

CITATION: Empire Steel Inc., et al. v. Dass et al., 2023 ONSC 3921
COURT FILE NO.: CV-23-80466
DATE: 20230630

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
EMPIRE STEEL INC., and) S. Gebrael, for the Plaintiffs
STEELSERVE CORP.)
)
)
Plaintiffs)
)
- and -)
)
)
2469521 ONTARIO INC. dba DASS) K. Sherkin and M. Lightowler, for the
METAL PRODUCTS & DASS STEEL) Defendants
SERVICE CENTRE, 2835085)
ONTARIO INC., JOHN DOE)
CORPORATION, HASWANT DASS,)
PREET DASS and NAVJOT DASS)
)
Defendants)
)
)
) **HEARD:** June 28, 2023

REASONS FOR JUDGMENT

The Honourable Justice R. J Harper

- [1] This is a motion brought by the Plaintiff Empire Steel Inc, and Steelserve Corp. (Empire) to extend the preservation order of Justice Goodman dated April 20, 2023, allowing for certain steel coils to be preserved.
- [2] In the alternative, for an order granting an injunction enjoining the Defendants (Dass) from selling, dissipating, alienating, transferring or otherwise disposing of the subject steel coils property.

Background

- [3] Between August to November 2022, Empire sold and delivered 194 steel coils to Dass for the sale and purchase price of \$4,476,345.40.
- [4] Dass paid a total of \$901,754.68 of the amount owing and stopped payment on or about November 25, 2022. On or about December 14, 2022, Dass complained about the quality of the coils that were shipped to them pursuant to their purchase orders. Dass's counsel, at that time, sent an email to Empire alleging that no further payment would be made on the claim that the subject coils were damaged, unusable and illegal.
- [5] In order to properly consider the relief requested in this motion, it is important to be aware of the factual background and allegations that were before the court during three motions that came before Justice Goodman on

January 19, 2023, March 16, 2023, April 20, 2023. This history represents an important foundation in order to consider what has been advanced as new evidence in the motion before me that would allow the court to grant an injunction at this stage.

- [6] It is also important to note that Justice Goodman did not make any findings of fact when he issued the preservation orders and the Anton Pillar Order that he granted.

The Factual Background

- [7] Empire commenced an action against Dass by way of an application which was later converted to an action.

- [8] In the motion before Justice Goodman on January 19, 2023, Empire alleged that Dass had defrauded Empire by accepting receipt of the subject coils between August and November 2022. Dass only partially paid for the coils and then made a unilateral claim that the coils were so damaged they had to be sold for scrap. Dass refused to pay the balance of approximately \$3,600,000.

- [9] Counsel for Dass stated in a letter to counsel for Empire dated March 15, 2023:

“Dass confirms that all 100 unprocessed coils were sold for scrap between December 8, 2022, and December 27, 2022.

[10] After receiving counsel’s letter of December 14, 2022 that no further payment would be made as the coils were damaged and unusable, counsel for Empire replied to Dass that Empire would collect any damaged coils at their expense and replace them or deduct them from the purchase price. They were never given that opportunity.

[11] In their letter of December 14, 2022, Dass’s counsel made no reference to any coils being sold for scrap. In fact, counsel for Dass took the position that Dass had more than fully paid for what was accepted and usable and a refund was due to Dass for overpayment.

[12] Empire was never given the opportunity to verify what was usable or what level of alleged damages existed in the subject coils.

[13] It is significant that Novjot Dass on behalf of Dass, in an email thread commencing October 21, 2022, replied to an email sent by someone else from Dass that there was a concern about white rust and light oil on some of the coils. However, a further email was sent shortly after that email of concern to state that the previous email should be disregarded. There was no further communication by Dass to Empire that there was a concern about the subject

coils until after Dass unilaterally claimed the subject coils were damaged and unusable. The next communication from Dass to Empire was that they sold the damaged coils for scrap.

[14] In the evidence that was before Justice Goodman, Empire stated that the Purchase Order (“PO”) sent between Empire and Dass specifically stated that White Rust and Light Oil would be accepted. However, Preet Dass filed an affidavit stating that the PO that referred to was not the PO that was relied on. She produced another PO that was signed by her that had no accepting of White Rust and Light Oil.

[15] She stated in her affidavit that Dass had no use for such tainted coils and would not accept them. This is contradicted in evidence submitted, after the inspections started, wherein pictures clearly showed coils with both White Rust and Light oil in the Dass warehouse.

[16] It is with the above noted background that the two preservation and inspection orders were granted by Justice Goodman. Counsel for both Empire and Dass accepted that Justice Goodman expressed shock that Dass would take it upon themselves to declare approximately 102 coils unusable and then claim they were sold for scrap. It is difficult to imagine that anyone would not be shocked by such conduct.

