

CANADA / JUDGMENT

Plaza 500 Hotels Ltd. v. Millgate Limited

2019 BCSC 1295

COURT

Supreme Court of British Columbia

DECIDED

30 July 2019

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2019 BCSC 1295 Plaza 500 Hotels Ltd. v. Millgate Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Plaza 500 Hotels Ltd. v. Millgate Limited,

2019 BCSC 1295

Date: 20190730

Docket: S182964

Registry: Vancouver

Between:

Plaza 500 Hotels Ltd.

Plaintiff

And

Millgate Limited, Penrose Properties Limited,

Louvre Trust (Guernsey) Limited, and

Adil Abdulkarim Chatur Popat

Defendants

Corrected Judgment: The front page of the judgment was corrected
on August 29, 2019.

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment

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L.J. Smith

Place and Date of Hearing:

Vancouver, B.C.

July 25 and 26, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2019

Introduction

- [1] The plaintiff Plaza 500 Hotels Ltd. (Plaza 500) seeks mandatory interlocutory injunctions ordering the defendants Millgate Limited (Millgate) and Penrose Properties Limited (Penrose) to execute priority agreements, subordination agreements, postponement agreements or any other agreements or documents required to secure the financing they seek from Kingsett Mortgage Corporation (Kingsett) and Leo Montis Ventures Ltd. (LMV).
- [2] Plaza 500 owns real estate in Vancouver. Originally a hotel, in 2016 Plaza 500 was converted into 118 rental apartments and some retail operations (the Plaza site). Plaza 500's business is the redevelopment and operation of the Plaza site. In order to finance projects on the Plaza site the plaintiff relies on outside funding.
- [3] Some history of the financing is required in order to frame the current application.
- [4] On October 22, 2004 the plaintiff entered into an agreement with the defendants Millgate and Penrose (the defendants) for financing. The term in that agreement that is at the centre of this application is headed Subordination and reads as follows:

The lenders agree to execute priority agreements, subordination agreements, postponement agreements and any other similar agreement that may be requested by any third-party lender in connection with the financing being provided by such third-party lender to the borrower.

- [5] On February 6, 2012 the plaintiff and the defendants executed a document consolidating the loans provided to the plaintiff. In letters the defendants advised the plaintiff that the purpose of the document was to consolidate the loans provided to the plaintiff "on the same terms as the previous loan agreements".
- [6] In August and October 2013 as well as in October 2014 the defendants executed priority agreements for new lenders.
- [7] In April 2016 when asked by the plaintiff to sign a fourth priority agreement, the defendants did not automatically do so. Instead they sought information about the operations of the plaintiff, including explanations regarding their expenditures of funds. They also demanded interest and a repayment plan. Unable to secure financing, the plaintiff defaulted on mortgage payments to Peoples Trust. In January 2017 Peoples Trust commenced foreclosure proceedings against the plaintiff.
- [8] In September 2017 Millgate and Penrose finally agreed to sign the 2016 priority agreement and the plaintiff was able to secure financing through Institutional Mortgage Capital Canada Inc. (IMC), avoiding foreclosure.
- [9] Under the terms of the September 2017 Subordination and Standstill Agreement, the defendants consented, inter alia, to "promptly take all actions as may be required by [IMC] to facilitate refinancing"; and "not to contest, oppose, object to, challenge, or take any action which hinders, impairs or delays any such refinancing " (Clause 1(d)).
- [10] In February 2018 the plaintiff commenced the subject action seeking damages for breach of contract (the 2004 and 2012 loan agreements) by "refusing" to sign the 2016 Priority Agreement. The defendants were served with the Notice of Civil Claim (NOCC) on January 30, 2019.
- [11] By March 2019 the plaintiff was unable to make the mortgage payments required under the IMC mortgage. As a result, on or about March 22, 2019 IMC commenced foreclosure proceedings against the plaintiff.
- [12] On June 3, 2019 IMC obtained an order nisi on the Plaza site. The redemption date is November 8, 2019.
- [13] By May 2019 the plaintiff had found new financing through two loans - one from Kingsett in the amount of \$66 Million and the other through LMV for \$10 Million. The plaintiff gave notice to the defendants that they would need a subordination from them in order to secure this financing.

