

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20111215
Docket: S116545
Registry: Vancouver

Between:

X-Sensible Footwear North America Ltd.

Plaintiff

And:

**Stephen Fahringer aka Stephen Anthony Fahringer Jr. and
Melanie Fahringer aka Melanie Clair Monsma-Fahringer**

Defendants

Before: The Honourable Madam Justice Dillon

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

J. Dubas

Counsel for Defendants:

J.C. Gopaulsingh

Place and Date of Trial/Hearing:

Vancouver, B.C.
December 15, 2011

Place and Date of Judgment:

Vancouver, B.C.
December 15, 2011

[1] **THE COURT:** The defendants have applied for cancellation of a certificate of pending litigation that was filed by the plaintiff against certain lands as described in the notice of application located in the city of Vernon.

[2] The plaintiff has applied for security for any judgment or costs that the plaintiff might potentially receive and that the property, which are the lands in Vernon, and any funds received from the sale of those lands, be charged and secured with an obligation to pay the amount of \$32,381.26 to the plaintiff on account of an order for costs and judgment to be received in the future. The \$32,381.26 may be broken down for the amount of the judgment sought, which appears to be \$22,431.26, and the balance there would be for security for costs.

[3] The background facts are that the defendant Melanie Fahringer has been the owner of the lands since 2002. There is a pending sale of those lands which is to complete on December 22. The said defendant has had the lands valued at approximately \$300,000.

[4] The defendant Stephen Fahringer transferred his interest in the lands to Melanie Fahringer in about 2008. Melanie Fahringer and Stephen Fahringer are shareholders and directors of a company called Sweet Medicine Corporation, which purchased shoes from the plaintiff company beginning in about 2004. In 2006, Melanie Fahringer appears to have signed a personal guarantee for ongoing credit provided to the company for goods to be supplied by the plaintiff company. Sweet Medicine Corporation was indebted to the plaintiff company for about \$60,000 in April 2008. Sweet Medicine Corporation is not a defendant or party in these actions. Sweet Medicine Corporation paid \$38,000 on this debt since Stephen Fahringer transferred his share of the lands to Melanie Fahringer. It is noted that the plaintiff company alleges an oral guarantee by Stephen Fahringer. However, at the time Stephen Fahringer transferred his interest in the lands to Melanie Fahringer, only Melanie Fahringer had a written guarantee, and Stephen Fahringer disputes that he gave an oral guarantee.

[5] Sweet Medicine Corporation is presently in bankruptcy. A report of the trustee to creditors dated September 16, 2011, is before me. The trustee states that the company's current directors are Stephen and Melanie Fahringer and they are also the shareholders of the company. The company currently operates three retail stores operating under the name of Good Feet, a franchisee, with the principal franchisor located in the United States. The head office of Sweet Medicine Corporation is in Vernon, B.C., and the three retail stores that are presently operating are located in Vernon, Langley and Burnaby. The company currently employs eight individuals at its head office and store locations.

[6] The bankruptcy of the company was attributed in large part to the general economic downturn that occurred in 2008, but the present situation of the company was described in para. 4 of the report: that the management was optimistic that the company could return to operating at a profitable level with the three remaining locations that had been proven to be financially viable and that management had taken steps to meet their expenses by reducing overhead expenditures and undertaking other processes to drive revenue. There were also plans for new product lines.

[7] The proposal as described by the trustee is for the payment of creditors, including the plaintiff company, over a period of 38 months, with the expectation of a 32% recovery by the plaintiff on their debt.

[8] The defendants have shareholders loans in the Sweet Medicine Corporation valued at approximately \$35,000.

[9] The plaintiff claims a fraudulent conveyance in relation to the lands and also seeks a declaration of equitable trust over the lands. The basis of that claim is set out in para. 11 of the affidavit of Ryan Langley, the operation manager for the plaintiff company, where he said that:

In respect to the issue of the certificate of pending litigation as outlined in the notice of civil claim, Good Feet stores [that is, the stores operated by the Sweet Medicine Corporation] would have access to the inventory sent to them. They would have used the proceeds from sale of the items to pay the

expenses of the defendants, which likely would have assisted in maintaining the subject property.

By "they" is obviously meant Good Feet stores, and the suggestion there is that the company Sweet Medicine Corporation used proceeds of sales to pay expenses of the defendants personally which assisted somehow in maintaining the subject property.

