2019 ONSC 1727
Ontario Superior Court of Justice

Lakhani et al. v. Gilla Enterprises Inc. et al., 2019 ONSC 1727

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BEJU LAKHANI, ANTHONY DIAB, and ANDREW DIAB (Plaintiffs / Moving Parties) and GILLA ENTERPRISES INC., GILLA INC., VAPE BRANDS INTERNATIONAL INC., HYSTYLE BRANDS INC., GRAHAM SIMMONDS, ASHISH KAPOOR, and DANIEL YURANYI (Defendants / Motion Respondents)

Perell J.

Heard: February 27, 2019
Judgment: March 18, 2019
Docket: CV-18-00602553-0000

Counsel: Guillermo Schible, for Plaintiffs, Moving Parties
Bonnie Roberts Jones, Martin Mendelzon, for Defendants, Motion Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

***Perell J.*:**

A. Introduction

1 The Plaintiffs Beju Lakhani, Anthony Diab, and Andrew Diab were the owners of the Defendant Vape Brands International Inc., a manufacturer of e-liquids for e-cigarettes. In the summer of 2017, pursuant to a Share Purchase Agreement, they sold their company to the Defendant Gilla Enterprises Inc., which is the subsidiary of Gilla Inc., also a manufacturer of e-liquids with plans to spin-off a marijuana-related business. The Defendants Graham Simmonds, Ashish Kapour, and Daniel Yuranyi are the executives of Gilla Inc.

2 In the spring of 2018, Gilla Inc. decided to spin off the marijuana-related business to another subsidiary, the Defendant Hystyle Brands Inc.

3 The business of Vape Brands floundered. Mr. Lakhani and the Diabs were not paid what they were owned under the Share Purchase Agreement. Mr. Lakhani was pursued by Vape Brand's credits as he had made guarantees for Vape Brands.

4 In the summer of 2018, the Plaintiffs sued the Defendants for breach of the Share Purchase Agreement and for an oppression remedy.

5 In the motion now before the court, Mr. Lakhani and the Diabs seek a *Mareva* injunction restraining Vape Inc., Gilla Inc., Gilla Enterprises, and Hystyle Brands from dissipating Vape Inc. assets and for an injunction restraining the spin-off of the marijuana-related business to Hystyle Brands.

6 For the reasons that follow, the motion for injunctive relief is dismissed.

B. Facts

7 Before the summer of 2017, Beju Lakhani, Anthony Diab, and Andrew Diab owned all the common shares of Vape Brands, a privately-held company incorporated pursuant to the Canada *Business Corporations Act*.[1] Mr. Lakhani owned 70% of the shares. The Diabs' owned 15% each. Vape Brands manufactured and sold e-liquids for e-cigarettes. Mr. Lakhani had

signed guarantees with respect to bank loans made to Vape Brands.

8 Gilla Inc. is a Nevada corporation, which also was in the business of manufacturing and selling e-liquids. It is a public corporation subject to regulation of the United States' Security Exchange Commission. One of Gilla Inc.'s, wholly-owned subsidiaries was Gilla Enterprises Inc., a corporation under Ontario's *Business Corporations Act*.[2] Gilla Enterprises carried on business as a management company for Gilla Inc. and was not a revenue-generating enterprise and rather its operations were funded by Gilla Inc.

9 Graham Simmons, who is an Ontario resident, is the CEO and Chairman of Gilla Inc. Ashish Kapoor, who is an Ontario resident, is the CFO of Gilla Inc., Daniel Yurani, who is an Ontario resident, is the CPO of Gilla Inc.

10 On July 31, 2017, by a Share Purchase Agreement, Mr. Lakhani and the Diabs sold their shares to Gilla Enterprises Inc. As consideration for the sale of the shares, Mr. Lakhani and the Diabs received shares and warrants in Gilla Inc., short term promissory notes worth $100,000, long term promissory notes worth $450,000, and a revenue-based earn-out from the sale of e-liquids. Gilla Inc. was the guarantor of Gilla Enterprises' obligations under the Share Purchase Agreement.

11 After the sale of his shares in Vape Brands, Mr. Lakhani continued as part of the management at Vape Brands and received an annual salary of $155,000.

12 Gilla Inc. and Gilla Enterprises now allege that they were fraudulently induced to purchase the Vape Brand shares by the misrepresentations of Mr. Lakhani and the Diabs, who knew that the shares were worthless because of outstanding liabilities and poor prospects. The Gilla Defendants allege that Mr. Lakhani and the Diabs misrepresented: (a) the resources, infrastructure, and capabilities of Vape Brands; (b) that Vape Brands financial statements were capable of audit to secure a listing on a stock exchange; and (c) that Mr. Lakhani was a talented, connected, and successful sales leader who would expand Gilla Inc.'s international sales.

