CITATION: Taylor v. Freeman, 2025 ONSC 3760
DIVISIONAL COURT FILE NO.: DC-24-1590
DATE: 20251028

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: DAVID JEROME TAYLOR, JAMES TAYLOR, SANDRA IRENE TAYLOR AND NORTH PORT GROUP INC., Appellants

AND:

DWAYNE FREEMAN, 2818671 ONTARIO INC. AND D.S.F. SERVICES INC., Respondents

BEFORE: D.L. Corbett, S. Shore, M. McArthur JJ.

COUNSEL: *John Montgomery*, for the Applicants

Brian Sherman, for the Respondents

HEARD at Toronto: June 23, 2025

REASONS FOR DECISION

Shore, J.:

[1] The appellants brought a motion for a *Mareva* injunction, to prevent the respondents from selling the land or, in the alternative, an order that $4,000,000 from the proceeds of sale of the land by the appellants, be paid into court as security for the respondents' damages claim. The motion was granted in part, requiring some of the proceeds of sale to be held as security.

[2] This appeal is brought, with leave, from the order of Justice Lavine, dated May 22, 2024, requiring $4,000,000 from the proceeds of sale of property owned by the appellants be paid into court, as security for the respondents' claim for damages.

[3] For the reasons below, the appeal is granted, and the order below is set aside, with appeal costs.

Background:

[4] The land in question, 132 and 144 North Port Road, Port Perry (the "Property"), comprised of 20 acres of land, is owned jointly by the David Jerome Taylor ("Jerry") and his wife. The appellants, James Taylor and Sandra Irene Taylor, are Jerry's son and wife, respectively. The

appellant, North Port Group Inc., is a corporation owned by Jerry and his wife, through which they manage the Property.

[5] The respondents, DSF Services Inc. and 2818671 Ontario Inc. are companies owned by the respondent, Dwayne Freeman.

[6] In 2019, Jerry agreed to rent the front four acres of 144 North Port Road to the respondents, for $2,500 per month plus HST, for the purpose of parking and storing trucks and heavy equipment. From at least 2021 onward, DSF occupied the property and paid monthly rent in the amount of $2,500 plus HST.

[7] Sometime thereafter, DSF occupied the remaining property and built up a business receiving and processing excavated material from hydro-excavation trucks. Development of the business included obtaining regulatory approval and all necessary permits, constructions of parking and staging areas, a cement-lined drive-up pit onto which the liquid loads could be dumped and areas for drying of the soil. The respondents submit that they invested $500,000 into the Property, although they did not provide supporting documents. By 2023 this new business was operating on the Property, with the knowledge and consent of the appellants.

[8] The appellants submit that the arrangement was a simple commercial leasing arrangement, albeit without a written lease, and the problem is that the respondents refused to pay rent. The respondents submit that their agreement with the appellants was in the form of a joint venture agreement, the ultimate objective of which is to have the respondents' business and Jerry's real property sold together, to one buyer.

[9] In 2023, a hydro-vac excavation company, Southview Group, expressed interest in purchasing the property and the business. A deal was not reached. In January 2024, the appellants advised the respondents that the land would be listed for sale because they no longer wanted to be landlords, and they served a notice of breach of lease for the respondents' failure to pay rent.

[10] The respondents believed that there was an agreement that they would develop the land into a licensed hydro-vac dump site, and the parties would sell the business and land together, for mutual profit. The respondents submit that the appellants waived rent in light of the significant financial commitment the respondents made to develop the property.

[11] In January 2024, the respondents commenced an action seeking a *Mareva* injunction, and damages "as yet uncalculatable, but provisionally in the amount of $4,000,000 for intentional interference with economic relations, intentional economic harm, breach of joint venture agreement, conspiracy to breach a joint venture agreement, quantum meruit and unjust enrichment".

[12] The motion for injunctive relief was heard on March 8, 2024. The motion judge made an order on May 22, 2024, requiring $4,000,000 from the proceeds of sale of the Property be paid into court, as security for the respondents' claim for damages. The appellants appeal this decision.

[13] The appellants submit that the motion judge erred in law in applying the wrong test for a *Mareva* injunction and, in the alternative, by ordering a remedy under r. 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that was not available in this case. For the reasons below, I agree with the appellants' submissions.