The New Evidence Subsequent to Order # 1 of January 19, 2023

[17] The Order of Justice Goodman of January 19, 2023 was not taken out until March 16, 2023. Justice Goodman, in his endorsement of January 19, 2023, stated that this motion came before him as an urgent matter and he endorsed: “for brief oral reasons” provided to the parties, there will be an interim preservation order under Rule 45 of the *Rules of Civil Procedure*, R.R. O. 1990, Reg. 194. In addition, he ordered, under Rule 32, inspections to take place on terms. Justice Goodman then directed the parties to draft an order and send it to his attention for his signature. It was the parties who drafted the terms of the inspection.

[18] The parties could not agree on the wording of the Order and they attended before Justice Goodman on March 16 to settle the Order. Justice Goodman did not make any findings of fact. However, he granted the preservation order against Dass with respect to the coils that were set out in a schedule to the Order. That schedule was thereafter referred to as the Subject Coils that consisted of 102 coils.

[19] It is clear from the evidence and the wording of the Order, the spirit and scheme of the order was to allow Empire to attend at Dass and inspect

coils in order to determine what subject coils remained in Dass's possession and that Dass was to preserve those coils.

[20] Empire claimed that Dass immediately breached Order #1 by not allowing Empire's representative, Mr. Murlyan, to attend the premises in order to look for the subject coils. Instead, the Dass representative only allowed the Empire representative to view 3 or 4 very damaged coils that they represented were the Empire coils and then escorted the Empire representative out of their premises. After reviewing the security videos contained in Dass' evidence, I find that Dass did not allow Mr Murlyan to attempt to locate any other Empire coils. I agree that Dass did breach Order #1.

[21] A further alleged breach of Order #1 allegedly occurred on March 11, 2023. Preet Dass also attached a link to a security video dated March 11, 2023. It shows a parking area of the Dass facility where representatives of Empire and two police officers were attempting to get access to the Dass facility pursuant to the inspection order of Justice Goodman. There were two further links provided in the affidavit of Preet Dass that show the Empire representatives enter the facility and eventually a confrontation happens between the Dass representatives and the Empire representatives. There are

heated words exchanged before the Empire representatives had to leave the Dass facility.

[22] As a result of Empire alleging that Dass was obstructing the inspection order of Justice Goodman, an Anton Pillar Order was granted by Justice Goodman. Dass responded to the allegations and the matter came back before Justice Goodman on April 20, 2023.

[23] Justice Goodman, once again granted a preservation and inspection order with terms to be drafted by counsel. He did not make findings of fact and it was Dass' counsel, Mr. Sherkin, who submitted on this motion that the April 20, 2023 Order was essentially a consent order.

[24] I find that the April 20, 2023 Order was also an order that was intended to allow for further inspections at specified times that would allow a search and potential identification of any of the subject coils to be located and identified on Dass property.

[25] The Order contained certain clauses that are also relevant to my determination. The Order provided at paragraph 3:

3. The purpose of this inspection is to allow the parties to obtain evidence with respect to whether the Disputed Steel

Coils were delivered by the Applicant to the Respondent as alleged by the Applicant.

[26] Paragraph 4 provided:

4. The Respondents hereby agree that if a Court ultimately determines that any of the Disputed Steel Coils were delivered to the Applicant by the Respondent, the Respondent shall:

A) not challenge that such Disputed Coils were sufficient to be fit for the purposes intended and had no defects.

[27] There has been no determination by any court as contemplated in Paragraph 4 as set out above.

[28] Paragraph 5 reads:

5. On June 15, 2023, the Respondent shall no longer be under an obligation to preserve the Disputed Steel Coils (the Release Date)

[29] The Release date as set out in paragraph 5 has come and gone.

[30] This motion before me claims that, since the Order of April 20, 2023, there has been new evidence that could not have reasonably been before the court prior to April 20, 2023.

[31] Empire states that the following amounts to new evidence:

The most important new evidence is that the test results on the Disputed Coils have come in and they were part of both the expert report of Empire and of Dass with respect to their opinion as to the presence of Empire Coils

at Dass. The Expert reports and the cross examination of the Experts has also taken place and is now before the court.

[32] I find that the whole scheme of the preservation and inspection orders of Justice Goodman was to arrive at the point in the evidence that we are at presently. To allow for the opportunity that any disputed coils be preserved and to allow a court to make a determination as to whether the Disputed Coils are Empire coils. I repeat that no such determination has been made to date. The parties have been on, what I characterize as, a treacherous winding road of deception and concealment that I find has been perpetrated by Dass. That road started with the unilateral declaration of most of the coils being damaged and unusable. It escalated from Dass wanting a refund, to Dass allegedly selling many of the coils for scrap. It proceeded to a lack of compliance with the letter and the spirit of Justice Goodman's Order #1. With such a backdrop, this matter had to be rushed into court on a number of occasions.

