

CANADA / JUDGMENT

Fernandes v. Legacy Financial Systems, Inc.

2020 BCSC 885

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 885 Fernandes v. Legacy Financial Systems, Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fernandes v. Legacy Financial Systems, Inc., 2020 BCSC 885 Date: 20200525 Docket: S204900 Registry: Vancouver Between: Keith Fernandes, Golden Era Ventures, Ltd., Gilbert Oudaimy, Peter Corry, Maura Traylor, and Mark Wilson Plaintiffs And Legacy Financial Systems, Inc., True Innovations, Inc., Lumien Technologies, Inc., Vladyslav Fadyeyev, (aka Vladyslav Fadyeyeva, Vlad Fadeyeff) Individually, Solimano Law Corporation, Diego Solimano Individually, Eagle Spirit Energy Holdings Ltd., Calvin Helin Individually, and Richard J. Jackson Individually. Defendants Before: The Honourable Justice Branch (Appearance via telephone) Oral Reasons for Judgment (Re: Ex Parte Application for Mareva Injunction) Counsel for Plaintiffs : J.E. Ankeny Counsel for Defendants: No appearance Place and Date of Trial/Hearing: Vancouver, B.C. June 2, 2020 Place and Date of Judgment: Vancouver, B.C. June 2, 2020 Table of Contents Introduction.. 3 Background.. 3 Jurisdiction.. 5 The Test for a Mareva Injunction.. 5 Relative Strength and the Strong Prima Facie Case. 7 Balance of Justice and Convenience. 9 Residency. 10 Enforcement Rights. 10 Amount of the Claim.. 10 Defendants' Conduct 10 Existence of Assets. 10 Risk of Dissipation/Irreparable Harm.. 10 Strength of the Case. 11 Nature of the Transaction.. 11 Effect on Third Parties. 11 Factors Affecting the Public Interest 11 Conclusion on Balance of Convenience.. 12 Application of Discretion.. 12 Terms of the Orders.. 13

Introduction

- [1] This is an application for an asset preservation order, commonly known as a Mareva injunction.

Background

- [2] The plaintiffs assert that they have provided funds to the defendants in a variety of ways, and based on a variety of incorrect representations. They allege that the three companies have essentially operated as a joint pyramid scheme, and that the pyramid is about to come crashing down. On the evidence before me, the individual defendant, Mr. Fadyeyev, appears to have acted as principal for the three lead defendant companies.
- [3] It appears that the plaintiffs' concern about the financial health of the defendants, Legacy Financial Systems, Inc. ("Legacy Financial") and True Innovations, Inc. ("True Innovations"), is well founded, as there was an email from Mr. Fadyeyev dated March 31, 2020, in which he states that Legacy Financial and True Innovations were not in a position to repay all the funds demanded by various parties in one installment, but promised a payment schedule would be forthcoming. On May 7, 2020, Mr. Fadyeyev sent an email stating: To begin the process of repayment of all creditors of the companies, the payment schedule will follow this format: An initial payment of 10% of the outstanding amounts owed to each creditor will be made in 45 days from the date of this email. The remaining payments will be made in increments of 10% every 4 weeks after the first payment until all creditors are paid in full. The timing of this payment schedule is necessary to allow the companies to repay all outstanding creditors. The next step will be to verify all amounts and the destination of the transactions. The next communication will be in the first week of June.
- [4] There is no evidence of Legacy Financial or True Innovations having obtained the approval of its creditors or the court for this payment schedule. There is no evidence of further communication from Mr. Fadyeyev since May 7, 2020.
- [5] I do have some concerns about the scope and foundation of all of the various claims advanced. The affidavit material is highly disjointed. It alleges a mix of loans and equity payments made by various plaintiffs to various defendants at various times and pursuant to various representations. There is some suggestion that certain loans were converted to equity. There are references to certain payments, but often without particulars as to dates or amounts.
- [6] That said, the clearest aspects of the claims are those relating to certain promissory notes. There is evidence of the following promissory notes having been issued by the defendants, and subsequent demands having been made for repayment:
- a) Golden Era Ventures Ltd., Mr. Fernandes' company, received a promissory note from True Innovations in the amount of \$500,000 dated January 28, 2019, which was replaced by a promissory note for \$300,000 dated December 21, 2019. These notes did not provide a specific date for repayment. It did provide that "The Company [True Innovations] will have the right at any time to repay or return all, or any portion of, the Principal Sum outstanding, without notice, bonus or penalty". All of the other promissory notes discussed below used the same language. Mr. Fernandes has provided evidence that he made demand for repayment by way of email on March 9, 2020. There is evidence that Mr. Fernandes made

further follow up requests for these funds on March 31, 2020 and April 13, 2020. (This latter information was provided by way of a solicitor's affidavit sworn before the solicitor himself, which was clearly improper. However, I have received this information on the solicitor's undertaking to file the same information under an affidavit of Mr. Fernandes before the order issued below becomes effective).