[10] Mr. Langley went on to say:

Finally, my understanding of the situation facing the defendants and the Sweet Medicine Corporation, Good Feet company was that as they had close to \$600,000 of unsecured liabilities (sic). In this regard the liability issues would have piled up over a considerable period of time and the transfer of the subject property was likely made, in my view, to hinder creditors like ourselves from pursuing one or both of the defendants. In fact, in an e-mail dated September 27, 2010, Mrs. Fahringer said to me as follows: Through 2008 we lost over \$850,000. In 2008 we turned things around, shut the Edmonton store, reduced our overhead in every way possible, and actually had a \$150,000 profit.

[11] I point out that the suggestion that the defendants' company would have used proceeds from sale to directly pay expenses of the defendants, and in particular expenses of the defendants relating to maintaining the lands, is complete speculation and not supported by any evidence. In particular, there is no evidence that the defendants personally received any money from Sweet Medicine Corporation at all or that, if they did, any of these monies was applied to the lands. Furthermore, there certainly is not any evidence that the Sweet Medicine Corporation itself directly paid any of these expenses as alleged.

[12] Also, the suggestion that the transfer of the lands from Mr. Fahringer to Mrs. Fahringer was made to defeat creditors is similarly speculative, especially since Melanie Fahringer retained full interest in the lands and was the sole written guarantor.

[13] The suggestion by Mr. Langley that liability issues would have piled up over a considerable period of time and that the transfer was made to hinder creditors does not bear scrutiny in view of the e-mail that he received from Mrs. Fahringer indicating

that in 2008 the business started turning itself around. Therefore, I conclude that the suggestion that the transfer of lands was made purposely to defeat creditors is similarly speculative.

[14] With respect to the application to cancel the certificate of pending litigation, I have had regard to the case of *Seville Properties Ltd. v. Coutre*, 2005 BCSC 1105, wherein Mr. Justice Macaulay at para. 6 set out s. 215(1) of the *Land Title Act*, R.S.B.C. 1996. c. 250, under which a certificate of pending litigation is filed and wherein it is made clear that:

215 (1) A person who has commenced or is a party to a proceeding, and who is

(a) claiming an estate or interest in land, or

(b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land ...

[15] However, the claim for an interest in land must be evidence based. At para. 7, Mr. Justice Macaulay said that the section under the *Land Title Act* narrowly limits who is entitled to register a certificate of pending litigation. The party must claim an estate or interest in land and other parties entitled to file certificates are those seeking to enforce a restrictive covenant or building scheme, et cetera. The learned justice went on to say at para. 20 that the certificate of pending litigation cannot be used solely as a negotiating tool in litigation. I might add that merely claiming an interest in land when the interest comes up for review, as it is here, may not be sufficient when that claim appears to be a bald assertion of a claim, as here.

[16] The claim for an interest in the land in trust here is speculative and not founded upon any evidence. The claim under the fraudulent conveyance is also speculative and, I conclude, designed solely to secure an advantage in the litigation for a relatively insignificant debt that is protected under bankruptcy proceedings and through the remedy of a guarantee.

[17] The evidence establishes that the defendants' company, Sweet Medicine Corporation, is dealing with creditors, including the plaintiff, in a proper manner in the bankruptcy proceedings. The defendants' application is allowed.

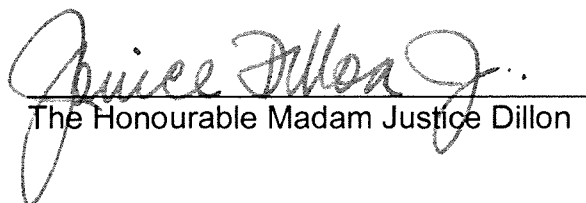
[18] With respect to the plaintiff's applications for the lands to be held as security for its judgment or the proceeds of the sale of those lands to be held as security for the judgment, while the court does have jurisdiction to restrain a defendant from dealing with his assets, a defendant ought not generally to be required to post security as a condition for leave to defend and the court will not generally restrain a defendant from dealing with his assets before judgment, especially in the situation here where the plaintiff has remedies in bankruptcy and under the guarantee.

[19] The plaintiff's application for security before judgment in relation to the property and in relation to the proceeds of the sale of the property is dismissed.

[20] The plaintiff's application for security for costs is against the two individual defendants. That application is also dismissed. Only in egregious or special circumstances will individuals be ordered to post security for costs: *Bronson v. Hewitt*, 2007 BCSC 1751 at paras. 42 and 47.

[21] The circumstances here are neither egregious nor special. Furthermore, I note that the plaintiff has failed to provide a bill of costs so that the Court is in a position to assess any quantity that would have to be held under a security bond.

[22] The costs with respect to all of these applications shall be in the cause of the plaintiff's action. Thank you.


The Honourable Madam Justice Dillon