

CANADA / JUDGMENT

Getz v. Getz

2023 BCSC 1687

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Supreme Court of British Columbia

DECIDED

6 September 2023

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2023 BCSC 1687 Getz v. Getz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Getz v. Getz,

2023 BCSC 1687

Date: 20230906

Docket: S247266

Registry: New Westminster

Between:

Barbara Getz

Plaintiff

And:

Alan Getz, Carrie Farnell and 1137220 B.C. Ltd.

Defendants

Before: The Honourable Justice Brongers

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff (by video):

S. Payne

Counsel for the Defendants (by video):

E.R. Lewis

Place and Date of Hearing:

New Westminster, B.C.

August 25, 2023

Place and Date of Judgment:

New Westminster, B.C.

September 6, 2023

THE COURT:

Introduction

- [1] This is an application to extend a property preservation order that was originally obtained without notice on an ex parte basis.
- [2] There are four parties: Barbara Getz, Alan Getz, Carrie Farnell, and 1137220 BC Ltd. In these reasons, I will reference the individual parties by their first names for clarity. I mean no disrespect in doing so. 1137220 BC Ltd. will be referenced as "the Numbered Company."
- [3] Barbara is the plaintiff in the underlying proceeding. Alan, Carrie, and the Numbered Company are the defendants. The three of them are collectively represented by a single counsel.
- [4] Barbara is also Alan's mother. Carrie is Alan's spouse. Alan is the sole director and shareholder of the Numbered Company.
- [5] Barbara's claim relates mainly to 110 common shares in a corporation called Sandon Holdings Ltd. I will reference this corporation as "Sandon" and the stocks in issue as the "Sandon Shares."
- [6] After the parties had exchanged pleadings, Barbara obtained an ex parte preservation order in respect of the Sandon Shares. Notice of this order was subsequently provided to the defendants. The parties agreed that the question of whether the preservation order should continue would be heard by means of a further chambers application at which all parties could present their respective positions. That application was heard by me on August 25, 2023.
- [7] Having reviewed the application record and considered the submissions of counsel, I have decided that the preservation order will be extended, but not indefinitely. My reasons for this decision are as follows.

Background

- [8] Barbara's notice of civil claim was filed on January 3, 2023. It sets out a primary claim that is directed at Alan and the Numbered Company. Barbara says that she used to own the Sandon Shares but, at Alan's urging, she agreed to transfer them to the Numbered Company. In return, Barbara was to have received non-voting preference shares in the Numbered Company. However, Barbara pleads that she never received the promised preference shares, or any other consideration, for Barbara's Sandon Shares. Barbara also says that she only agreed to this unconscionable transfer because of Alan's misrepresentations and undue influence. Barbara now wants the Court to order that the Sandon Shares be returned to her.
- [9] The notice of civil claim also sets out a secondary claim against Alan and Carrie. Barbara says that her son and daughter-in-law misappropriated certain jewellery, art, and funds from her. Barbara wants the Court to order their return, and seeks compensatory and punitive damages as well.
- [10] Alan, Carrie, and the Numbered Company filed their response to civil claim on May 12, 2023. They deny any wrongdoing. In particular, they say that Barbara knowingly and willingly transferred the Sandon Shares to the Numbered Company. They insist that Barbara received Numbered Company preference shares as agreed, but that Barbara subsequently gifted them to Alan. The defendants say that Barbara made this gift after receiving independent legal advice. In essence, the defendants submit that there was no undue influence, no unconscionability, no misrepresentation, and no misappropriation of Barbara's assets or funds.
- [11] On June 19, 2023, counsel for Barbara presented an application for a preservation order in respect of the Sandon Shares in general chambers at New Westminster. It was heard by Justice Blok. This was done on a without notice basis. Counsel for Barbara explained that they did so out of concern that Alan might dissipate the Sandon Shares if Alan knew that the application was being brought. This concern arose from information Barbara heard from a director of Sandon to the effect that Alan is trying to sell the Sandon Shares.
- [12] Justice Blok decided to issue an interim preservation order. However, he imposed time limits to ensure that notice would be given to the defendants and enable the matter to be ultimately decided further to a contested application. Specifically, Justice Blok indicated that his order would expire on July 19, 2023, unless extended by the Court or on consent of the parties. In addition, the defendants were permitted to seek to set aside the order on five days' notice.
- [13] The parties then agreed to effectively extend the adjournment preservation order until the present application could be heard by me on August 25, 2023. As I took the matter under reserve, I further extended that order until the issuance of my reasons for judgment today.