- b) Mr. Wilson says that he personally provided \$235,000 in funds, and the evidence includes a promissory note in the same amount dated August 3, 2019, from Legacy Financial. Mr. Fernandes says that he made a demand on Mr. Wilson's behalf in the same March 9, 2020 email discussed above.
- c) Mr. Corry received a promissory note from Legacy Financial for \$1,030,000 dated June 29, 2019, and from the same company for \$77,800 dated August 1, 2019. There is some evidence that Mr. Corry made demands on the notes in March 2020, and specifically on March 9, 2020 (although this latter evidence is subject to the same evidentiary failing outlined above, which plaintiffs' counsel again undertook to remedy before this order would become effective). Jurisdiction

[7] The jurisdiction to award a Mareva injunction in B.C. is sourced through the following:

- a) The Law and Equity Act, R.S.B.C. 1996, c. 253 s. 39(1) confers upon the court the authority to grant an injunction by interlocutory order "in all cases in which it appears to the court to be just or convenient that the order should be made." Such an order may be made "either unconditionally or on terms and conditions the court thinks just."
- b) Rule 10-4(3) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 allows the court to grant an ex parte injunction.
- c) As a court of inherent jurisdiction, the British Columbia Supreme Court can grant any remedy necessary to do justice between the parties before it. The Test for a Mareva Injunction

[8] The flexible approach to the test for granting a Mareva injunction that has been adopted in B.C. is summarized in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420:

[10] In British Columbia, the general approach to applications for Mareva injunctions differs from other jurisdictions. This province has adopted a more "flexible" or "relaxed" approach, as first articulated by Justice Huddart (then of the Supreme Court of British Columbia) in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (S.C.) [*Mooney v. Orr* No. 2], from the more rules-based approach of *Aetna*. Under this jurisdiction's approach, once an applicant has established a strong prima facie case, the focus of the application shifts to the balance of justice and convenience between the parties. Determination of a Mareva injunction application in this province is governed by *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196 (C.A.) [*Silver Standard*], as clarified in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 [*Tracy*], and as applied in *ICBC v.*

Patko, 2008 BCCA 65.

- [9] Some further guidance is provided by the Silver Standard decision referenced in Kepis:
- a) The court's flexible approach should take account of a wide variety of circumstances including the usual injunction enquiries:
 - i. relative strength of the parties' cases; ii. evidence of irreparable harm one way or the other; iii. potential effects on third parties; and iv. factors affecting the public interest (Silver Standard at para. 19).
 - b) It is not a hard and fast rule that a Mareva injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor or where the payment in question is proposed to be made in the ordinary course of business (Silver Standard at para. 20).
 - c) However, in most cases it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he or she may never obtain. Courts will be reluctant to interfere with a party's normal business arrangements and affect the rights of its other creditors, merely on the speculation that the plaintiff will ultimately succeed on its claim and have difficulty collecting this judgment if the injunction is not granted (Silver Standard at para. 21).
- [10] As such, a Mareva injunction may be granted in B.C. even where the plaintiff cannot show a risk of the defendant moving assets with the intent to defeat or evade judgment: *Blue Horizon Energy Inc. v. Ko Yo Development Co. Ltd.*, 2012 BCSC 58 at paras.16, 24-30.
- [11] There is no strict list of factors that enter into the two-part analysis. Rather, each case is decided on its own factual matrix. Relevant factors in one case may be less helpful in the analysis of others: *Blue Horizon* at para. 30. A granting of a Mareva injunction is both an equitable and discretionary remedy. As such, even if all of the constituent elements are established, the court may refuse to grant an order if it has concerns about the applicant's case or conduct.
- [12] I turn now to the application of the two-part test, and the factors most germane to the present application. *Relative Strength and the Strong Prima Facie Case*
- [13] As noted above, in order to obtain an injunction, the applicant must first establish a strong prima facie or good, arguable case on the merits. While certain judgments refer to "good arguable case" and others to "strong prima facie case," the difference in words is a difference without practical consequence. Under either standard, it is more than an arguable case, but does not reach the "bound to succeed" threshold: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 54.

