

CITATION: Alonso v. Greenwald, 2019 ONSC 1989
COURT FILE NO.: CV-18-603049-00
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:

TED GREENWALD

BEFORE: MR. JUSTICE CHALMERS

COUNSEL: MR. MALCOLM N. RUBY AND MR. MATTHEW DOAK, for the Plaintiffs
MR. TED GREENWALD in Person

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 7, 2018, against the Defendant, Ted Greenwald.

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'Conomy Fund, LP, Elm Tree Motion Opportunity, LP, and Etopia, LP ("the Receiver").

[3] On November 15, 2016, the Receiver filed an Amended Complaint in the US District Court against a number of Defendants; one of whom was the Defendant, Ted Greenwald ("the Complaint"). In the Complaint it is alleged that Frederick Elm f/k/a/, Frederick Elmaleh and the Elm Tree companies, engaged in a fraudulent "Ponzi" scheme that raised more than \$17 million from more than 50 investors.

[4] With respect to Ted Greenwald, it is alleged that Elm Tree Motion Opportunity LP ("ETMO") transferred funds to him in the amount of \$110,000.00 USD. It is alleged that the transfers were made on July 1, 2014 in the amount of \$55,000.00 and on August 21, 2014 in the amount of \$55,000.00.

[5] On December 14, 2016, the Complaint was personally served on Mr. Greenwald at his home address, 7 Townsgate Drive, unit 1010, Thornhill, Ontario, as evidenced by the Affidavit of Service of Wesley Sutton, Process Server, sworn on December 14, 2016.

[6] Mr. Greenwald filed a motion for an extension of time to respond to the Complaint on January 9, 2017. The motion was granted by order dated January 10, 2017. Mr. Greenwald had until February 6, 2017 to respond to the Complaint.

[7] Mr. Greenwald retained counsel in Florida. On February 6, 2017, Mr. Greenwald's counsel filed a motion to dismiss the action on the basis of a lack of personal jurisdiction. The motion was denied by order of the court dated April 10, 2017.

[8] Counsel for Mr. Greenwald filed an Answer and Affirmative Defence on June 1, 2017. In the defence, Mr. Greenwald took the position that he did not receive the \$110,000.00 USD.

[9] On December 27, 2017, the Receiver filed a motion for Summary Judgment against Mr. Greenwald. No answer was received and on January 19, 2018 the US District Court ordered Mr. Greenwald to show cause as to why Summary Judgment should not be granted no later than February 2, 2018. There was no response filed and Summary Judgment was granted on February 12, 2018. Pursuant to the Judgment, the matter was referred to a Damages Hearing.

[10] Mr. Greenwald personally attended at the Damages Hearing on March 27, 2018. He submitted to the Court that he did not receive any wire transfers from Fred Elamheh in connection with the Ponzi scheme. The court rejected his evidence and ordered Summary Judgment against him in the amount of \$110,000.00. USD.

[11] Although the court ordered Summary Judgment against Mr. Greenwald, he was advised by the court that he could hire a lawyer to bring a motion to set aside the judgment against him.

[12] On April 4, 2018, the US District Court issued an order granting a 30-day extension to allow Mr. Greenwald to file a motion for the Court to reconsider the Summary Judgment. The order specifically provided that failure on the part of Mr. Greenwald to file a motion to reconsider would likely result in a recommendation that the court enter final judgment.

[13] The Order dated April 4, 2018 was served on Mr. Greenwald by registered mail at his municipal address 7 Townsgate Drive, Unit 216, Thornhill, Ontario. Service was effective April 18, 2018.

[14] Mr. Greenwald did not respond and did not proceed with a reconsideration of the Summary Judgment. On May 17, 2015, over 50 days after the damages hearing, the US Magistrate Judge entered a report recommending that Summary Judgment be entered against Mr. Greenwald in the amount of \$110,000 USD plus pre-judgment interest. A copy of the judgment was mailed to Mr. Greenwald.

[15] The Plaintiff moves for Summary Judgment for recognition and enforcement in Ontario of the judgment of the United States District Court dated June 7, 2018.

[16] Mr. Greenwald opposes the Plaintiff's motion. It is his position that the US judgment was obtained fraudulently and deceitfully and therefore it ought not to be recognized and enforced in Ontario.

[17] On this motion, Mr. Greenwald put forward similar evidence to what was before the US District Court judge on the Damages Hearing on March 27, 2018.

[18] On this motion, Mr. Greenwald submitted an affidavit sworn on January 7, 2019, in which he deposed that he had entered into a partnership with Fred Elmaleh (Cube Investments International Inc.) to purchase a 4-plex property in Fort Lauderdale in June 2005. He paid \$100,000.00 USD to Fred Elmaleh for a 50% share of the property. Over a year after the 4-plex was purchased, Fred Elmaleh advised that he had sold two of the units and sent \$50,000 USD to Greenwald as his share of the proceeds. In 2014, Greenwald asked Fred Elmaleh to either produce proper documentation or buy out his share in the property. By e-mail sent May 14, 2014, Fred Elmaleh agreed to send \$55,000 USD as payout for Mr. Greenwald's share in the properties. There were two attempts to wire this sum but the first wire was rejected because it had been converted to Canadian currency before it was received by his bank and the second wire was rejected because it contained income information. On August 20, 2014 Mr. Greenwald received the sum of \$55,000.00 USD from Fred Elmaleh. This was deposited into Mr. Greenwald's account.

