

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
D.S.B. Systems Ltd. operating as Safelink)
Security, Safe Technologies Inc. and) David Seed, Counsel for the Plaintiffs
Safelink Corporation)
)
Plaintiffs)
)
- and -)
)
Kastem Security Solutions Ltd., 2448486)
Ontario Inc., Dino Bauco, Robert) Harold Rosenberg, Counsel for the
Gathercole, Custom Sound and Vision Inc.) Defendants, Kastem Security Solutions Ltd.,
) 2448486 Ontario Inc. and Dino Bauco
Defendants)
) No one appearing for the Defendant, Robert
) Gathercole
)
) No one appearing for the Defendant, Custom
) Sound and Vision Inc.

2019 ONSC 6576 (CanLII)

REASONS FOR DECISION

CHARNEY J.:

Introduction

- [1] On August 16, 2019, I granted the plaintiffs’ *ex parte* motion for a Mareva injunction to prevent the defendant, Dino Bauco, from disposing of his assets in the face of litigation brought by the plaintiffs.
- [2] Pursuant to Rule 40.02(1) of the Rules of Civil Procedure, the injunction was scheduled to return for a review on August 22, 2019, after notice was given to the defendants, in order to consider the merits of the motion with the benefit of evidence and argument from both sides.
- [3] For a number of reasons that are not relevant to my analysis, the return of the motion was adjourned to November 4, 2019.

- [4] After hearing argument from counsel for the plaintiffs and defendants, I set aside the Mareva injunction with brief oral reasons, indicating that written reasons would follow. These are those reasons.

Factual Background

- [5] The plaintiffs are a group of three related companies that are involved in the sales, installation, servicing and monitoring of fire and security alarm systems for commercial, industrial and residential use. These companies were incorporated and are owned by Dino Beltrame, who is the only officer, director and sole shareholder.
- [6] The defendant Dino Bauco is a former senior manager of the plaintiff corporations, and is married to Dino Beltrame's daughter.
- [7] In April 2018 Mr. Bauco informed Mr. Beltrame that he was resigning from his position with the plaintiff companies as of May 31, 2018.
- [8] The plaintiffs allege that prior to leaving the plaintiff companies, Mr. Bauco and the defendant Robert Gathercole incorporated a new business - the defendant Kastem Security Solutions Ltd. - and began competing with the plaintiff corporations.
- [9] The plaintiffs commenced this action on February 26, 2019, seeking damages for breach of contract of employment, breach of confidence, misuse of confidential information, breach of fiduciary duty and misuse of corporate resources. The Statement of Claim alleges that Mr. Bauco downloaded the plaintiffs' customer lists and corporate information to compete with the plaintiffs and was actively competing with the plaintiffs before May 31, 2018. It is also alleged that Mr. Bauco erased thousands of emails from the plaintiffs' computer in order to hide evidence that he was actively competing before May 2018.
- [10] A Statement of Defence and Counterclaim was filed on May 23, 2019, denying the allegations in the Statement of Claim.
- [11] The defendant was served with the Statement of Claim in March 2019. The plaintiffs discovered that Mr. Bauco and his wife (Mr. Beltrame's daughter) listed their residence at 12 Mary Agar Court in Nobleton, Ontario for sale on March 20, 2019. The real estate agents are Mr. Bauco's cousins.
- [12] Mr. Beltrame was concerned that the house was being sold by Mr. and Mrs. Bauco in order to liquidate their assets as a first step to hiding or dissipating them in order to avoid a potentially adverse judgment. The plaintiffs therefore brought an *ex parte* motion for a Mareva injunction.

Mareva Injunction

[13] A Mareva injunction freezes a defendant's assets pending the court's determination of a proceeding where there is a genuine risk that a defendant will remove property or dissipate assets prior to trial in order to avoid judgment. To support a Mareva injunction, a plaintiff must show a strong *prima facie* case, a real risk of dissipation of assets, and a balance of convenience favouring the plaintiff.

[14] The test for granting a Mareva injunction was summarized by Perell J. in *O2 Electronics Inc. v. Sualim*, 2014 ONSC 5050, at para. 67:

Because procedural law disfavors pre-judgment execution, to obtain a Mareva injunction, a plaintiff must satisfy the normal criteria for an injunction and also several additional criteria. For a Mareva injunction, the moving party must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; and (3) that there is a serious risk that the defendant will remove property or dissipate assets before the judgment. A Mareva injunction should be issued only if it is shown that the defendant's purpose is to remove his or her assets from the jurisdiction to avoid judgment. The moving party must also establish that he or she would suffer irreparable harm if the injunction were not granted and that the balance of convenience favours granting the injunction. Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.