Analysis

[14] Given the manner in which the parties have framed their positions, the following questions must be addressed:

- 1) Did Barbara fail to disclose material facts at the ex parte preservation order application such that she should now be precluded from seeking this relief going forward?
- 2) If no, should the preservation order be continued?

Question 1: Was there material non-disclosure?

- [15] The defendants raise as a threshold issue the question of whether there was material non-disclosure by Barbara before Justice Blok when he issued his interim preservation order on June 19, 2023.
- [16] The defendants say that this was the case, and that two consequences follow. First, Justice Blok's order should be set aside as a nullity. Second, Barbara is now precluded from obtaining any further preservation orders.
- [17] Barbara on the other hand submits that the disclosure her counsel provided to Justice Blok was sufficient. Therefore, there is no reason why the Court should not address the substantive question of whether the preservation order should be maintained.
- [18] In considering the defendants' preliminary objection, I note first that Justice Blok's interim order has effectively expired. Furthermore, it was respected by the defendants. Accordingly, determining whether that order should now be retroactively set aside as a nullity would serve no practical purpose. The only live issue is whether the disclosure provided by Barbara's counsel before Justice Blok was such that the Court ought to simply dismiss Barbara's present application, regardless of its merits.
- [19] There is authority for the proposition that past material non-disclosure by a party on an ex parte application may be sanctioned by denying that party a prospective order for the same relief. This was noted by Justice D. MacDonald in *A.M. v. Dr. F.*, 2021 BCSC 32, at paragraph 93 as follows:
- [93] When a party fails to comply with the requirement of scrupulous disclosure on an ex parte application, this may prevent the party from seeking similar relief going forward: *Green v. Jernigan*, 2003 BCSC 1097 at paras. 28-29. Further, where a party fails to meet its obligations on an ex parte application and then later applies for the same relief on a subsequent with-notice motion, the party's conduct may amount to an abuse of process, and the court may dismiss their motion on those grounds: *Somers v. Feldman-Kiss*, 2019 ONSC 1724 at paras. 38-45.

- [20] However, the imposition of such a sanction is not automatic. For example, in *Nie v. Blackfish Sales Ltd.*, 2022 BCSC 682, Justice Forth found that the applicant had failed to disclose a material fact on an ex parte application for a preservation order, which she then set aside. Justice Forth was nevertheless still prepared to consider the matter on a de novo basis. She also granted the applicant a new interim preservation order in that case.
- [21] Furthermore, while it is well established that an ex parte order applicant must make full, fair, and frank disclosure of all material facts and potential defences, not every omission will necessarily preclude the applicant from maintaining a preservation order. The standard of disclosure required is not perfection, and it is impractical to expect that every nuance of the parties' positions will be brought to the attention of the court. As such, when information has been withheld, its relative importance must be taken into account by the court when deciding whether to maintain a preservation order. I cite *Takhar v. Takhar*, 2020 BCSC 2049, at paragraphs 38 to 40.
- [22] Having reviewed the transcript of the June 19, 2023 hearing of Barbara's without notice application for a preservation order before Justice Blok, I am of the view that Barbara did not fail to disclose a material fact that would justify a summary dismissal of the present application. In particular, I note that during counsel for Barbara's 21-minute appearance before Justice Blok, counsel mentioned the defendants' adamant denials of Barbara's claims, particularly in relation to Alan and Carrie's alleged misrepresentations. Counsel for Barbara also drew to Justice Blok's attention a document titled "Certificate of Independent Legal Advice" consistent with the defendants' position that Barbara knowingly gifted the Numbered Company shares to Alan. In so doing, counsel for Barbara also effectively informed Justice Blok that her pleading to the effect that she never received any consideration for the Sandon Shares is not entirely accurate. Indeed, it appears that the parties now agree that Barbara did receive preferred shares in the Numbered Company, but that she no longer has them as a result of her gift to Alan - a transaction Barbara now wants to have set aside because of its alleged unfairness.
- [23] In reaching my conclusion, I have considered counsel for the defendants' argument that a number of "material facts" were not disclosed to Justice Blok. These include:
- a) the existence of another lawsuit in which Barbara is said to be making similar arguments of undue influence against Alan's sister, who also had access to Barbara's bank account;
 - b) the disputed circumstances surrounding the transfer of the Sandon Shares to the Numbered Company;
 - c) the timing of certain text messages sent between Barbara and Alan; and
 - d) further particulars of the defendants' allegations as to why Barbara's gift of shares to Alan was made knowingly and willingly.

