COURT FILE NO.: 02-CL-4568
DATE: 20090622

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BERTINA ALFANO, TRUSTEE OF THE CARMEN ALFANO FAMILY TRUST, BERTINA ALFANO, ITALO ALFANO, TRUSTEE OF THE ITALO ALFANO FAMILY TRUST, ITALO ALFANO, ULTI ALFANO TRUSTEE OF THE ULTI ALFANO FAMILY TRUST and ULTI ALFANO v. CHRISIAN PIERSANTI, PIERSANTI and CO. BARRISTERS AND SOLICITORS, GOLD FINANCIAL CORP., OSLER PAVING LTD., 758626 ONTARIO LIMITED NOW KNOWN AS DILIGENT FINANCIAL CORPORATION, 1281111 ONTARIO LIMITED, 1269906 ONTARIO LIMITED and 1281632 ONTARIO LIMITED, 1212700 ONTARIO LIMITED and TERRY PIERSANTI, ALSO KNOWN AS TERRY SCATCHERD, 1281038 ONTARIO LIMITED, 3964400 CANADA INC.

AND

BETWEEN: CHRISTIAN PIERSANTI, DILIGENT FINANCIAL CORPORATION and 1212700 ONTARIO LIMITED v. BERTINA ALFANO, ITALO ALFANO, ULTIMO ALFANO, JOE ALFANO, 815748 ONTARIO LIMITED, ONTARIO POWER CONTRACTING LIMITED, PUSLINCH INVESTMENTS INC., 1026864 ONTARIO LIMITED

BEFORE: **Ellen Macdonald J.**

HEARD: **June 16 & 19, 2009**

COUNSEL: James Diamond and Kevin Sherkin for the Plaintiffs

Ross Morrison, for the Piersanti Defendants

Paul Bates and Robert Gain for the Gold Defendants

REASONS FOR DECISION

[1] The original notice of motion in this matter was served by the Plaintiffs[1] on March 19, 2009. By that time, the Plaintiffs had closed their case. The Defendants had called ten of their witnesses. Mr. Piersanti began his testimony on March 26, 2009. His examination in chief and cross examination lasted 24 days. Mrs. Piersanti testified for 4 days on May 25, 26, 27 and 28. On June 7, 2009, the plaintiffs served an amended notice of motion. At the conclusion of submissions on June 19, I endorsed the motion record that an order shall go in the form approved by me and that the balance of the relief sought by the Plaintiffs is reserved. I stated that I would

[1] In these reasons, I will also refer to the Plaintiffs as the Alfanos.

release reasons with respect to the reserved relief on Monday June 22, 2009. What follows are those reasons.

[2] The order made on June 19, 2009, directed that the approximate sum of $887,553.24 then held jointly in two solicitors' trust accounts be paid out to the Plaintiff's solicitors in trust. This sum is being released from the sale proceeds of the Bowes Road property. I did not make any reference to the request of the Gold Defendants that $300,000 be held back to take into account the extra charges that were paid to the Receiver for the delays said to have been caused the Alfanos when they were negotiating the purchase of the RBC and BDC debt after the bankruptcy of Osler Paving. I will deal with this issue in my judgment after trial.

[3] The balance of the relief is for an order compelling the Defendants to pay into court pending the release of the trial judgment (and presumably the disposition of any appeal) the sum of $4,800,000. Mr. Diamond calculated this amount as being the approximate total of monies that were dissipated from the two retail shopping plazas operating under the numbered companies, 1281038 and 1281632 Ontario Limited. I do not overlook the fact that 1281038 Ontario Limited was not a defendant at the time of the order of Justice Molloy.[2] It is no answer to say that because 1281038 and 3964400 Canada Inc. were not parties to the original injunction they cannot be subject to the relief that is now being sought in this motion. Nor can it be said or implied that because there has been no motion to amend or extend the terms of the injunction to include them, that the only company that is properly before the Court in this motion is 1281632 (the Glenwoods Centre plaza). 1281038 Ontario Inc. and 3964400 Canada Inc. were added as parties to this action when the Statement of Claim was amended in September 2008. To clarify the position with respect to these two companies, an order for a Mareva injunction shall apply to them on the same terms and conditions as the order of Justice Molloy.

[4] The Plaintiffs say that the payments were made at the direction of Mrs. Piersanti and that they constitute flagrant disregard of the Mareva injunction ordered by Justice Molloy on June 18, 2002. This injunction has been upheld seven times during the course of this hotly contested and lengthy litigation. It remains in place at this time. To put the Plaintiffs' position in a nutshell, it is that the Defendant, Gold Corporation has conducted itself in flagrant disregard of the injunction. It dissipated the value of assets by making many payments to the benefit itself and third parties which were not in the ordinary course of business. The Plaintiffs say that the requested disclosure is entirely unreliable and incomplete. The Defendant's response is that the many transactions that have been disclosed are justified as being the ordinary course of business because they constitute substantial improvements and expansion of the properties as opposed to dissipating their value. I will have more to say about the state of disclosure later in these reasons.

