

Court File Number: CV-15-11187-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

KHASHAYAR KHAVARI and MOHAMMAD MAHDI TAJBAKHS

Plaintiffs/ Defendants by Counterclaim

AND

SAM MIZRAHI AND OTHERS

Defendants/Plaintiffs by Counterclaim

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Nadia Campion and John Carlo Mastrangelo for Mizrahi Parties		
Nina Perfetto for 8891303 Canada Inc. and Coco International Inc.		
Jessica Zagar and Casey Chisick for Constantine Enterprises Inc.		
Fraser Mackinnon Blair for CERIECO Canada Corp.		
Michael Round for Interested lender		
Jordan Goldblatt and Michael Darcy for Plaintiffs / Defendants by Counterclaim		

- Order Direction for Registrar (**No formal order need be taken out**)
 Above action transferred to the Commercial List at Toronto (**No formal order need be taken out**)

- Adjourned to: _____
 Time Table approved (as follows): _____
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Hearing Date: April 28, 2021

ENDORSEMENT

Introduction

- [1] There are three motions before me which were directed to be heard together.
- [2] The first motion is brought by the Defendants Sam Mizrahi and Mizrahi Inc. (the “Mizrahi Parties”) requiring the Plaintiffs and the Plaintiff by Counterclaim, Mahmoud Reza Khavari, to pay security for the costs of their respective actions in the amount of \$1,000,000 pursuant to rule 56.01(1) of the *Rules of Civil Procedure*.
- [3] The second motion is made by the Plaintiffs for an order requiring certain of the Defendants to produce financial documents described in the notice of motion consisting of “QuickBooks” accounting records and bank statements (the “Requested Documents”).
- [4] The third motion is a cross-motion brought by the Mizrahi Parties for an order dividing the production of the Requested Documents pursuant to rule 30.04(8) of the *Rules of Civil Procedure*.
- [5] For the following reasons (i) the motion for security for costs is dismissed, (ii) the motion for production of the requested documents is granted, and (iii) the motion for divided discovery is dismissed.

Motion for security for costs

- [6] The Mizrahi Parties move for an order for security for cost under Rule 56.01(1)(e) which provides:
- The court, on a motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that ... there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.
- [7] In deciding whether or not to order security for costs, the court must apply a two-step inquiry. The first step requires the moving party to show that it appears that the factor it relies on as the basis for the motion (one of the six subheadings under the Rule) exists. The moving party is not

required to establish with certainty that this is the case - only that it appears to be. Once it has done that, the moving party has a *prima facie* right to an order for security for costs. This right, however, can be displaced during the second stage of the inquiry.

