

CITATION: Pappas v. Vacek, 2024 ONSC 898
COURT FILE NO.: CV-24-0025-00
DATE: 2024-02-09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: George Pappas v. Francis John Vacek
HEARD: February 8, 2024
BEFORE: Fitzpatrick J.
COUNSEL: *N. Wainwright*, for the Plaintiff, moving party
G. Marchak, for the Defendant, responding party

Endorsement on Motion

The Motion

[1] The plaintiff moves for an order for interim preservation of property. The property is a two-door hardtop design 1963 Pontiac Parisienne containing a 409/L80 V8 engine bearing car engine number T0108QB which is associated with Vehicle Permit Number NO489475 and Vehicle Identification Number 3784760394 (“the car”). The car is currently in Thunder Bay in the possession of defendant who lives in Thunder Bay.

[2] The plaintiff alleges that he purchased the car for \$30,000 at an auto show in Illinois in November 2023. He alleges that he put a \$100 deposit on the car, on the spot. The plaintiff alleges that the parties agreed to close the purchase by transferring the car to the plaintiff’s possession in Swift Current, Saskatchewan. Swift Current is roughly the mid-point between Thunder Bay, Ontario, and Langley, British Columbia, where the plaintiff resides. After returning to Thunder

Bay with the car, however, the defendant has apparently resiled from the alleged agreement to sell the car and now appears to be advertising it again for sale.

Position of the Parties

[3] The defendant responds to the motion by asking for an adjournment to allow him to file materials challenging the jurisdiction of the court to make any order. The defendant would rely on the place where the first instance sale was transacted as the *forum conveniens* for this matter. The defendant was not prepared to consent to any order to avoid being taken as having attorned to the jurisdiction of this court.

[4] The plaintiff was prepared to agree to an adjournment if it was on particular terms, including that this interim order be made without prejudice to the defendant's right to bring a motion to dismiss the entire proceeding for want of jurisdiction.

The Law

[5] Rule 45 of the *Rules of Civil Procedure* governs motions for the interim preservation of property. It is a discretionary remedy. Recently, the Court of Appeal for Ontario in the case of *BMW Canada Inc. v. Autoport Limited*, 2021 ONCA 42 [BMW], discussed the appropriate test for such motions and confirmed that the so called *Taribo* test (from the Divisional Court decision of Sachs J. in *Taribo Holdings Ltd v. Storage @ccess Technologies Inc.*, 27 C.P.C. (5th) 194, [2002] O.J. No. 3996 (Ont. S.C.) (*sub. nom. Taribo Holdings Ltd. v. Storage Access Technologies Inc.*)) is appropriate for a matter where a moving party seeks to preserve property it claims in the litigation. At paras. 42-43 of *BMW*, K.M. van Rensberg J.A. explained:

41 In some cases a r. 45.01 motion will seek to preserve the very property the plaintiff or applicant is pursuing in its litigation. In *Taribo*, for example, the litigation involved a dispute about shares that former employees of the respondent corporation had tendered in consideration for a reduction of their obligations under promissory notes. The shares were pledged and deposited with a third party. The moving parties' motion for an interim preservation order sought what was essentially a form of injunctive relief - to prevent the corporate respondent from having the shares released from deposit to it and then converting or cancelling the shares.

42 The motion judge in *Taribo* articulated and applied a three-part test requiring that: (1) the assets sought to be preserved constitute the very subject matter of the dispute; (2) there is a serious issue to be tried regarding the plaintiff's claim to that asset; and (3) the balance of convenience favours granting the relief sought by the applicant or moving party. She relied on two cases involving r. 45.02, which provides that 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: *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (S.C.); *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.). The *Taribo* test has been applied in other cases involving r. 45.01 where the moving party is seeking to preserve property that it seeks to recover in the litigation: see e.g., *Progressive Moulded Products Ltd. v. Great American Group*, 2007 CanLII 12205 (Ont. S.C.); *Meade v. Nelson Resources Limited* (2005), 14 B.L.R. (4th) 244 (Ont. S.C.).

