

CITATION: Voysus Connection Experts Inc. v. Shaikh, 2019 ONSC 6683
COURT FILE NO.: CV-19-617353
DATE: 20191120

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Voysus Connection Experts Inc.

AND:

Tayyab Shaikh, Anisha Shaikh, Afira Saleem, aka Afira Shaikh, Faazil Shaikh, Geetika Srikrishnakumar, Humaira Bangee, Rahil Shaikh, Memnu Shaikh, Nasir Shaikh, Raisha Shakh, Adnan Saleem, Iki Hasnoo, aka Iqbal Hasnoo, Jean Marie Pitter, Shadi Abdullah, Shehtabbanu Shaikh, Shahnawaz Shaikh, Riyaz Shaikh, Talhah Shaikh, Abdulqader Shaikh, Maham Shaikh, Umer Faruq Shaikh and John Does #1-10

BEFORE: Nishikawa J.

COUNSEL: *Larry Keown and Nicholas Reinkeluers*, for the Plaintiff

Bradley Phillips and Peter Askew, for the Defendants Tayyab Shaikh and Anisha Shaikh

HEARD: November 5, 2019

ENDORSEMENT

Overview and Procedural Background

[1] In April 2019, the Plaintiff, Voysus Connection Experts Inc. (“Voysus”), commenced an action against the Defendants, who are all former employees of the Plaintiff, alleging fraud, conspiracy, breach of fiduciary duty, breach of trust, unjust enrichment and conversion. The claims are based on two alleged fraudulent schemes further described below.

[2] On May 24, 2019, Myers J. granted an *ex parte* Mareva injunction restraining the Defendants, Tayyab Shaikh and Anisha Shaikh¹ (together, the “Defendants”), from dissipating the proceeds of the sale of their home, until the return of the motion on notice (the “Mareva Order”). In his endorsement, Myers J. found that Voysus had alleged a solid basis to support an inference of dissipation, and that there would be little harm in restraining the proceeds, since the order was narrowly tailored and the motion was to return quickly.

¹ Given the number of individuals with the same last name, all parties will be referred to by their first names.

[3] The Mareva Order restrains \$142,367.13. This sum represents the proceeds of the sale of the property (the “Proceeds”), which continue to be held in trust by the Defendants’ real estate lawyer. No property or assets of any other defendants are restrained. None of Tayyab or Anisha’s other assets have been restrained. Tayyab and Anisha are the only defendants who responded to this motion.

[4] The return of the motion was subsequently adjourned to August 14, 2019. On that date, the hearing was adjourned to a date to be scheduled because the parties were not prepared to proceed. The motion to continue the Mareva Order returned before me on November 5, 2019 (the “Mareva Motion”).

[5] On that date, Voysus also brought a motion to strike documents and records produced by the Defendants in their affidavit of documents, including certain records that the Defendants rely upon in response to the Mareva Motion.

[6] As the Mareva Order was to expire on the date of the hearing of the Mareva Motion, at the conclusion of the hearing, I made an order continuing the Mareva Order until a decision on the Mareva Motion. I also ordered that the Defendants were prohibited from using any of Voysus’ confidential information until the Plaintiff’s motion to strike was determined.

[7] The evidentiary record on the Mareva Motion is voluminous, including numerous affidavits, documents, and transcripts from the cross-examinations of fifteen individuals. There are numerous allegations of dishonesty by both parties, including falsification of documents. While I have reviewed all of the evidence thoroughly, these reasons will not address every allegation and counter-allegation. Any findings of fact that I have made are solely for the purposes of deciding the Mareva Motion.

Facts

The Parties

[8] Voysus is a corporation carrying on business in Ontario with a head office in Toronto. It operates a full-service call centre providing services to businesses across Canada. Nusrat Habib is the current owner and Chairman of Voysus. He previously held the position of Chief Executive Officer, until this role was assumed by Fatima Khalfan in 2018.

[9] The defendant, Tayyab Shaikh, was employed by Voysus from August 2010 to February 2019. He was first employed as a sales verifier. In 2018, Tayyab was promoted from Director of Operations to Chief Operating Officer.

[10] The defendant, Anisha Shaikh, was employed by Voysus from 2009 to January 2019. Anisha was originally hired in an entry-level position and was later promoted to the position of Operations/Contact Centre Manager.

[11] Tayyab and Anisha are spouses. They were married in 2018.

[12] The defendant, Afira Saleem, also known as Afira Shaikh, is Tayyab's sister. Since 2013, Afira has worked as a Training and Quality Assurance Manager at Voysus.

[13] Voysus alleges that all of the other defendants are related to either Tayyab or Anisha. Tayyab and Anisha admit that the following defendants are related to them: Adnan Saleem, Rahil Shaikh, Memuna Shaikh, Nasir Shaikh, Raisha Shaikh, Faazil Shaikh, Talhah Shaikh, Jean Marie Pitter and Humaira Bangee (together, the "Family Member Defendants").