[24] In my view, these are not "material facts" which might reasonably have influenced Justice Blok's decision to grant the temporary preservation order. It is apparent from the transcript that Justice Blok knew that the underlying facts in this case are disputed and that significant questions of credibility have been raised. However, he was satisfied that sufficient evidence had been presented to justify a preservation order of limited duration that would subsist only until a contested hearing could take place. There is no reasonable basis for concluding that Justice Blok's decision might have been different if only counsel for Barbara had highlighted the defendants' additional assertions, as their counsel argues ought to have been done here.

[25] In sum, the defendants' preliminary objection is rejected. I will turn now to the merits of Barbara's application.

Question 2: Should the preservation order be continued?

[26] The Court's discretionary authority to issue a property preservation order is set out in Rule 10-1(1) of the Supreme Court Civil Rules, BC Reg 168/2009, as follows:

The court may make an order for the detention, custody, or preservation of any property that is the subject matter of a proceeding or as to which a question may arise, and for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

[27] The four-part test for obtaining a Rule 10-1 preservation order is well established. In *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 [Kepis] at paragraph 21, the test is summarized in these terms:

- a) Is there a claim on the evidence and not just the pleadings to a propriety interest in property?
- b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
- c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
- d) Does the balance of convenience favour granting the order?

[28] I will address each of the four parts in turn.

Part 1: the plaintiff's claim to a propriety interest

[29] First, I am satisfied that Barbara has presented evidence of a propriety interest in the Sandon Shares. In particular, Barbara's affidavits indicate subjectively that while Barbara agreed to the two disputed transactions (i.e. the transfer of Barbara's Sandon Shares to the Numbered Company, and the transfer of the Numbered Company preferred shares to Alan) she did so while under the undue influence of her son and with the understanding that the Sandon Shares would be kept in trust for her benefit. On this basis, I accept that Barbara

may arguably be entitled to a proprietary remedy in respect of the Sandon shares. While a trial judge may ultimately prefer Alan's evidence to the contrary, Barbara's evidence is sufficient to satisfy the first part of the Rule 10-1 test.

Part 2: the plaintiff's belief the property is threatened with disposition

- [30] Second, I find that there is evidence to render reasonable Barbara's belief that the Sandon Shares are threatened with disposition. I note that the evidentiary standard to be applied here is that of a "reasonable belief" that the property is at risk of dissipation or disposal. It is not the higher "real or genuine risk" standard that applies for Mareva injunctions: *Kepis* at para. 23.
- [31] In this case, Barbara's evidence is that she spoke to a director of Sandon, Ron Schuss, on May 21, 2023, and he told her that Alan is trying to sell the Sandon Shares. Barbara also asserts that Alan lives in Alberta and that, to her knowledge, Alan does not and has never had major assets in British Columbia.
- [32] While Alan made a detailed affidavit in response to Barbara's application, it is silent with respect to Alan's intentions regarding the Sandon Shares. Accordingly, while Barbara's evidence regarding risk of disposition in relation to Sandon Shares is based on hearsay, it is uncontradicted. Furthermore, counsel for Alan indicated at the hearing that his client is considering selling the Sandon Shares, although no specific arrangements have been made. In these circumstances, Barbara has shown that her belief that Alan may dispose of the Sandon Shares is a reasonable one.
- [33] The matter of Alan's Alberta residency and alleged lack of assets in British Columbia was also the subject of some discussion at the hearing. Indeed, both counsel seemed to suggest that the "asset dissipation" element of the preservation order test requires consideration of whether the assets are at risk being transferred outside of the Court's jurisdiction. Upon closer review, however, there is no such absolute requirement in either the wording of Rule 10-1, or the jurisprudential test articulated in *Kepis*. In fact, the latter is disjunctive, with the question being whether the property is "threatened with disposition or transfer outside the jurisdiction."
- [34] In sum, Barbara has satisfied the second part of the Rule 10-1 test.

Part 3: the question of the plaintiff's entitlement to the property

- [35] Third, I am persuaded on the basis of the evidence tendered that there is a substantial question to be tried in relation to Barbara's entitlement to the Sandon Shares.
- [36] As noted at paragraph 24 of *Kepis*, this standard - that of a "substantial question to be tried" - is a less onerous standard than the strong *prima facie* or good arguable case for a Mareva injunction. Instead, it is akin to the relatively low "serious question to be tried" standard for a conventional interlocutory injunction. In *RJR-MacDonald Inc. v. Canada* (Attorney

General), [1994] 1 S.C.R. 311, at page 337, the Supreme Court of Canada indicated that a court need only be satisfied that the application is neither vexatious nor frivolous, based on a preliminary assessment of the merits of the case. Also, as was noted by Justice Giaschi in *Gaerber v. Gaerber*, 2020 BCSC 2080 at para. 31, the Court on a property preservation application "must be cautious in entering into the enterprise of weighing competing evidence" (citing *Laxton v. Coglon*, 2006 BCCA 178, at para. 23).

