

CITATION: 1999269 Ontario Limited et al v. Aguiar et al, 2023 ONSC 3135
COURT FILE NO.: CV-23-00693397-0000
DATE: 20230303

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1999269 Ontario Limited and 1999267 Ontario Limited Plaintiffs

AND:

Gonzalo Raul Gadea Aguiar a.k.a. Gonzalo Raul Aguiar Gadea, A.D. Group of Companies Inc., Roxana Guadalupe Marroquin Donan, Andree Alejandro Aguiar Donan a.k.a. Andree Alejandro Donan Aguiar, Adrian Aguiar Donan, a.k.a. Adrian Donan Aguiar, A.R.A. Group of Companies Inc., Optima Caulking Inc., John Doe, Jane Doe and Doe Corporation Defendants

BEFORE: Justice Chalmers

COUNSEL: *N. Groot and A. Ferguson* for the Plaintiffs

G. Aguiar, and A. Donan, self-represented

HEARD: by Videoconference

ENDORSEMENT

Overview

[1] The Plaintiffs allege that the Defendants, Gonzalo Raul Gadea Aguiar a.k.a. Gonzalo Raul Aguiar Gadea (Aguiar) and Roxana Guadalupe Marroquin Donan, (Donan) and their company, A.D. Group of Companies (A.D. Group) have engaged in a significant and prolonged fraud. Throughout 2019 – 2021 the Plaintiffs’ Canadian investors provided US\$27,338,248 for the specific purpose of developing various medical cannabis production facilities in Uruguay. The Plaintiffs state that the money was not used for the intended use and instead was appropriated by the Defendants.

[2] Aguiar, Donan and A.D. Group are subject to a worldwide *Mareva* injunction up to the amount of US\$25,000,000 issued by Justice Perell on January 31, 2023. The *Mareva* injunction was extended by Justice Dow on February 9, 2023.

[3] The *Mareva* injunction includes ancillary orders for the production of documents. Justice Perell ordered that the Defendants provide full disclosure of the nature, location and value of assets and funds and disclosure of the Defendants’ dealings with them. In particular, the disclosure order required the Defendants to provide a sworn asset declaration, and a sworn

accounting describing where the funds were transferred or otherwise utilized as well as an accounting of any use of the funds.

[4] The Order dated January 31, 2023, was served on the Defendants on February 1, 2023. To date, Aguiar and Donan have not delivered any documents to the Plaintiffs' solicitors. The Defendants state that they did not want to provide the documents until after retaining counsel. On the return of the motion today, Donan stated that she spoke to a lawyer today. Aguiar stated that he would also like to retain counsel but has not yet done so. Neither Aguiar nor Donan provided an explanation to the court for their failure to retain counsel sooner.

[5] The Plaintiffs argue that because of the Defendants' failure/refusal to comply with the order of the court for production, there is no reasonable prospect that they will comply with their documentary preservation and production requirements through the discovery phase of the action.

[6] On this motion, the Plaintiffs seek an order continuing the *Mareva* injunction along with ancillary relief, and an *Anton Pillar* Order. For the reasons set out below, I am satisfied that the Plaintiffs are entitled to the relief sought.

Factual Background

[7] On January 23, 2023, the action was commenced by way of Notice of Action. The Statement of Claim was issued on February 23, 2023. On January 31, 2023, the Plaintiffs brought an urgent *ex parte* motion for a *Mareva* injunction and *Norwich* order, and other ancillary relief. Justice Perell found that the Plaintiffs had established a strong *prima facie* case of fraud. He also found that there was a serious risk that the Defendants will remove property or dissipate assets before judgment. He granted the *Mareva* injunction and *Norwich* order along with ancillary relief which required the Defendants to make documentary disclosure. He set the return date for February 9, 2023.

[8] The Order was served on the TD Bank. After being advised that the bank accounts were frozen, the Order was served on the Defendants by e-mail. There was no response from the Defendants.

[9] On February 9, 2023, Aguiar and Donan attended on the return date of the motion before Justice Dow. Justice Dow set a further return date of March 3, 2023, and ordered Aguiar and Donan to attend for examination on February 17, 2023. Justice Dow encouraged the Defendants to retain counsel. He did not however, make an order that compliance with his order was contingent on the Defendants retaining counsel.

[10] The Plaintiffs served Notices of Examination on February 17, 2023. The Plaintiffs also made demand for the production of the required documents including asset declarations, accounting documentation and expenditure logs. No response was received from the Defendants until February 18, 2023. Donan stated that she and Aguiar did not view their compliance with the court orders necessary because they had not yet retained counsel.