[14] Tayyab and Anisha do not admit any family relationship with the remaining defendants, Geetika Srikrishnakumar, Iki Hasnoo (also known as Iqbal Hasnoo), Shadi Abdullah, Shehtabbanu Shaikh Shahnawaz Shaikh, Riyz Shaikh, Talhah Shaikh, Abdulqader Shaikh, Maham Shaikh and Umer Faruq Shaikh (together, the "Remaining Defendants").

The Alleged Fraudulent Employees Scheme

[15] In May 2018, Nusrat requested that Voysus' external accountant, Christopher Jones, comment on Voysus' financial position. Christopher reported that based on his review, Voysus' payroll expenses were unusually high. The payroll expenses were approximately 70 percent of gross revenue, where Christopher expected they would be approximately 50 percent of gross revenue. Nusrat was not satisfied with the explanations offered by Tayyab as to why the payroll expenses were so high.

[16] Voysus alleges that Tayyab, Anisha and Afira conspired to defraud Voysus by hiring family members as employees, including the Family Member Defendants and Remaining Defendants, and putting them on the payroll even though they performed little or no work for Voysus. Voysus alleges that in order to conceal the fraud, Tayyab and Anisha instructed the Family Member Defendants and Remaining Defendants not to log into Vocalcom, the software system used to log hours for Voysus employees. As part of the Fraudulent Employee Scheme, the Family Member Defendants and Remaining Defendants purportedly worked from home, when Voysus claims that it had a policy against employees working from home.

[17] In the case of one of the Remaining Defendants, Voysus relies upon the affidavit of Iqbal Hasnoo, who testified that Tayyab and Anisha proposed an arrangement in which he would not have to come in to work and they would receive one-half of his pay as compensation. Iqbal was not available for cross-examination.

[18] Voysus claims that through the alleged Fraudulent Employees Scheme, the Defendants defrauded Voysus in the amount of \$579,870.45 between 2014 and 2018. This amount represents the total amount of payroll paid to the Family Member Defendants and the Remaining Defendants from 2014 to 2018. The amount paid to admitted Family Member Defendants is \$331,043.31.

[19] The Family Member Defendants and the Remaining Defendants were terminated in November 2018. Voysus alleges that Tayyab terminated some of the employees before Voysus could further investigate or put payroll controls into place. Nusrat's affidavit states that he

terminated some of the employees. The evidence is not clear as to who terminated which employees.

The Alleged Fraudulent Expenses Scheme

[20] In addition, Voysus alleges that all of the defendants engaged in a scheme to defraud Voysus using its gift budget. The gift budget was allocated to purchase gifts and prizes (“Gifts”) as incentives to employees (the “Gift Budget”). The Gifts included consumer electronics, such as laptops and iPads, and gift cards. The Gift Budget was also used for parties, meals and employee events that were also intended to be incentives. Some amount of the Gift Budget was provided by the clients, as part of the contract with Voysus. During the relevant time period, Voysus’ main client was Reliance Home Comfort (“Reliance”). The parties dispute whether the entire Gift Budget was funded by Reliance or whether a portion of the Gift Budget came from the client and was supplemented by Voysus.

[21] Tayyab was responsible for the Gift Budget and for purchasing items to use as gifts and prizes. He used his personal credit cards and cash to purchase the Gifts and then submitted expense reports for reimbursement.

[22] In August 2018, after the payroll issues were identified, Nusrat and Fatima began to attend more frequently at Voysus than previously. Nusrat claims that it was then that employees informed them that Tayyab and Anisha were absent from the office for significant periods of time and that they were not distributing Gifts. A number of Voysus employees provided affidavits stating that they did not observe Gifts being distributed or that only Tayyab and Anisha’s family members received Gifts.

[23] Voysus alleges that Tayyab used the Gift Budget to purchase Gifts, but then: (i) kept the Gifts; (ii) gave the Gifts to family members; or (iii) used the receipts to return the items or gift cards to the store where they were purchased, while also submitting expense reports to be reimbursed for the purchase.

[24] Tayyab admits that he submitted expense reports for Gifts that he purchased using the Gift Budget and then subsequently returned for refund. He admits that he did this occasionally in 2016 and more frequently in 2017-2018. Tayyab claims that Nusrat instructed or authorized him to do so in order to supplement his income. Tayyab claims that he had repeatedly asked for salary raises but Nusrat refused. According to Tayyab, Nusrat’s rationale was that he wanted to sell the company. In order to make Voysus more attractive to potential purchasers, Nusrat did not want large management expenses on the balance sheet.

[25] Voysus disputes Tayyab’s explanation and claims that all of the expense reports submitted by Tayyab during his employment at Voysus were fraudulent. The expense reports total \$225,229.50.

Afira, Anisha and Tayyab Leave Voysus

[26] On January 7, 2019, Anisha provided Voysus with a letter resigning from her employment, effective immediately.

[27] On January 9, 2019, Afira left her position at Voysus after being disciplined by Fatima.

