

CITATION: Allen v. Gerstel, 2023 ONSC 107
COURT FILE NO.: CV-22-685878
DATE: 06012023

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
) *Neil Colville-Reeves*, for the Plaintiff
)
JUDITH ANN ALLEN)
Plaintiff)
)
)
– and –)
) *Daniel Fridmar*, for the Defendant Anthony
) Sinopoli c.o.b. as AFS Contracting and
) Design
ESTHER GERSTEL INC., HAROLD THE)
MORTGAGE CLOSER INC., ANTHONY)
SINOPOLI c.o.b. as AFS CONTRACTING)
AND DESIGN and KAMELE BARRETT)
Michael Suria, for the Defendant Esther
Gerstel Inc. and Harold the Mortgage Closer
Inc.
Defendants)
Niki Manwani, for the Defendant Kamele
Barrett
)
)
) **HEARD:** November 2, 2022

2023 ONSC 107 (CanLII)

REASONS FOR DECISION

P.T. SUGUNASIRI J.:

Overview

[1] Ms. Allen is a 76-year-old retired nurse who lived at 203 Johnston Avenue in Toronto. She is embroiled in two actions regarding renovations that took place at her home and loans taken to fund those renovations. In the first action, Ms. Allen claims that Esther Gerstel Inc. (“EGI”), Harold the Mortgage Closer Inc., Anthony Sinopoli carrying on business as AFS Contracting and Design (“AFS”), and Kamele Barrett, a lawyer, conspired to bamboozle a sick and elderly lady to enter into unconscionable loans to fund over-invoiced and sub-standard renovations. In the second action EGI, sued on its mortgages and obtained default judgment. The property has now been sold

and the net proceeds of sale were paid into court by order of Justice Black dated August 25, 2022. Justice Pollak also froze Sinopoli and AFS's assets pending the return of this motion with a permissible weekly allowance of \$15,000.

[2] Allen moves to set aside default judgment, continue Justice Pollak's Mareva order, obtain financial disclosure from Sinopoli and AFS, and continue to hold back the proceeds of sale pending resolution of the two actions. EGI wants to be paid its principal loan of \$750,000, at the very least, and AFS and Sinopoli resist their assets being frozen. AFS also claims that it has no further documents to disclose pending the review of documents returned to Sinopoli by the police.

[3] For the reasons that follow I set aside default judgment, extend Justice Black's order to hold the net proceeds in court until resolution of the actions, and extend Justice Pollak's order until such time that Sinopoli or AFS pay \$500,000 into court or post acceptable security.

The Mareva Injunction

The Test

[4] A Mareva injunction would preserve AFS and Sinopoli's assets to satisfy any judgment Allen may obtain. It is an extraordinary remedy that runs contrary to the general rule that there cannot be execution before judgment. To preserve AFS and Sinopoli's assets, Allen must establish that she has a strong *prima facie* case; that AFS and Sinopoli have assets in the jurisdiction that are at risk of being disposed of or put beyond her reach should she get judgment; that Allen will suffer irreparable harm if I do not grant to order; and the balance of convenience in granting the order favours Allen.¹ I accept Allen's further principle that judges should not become prisoners of a formula but should consider what is just and equitable in all the circumstances of the case.² In this case, Allen I would not impose the extraordinary remedy of a Mareva injunction if the record reveals nothing more than a regular construction deficiencies case. There must be something more that warrants the courts' intervention to give execution before judgment, considering the justice of the case. In my view, Allen has satisfied me this is potentially more than a construction deficiency case that warrants the court's intervention at this early stage.

Strong prima facie case of fraud

[5] Allen argues that the record demonstrates a strong *prima facie* case that she has been defrauded because the Plaintiff has demonstrated that she paid AFS \$1,225,000 between October 5, 2020 and April 4, 2022; that AFS's work was shoddy, incomplete and overpriced and that Sinopoli used the funds for his own benefit. She also argues that it is apparent on its face that a renovation of an 800 square foot bungalow would not cost in excess of \$1.2 million and is

¹ *HZC Capital v. Lee*, 2019 ONSC 4622 at paras. 45-6.

² *R. v. Fastrate*, (1995) CanLII 1527 (ONCA) at page 52.

supported by her evidence and photographs. Taken together, Allen suggests these facts amount to badges of fraud sufficient to make out a strong *prima facie* case.