- [8] Once the moving party has satisfied its onus at the first stage of the inquiry, the onus shifts to the responding party. In the second stage, the court must make such order “as is just”. In arriving at the appropriate order, the court must inquire into all factors that have a bearing on the justice of the case, including the merits of the case. The end result could be an order that no security is required, notwithstanding that the moving party cleared the first hurdle. At the second stage, the court is required “to step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront”. See *Shuter v. Toronto Dominion Bank*, 2007 CarswellOnt 5732 (Master), at paras. 60-65; *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, at para. 22.
- [9] On a motion for security for costs, the court is not required to embark on the same analysis as it would engage in for purposes of a motion for summary judgment. The analysis is primarily on the pleadings with recourse to evidence filed on the motion, and in appropriate cases, to selective references to excerpts of the examinations for discovery where available. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. See *Coastline Corp. v. Canaccord Capital Corp.*, 2009 CarswellOnt 2312, at para. 7(vi) and (vii).
- [10] At the first stage of the inquiry, the Mizrahi Parties rely on the following evidence in support of their submission that it appears that there is good reason to believe that the Plaintiffs have insufficient assets in Ontario to pay the costs of the Mizrahi Parties:
- a. Mr. Khavari, through a corporation, is a partner in a real estate development project on Broadview Avenue in Toronto in respect of which the Plaintiffs personally guaranteed two mortgages securing the principal amounts of \$6.6 million. In July 2020, a receiver of the properties in this project was appointed by the court.
 - b. Mr. Tajbakhsh is the principal of certain limited partnerships formed for the purpose of acquiring interests in real estate development projects in the Greater Toronto area. In November 2018, certain limited partners (described by the Mizrahi Parties as “TriDelta”) applied for an order for production of financial records of the partners in these developments of which Mr. Tajbakhsh is a principal. The partners refused to produce these documents. TriDelta demanded return of their investment and redemption of partnership units which was refused. In May 2019, the court ordered Mr. Tajbakhsh’s entities to disclose financial records sought by TriDelta. An appeal to the Court of Appeal in May 2020 was unsuccessful and a costs order remains outstanding. In these proceedings, a motion was brought against Mr. Tajbakhsh for contempt of court on the basis of allegations that he had not complied with a court order. According to the Mizrahi Parties, the documents were then produced, and the contempt motion was dismissed without costs.
 - c. A home owned by a member of Mr. Tajbakhsh’s family (which the Mizrahi Parties describe as Mr. Tajbakhsh’s family residence) was sold in March 2020 for \$6 million. On completion of the sale, the encumbrances consisting of a \$5.4 million mortgage and a \$154,000

judgment were deleted from title. The documents in respect of this property that are appended as exhibits to the affidavit of a law clerk with the law firm of counsel for the Mizrahi Parties appear to show that the property was owned by 2328884 Ontario Ltd. whose President is Mandana Shavarini, a Plaintiff by counterclaim.

- [11] The Mizrahi Parties submit that (i) the evidence that a receiver has been appointed over the Broadview property in which an investment company owned by Mr. Khavari has an interest, and (ii) the Plaintiffs personally guaranteed two mortgages on this property securing \$6.5 million supports their submission that it appears that there is good reason to believe that the Plaintiffs have insufficient assets in Ontario to satisfy a costs order in this action. The mortgages are first and second mortgages. If the Broadview property is sold for more than \$6.5 million, the Plaintiffs will not be liable under their personal guarantees. If this property is sold for less than \$6.5 million, the plaintiffs may be liable under their personal guarantees, but the amount of their exposure cannot be known. There is no evidence before me concerning the value of the Broadview property. The extent of the Plaintiffs' exposure on their personal guarantees, if any, cannot be determined on this record.
- [12] The Mizrahi Parties submit that the fact that a contempt motion was needed before Mr. Tajbakhsh complied with an order to produce financial documents in relation to investments made by entities of which he is the principal support their contention that there is good reason to believe he lacks sufficient assets in Ontario to satisfy a costs award. The Mizrahi Parties contend that this is so because if he has assets of value in Ontario, including through these investment entities, there would be no reason for him not to produce the financial documents. They rely, in part, of the Notice of Motion of the moving parties on the contempt motion which includes an assertion that Mr. Tajbakhsh did not take his obligations under the production order seriously and flouted his legal obligation to provide disclosure of financial information of entities of which he is the principal.
- [13] The Notice of Motion is not evidence of the truth of statements made in it. Even so, the evidence that financial documents of entities of which Mr. Tajbakhsh is a principal were produced only after a contempt motion was brought against him does not fairly support the conclusion that there is good reason to believe that Mr. Tajbakhsh, himself, does not have sufficient assets to satisfy a costs order. The evidence in respect of the contempt motion tells me very little about the existence or value of the assets of Mr. Tajbakhsh in Ontario.
- [14] The evidence in relation to the sale of a family residence resulting in net proceeds of sale of approximately \$500,000 to the owner (not either of the Plaintiffs) does not support a reasonable belief that the Plaintiffs lack sufficient assets in Ontario to satisfy a costs order. If I am to infer that Mr. Tajbakhsh has control over the net proceeds of sale, this would lead to the conclusion that he has assets of at least \$500,000 with which to satisfy a costs order. This evidence tells me nothing about the existence or values of other assets of the Plaintiffs in Ontario.
- [15] I conclude that the Mizrahi Parties have failed to meet their onus at the first stage of the inquiry to show that it appears that there is good reason to believe that the Plaintiffs have insufficient assets in Ontario to pay the costs of the Mizrahi Parties.
- [16] I briefly address the Mizrahi Parties' submissions in relation to the other part of the inquiry at the first stage.

