
CANADA / JUDGMENT

Shair.Com Global Digital Services Ltd. v. Arnold

2018 BCSC 1512

COURT

Supreme Court of British Columbia

DECIDED

2 August 2018

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2018 BCSC 1512 Shair.Com Global Digital Services Ltd. v. Arnold

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shair.Com Global Digital Services Ltd. v. Arnold,

2018 BCSC 1512

Date: 20180802

Docket: S188392

Registry: Vancouver

Between:

Shair.Com Global Digital Services Ltd.

Plaintiff

And

Jason Bradley Arnold

Defendant

Before: The Honourable Mr. Justice Skolrood

Oral Ruling Re Ex Parte Application for Mareva and Preservation Orders

(In Chambers)

Counsel for the Plaintiff:

T. M. Tomchak

Y. Li-Reilly

Counsel for the Defendant:

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

August 1, 2018

Place and Date of Ruling:

Vancouver, B.C.

August 2, 2018

- [1] THE COURT: This is an ex parte application by the plaintiff for a preservation order as well as for a Mareva injunction. The application is brought in the context of underlying litigation in which the plaintiff alleges that the defendant, a former officer and employee of the plaintiff, converted and/or misappropriated company property, including particular digital currencies and information related thereto.

Background

- [2] Briefly, by way of background, the plaintiff is a BC company in the business of online content marketing, publishing, persona creation and management for online marketers.
- [3] The defendant commenced employment with the plaintiff or its predecessor company in May 2011 in the position of chief operating officer. In or about October of 2015 the defendant became the secretary and vice president of the plaintiff, a position he occupied until his employment terminated in April 2017. The defendant continues to be a shareholder in the plaintiff.
- [4] The defendant promoted himself, both publicly and internally with the plaintiff, as being very knowledgeable and experienced in computer technology. Given this expertise he was in charge of technology development in relation to much of the plaintiff's business.
- [5] In early 2013, at the defendant's request, the plaintiff purchased him a laptop computer for use in his work. It was a company policy made known to the defendant that important and confidential company information was to be stored on Citrix, which is a secure server that allows employees of a company to access company information remotely.
- [6] In or around late 2013, the plaintiff began considering working with digital currencies, including Bitcoin. As the defendant was the most knowledgeable person in the company with respect to digital currencies, he took the lead in exploring the opportunities.

- [7] In January 2014 the defendant advised the plaintiff that he had obtained an online Bitcoin wallet into which the plaintiff could store its Bitcoin. He also advised the plaintiff that he had created a digital and paper backup of the wallet and that he would create a further digital backup on Citrix. As it turned out, he failed to do so, or at least failed to provide the plaintiff with any information about such a backup.
- [8] In the period of June to August 2014 the defendant purchased \$18,500 in Bitcoin with funds provided by the plaintiff. It appears that some of that Bitcoin was then subsequently used to purchase a different form of digital currency known as Whitecoin. It is apparent from the record that other member of the plaintiff company, including the now president and CEO Mr. Alfreds, had little knowledge or involvement in what the defendant was doing vis-à-vis the digital currency and the defendant did little to keep them informed.
- [9] The defendant's employment with the plaintiff ended in April 2017. In December 2017 the plaintiff realized that the defendant had not returned the company laptop. The plaintiff also realized that contrary to what he had previously said, the defendant had not uploaded any information concerning the digital wallet to Citrix. Nor had he created or provided any backup of the wallet information.
- [10] Around the same time, Mr. Alfreds requested that the defendant return the wallet information to the plaintiff. The defendant advised that he was unable to do so because his laptop had "died" and as a result "everything was lost on it, including the wallet." The defendant did say, however, that he had approximately 26 Dashcoin, which is another digital currency, belonging to the plaintiff that he subsequently transferred to the plaintiff.
- [11] Given the defendant's failure to return the laptop, his advice that his computer had died and the fact that he had apparently purchased Dashcoin without the company's knowledge, the plaintiff retained the services of a digital currency consultant to further investigate the defendant's activities. As part of her investigation she determined the defendant has acquired and communicated with respect to at least nine different digital wallets linked in some way to the plaintiff. The plaintiff alleges that it was unaware of the defendant's activities in this regard. The investigation also revealed that the plaintiff in fact held Bitcoin as far back as January 2014, again which it was unaware of.
- [12] The investigation was unable to determine the current location or value of digital currencies owned by the plaintiff, but the plaintiff alleges that the \$18,500 in Bitcoin purchased by it in June and August 2014, if it remained in Bitcoin, would have a current value of approximately \$225,000. Had all that Bitcoin been converted to Whitecoin, the current value would be approximately \$5.3 million US. That number is, of course, entirely speculative because the plaintiff does not know if, in fact, the Bitcoin has all been converted.

Discussion

[13] As noted the plaintiff seeks both a preservation order and a Mareva injunction. Rule 10-1(1) deals with preservation orders. It provides:

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.

[14] The test for granting a preservation order involves four elements:

- a) the plaintiff has a proprietary interest in the property in issue;
- b) the plaintiff's belief that the property is threatened with disposition is reasonable;
- c) there is a substantial question to be tried as to whether the plaintiff may ultimately be entitled to call of the partnership property in question; and
- d) the balance of convenience favours the granting of the order.

(See *McKnight v. Hutchison*, 2011 BCSC 36, at paragraphs 145 to 146.)

