CITATION: Amanat Investment Corp. v Ghazi - 2024 ONSC 7321
COURT FILE NO.: CV-24-1751
DATE: 2024-12-31

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Amanat Investment Corp, plaintiff/defendant by counterclaim, responding party

AND:

Mohammad Iqbal Ghazi and Abdul Rasheed, defendants/plaintiffs by counterclaim, moving parties

AND

Canadian Interest-Free Investment Corp., 12108593 Canada Inc., Maximize Realty Inc. Zanhib Development Inc., Nisar Ahmad Butt, Fozia Butt, and Muhammad Naeem Toheed, defendants by counterclaim, responding parties

BEFORE: Mr. Justice M.M. Rahman

COUNSEL: Muhammad Zafar, for the responding party, Amanat Investment Corp.

Tamur Shah, for the moving parties, Mohammad Ghazi and Abdul Rasheed

HEARD: Heard August 30, 2024

ENDORSEMENT

Introduction

[1] The defendants/plaintiffs by counterclaim (moving parties), bring this motion seeking a certificate of pending litigation (CPL) for two properties. The moving parties successfully obtained an interim *ex parte* order on June 10, 2024 preventing the sale or encumbering of the properties. As part of the interim order, the moving parties were required to bring a motion on notice returnable as a regular motion.

[2] The two properties are located at 7287 Dellaport Drive, Mississauga and 192-1055 Dundas Street East, Mississauga. The moving parties invested in these properties by entering into loan and share-purchase agreements with the with the defendants by counterclaim Canadian Interest-Free Investment Corp (CFIC) and 12108593 Canada Inc. The litigation started when the responding

party, Amanat Investment Corp., sued the moving parties for damages respecting a third investment property (4172 Tea Garden Circle). The responding party claimed that the moving parties breached an investment contract respecting that property causing the responding party to suffer damages. The moving parties launched a counterclaim alleging that the defendants by counterclaim, including the responding party, were engaged in a fraudulent scheme. As part of their counterclaim, the moving parties seek leave to issue a CPL on the Dellaport and Dundas properties.

[3] The responding party opposes the motion. In addition to alleging that the motion lacks merit, the responding party also takes issue with the evidentiary basis for the motion. The responding party says that the affidavit filed in support of the motion was deposed by a lawyer from the moving parties' lawyer's firm. The responding party also argued that there was no evidence supporting the moving parties' fraud allegations and that the motion should be dismissed.

[4] For the reasons that follow, the motion is dismissed. Even assuming that the moving parties have a reasonable claim to an interest in either or both of the properties, the equities do not favour granting leave to issue a CPL. There is nothing unique about the land and damages here would be a satisfactory remedy. The moving parties cannot use the CPL as a means of securing what is really a claim for damages.

Background

[5] As mentioned above, there are three properties at issue in this litigation. The moving parties seek a CPL against the second and third properties, listed below:

a. 4172 Tea Garden Lane: the moving parties were among six parties who loaned money to Amanat Investments to buy this property, renovate it, and then sell it. Amanat Investments launched the initial claim against the moving parties regarding this property.

b. 7287 Dellaport Drive: the moving parties were among nine people who loaned money to 12108593 Canada Inc. to buy this property, renovate it, and then sell it.

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The moving parties claim an interest in this property and want to register a CPL against it.

c. 192-1055 Dundas Street East: the moving party, Rasheed, and the moving party Ghazi's wife, Tarannum Rizvi, bought shares in a company called Canadian Interest-Free Investment Corp (CFIC), whose sole purpose was to buy this property. They bought these shares pursuant to a share purchase agreement. The company had 118 shares valued at $5,000 each. Mr. Rasheed bought seven shares, and Ms Rizvi bought 10 shares. Mr. Butt is listed as the sole director for CFIC.

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[6] As mentioned above, the litigation between the parties started when the responding party issued a claim against the moving parties for damages arising out of the parties' loan contract for the Tea Garden property. The moving parties then launched their counterclaim against the responding party (and other defendants by counterclaim). The counterclaim alleges that the responding party's directors, Nisar Butt and Muhammad Toheed (both of whom are named as defendants in the counterclaim), defrauded the moving parties in their real estate dealings.