[28] At a meeting on February 8, 2019 between Nusrat and Tayyab, Tayyab provided a letter of resignation.

[29] The Plaintiff maintains that Tayyab, Anisha, and Afira resigned from their employment. Tayyab, Anisha and Afira deny having resigned and have brought counterclaims for wrongful dismissal. Neither Anisha nor Afira have sworn affidavits in response to the Mareva Motion.

The Property

[30] Tayyab and Anisha purchased the property at 57 Cornwall Drive, Ajax, Ontario (the "Property") on October 4, 2018 for a purchase price of \$587,500. They made a down payment of \$124,536.19 and entered into a five-year mortgage with Scotiabank for \$470,000.00.

[31] The Defendants state that the money from the down payment on the Property was a combination of: a \$40,000.00 gift from Anisha's brother, Yasaf Shaikh; \$10,000.00 in wedding gifts; and \$74,536.19 from Tayyab and Anisha's funds, including money from Tayyab's TFSA account.

[32] Yasaf's spouse is the defendant, Jean Marie Pitter, who was employed at Voysus. There is contemporaneous documentary evidence of the \$40,000.00 gift from an account jointly held by Yasaf and Jean Marie.

[33] On April 29, 2019, two weeks after they were served with the Statement of Claim, Tayyab and Anisha listed the Property for sale. On May 13, 2019, the Property was sold to an arms' length purchaser for a purchase price of \$639,900.00. The sale closed on June 3, 2019. As noted above, only the Proceeds of \$142,367.13 are subject to the Mareva Order.

Issues

[34] The issues that must be addressed in the motions are as follows:

- (a) Should the motion to strike the Disputed Evidence be granted?
- (b) Has the Plaintiff met the test for a continuation of the Mareva Order?

Analysis

Should the Motion to Strike the Disputed Evidence be Granted?

[35] The Plaintiff brings a motion to strike certain evidence produced by Tayyab and Anisha in their affidavit of documents, and an order “prohibiting Tayyab and Anisha from introducing into evidence, at any stage in this proceeding, videos or any other documents surreptitiously and unlawfully obtained from the secure information technology systems of Voysus.” The evidence that Voysus seeks to strike falls into the following categories (the “Disputed Evidence”):

- (a) Payroll, paystubs and employment agreements relating to other employees;
- (b) Accounts receivable invoices, responses to Requests for Proposals and other financial information;
- (c) Video recordings taken from video surveillance cameras at Voysus’ office on certain dates; and
- (d) Audio recordings of conversations between various individuals on certain dates.

[36] The basis for the Plaintiff’s motion to strike is that the Disputed Evidence constitutes confidential information which Tayyab obtained unlawfully, in violation of either s. 184 or s. 342.1 of the *Criminal Code*, R.S.C. 1985, c.C-46 (the “*Criminal Code*”) or in breach of fiduciary duties owed to Voysus.

[37] Tayyab states that he collected the Disputed Evidence during his employment at Voysus when he became concerned about his continued employment and the possibility that he might be sued.

[38] Tayyab and Anisha listed the Disputed Evidence in their affidavit of documents as relevant to the proceedings, but do not seek to rely on all of the Disputed Evidence above on this motion. To the extent that the motion to strike relates to evidence that the Defendants do not seek to rely on for the Mareva Motion, it would be premature at this stage for an order prohibiting the Defendants from using the Disputed Evidence in this proceeding generally. Voysus has provided no authority for making a blanket exclusion order.

[39] The records that Tayyab and Anisha seek to rely on for the Mareva motion are: (i) payroll information, paystubs and employment agreements relating to other employees; (ii) Voysus profit and loss reports; (iii) accounts receivable invoices, responses to RFPs; (iv) video recordings dated October 2017, December 2017, and May 17, 2019; and (v) audio recordings of conversations on January 16, 2019, January 23, 2019, and May 26, 2019. I make no findings in respect of the admissibility of any of the Disputed Evidence other than for the purposes of the Mareva Motion.

[40] Voysus submits that the Disputed Evidence must be struck from the record on the Mareva Motion because it was obtained unlawfully or in breach of Tayyab’s legal duties. Even if this

could be proven, illegally obtained evidence is generally admissible in a civil dispute, if it is relevant: *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 1570, 200 A.C.W.S. (3d) 853, at para. 14. Accordingly, I need not address whether the Defendants have violated ss. 184 or 342.1 of the *Criminal Code*. I have serious doubts as to whether Voysus would be able to establish any violation.

[41] The motion to strike the Disputed Evidence as inadmissible on the Mareva Motion is dismissed.

[42] While I have dismissed the Plaintiff's motion to strike, I note that much of the Disputed Evidence that the Defendants seek to rely upon is of questionable reliability or marginal relevance to the Mareva Motion. In many instances, the Disputed Evidence is not used to establish any particular fact in issue, but rather to suggest that various affiants had a motive to lie. The aim of the audio and video recordings is to attack the credibility of Voysus' affiants. Similarly, the Defendants seek to rely on the payroll information to show that certain employees received raises and are therefore " beholden " to Voysus. Indeed, the Mareva Motion was significantly sidetracked by such issues. In deciding the Mareva Motion, I place minimal reliance on the Disputed Evidence. Where I rely on a particular document or record, I will specifically refer to it.

