

COURT FILE NO.: 07-CV-334666PD2
DATE: 20070620

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: State Farm Insurance Company v. Jean Brijlal and Roy Brijlal
BEFORE: Justice D. Brown
COUNSEL: Pamela Pengelley, for the Plaintiff/Moving Party
Without notice to the defendants
DATE HEARD: June 20, 2007

2007 CanLII 23176 (ON S.C.)

ENDORSEMENT (corrected)

I. Introduction

[1] State Farm Insurance Company (“State Farm”) commenced this action on June 13, 2007 seeking (i) to set aside, as fraudulent, a conveyance on December 13, 2002 (the “Transfer”), by the defendant, Jean Brijlal, of her undivided one-half interest in a residential property located at 45 Irenemount Crescent, Markham, Ontario (the “Property”), to her husband, the defendant, Roy Brijlal, (ii) an order vesting the joint interest of Jean Brijlal in the Property into the name of the plaintiff; (iii) damages for depletion in value of the Property and breach of trust; (iv) a certificate of pending litigation against the Property; and, (v) a Mareva injunction against the defendants.

[2] State Farm moved *ex parte* before me for a Mareva injunction and leave to register a certificate of pending litigation against the Property.

II. Facts

[3] The following summary of facts is taken from the affidavit of Jim Smith, a Claims Section Manager of State Farm, filed in support of the motion.

[4] Jean Brijlal and her husband purchased the Property as joint tenants on July 19, 1989 for \$293,000.

[5] From 1999 until 2001 Jean Brijlal worked for State Farm. In July, 2001 she confessed to defrauding State Farm of thousands of dollars. On July 23, 2001 Jean Brijlal was charged with numerous counts of fraud and using forged documents. On October 31, 2002 she pleaded guilty to one count of fraud and one count of knowingly using a forged document. On January 23, 2003 she was sentenced to two years less a day on each count, to run concurrently. As a term of her conditional sentence, she was required to remain confined to her residence for the first twelve months of her sentence. The Information showed that Ms. Brijlal's address was that of the Property.

[6] The materials before me show that on December 13, 2002, two months after pleading guilty and a little over one month before her sentencing, Jean Brijlal conveyed her undivided one-half interest in the Property to her husband for nominal consideration, described on the land transfer tax affidavit as "natural love and affection".

[7] Less than two months later, on February 7, 2003, Roy Brijlal mortgaged the Property to The Toronto-Dominion Bank for \$251,250. This was only two weeks after his wife had been sentenced.

[8] A little over a year later, on June 23, 2004, Mr. Brijlal entered into a further mortgage with The Toronto-Dominion Bank in the amount of \$60,000.

[9] On July 28, 2006 State Farm commenced an action against Jean Brijlal for damages in the amount of \$122,284 in respect of the money fraudulently misappropriated by her, and related orders. Service of the Statement of Claim was effected on July 28, 2006 by leaving a copy of it with her sister, Chaundra Tackordai, and mailing a copy to her on August 9, 2006 pursuant to Rule 16.03(5).

[10] Mr. Rideout, a lawyer with State Farm's counsel, met with Jean Brijlal on August 25, 2006 at which time she advised that she would not be defending the action. Spence J. granted default judgment against Jean Brijlal in the amount of \$183,352.35 on December 15, 2006. State Farm's counsel wrote to Ms. Brijlal on January 11, 2007 enclosing a copy of the judgment and advising that State Farm might commence proceedings against her to set aside the Transfer of her interest in the Property. An affidavit of service attested that the letter and default judgment were left with Mr. Brijlal on January 13, 2007.

[11] In January and February of this year State Farm's counsel spoke to and met with Ms. Brijlal in an effort to negotiate payment of the default judgment, but no agreement was reached.

