

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GRISEL ALONSO, AS RECEIVER FOR ELM TREE INVESTMENT ADVISORS, LLC,
ELM TREE INVESTMENT FUND, LP, ELM TREE
'e' CONOMY FUND, LP, ELM TREE MOTION OPPORTUNITY, LP,
and ETOPIA, LP

Plaintiff

-and-

VICTOR ELMALEH and MERCEDES ELMALEH

Defendants

FACTUM OF THE DEFENDANTS
VICTOR ELMALEH and MERCEDES ELMALEH

PART I — OVERVIEW

1. The Motion for Summary Judgment is brought by the Plaintiff, Grisel Alonso (hereinafter referred to as "Alonso" or "Receiver"), seeking recognition and enforcement of the June 13, 2018 U.S. Final Judgment by Justice Altonaga in the Province of Ontario. The Defendants, Victor Elmaleh and Mercedes Elmaleh (hereinafter collectively referred to as the "Defendants"), were forced to abandon their defence in the United States District Court Southern District of Florida, Fort Lauderdale Division due to their inability to afford a U.S. Attorney. At the time, the Defendants consented to the Summary Judgment against them in the state of Florida. The United States District Judge Altonaga made a Final Judgment against the Defendants for \$1,980,224.30 USD and \$322,327.58 USD in pre-judgment interest accrued through May 11, 2018 on June 13,

2018. However, upon further investigation, it became apparent that the quantum stipulated in the Order may not have included the substantial payments that have been made directly to the investors for whom the Plaintiff is acting on behalf of.

PART II — THE FACTS

2. On January 16, 2015, Grisel Alonso was appointed as the Receiver for Elm Tree Investment Advisors, LLC ("ETIA"), Elm Tree Investment Fund, LP ("ETIF"), Elm Tree 'e' Conomy Fund, LP ("ETEF"), Elm Tree Motion Opportunity, LP ("ETMO") and Etopia LP (hereinafter collectively referred to as the "Receivership Entities").

Reference: Complaint, paras 2, 5 and 8, Plaintiff's Motion Record ("PMR"), Tab 2A, pp. 12.

3. On July 12, 2017, Alonso commenced a Complaint in the United States District Court Southern District of Florida, Fort Lauderdale Division against the Defendants as well as various companies. The Defendants are both Canadian citizens residing in the City of Thornhill, in the Province of Ontario. The defendant Victor Elmaleh is 74 years old and works as a bookkeeper. Mr. Elmaleh's wife and co-defendant, Mercedes Elmaleh, is a 70 year old housewife and has never carried on a business.

Reference: Complaint, paras 17 and 18, PMR, Tab 2A, pp. 14.
Affidavit of Victor Elmaleh sworn on November 23, 2018, para 4, Responding Affidavits of the Defendants, Victor Elmaleh and Mercedes Elmaleh ("RAD"), Tab 1.
Affidavit of Mercedes Elmaleh sworn on November 23, 2018, para 7, RAD, Tab 2.

4. In her Complaint, the Receiver alleged that the Defendants were involved in a fraudulent scheme and as a result of the misappropriation of approximately 2 million dollars in investor funds, they have unjustly benefited from it.

Reference: Complaint, paras 25 and 36, PMR, Tab 2A, pp. 15 and 17.

5. The elderly couple attempted to defend the action commenced against them while looking for an affordable U.S. Attorney to retain. However, the range of fees they were quoted

was excessive compared to the amount that they could afford with their limited finances. Ultimately, they were unable to retain anyone.

Reference: Receiver's Motion for Summary Judgment, PMR, Tab 2G, pp. 135-137.
Affidavit of Victor Elmaleh sworn on November 23, 2018, para 6, RAD, Tab 1.

6. On October 10, 2017, the Defendants filed a collective defence to the Receiver's Complaint. Unfortunately, Judge Altonaga struck the defence from the record stating that the Victor Elmaleh could not act on behalf of his spouse or the other corporate defendants.