[19] On this motion Mr. Greenwald put into evidence an e-mail from the Help Desk at Global Operations and Banking Services TD Securities dated October 1, 2018. That e-mail provides that there was only one incoming wire transfer between the dates of June 28, 2014 and July 28, 2014. That wire transfer was returned for \$56,916.90 CDN. The reason provided for the return was stated as: Unable to Apply Income of Currency Received.

[20] Mr. Greenwald takes the position that this e-mail is evidence that he did not receive these funds. Mr. Greenwald also takes the position that this e-mail was not available at the time of the damages hearing in the US District Court on March 27, 2018.

Analysis

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

- (1) Did the foreign court have a real and substantial connection over either the subject matter and the action or the Defendant;
- (2) Is the judgment of this foreign jurisdiction final and binding;
- (3) There are no applicable defences such as fraud, which would prevent the Ontario Court from recognizing the foreign judgment (reference: *Dish v. Shava*, 2018 ONSC 2867 (OSCJ)).

[22] 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 a foreign court is based on the notion of comity. The notion of

comity has been described as the “deference and respect due by other states to the actions of a state legitimately taken within its territory” (reference: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42).

[23] A Defendant will be deemed to have accepted the jurisdiction of the foreign court if the Defendant attorns to the jurisdiction of the foreign court. As stated by the Supreme Court of Canada in *Beals v. Suldanha*, 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 to or agreeing to the jurisdiction of a foreign court.”

[24] In this case, Mr. Greenwald attorned to the jurisdiction of the US District Court. He initially challenged the jurisdiction of the US District Court. By order dated April 10, 2017, the Court ordered that it had jurisdiction over Greenwald. The Defendant retained counsel in Florida and counsel delivered an Answer and Affirmative Defence to the Complaint in the US District Court.

[25] I also find that the second aspect of the test is satisfied in that the judgment of the US District Court is final and binding. The time for the Defendant to have brought either a motion for reconsideration or appeal has passed.

[26] The Defendant is taking the position that the third aspect of the test has not been met because the judgment in the US District Court was obtained through fraud. In particular, it is his position that the Plaintiff was aware that he did not receive the funds from Fred Elmaleh pursuant to the Ponzi scheme. As evidence, he referred to the e-mail from the Global Operations and Banking Services, TD Securities dated October 1, 2018, which he says is proof that the funds were returned and not deposited into his account.

[27] Although the Defendant did not have the e-mail dated October 1, 2018 at the time of the Damages Hearing on March 27, 2018, he made the same arguments at that time. According to the transcript from the Damages Hearing, Mr. Greenwald produced some e-mails which he argued was evidence that he did not receive at least some of the monies (p. 14) He argued that all funds received were transferred back (p.16). He denied receiving either payment in the amount of \$55,000 USD (p.19).

[28] The court did not accept Mr. Greenwald’s submissions on the Damages Hearing that he had not received the funds. The Court ordered Summary Judgment against him in the amount of \$110,000.00 USD, plus prejudgment interest.

[29] Mr. Greenwald argues that he now has new evidence; the October 1, 2018 e-mail from Global Operations and Banking Services, TD Securities, which supports his position. He argues that the e-mail dated October 1, 2018 is evidence that was not available at the time of the Damages Hearing.

[30] It is not clear as to why this evidence could not have been obtained before the Damages Hearing on March 27, 2018. Although the Defendant argued that he had tried to get this information sooner, there is no explanation for why it was not received before the Damages Hearing. The e-mail refers to transactions which occurred several years before, between June 28, 2014 and July 28, 2014.

[31] The onus is on the Defendant to establish that the new evidence 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.”

[32] I find that Mr. Greenwald has failed to satisfy the onus of proving that the e-mail sent October 1, 2018 could not have been obtained before the Damages Hearing on March 27, 2018.

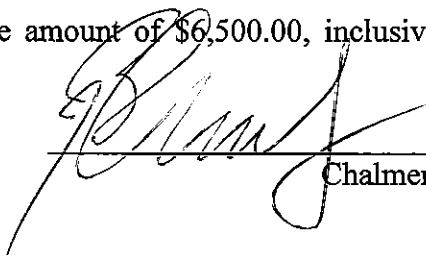
[33] I conclude that the Defendant has failed to establish that the judgment was obtained through fraud or deceit. As stated above, the purpose of the recognition and enforcement action is not to re-litigate the matter. The issue of whether the Defendant received the funds was litigated in the US District Court, and the Defendant had the opportunity at that time to advance any arguments. Based on the transcripts from the Damages Hearing, Mr. Greenwald made the same arguments in the U.S. District Court which arguments were rejected.

[34] I therefore allow the Plaintiff's 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 Greenwald*; Case No. 16-CV-62603, dated June 7, 2018, shall be recognized and enforceable in the Province of Ontario.

[35] The Judgment of the U.S. District Court was in the amount of \$110,000.00 USD. I order that the Defendant shall pay to the Plaintiff the amount of Canadian currency sufficient to purchase \$110,000.00 USD at a bank in Ontario listed in Schedule 1 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.

[36] The Judgment of the U.S. District Court provided that the Defendant was required to pay pre-judgment interest on \$110,000.00 USD. The Plaintiff is seeking pre-judgment interest in the amount of \$899.59 USD. I am satisfied that this is a reasonable amount for prejudgment interest. I order that the Defendant shall pay to the Plaintiff the amount of Canadian currency sufficient to purchase \$899.59 USD at a bank in Ontario listed in Schedule 1 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.

[37] 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