CITATION: Grovum v. Kouznetsov, 2018 ONSC 1887
COURT FILE NO.: CV-16-11618-00CL
DATE: 20180322

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Dwight Grovum and Grovum Equities Inc., Applicants/Moving Parties

AND:

Andrei Kouznetsov, Kouznetsov Equities Inc. and Akinvest – XPT Inc., Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Young Park* and *Kyle Keupfer*, for the Applicants

Arkadi Bouchelev, for the Respondents

HEARD: March 16, 2018

ENDORSEMENT

Introduction

[1] This is a motion by the Applicants, Moving Parties, Dwight Grovum and Grovum Equities Inc. (the "Applicants"), for, among other things, a declaration that the Respondents, Andrei Kouznetsov ("Kouznetsov"), Kouznetsov Equities Inc. and Akinvest-XPT Inc., are in contempt of court.

[2] The alleged contempt arises from the Applicants' position that the Respondents have failed to answer undertakings within the time periods given during the examination of Kouznetsov contrary to the order of Hainey J. dated March 23, 2017 (the "Hainey Order"), and the direction of McEwen J. on October 10, 2017 (the "McEwen Direction").

[3] For the reasons that follow, I dismiss the motion.

Background

[4] The Hainey Order is a *Mareva* Injunction enjoining the Respondents from, among other things, selling, removing or dissipating their worldwide assets.

[5] Paragraph five of the Hainey Order provides that the Respondents are to prepare and provide to the Applicants by April 10, 2017, a sworn statement describing, among other things, the nature, value, and location of their worldwide assets. Paragraph six requires the Applicants submit to examinations under oath within seven days of the delivery of the sworn statements. Paragraph seven provides, in part: "Wrongful refusal to provide the information referred to in paragraph 5 herein is contempt of court and may render Kouznetsov liable to be imprisoned, fined, or have his assets seized."

[6] In lieu of providing the sworn statements of assets and the subsequent examination under oath as provided in paragraphs five and six of the Hainey Order, the parties agreed that the Respondents could disclose their assets through an examination of Kouznetsov by both his counsel and the Applicants' counsel before a Superior Court Judge. Kouznetsov's examination by the Respondents' counsel took place before Conway J. on September 19, 2017. The examination by Applicants' counsel took place before McEwen J. on October 10, 2018.

[7] At the conclusion of the October 10, 2017 examination, the following discussion took place between counsel and McEwen J.:

> Mr. Thomas: Your Honour, I'm finished with my questions for the witness. This is not an examination being conducted under the rules, but undertakings have been given today. Are you prepared to place an order on the timeline for answers or in the case of authorizations to simply sign an authorization?
>
> The Court: What do you think is a reasonable time, guideline for that, Mr. Bouchelev?
>
> Mr. Bouchelev: Ah well the – I think that the only undertaking to provide – was to provide Tax Returns, that was an undertaking for documents. Everything else was to write the bank or to write to the hotel, so I say we can write within 30 days and we can obtain Tax Returns I'm sure within 30 days, that shouldn't be an issue.
>
> The Court: Mr. Thomas.

> Mr. Thomas: I'm going to quibble with that, Your Honour, I hope that we could get the information in two weeks. The injunction was ….
>
> The Court: Two weeks is plenty, he can get his own Tax Returns – in two weeks and send the authorizations in two weeks, that is very reasonable. Does that complete today's examination?

The examination was then adjourned, subject to answers to the undertakings.

[8] The above direction by McEwen J. providing for the time within which to produce the Tax Returns and provide the requests and the authorizations is the "McEwen Direction".

[9] On or about November 13, 2017, the Applicants changed counsel to their current counsel.

[10] On November 17, 2017, the Applicants' counsel wrote to the Respondents' counsel enclosing a list of the documents undertaken to be provided. They included bank account statements for a number of accounts at Royal Bank ("RBC") going back two years; line of credit statements at RBC going back two years; Visa Card statements going back two years; copies of Kouznetsov's Tax Returns for the prior two years and letters to be sent by Kouznetsov to the Westin Hotel, Playa Corchal, Costa Rica and the Mosoblbank in Moscow authorizing the release of certain information. The letter noted that the undertakings were to be answered by October 24, 2017, and asked when the answers would be provided. On the same day, the Applicants sent the Respondents a copy of the transcript of the October 10, 2017 examination.

