Court File # CV-11-420316

ONTARIO SUPERIOR COURT OF JUSTICE

Lublin Financial Corporation

Plaintiff

and

Ester Ostfeld

Defendant

Court File # CV-09-377474

ONTARIO SUPERIOR COURT OF JUSTICE

Ronald Rutman

Plaintiff

and

Rabinowitz et al

Defendants

Motions For Production

REASONS FOR DECISION

The parties to the above actions have entered into the Speedy Justice Agreement (the agreement) to have their respective motions for production heard before me, which hearing was conducted on June 27th, 2014.

The requests for production are contained at #3.) of the agreement. In the first action (the Lublin action) the plaintiff seeks payment on a mortgage for $300,000.00 which it argues is valid and binding, being done to replace weak security for monies previously lent with stronger security on the defendant's condo. The defendant argues that the mortgage was a sham and only entered into to defeat a potential CRA claim which might have been realized on the Defendant's condo. The core issue in this action is the validity of the mortgage and whether or not it was entered into as a sham, in which case it would not be enforceable.

The second action (the Rutman action) is a claim for defamation, extortion, impersonation and other

related claims. The central issue in this action is whether there is evidence of this tortious conduct.

Rutman Action

Referring to the production sought in #3a) ii) of the Agreement, there was some agreement at the hearing which I will encapsulate herein as an order binding on the parties.

UNDERTAKINGS

I am ordering that the answers to undertakings given on the examination of Saul Rabinowitz on his discovery of December 20, 21 and March 23, 2012 be provided within 14 days of the date of these Reasons.

HTML FRAGMENTS

A problem which was identified at the hearing was that these fragments are in a form which is not decipherable and that a computer expert needs to attempt to reconstruct them in order to make them readable. Until that is done, it is not possible to determine whether any of them are privileged. Until that determination is made, it is premature to consider disclosure of these items.

Accordingly, I am ordering that the following procedure be followed respecting the HTML fragments (including fragments 2 and 4, 6, 14, 15, 17 and 22) taken from the examination of Moishe Bergman's computer and Saul Rabinowitz's computer.

The Defendant shall have one week in which to have its computer expert attempt to decipher these fragments.

i) if any of the fragments remain undecipherable, they shall be produced in their entirety;

ii) if any of the fragments are deciphered, then the defendant shall determine whether it is asserting privilege over any of them. That which is not privileged shall be produced.

iii) respecting any fragments over which privilege is asserted, the Defendant shall comply with the requirements of a Schedule B in an Affidavit of Documents (the Schedule B standard/requirements) and give reasons for asserting the privilege;

iii|) the plaintiff shall have leave to contest any assertions of privilege and can make its own submissions, written or oral or both, to so contest that designation, to which the defendant shall have a right to make its submissions, written, oral or both demonstrating why privilege should be upheld. The Arbitrator shall then examine the contested fragments and decide the questions of privilege.

Lublin Action

REPORTING LETTER FROM JOE FRIED TO RUTMAN

The defendant argues that there are many suspicious aspects to this mortgage transaction which support the notion that it is a sham and not enforceable. It bears repeating here that it is not my role to decide the issue to be tried, but rather only to decide whether production is warranted in the context of the arguments made and to determine the relevancy of that sought to be produced in conjunction with any rule of law such as privilege. In the defendant's submission, the presence or lack of a reporting letter will shed some evidentiary light on arguments regarding the validity of the mortgage.

The plaintiff argues that the reporting letter is privileged and in any event is not relevant.

In my view the presence or lack of such a reporting letter would be relevant to the issue of whether the mortgage was a sham.

Further, whether a reporting letter was sent or not is a fact, or possibly an act, and is not prima facie privileged. (Manes and Silver, Solicitor-Client Privilege in Canadian Law at pp 127, 133). There has never been "a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue." (Dodek, Solicitor-Client Privilege, p.120 quoting Susan Hosiery v Minister of National Revenue, (1969) 2 Ex.C.R. 27). While the fact of the existence of such is a letter is not in my view privileged, the content of the letter might be so.

Accordingly, I am ordering that the Plaintiff disclose whether or not such a reporting letter exists. The Plaintiff shall then, in accordance with the Schedule B standard, indicate whether it takes the position the letter is privileged. If not, it shall be disclosed. If privilege is asserted, as with the HTML fragments, the parties will have to make submissions if privilege is contested and the content will have to be examined by the arbitrator for a decision. I am mindful of the exception to privilege in the case of communications in furtherance of a fraud (Manes and Silver pp 83-84), or in the event of waiver (Ibid. pp 203-209).

FRIED'S ACCOUNT TO RUTMAN

The arguments advanced by the parties regarding an account for services rendered by Joe Fried to Rutman were essentially the same as those for the reporting letter. I believe that the existence of the account is relevant, and that same is a fact, not a privileged communication. "Courts have found that where statements of account only contain names and amounts, rather than indications of the services rendered, or opinions given, those statements of account will not be considered privileged." (Dodek, p 138). Generally, a solicitor's account has not been held to be privileged (Manes and Silver pp173-174) although the dockets may be and so of course may any notations on the account. The Supreme Court in the recent decision of Maranda did hold that in a criminal case, the gross amount of the account was privileged. It is not clear whether the case applies to civil cases in the same manner. However, all of that is putting the cart before the horse. The existence of the account is a fact (or act) which is not privileged.