Analysis:

***Mareva* Injunction:**

[14] In their notice of motion, the respondents sought an order for a *Mareva* injunction.

[15] Section 101(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides:

> **101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

[16] Rule 40.01 of the *Rules* provides that an interlocutory injunction or mandatory Order under ss. 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

[17] At paragraph 22 of the decision, the motion judge set out the three-part test relied on for an interlocutory injunction, as set out in *RJR v MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paras. 83-85:

a. there is a serious issue to be tried;

b. they will suffer irreparable harm if the remedy claimed is left to be granted at trial; and

c. the balance of convenience favours granting an injunction.

[18] But the test relied on by the motion judge is the general test for an interlocutory injunction, and not the more stringent test for a *Mareva* injunction.

[19] A *Mareva* injunction is an injunctive order that restrains a party from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings. Since the general principle of the common law is that there shall not be execution before judgment, a *Mareva* injunction is both an exception to a general rule and an exceptional exercise of the court's equitable jurisdiction to grant interlocutory relief. A *Mareva* injunction is granted only sparingly and in the clearest cases. However, where there is a strong case that the defendant has defrauded the plaintiff, the law's reluctance to allow prejudgment execution yields to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct: *Wang v. Feng*, 2023 ONSC 2315, at para. 129.

[20] The test for a *Mareva* injunction is as follows:

a. a strong *prima facie* case;

b. that the defendant has assets in the jurisdiction;

c. that there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets to avoid judgment;

d. that the moving party will suffer irreparable harm if the injunction is not granted;

e. that the balance of convenience favours granting the injunction; and

f. the moving party gives an undertaking as to damages.

See: *Borrelli, in his Capacity as Trustee of the SFC Litigation Trust v. Chan*, 2017 ONSC 1815 (Div. Ct.); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (ON CA); *Wang v. Feng*, at para. 127.

[21] I find that the motion judge erred in law. The judge did not refer to or consider the test for a *Mareva* injunction. The motion judge considered whether there was "a serious issue to be tried", instead of a strong *prima facie* case, which carries a higher threshold. The motion judge did not consider whether there was a real risk that the appellants would remove their assets from the jurisdiction or dissipate their assets to avoid judgment, a key finding required for a *Mareva* injunction.

[22] Further, I find that on the facts of this case, the test for a *Mareva* injunction could not have been met. Jerry is 85 years old and retired. He is the former mayor of Scugog Township. He owns other property. There is no evidence or claim that there is a real risk that the appellants will remove their assets from the jurisdiction or dissipate their assets to avoid judgement. The respondents do not make this claim anywhere in their materials. This part of the test is not met and therefore, a *Mareva* injunction could not have been granted.

[23] As noted above, the test for a *Mareva* injunction includes an undertaking as to damages to be provided by the moving party to the court. This undertaking should be included in the order itself, including any limitations on the undertaking the court sees fit to impose. In this case, the moving party did not provide an undertaking as to damages, and the issue was not raised with the parties by the motions judge. No such undertaking was included in the order.

[24] The undertaking as to damages has been characterized as the "price" of obtaining a *Mareva* injunction. The court may dispense with it, but only if circumstances of the case warrant dispensing with this requirement: see for example *Business Development Bank of Canada v. Aventura II Properties Inc.*, 2016 ONCA 300 at para.25. A court dispensing with the requirement should explain the reasons it has done so. None of that happened in this case.

[25] I also have serious doubts that the respondents could have met the "strong *prima facie* case" aspect of the *Mareva* test. The respondents' theory of the case appears unsupported by documentary evidence one would expect to establish their claim. They have not put evidence of their financial contribution to the property beyond a bald statement that the amount has been "at least $500,000." This evidence, itself, would not seem to justify the extraordinary remedy of an order for payment into court of $4,000,000. However, since it is clear that the motion could not have succeeded on the risk of dissipation or removal of assets, it is neither necessary nor desirable that the court enter into a detailed analysis of the merits at this juncture.

[26] For these reasons I conclude that the motion judge erred in granting a *Mareva* injunction, and that the injunction could not have been granted applying the correct test.