[12] The Brijlals retained counsel, Ms. Elsie Peters, who advised State Farm on March 29, 2007 that she was bringing a motion to set aside the default judgment. A motion was brought. Ms. Brijlal filed an affidavit dated May 3, 2007 in support of the motion. She deposed that since

she was not served with the Statement of Claim and since the default judgment “is wrongful”, the judgment should be set aside. It is worth noting that Ms. Brijlal did not depose that she had a good defence on the merits. Mr. Brijlal also swore an affidavit on May 3, 2007 in support of the motion in which he stated: “I can truthfully say that the respondent (Ms. Brijlal) was not served with the statement of claim neither were (sic) she served with a Judgment Notice”. Mr. Brijlal did not depose, one way or the other, whether a copy of the Statement of Claim had been left with him, as was set out in State Farm’s affidavit of service. He conceded receiving a letter on January 27, 2007, but contended it was misplaced and ended up behind some boxes in a closet.

[13] State Farm served notices of examination on Jean and Roy Brijlal for cross-examinations on May 23, 2007. They failed to attend. On June 4, 2007 Newbould J. ordered that the parties were to agree on a suitable date for the cross-examination of the Brijlals and that the motion to set aside the default judgment should not proceed until after the cross-examinations had taken place. Cross-examinations are now scheduled for next week on June 29, 2007.

[14] On May 29, 2007, a week after the Brijlals had failed to attend on their cross-examinations, Roy Brijlal granted a third mortgage to the Toronto Dominion Bank, this one in the amount of \$219,000. State Farm filed a parcel register for the Property dated June 7, 2007 which showed all three mortgages to The Toronto Dominion Bank as outstanding.

[15] On June 13, 2007 State Farm commenced this fraudulent conveyance action against Jean and Roy Brijlal.

III. Analysis

A. Mareva Injunction

[16] Ground J. succinctly summarized the requirements for granting a Mareva injunction in *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)* at para. 14:

The parties appear to agree that there is a two-prong test to be satisfied for the issuance of a Mareva injunction order. The first prong is that the moving party must satisfy the court that it has a strong *prima facie* case in the sense that it is "clearly right" in its allegations made against the responding party in the action or that it is "almost certain to succeed at trial" in respect of those allegations. The second prong of the test has been variously stated in decisions of Canadian courts commencing with *Chitel et al v. Rothbath et al* (1982), 39 O.R. (2d) 513 (Ont. C.A.) and *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.). In my view, the second prong of the test is most clearly stated by Estey, J. in *Aetna Financial, supra*, where he stated at pages 160 and 162:

"The overriding consideration qualifying the plaintiff to receive such an order as an exception to the Lister rule is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment".

...

"In summary, the Ontario Court of Appeal recognized Lister as the general rule, and Mareva as a "limited exception" to it, the exceptional injunction being available only where there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets "to avoid the possibility of a judgment ..."

(i) Strong *prima facie* case

[17] In this action State Farm seeks to set aside as fraudulent the Transfer on the basis that Jean Brijlal and her husband made the Transfer with the intention to defeat the realization of State Farm's debt and future judgment against her. In addition, State Farm pleaded that the defendants intentionally diminished the value of the Property in order to defeat State Farm's judgment against Jean Brijlal.

[18] To determine whether State Farm has demonstrated a strong *prima facie* case, I must consider (i) whether State Farm has a very strong defence to Ms. Brijlal's motion to set aside the default judgment, and (ii) whether it has a strong *prima facie* case of fraudulent conveyance.

[19] On the evidence presented before me, I have no doubt that State Farm has a strong defence to the motion to set aside default judgment. First, in his affidavit of May 3, 2007 Mr. Brijlal failed to deal with the issue of whether he received a copy of the Statement of Claim on behalf of his wife. That absence from his affidavit is conspicuous. Second, in light of her guilty plea to the criminal charges, I have great difficulty seeing how Ms. Brijlal will be able to persuade the Court to permit her to re-litigate the subject matter of her criminal convictions: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 (C.A.). If Ms. Brijlal cannot re-litigate the subject-matter of her criminal convictions, she would not have a defence on the merits: *Bank of Montreal v. Woldegabriel*, [2007] O.J. No. 1305 (S.C.J.)

[20] As to its claim for fraudulent conveyance, the evidence adduced by State Farm satisfies me that it has a strong *prima facie* case against the defendants. Section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 provides:

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

[21] The Transfer occurred only two months after Ms. Brijlal pleaded guilty and one month before she was sentenced. The timing of the Transaction very strongly suggests that Ms. Brijlal made it in order to transfer a major asset to her husband in advance of her sentencing. The Information revealed that in addition to receiving a sentence of two years less a day, a free

standing restitution order of \$134,000 was made against Ms. Brijlal. The evidence suggests that as a result of her conviction Ms. Brijlal appreciated that she might become indebted to State Farm, and she acted to protect her assets from her creditors.

