CITATION: Alonso v. Elmaleh, 2019 ONSC 1988
COURT FILE NO.: CV-18-00602615-0000
DATE: 20190328

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND:

VICTOR ELMALEH AND MERCEDES ELMALEH

BEFORE: MR. JUSTICE CHALMERS

COUNSEL: *Mr. M. N. Ruby and Mr. M. Doak*, for the Plaintiffs

Mr. K. Page for the Defendants

HEARD: February 25, 2019

ENDORSEMENT

Overview

[1] The Plaintiff is seeking an order granting Summary Judgment for recognition and enforcement of the judgment of the United States District Court for the Southern District of Florida, granted June 13, 2018, against the Defendants, Victor Elmaleh and Mercedes Elmaleh.

The Facts

[2] On January 16, 2015, Mr. Grisel Alonso was appointed the receiver of Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP Elm Tree 'e'comony Fund, LP, Elm Tree Motion Opportunity, LP and Etopia, LP, (the "Receiver").

[3] On July 12, 2017, the Receiver filed a Complaint in the United States District Court against several Defendants, including Victor and Mercedes Elmaleh. (the "Complaint"). In the Complaint, it is alleged that Frederick Elm f/k/a Frederik Elmaleh and the Elm Tree companies engaged in a fraudulent securities "Ponzi" scheme that raised more than $17 million from more than 50 investors. It is alleged that Victor and Mercedes Elmaleh received money from the Ponzi scheme. It is also alleged that Victor and Mercedes are the parents of Frederick Elm.

[4] On July 22, 2017, Victor and Mercedes Elmaleh were properly served with the Complaint at their address at 59 McCabe Crescent, Thornhill, Ontario.

[5] Victor Elmaleh filed an Answer and Affirmative Defences to the Plaintiff's Complaint on behalf of the Defendants. Victor Elmaleh is not a lawyer and therefore he could not represent any Defendants other than himself. The defence was struck by order dated October 17, 2017.

[6] On October 24, 2017, Mercedes Elmaleh filed an Answer and Affirmative Defences to the Plaintiff's Complaint, on her own behalf.

[7] On April 16, 2018, Victor Elmaleh sent an e-mail to counsel for the Plaintiff in which he stated as follow:

> "...my wife and I are not actively defending this case. As mentioned previously, we cannot afford to defend this case. A letter was sent to the court and was also e-mailed to your office. We understand that not defending this case will result in judgment, but unfortunately, we do not have a choice. We do not really understand why you are attempting to change the proposed timeline. There is no reason to change the scheduling dates because we are consenting to judgment.
>
> In addition, you sent us a request for production of documents, but as previously mentioned, this is not necessary because you have all the documents and we are not actively defending this case. We are consenting to Summary Judgment."

[8] On May 1, 2018, the Plaintiff filed a motion for Summary Judgment seeking repayment of the sum of $1,980,224.30 USD, plus pre-judgment interest. The Plaintiff alleged that this was the sum that Victor and Mercedes Elmaleh received as part of the fraudulent scheme. The motion for Summary Judgment was served on Victor and Mercedes Elmaleh by electronic transmission.

[9] Victor and Mercedes Elmaleh did not attend the motion for Summary Judgment. The motion was granted and the United States District Court entered an Order for Final Judgment in the amount of $1,980,224.30 USD plus $2,735.43 USD in pre-judgment interest. The rate of post-judgment interest is 5.72% per annum.

[10] The Plaintiff brought this action in the Superior Court of Justice for Ontario, seeking recognition and enforcement of the Judgment of the United States District Court, dated June 17, 2018. Victor and Mercedes Elmaleh filed a Statement of Defence, dated September 4, 2018.

Analysis

[11] The test for recognizing and enforcing a foreign judgment is as follows:

(1) Did the foreign court have a real and substantial connection over the subject matter of the action or the Defendant?

(2) Is the judgment of the foreign court final and binding?