Reference: Defendants' Answer and Affirmative Defences to Plaintiff's Complaint, PMR, Tab 2C, pp. 50.
Judge Altonaga's October 17, 2017 Order, PMR, Tab 2D, pp. 65.

7. By April 16, 2018 the Defendants notified the Plaintiff's counsel through email that both Victor and Mercedes will not be able to continue defending the action against them as it was too onerous. Subsequently, they felt forced to consent to the Summary Judgment launched by the Receiver.

Reference: Victor Elmaleh's Email to Plaintiff's Counsel, PMR, Tab 2F, pp. 84.
Affidavit of Victor Elmaleh sworn on November 23, 2018, para 6, RAD, Tab 1.

8. On the 13th of June 2018, a Final Judgment was entered against the Defendants. Judgment was entered for the total amount of \$1,980,224.30 USD and \$322,327.58 USD in pre-judgment interest accrued through May 11, 2018 on June 13, 2018.

Reference: Affidavit of Victor Elmaleh sworn on November 23, 2018, para 6, RAD, Tab 1.
Judge Altonaga's June 13, 2018 Final Judgment, para 2. PMR, Tab 2H, pp. 151-152.

9. After the Defendants' received the Final Judgment, they were able to review the matter with their son who was involved in the transactions relating to the Florida matters. It became apparent that the quantum stipulated in the Final Judgment did not include the substantial payments that have been made to the investors for whom the Plaintiff claimed has suffered.

Reference: Affidavit of Victor Elmaleh sworn on November 23, 2018, para 7, RAD, Tab 1.

10. After the incorrect quantum amount for damages was discovered by the Defendants, new evidence became available after the default judgment was ordered against the Defendants being receipts of the countless transfers paid directly to investors. The total sum of the transfers made to the multitude of investors amounts to \$1,976,578.84.

Reference: Affidavit of Victor Elmaleh sworn on November 23, 2018, para 7, RAD, Tab 1.

PART III—ISSUES

11. There are 3 major issues that arise from this Summary Judgment, which are:
- a. Whether the quantum stipulated in the Final Judgment made by Judge Altonaga is incorrect as to impose a defensible fraud claim against recognition and enforcement of the U.S. Judgment brought by the Plaintiff;
 - b. Whether enforcing the foreign judgment would be contrary to the fundamental public policy of Ontario; and,
 - c. Whether the Defendants can succeed under s. 3(g) of the *Reciprocal Enforcement of Judgments Act* against the recognition and enforcement of the U.S. Judgment?

PART IV—LAW & ANALYSIS

12. Section 3 of the *Reciprocal Enforcement of Judgments Act* states:

Conditions of registration

3 No judgment shall be ordered to be registered under this Act if it is shown to the registering court that,

- (a) the original court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, despite the fact that the judgment debtor was ordinarily resident or was carrying on business

within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
(d) the judgment was obtained by fraud; or
(e) an appeal is pending, or the judgment debtor is entitled and intends to appeal against the judgment; or
(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering court; or
(g) the judgment debtor would have a good defence if an action were brought on the original judgment.

Reference: *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c.R.5, s. 3.

13. Section 111 of the *Courts of Justice Act* states:

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance.

Reference: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 111.

14. The role of the court is not to assuage the whims of every judgment made in a foreign jurisdiction, but to recognize and enforce legitimate foreign claims. In order to do so, *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 provides the steps to achieve this.

15. The first issue that is initially considered is that of comity. This refers to the "recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Morguard established that the determination of the proper exercise of jurisdiction by a court depended upon two principles (relied on by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), at para. 34), the first being the need for "order and fairness". The second was the existence of a "real and substantial connection" (see also *Indyka v. Indyka* (1967), [1969] 1

A.C. 33 (U.K. H.L.); *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 (S.C.C.)). Modern ideas of order and fairness require that a court must have reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions.

Reference: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, para 31. *Beals v. Saldanha*, 2003 SCC 72, paras 21-22.

16. On the other hand,

[t]he "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

Reference: *Beals v. Saldanha*, 2003 SCC 72, para 32.