(ii) Real risk of dissipation of assets

[22] The evidence also established, in my view, that State Farm has a strong *prima facie* case against the defendants that they are diminishing the net value of the Property in an effort to defeat State Farm's claim against Ms. Brijlal. Although the timing of the second mortgage dated June 23, 2004 was not closely linked to any step in the proceedings between State Farm and Ms. Brijlal, it demonstrated an effort by Mr. Brijlal to extract as much equity out of the Property as possible. The timing of the third mortgage, just one week after the defendants failed to attend on their cross-examinations, strongly suggests that the Brijlals are acting to encumber the Property as much as possible and convert the equity into liquid funds. By the time of their scheduled cross-examinations both Brijlals knew that State Farm intended to commence an action to set aside the Transfer as fraudulent. Accordingly, the third mortgage possesses some hallmarks of an effort by a creditor to protect its assets from execution.

[23] I recognize that in his May 3, 2007 affidavit Mr. Brijlal suggested that he had borrowed money to finance his children's education. Whether the three mortgages were entered into in order to secure tuition funds for their children remains for the defendants to demonstrate. If proved, that might explain the financing of the Property. In my view, however, the timing of the Transfer and the timing of the first and third mortgages strongly suggest an improper attempt by the Brijlals to defeat the claim, or potential claim, of State Farm.

(iii) Summary

[24] On the whole of the evidence before me, therefore, I am satisfied that State Farm has established that it has a strong *prima facie* case against the defendants and that a real risk exists that the defendants are dissipating or diminishing the value of their assets. In addition, the criminal conviction of Ms. Brijlal reveals that State Farm has a strong *prima facie* case of fraud against her, and a court may grant a Mareva injunction even in the absence of evidence that there is a risk that the defendant will dissipate its assets: see the references cited at paragraph 8 in *Voketel Inc. v. More*, [2006] O.J. No. 4781 (S.C.J.).

[25] State Farm is entitled to an order in the nature of a Mareva injunction against the defendants.

[26] I have reviewed the draft order proposed by State Farm. In my view it is reasonable in scope and contains provisions that would enable the defendants to move quickly to set aside this order. It strikes an appropriate balance between the interests of the plaintiff and those of the defendants in the circumstances of this case.

B. Certificate of Pending Litigation

[27] A certificate of pending litigation may issue where an interest in land is in question: *Courts of Justice Act*, R.S.O. 1990, c. C.43. In order to obtain a certificate of pending litigation the motions judge must determine that a triable issue has been raised as to whether the party registering the certificate of pending litigation has a reasonable claim to an interest in land: *G.P.I. Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (C.A.). In the present case, State Farm claims, in paragraph 1(c) of its Statement of Claim, “an order vesting the joint interest of Jean Brijlal in the Property into the name of” State Farm. An interest in land therefore is in question in this proceeding. Since I have concluded that State Farm has demonstrated a strong *prima facie* case in respect of its fraudulent conveyance case, the company has satisfied me that a triable issue has been raised that it has a reasonable claim to an interest in the Property.

[28] Accordingly, a certificate of pending litigation shall issue against the Property.

IV. Summary of Order

[29] For these reasons, I grant State Farm a Mareva injunction against the defendants and grant them leave to issue a certificate of pending litigation against the Property, in accordance with the terms of the draft order filed by State Farm, which I have signed.

[30] State Farm shall serve copies of its Motion Record, Factum, Book Authorities, my order and endorsement on Ms. Elsie Peters, counsel for the defendants, no later than 3 p.m. tomorrow, June 21, 2007, and on the defendants personally no later than 7 p.m. tomorrow, June 21, 2007. If the defendants are not at the Property tomorrow when service is attempted, State Farm shall leave one set of those documents at the Property and act promptly to serve the defendants personally on June 22, 2007.

D. Brown J.

DATE: June 20, 2007