[7] The moving parties claim to be unsophisticated investors who relied on Mr. Butt and Mr. Toheed's representations to invest in these ventures. The moving parties claim that the responding party and defendants by counterclaim "made false representations about the risks associated with lending funds to the corporate entities associated with Butt and Toheed, the status of the defendants by counterclaim's poor and declining financial position and generally the viability of the defendants by counterclaim's projects." The moving parties say that they relied on these false representations in deciding to lend money to the defendants. The moving parties also allege that the money that they loaned the defendants was not used according to the terms of the agreements but was misappropriated. The moving parties also claim that Mr. Butt told them that the Dundas property had been sold at a loss, yet they later discovered that it had not been sold at all. In oral submissions, counsel for the moving parties described the defendants as engaging in a "Ponzi scheme." He alleged that the defendants used the loaned money to pay off other investors or "maintain the illusion of profitability." He also alleged that the defendants hired their own family members as contractors to work on the house and provided the loaned money to them.

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[8] The moving parties seek $338,388.21 in damages for the money they claim to be owed under the various agreements. In addition to damages, the moving parties seek to have mortgages placed on the Dellaport and Dundas properties.

[9] I will first address the evidentiary record on this motion and the problems with the moving parties' record.

The evidentiary record on this motion

[10] Neither Mr. Rasheed nor Mr. Ghazi filed affidavits in support of their motion. Rather, a lawyer from the firm representing them in the litigation, Muraad Shah, swore an affidavit in support of the motion. The facts underlying the motion are contested. Although the parties agree that they entered into agreements respecting three different pieces of real property, they disagree in many respects about what happened between them regarding these agreements.

[11] During the motion hearing, Mr. Zafar took issue with the fact that the moving parties' lawyer, as opposed to the parties, swore the affidavit in support of the motion. Suffice to say, he did not accept the disputed facts set out in the lawyer's affidavit. I note also that the responding affidavit on the motion, sworn by Mr. Butt, also made clear that the responding party took issue with the hearsay contained in Mr. Shah's affidavit. I set out that paragraph in its entirety, exactly as it appears in Mr. Butt's affidavit, below:

> It is alarming situations that the Motion filed by the Defendants, Mohammad Iqbal Ghazi and Abdul Rasheed in main action and Plaintiffs in counterclaim, with supporting Affidavit of their Lawyer with wrong information, which is highly disgusting and against the legal procedure, which should be penalized for false statement under oath can be charged with perjury.

[12] Before dealing with the substance of the responding party's objection, I must comment on the language used above. This kind of inflammatory language is completely inappropriate. What is more troubling is that Mr. Zafar did not seem to understand that it was inappropriate because he proceeded to read it out during the motion hearing. As with most affidavits, I assume that Mr. Zafar or someone who works with him drafted it. And even if he did not draft it, he saw fit to include it in his materials. As I told Mr. Zafar during the hearing, this language is neither necessary nor appropriate and its inclusion in the motion record was unacceptable and unprofessional. If his client takes exception to the moving parties' reliance on hearsay, and disagrees with the affidavit's

assertions, then it is easy to simply say so. There is no need to use words like "disgusting" and "perjury." If counsel think that such extreme language helps their case, they can rest assured it does not.

[13] I will next consider the substance of the objection to the moving parties' reliance on hearsay.

[14] The *Rules of Civil Procedure* permit a party to rely on hearsay when filing affidavits in support of motions. Rule 39.01(4) makes clear that hearsay is permitted provided the source of the information is specified in the affidavit. For ease of reference, the provision is set out below:

> An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[15] Mr. Shah's affidavit is made up mostly of inadmissible hearsay. The affidavit contains the standard paragraph that appears at the beginning of many affidavits. It says that, as a partner at the law firm for the moving parties, he has "personal knowledge" of the matters in the affidavit. It also says that unless he says otherwise, the facts within his personal knowledge are true. Finally, the paragraph contains the statement that "[w]here it is indicated that information has been obtained from other sources, I verily believe those facts to be true." I set out the paragraph in its entirety, below:

> That I am a partner in the law firm Shah & Shah Lawyers, lawyers for the Defendants and Plaintiffs by Counterclaim, Mohammad Iqbal Ghazi ("Ghazi") and Adbul Rasheed ("Rasheed"). As such, I have personal knowledge of the matters hereinafter deposed to. Unless otherwise indicated, these facts are within my personal knowledge and are true. Where it is indicated that information has been obtained from other sources, I verily believe those facts to be true.