- [14] Here, I conclude that the claims under the promissory notes identified above meet the requisite standard. Although there is no due date on the face of the notes, there is at least an arguable case that these notes became payable on the occurrence of the demands outlined above: Bills of Exchange Act, R.S.C. 1985, c. B-4, ss. 2, 22(1)(b), 186(1); *Skuy v. Greenough Harbour Corporation*, 2012 ONSC 6998 at paras. 30-42.
- [15] However, I am unable to conclude that any of the other claims meet the standard. More specifically:
- a) With respect to an alleged promissory note to Mr. Corry of July 3, 2019 for \$45,000, the affidavit provided to the court did not include the referenced exhibit;
 - b) With respect to Mr. Corry's further investment of \$23,885 USD in June 2019, there is insufficient information to allow me to conclude that the requisite standard is met, particularly in light of the ambiguity regarding what type of investment it was, to whom it was paid, or when and if any funds are now due and owing under any arrangement.
 - c) The same weaknesses exist with respect to:
 - i. Mr. Corry's provision of certain funds to the defendants either by himself or through others in October 2019, December 2019, and January 2020; ii. Mr. Fernandes's alleged other amounts paid by him not papered by way of promissory notes; and iii. Mr. Oudaimy's alleged loans to the defendants, Solimano Law Corporation, Legacy Financial Systems Inc., True Innovations Inc, and Lumie Technologies Inc., none of which were supported by promissory notes or other written agreements.
- [16] Although it is true that a Mareva injunction can be obtained based on an alleged breach of an oral contract, I am of the view that the evidence proffered here was insufficient to meet the requisite standard. For example, Mr. Oudaimy's claims are muddled by the suggestion that he was offered shares of Legacy Financial in return, suggesting that some or all of the amounts paid may have been intended to be equity investments rather than loans. And if they were loans, the terms of such loans, and whether they are presently payable, is far from certain. Further, although the Notice of Civil Claim suggests that Solimano Law Corporation violated responsibilities owed to clients, there is little if any evidence that any of the plaintiffs were clients of the firm. Balance of Justice and Convenience
- [17] Turning to the balance of justice and convenience as between the parties, factors that may be considered include:
- a) the residency of the defendant;
 - b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;
 - c) the amount of the claim;
 - d) the history of the defendant's conduct;

- e) evidence showing the existence of assets within the jurisdiction or outside;
- f) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
- g) evidence of irreparable harm;
- h) the strength of the plaintiff's case;
- i) the nature of the transaction giving rise to the action;
- j) the risk inherent in the transaction;
- k) the defendant's assets; and
- l) evidence that the injunction would have a material adverse effect on an innocent third party. See 567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc., 2009 BCSC 711 at para. 16.

[18] I will examine those factors most relevant to the present application. Residency

[19] Here, the defendants are all said to be resident in B.C., although there is a concern about extra-jurisdictional movement of assets given that the investments included sums from outside the country, and some funds, including certain of those from the plaintiffs, were provided in the form of bitcoin. There is also evidence that Mr. Fadyeyev took frequent trips to Mexico for business purposes. Enforcement Rights

[20] There is no information available indicating that adequate enforcement rights would be available in other jurisdictions. Amount of the Claim

[21] The total amount of the plaintiffs' claims is said to be several million dollars, but even the more limited promissory note claims--which I accept clear the requisite merits threshold--total more than \$1 million. Defendants' Conduct

[22] In terms of the defendants' conduct, the plaintiffs' affidavits suggest a series of misrepresentations and misconduct that could eventually reach a finding of fraud. However, I apply some caution in this respect given that the application was brought ex parte. Existence of Assets

[23] In terms of evidence regarding the existence of assets, the defendants have suggested that they will be able to repay with time, suggesting that there may be some assets of value over which a Mareva injunction could usefully apply. Risk of Dissipation/Irreparable Harm

[24] There is little evidence showing active efforts to dispose or dissipate assets by the defendants. That said, as noted above, this is not an absolute requirement in British Columbia. There is certainly some evidence of potential irreparable harm, as the companies who issued the promissory notes appear to be in financial difficulty. Mr. Fadyeyev has also largely been out of contact with some or all the plaintiffs for some time.