[37] As I found in relation to the first part of the Rule 10-1 test, Barbara has pleaded and provided evidentiary support for her claim against the defendants in respect of the Sandon Shares. In my view, her assertion that she agreed to effectively transfer the Sandon Shares to the Numbered Company while under undue influence and further to misrepresentations made by Alan meets the "serious question to be tried" standard. While Alan's pleading and evidence also appear to set out a strong defence to Barbara's claim, they do not conclusively refute it. Indeed, it appears to me at this stage that a trial at which the credibility of the parties can be fairly assessed will be required to resolve this dispute.

[38] Barbara has therefore satisfied the third part of the Rule 10-1 test.

Part 4: the balance of convenience

[39] Finally, I turn to an assessment of the balance of convenience.

[40] It is Barbara's submission that the Sandon Shares are the primary asset sought in these proceedings. If the Sandon Shares are disposed of, then Barbara may have little or no recourse even if she is successful at trial. Therefore, Barbara argues that she will suffer irreparable harm if Alan or the Numbered Company were to dispose of the Sandon shares.

[41] On the other hand, the defendants say that Barbara has not established that damages would not be an adequate remedy should she make out her claim. The defendants also invite the Court to assess the strength of Barbara's case on the basis of the affidavits filed and conclude that there was no undue influence. As such, the defendants argue that the balance of convenience, properly assessed, does not favour Barbara.

[42] In considering the balance of convenience, I note that I have already accepted Barbara's position that there is some risk of disposition to the Sandon Shares should a preservation order not be issued. The real question at this fourth step of the Rule 10-1 analysis is therefore whether such an order would cause prejudice to the defendants that outweighs this risk.

[43] Having carefully reviewed the affidavit evidence tendered by Alan personally and through legal assistants that work for the defendants' law firm, I have found no evidence of any such prejudice. Instead, counsel for the defendants effectively asks the Court to simply presume that the preservation order will be prejudicial to his clients. Without actual evidence, however, I am unable to reach such a conclusion. I also note that Barbara has not asked for an order that would impact the defendants' ownership rights in the Sandon Shares beyond preventing their assignment to others. In particular, the order would not deny the

Numbered Company as directed by Alan from enjoying its voting, dividend, and corporate dissolution rights as a Sandon shareholder.

- [44] The defendants have also not presented any evidence to address Barbara's allegations regarding the defendants' ability to satisfy a judgment should the Sandon Shares be transferred. Instead, they have simply focused their evidence on the merits of Barbara's underlying claim. While such evidence is germane to parts one and three of the Rule 10-1 test, it is not helpful to the balance of convenience assessment.
- [45] Accordingly, I conclude on the evidence presented that the balance of convenience favours Barbara at this time.
- [46] That said, this balance is not overwhelming. Indeed, my conclusion may well have been different if there was evidence of active efforts by the defendants to effect a bona fide sale or other transfer of the Sandon Shares to an interested third party. It may also have been impacted by evidence of the defendants' ability to satisfy a potential judgment against them even if they no longer own the Sandon Shares.
- [47] Accordingly, while I will grant the preservation order, it will be on terms that will leave open the possibility of revisiting the order should there be a material change in circumstances in the future. The order will also be time limited for the purpose of encouraging the parties to try to resolve this matter expeditiously.

Disposition

- [48] For all of these reasons, the following orders are issued:
- 1) The defendants Alan Getz and 1137220 B.C. Ltd. are hereby enjoined, restrained, and precluded from selling, disposing of, transferring, mortgaging, pledging, assigning, diminishing, or in any manner encumbering or conveying the 110 common shares in Sandon Holdings Ltd. held by 1137220 B.C. Ltd. or Alan Getz, whether done directly or indirectly, including by way of sale of shares in 1137220 B.C. Ltd. or any corporation that owns shares in 1137220 B.C. Ltd. (the "Preservation Order").
 - 2) The Preservation Order shall expire upon disposition of this action, agreement of the parties, further order of the Court, or one year from today, whichever occurs first.
 - 3) Should there be a material change in circumstances, the defendants are at liberty to apply to set aside the Preservation Order on 14 days' notice to the plaintiff Barbara Getz.
 - 4) Costs of this application shall be in the cause.
- [49] Unless there are any questions from counsel, we are concluded.
- "Brongers, J."

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