[33] I find that some of the evidence represented as new evidence must be considered new evidence and is material to the same issues of the identification of Empire Coils on Dass facilities and the need to preserve those coils.

[34] The evidence of Robert Johnston must be looked at as part of the foundation that I see this new evidence.

[35] Mr. Johnston was the operations manager at Dass. His evidence from the Disputed Coils was that personnel at Dass removed and discarded all identifying materials after Justice Goodman's January 19, 2023 Order. His evidence was a description of a clandestine event by which Dass personnel removed the identifying tags on the coils and placed them in cube vans. He then witnessed the tags being taken from the cube vans and discarded.

[36] This evidence is concerning and reveals the lengths to which Dass was prepared to go to conceal the presence of the Empire Coils. I accept the evidence of Mr. Johnston. The only response to his evidence was that he is a disgruntled former employee. I do not accept that as a response that would lessen the weight of Mr. Johnston's evidence. He was not cross examined on this evidence. I accept that the original tags would have allowed easy access to the mill certificates that would identify the coils were removed and destroyed by Dass. I also find that the identifying mill certificates were never produced by Dass, even when their own expert asked for them. I draw an adverse inference as a result of this lack of production of these certificates against Dass. This is very significant given the evidence that the Tags and Mill Certificates must be kept in order for safety tracing in case there is an event where construction involving the steel failed and may have been a cause of that

failure. In such cases, it is very important to be able to trace the origin of the products used in the construction.

[37] This evidence must also be looked at in conjunction with the evidence that, what appeared to be homemade tags, were found on many coils in the Dass warehouse. Dass's own expert, Robert Sparling, stated in his cross examination, when shown the "homemade tags", that he had never seen tags like that and that all tags that he has seen either have bar codes or printed tags.

[38] The Dass expert, Sparling, also testified in his cross examination about what was referred to as "Coil #72" being the coil in which the Severstal tag was found. He stated that in all likelihood, it was a Severstal coil. When asked further that, based on his opinion that # 72 was likely a Severstal coil, if that would make it more likely that the other 101 coils were also Severstal coils, he responded that they are "exceptionally similar to coil #72". Sparling stated that the "chemistry is a bit different, but, yeah, they're really similar" which is what he concluded in his report.

[39] I find the evidence of Mr. Sparling very significant. He opined that the 102 coils are most likely Empire Coils. That evidence, taken together with Empire's expert report, strongly suggest that the 102 coils located at Dass are Empire's.

[40] There was much more evidence provided under the heading of new evidence that I characterize as evidence that was not available prior to Justice Goodman's April 20, 2023 Order. I also find that it could not have been reasonably available given the rapid pace Empire had to move in this litigation as a direct result of the conduct of Dass. I find that the evidence that Dass conducted themselves in a nefarious manner is strong and some of the new evidence is confirmatory of their continuation of such conduct.

[41] I find that there has been a strong *prima facie* case of fraud perpetrated by Dass. When a court finds such a strong case of fraud, it must intervene to protect the property that is the central focus of the case.

[42] I adopt the comments of *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, at paragraph 64:

[64] The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity. [...] it seems to me however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue.

[43] I find that, the evidence before me demonstrates a pattern of fraudulent conduct and there is a real risk that that conduct will continue. The pattern of fraudulent conduct on the part of Dass has been a continuum since the coils' commencement date of delivery from Empire to Dass. The fraudulent conduct

on the part of Dass was multiple and at a rapid pace. This was a sprint not a marathon. I find that Empire's attempts to get evidence of the fraudulent conduct needed to unfold in steps as even the preservation Orders starting on January 19, 2023 did not prevent the conduct. Dass obstructed the first inspection attempt and continued their concealment in a manner that shocks the court.

[44] There are too many examples of this conduct. However, I will only relate two of the many concerning events. After the April 20, 2023 Order of Justice Goodman, Empire examined the Vice President of Venture and GatSteel, Mr. Claudio Cortina. He testified that these companies are in the business of processing steel coils. He describes processing as converting the coils into sheets of smaller coils.

[45] In or about mid December 2023, his companies were provided a number of coils from Dass for processing. Three of the coils had to be shipped back to Dass. When he was shown three coils that were represented by Dass to be Empire Coils that were severely damaged to the point of almost being crushed, he stated that those coils could not have been shipped. Coils in that state did not have sufficient diameter to allow the lifting of the coils to be placed on the truck. Other evidence showed that these three coils were Empire Coils. On the

evidence before me, the only reasonable inference is that the coils were crushed at Dass and then represented as damaged coils from Empire.

