

KEEPING CURRENT

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Execution before judgment rejected in claim arising from aborted transaction (*Leanne Homes Limited v. Singh*)

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In Ontario, it may take several months to years before a plaintiff obtains judgment against a defendant in the civil courts, even in a straightforward debt claim. Understandably, plaintiffs may wish to take steps to secure payment in the interim so that they won't be left with a hollow victory whenever judgment is eventually obtained. Such efforts may be thwarted, however, by the general rule against a plaintiff obtaining "execution before judgment".

In *Leanne Homes Limited v. Singh*, [2024 ONSC 6634 \(CanLII\)](#), the plaintiff builder sued three defendants for damages following their failure to complete a transaction to purchase a property in Shelburne, Ontario. The three defendants had agreed to buy the property for \$1,182,990 and paid a deposit of \$170,000. On the closing date of January 18, 2024, the defendants failed to complete the transaction.

The plaintiff issued a statement of claim in January 2024. Two of the three

defendants absconded, and the plaintiff was successful in obtaining a Mareva injunction against them by showing evidence that they were depleting equity in their properties with a view to defeating the plaintiff's ability to recover damages. A "Mareva injunction" is a specific type of injunction that requires evidence of a risk of the defendant's assets being removed out of the jurisdiction or otherwise disposed so that the plaintiff would be unable to satisfy any judgment. The injunction is intended to freeze the defendant's assets until judgment is obtained.

In a separate claim, the plaintiff also moved to tie up a property owned by the remaining defendant, in Mississauga, Ontario. The plaintiff attempted to paint him with the same brush as the absconding defendants and argued that it would suffer irreparable harm if the injunction were not granted.

In response, the defendant argued that the plaintiff had not mitigate its losses

since the property in Shelburne was not listed for sale and the plaintiff had a claim to the \$170,000 deposit. The defendant did not deny that he tried to sell his Mississauga property.

In the motion judge's view, the only issue to be determined on the motion was whether the plaintiff had satisfied the test for an interim injunction as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994 CanLII 117 \(SCC\)](#), at pp. 348-349:

- a) Is there a serious issue to be tried;
- b) Will the applicant suffer irreparable harm if the injunction is not granted; and
- c) Where does the balance of convenience lie?

There is generally a low threshold for a party to show a "serious issue to be tried". In the circumstances, the plaintiff met this threshold with a strong *prima facie* case for breach of contract.

However, the plaintiff failed to meet the test for showing irreparable harm. The plaintiff argued that any judgment obtained would be hollow if the defendant dissipated his assets along with the absconding defendants. The motion judge noted, however, that there was no evidence before the court quantifying what the damages might be or whether they would even exceed the \$170,000 deposit. There was no evidence filed for the motion of any steps taken to sell the Shelburne Property. This was insufficient to establish irreparable harm.

The motion judge refused to provide plaintiff's counsel with an opportunity to submit a further affidavit outlining the plaintiff's efforts to mitigate its damages in order to address the evidentiary deficiency. While noting that it was not a summary judgment motion, the plaintiff nevertheless had an obligation as the moving party to put their best foot forward, particularly

when seeking to prohibit another party from performing a particular act.


The motion judge distinguished cases, such as in *Christian-Philip v. Rajalingam*, [2020 ONSC 1925](#), where there was evidence of dissipation of assets but no evidence that the defendants had the means to satisfy any judgment obtained by the plaintiff. In *Christian-Philip*, the court was satisfied that the plaintiffs would suffer irreparable harm if they obtained judgment and the defendants' assets were removed or dissipated.

In the case at hand, conversely, the plaintiff had a claim to the \$170,000 deposit from which to recoup potential losses.

Lastly, on the issue of the balance of convenience, the motion judge concluded that the defendant would suffer the greater harm as the plaintiff sought to stop him from dealing with one of his primary assets.

The motion for an injunction was therefore [dismissed](#).

Of note, since the plaintiff could not meet the general criteria for injunctive relief under the *RJR-MacDonald* test the court did not consider the additional factors required for a Mareva injunction. It is unclear whether, had plaintiff filed sufficient evidence to quantify damages, it could have also met that test, which requires evidence of a risk of the defendant's assets being removed out of the jurisdiction or otherwise disposed so that the plaintiff will be unable to satisfy any judgment. The plaintiff will now have to proceed to seek judgment in the ordinary course, whether by way of summary judgment or trial. The decision shows the difficulties that plaintiffs in civil claims may face when seeking an interim order to freeze assets. Without evidence of damages that cannot be recovered or other substantial risk that a defendant will dissipate their assets, plaintiffs



have few options but to try and obtain judgment as quickly as they can.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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