Is Any Relief in Respect of the Disputed Evidence Warranted?

[43] The disposition of the motion to strike does not end the matter. Although the motion was brought as a motion to strike evidence, in its notice of motion, Voysus also seeks an order requiring that the Defendants return the Disputed Evidence, which is injunctive relief. During the course of the hearing, Voysus provided authority to support its request for injunctive relief.

[44] The employment agreement entered into between Voysus and Tayyab dated August 13, 2013, specifically identifies various types of " Confidential Information " pertinent to the business, including, among other things, letters of intent, customer lists, business plans, financing arrangements, financial information and personnel information. The agreement states that Tayyab is required to keep the information confidential after the termination of employment. There is an identical term in the employment agreement between Voysus and Anisha dated August 13, 2013, however, the copy that was included in the record is inexplicably signed by Tayyab. In his resignation letter dated February 7, 2019, Tayyab agrees to " relinquish all intellectual properties, i.e. (passwords, hardware, written material, etc.) at a mutually agreed upon time and place. " This did not take place.

[45] In order to obtain an order requiring the return of the Disputed Evidence, Voysus would have to demonstrate: (i) a strong *prima facie* case; (ii) irreparable harm; and (iii) that the balance of convenience favours granting an injunction: *R v. Canadian Broadcasting Corp.*, 2018 SCC 5, at paras. 4, 6.

[46] Tayyab is subject to an obligation to maintain the confidentiality of Voysus' confidential information. He failed to return Voysus' confidential information when his employment was terminated. While there is no suggestion that he or Anisha seek to use Voysus' confidential

information other than in this proceeding, they continue to possess confidential information. Voysus has demonstrated a strong *prima facie* case that Tayyab is in breach of the confidentiality term of his employment agreement.

[47] This court has found that a misuse of confidential information constitutes irreparable harm or can give rise to a probability of irreparable harm: *Hargraft Schofield LP v. Schofield*, [2007] O.J. No. 4400 (S.C.J.), at para. 36; *GDI Solutions Inc. v. Walker*, 2012 ONSC 4378, 222 A.C.W.S. (3d) 1039, at para. 93. In such circumstances, the balance of convenience favours the protection of the confidential information.

[48] In my view, the record supports an order prohibiting Tayyab and Anisha from disclosing or otherwise using Voysus' confidential documents and records. Pursuant to the employment agreement, Tayyab was obligated to maintain the confidentiality of Voysus' confidential information in any event. However, I decline to order the return of the Disputed Evidence, since there is no suggestion that the Defendants intend to use the documents other than in this proceeding, which they may be entitled to do. Accordingly, Tayyab and Anisha are ordered to keep, without deleting, any documents and records that they took from Voysus and to maintain the confidentiality of those documents until further order of this court.

[49] The video recordings dated May 17, 2019 were not taken by Tayyab during the course of his employment. Tayyab claims that they were sent to him by an anonymous Voysus employee. Irrespective of how they came into Tayyab's hands, they are included in the above order.

[50] All of the audio recordings were made by Tayyab and are not, strictly speaking, Voysus' confidential business records. However, to the extent that the audio recordings refer to Voysus' confidential information, they are also subject to the order prohibiting disclosure.

Should the Mareva Order Be Extended?

The Test for a Mareva Injunction

[51] A Mareva injunction is an extraordinary remedy, since it operates to freeze some or all of the defendant's assets until judgment. It is a form of execution before judgment which can have extreme negative consequences on the recipient: *HZC Capital Inc. v. Lee*, 2019 ONSC 4622, 309 A.C.W.S. (3d) 171, at para. 44; *Lakhani et al. v. Gilla Enterprises Inc. et al.*, 2019 ONSC 1727, 145 O.R. (3d) 704, at para. 30 [*Lakhani*].

[52] Where a Mareva injunction was obtained *ex parte*, the motion is to be heard *de novo* when it returns on notice: *Pavao v. Ferreira*, 2018 ONSC 1573, 291 A.C.W.S. (3d) 553, at para. 52.

[53] In *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.) [*Chitel*], the Court of Appeal for Ontario set out the following guidelines to be applied by the court in determining whether a Mareva injunction ought to be ordered:

- (a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge which are material for the judge to know;
- (b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
- (c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;
- (d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and
- (e) the plaintiff must give an undertaking as to damages.

Chitel, at para. 56.

[54] Subsequent cases have summarized the requirements for a Mareva order as follows:

- (a) A strong *prima facie* case against the defendants;
- (b) The defendants have assets in the jurisdiction;
- (c) There is a risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise put beyond the reach of the court such that the plaintiff will be unable to realize on a judgment in its favour;
- (d) The moving party would suffer irreparable harm if the order is not made; and
- (e) The balance of convenience favours the granting of the order.