- [17] The Mizrahi Parties also submit that they have discharged their onus of showing that it appears that there is good reason to believe that the Plaintiffs' claim to an interest in two projects at One Bloor West and 128 Hazelton Avenue in Toronto (the "Other Projects") is frivolous and vexatious. The Other Projects that are the subject of the Plaintiffs' action are in addition to claims in relation to projects at 133 Hazelton Avenue and 181 Davenport Road in Toronto (the "133/181 Projects"). The Mizrahi Parties do not contend that there is good reason to believe that the action, insofar as it involves claims in respect of the 133/181 Projects, is frivolous and vexatious.
- [18] The Plaintiffs do not accept that the Mizrahi Parties have shown that the claim in relation to the Other Projects is frivolous and vexatious. They contend that the evidence supports a contrary conclusion. Nevertheless, they submit that the Mizrahi Parties have failed to discharge their onus at the first stage of the inquiry because they do not allege that there is good reason to believe that the *action* is frivolous and vexatious; only that the claims in relation to the Additional Projects appear to be frivolous and vexatious. The Plaintiffs contend that this does not satisfy the requirement in Rule 56.01(e) that the moving party show that there is good reason to believe that "the action" is frivolous and vexatious.
- [19] I accept this submission. Although it is not necessary for me to reach a conclusion on this point, even if I were to conclude that there is good reason to believe that the claims in relation to the Other Projects are frivolous and vexatious, the Plaintiffs have made claims in relation to the 133/181 Projects that, admittedly, are not frivolous and vexatious, and they are entitled to proceed to trial on these claims.
- [20] The Mizrahi Parties have failed to discharge their onus at the first stage of the inquiry of showing that it appears that there is good reason to believe that the action against the Mizrahi Parties is frivolous and vexatious.
- [21] As a result of my conclusion that the Mizrahi parties' motion fails at the first stage of the inquiry, I do not need to decide whether the Plaintiffs have satisfied their onus at the second stage of the inquiry.

Plaintiffs' motion for production of documents and Mizrahi Parties' cross-motion for divided discovery

- [22] The Plaintiffs move for an order requiring the Mizrahi Parties to produce the Requested Documents which consist of QuickBooks accounting records and bank statements for Mizrahi Inc., Mizrahi Enterprises Inc., and the Other Projects. They contend that the Requested Documents are relevant to matters in issue in the action and, therefore, under Rule 30.02 of the *Rules of Civil Procedure*, these documents are required to be disclosed and produced.
- [23] The Mizrahi Parties produced financial documents in relation to the Other Projects for the period of time ending December 31, 2015 which, they say, covers the period when money could have been diverted from the 133/181 Projects and used to acquire the Other Projects, as alleged in paragraph 43 of the Amended Statement of Claim. They also produced similar financial documents for another project in Ottawa (in which the Plaintiffs also claim an interest) in which there are no equity partners.
- [24] The Mizrahi Parties submit that the Requested Documents contain sensitive and confidential financial information which belongs to the Mizrahi Parties as well as to third parties who are equity partners in and lenders to the Other Projects. The Mizrahi Parties contend that given the

evidence in the record in relation to misconduct of the Plaintiffs in this litigation, they cannot be trusted to comply with their obligations under Rule 30.1.01 by which all parties and their lawyers are deemed to undertake not to use evidence or information obtained through the documentary discovery process for any purposes other than those of the proceeding in which the evidence was obtained. The Mizrahi Parties submit that they have shown that there is a risk that confidential information in the Requested Documents will be disclosed and result in prejudice to them and to their equity partners in and lenders to the Other Projects.