[11] Donan attended the examination on February 17, 2023. On the examination, she advised Plaintiffs' counsel that she had TD Bank records at their home located at 210 Melbourne Drive, Bradford (the Melbourne Property). She refused to produce the records to the Plaintiffs despite request. Aguiar's examination was not completed because of an alleged medical issue. He has not attended for the completion of his examination. He participated on the motion today from Uruguay.

[12] On February 23, 2023, Donan attended for her continued examination. She refused/failed to provide the TD Bank records in her possession. She confirmed that she is the person who completed most, if not all the wire transfers from the USD TD Bank account. She confirmed that Aguiar purchased a US \$4 million estate in Uruguay. The Defendants state that the mansion was purchased so it would avoid US banking and money transfer regulations when it was sold.

[13] Following the examination, the Plaintiffs renewed their request for production of the documentation. There was no response. On February 24, 2023, the Plaintiffs served a Supplementary Motion Record returnable March 3, 2023, for the production of the documents, continuation of the *Mareva* injunction and for an *Anton Pillar* order.

Analysis and Discussion

Anton Pillar Order

The Order Sought

[14] The Plaintiffs seek an order to enter the Melbourne Property to seize and preserve the documents and electronic evidence that Donan has confirmed is in her possession. The Plaintiffs propose that the following evidence to be preserved are:

- (a) any and all information and documents, including paper documents and all computer stored data and equipment (including phones, computers, computer media, electronics, magnetic and optical storage devices, facsimiles transmission devices, tape cartridges, printers, and other devices) that may contain data or information of any nature or kind whatsoever related to, arising from, or connected with:
 - (i) all communications, business, or financial transactions conducted by the Defendants Aguiar and Donan between 2019 to present with respect to the Plaintiffs and the Defendants as set out in the Statement of Claim;
 - (ii) any assets, items, notes, files and such other documents, whether physical or electronic, located in the Property, which may have originated from transactions between the Plaintiffs and Defendants between 2019 to present as set out in the Statement of Claim;

- (iii) any and all communication records, whether in hard copy or electronic form, involving the Defendants Aguiar and / or Donan, and including but not limited to the Defendant Aguiar's secretary, Jimena Fierro, between 2019 to present with respect to third parties relating to any fact as set out in the Statement of Claim;
- (iv) any and all bank account statements and transaction records for TD Canada Trust Account Nos.: 7304033 and 5228537, in the name of A.D. Group of Companies Inc. from 2019 to present; and
- (v) such other evidence as this Court identifies and deems appropriate.

[15] The Plaintiffs also seek to have a data forensic expert mirror and preserve the electronics and if this cannot be practically done during the search to remove the electronics for preservation.

The Test for an Anton Pillar Order

[16] An *Anton Pillar* order is a private search warrant. The purpose of the order has been described as follows:

Experience has shown that despite their draconian nature, there is a proper role for *Anton Pillar* orders to ensure that unscrupulous defendants are not able to circumvent the Court's process by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, at para. 32.

[17] The test for an *Anton Pillar* order is four-fold:

- (a) the plaintiff must demonstrate a strong *prima facie* case;
- (b) the damage to the plaintiff of the defendants' alleged misconduct, potential or actual, must be very serious;
- (c) there must be convincing evidence that the defendant has in its possession incriminating evidence; and
- (d) there is a real possibility that the defendant may destroy such evidence before the discovery process can do its work: *Celanese Canada Inc. v. Murray Demolition Corp.*, at para. 36.

Application to the Facts

[18] I am satisfied that the Plaintiffs have established a strong *prima facie* case. The evidence put forward by the Plaintiffs establishes that Aguiar and Donan orchestrated an elaborate scheme to defraud the Plaintiffs' investors of over US\$27.5 million. As noted by Justice Perell in his Decision dated January 31, 2023, there is "considerable evidence for each element of the fraud claim." The Defendants have not produced any material on this motion which would allow for a different conclusion.

[19] I am also satisfied that if the order is not granted, it is likely that relevant documents will be destroyed, lost, or concealed which will affect the Plaintiffs' ability to recover the missing funds. If the documents are destroyed, lost or concealed, the Plaintiffs will suffer irreparable harm including the inability to prove its case.

[20] Donan has admitted on her examination that she has in her possession documents relevant to this proceeding, including TD Bank records, and that the records are at the Melbourne Property. She also admitted that she has records with respect to the transfer of the funds. She also admitted that she has communication records containing directions from Aguiar with respect to the dissipation of the funds. I am satisfied that the Plaintiffs have established that the Defendants have in their possession relevant evidence.

[21] The Defendants failed to comply with the order of Justice Perell to produce documentation and has not responded to the request for production from Plaintiffs' counsel. There is a strong *prima facie* case of fraud. I am satisfied that I may infer from the strong *prima facie* case of fraud and the Defendants' failure to comply with the production order made by Justice Perell, that there is a real risk of destruction of evidence or the dissemination of evidence if the order is not granted: *Capitanescu et al. v. Universal Weld Overlays Inc. et al.*, 1996 CanLII 7286 (ABQB) at para. 22.