Rule 45.02:

[27] The Appellant argues, in the alternative, that it was entitled to the relief claimed pursuant to r. 45.02 of the Rules of Civil Procedure. There are multiple problems with this argument. First, the Appellants did not plead a claim or advance an argument on the motion under r. 45.02. The motion judge made no factual findings relative to such a claim for the simple reason that the issue was not before her. I would not permit the Appellant to raise a claim pursuant to r. 45.02 for the first time on appeal in these circumstances: for example, see *Kaiman v. Graham*, 2009 ONCA 77 (CanLII) at para. 18 and *DeGroot v. Licence Appeal Tribunal*, 2022 ONSC 6160 (CanLII) at para. 27.

[28] Further and in any event, r. 45.02 does not apply to the circumstances of this case in any event. The Appellant has not claimed an interest in a specific fund, and no specific fund exists to which such a claim might attach.

[29] Rule 45.02 provides:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just. R.R.O. 1990, Reg. 194, r. 45.02.

[30] The motion judge found that the respondents' claim is effectively a claim for unjust enrichment. However, a breach to an alleged joint venture agreement is also plead as a basis for a claim to damages. The respondents specifically plead that they are not claiming an interest in the real property: there is no claim of constructive trust.

[31] The appellants rely on *Guz v. Olszowka*, 2019 ONSC 5308 for the proposition that they are claiming a right to a specific fund. But in that case, the moving party had a constructive trust claim on the real property being sold.

[32] A claim for damages (whether for unjust enrichment or breach of a joint venture agreement) is a claim for a monetary award, and not a claim to a specific fund: see *167986 Canada Inc. v. GMAC Commercial Finance Corporation-Canada/Société Financière Commerciale GMAC-*

Canada, 2009 CanLII 65819 (ON SCDC), at para. 41, citing *Assante Financial Management Ltd. v. Dixon*, [2004] O.J. No. 2237 (S.C.J.), at para. 28.

[33] I would not give effect the Respondent's alternative argument respecting r. 45.02.

Delay

[34] The order of the motions judge was made in May 2024. This appeal was not heard until more than a year later, in June 2025. During oral argument the parties advised that nothing had been done to advance the case since May 2024.

[35] The purpose of an interlocutory injunction is to preserve a reasonable state of affairs so that the court may do justice in its final determination of the case. The parties have an obligation to move the case forward promptly if interlocutory relief has been granted, to minimize the prejudice of the order. The court should acknowledge and enforce this requirement from the outset. For example, in a comparable case recently considered in this court involving oppression remedy claims under the *OBCA*, injunctive relief was ordered pending the hearing on the main application, which was scheduled (and was heard) a few weeks later: *Morgan Investments Group Inc.* v. *ADI Development Group Inc.*, 2025 ONSC 4344; aff'd 2025 ONSC 5346 (Div. Ct.).

[36] The motion judge should have addressed the requirement to move forward promptly, either by establishing a schedule or by directing appointment of a case management judge. The plaintiff, in particular, should have been required to ready its case for trial with all due haste as part of the price of obtaining the *Mareva* injunction. Ideally, a moving party / plaintiff will address this issue in its motion materials, but where it does not do so, the court should weigh in, as part of the terms of the order, to direct a schedule or ongoing oversight to ensure things move ahead properly.

[37] Where the court does not direct a schedule or establish ongoing judicial oversight, it is still the responsibility of a party obtaining a *Mareva* injunction to advance their case promptly to a hearing. If that had been done in this case, the plaintiff should have been ready for trial before this appeal was heard. Instead, the plaintiffs did nothing between obtaining the *Mareva* injunction and the hearing of the appeal.

[38] When asked about this point, respondents' counsel said his clients wished to await the decision of this court before moving ahead further. This court has been at pains to say, repeatedly, that proceedings below are not stayed pending interlocutory appeal proceedings to this court. If a party wishes a stay, they may seek one from this court. In the absence of such a stay order, the proceeding below should continue and should not await decision on an interlocutory appeal. Otherwise, proceedings below can be delayed interminably.

[39] If the *Mareva* injunction were otherwise proper, I would not have set it aside in this court because of delay, but I would have noted that the issue of delay could be addressed below on a motion to discharge the order for delay, and I would have given directions that the case now proceed with real alacrity in light of the delay to date.

Disposition:

[40] The appeal is granted, and the order of the motion judge is set aside, with costs payable by the respondents to the appellants in the agreed sum of $7,500 inclusive of HST.

"Shore J."

I agree "D.L. Corbett J."

I agree "M. McArthur J."

Date: October 28, 2025