[6] While I agree that the record supports the amount of money paid, there is little evidence from her on what renovations she asked for. According to Allen, she hired AFS and Sinopoli to renovate her home so that she could “age in place”. At the time her home was an 800 square foot bungalow. She found AFS in a local newspaper. By the end of 2020, Allen states that she had paid approximately \$100,000 to Sinopoli and AFS from her personal savings. Between October 5, 2020 and January 22, 2021, Allen paid either Sinopoli or AFS \$1,077,100 with funds derived from multiple mortgages. Allen does not describe in her affidavit what renovations she sought. She was in and out of hospital during the renovation and appears to have no documents to support her claim other than evidence of payment and three unsigned invoices. In response to a question on cross-examination of her affidavit, Ms. Allen provided an engineering report purporting to opine on the state of the renovations and the deficiencies. The Respondents object to admission of the report as expert testimony; because it is hearsay, untested, and not qualified by the court as a proper expert. I agree that the report is hearsay and not necessary for the purposes of this motion. The issue for this motion is not whether there were construction deficiencies. The question is whether there is a strong *prima facie* case fraud or conspiracy as pleaded by Allen. Otherwise, the case would proceed as any regular construction deficiency case, with documents disclosed at discovery and assets left in the hands of AFS and Sinopoli until such time as Allen proves her case and obtains judgment.

[7] Mr. Smith’s report is however helpful in contextualizing Allen’s claim that she was substantially overcharged for a simple renovation to an 800 square foot bungalow and that alone makes out a strong *prima facie* case for fraud. In the absence of evidence from Allen about the scope of the renovations, Mr. Smith’s photos and description of the work done are necessary and reliable for that limited purpose.

[8] What then was the scope of work described in Mr. Smith’s report? He identifies:

- a. A new garage with two windows;
- b. Removal of the existing porch and construction of a new unfinished cold cellar which includes a new wood frame roof and a new suspended concrete slab supporting new stairs to the front porch (these stairs were replaced by a ramp leading to the front door);
- c. Changes to the masonry of two of the exterior walls including board siding at the upper west wall;
- d. Landscaping alterations to the front yard;
- e. Significant alteration to the interior layout including removing most interior walls;
- f. New bathroom;
- g. Significant alteration to the kitchen layout;

- h. Plank board interior finish;
- i. Removal of ceiling from the main floor and conversion to cathedral ceilings;
- j. Construction of a rear sunroom addition with a wraparound deck which involved removing the back exterior wall;
- k. Plank board siding on the extension;
- l. Installation of several skylights;
- m. HVAC alterations;
- n. New tankless water heater;
- o. Framing alterations to the first-floor frame adjacent to the staircase and removal of interior finishes in the basement;
- p. New engineered wood beam; and
- q. Significant reconstruction of staircase between main floor and basement;

[9] In a nutshell, this was not a simple renovation to an 800 square foot bungalow. The question remains however whether there is anything about the billing that AFS did for the work that raises a strong *prima facie* case of fraud as Ms. Allen suggests.

[10] Mr. Sinopoli’s recollection of the work is more robust even though he states that it is largely on memory because he did not have the benefit of his records that had been confiscated by the police during their investigation of him. According to Sinopoli, in September or October of 2020 he received a call from Allen to discuss a renovation project to her outside stairs and porch. At that time Sinopoli quoted \$15,000 plus HST for the job with a 30% deposit although Allen paid the full \$15,000 rather than a deposit. He then explains that the project ballooned due to a scope creep and included a “supervision fee” payable to himself to coordinate the ballooning work.

[11] The best documentary evidence that speaks to the scope of work is an invoice prepared by Sinopoli dated December 3, 2020, where he sets out the scope of work and its cost of \$339,000. I set out below a comparison of Sinopoli’s description of the “scope creep” he describes in his affidavit that justified the project’s ultimate cost, and the work covered by the December 3, 2020, invoice:

Sinopoli Affidavit	December 3, 2020, invoice for \$339,000
Para. 7, Porch portion \$15,000	“New front porch 20x6 with full enclosure”