[46] The other fraudulent conduct on the continuum was the representation by Dass that they sold for scrap many of the coils. They disclosed that some of the damaged coils sold for scrap were sold to a company referred to as BLG Group. After that disclosure, Empire made multiple efforts to determine the legitimacy of this claim. Dass was suggesting, without proof of the extent of the damage to the coils they received, that BLG would have purchased approximately \$2.2 million dollars worth of unusable steel.

[47] Empire established that BLG had been inactive for many years and did not have a GST or HST number. The address given was not a proper address. The phone number given was not assigned. Dass represented that a person named Torres was operator of this company. Dass did not provide any contact numbers for him, nor did they provide any evidence that he existed. The invoices that Dass provided disclosed coils that did not fit the dimensions of the Empire Coils.

[48] Another company name was provided by Dass as yet a further company that purchased the Suspect Coils. That company was stated to be World Metal Products (WWP) a CPR search of WWP showed that WWP was incorporated

in November 2022, in or around the time Dass stopped paying Empire. Only 20 coils purchased by WWP allegedly even matched the description of the 102 Empire Coils. WWP does not have a website, nor did it have any presence until the early part of 2023.

[49] The evidence that is before me is shocking. It represents the incredible lengths Dass has gone in order to conceal Empire coils and falsely claim that they were sold for scrap.

Should there be an Interim Injunction Order be granted at this stage.

The Law and Analysis

[50] This motion is a motion for an interim injunction. I do not see this as a request for an extension of the preservation order of Justice Goodman. The April 20, 2023 Order represented a preservation and inspection order that provided for a scheme to protect and inspect coils so that the parties could get evidence of what happened to the coils sold by Empire to Dass for \$4.5 million dollars. The fast-paced litigation became somewhat of a litigation hide and seek. The order of Justice Goodman contained a “release date” of June 15, 2023 for the vesting order. However, the hiding and the seeking continued as a result of the conduct of Dass. The court is now faced with new evidence that,

when taken together with all of the evidence of Dass fraud since mid December 2022, there must be intervention by the court as it is reasonable to infer that the fraudulent conduct will continue.

[51] The only substantive issue to be determined on this motion is whether Empire has satisfied the three-part test for entitlement to an interim injunction (*RJR MacDonald Inc., v. Canada (Attorney General)*), [1994] 1 S.C.R. 311:

- a) Is there a serious issue to be tried?
- b) Will Empire suffer irreparable harm if the injunction is not granted?
- c) In which party's favour does the balance of convenience rest?

Serious Issue to be tried.

[52] Counsel for Dass did not even make submissions on this issue. There is clearly a serious issue to be tried.

Irreparable harm

[53] Dass did not give Empire any opportunity to attend and inspect the alleged damaged coils before making a self proclamation that the coils had been sold for scrap and they were not paying approximately 3.6 million

dollars. The search for the truth yielded conduct on Dass's part that can only be described as egregious deception. If an injunction is not granted, there will be irreparable harm to Empire. Simply put, on the evidence before me, Dass cannot be trusted. There is good reason to believe fraudulent conduct on their part will continue and they will make every effort to complete their apparent plan to convert the 102 coils into cash and conceal the money received.

[54] I accept the very concerning evidence of Doug Thompson. He is an ex-employee of Dass who was recently terminated from Dass. He informed Empire that Dass operates through many different companies. Mr. Thompson provided a screen shot of the names of companies that he was paid from employment with Dass. I find that Dass has a complex corporate structure that will allow them to become judgment proof if Dass converts the coils. Given their past conduct, I find that the only protection that can be afforded for Empire is to grant an injunction that would prevent Dass from handling the 102 coils in a manner that would risk their depletion. These coils most likely would represent the only way Empire could realise on any judgment they obtain.

The Balance of Convenience

[55] I find that the balance of convenience rests with Empire. The subject coils must be preserved pending the trial of this matter. The conduct I have

found that Dass has embarked upon is egregious, and the court has no confidence that, if Dass retains the subject coils, they will not be depleted or dissipated by trial.

The following is my Order:

1) Dass is enjoined from handling the 102 coils shown on the schedule to the Empire expert report. They shall not, in any manner, remove, damage, dissipate, sell or transfer the subject coils.

2) Empire shall be allowed to transport the subject coils to their own facility. Such transporting of the coils shall take place on July 15, 2023.

3) Empire shall choose a transport company of their own choosing. The reasonable costs of this transport shall be paid by Dass no later than July 31, 2023.

4) Empire shall preserve the subject coils in a warehouse of their choosing until further order of this court.

5) The trial of this matter shall be expedited.

6) For oral reasons given, Dass shall pay the costs of this motion and the motions before Justice Goodman in the total amount of \$90,330.29 of fees disbursements and HST.

Justice R.J. Harper

Released: June 30, 2023

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- and -

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