Accordingly, I am ordering that the plaintiff disclose whether or not such an account exists. The plaintiff can then indicate, in accordance with Schedule B requirements, whether it asserts privilege. If not the account shall be disclosed. If so, then the parties shall make submissions if the privilege is contested and the content will be examined by the arbitrator for a decision.

ACCOUNTING RECORDS OF LUBLIN AND FEZ

The plaintiff objects to disclosure of these records/entries on the basis that they are really a red herring. Given that what is at issue is the validity of the mortgage, the case is really about the existence of a contract, which is confined to an analysis of offer, acceptance and consideration. Accordingly evidence pertaining to any subjective intentions is not relevant.

I respectfully disagree. Mr. Sammon's view of relevance in this case is too narrow. In light of the defendant's argument that the mortgage is a sham, the intentions of the parties are relevant. Facts regarding the internal treatment of this transaction are relevant in buttressing, or defeating, those arguments or in generating reasonable inferences therefrom. Information on how the $300,000.00 was accounted for by Fez (to which Rutman has said the money was transfered) and how Lublin dealt with it could shed light on the defence issues raised. Mr Sammon sought to demonstrate that the mortgage had a legitimate commercial purpose---namely to replace weak security for the prior loan with stronger security. He cited the exchange of e-mails between Rutman, Fried and Simon Schonbloom as evidence for the valid commercial structure of the transaction. It may be that the mortgage was for a legitimate commercial purpose and therefore not a sham (in which case it would be enforceable). However it is not the role an adjudicator of this motion to decide that issue, which is to be left for trial. Because the defendant is alleging a sham mortgage, which would if proven be a defence to the claim, the field of relevance is expanded in this case.

I also agree with the defendant's argument that if the money was returned, same is relevant to the issue of consideration. If no credit was in fact given, there can be no consideration and no contract. That evidence may support arguments for a sham mortgage.

The plaintiff also argues that requiring these records from Lublin and Fez, each of whom are not parties, would go beyond the Rules and any case law in the area.

However, Rule 30.02(1) requires that every document "relevant to **any** matter in issue...that is or has been in the possession, **control, or power of a party**...shall be disclosed." (emphasis added) The same wording in Rule 30.02(2) applies to the production of any document for inspection unless privilege is claimed.

Further, Rule 30.02(4) allows the ordering for disclosure of all relevant documents "in the possession, **control, or power of the party's subsidiary, or affiliated corporation or of a corporation controlled directly or indirectly by the party** and to produce all such documents that are not privileged." (emphasis added)

In my opinion the Rules are worded in this way so as to avoid a party resisting disclosure of a relevant non-privileged document by virtue of a claim that it resides with another entity with which the party is closely associated. In this case, Rutman admits that he is the principal of Lublin (para 1 of his affidavit). This establishes the requisite power or control to require Lublin to produce relevant documents. Respecting Fez, in para. 27 of his affidavit, Rutman states that the mortgage was "accounted for in a related company called Fez Financial Corporation (Fez)." In my view Fez would qualify under Rule 30.02(4) as an affiliated corporation or one controlled directly or indirectly by Rutman.

In summary, I think the Rules do provide for disclosure in a case such as this.

Finally, the plaintiff argued that the disclosure sought would breach the proportionality rule. I believe that it is possible to articulate the disclosure in such a way so as to limit it to that which is strictly relevant to the issues here. The defendant is certainly not entitled to undertake a fishing expedition.

Accordingly, I am ordering that the plaintiff produce all original records/entries of Lublin and Fez **solely** respecting the Eran Ostfeld mortgage and the August 22 2008 advance and the August 27th 2008 payment. In addition the Plaintiff shall produce Lublin's and Fez's disbursement and receipt journal and any interest calculation records pertaining to the Ostfeld mortgage.

I am therefore not ordering any blanket inspection but merely that the plaintiff dig into Lublin and Fez's internal records and produce those related to the Ostfeld mortgage.

ACCOUNTING INFORMATION SENT TO FRED TAYAR

Mr. Teplitsky argued that production of the accounting information given to Tayar was relevant because he (Teplitsky) had identified inconsistencies and errors in Tayar's letter of August 9, 2010 as well as other documents purporting to show the outstanding indebtedness. The defendant would like to know how Tayar came to his numbers referred to in the letter.

I am concerned that when we get into material sent by the client to his lawyer that privilege should be invoked against disclosure. Again, facts (ie/whether any calculation was sent to Tayar) are not privileged, but the content of those communications may be or may be intertwined with privileged content.

Accordingly I am ordering the Plaintiff to disclose whether any calculation was in fact sent to Tayar. If so and no privilege is claimed in respect of that calculation, then it shall be produced. If privilege is claimed, and I think this likely, then same must be advanced in accordance with Schedule B standards. If privilege is contested, the parties shall make submissions and the arbitrator shall examine the content to determine the claim of privilege.

INCOME TAX RECORDS OF FEZ AND LUBLIN

Production is sought of the income tax records of Fez and Lublin showing whether pre-paid interest on the mortgage was declared to CRA.

In my view this request is too remote from what can be established to be relevant to the issues involved in the defence. There is too much danger of a fishing expedition, or an ulterior use of the disclosed information (even if the tax records produced are confined to the issue of pre-paid interest).

Accordingly I am not ordering any production of the income tax materials.

I thank counsel for their skillful argument and remain to be spoken to in the event there is a contest over items for which a Schedule B assertion of privilege is made.

June 27, 2014.

Michael Silver Arbitrator