Para. 8 – demolition to existing interior \$100,000	“Gut House completely right to bare studs”
Para. 9 – remove existing walls, install new framing including a cathedral ceiling, rough in and enclose the interior and exterior of the property \$600,000	Gut house as noted above “Insulate all existing exterior walls and ceiling” “Ceiling to be converted to cathedral ceiling throughout the whole house” “All new electrical, with 45 potlights” “All new plumbing”
Para. 12, Shed construction \$14,000	Not included
Para 13, Barnboard upgrade to interior \$143,000	“All interior walls and cathedral ceiling completed with 12’ barnboard”
Para. 15, 450 sq ft solarium with three 12 ft sliding doors, a new roof covering and new flooring \$60,000	“Rear addition 16x16 with 3 12 food sliding doors on each side, to be completed with cathedral ceiling and barn board throughout with heated floors”
Para. 16(a) – demolish existing garage and apply for a permit for a single car garage \$60,000	“Existing garage block garage to be removed/torn down to be relocated in front of house”
Para. 16(b) – demolish and re-construct existing basement \$40,000	Not included
Para. 16(c) – landscaping services and materials to install flower boxes, new retaining wall in the back, sprinkler system and general landscaping \$30,000	Not included

Upgrade to front fascia to granite \$30,000	“Remove the brick in front of house and put natural stone...”
Para. 20 – renovate the driveway \$11,000	Not included
Para. 21 – increase the width of the porch and add an overhead roof	“Remove the brick in front of the house and put natural stone/redo whole roof”
Para. 22 Heated floors throughout and black porcelain tiles	“Heated floors throughout whole main floor” “Porcline tile 12x24 (850 sq ft) « Rear addition... with heated flooring” No mention of skylights
Para. 23 -fence construction \$5000	Not included
Para. 24 – Supervision fee \$140,000	Not included

[12] Based on a comparison of Sinopoli’s evidence and his December 3, 2020 invoice, it appears that there is a discrepancy not only in the timing of the requests alleged to have been made by Allen, but also the cost. It is clear that most of the alleged scope creep that Sinopoli uses to justify the cost of the project was captured by the December 3, 2020 invoice for \$339,000. He admits this in cross-examination. Further, the items not included in the invoice amount to approximately \$240,000 for a total of \$579,000, a project cost which is still well short of the approximately \$1.3 million Allen ultimately paid. Based on this preliminary analysis, I am satisfied that Allen has demonstrated a strong *prima facie* case of fraud. The delta is simply too large to go unnoticed. It is also unexplained. Notwithstanding Sinopoli’s evidence that his recollection of the work is by memory and only some of the scanned documents returned to him, he had sufficient information to provide the detail that he did in his affidavit. Sinopoli could have addressed the significant gap between the December 3, 2020 invoice and his recollection that might have countered an inference of fraud. I find that he has not done so.

Assets in Ontario, irreparable harm and risk of dissipation

[13] Allen submits that the various elements of the test for a Mareva injunction (strength of the case, irreparable harm, risk of dissipation and balance of convenience) are not watertight compartments and that the ultimate focus must always be on justice and equity. I agree, especially in this case when all of the information that might assist Allen in meeting her burden is in the hands of Sinopoli and AFS. There is no dispute that AFS has assets in the jurisdiction. Sinopoli and AFS argue that Allen has not provided any evidence of irreparable harm other than the possibility of not being able to collect from them and that she has lost everything. Allen attests that she is now in a senior's residence funded by her friend. I agree that there is no direct evidence from her of irreparable harm if I do not continue to freeze AFS and Sinopoli's assets. I accept however that a person with significant health issues losing access to money in the later years of life can be harm that is irreparable because there may be less time to use the money that she might otherwise have had but for the potential wrongdoing of the Defendants. In other words, the irreparable harm is lost opportunity. The evidence is clear in this case that Allen suffers from a number of health concerns and is now almost eighty. I consider irreparable harm through this lens.

[14] Allen further argues that proving *prima facie* fraud leads to the conclusion that Sinopoli is likely to dissipate his and AFS's assets if not preserved. The only evidence Allen presents is hearsay evidence from Detective Clark of some possible uses of Allen's payments to Sinopoli and AFS. I do not consider this hearsay evidence on a material issue. On the other hand Sinopoli attests that he has been in the business in the Greater Toronto Area for a long time, has assets in Ontario, and does not intend to dissipate them other than in the ordinary course of business. The difficulty in assessing this factor as a watertight compartment is the lack of financial records from these Defendants. This makes it difficult for Allen to prove likelihood of dissipation and makes Sinopoli's statement nothing more than a bald denial.