[15] Rule 39.01(6) imposes "full and fair disclosure" obligations on a party that brings a motion without notice. The rule provides:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

[16] In *R. A. Fox v. R.S. Fox*, 2014 ONSC 1135, the Divisional Court outlined the reason for Rule 39.01(6) (at paras. 11-13):

The reason for requiring such disclosure is based on the recognition that the judicial officer hearing a motion has only the moving party or their counsel before him. There is usually no opponent present who can file opposing evidence and make opposing submissions. Accordingly, there is a heavy burden on a moving party to tender evidence that he might prefer not to tender so the judicial officer can obtain a reasonably balanced view of those facts that might reasonably affect the outcome of the motion.

[17] That said, the duty of full and fair disclosure recognizes that *ex parte* motions prepared on an urgent basis may suffer from imperfections that should not necessarily defeat the

continuation of the injunction. In *Boal v. International Capital Management Inc.*, 2018 ONSC 2275, Perell J. summarized the factors to be considered, at para. 62:

The court has some discretion and may continue the interlocutory injunction if the undisclosed facts were not material or the non-disclosure was not intentional. In exercising its discretion to continue the injunction in circumstances of non-disclosure, the court should consider: (a) the practical realities that there is often urgency or an emergency that explains why the motion is made without notice; (b) whether facts were intentionally suppressed or whether simple carelessness or ignorance was the cause of the non-disclosure; (c) the pervasiveness of the non-disclosure; (d) the difficulty of determining what is a material or an immaterial non-disclosure; and (e) the significance to the outcome of the motion of the matters that were not disclosed to the court.

- [18] In the present case, counsel for the Mr. Bauco argued that the plaintiffs failed to make full and fair disclosure of all material facts, and the Mareva injunction should be set aside on that ground alone. In my view, the plaintiffs' material did fairly disclose all of the material facts that could have been known to the plaintiffs at the time of the motion. While I did decide to set aside the Mareva injunction, it was not on the basis of any failure by the plaintiffs to comply with Rule 39.01(6). As is often the case, the Mareva injunction was vacated because counsel for Mr. Bauco persuaded the court to view the facts relied on by the plaintiffs from a different perspective, and put before the court facts that would not have been known to the plaintiffs when the motion was originally brought in August.
- [19] The Rules require a full review of the original *ex parte* order because this is the first opportunity the court has to hear the other side. As Mesber J. stated in *Promo-Ad v. Keller*, 2013 ONSC 1633, at para. 55:

Another issue is the general role of the judge reviewing the original order, but with the benefit of a full evidentiary record from all parties. Ordinarily, the court would be bound by a prior decision of a judge of the same court. Since, however, the original orders were made without notice, the court reviewing the *ex parte* order must hear the matter *de novo*.

Strong *Prima Facie* Case

- [20] In the present case, I was persuaded on the *ex parte* motion that the plaintiffs presented a strong *prima facie* case that the defendant Bauco had defrauded the plaintiff company immediately before he departed the company and began his own company. Evidence of fraud is relevant to the granting of a Mareva injunction because the risk of removal/dissipation of assets may, in the appropriate case, be inferred from the surrounding circumstances of a responding party's misconduct: see *Sibley & Associates*

LP v. Ross, 2011 ONSC 2951, at para. 63; *OPFFA v. Paul Atkinson et al*, 2019 ONSC 3877, at paras. 7-8.

- [21] Having now heard the other side, I am no longer of the view that the plaintiffs have presented a strong *prima facie* case that the risk of removal/dissipation of assets may be inferred from Mr. Bauco's conduct prior to his departure from the plaintiff company.
- [22] A couple of examples will suffice to explain my change of opinion.
- [23] The evidence presented on the *ex parte* motion suggested that Bauco had defaulted on payments to the Canada Revenue Agency (CRA) and others by not remitting payroll taxes and HST to CRA, creating a financial crisis at the time of his departure. This occurred in 2018, while Bauco was senior financial manager of one of the plaintiff corporations.
- [24] Upon review of the evidence relied on in the *ex parte* motion, it is apparent that while the failure to remit taxes may have happened under Bauco's "watch", the actual default was more likely that of another employee who was employed as a bookkeeper/controller and had direct responsibility for the remittances. The company dismissed this employee in February 2018 when the default was discovered. This was a few months before Bauco's departure. Even if this evidence might support an allegation that Bauco's oversight of that employee was careless or lax, the evidence presented does not rise to the level of fraud on the part of Bauco, and does not meet the higher "strong *prima facie* case" standard required for a Mareva injunction.
- [25] Similarly, the plaintiffs presented evidence that Bauco had misappropriated company funds through the use of company credit cards for personal expenses and to set up his competing security company while he was still a manager of the plaintiff company. Having considered counsel for the defendant's detailed review of the affidavit evidence relied on to support that allegation, I am now satisfied that my initial impression was incorrect, and the evidence is not sufficient to support the "strong *prima facie* case" standard.
- [26] The plaintiffs relied on the affidavit of a Chartered Professional Accountant (CPA) who reviewed the credit card charges in question. These charges are from companies like Best Buy, Lowe's, Home Depot, Canadian Tire and Staples. The CPA concluded that "based on the nature of the vendor's business" approximately \$41,000 in credit card charges "likely relate" to Mr. Bauco's personal residence.
- [27] Mr. Bauco has now had an opportunity to respond to this allegation. He points out that he and his wife lived in a basement apartment in Mr. Beltrame's home until May 2016, and the impugned credit card charges that the CPA suggests relate to Mr. Bauco's personal residence date back to January 2015, more than a year prior to Mr. Bauco owning his home. The CPA appears to be unaware that the Baucos lived with the Beltrames until May 2016.