- [25] Issuing the order may undoubtedly cause harm to the defendants, but the terms I have ordered seek to minimize the harm by minimizing the scope of the defendants covered by the order, restricting the amount that must be restrained, providing some funds for ongoing operations and defence, and limiting the return period of the order. Strength of the Case
- [26] I have addressed the strength of the case above. In relation to the promissory notes, there is a strong prima facie case, and no obvious defences depriving the plaintiffs of their right to enforce on the notes. Nature of the Transaction
- [27] The nature of the transactions giving rise to the claim were generally investments in software enterprises, which clearly carry an element of risk. However, the provision of promissory notes is intended to provide greater security and certainty of repayment than an equity investment--yet material risk is now pressing in on the plaintiffs. Effect on Third Parties
- [28] I am concerned that aspects of the order requested could have material effects of the rights of third parties, particularly with respect to the order requested against the defendant law firm. I am concerned that the order requested could have a negative impact on the clients of the firm. If the firm is not able to meet its obligations, the firm's ability to protect its clients' rights may be seriously impinged. Factors Affecting the Public Interest
- [29] The courts have also considered factors affecting the public interest in such applications. The plaintiffs seek to rely on this factor, raising the allegation that the defendants are continuing to improperly seek funds for the companies. However, I find that there is insufficient evidence of these efforts to put much weight on this factor. Conclusion on Balance of Convenience
- [30] Considering all of these factors and the evidence presented, I find that, subject to the necessary restrictions on the order set out below, the plaintiffs have made out a balance of convenience in their favour in relation to their promissory note claims, particularly in light of the financial concerns expressed by the companies themselves, and the serious fraud allegations. Application of Discretion
- [31] As noted above, even if the constituent elements were satisfied, the court may still refuse to grant the order if it has concerns about the applicants' case or conduct. In this case, even if some of the collateral non-promissory note claims did clear the merits threshold, I find that it would not be appropriate to enhance the terms of the Mareva injunction made below to reflect those claims. The lack of clarity in the pleadings, the weaknesses in the evidence, and my concern that there is almost certainly another side to these claims I am not hearing on an ex parte application, all cause me to exercise my discretion to confine the Mareva injunction to a scope necessary to reflect the claims under the identified promissory notes. My concern about issuing a more aggressive order, absent submissions of the defendants, also causes me to decline to issue the disclosure orders sought until notice has been given to the defendants.

- [32] The plaintiffs sought a six-month return period, and that no funds be left for normal operations or legal assistance. In my view, such terms would be too harsh on the evidence, could in fact end up undermining the plaintiffs' recovery, and would make the future conduct of this proceeding more cumbersome. As such, I have provided for a one-month return date, \$10,000 per month for normal business operations, and \$10,000 per month for legal expenses for each company restricted by the injunction. Terms of the Orders
- [33] Given my conclusions above, I find that orders should issue on the following terms:
- a) For sake of convenience and clarity, separate orders should be drawn up for each of True Innovations and Legacy Financial, and shall not apply to any other defendant;
 - b) The orders shall not be effective until affidavits are filed from Mr. Fernandes and Mr. Corry or Ms. Traylor, attaching the exhibits to the Ankeny #6 Affidavit;
 - c) The orders should be in the draft model form. Where the model form requires particulars, I order as follows:
 - i. The injunction shall be worldwide. ii. The order shall provide that it will not prevent disposal if assets remain in the jurisdiction, having a fair market value of at least \$300,000 for True Innovations, and \$1,342,800 for Legacy (the "Asset Limits") iii. The order will not prohibit True Innovations or Legacy Financial from each spending \$10,000 per month on ordinary and proper business expenses and \$10,000 per month on legal advice and representation; iv. The return date will be one month after this order becomes effective through the deposit of the further required affidavits and the undertakings as to damages required below;
 - v. The order will cease to have effect against the individual companies if security is paid in the amount of the Assets Limits; vi. The restriction on Third Parties will be subject to the Asset Limits, again as contemplated by the model order.
 - d) The proposed Disclosure Orders may be considered on a return date after the provision of notice to the defendants;
 - e) Each of the plaintiffs shall provide the required undertaking as to damages before the order becomes effective. The plaintiffs consented to this term. "Branch J."

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