[6] The decision of the Supreme Court of Canada of *Club Resorts Ltd. v. Van Breda*, 2012 S.C.C. 17, is the leading case concerning whether an Ontario court can properly assume jurisdiction over a matter, given the interrelationships among the matter, the parties, and Ontario. In a 2023 decision, *Gebien v. Apotex*, 2024 ONSC 4651, Perell J. at para. 182 eloquently summarized the holding in *Van Breda*, stating:

182 In *Club Resorts Ltd. v. Van Breda*, the Supreme Court of Canada developed an analytical framework to determine when a court has jurisdiction simpliciter by assumed jurisdiction. The analytical framework begins by identifying circumstances where a court may presumptively assume jurisdiction on the basis of a real and substantial connection with the litigation. The underlying idea to all presumptive factors is that there are some circumstances where there would be a relationship between the subject matter of the litigation and the forum where it would be reasonable to expect that the defendant attend to answer the claim made against him or her in that forum.

Disposition

[7] I am persuaded that the plaintiff's proposal for an interim order will secure the just, most expeditious and least expensive interim resolution of the matter as it exists before the court today. The defendant and the car are in Thunder Bay. They are within the jurisdiction of this Court today. I appreciate the defendant is not prepared to attend to the jurisdiction of this court. It seems to me on the *Van Breda* test, there appears to be a real and substantial connection of this court to the parties and matters in the litigation.

[8] The car is the subject of the dispute. There is a serious issue to be tried about the validity of the sale. The balance of convenience favours granting the interim relief sought by the plaintiff. I make this finding as the car appears to be unique and difficult for the plaintiff to obtain otherwise. The plaintiff seeks specific performance of the contract. The item is vintage and the ability of the defendant to deal with the car will not be prejudiced in the short term if the order is granted. In my view, interim preservation will not affect the market value of an item built in 1963. However, I accept that the plaintiff could be greatly prejudiced if the defendant sells the car to some third party pending resolution of the jurisdictional issue and responding to the motion. I also see it as just to have a term of the interim order provide that the plaintiff be required to pay in to court the funds he claims he agreed to pay for the car, however, this will not be an impediment to granting that the preservation order be effective immediately.

[9] I therefore grant the plaintiff's request for an interim, interim preservation order in respect of the car. Effective 4:00 p.m. Eastern Time February 8, 2024, the defendant Francis John Vacek shall not take any steps to sell, remove, dissipate, alienate, alter, transfer, assign, encumber, or similarly deal with the classic car in his possession; namely a two-door, hardtop design 1963 Pontiac Parisienne containing a 409/L80 V8 engine bearing car engine number T0108QB which is associated with Vehicle Permit Number NO489475 and Vehicle Identification Number 3784760394.

[10] This interim preservation order shall remain in place until at least March 22, 2024, at 5:00 p.m. Eastern Time.

[11] The defendant will be given until February 29, 2024, to serve any responding material to the plaintiff's motion including a Rule 21.01(3)(a) motion challenging this Court's jurisdiction to hear the matter. For clarity, this order is without prejudice to the right of the defendant to bring such a motion. The plaintiff will pay to the Accountant of the Ontario Superior Court of Justice the amount of \$29,900 on account of this action on or before March 7, 2024. This matter will return to the regular Northwest Regional Motions Court on March 21, 2024, at 10:00 a.m. for argument or to be spoken to if further terms can be agreed.

[12] I have prepared an order that reflects this endorsement that was issued and entered prior to the release of this endorsement. This was done as I saw the issuance of the order to be an urgent matter and there would be a slight delay in the release of this endorsement due to technical issues in our office.

[13] No costs for today's attendance.

"original signed by"
The Hon. Mr. Justice F.B. Fitzpatrick

Date: February 9, 2024

CITATION: Pappas v. Vacek, 2024 ONSC 898
COURT FILE NO.: CV-24-0025-00
DATE: 2024-02-09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: George Pappas
v.
Francis John Vacek

HEARD: February 8, 2024

BEFORE: Fitzpatrick J.

COUNSEL: *N. Wainwright*, for the Plaintiff,
moving party

G. Marchak, for the Defendant,
responding party

ENDORSEMENT ON MOTION

Fitzpatrick J.

DATE: February 9, 2024