[14] In their May 29 2019 letter to the plaintiff responding to this notice counsel for the defendants distinguishes between the two loans. Regarding the Kingsett loan counsel for the defendants asks to review the agreement sought before they agree to subordinate their interest as follows:

With respect to the Kingsett financing, our clients do not object in principle to a subordination, subject to a review of the documentation, and subject to confirming that the agreements fall into our clients' obligations under the existing IMC facility. Please send us their form of subordination/priority agreement for our review.

[15] With respect to the LMV loan counsel for the defendants questions why it is required and poses a number of questions regarding the plaintiff's business operations and intentions for the Plaza site, stating that they need answers to these questions before they can consider whether they are agreeable to subordinate to LMV.

[16] There followed correspondence between the parties until June 27, 2019. On July 12, 2019 the plaintiff filed this application for mandatory injunction.

[17] To date no draft agreement has been provided and no subordination agreement signed.

[18] On July 23, 2019 the plaintiff amended their NOCC against the defendants adding actions relating to their "refusal" to sign these subordination agreements in breach of the 2017 agreement. In the amended NOCC in addition to damages the plaintiff seeks injunctions requiring the defendants to execute the subordination and any other similar agreements as requested by third party lenders.

[19] The defendants oppose the application.

Issue

[20] The issue on this application is whether the mandatory injunctions should be granted compelling the defendants to sign the agreements sought by the plaintiff.

The Law

[21] An interlocutory injunction is an extraordinary remedy the court may grant when it is just and convenient to do so: s. 39(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253.

[22] In order to grant mandatory injunctive relief the court must be satisfied that:

- 1) the applicant has demonstrated a strong prima facie case that it will succeed at trial;
- 2) the applicant will suffer irreparable harm if the injunction is not granted; and
- 3) the balance of convenience favours granting the injunction.

R. v. Canadian Broadcasting Corp., 2018 SCC 5 [CBC].

[23] The onus is on the plaintiff.

[24] I will consider the three branches of the CBC test separately.

Analysis

1. Whether the plaintiff has a strong prima facie case

[25] The Supreme Court of Canada in CBC defined a strong prima facie case as "strong and clear" or "almost certain" of success.

[26] The burden is on the applicant to show that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice: CBC at para. 17.

[27] In order to make an assessment under this branch of the test, the Supreme Court of Canada made clear in CBC that it requires the court to undertake an extensive review of the merits of the plaintiff's case:

[15] on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the RJR - MacDonald test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong prima facie case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR - MacDonald as "extensive review of the merits" at the interlocutory stage. [Emphasis added.]

[28] The expectation for the merits of the case to be proved through admissible evidence goes along with the heightened threshold for an interlocutory injunction. This was stressed by our court of appeal in Premium Weatherstripping Inc. v. Ghassemi, 2016 BCCA 20:

[7] An interlocutory injunction is well understood to be a special sort of non-final order in that, by its very nature, it restricts the freedom of the party against whom it is made, without the applicant having had to prove any allegation beyond the standard of an arguable case. An interlocutory injunction often becomes the entire remedy in an action, and can endure for a very long time unless temporal limits are placed upon it. For that reason, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified. There is no room in interlocutory

injunction practice for relaxation of that requirement, in my view. [Emphasis added.]

[29] The defendants contend that the plaintiff does not have a strong prima facie case. They point to the following:

- a) They have not refused to sign the 2019 priority agreement. They have simply asked to see the proposed form of the agreement that the lenders want them to execute;
- b) The order being sought is uncertain and vague;
- c) The plaintiff is asking the court to impose on the parties an agreement that has not been reached between the parties in relation to potential refinancing. There are unexplained amendments made to the commitment letter that have not been agreed to. The commitment letter relied on in this application is unsigned. Further there is no evidence before this Court indicating that they have fulfilled any of the conditions precedents sought by Kingsett or what plans they have for doing so. Of note these conditions were to be satisfied by July 29 2019. On their face several of the conditions would be impossible for the plaintiff to satisfy;
- d) This application is an attempt by the plaintiff to litigate what will be the ultimate issue at trial on the basis of hearsay and double hearsay evidence. The evidence relied on by the plaintiff is wholly deficient and cannot form the basis of such an extraordinary remedy. The plaintiff relies on an affidavit of a legal assistant appending documents. There is no evidence from a representative of the plaintiff or Kingsett filling in the blanks regarding the status of the financing;
- e) The 2004 agreement is simply an agreement to agree and is not binding;
- f) The 2017 agreement only applies to refinancing which the proposed LMV loan is not; and
- g) The defendants' loans are secured. The effect of subordinating to the amounts requested in favour of Kingsett and LMV may subordinate the defendants to below the value of the property, rendering their loans unsecured.