[11] The documents Kouznetsov undertook to provide on October 10, 2017 were sent to counsel for the Applicants in four separate batches between December 2017 and March 2018, as detailed below. In all the documents totaled over a thousand pages and included statements for 21 bank, mutual find and credit card accounts for a period of two years or more.

[12] On December 27, 2017, the Respondents delivered copies of bank, credit card and line of credit statements. By letter dated January 22, 2018, the Applicants' counsel took issue with the sufficiency of the information provided and advised that the Respondents were in breach of the undertaking.

[13] On February 5, 2018, the Respondents provided further bank statements, a copy of letters of authorization to the Westin Hotel, Playa Corchal, Costa Rica, and

the Mosoblbank in Moscow, authorizing the release of certain information. The later letter was dated October 17, 2017. On February 21, 2018, counsel for the Applicants took the position that the undertakings had still not been answered. Not all the bank statements had been produced, no Tax Returns had been provided and the Mosoblbank letter was not satisfactory.

[14] On February 23, 2018, the Respondents provided further bank statements, including line of credit information and copies of Kouznetsov's Tax Returns. On March 5, 2018, the Applicants advised the Respondents that the undertakings had still not been fulfilled. Specifically, they referred to certain statements missing from a bank account at the RBC and requested that a further and better letter be sent by Kouznetsov to the Mosoblbank, together with proof of delivery.

[15] On March 12, 2018, the Respondents provided further bank and credit card statements and a copy of a further letter dated March 12, 2018, which had been sent by the Respondents' counsel to the Mosoblbank, together with proof of delivery.

[16] Kouznetsov's wife's evidence is that, given the number of bank and credit card accounts involved, multiple requests of the RBC were required to obtain all of the statements.

[17] At the outset of the motion before me, counsel for the Applicants conceded that the Respondents had answered all of the undertakings.

Position of the Parties

[18] The Applicants submit that, notwithstanding that the Respondents have now answered all of the undertakings given during the October 10, 2017 examination, the court still has jurisdiction to find the Respondents and specifically Kouznetsov in contempt. They submit that the Respondents' failure to comply with the clear obligations in paragraph 5 of the Hainey Order and the McEwen Direction to answer the undertakings by October 24, 2017 (two weeks after October 10, 2017), constitute contempt of court. They describe the Respondents' conduct in failing to answer any undertakings by the deadline of October 24, 2017 to be "cavalier and dismissive".

Analysis

[19] Civil contempt is a quasi-criminal proceeding. In order to establish it, the proponent must establish three elements beyond a reasonable doubt: the order alleged to have been breached must state clearly and unequivocally what should and should not be done; the party alleged to have breached the order had actual knowledge of it; and the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Carey v. Laiken*, [2015] 2 S.C.R. 79 at paras. 32 to 35.

[20] In para. 38 of *Carey v. Laiken*, Justice Cromwell, who wrote the decision on behalf of the court, refers to but does not delineate the discretionary power of the judge hearing a contempt motion to decline to impose a contempt finding "where it would work an injustice in the circumstances of the case".

[21] Civil contempt proceedings in Ontario are governed by rule 60.11 of the *Rules of Civil Procedure*. Specifically, rule 60.11(5) provides that in disposing of a contempt motion, the judge may make such order as is just.

[22] The Applicants' position before me, and in fact from the first letter they wrote to the Respondents after their retainer concerning the undertakings, is that the Respondents are in breach of the Hainey Order (paras. 5 and 7) and the McEwen Direction by not providing the answers to their undertakings by October 24, 2017, two weeks following Kouznetsov's examination.

[23] The Hainey Order does not state clearly and unequivocally that the Respondents must provide the answers to their undertakings by October 24, 2017.

