sale of some of the shares) and to the best of the knowledge of Kozak, the accounts do not contain any other assets. Kozak’s evidence includes the statements from Research Capital for the accounts as of June 30, 2024. He always had online access to the accounts until recently. Approximately one week prior to the swearing of his affidavit, Kozak’s online access to the accounts was terminated by Russo with the result that he no longer has any visibility into transactions into the accounts.

16. On July 15, 2024, Russo advised Kozak by text message that she was terminating their relationship. Kozak then requested on July 26, 2024 transfer of the shares and proceeds to him. Russo has not complied with that request notwithstanding the Declaration of Trust, and notwithstanding subsequent demands from counsel for Kozak.

17. Kozak also wrote through counsel to Research Capital requesting that it freeze the accounts and it declined to do so absent a court order (i.e., the order sought today).

18. Russo subsequently suggested that she may transfer the shares. For example, in an email sent to Kozak on July 22, 2024, she stated that “counsel has recommended moving the shares to another brokerage until all of this is rectified. So I am going to CIBC now to inform myself”.

19. Russo has also claimed to be entitled to half of the value of the shares and proceeds as expressed, for example, in an email to Kozak of July 25, 2024.

20. Accordingly, Kozak wants the shares and the proceeds preserved pending a determination of the issues on the merits.

21. It is not clear whether Russo opposes the relief sought on this motion in any event. Counsel to Kozak sent a draft Direction to Russo to be signed by her directing and authorizing Research Capital to freeze the accounts pending a resolution of the issues or order of the court. Russo signed and returned the Direction. Kozak then forwarded same to Research Capital and requested again that it freeze the accounts. It refused, citing “an issue with Russo’s signature”.

22. The evidence is that Research Capital advised Kozak (or his counsel) that it had received an electronic mail message from Russo questioning or challenging the validity of her signature on the Declaration. Kozak has not received that email and Research Capital will not provide it to him. Neither will that firm, however, agree to freeze the shares and funds.

23. As a preliminary matter, I granted the order validating and regularizing service on Ms. Russo. It is crystal clear from the email correspondence in the record that she is well aware of this motion, has received the motion materials, and indeed has responded, repeatedly, by responding emails. Counsel for the plaintiff also provided the zoom link for this scheduling appearance last week and for the hearing of the motion this week.

24. I do acknowledge, as clearly and expressly brought to the attention of the Court by counsel for Kozak, as would be expected in such circumstances where, although in receipt of the materials, the responding party has not appeared (with the result that the hearing proceeded *ex parte* although on notice), that Russo has requested an adjournment of this motion for some weeks until she can return from her studies in Italy this summer.

25. Two things flow from this. First, I am reinforced in my conclusion that service should be validated: there is no issue that Russo has received the materials and is well aware of the motion. Second, to the extent that the adjournment is requested, I would deny it in the circumstances given the clear evidence demonstrating a risk of dissipation of the assets in issue.

26. Pursuant to Rule 45.01 and 45.02, the plaintiff must establish that there is a serious issue to be tried regarding his claim to the assets; and that the balance of convenience favours granting

the order. The assets sought to be preserved must constitute the very subject matter of the dispute and the plaintiff must establish a right to the specific fund or asset in question.

27. For all of the above reasons, I am satisfied that the test has been met here. The plaintiff asserts a clear right to the property here. The property that the plaintiff seeks to have preserved on an interim basis, includes the shares and proceeds clearly identified in the Statement of Claim as being the subject matter of the dispute.

28. I am further satisfied that for the purposes of this motion at least, the plaintiff has established a right to those assets based on the Declaration of Trust and the other facts set out in his affidavit. There is clearly a serious issue to be tried, recognizing that the threshold of a “serious prospect of success” is a low one. Here, I am satisfied that the claim of the plaintiff is not frivolous or vexatious.

29. Finally, the balance of convenience clearly favours granting the interim preservation order here. The defendant has advised the plaintiff that she is considering moving the property to another institution and was seeking advice and direction in that regard. There is evidence that she is contemplating dissipating the property. I recognize that this would appear to be inconsistent with the Direction she signed directing Research Capital to freeze the accounts, yet that is called into question by the email that that firm apparently received from the defendant apparently challenging her signature on the Declaration.

30. Perhaps most importantly however, the defendant, who is currently in a foreign jurisdiction such that the plaintiff’s ability to recover if he is successful in his claim might be more challenging, is in my view not prejudiced by the order since the evidence before me is that she signed the Declaration and moreover has confirmed in email correspondence to the plaintiff that is in the record, that she is content to agree to, and does not oppose, the preservation of the assets until the matter is determined by the court or agreed by the parties. Accordingly, there is no evidence of any prejudice to her.

31. Finally, the plaintiff has provided an undertaking for damages.

32. For all of these reasons, the relief sought is granted.

33. The plaintiff also seeks costs of this motion on a partial indemnity scale inclusive of disbursements and fees of \$17,234.20. In my view, this amount is reasonable and the plaintiff is entitled to costs on this scale in that amount. This motion ought not to have been necessary given the circumstances. However, given the position of the defendant that is at best inconsistent, it was entirely reasonable and appropriate for the plaintiff to bring this motion. The defendant neither responded nor consented to the relief sought, but instead sought an adjournment through her email correspondence to the plaintiff or his counsel. In the circumstances, that was not a reasonable response. Accordingly, I award costs to the plaintiff in the above partial indemnity amount.

34. Order to go in the form signed by me at the conclusion of this hearing, which order was, as stated, effective immediately and without the necessity of issuing and entering.

Osborne J.