17. In the alternative that the foreign judgment passes the "real and substantial connection" test, the courts have established certain defences against the recognition and enforcement of foreign judgments which have been enumerated in s. 3 of the *Reciprocal Enforcement of Judgments Act*.

A. THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA HAS JURISDICTION OVER THE ACTION COMMENCED AGAINST VICTOR ELMALEH AND MERCEDES ELMALEH.

18. In order for a court to apply the recognition and enforcement of a foreign judgement, it must pass the "real and substantial connection test". The objective is to illustrate that a considerable connection exists between the action and the foreign court. Additionally, it takes into account the defendant's participation of that foreign jurisdiction. If one attorns to the jurisdiction in which the action is brought by entering a defence, subsequent procedural failures under that state do not invalidate that attornment.

Reference: *Beals v. Saldanha* at paras 32, 34.

19. In the present case, the defendants entered a defence for the action they were involved in. Victor Elmaleh's defence was stricken from the record as inconsistent with Florida law. Their failed attempts at defending the case has attorned them to the jurisdiction of the Florida court. Therefore "irrespective of the real and substantial connection analysis, the Florida court would [have] jurisdiction [...] for the [purpose] of enforcement in Ontario."

Reference: *Beals v. Saldanha* at para 34.

B. THE DEFENDANTS ARE NOT PRECLUDED FROM RAISING DEFENCES TO THE ENFORCEMENT OF JUDGE ALTONAGA'S JUDGMENT.

20. When a foreign judgment is found to have passed the "real and substantial connection" test, or if the defendant has attorned, the court will take into account the defences available for the domestic defendant in contesting the recognition of said judgment.

21. It is submitted to this Honourable Court that the Defendants meet the standard for the scope of defences required to estop the enforcement of a foreign judgment.

22. It is also submitted to this Honourable Court that the quantum stipulated in the Final Judgment made by Judge Altonaga amounts to a fraudulent claim against the enforcement of the U.S. Judgment brought by the Plaintiff. The issue of legal or equitable set-off acts as their defence against the original judgment making the Final Judgment unenforceable in the Province of Ontario.

23. It is also submitted to this Honourable Court that enforcement of the judgment would be contrary to the fundamental public policy of the Province of Ontario.

- i. **The Quantum Stipulated in the Order by Judge Altonaga is Inaccurate; The Legal Or Equitable Set Off Against the Amount Owed with Respect to Damages Was Never Brought to the Attention of the Learned Judge, Hence Amounting to Fraud.**

24. Under s. 3(d) of the *Reciprocal Enforcement of Judgments Act* of Ontario, it states that a judgment will not be enforced if "the judgment was obtained by fraud".

Reference: R.S.O. 1990, c.R.5

25. It should be noted that

the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment. [...] in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment.

Reference: *Beals v. Saldanha* at paras 51-52.

26. Under s. 111 of the *Courts of Justice Act*, the Defendants have the right of set off. During the course of this complaint, it was never raised by the Receiver that some investors were properly compensated for their investments. The Receiver has neglected to notify the court this critical component in the proceeding.

27. In addition, the Complaint filed by the Receiver made no mention of funds paid to investors prior to his receivership.

28. After the Final Judgment was ordered by Judge Altonaga, the Defendants realized that their right of set off was not considered and therefore, the total amount for damages against them was incorrect.

29. After the incorrect quantum amount for damages was discovered by the Defendants, new evidence became available after the default judgment was ordered against the Defendants that receipts of the countless transfers made to investors were available to the Defendants. The total sum of the transfers to the multitude of investors amounts to \$1,976,578.84.

30. The Defendants contend that the Receiver has not complied with his duties if he did not discover the discrepancies with regards to the payments of funds to the creditors/investors. It would have easily been identified during the necessary accounting of the Receiving Entities and would have rectified the Receiver's misunderstanding without having wasted the court's time and resources to adjudicate the within matter.

31. The Defendants also contend that the Receiver's Complaint has therefore misled the United States District Court Southern District of Florida by failing to mention the funds paid out to the creditors, thus amounting to fraud and precluding the enforcement of the Final Judgment by Altonaga.

ii. **Enforcing the Final Judgment Ordered by Judge Altonaga Would be Contrary to the Fundamental Public Policy of the Province of Ontario.**

32. "This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. [...] It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system."