[25] I heard submissions from counsel for several of the equity partners and lenders in respect of the Other Projects who support the positions taken by the Mizrahi Parties on this motion. These parties expressed concern that sensitive and confidential information was at risk of disclosure if it was ordered to be produced which would be prejudicial to them. Submissions were made that the Plaintiffs are active in the real estate development industry which is highly competitive and that disclosure of information in the Requested Documents to the Plaintiffs would give them an unfair competitive advantage over other participants in this industry and lenders who operate in this industry.

[26] The Mizrahi Parties accept that given the Plaintiffs' claim to an ownership interest in the Other Projects, the Requested Documents are relevant to remedies that would follow from an adjudication that the Plaintiffs have such an interest. They contend that the requested documents are not relevant to the determination of whether the Plaintiffs are entitled to the interest they claim, which is a threshold issue to be determined.

[27] The Mizrahi Parties move for an order pursuant to rule 30.04(8) which provides:

Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

[28] Such an order, if granted, would require that the Plaintiffs proceed to a hearing in respect of their claims to an ownership interest in the Other Projects without receiving the Requested Documents and, if they were held to have an interest in the Other Projects, there would then be a separate hearing to determine the remedies to which the plaintiffs are entitled as a result of their interest. The Requested Documents would be disclosed and produced for use in this hearing. If the Plaintiffs were unsuccessful in establishing an interest in the Other Projects, there would be no need for a hearing on issues of remedies and the Requested Documents would not need to be disclosed or produced.

[29] In *L.C.D.H. Audio Visual Ltd. v. I.S.T.S. Verbatim Inc.*, 1986 CarswellOnt 562, Henry J., at para. 18, set out the principles that he applied on a motion under rules 30.04(8) and 31.06(6) which provide for divided discovery. The principles identified by Henry J. include (i) there should generally be the fullest disclosure of information on all issues to be tried with a view to the speedy and efficient resolution of those issues at one time in one trial; (ii) postponement of production and discovery should be resorted to only in the clearest of cases; (iii) where the threshold issue is not clearly severable from the consequential issue, in the sense that information sought to be withheld is not relevant to determination of the threshold issue, leave to divide discoveries and productions

ought not to be granted since that could deprive the party of information necessary to establish or fortify its case; (iv) once the court concludes that the issues are severable, the test to be applied is serious prejudice to the moving party which is a finding of fact for the court to make; and (v) if the court finds that serious prejudice to the party will result, the court must then consider how to exercise its discretion in accordance with proper principles, on a case-by-case basis, according to all the circumstances.