Kashechewan First Nation v. Kirkland, 2018 ONSC 3014, 293 A.C.W.S. (3d) 453, at para. 67 [*Kashechewan First Nation*]; *Lakhani*, at para. 31.

[55] In this case, there is no question that the Defendants have assets in the jurisdiction. The undertaking as to damages is also not at issue.

Have the Defendants Demonstrated a Strong Prima Facie Case?

[56] The standard of a strong *prima facie* case does not require that the Plaintiff prove its case. Rather, the standard is met when the Plaintiff demonstrates, on a balance of probabilities, that it is likely to succeed. In *Kashechewan First Nation*, at para. 68, the question was put as follows: “If the court had to finally decide the matter on its merits, on the basis of the material before it, would the plaintiff succeed?”

The Fraudulent Expenses Scheme

[57] Based on the evidentiary record on the Mareva Motion, I find that Voysus has demonstrated a strong *prima facie* case on the Fraudulent Expenses Scheme. On cross-examination, Tayyab admitted that he “controlled” the Gift Budget and diverted funds from the Gift Budget to himself, whether by keeping the Gifts or by returning the Gifts and keeping the funds. While Tayyab claims that this was authorized by Nusrat to supplement his income, Voysus denies this explanation, for which there is no support in the evidence. Notably, Tayyab did not track the refunds, which would be expected if Nusrat agreed that Tayyab could supplement his income in this manner. It would have been improper for Voysus to agree to such an arrangement, given that some portion of the Gift Budget was funded by specific clients.

[58] Tayyab’s expense reports for Gifts increased markedly from \$1,200.00 to \$1,800.00 per month in 2013-2014 to \$4,000.00 to \$5,000.00 per month in 2018. In addition, in February 2018, Tayyab began to pay for the Gifts by cash. As Voysus alleges, this could be so that he could return the items and receive cash, leaving no record such as a credit card statement. In February 2019, Voysus’ counsel requested that Tayyab provide his credit card statements to verify the amounts spent on Gifts and any amounts refunded. Tayyab has not provided the documents, despite having produced his affidavit of documents. The credit card statements are clearly relevant to the amounts Tayyab claimed and was refunded.

[59] This is not to suggest that the evidence is indisputable. On the whole, there is a striking lack of particularity in relation to the Fraudulent Expenses Scheme. Despite the allegation that Gifts were only given to family members, Nusrat was not able to identify any specific Gifts or any particular individuals who received them. If Tayyab had not admitted that he returned Gifts to supplement his income, there would be no evidence to support the allegation that he expensed Gifts that he had returned for refunds.

[60] The Plaintiff relies heavily upon the allegation of “nepotism” made by a Voysus employee, David Bowness. However, on cross-examination, David acknowledged that significant prizes, such as televisions and other electronics were given to Voysus employees who were not family members of Tayyab or Anisha. While his affidavit stated that Gifts were only given to family members, he could not give specific examples of Gifts or individuals who received them.

[61] The one specific example that Voysus has detailed is a television that Voysus employee, Maria Rodrigues, received as a Gift. Voysus relies upon a “Summary of Meeting” dated November 20, 2018, signed by Maria and witnessed by another Voysus employee, Senthuran Rajapathy (the “Summary”). The Summary states that Maria received a television as a Gift in August 2018 and that Tayyab also provided her with a receipt from Best Buy. It further states that when Maria went to Best Buy to return the television or to upgrade it, she was informed that the item on the receipt had already been returned. She was also told that the television was a refurbished television of little value.

[62] The Defendants allege that the Summary was not drafted on November 20, 2018 as it states but was actually drafted at a meeting held on May 17, 2019 and backdated to November 2018. The Defendants rely upon a video surveillance recording from May 17, 2019 to support this allegation.

[63] For the purpose of the Mareva Motion, I place no reliance on the Summary. Although it is signed by Maria, it was not drafted by her. The Summary states “Maria came to us and told us that she received a TV as a gift for being top salesperson for the month at Voysus.” Voysus has not identified who drafted the Summary. Ms. Rodrigues did not swear an affidavit and was not examined. To the extent that it contains evidence from Ms. Rodrigues and the Best Buy salesperson, the statements are hearsay and cannot be relied upon for the truth of their contents.

[64] Moreover, in response to an undertaking given by Nusrat, Maria advised that she could not recall when she went to Best Buy, which Best Buy shop she went to, and whom she spoke to. She no longer had the receipt.

[65] As a result, I need not determine whether the Summary was backdated as the Defendants allege. In any event, in my view, the contents of the Summary cannot be seen sufficiently on the video-recording.