[24] In fact, paragraphs 5 and 7 of the Hainey Order make no mention of a time limit within which answers to undertakings are to be provided. The only mention of time limits concerning disclosure of information is in paras. 5 and 6 dealing with when the Applicants sworn statements of assets must be provided and when the examinations under oath will occur. Those time limits are not applicable given the parties agreement to proceed by an alternate procedure.

[25] Nor do I consider, for reasons that follow, that the Respondents' delay in delivering the answers to undertakings constitutes a "wrongful refusal" to provide information. While production of the information was delayed, the Respondents never refused to provide it. Accordingly, the Respondents are not in breach of the Hainey Order.

[26] The McEwen Direction was given at the end of Kouznetsov's examination. As noted, no formal order concerning it was ever taken out by the Applicants. In my view, in the absence of a formal order, it remains a direction. A formal, issued and entered order sets out exactly what has been ordered by the court. As a result, it is an essential component of a contempt proceeding. Without a formal order, a contempt proceeding cannot proceed.

[27] Even if I'm wrong and a contempt proceeding can proceed in the absence of a formal order, I am not satisfied, apart from the provision of the Tax Returns and the authorization letter to the Westin Hotel in Costa Rica, that the Applicants have established, beyond a reasonable doubt that the Respondents were in breach of the McEwen Direction.

[28] A review of the transcript of the October 10, 2017 examination makes it clear that the undertakings agreed to involve both requesting and providing copies of bank and credit card statements, sending letters authorizing the release of certain information from third parties and producing Kouznetsov's Tax Returns for the prior two years.

[29] What was discussed before McEwen J. as set out in the above portion of the transcript was the time frame within which the requests would be made, the authorizations sent and the Tax Returns produced. Justice McEwen did not direct that the Respondents produce copies of all the bank and credit card statements within that time frame. Importantly, Justice McEwen was not asked, nor did he provide for any time period for the production of the bank and credit card statements.

[30] Before me, the Applicants have produced no evidence that the Respondents did not request the bank and credit card statements within the two-week time period. From their first letter on November 17, 2017, the Applicants have taken the position, wrongly, in my view that the Respondents were required to provide copies of the bank and credit card statements by October 24, 2017 and having not done so, they were in breach of the McEwen Direction. There is no evidence the Applicants ever asked for proof that the statements were requested within the two-week period.

[31] With respect to the letters of authorization, the record indicates the Respondents wrote to the Mosoblbank by letter dated October 17, 2017, but the Applicants objected to the substance of the letter and the lack of proof of delivery

resulting in the Respondents sending a further letter with proof of delivery, which the Applicants directed.

[32] The only letter of authorization to the Westin Hotel, Playa Corchal, Costa Rica in the record is dated in early February 2018 and the Tax Returns were not produced until February 23, 2018. While those productions were not produced within the time set by the McEwen Direction, in all the circumstances, including the reasonable delay occasioned in obtaining all of the bank and credit card statements requested, it would not be just, in my view, to make a finding of contempt against the Respondents.

[33] In my view, this motion should never have been brought by the Applicants.

[34] At para. 37 of *Carey v. Laiken*, Cromwell J. notes that the contempt power is discretionary and should be used "cautiously and with great restraint". It is an enforcement power of the last resort. The learned judge also notes that the courts have "consistently discouraged its routine use to obtain compliance with court orders".

[35] Apart from the Applicants wrong interpretation of what the McEwen Direction provides for; they have obtained all of the productions the Respondents undertook to provide, albeit after some delay. Faced with what they considered to be unacceptable delay, the proper procedure, in my view, was for the Applicants to have brought a motion to require production by a certain date, not for contempt in the first instance. Contempt is the last resort. Having obtained all of the answers to the undertakings, proceeding with the contempt motion was neither necessary nor appropriate in this case. In the circumstances, I agree with the Respondents that its purpose was strictly to punish the Respondents and specifically, Kouznetsov.

Conclusion

[36] The Applicants motion is therefore dismissed.

[37] Given my view of what I consider to be the improper use of a contempt motion, I would have awarded substantial costs against the Applicants but for the fact that at the end of the hearing, the Respondents indicated that they were seeking no costs in the event they were successful. Accordingly, there will be no order as to costs.

L. A. Pattillo J.

Released: March 22, 2018