[16] Although Mr. Shah says that, by virtue of being the moving parties' lawyer, the information is within his personal knowledge, much of it clearly is not. Much of the evidence in the affidavit is clearly information that Mr. Shah has learned from someone else, likely his clients. The affidavit does not cite any source for much of the information contained in it that is material to the motion and the claim. There are what purport to be exhibits to the affidavit. Within the body of the affidavit, they are simply referred to in footnotes not as exhibits. These documents follow the affidavit after a page saying that all exhibits follow. The exhibits are not individually identified by

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the affiant or the commissioner. Even putting aside this formal requirement, the affiant does not explain where some of the key documents came from, and how *he* knows what they are. The portions of the affidavit that detail the various dealings and discussions between the moving parties and the defendants by counterclaim consist mostly of unsourced hearsay. For example, a significant aspect of the claim is that both moving parties were unsophisticated investors who, according to the counterclaim lacked "investment knowledge, education, and experience in construction projects and the purchase and sale of the residential and commercial real estate." It is unclear how Mr. Shah could attest to this fact. Similarly, a central allegation in the moving parties' claim is that they were told that the Dundas property had been sold. It is unclear how Mr. Shah would be aware of this. This essential fact is unsourced. Simply appending documents that Mr. Shah implies were sent to his clients is not enough, since it is what his clients were told and believed about these documents that is important. Only the moving parties would know what they had been told about the property, and whether they believed it had been sold.

[17] These are not simply problems of form. They are problems of substance. A motion requires supporting evidence. That evidence must comply with the *Rules*. On its own, the affidavit filed by the moving parties' does not contain enough admissible evidence to supports the relief that they request. The court cannot simply read their counterclaim, and an affidavit based almost entirely on unsourced hearsay, and grant relief.

[18] However, the moving parties' materials are not the only materials the court can look to on this motion. The responding party filed an affidavit from a qualified deponent – Mr. Butt. Mr. Butt's affidavit contains many of the same documents that are appended to Mr. Shah's affidavit. As I will explain, Mr. Butt's affidavit contains some evidence to support the moving parties' assertions about their dealings with Mr. Butt and Mr. Toheed.

[19] Mr. Butt's affidavit acknowledges the various agreements between the parties for the three properties. Mr. Butt's affidavit acknowledges that the moving parties have an interest in the Dellaport property, albeit a relatively small interest. As for the Dundas property, Mr. Butt says that the moving parties were given back their shares in the holding company that owns the property. Mr. Butt also disputes the moving parties' allegation that they were told the Dundas property has been sold. Attached as exhibits to his affidavit are the same documents attached to Mr. Shah's that

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purport to show the calculation of the payout to shareholders. On their face, these documents appear to suggest that the property had been sold. They refer to a “selling price” and calculate the loss incurred by the investors. Although this is not determinative, I am satisfied that these documents lend some support to the moving parties’ claim that Mr. Butt represented to them that the property had been sold.

[20] I will next consider whether, based on the evidentiary record, the court should grant leave to issue a CPL.

Should leave be granted to issue a CPL?

[21] Section 103 of the *Courts of Justice Act* gives the court authority to issue a CPL. In deciding whether to grant leave to issue a CPL, the court must apply a two-part test. First, the court must determine if the party seeking the CPL has demonstrated a triable claim to an interest in the subject property. Second, the court must consider whether the equities favour granting leave to issue the CPL.

[22] Because the responding party has acknowledged that the moving parties have an interest in the Dellaport property, the remaining issue is whether the moving parties have demonstrated an interest in the Dundas property. I begin by noting that Mr. Ghazi was not a party to the share purchase agreement for the Dundas property, since only his wife signed the agreement. There is no evidence that she did so on his behalf or otherwise as his agent. As I have already mentioned, there is no dispute that Mr. Rasheed no longer has an interest in the property. He claims that his share in the holding company was returned to him under false pretences, i.e. the property had been sold. As I have also already mentioned, I am satisfied that the evidence filed by the responding party on this motion lends some support for his assertion. It is not disputed that the holding company still owns the property and has not disposed of it. In the circumstances, if Mr. Rasheed’s claim of fraud succeeds, it is arguable that he can claim an interest in the property because he would not have had to sell his shares had the property not been sold. I am therefore satisfied that Mr. Rasheed has also established a triable claim to an interest in the Dundas property.