- [28] Moreover, the CPA's conclusion in this regard is based exclusively on the "the nature of the vendor's business", without considering the nature of the plaintiffs' business, which includes the need to purchase building, electronic and hardware supplies for the installation and maintenance of electronic security systems. The CPA's affidavit simply fails to explain why the plaintiffs' business would not require supplies that could be purchased at the questioned vendors. For example, approximately 25% of the impugned purchases, commencing January 2015, come from Staples, which is an office supply store. There is no indication from the CPA as to why he believes that the plaintiff companies did not purchase office supplies in 2015 and 2016.
- [29] Accordingly, I conclude that the evidence relied on by the plaintiffs does not meet the strong *prima facie* case standard required for a Mareva injunction.

Is there a serious risk that the defendant will remove property or dissipate assets before the judgment?

- [30] The evidence presented on the *ex parte* motion indicated that Mr. and Mrs. Bauco listed their house for sale soon after Mr. Bauco was served with the Statement of Claim. I held that the timing of the listing of the home suggested a serious risk that Mr. Bauco would dissipate his assets prior to judgment.
- [31] Mr. Bauco has now provided an affidavit indicating that he and his wife decided to sell the family home in February 2019, the month before he was served with the Statement of Claim. He has provided copies of text messages between him and his real estate agent in early February 2019 that supports this position.
- [32] His affidavit explains that he and his wife decided to sell the family home because they could no longer afford their monthly expenses and needed to downsize and obtain some funds to pay off debts. The evidence also indicates that he and his wife are actively looking for another home in the same neighbourhood where their three children go to school, and have made offers to purchase.
- [33] Given this explanation and evidence, I am no longer satisfied there is a serious risk that the defendant will remove property or dissipate assets to avoid judgment. There is no suggestion that Mr. Bauco or any of his assets will be removed from the jurisdiction, and it is exceedingly unlikely that he will dissipate his assets so that he, his wife and their three children will be left without any place to live.
- [34] Moreover, Mr. Bauco's affidavit evidence indicates that the Mareva injunction has made it very difficult for him and his wife to purchase a replacement home. While the Mareva injunction permitted the sale of the home, the net proceeds of the sale were required to be retained in the trust account of the lawyer acting for the Baucos on the sale. Since the net proceeds of the sale have been frozen, the Baucos do not know whether they will be able to use these proceeds to purchase another house, and this has required them to make all of their offers to purchase conditional on confirmation that the proceeds can be released. This condition has put them at a competitive disadvantage in the current real estate

market. As a result, I am satisfied that the balance of convenience no longer favours the granting of the injunction.

Conclusion

- [35] For these reasons, the Mareva injunction granted on August 16, 2019 was set aside on November 4, 2019.
- [36] If the parties are not able to agree on costs, the defendant may file costs submissions of no more than three pages plus costs outline and any offers to settle within 20 days of the release of these reasons, and the plaintiff may file responding submissions on the same terms within 15 days thereafter.

Date: November 14, 2019

Justice R.E. Charney

CITATION: D.S.B. Systems Ltd. v. Kastem Security Solutions Ltd., 2019 ONSC 6576

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

D.S.B. Systems Ltd. operating as Safelink Security, Safe
Technologies Inc. and Safelink Corporation

Plaintiffs

– and –

Kastem Security Solutions Ltd., 2448486 Ontario Inc.,
Dino Bauco, Robert Gathercole, Custom Sound and
Vision Inc.

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: November 14, 2019