13 Vape Brands was unable to obtain a financial audit sufficient to apply for a listing on a Canadian stock exchange.

14 Vape Brands business was floundering.

15 On May 17, 2018, Gilla Inc. issued a press release announcing that it was establishing a subsidiary Hystyle Brands Inc. for a cannabis-related business. It had been planned to run this business through Vape Brands, but the inability to have Vape Brands financial statement audited and the company listed on a stock exchange meant that Vape Brands could not be properly capitalized. Thus, the decision was made to spin-off Gilla Inc.'s cannabis-related business through another subsidiary.

16 Meanwhile, Vape Brands business continue to flounder, and the relationship between Mr. Lakhani and the executives of the Gilla Defendants was deteriorating. The promissory notes were not paid, and the only funds paid to Mr. Lakhani and the Diabs was $4,000.

17 On July 31, 2018, Mr. Lakhani and the Diabs commenced this action. Among other things, they claimed: payment of the promissory notes; that the defendants arrange releases of guarantees that the plaintiffs had signed with the Toronto Dominion Bank and the Royal Bank of Canada; specific performance of the Share Purchase Agreement; $2 million in damages for bad faith performance in the operation of Vape Brands; and $2 millions in damages and an oppression remedy.

18 The claims against Vape Brands continued to mount. On August 16, 2018, Axis Employment Agency Inc. commenced an action against Vape Brands, Messrs. Lakhani, Simmonds, Kapoor, and Yurani for $181,380.03 for employment services provided to Vape Brands.

19 In September 2018, Mr. Lakhani's employment was terminated for alleged mismanagement and misconduct. After his dismissal, Gilla Inc. learned that Mr. Lakhani had established a competing business, Red Vaper Inc., and was soliciting Gilla Inc.'s employees for positions at his new company.

20 In October 18, 2018, Gilla Enterprises decided to close down Vape Brands. Mr. Duranyi told Ynigo Samaniego, Vape Brands' production manager that Gilla Enterprises would operate using distributors in Daytona, Florida. Mr. Samaniego was ordered to move goods and property to Florida. The evidence from the Gilla Defendants is that the property that was moved was property of the Gilla Defendants and not owned by Vape Brands.

21 On October 18, 2018, Mr. Lakhani and the Diabs delivered an Amended Statement of Claim in the case at bar, and Mr.

Lakhani commenced a wrongful dismissal action against Gilla Inc., Gilla Enterprises and Vape Brands.

22 On November 12, 2018, Mr. Duranyi told Mr. Samaniego and five other employees that they were being laid off. The operations of Vape Brands was shut down.

23 On November 21, 2018, Mr. Lakhani delivered his Statement of Defence in the action brought by Axis Employment Agency Inc.

24 On November 30, 2018, Vape Brands made a voluntary assignment into bankruptcy. Thus, in the action at bar, the claims against Vape Brands are stayed.

25 On December 15, 2018, Gilla Inc., Gilla Enterprises, Hystyle Brands, and Messrs. Simmonds, Kapoor, and Yuranyi delivered their Statement of Defence and Counterclaim.

26 The Counterclaim by Gilla Inc. and Gilla Enterprises claimed, among other things, damages for **fraud**, fraudulent misrepresentation, and conspiracy, damages against Mr. Lakhani for breach of his non-competition agreement, a declaration that the promissory notes were void, and a constructive trust over the shares and warrants transferred under the Share Purchase Agreement.

27 On January 9, 2019, Mr. Lakhani and the Diabs delivered their Reply and Defence to the Counterclaim.

28 In February, 2019, Mr. Lakhani and the Diabs brought the motion now before the court for a *Mareva* injunction restraining Vape Inc., Gilla Inc., Gilla Enterprises, and Hystyle Brands from dissipating Vape Inc. assets and an injunction restraining the spin-off of the marijuana-related business to Hystyle Brands. At the hearing of the motion, the Plaintiffs delivered their undertaking as to damages.

C. Analysis

1. Mareva Injunctions

29 Section 101 of the *Courts of Justice Act*[3] provides the court with the jurisdiction to grant interlocutory injunctions including *Mareva* injunctions. Section 101 states:

> *Injunctions and receivers*
>
> 101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory Order may be granted or a receiver or receiver and manager may be appointed by an interlocutory Order, where it appears to a judge of the court to be just or convenient to do so.
>
> *Terms*
>
> (2) An Order under subsection (1) may include such terms as are considered just.

