

CITATION: Silver v. Tenenbaum, 2023 ONSC 1448
COURT FILE NO.: CV-22-00679692-0000
DATE: 20230302

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KAILA SILVER, Plaintiff

– and –

ELI TENENBAUM, Defendant

BEFORE: E.M. Morgan J.

COUNSEL: *James Gibson*, for the Plaintiff

Eli Tenenbaum, on his own behalf

HEARD: February 24, 2023

MOTION FOR JUDGMENT

[1] The Plaintiff seeks judgment on her claim of fraud perpetrated by the Defendant. The matter came before me on February 6, 2023, at which time the Defendant appeared and requested more time to retain counsel and prepare a defense. He also asked that a Mareva injunction that the Plaintiff has had in place since April 21, 2022 be lifted from his CIBC account so that he can access funds to pay a lawyer.

[2] In my endorsement, I indicated that the Defendant was noted in default in May 2022. He has been aware for the past 9 months that he is in default but has never made an effort to set the noting aside or to provide a defense to the claim.

[3] The Statement of Claim sets out, and the Motion Record establishes, that the Plaintiff gave the Defendant \$345,000 to invest and has had no report or accounting of what has become of her funds. The Plaintiff only knows of one bank account at the CIBC containing \$4,600 that is in the Defendant's name. Other than that one bank account, which is now subject to the Mareva, no other assets or accounts have been disclosed by the Defendant.

[4] On February 6th I granted a short adjournment on the understanding that the Defendant must, after much delay and obfuscation during the past year, obey the Mareva order and disclose his assets and reveal where the Plaintiff's funds have gone. Financial transparency and full

disclosure of assets are at the heart of a Mareva injunction; those obligations are not to be taken lightly or ignored.

[5] The terms of adjournment were, in my view, rather clear and easy to follow. The salient paragraph stated:

I am willing to give the Defendant some more time to make the full disclosure of his assets that he is required to do under the Mareva. He is to provide Plaintiff's counsel with an affidavit listing those assets, and specifying in detail (including names and addresses) where the Plaintiff's money has gone. I will then reconvene this motion and consider whether he has met his disclosure obligation, and will weigh that consideration with a re-consideration of his request to unlock the CIBC account so that he can have access to those funds.

[6] At the last hearing, the Defendant advised that he was appearing by Zoom from Mexico. He claims that he is being financially supported there by friends and family, not by his own funds. I had my doubts in that regard, but he assured the court that he understood his obligation to disclose all of his assets, and to provide a detailed tracing of the Plaintiff's funds. He stated that he would provide that information in writing before the next hearing date.

[7] The day before the return of the motion, the Defendant sent a "chart" of what purport to be his total assets to counsel for the Plaintiff. I have pasted a copy of the Defendant's total disclosure here:

Eli Tenenbaum worldwide assets as of Feb 2023

Name	Currency
Debt to Kaila Silver for loan \$ (345,000.00)	CAD
Loan Miller Brothers \$ (120,000.00)	USD
Yosher Inc \$ (75,000.00)	CAD Real Estate Debt for multiple land sites through Yosher Inc.
PGC Inc. \$ (350,000.00)	CAD Betting Syndicate fund based in Nassau Bahamas with Jonathan Stern deposited via 888, can be shown on statement from CIBC
Total Balance of Capital \$ (890,000.00)	

Other funds were used for lawyer fees (Epstein Cole LLP) and other personal expenses including but not limited to, toys for children, couch for apartment in Summer Hill Toronto, in possession of Ms. Silver.

[8] As can be seen, the “disclosure” of assets is little more than a list of debts. Moreover, it is not exactly a transparent form of disclosure. There is an apparently untraceable amount with an offshore betting syndicate in the Bahamas, and a real estate debt owed to a company called Yosher Inc. whose address is undisclosed. Plaintiff’s counsel advises that a thorough computer search has turned up no such company in any searchable jurisdiction. To this, the Defendant responded that he might have spelled the name of the company wrong, and held up to the Zoom lens his cell phone with a differently spelled name written on an otherwise empty screen.

[9] Furthermore, the “disclosure”, such as it is, contains no information about where the Plaintiff’s funds have gone, despite the admonition in my adjournment endorsement that this information must be provided. When I asked the Defendant about that at the hearing, he responded that he doesn’t want to give the names of the people to whom he sent the Plaintiff’s money because he is afraid that the Plaintiff and her lawyer will “hound” them.

[10] I do not know whether the Defendant is pretending not to appreciate that the Mareva and my endorsement are mandatory, not optional, or if he really cannot bring himself to comprehend that. But for his sake, I will reiterate here that the Mareva requires him to make full disclosure, and it empowers the Plaintiff and her lawyers to trace those funds and call for them to be frozen in place until this matter is resolved or until the injunction is otherwise lifted. If Plaintiff’s counsel contacts parties that the Defendant discloses have received the Plaintiff’s funds, that contact would be in keeping with the law’s requirements rather than contrary to the law as the Defendant suggests.

[11] What makes the Defendant’s supposed disclosure of assets even more startling is that in enticing the Plaintiff into investing with him, the Defendant showed her what purported to be a bank statement from Chase Manhattan Bank (with branch, address and account name obscured). He indicated to her that the bank statement, which showed a cash balance held of over \$11 million, belonged to a “trust” owned by him. His accompanying text message said: “One of my accounts. I have \$21M in another.”

[12] The Defendant’s asset disclosure, which as indicated is really a debt disclosure, contains nothing that would indicate that he has, or that he once had and has lost, assets of this magnitude. There is no Chase Manhattan account mentioned in his recent disclosure, and even the one CIBC account with a \$4,600 balance that the Plaintiff does know about was not mentioned by the Defendant.