Reference: *Beals v. Saldanha*, 2003 SCC 72, paras 71-72.

33. Although *Beals v. Saldanha* has stated that a large amount requested for damages would not be sufficient to refuse enforcement of a foreign judgment, the court did acknowledge that the record will need to indicate a discrepancy in order to "provide any basis for allowing a Canadian court to re-evaluate the amount of the award."

Reference: *Beals v. Saldanha*, 2003 SCC 72, para 76.

34. As it was previously stated, the Defendants' right of set off was never considered when the judge made her ultimate decision. It is imperative that this Honourable Court re-evaluates the amount of the award in order to put the Defendants and the Plaintiff to rights.

35. Enforcing the Final Judgment would be contrary to Ontario's public policy; the amount does not accurately reflect the actual damages owed. Forcing the Defendants to pay this exorbitant amount when the majority has already been paid back to the investors would be bordering on unconstitutional. It is in the best interest of the public as well as this court to step in and calculate the actual amount owed. The elderly couple tried to defend the action against them in the state of Florida but were unable to either retain a lawyer with their limited funds or keep up with the legal procedures required for the civil action.

36. This Honourable Court should not enforce the foreign judgment and should re-evaluate the award without forcing the elderly Defendants to pay an insurmountable amount that was solely based on inaccurate information.

iii. The Defendants have a Good Defence if an Action was brought on the Judgment Ordered by Judge Altonaga.

37. Under s. 3(g) of the *Reciprocal Enforcement of Judgments Act* of Ontario, it states that a judgment will not be enforced if "the judgment debtor would have a good defence if an action were brought on the original judgment".

Reference: R.S.O. 1990, c.R.5.

38. To set aside the registration and enforcement of a judgment under s. 3(g) of the Act, the Defendants need to show that they have a good defence if an action was brought on the Florida judgment.

What is contemplated by s. 3(6)(g) [the Manitoba equivalent to section 3(g) of our Act], is a good defence to the judgment and not to the original cause of action. A good defence

to the judgment would only go to the jurisdiction of the Alberta court. The foreign judgment, in the absence of fraud, breach of natural justice or public policy, is conclusive on the merits of the original cause of action.

Reference: *Dalla-Longa v. Olsen*, 2005 CanLII 21869 (ON SC), para 33.

39. Considering the submissions regarding the claim for fraud and the right of set off as well as the fact that it is contrary to Ontario's public policy, the Defendants can succeed in setting aside the registration of the Florida judgment under s. 3(g).

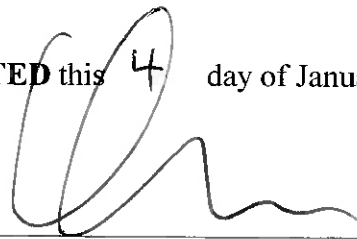
PART IV— ORDER REQUESTED

40. The Defendants seek an order stating that the Final Judgment made by Judge Altonaga is unenforceable in the Province of Ontario.

41. It is also respectfully submitted that the Plaintiff's motion for Summary Judgment ought to be dismissed with costs fixed and payable on a substantial indemnity basis.

42. In the alternative, the Defendants seek a trial of an issue to determine the amount, if any, owed to the Plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4 day of January, 2019.



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SCHEDULE “A”
LIST OF AUTHORITIES

1. *Beals v. Saldanha*, 2003 SCC 72
2. *Dalla-Longa v. Olsen*, 2005 CanLII 21869 (ON SC)
3. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5

CONDITIONS OF REGISTRATION

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Courts of Justice Act, R.S.O. 1990, c. C.43

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Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

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(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance.

**GRISSEL ALONSO, AS RECEIVER FOR ELM TREE
INVESTMENT ADVISORS, LLC, et al.**

Plaintiff

and

VICTOR ELMALEH and MERCEDES ELMALEH

Defendants

Court File No.:

CV-18-00602615-0000

Ontario
SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

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