CITATION: 2384125 Ontario Inc. v. The Diamond at Don Mills Developments Inc., 2015 ONSC 5581
COURT FILE NO.: CV-15-519787
DATE: 20150904

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2384125 Ontario Inc., 8325740 Canada Inc., Ahmadreza Tafazoli, Rana Kheshabi, Mina Kheshabi, Mary Am Pazuki, 1532208 Ontario Limited, Hailong Yue, Shaoqing Dang, Soheil Holdings Inc., Morvarid Parandakh, 2272693 Ontario Ltd., Sirus Rahmani, 2389006 Ontario Inc., 2389728 Ontario Limited, Hiral Investments Ltd., 477318 Ontario Ltd., 1567559 Ontario Inc., Morvareed Properties Inc. , 1905242 Ontario Inc., Kia Sun Inc., Ebrahim Sayed Salehi, Majid Shajiee, Buildmonte Holdings Inc. and Buildwell Holdings Inc., Plaintiffs

AND:

The Diamond At Don Mills Developments Inc. and Parallax Investment Corporation, Defendants

BEFORE: Mr. Justice Graeme Mew

COUNSEL: *R. Malen and R. Drake*, for the Plaintiffs

Thomas Dunne QC and Laura Van Soelen, for the Defendants

HEARD: 4 September 2015 at Toronto

ENDORSEMENT

[1] The possibility that a defendant will be unable to satisfy a judgment obtained against it by a plaintiff is an everyday risk of civil litigation.

[2] In the present case, the defendant Diamond Inc. is described by the plaintiff as "a single-purpose development company" whose only remaining assets out of the sale of 71 commercial condominium units are one unsold condominium unit and two vendor take-back mortgages of $220,000 (in total).

[3] The twenty-five plaintiffs in this action are small business owners who purchased a total of forty commercial condominium units at a retail/commercial development called The Diamond at Don Mills. They allege that their purchases from the developer were induced by misrepresentations and that they were saddled with unjustified increased purchase prices at closing and were overcharged on occupancy fees. They sue for a total of $7 million.

[4] There are two defendants. The target of this motion, the defendant The Diamond at Don Mills Developments Inc. ("Diamond Inc.") was the vendor of the condominium units purchased by the plaintiffs. An Agreement of Purchase and Sale was entered into with respect to each unit. The other defendant, Parallax Investment Corporation described itself in promotional material relating to the subject development as having "developed millions of square feet of highly successful and dynamic leasehold and condominium shopping centres throughout southern Ontario".

[5] The plaintiffs allege that Diamond Inc. is the corporate vehicle used by Parallax to develop and build the commercial condominiums at issue in these proceedings. Parallax denies that it was the developer but acknowledges that it was the initial holder of the agreement of purchase and sale for the lands where the development is located, and that prior to the closing of the agreements of purchase and sale, Parallax assigned title to Diamond Inc.

[6] The value of the assets of Diamond Inc, as known to the plaintiffs, is approximately $500,000. The last unit to be sold, Unit 54, was sold on 4 June 2015 for $350,000 with a vendor take-back mortgage of $75,000. The evidence is that the funds from this sale ($275,000) were deposited into Diamond Inc.'s bank account and were used to pay Diamond's creditors and then its investors. Diamond Inc. has declined to say whether all of the funds have been paid out or to identify the investors.

[7] The plaintiffs seek an order preventing Diamond Inc. from in any way disposing of or mortgaging the remaining unsold unit or from assigning the vendor take-back mortgages which it holds or from distributing any monies paid by the mortgagors pursuant to those mortgages. The plaintiffs claim that such relief is justified because the unsold unit and the mortgages are believed to be the only assets available to satisfy any judgment obtained by the plaintiffs against Diamond Inc.

[8] The plaintiffs acknowledge that they are not entitled to a Mareva injunction because of the lack of any evidence that Diamond Inc. is about to remove its assets from the jurisdiction to avoid the possibility of a judgment. But they nevertheless ask the court to exercise its equitable jurisdiction to restrain conduct which would dissipate the remaining assets of Diamond Inc. and thereby frustrate the plaintiffs' ability to recover judgment.

[9] As a general principle, the law has a strong disinclination to permit execution before judgment: *Aetna Financial Services Ltd. v Feigelman*, [1985] 1 SCR 2 at para 8. The type of relief sought by the plaintiffs in this case is an extraordinary remedy requiring a strong *prima facie* case and strong evidence that the defendant is or is about to dissipate or dispose of its assets in a manner clearly distinct from its usual or ordinary course of business: Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora: Canada Law Book, 1992), para 2.760. Even assuming those hurdles could be overcome, the plaintiffs also have to demonstrate that they will suffer irreparable harm if the relief they seek is not granted. In *RJR-Macdonald Inc. v Canada*, [1994] 1 SCR 311 at 64, the Supreme Court of Canada noted that irreparable harm is harm "which either cannot be quantified in monetary terms or which cannot be cured" and the "fact that one party

may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages".

[10] The plaintiffs rely on a decision of the Saskatchewan Court of Appeal, *101114752 Saskatchewan Ltd. v. Kantor*, 2012 SKCA 64. In that case the plaintiffs were minority shareholders who sought to restrain the majority shareholders from dissipating the proceeds of the sale of potash permits by the company. The court considered the context, which required consideration of whether the corporation would commit an act that was oppressive to the minority shareholders. In the absence of any evidence that the corporation was unlikely to distribute the funds to the majority shareholder, and given the corporate structure, which was such that there would be no other assets to satisfy any judgment that might be obtained, the court granted an injunction to the minority shareholders. It is immediately apparent that the context in the *Kantor* case – a dispute between shareholders over the sole asset of the corporation in which the remedies available under the *Business Corporations Act* were invoked - is quite different from a situation where parties to a commercial agreement are in a dispute and the assets of one of the defendants are diminishing in circumstances where there is no evidence that the dissipation of those assets is occurring outside the normal course of business.

[11] As the Sharpe text and many of the injunction cases it cites note, the bar for granting the sort of extraordinary relief requested by the plaintiffs in this case is a high one.

[12] In the present case I am by no means certain that the plaintiffs have met the strong *prima facie* case requirement. In any event, I am not persuaded by the evidence that Diamond Inc. is disposing of its assets other than in the ordinary course of its business. And, for the reasons given in *RJR – Macdonald*, the requirement of irreparable harm is not met either.

[13] Under the circumstances the plaintiff's motion should be dismissed.

[14] The plaintiffs will pay costs of the motion to the defendants on a partial indemnity scale, fixed at $22,500 inclusive of HST and disbursements.

Graeme Mew J.

Mew J

Date: 4 September 2015

Corrections made: 29 September 2015
Para. 5 – last sentence *"Parallax denies that it was the developer but acknowledges that it was the initial titleholder to the lands where the development is located. Parallax assigned title to Diamond Inc. prior to the closing of the agreements of purchase and sale."* replaced by the sentence *"Parallax denies that it was the developer but acknowledges that it was the initial*

holder of the agreement of purchase and sale for the lands where the development is located, and that prior to the closing of the agreements of purchase and sale, Parallax assigned title to Diamond Inc."