(3) Are there any applicable defences such as fraud, which would prevent the Ontario Court from recognizing the foreign judgment? (reference: *Dish v. Shava*, 2018 ONSC 2867 (SCJ).

[12] As stated by the Supreme Court of Canada in *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, the purpose of an action for the recognition and enforcement of a foreign judgment is not to re-litigate the matter, but to enforce an "already-adjudicated obligation". The recognition and enforcement of the order of the foreign court is based on the notion of comity. The notion of comity has been described as "deference and respect due by other states to the action of a state legitimately taken within its territory." (*Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at paragraph 51).

[13] A Defendant will be deemed to have accepted that a foreign court has a real and substantial connection over the subject matter of the action, or the Defendant, if the Defendant attorns to the jurisdiction of the foreign court. As stated in *Beals v. Saldanha,* 2003 SCC 72 at paragraph 37, a Defendant "is free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court."

[14] In this case, Victor and Mercedes Elmaleh attorned to the jurisdiction of the United States District Court. Both Victor and Mercedes Elmaleh filed separate Answers and Affirmative Defences to the action in the United States District Court. In addition, the Defendants did not take issue with the jurisdiction of the Court and consented to the summary judgment. I am satisfied that the first aspect of the test is satisfied.

[15] I also find that the second aspect of the test is satisfied in that the judgment of the District Court is final and binding. The time for the Defendants to appeal the judgment has passed.

[16] With respect to the third aspect of the test, the Defendants are taking the position that the Judgment in the United States District Court was obtained through fraud, because the court did not have the evidence regarding payments made to the Receiver.

[17] The Defendants take the position that there is new evidence. In their affidavits, sworn on November 23, 2018, they depose that they have been advised by their son, Fred Elmaleh that the Receiver failed to account for money paid to the original investors. Attached to their affidavits are copies of the various cheques totaling $1,976,578.84.

[18] The cheques are all dated 2014. The information from their son and the cheques ought to have been available at the time of the Summary Judgment in May, 2018. The Defendants have not provided any reason why the evidence regarding the monies received by the Plaintiff could not have been submitted in the United States District Court action.

[19] The onus is on the Defendants to demonstrate that the "new and material" facts could not have been discovered by the exercise of due diligence. As stated in *Beals v. Saldanha*:

> "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." (see paragraph 52).

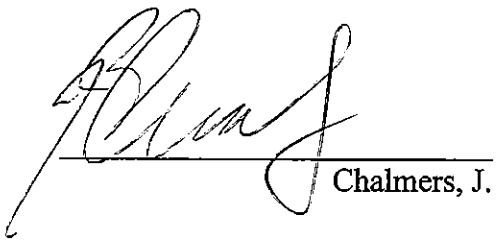
[20] I find that the Defendants failed to satisfy the onus to prove that the "new and material" evidence could not have been available at the time of the summary judgment motion in Florida.

[21] I therefore allow the Plaintiffs motion and grant summary judgment ordering that the Judgment of the United States District Court for the Southern District of Florida, Fort Lauderdale Division against Victor and Mercedes Elmaleh dated June 13, 2018 is recognized and enforceable in the Province of Ontario.

[22] The Judgment of the United States District Court, dated June 13, 2018 was in the amount of $2,302,551.88 USD. I therefore grant judgment in the amount of Canadian currency sufficient to purchase $2,302,551.88 USD at a bank in Ontario listed in Schedule I of the Bank Act (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the Plaintiff.

[23] I award pre-judgment interest on the amount set out in paragraph 22 above, at the rate of 1.5% per annum from the date of the final judgment of the United States District Court to the date of this order, in the amount of $92,735.43 USD. I therefore grant judgment in the amount of Canadian currency sufficient to purchase $92,735.43 USD at a bank in Ontario listed in Schedule I of the Bank Act (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the Plaintiff.

[24] Costs shall be payable to the Plaintiff fixed in the amount of $6,500.00 inclusive of counsel fee, HST, and disbursements.



Chalmers, J.

Date: March 28, 2019