- [30] In *Holbrook v. FX Displays Packaging Logistics Inc.*, 2017 ONSC 4756, at para. 23, Master McGraw held, citing the decision of Master Sproat in *Bilich v. Buck*, [2008] O.J. No. 2706, that serious prejudice requires evidence that production of the documents and information will disrupt the producing party's business relationship or harm their competitive position in the market. Master McGraw noted that in the context of documentary discovery generally, the disclosure of confidential and commercially sensitive information is not a valid basis for refusing to make required disclosure.
- [31] The Plaintiffs submit that the Requested Documents, although relevant to their remedies if they are successful in establishing an ownership interest in the Other Projects, are also relevant to proving their allegation that the partnership with Sam Mizrahi included the Other Projects by showing that money belonging to the 133/181 Projects was transferred to the Other Projects. They also submit that Requested Documents are relevant to causes of action pleaded for oppression, breach of contract, breach of fiduciary duties, unjust enrichment, and conversion, and damages that would follow from a finding of liability based on these causes of action. The Plaintiffs rely on evidence from the forensic account they retained, Mr. Carlucci, that he needs the requested documents to complete his analysis involving tracing any funds which may have flowed out of the 133/181 Projects to benefit the Other Projects. The Mizrahi Parties provided evidence from Sam Mizrahi that Mr. Carlucci has the documents that he needs to conduct the verification and provided explanations to show that money that was transferred to Mizrahi Inc., which acted as general contractor for all the projects, was properly used.
- [32] The Mizrahi Parties submit that production of the Requested Documents would seriously prejudice them, and their partners and lenders in respect of the Other Projects, because they have shown that the misconduct of the plaintiffs in this litigation is such that there is a significant risk that the Plaintiffs would breach their obligations under the deemed undertaking rule and misuse the Requested Documents or disclose them to third parties. Several of the interested parties share this concern.
- [33] The evidence upon which the Mizrahi Parties rely to justify this concern was given by Sam Mizrahi on this motion. This evidence contains statements in support of the allegations of misconduct against the Plaintiffs pleaded in the Defendants' Amended Statement of Defence and Counterclaim. In their Amended Reply and Defence to Counterclaim, the Plaintiffs deny the alleged misconduct. Khashayar Khavari swore an affidavit for use on these motions in which he denies the allegations of misconduct. There were no cross-examinations on the affidavits filed for use on these motions.
- [34] In this action, there has been extensive documentary production, including production of similarly sensitive and confidential documents, and there are no allegations of breaches of the deemed undertaking over the last four years during which documentary and oral discovery has been taking place. Additional protections were provided for by the Confidentiality Order of Hainey J., made

on consent, dated April 24, 2019, and there are no allegations that the Plaintiffs breached their obligations under this Order. The Plaintiffs are willing to abide by an order with similar protections in addition to the protections under rule 31.1.01. I am not satisfied that the Mizrahi Parties have shown that production of the Requested Documents would seriously prejudice them, or that the interested parties who made submissions would be seriously prejudiced, given the deemed undertaking rule and additional protections that can be ordered.

- [35] The Confidentiality Order, in paragraph 8, limits disclosure of the information covered by that order. Under this Order, the information shall not be disclosed to any of the parties to the action other than for the sole purpose of seeking or receiving legal advice and providing instructions to Designated Counsel (a defined term). In my view, the Confidentiality Order, if it were to apply to production of the Requested Documents, would address the risk of disclosure, and prejudice, that the Mizrahi Parties and the interested parties fear.
- [36] On the evidence before me, I am not satisfied that this is one of those cases where the threshold issue is clearly severable from the consequential issue in the sense that the Requested Documents are clearly not relevant to determination of the threshold issue. I am not satisfied that production of the Requested Documents would seriously prejudice the Mizrahi Parties or the interested parties, given the deemed undertaking rule and the additional protections that can be provided through a confidentiality order such as the one made by Hainey J. This is not one of the clearest of cases where it is proper to make an order for divided discovery which could result in separate hearings of the claims in respect of the Other Projects.
- [37] Given my conclusion with respect to the motion by the Mizrahi Parties under rule 34.04(8), it is not necessary for me to decide whether an order for divided discovery is precluded by rule 6.1.01 which provides that “[w]ith the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages”.

Disposition

- [38] For these reasons:
- a. The motion for security for costs by the Mizrahi Parties is dismissed.
 - b. The motion by the Plaintiffs for production of the Requested Documents is granted, provided that the documents to be produced are subject to the confidentiality terms in the Order of Hainey J. dated April 24, 2019.
 - c. The motion by the Mizrahi Parties for an order for divided discovery is dismissed.
- [39] I ask counsel to consult and provide me with an approved form of Order to be signed to give effect to this endorsement. If there is disagreement about the form of the Order, I may be spoken to.

[40] The parties are urged to resolve the question of costs. If they are unable to do so, they may make written submissions according to a timetable to be agreed upon and approved by me.

Cavanagh J.

November 26, 2021