[30] In my view the defendants' arguments raise valid questions as to the strength of the plaintiff's case. I am not satisfied that the plaintiff has a strong prima facie case.

2. Whether the applicant will suffer irreparable harm if the injunction is not granted

[31] Turning now to the second branch of the test, irreparable harm.

[32] The type of harm that may qualify as irreparable is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable

damage to its business reputation (American Cyanamid, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). 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, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

- [33] Of note in the above passage is that irreparable harm is harm which either cannot be quantified in monetary terms or cannot be cured by the payment of money.
- [34] The plaintiff submits that if the injunction is not granted by July 31, 2019 they will lose the Kingsett financing which puts them in peril of losing the Plaza site, the plaintiff's sole asset.
- [35] There is no evidence to support this assertion. As noted above the plaintiff has not proved that there is any certainty to the Kingsett financing option. Additionally, there is no evidence that the plaintiff has exhausted its financing options.
- [36] I agree with the defendants that this argument is speculative. The test is that failure to grant the injunction will cause irreparable harm, not may cause harm.
- [37] Further I am satisfied on all of the evidence that any harm alleged by the plaintiff can be cured by the payment of money. I do not accept the plaintiff's submission likening the loss of the Plaza site to losing a home. This is a business. The Plaza site was listed for sale earlier this year. The evidence indicates that it may be listed again.
- [38] Finally, I am not satisfied that a subordination agreement would secure the financing.
- [39] Having regard to all of the evidence on this point I am not satisfied that the plaintiff has established that it will suffer irreparable harm should the injunction not be granted.

3. Whether the balance of convenience favours granting the injunction

- [40] The determination of the balance of convenience requires a consideration of whether either party will suffer irreparable harm; the likelihood that damages, if awarded, will be paid; the preservation of contested property; the strength of the applicant's case; the public interest; whether it is appropriate to preserve the status quo; whether the court is being asked to grant a mandatory injunction; and whether there has been an undertaking as to damages: Canadian Broadcasting Corp. v. CKPG Television Ltd. (1992), 64 B.C.L.R. (2d) 96 at para. 23, [1992] 3 W.W.R. 279 (C.A.).

[41] If the injunction is ordered:

- a) There is no evidence that the plaintiff can even complete the financing;
- b) If the financing does complete the defendants will be subordinated to an additional \$17 Million in debt. The security for their loans will be questionable;
- c) It will amount to a final order that cannot be remedied; and

- d) Although the plaintiff is willing to give the defendants an undertaking as to damages, it is clear from the evidence before me that their ability to pay is questionable.

[42] If the injunction is not granted:

- a) The plaintiff may find alternate financing;
- b) The redemption period will expire in November 2019. If the plaintiff is unable to find other financing then the property will be subject to a court ordered sale. There is no evidence before me that that would constitute harm to the plaintiff; and
- c) The plaintiff may seek an injunction at trial.

[43] It is important to put this application in context. The defendants have not refused to sign the subordination agreement. They have merely sought information and clarification. Given the plaintiff's increasing amount of debt and the corresponding decreasing amount available to secure their "secured" loans the defendants' requests seem both prudent and reasonable.

[44] Weighing all of the factors set out above, I find that the balance of convenience strongly favours the defendants, and that the plaintiff fails on this factor as well.

Conclusion

[45] The application is dismissed.

[46] As I am satisfied that this application was brought prematurely with inadequate evidence, I order costs to the defendants in any event of the cause, payable forthwith.

"The Honourable Madam Justice Murray"

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