[15] I am satisfied that the test is met in this case. The plaintiff has established that it has a claim to a proprietary interest in the laptop computer and in any digital currencies purchased by the defendant flowing from the plaintiff's initial \$18,500 investment in Bitcoin. I would note that in his correspondence, the defendant did not deny that interest. He simply stated that his computer had died and that the wallet information was no longer available. I am also satisfied that the third element of the test is satisfied, that being a substantial question to be tried as to the plaintiff's interest in the property.

[16] Given the nature of digital currencies and difficulty in tracking ownership of digital wallets, I am satisfied that there is a reasonable apprehension that the currencies may be transferred outside of the jurisdiction. The special considerations and risks that arise in respect to electronic information were commented on by the court in *Yaghi v. WMS Gaming Inc.*, 2003 ABQB 680, at paragraph 49.

[17] Finally, the balance of convenience favours the order sought. If the order is not granted, the plaintiff risks losing the wallet information and digital currencies forever, whereas there is no prejudice to the defendant in preserving the property and information given that he has, in fact, not asserted any ownership in the property in issue. I am therefore satisfied that the preservation order should be granted. I will return to the terms of that order shortly.

[18] A Mareva injunction has a different function or objective than a preservation order. The difference was described in *MacMillan v. Northstar Tool Corporation*, 2009 BCSC 148, at paragraph 7 as follows:

An order made to preserve property [under Rule 46] is not akin to a Mareva injunction. The latter is obtained to prevent a potential judgment debtor from removing assets from the jurisdiction that would satisfy the judgment. The latter relief is granted before judgment and therefore the onus upon the applicant is more stringent and requires the applicant, among other things, to show a strong prima facie case

[19] The test for obtaining a Mareva injunction is similar to the test for obtaining an injunction generally, subject to two qualifications:

- a) the applicant must show a strong prima facie case;
- b) the applicant should demonstrate a real risk that the assets will be disposed of or dissipated such that without the injunction, a judgment would be hollow.

(See *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 [*Northwestpharmacy.com*], at paragraphs 11 to 12.)

[20] Recent jurisprudence has made it clear that risk of disposal or dissipation of assets is not an essential requirement for obtaining a Mareva injunction, but it remains an important factor for the court to consider: *Northwestpharmacy.com* at paragraph 12.

[21] The over-arching consideration in each case is the balance of convenience and justice between the parties. See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, (1998), 59 B.C.L.R. (3d) 196 (C.A.) at paragraph 20.

[22] In assessing that balance, the court will consider a number of factors as articulated in cases like *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc.*, 2009 BCSC 711, at paragraph 16.

[23] In the present case, I am satisfied that the plaintiff has a strong prima facie case with respect to the digital currencies and wallet information, all of which are directly related to the plaintiff's initial investment in Bitcoin. Its interests may extend beyond that if it can be established that the defendant was, in fact, investing or trading in digital currencies prior to June 2014 using company funds.

[24] I am also satisfied that there is a risk of dissipation of any digital assets, being the digital currencies and related wallet information, again given the unique nature of electronic data. That concern has, however, been addressed by way of the preservation order.

[25] I am not satisfied that the plaintiff has established any real risk of disposition or dissipation of the defendant's other assets, which include physical assets like vehicles and at least three pieces of real property.

[26] The plaintiff has provided a list of known assets of the defendant in BC that total approximately \$3 million. There is no evidence to suggest that the defendant has taken any steps or has any intention of disposing of those assets. Again, the absence of such evidence is not fatal to the application, and I take the plaintiff's point that the fact that the defendant

appears to have been less than forthright in his dealings with the plaintiff gives rise to some concerns. However, a Mareva injunction tying up a person's assets prior to judgment is an extraordinary and blunt instrument that should only be resorted to in the clearest of cases.

[27] In this regard I echo the comments of Justice Macintosh in *Northwestpharmacy.com*, where he said at paragraph 41:

When the substantial intrusion on a defendant from a Mareva order is kept in mind, there must be something more to support the order than can be found on the facts here. The absence of evidence that there is a risk of assets being dissipated or removed weighs heavily against the Plaintiff.

[28] An additional factor in this case that weighs directly on the balance of justice and convenience is the fact that the plaintiff's principal claim relates to the alleged misappropriation or conversion of digital currencies flowing from its initial investment in Bitcoin. While the plaintiff speculates about what that initial investment might be worth now under different scenarios, it is just that, speculation. To tie up almost \$3 million of the defendant's assets in the face of such a speculative claim would, in my view, be unreasonable, particularly given, again, the absence of evidence about likely disposition of assets.

[29] The application for a Mareva injunction is therefore dismissed.

[30] Returning to the preservation order. I am satisfied that the two terms set out in the plaintiff's draft order are appropriate. I was wondering, Ms. Tomchak, whether there is any reason why you would not ask as part of that order to have the defendant deliver up the company laptop for inspection. I know you said there may be other computers involved, but I would have thought that might be an obvious step, as a means of investigating what has happened and at least investigating whether it has died or not.

[31] MS. TOMCHAK: Yes, My Lord, I think that certainly makes sense.

[32] THE COURT: The way I read the rule it seems to me that that falls within the authority under the rule. So I would add that.

[33] MS. TOMCHAK: Okay.

[34] THE COURT: If you are so inclined.

[35] MS. TOMCHAK: Yes. Thank you.

[36] THE COURT: And then I am also inclined, given the ex parte nature of the application, to include a term that he can apply to set it aside. It is not as important as it would be in a Mareva, but again, I think given the ex parte nature of the order, I would include a term that he can apply to set it aside on three days' notice.

[37] It should be noted that I am unavailable for the next five weeks, so that application may be brought before any judge of the court.

"Skolrood J."

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