[13] Moreover, the Plaintiff’s investment was in Canadian funds, suggesting that it was deposited in a Canadian account. Since there is no sign of those funds having flowed through the Defendant’s small CIBC account, there is a strong suggestion in the record that the Defendant has not only U.S. and possibly offshore accounts, but other undisclosed accounts in Ontario or elsewhere in Canada.

[14] I can only conclude that the Defendant was either lying about his wealth in his text exchanges with the Plaintiff prior to her investment, or that he is lying about his wealth in response to the Mareva and to my adjournment endorsement, or, perhaps even more likely, that he is lying both times. His willingness to fabricate stories about himself and his assets seems to know no bounds, even in the face of an explicit court order to disclose his entire assets and the whereabouts of the Plaintiff's missing funds.

[15] The communications between the parties that resulted in the Plaintiff sending the Defendant her funds record an unfortunate pattern of the Defendant assuring the Plaintiff of his wealth, financial experience, and trustworthiness, and the Plaintiff obviously wanting to believe him. As for the Defendant's responses to the litigation once commenced, I have rarely seen a more explicit disregard for court orders and mandatory disclosure obligations.

[16] The Defendant has long been in default for failure to file a Statement of Defense. He has promised repeatedly to move to set aside that default but has not done so. I find his statement that he needs the \$4,600 in the CIBC account in order to pay a lawyer to not be credible. He is somehow supporting himself and travelling to Mexico; in general, nothing that he says about his state of finances can be believed.

[17] In fact, Plaintiff's counsel has not entirely opposed making the small amount of funds in the CIBC account available to the Defendant. He has simply asked for some information about the source of the \$4,600 in the CIBC account. Plaintiff's counsel is understandably concerned that what the Defendant is asking the court to unfreeze is not his own money but is, in fact, the Plaintiff's money. The Defendant has failed to provide any answer to this request, just as he has failed to provide the whereabouts of any of the Plaintiff's funds.

[18] The Plaintiff shall have judgment in the amount of \$345,000 plus pre and post judgment interest.

[19] The Plaintiff has also asked for \$200,000 in punitive damages. In order to justify an award of punitive damages, the Defendant's conduct must be found to be reprehensible. The award must also be rationally connected to the objectives of retribution, deterrence, and denunciation: *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, at para 79. I have no hesitation in concluding that the Defendant's conduct has been reprehensible and that it warrants a measure aimed at retribution, deterrence, and denunciation.

[20] My only hesitation in granting the Plaintiff's request is that the amount sought by the Plaintiff is nearly two-thirds again of her loss. The Supreme Court of Canada has said that the governing rule when it comes to quantum of punitive damages is proportionality. As Justice Binnie put it in *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595, at para 71, the court must ask "what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational."

[21] In my view, a \$100,000 award of punitive damages is more proportional to the size of the compensatory award that the Plaintiff receives here. It is also an amount that, in my estimation,

will suffice to drive the point home to the Defendant that the court will not tolerate the impunity that he has exhibited in his dealings with the Plaintiff and in the face of a Mareva injunction.

[22] Plaintiff's counsel has also asked for an order under Rule 60.12 of the *Rules of Civil Procedure* barring the Defendant from moving to set aside the default judgment issued here. That would be a form of order that follows a contempt hearing. I do not think it is necessary here. The Defendant has been contemptuous of the disclosure obligations in the Mareva injunction, but for the moment the remedy is that the court is granting final judgment against him. He can now be examined as judgment debtor if the Plaintiff and her counsel think that will be helpful. If he fails to answer questions under oath in that procedure, there are further remedies available.

[23] If the Defendant were to move to set the present judgment aside at some future time, it would be a high hurdle for him to jump. He has been fully aware of every step taken in the proceeding, has participated in person, and has assured the court at every step that the next time up he will appear with counsel and file a substantive defense. That has never happened – not because the Defendant does not have the wherewithal to retain counsel, but because he knows that once he has counsel on record he will no longer be able to game the system in the way he has done until now.

[24] I am confident that any future judge reading the record of proceedings in this action will understand that the present judgment is being issued as a final judgment after the Defendant has taken full advantage of all of the procedural rights the litigation process offers him. There is no need for an order at this point that bars him from taking what would likely be a futile step in the future.

[25] The Plaintiff seeks costs of this motion on a substantial indemnity scale. Given the Defendant's conduct, his "disclosure" that hid more than it revealed, and his failure to respond to my specific terms of adjournment, substantial indemnity costs are called for. The Defendant was already under a court order to produce the materials he has again failed to produce here, and he put the Plaintiff to considerable expense in taking this uncooperative approach to legal process.

[26] Plaintiff's counsel's Bill of Costs puts the substantial indemnity request at \$55,078, inclusive of fees, disbursements, and HST. The Bill substantiates that the amount sought accurately reflects the time and effort invested by Plaintiff's counsel. Costs are discretionary under section 131 of the *Courts of Justice Act*, and I am not inclined to use my discretion to reduce the value of the work that Plaintiff's counsel has put into this matter. Plaintiff and her counsel deserve their full request of costs, which I will merely round off for convenience.

[27] The Defendant shall pay the Plaintiff \$345,000 in compensatory damages, plus pre-and post-judgment interest at the contractual rate of 12% per year. The Defendant shall also pay the Plaintiff \$100,000 in punitive damages and \$55,000 in costs.

[28] There will be a judgment to go reflecting the figures in the paragraph above, to be submitted to me by Plaintiff's counsel. There is no need for the Defendant's approval as to form and content of the judgment.

Date: March 2, 2023

Morgan J.