[15] To balance the interests of the parties and focusing on the justice and equity of the circumstances of this case, I conclude that an injunction should continue against Sinopoli and AFS but with some modification. I understand Sinopoli's submission that he did not contract with Allen; AFS did. However, because there were instances when money was paid to Sinopoli directly for work done on the project, I continue to apply the injunction against both Sinopoli and AFS. I extend paragraphs 1 and 2 of Justice Pollak's order September 14, 2022 order until such time that AFS or Sinopoli pays \$500,000 into court (which represents part of the difference between what Allen has paid and what the December 3, 2020 invoice reflects) to the credit of this action or posts some other form of security acceptable to Allen (like a bank Letter of Credit). This is without prejudice to Sinopoli and AFS returning to vary the order for a less intrusive remedy once they have access to all documents. Once Sinopoli and AFS pays these funds into court or provides security, counsel can write to my judicial assistant and provide a consent order to discharge the injunction. If Sinopoli simply chooses to keep the existing Mareva in place until he moves to vary it based on the financial information, there is no need to contact my assistant.

The proceeds of sale will remain in court

[16] This takes me to Allen's request to retain the proceeds of sale of her property in court pending final resolution of her action and allow her to defend EGI's mortgage action. I grant this relief. Rule 45.02 of the *Rules of Civil Procedure* provides that a court may order specific funds to

be held in court where there is a dispute about entitlement of a party to the fund. To obtain this order, Allen must:

- a. Demonstrate a right to a specific fund;
- b. Establish that there is a serious issue to be tried with respect to Allen's claim to that fund; and
- c. Establish that the balance of convenience favours her.³

[17] EGI advanced several loans to Allen to fund the renovation. Allen claims that EGI, Harold the Mortgage Closer Inc., Sinopoli and the lawyer Kamele Barrett conspired to unjustly induce her to overpay for the project using funding from EGI who charged oppressive interest rates. EGI registered four high interest loans against Allen's property totalling \$750,000. Since commencing the motions, Allen has now sold the property for \$1.4 million. The proceeds of sale were paid into court on an interim basis pending resolution of Allen's motions to hold the funds and challenge the mortgages. The proceeds should remain in court, and I permit Allen to challenge the mortgages.

[18] Over the course of the construction, Allen mortgaged her property five times. In her view, Sinopoli was the lynchpin to all of them in the sense that he found the mortgagees and in the case of EGI, conspired with them to defraud Allen. The first mortgagee is not a party to this action. EGI holds the remaining four. Allen attests that most of the mortgage funds were paid directly to Sinopoli at his behest and that he put Allen in touch with the first mortgagee and Harold Gerstel. Allen believes that Harold put her in touch with Ms. Barrett to be the lawyer on the proposed mortgage transactions. The first EGI mortgage was registered on March 2, 2021 for \$445,000. The next three were registered on March 18, 2021 for \$270,000, June 14, 2021 for \$225,000 and August 11, 2021 for \$180,000. During this time Allen states that she was advised by Barrett and was in and out of hospital and focusing on health issues. All four mortgage carry an interest rate of 22%. Allen states that she did not appreciate that the rates were high nor did Ms. Barrett properly explain the implications and details of the interest rates.

[19] Gerstel disagrees. He attests that Sinopoli found his name through his advertising and that after an initial introduction, Gerstel insisted that he deal directly with Allen and did so. He described the Allen mortgages as high risk which warranted the admittedly high interest rates. He vehemently denies any conspiracy to harm Allen. Sinopoli takes the same position. The Gerstels seek payment of at least the \$750,000 paid out to Ms. Allen by EGI. Allen claims that she only received \$573,760 of this amount as reflected in the bank statements that she provided. Gerstel's own evidence only shows \$600,000 advanced to Allen with \$147,900 of that amount paid directly to Sinopoli through AFS.

³ *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 at para. 18.