[5] Mr. Bates submitted that the Alfanos are not at risk in relation to the disputed transactions of approximately $4,800,000. He referred to the evidence at trial and to the affidavit evidence of

[2] When the injunction was continued by Justice Ground, 1281038 (the Guelph plaza), was still not a party. When the fresh as amended statement of claim was issued in July 2003 there were two new defendants, namely 1281038 Ontario Limited and 3964400 Canada Inc.

Mrs. Piersanti.[3] Mr. Bates reminded the Court of her evidence that several millions of dollars of equity was put into the properties to acquire them in 1995 and that $9,000,000 was advanced by 3964400 Canada Inc. to the plaza companies in relation to what she described as improvements. She testified that the value of the properties is now in excess of $30,000,000. There is some confusion as to whether Mrs. Piersanti said the value or equity is in excess of $30,000,000. This can be clarified by reference to this portion of the trial transcripts, which I did not have access to at the time of writing these reasons. Mr. Bates asked me to accept this evidence and to weigh it against the $4,800,000 of impugned transactions that form the basis for the Plaintiff's motion. He further submitted that it is not necessary for me to quantify an amount for the alleged impugned transactions because of my recent order that the Mareva injunction be re-registered on title to the three mall properties. It had been removed by a consent order of this court in December 2008 to permit the renewal of mortgages on two of the three plaza properties. The existing mortgage on the Tottenham mall is due for renewal in the very near future.

[6] Mr. Bates responded to a concern that I raised during Mr. Diamond's submissions. It is that if the Plaintiffs are successful, the relief sought, amounts to execution before judgment. Mr. Diamond responded that this cannot be so because the assets in question are already the subject of the preservation order. Quoting from the transcript of the hearing of the motion, Mr. Diamond stated "I'm not asking for any execution. I am asking for what the court granted originally, is that there is no dissipation of this asset. And if you so find that there's dissipation ---I'm not asking for the money to be paid to my firm or my clients. I'm asking for the money to be paid into court pending your decision. That's not executing any judgment. That's ostensibly putting the status quo that should have happened as the court ordered." In response, Mr. Bates submitted this is indeed a matter of execution before judgment and that even if the court is concerned that many of the impugned transactions have been inadequately explained, the reality is that the Plaintiffs want the money paid into court to satisfy any judgment that may eventually be released in favour of the Plaintiffs. Mr. Bates also submitted that what the Plaintiffs are really trying to do is secure an overall monetary judgment rather than to protect a legitimate claim to the impugned assets.[4]

[7] The motion seeks, as against the Piersanti defendants, an order that they have breached the injunction because they took in excess of $500,000 from the plaza accounts for payment for legal fees to Mr. Morrison's firm.

[8] I will refer to only one of the many reported and well known decisions on interlocutory injunctions. It is *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 23 O.R. (3d) 766, a decision of the Divisional Court wherein Borins J. (as he then was), writing for the Court, stated that whether the injunction is prohibitory or mandatory, there can be no doubt such interlocutory orders are only made with a view to assuring that the rights of the plaintiff asserted in the action may be effectually enforced by the Court in the event that action ultimately

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[3] Mrs. Piersanti's most recent affidavit was sworn on May 20, 2009. It is 40 pages long and contains 184 paragraphs. A great deal of this affidavit was cut and pasted from previous affidavits. The parties will know from comments that I made on the record that I have great concern about the truthfulness of this affidavit, particularly in light of the responses given by Mrs. Piersanti when she was being questioned during her crossexamination at trial.

[4] This submission is contained in the June 16 transcripts of the motion.

succeeds. This is a summary of the legal considerations that I have considered when I made order for payment out of the funds referred to in para.1 above. With respect to the payment into court of the $4,800,000, I decline to grant such relief. I do so even in the face of the very broad discretion that I have under Rule 60.02; which provides:

> **60.02** (1) In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,
>
> (a) a writ of seizure and sale (Form 60A) under rule 60.07;
> (b) garnishment under rule 60.08;
> (c) a writ of sequestration (Form 60B) under rule 60.09; and
> (d) the appointment of a receiver. R.R.O. 1990, Reg. 194, r. 60.02 (1).

[9] The attitude of the Defendants towards their obligation to make full and timely production of all relevant documents was appalling, if not defiant. Collectively or individually, they held back many documents from the very early stages of these proceedings. They picked or chose the documents that they would produce. For example, there has been almost no production of the documents listed in paras. 1, 2, 3, and 4 of the notice of motion. Mr. Diamond conceded that it is too late to order this production. Except for closing submissions, scheduled to begin tomorrow, this case is closed. The Defendants justifsied their actions with respect to the three plazas to which the Alfanos claim an interest on a very fluid concept of what is in the ordinary course of business. It will be for me to make findings on this matter and on the credibility of the parties and their witnesses when I am considering the totality of the evidence when writing my reasons for judgment. It must be kept in mind that I ordered the re-registration of the Mareva on title to the three plaza properties very recently. Bearing in mind that I have carefully listened to the Piersanti and Gold defendants, there are matters that I cannot decide until I hear and consider closing submissions. The plaintiffs are sufficiently protected with the existence of the Mareva injunction on title to the three plaza properties. The request for payment into court of the $4,800,000 or such lesser sum as I might arbitrarily fix is therefore dismissed. Costs of this motion are reserved to be dealt with at the time of the ultimate disposition of costs in this action.

Ellen Macdonald J.

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