[22] I am satisfied that the test for granting an *Anton Pillar* order has been established. I grant the order requested on the following terms:

- (a) A supervising solicitor, independent of the Plaintiffs shall be appointed and act as an officer of the court and is to be present at the search to ensure its integrity;
- (b) upon entering the Melbourne Property, the independent solicitor shall read this Order to the occupants;
- (c) the plaintiffs' solicitor, the independent solicitor, one data forensics expert and one audio/visual recorder is permitted to enter the Melbourne Property, for the search;
- (d) the order may be served and entry to the Melbourne Property shall take place between 9:00 am and 6:00 pm on a weekday. The execution of the order may take place for up to 6 hours after the time of entry;

- (e) following service of the order no entry to the Premises shall be permitted unless the independent solicitor is also present;
- (f) the Defendants or anyone else appearing to be in charge of the premises shall permit the authorized persons to remain on the premises until the search is completed; and
- (g) the authorized persons are permitted to record by audio, video or photograph the evidence and all acts, conversations and discussions occurring during the course of the search of the premises.

[23] The return date for the *Anton Pillar* order is set for March 10, 2023, at which time a report will be made to the Court with respect to the execution of the order.

Mareva Injunction and Ancillary Orders

[24] As noted by Justice Perell in his Reasons for Decision dated January 31, 2023, the Plaintiffs put forward “considerable evidence” to establish the fraud claim. It was also established that there was a serious risk that the Defendants will remove property or dissipate their assets in the jurisdiction before judgment. The Defendants have not put forward any evidence on this motion with respect to these issues.

[25] I am satisfied that the *Mareva* injunction is to continue. The return date for the *Mareva* injunction is March 10, 2023, and the Defendants are ordered to attend before the court for the purpose of responding to the Plaintiffs’ motion to extend the term of the Order.

[26] As noted by Justice Perell in his Reasons for Decision dated January 31, 2023, a *Mareva* injunction “may be coupled with ancillary disclosure orders to make the remedy meaningful and effective”: para. 52. He ordered the Defendants to provide a sworn asset declaration, a sworn accounting describing where the funds were transferred or otherwise utilized as well as an accounting of any use of the funds. He also ordered Aguiar and Donan to attend an examination on their sworn asset declaration and accounting affidavits. As noted above, the documentary disclosure has not been made.

[27] On the return of the motion today, the Plaintiffs seek the following additional ancillary relief:

- (a) The Melbourne Property is registered in the name of Aguiar. This appears to be the most significant asset owned by Aguiar in the jurisdiction. The Plaintiffs seek an order to register the *Mareva* injunction on title to the Melbourne Property.
- (b) There are two vehicles in the possession of Donan at the Melbourne Property, an Audi R8, and an Audi Q3. The Audi Q3 is owned by the Defendant, A.D. Group.

- (c) Donan is currently in Ontario. Aguiar is in Uruguay. The Plaintiffs seek an order that Donan surrender her passport and remain in the province of Ontario until further order of the court.
- (d) The Plaintiffs seek a further disclosure order to provide a sworn accounting declaration with reference to all funds transferred to Aguiar and Donan's daughter-in-law, Marie Del Corvo for the period from January 1, 2019 to present, including the November 18, 2022 transfer to Ms. Del Corvo of US\$350,000, and to provide the residential address, phone number and e-mail address for Ms. Del Corvo.
- (e) The sum of US\$103,000 was transferred to Ms. Del Corvo. The Plaintiffs seek an order that this sum be transferred to the trust account of the Independent Supervising Solicitors to be preserved for the benefit of this action until further order of the court. On the motion today, Ms. Donan did not object to this relief being granted.
- (f) The adjournment of the motion for a declaration that Aguiar and Donan are in contempt of court.

[28] I am satisfied that the Plaintiffs are entitled to the ancillary relief sought. With respect to the contempt motion, I order that the motion is adjourned and is to be spoken to for scheduling purposes at Civil Practice Court on a date convenient to the parties.

Disposition

[29] For the above reasons, the *Mareva* injunction, the *Anton Pillar* order and the ancillary relief shall be granted as requested.

[30] I am not seized of the matter. I set March 10, 2023, as the return date for the Plaintiffs to report to the court with respect to the execution of the *Anton Pillar* order, and to expend the *Mareva* injunction.

[31] Costs of the motion are reserved to the Judge hearing the final attendances on the motion.

[32] The Orders shall go in accordance with the draft orders filed and signed by me.

Date: March 3, 2023