30 Unlike the Queen of Hearts in Lewis Carroll's *Alice in Wonderland*, who favored execution before verdict, the common law strongly disfavors execution before judgment in a civil case. A *Mareva* injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings. In its effect, it is pre-judgment execution. It is a rare and extraordinary order.

31 For a *Mareva* injunction, the plaintiff must establish: (1) a strong *prima facie* case; (2) irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial; (3) the balance of convenience favours granting an interlocutory injunction; (4) the defendant has assets in the jurisdiction; and (5) that there is a serious risk that the defendant will remove property or dissipate assets before judgment.[4] Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.

32 I will grant that that Mr. Lakhani and Diabs have a strong *prima facie* case, particularly with respect to the unpaid promissory notes, but they have otherwise fallen far short from satisfying the criteria for any injunctive order, particularly the extraordinary *Mareva* injunction. And I should also note that the Gilla Defendants have a strong *prima facie* counterclaim.

33 Vape Brands is no longer in business and its assets are under the control and responsibility of the trustee in bankruptcy. Pre-judgment, Gilla Enterprises and Gilla Inc. are entitled to use their own assets as they see fit, and those assets cannot be frozen unless the requirements for a *Mareva* injunction are satisfied.

34 In the case at bar, Mr. Lakhani and the Diabs have failed to establish that any of Gilla Enterprises, Gilla Inc., and Hystyle Brands have any assets in Ontario. They have failed to establish that these defendants are doing other than carrying on business as they did before the acquisition of the now defunct Vape Brands. There is no evidence that these defendants are dissipating assets to make themselves judgment proof. Here, it should be recalled that the shares of Gilla Inc. are publicly traded and Gilla Inc. is subject to the disclosure obligations of U.S. securities law. There is no evidence that Gilla Inc. is doing something inappropriate with its own assets.

35 Apart from the assets of Hystyle Brands, who the Plaintiffs seek to prevent carrying on business entirely, it is not even clear what assets, Mr. Lakhani and the Diabs seek to freeze until judgment.

36 Mr. Lakhani and the Diabs have failed to show irreparable harm in the requisite sense needed for an interlocutory injunction and the balance of convenience highly favours allowing Gilla Enterprises, Gilla Inc. and Hystyle Brands to carry on business.

37 Mr. Lakhani and the Diabs rely on the oppression remedy case of *Le Maitre Limited v. Segeren*[5] in support for the proposition that some lesser standard for injunctive relief is used in oppression remedy cases. The case actually stands for the proposition that except in rare circumstances and, generally speaking, the principles for granting interlocutory relief should be applicable when injunctive relief is sought in the context of an oppression remedy. In *Le Maitre Limited v. Segeren*, Justice Pepall stated at para. 30:

> 30. It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as: [citations omitted].

38 In *Le Maitre Limited v. Segeren*, Justice Pepall went on to hold that the applicants meet the test for an injunction regardless of the articulation of its application. The same cannot be said in the immediate case, and it cannot be said in the immediate case that the dictates of fairness are so overwhelming that it may be appropriate to forgo compliance with the traditional considerations associated with an interlocutory injunction.

39 In *Amaranth LLC v. Counsel Corp*.[6] the traditional principles for injunctive relief were applied to dismiss a claim for injunctive relief in an oppression remedy case. In that case, Justice Colin Campbell warned against the improper use of the oppression remedy to tie up assets before judgment and warned of the danger associated with courts interfering with the operations of a corporation except in extraordinary circumstances.

40 Mr. Lakhani and the Diabs are shareholders in Gilla Inc. and will receive a dividend in the operations of Hystyle Brands. It appears that Mr. Lakhani and the Diabs are cutting off their nose to spite their face in seeking to restrain the business operations of the Defendants who are engaged in doing the opposite of making themselves judgment proof.

41 In short, there should be no injunctive relief, and the claim and the counterclaim should proceed in the normal course.

D. Conclusion

42 For the above reasons, the motion for injunctive relief is dismissed with costs on a partial indemnity basis fixed at $30,000, payable forthwith.

Footnotes

[1] R.S.C. 1985, c. C-44.

[2] R.S.O. 1990, c. B.16

[3] R.S.O. 1990, c. 43.

[4] *United States of America v. Yemec* (2005), 75 O.R. (3d) 52 (C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *DeMenza v. Richardson Greenshields of Canada Ltd.* (1989), 74 O.R. (2d) 172 (Div. Ct.); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.).

[5] [2007] O.J. No. 2047 (S.C.J.).

[6] [2005] O.J. No. 4329 (S.C.J.).