[66] The evidence on the Mareva motion raises many questions. After discovering the Fraudulent Expenses Scheme in November 2018, Voysus’ response was not to terminate Tayyab and Anisha, demand repayment and launch a comprehensive investigation. Voysus continued to employ Tayyab and Anisha until early 2019. On February 11, 2019, Voysus’ counsel sent a letter to Tayyab requesting documents, but no demand for repayment was ever made in writing. The investigation that Voysus conducted appears to be a series of meetings between Nusrat and Tayyab. There are no notes of the meetings or any contemporaneous documents identifying the alleged fraud. While Nusrat’s affidavit states that ten Voysus employees told him that Gifts were not distributed to employees, he could only identify three on cross-examination and could recall no specifics of any discussion with any employees. Voysus has provided no documentation, such as notes of interviews or meetings with the employees who made the allegations, reflecting an actual investigation into the alleged fraud in any formal sense. The Fraudulent Expenses Scheme was not reported to the police, which would be expected in a fraud of over \$225,000.00.

[67] Given that the evidence is that the Gift Budget included funds provided by clients, to be administered by Voysus, the lack of accountability in the use of those funds is concerning. Neither Voysus nor Tayyab appears to have maintained a monthly budget, list of top sellers or Gift recipients.

[68] I would further note that other than to make bald allegations that they assisted Tayyab, Voysus has provided no evidence as to how Anisha or Afira were involved in the Fraudulent Expenses Scheme.

[69] Despite the questions raised by the evidence, on a Mareva Motion, Voysus does not have to prove its case. Because of Tayyab’s admission that he supplemented his income with money

from the Gift Budget, I find that Voysus has demonstrated a strong *prima facie* case on the Fraudulent Expenses Scheme.

The Fraudulent Employees Scheme

[70] Since I have found that Voysus has demonstrated a strong *prima facie* case on the Fraudulent Expenses Scheme, for the purpose of the Mareva Motion, I need not consider whether Voysus has demonstrated a strong *prima facie* case in respect of the Fraudulent Employees Scheme. The strength of the Fraudulent Employees Scheme is, however, relevant to the amount of damages that Voysus claims, particularly since the amount claimed under the Fraudulent Employees Scheme is significantly higher.

[71] The evidence supporting the Fraudulent Employees Scheme is considerably weaker. Nusrat has had to backtrack from statements made in his affidavit in support of the alleged fraud. In his affidavit, Nusrat made broad, categorical statements, including that (i) none of the Family Member Defendants had ever performed any work for Voysus; (ii) Voysus had “never in the past hired work-from-home employees”; and (iii) “most” Voysus employees were required to log in to the Vocalcom system to keep track of their hours.

[72] The evidence that has subsequently emerged shows that: (i) some of the Family Member Defendants performed some work for Voysus; (ii) some Voysus employees worked from home; (iii) not all Voysus employees used the Vocalcom system to log their hours; and (iv) Nusrat also hired family members as employees. Voysus has identified no written policy prohibiting employees from working from home. To the contrary, in a Response to a Request for Proposals, Voysus specifically states that it allows employees to work from home or from remote locations. On cross-examination, Nusrat dismissed this as “marketing.” In addition, Nusrat’s sister, Saira Bhalwani, was one of the Voysus employees who worked from home and did not log into Vocalcom. He ought to have been aware of this when he swore his affidavit.

[73] The Plaintiff’s claim that Tayyab concealed the hiring of family members is also undermined significantly by the evidence that Tayyab e-mailed a payroll report to Nusrat every two weeks. The payroll report included the names of all Voysus employees and the amounts they were paid. Nusrat claims that he delegated all of the daily operations to Tayyab, and that he did not review the payroll reports. Even if this were the case, the fact that Tayyab sent him the payroll reports significantly weakens Voysus’ claim that Tayyab concealed the hiring of his family members. Had he reviewed the reports, he would have seen the names and addresses of the employees and would have been able to make further inquiries.

[74] Among the documents that Tayyab took from Voysus are profit and loss statements for 2016 showing that Voysus’ payroll expenses were 70 percent of its revenue. This refutes Voysus’ claim that Voysus began investigating the Fraudulent Employees Scheme because payroll expenses were higher than expected. In addition, had Nusrat opened the bi-weekly payroll reports, he would have known how much Voysus was paying in total payroll.

[75] It appears from the evidence that some of the Family Member Defendants were barely qualified for their roles or may have been paid more than they should have been in relation to the work done. However, this is not the same as the fraudulent scheme that Voysus has alleged.

[76] I make no further findings on the alleged Fraudulent Employees Scheme other than to observe that if the Plaintiff's claims against the Defendants were based on this ground alone, it would not have established a strong *prima facie* case.

Did Voysus Fail to Make Full and Frank Disclosure?

[77] Based on the evidentiary record before me on the Mareva Motion, it is clear that there are significant issues with Voysus' evidence on the *ex parte* motion before Myers J. As noted above, on cross-examination, Nusrat backtracked significantly on the categorical statements made in his original affidavit in support of the motion. On the alleged Fraudulent Employees Scheme, many of the statements he made regarding work from home arrangements and the Vocalcom system were without a factual basis. On cross-examination, Nusrat admitted that he never looked into what hours the Family Member Defendants worked and never reviewed any payroll reports.