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[23] The next question is whether the equities favour granting leave to issue the CPL. In deciding whether the equities favour granting leave, a court will typically consider the following factors set out by this court in *572383 Ontario Inc. v. Dhunna*, [1987] O.J. No. 1073 (S.C.):

> (i) whether the plaintiff is a shell corporation,
>
> (ii) whether the land is unique,
>
> (iii) the intent of the parties in acquiring the land,
>
> (iv) whether there is an alternative claim for damages,
>
> (v) the ease or difficulty in calculating damages,
>
> (vi) whether damages would be a satisfactory remedy,
>
> (vii) the presence or absence of a willing purchaser, and
>
> (viii) the harm to each party from the CPL

[24] Considering the foregoing factors, I am not satisfied that the equities favour granting leave to issue the CPL. The properties at issue here were acquired as investments. The moving parties loaned money or bought shares with the intent of earning money on their investments. They make no claim for specific performance, nor do they claim that there is anything unique about the properties. If the moving parties are successful in establishing their counterclaim, there is no reason that damages would not be a satisfactory remedy. Indeed, the principal relief sought in their counterclaim is damages. That makes sense given that they were among several investors in the subject properties. I also note that the moving parties' share of the Dellaport property is relatively small compared to all of the other investors. As for the Dundas property, Mr. Rasheed's share was similarly relatively small – he held seven of 118 total shares in CFIC. Finally, it is also worth noting that none of the other investors in either venture appeared to support this motion.

[25] A CPL is meant to protect an interest in land in situations where other remedies would be ineffective; it is not meant to be a means of securing a claim for damages: *Rahbar v. Parvizi*, 2022 ONSC 1104, at para. 40. The situation here is similar to the one described by Petersen J. in *2254069 Ontario Inc. v. Kim*, 2017 ONSC 5003, at para. 38. In that case, Petersen J. found that the moving parties had established a triable claim to an interest in the land. She found that the moving party had a triable claim for an equitable mortgage. Petersen J. held that, though the moving party's

claim for an equitable mortgage would be rendered moot by the sale of the property, the applicant's claim for damages would not be affected. Petersen J. concluded (at paras. 37 and 38) that the equities did not favour granting leave to issue a CPL because the applicant had no use for the property, it was not unique, and damages would be both the adequate and preferrable remedy:

> The Applicant has made a claim for damages in the alternative. If the Application succeeds, damages would not only be adequate but would be a preferable remedy. Moreover, damages would be easily calculable (whether based on the commitment fee and interest payments agreed upon, or the administrative discharge fee for pre-payment of the principal).
>
> In my view, the most significant factor in this case is that the Applicant has no intended use for the properties. The Applicant has not asserted and there is no evidence that the properties are unique. This case is distinguishable from those where a party seeking a CPL has a claim to possession or ownership of land that is uniquely suited to a particular intended purpose. The Applicant entered into the mortgage Commitment purely as an economic transaction in order to earn a profit from the commitment fee and income from the interest rates agreed upon. The properties have no intrinsic value to the Applicant other than as security for the damages that the Applicant claims to have suffered. As Master Muir stated in *Nabizadeh v. Manifar,* 2015 ONSC 5503, at para.19: "A CPL is intended to protect an interest in land in situations where other remedies would be ineffective. It is not intended to be an instrument to secure a claim for damages." [Emphasis added]

[26] The equities here do not favour granting leave to issue a CPL for either property. The moving parties do not seek to take ownership of the properties. Their only interest in the properties is as an investment. And their respective interests in the properties are not for the entire property, but only a share of it. Their real motivation appears to be to secure their claim for damages. As the law makes clear, that is not an appropriate use of a CPL.

Conclusion and orders

[27] The motion is dismissed. This court's interim order of June 10, 2024, preventing the sale or encumbrance of the Dellaport and Dundas properties is set aside.

Costs

[28] The parties are encouraged to resolve the issue of costs. If they cannot agree on costs, the responding party may file its costs submissions by January 10, 2025. The moving parties may respond by January 21, 2025. There will be no reply submissions. The costs submissions shall not exceed two pages (double-spaced, one-inch margins), excluding the bill of costs and any offers to

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settle. If I have received no submissions within these time limits, I will assume that the parties have resolved the issue and will make no costs order.

Rahman, J.

Date: December 31, 2024

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