Allen has raised a serious issue to be tried

[20] The discrepancy in these numbers, the timing of the mortgages (namely four mortgages in 5 months), the overlapping health issues that Allen faced during this time raises a serious issue to be tried on the respective entitlement of the proceeds of sale from Allen's home. Further, simply inspecting the registration document of the first EGI mortgage reveals an interest adjustment date the pre-dates the signing of the mortgage itself. Gerstel also agreed on cross-examination that on at least three of the four mortgages, the return on investment was 50%. I agree with Allen that this raises a serious issue to be tried on the conscionability of the transactions.

The balance of convenience favours Allen

[21] I find that the balance of convenience favours holding the proceeds in court pending resolution of the action. Allen has lost her home and resides in a retirement residence. I accept for the purpose of this motion and on a balance of probabilities that the proceeds of sale from her home is a significant asset. EGI on the other hand, is a habitual lender and has not tendered any evidence that suggests any particular harm if the monies remaining in court.

Default Judgment in CV-22-678334 is set aside

[22] For similar reasons, I set aside default judgment in EGI's mortgage action and allow Allen to defend. EGI served Allen with its Statement of Claim on March 15, 2022 while she was in the hospital. Allen became aware of default judgment around August 19, 2022 and immediately took steps to act.

[23] Rule 19.08 of the *Rules of Civil Procedure* gives the court power to set aside default judgment. As stated by the late Master Muir in *Kaur v. Janeallam*,⁴ the test requires Allen to show that she acted promptly, she has a plausible excuse for the delay, she has an arguable case on the merits, and she will suffer more prejudice in not defending than EGI will suffer in allowing her to defend. The court is also to consider the impact of any order on the overall integrity of the administration of justice. Allen meets the test, which is a low bar. Her allegations of fraud and conspiracy are more than arguable as already discussed, she has explained the delay, she acted promptly, there is no prejudice to EGI that cannot be compensated by costs, and the administration of justice would be brought into disrepute if she were not permitted to defend the mortgage action.

⁴ 2019 ONSC 4249 at para. 3.

Courts favour matters being determined on their merits and not by procedural failures that are, as in this case, explained and understandable.

Financial disclosure

[24] Allen seeks financial disclosure from Sinopoli and AFS. I make no order. AFS has the obligation to disclose relevant documentation as part of its disclosure obligations in the litigation. I have left the Mareva in place or required Sinopoli/AFS to post security. If anything, documentary exchange sooner than later could benefit Sinopoli and AFS to show the flow of funds which could streamline or remove the Mareva order.

Other housekeeping

[25] Given the nature of the case and the age and health of the Allen, I encourage the parties to seek case management by a judge. The case management judge would be more agile in adjudicating any variations to the Mareva injunction. I might also suggest that the parties should move quickly to trial without dawdling at discovery. Through the now three court appearances, the parties should know the case they have to meet and have exchanged most of the documents except for those from Sinopoli and AFS. If the parties do not wish to have case management, I direct them to schedule a case conference with a judge as soon as possible to see what steps can be taken to expedite the actions. The parties shall confer and propose an expedited plan to the case conference judge or explain why the actions cannot be set down for trial or summary trial in short order.

Costs:

[26] Allen was successful on her motions except for the request for financial disclosure. I consider this a minor issue for costs purposes. Justice Pollak also reserved costs of the attendance before her to the motions judge. The parties have exchanged costs outlines. Allen had to address issues with two parties, warranting more time. However, her costs outline is more than double that of Sinopoli/AFS and Gerstel combined. There was also an offer to settle that may be relevant to costs. The parties shall make costs submissions as follows:

- A. Allen will serve, file and upload to caselines costs submissions of no more than three pages, double spaced attaching any offers to settle by January 12, 2023;
- B. Sinopoli and EGI shall respond in kind by January 27, 2023; and
- C. Allen may serve, file and upload a brief reply of no more than two-pages double spaced.

Justice P. Tamara Sugunasiri

Released: January 6, 2023

CITATION: Allen v. Gerstel, 2022 ONSC 107
COURT FILE NO.: CV-22-685878
DATE:05/01/2023

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JUDITH ANN ALLEN

Plaintiff

– and –

ESTHER GERSTEL INC., HAROLD THE
MORTGAGE CLOSER INC., ANTHONY SINOPOLI
c.o.b. as AFS CONTRACTING AND DESIGN and
KAMELE BARRETT

Defendants

REASONS FOR DECISION

Justice P. T. Sugunasiri

Released: January 6, 2023