[78] Moreover, in his affidavit, he provided significant detail about Voysus' policies and practices, such as logging into Vocalcom, but had little detailed information on cross-examination. When asked the following questions, among others, Nusrat responded that he had "no idea": how many employees Voysus had; whether certain employees did not log into Vocalcom; whether employees doing "back office" work had to log into Vocalcom; how long Voysus had had video surveillance; Tayyab's salary; the size of the Reliance incentive budget, whether Reliance paid for "back office" work; and whether certain employees had to log into Reliance's system. This is inconsistent with the statement in his affidavit that as current Chairman and former Chief Executive Officer of Voysus, he had personal knowledge of the facts to which he was attesting. In fact, much of the critical information was either second-hand or lacked any basis.

[79] On the Fraudulent Expenses Scheme, Voysus provided insufficient information about the Gift Budget, such as whether it was in fact funded by clients, including Reliance. Given that a plaintiff is required to give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, this information is relevant. It impacts upon whether Voysus in fact suffered damages as a result of the alleged Fraudulent Expenses Scheme. Voysus failed to make full and frank disclosure on the motion before Myers J.

[80] In addition, Voysus alleged that Gifts were either not given out or only given to family members but had no evidence, other than the Summary, to support this allegation. None of its affiants were able to give any specific examples. On the motion before Myers J., Voysus ought to have acknowledged its allegation was based solely on the statements of employees but that it did not have documentary or other proof.

[81] Despite alleging that all of the Family Member Defendants and Remaining Defendants are related to either Tayyab or Anisha, Voysus appears to have made no attempt to verify which defendants were in fact related.

[82] Not only did the Plaintiff fail to make full and frank disclosure on the *ex parte* motion, its witnesses have continued to obscure relevant facts. In his endorsement dated August 14, 2019, Myers J. made an order that Rule 34.12 would apply to all cross-examinations, and that no questions were to be refused, aside from objections based on lawyer-client privilege. Notwithstanding this order, on cross-examination, Nusrat refused relevant questions and undertakings, as follows:

- (i) Refused to provide annual or monthly financial statements from the fiscal year prior to the purchase of Nusrat's interest in Voysus to the current date;
- (ii) Refused to provide the payroll to revenue ratio for the entire time the business was owned by Nusrat;
- (iii) Refused to provide Vocalcom and Ceridian records showing the hours logged by Voysus employees from 2017 to present. Without such information, it is not possible to identify or reconcile discrepancies between the two;
- (iv) Refused to disclose the amount of the Reliance incentive budget;
- (v) Refused to answer whether Voysus receives money from clients for gifts and incentives that do not get paid out;
- (vi) Refused to produce supporting records regarding expense claims, while claiming that all expenses submitted by Tayyab were fraudulent;
- (vii) Refused to advise how many gifts and prizes Voysus has distributed to employees before and after Tayyab's termination;

[83] I reject Voysus' position that the refusals were proper on the basis that the questions were abusive. None of the above questions were abusive or irrelevant.

[84] In response to an undertaking given by Nusrat to advise how much Voysus pays for Gifts on Reliance matters, Voysus did not advise how much it pays for Gifts, but rather, provided the amounts paid for Gifts and commissions together. This was not responsive to the undertaking and continues to obscure the amount that Voysus pays, if any, toward Gifts.

[85] As a plaintiff seeking extraordinary relief from this court, Voysus ought to have heeded Myers J.'s order, as well as the applicable legal test on a Mareva motion and the Rules. As a result of the Plaintiff's failure to make full and frank disclosure on the *ex parte* motion, the Mareva motion fails.

Is There a Risk of Dissipation of the Proceeds?

[86] If I am mistaken in my view that Voysus failed to make full and frank disclosure, the Mareva Motion would nonetheless fail because there is insufficient evidence of a risk of dissipation to support a continuation of the Mareva Order.

[87] In *Chitel*, the Court of Appeal stated that the plaintiff must demonstrate that the defendant is dissipating or disposing of his assets “in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law” (para. 58). In *RBC Dexia Investor Services Trust v. Goran Capital Inc.*, 2016 ONSC 1138, 263 A.C.W.S. (3d) 748, at para. 11(b), the court held that a Mareva injunction can only be granted if the court concludes that the purpose of intention of the defendant is to defeat any judgment that the plaintiff obtains against it. If the court concludes that the purpose of the defendant in using the funds is a legitimate one, the fact that it may affect the plaintiff’s ability to recover on a judgment does not justify granting a Mareva injunction. See also *R. v. Consolidated Fastfrate Transport Inc.* (1995), 125 D.L.R. (4th) 1 (Ont. C.A.), at para. 52.

[88] Voysus relies upon *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, 106 O.R. (3d) 494 [*Sibley*], to argue that the risk of dissipation of the Defendants’ assets “can be inferred by evidence suggestive of the defendant's fraudulent criminal activity” (at para. 64). In *Sibley*, Strathy J. (as he then was) stated:

Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

Sibley, at para. 63.

[89] In this case, the evidence shows that in January 2019, Tayyab sent an email to a real estate agent inquiring about comparable sale prices in the area. On February 10, 2019, Tayyab sent an email to a property management agent inquiring about the possibility of renting a portion of the Property. After they lost their jobs, Afira advanced three payments of \$2,250.00 each to Tayyab and Anisha in February to May, 2019 to help them to make their mortgage and home insurance payments. On April 29, 2019, the Property was listed on MLS. The Property was sold to an arms’ length purchaser on May 13, 2019.

[90] Voysus relies upon the timing of the sale of the Property as evidence that Tayyab and Anisha intended to dissipate their assets in order to defeat a judgment. Tayyab and Anisha listed

the Property for sale approximately two weeks after they were served with the Statement of Claim. Voysus also points to the fact that Tayyab and Anisha incurred penalties for early termination of their mortgage as demonstrating that they wanted to dispose of the Property in a hurry. In addition to the timing of the sale, Voysus points to the statement in Tayyab's affidavit that he wants to repay the \$40,000.00 gift received from Yasaf and the amounts loaned by Afira as evidence of a risk of dissipation.

[91] Tayyab's evidence is that they sold the Property because he and Anisha could no longer make the mortgage payments after they both lost their jobs with Voysus. Tayyab states that after they were served with the Statement of Claim, they realized they needed funds to retain counsel to defend themselves.

[92] The Defendants' explanation for the sale of the Property is a reasonable one. Tayyab and Anisha purchased the Property shortly after they were married and sold it when they could no longer pay the mortgage. They did not attempt to conceal the sale. They are unemployed but require funds to retain counsel to defend themselves in this proceeding, in which the Plaintiff seeks over \$1.5 million in damages and makes serious allegations of dishonesty. The Defendants' purpose in selling the Property is legitimate. As for Tayyab's intent to repay the gift from Yasaf and the loans from Afira, the fact that there may be no legal obligation to repay them does not amount to a risk of dissipation.

[93] In *Sibley*, Strathy J. concluded that the evidence of fraud was so strong that, coupled with the surrounding circumstances, it gave rise to an inference that there was a real risk that the defendants would attempt to dissipate or hide their assets. In this case, while I have found that the Plaintiff has demonstrated a strong *prima facie* case on the Fraudulent Expenses Scheme, the evidence is not so strong that it would give rise to an inference of dissipation.

[94] Moreover, the link between the alleged fraud and the purchase of the Property is weak. Voysus alleges that because Tayyab and Anisha had no source of income other than Voysus, the amount they paid toward the down payment on the Property necessarily came from the alleged fraudulent schemes. The Defendants have provided contemporaneous documentary evidence that they received a gift of \$40,000 from Anisha's brother, Yasaf, and his spouse, Jean Marie. This money was put toward the down payment on the Property. Therefore, almost one-third of the down payment was from funds unrelated to Voysus. Although Jean Marie is also a Family Member Defendant in this proceeding, the gift is from an account held jointly by Jean Marie and Yasaf, who was not employed by Voysus. There is no evidence that those funds were derived from the alleged Fraudulent Employees Scheme.

[95] In addition, Tayyab and Anisha also earned legitimate employment income from Voysus over a number of years. As noted above, other than to plead that Anisha assisted Tayyab, Voysus has not adduced any evidence that would implicate Anisha in the alleged fraud. Therefore, I am not satisfied that the Property was purchased with the proceeds of the alleged fraudulent schemes such that Voysus has a proprietary interest in the Property.

[96] In my view, the Mareva Motion must fail because there is insufficient proof of a risk of dissipation.

[97] Since I have found that Voysus has failed to meet the test to continue the Mareva Order, I need not address whether the Defendants have satisfied the requirements to set aside or vary the Mareva Order.

Conclusion

[98] Based on the foregoing analysis, I dismiss the Plaintiff's motion to continue the Mareva Order.

[99] In the event that no agreement is reached on costs, Plaintiff's counsel shall submit their costs submissions within fourteen days of the release of these Reasons. Defendants' counsel shall submit responding costs submissions within fourteen days of receiving the Plaintiff's cost submissions. There will be no reply submissions without leave. No costs submissions are to exceed six double-spaced pages, including a costs outline and may be sent to my judicial assistant, Roxanne Johnson, at roxanne.johnson@ontario.ca. If no costs submissions are received within this time frame, the parties will be deemed to have resolved costs

[100] Given that a large volume of documents have been exchanged and numerous cross-examinations have been conducted, it may be that this matter can proceed to trial expeditiously. To this end, if counsel agree, they may make a joint request through Ms. Johnson for a case conference with me for a timetable for further steps. If I do not hear within 30 days of this endorsement, I will assume that no case conference is necessary.

Nishikawa J.

Date: November 20, 2019