CITATION: Bridging Income Fund LP v. 3886727 Canada Inc., 2020 ONSC 602
COURT FILE NO.: CV-19-00620981-00CL
DATE: 20200128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Bridging Income Fund LP by its general partner SB Fund GP Inc. Applicant	S. Rappos, for the Applicant
– and –	
3886727 Canada Inc. carrying on business as Holistic Blend Respondent	Jacqueline Horvat and Sarah Petersen, for the Respondents and for the Moving Party 9022619 Canada Inc.
	Jeremy Nemers for the court appointed Receiver KSV Kofman Inc.
	HEARD: January 9, 2020

C. GILMORE, J.

REASONS FOR DECISION

OVERVIEW

[1] There are two motions before the court. The Applicant's motion for a declaration that all intellectual property used by the Debtor Respondent, 3886727 Canada Inc. ("the Debtor" or "388"), in operating its business is the property of the Debtor and subject to the Applicant's security and the receivership proceeding.

[2] In the alternative, a declaration that the transfer of certain Trademarks (as defined below) by the Debtor to 9022619 Canada Inc. ("902") is void as against the Applicant and the Receiver as a fraudulent conveyance under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 ("the *FCA*").

[3] 902 brings a cross-motion requiring the Receiver to disgorge the sum of CAD $27,795.19, which it alleges was inadvertently paid to the account of the Debtor by a customer of 902.

[4] Certain issues were resolved on consent of all parties. 902 agreed, on the day prior to the motion, to withdraw its claim for occupation rent from the Receiver. As well, the parties agreed to approve the fees and disbursements of the Receiver and its counsel, and the First Report of the Receiver dated December 18, 2019.

[5] The Receiver brought its own motion to dismiss 902's motions and for approval of its fees and Report. The Receiver took no position on the Applicant's motion.

[6] At the conclusion of argument, I dismissed 902's motion and reserved on the Applicant's motion with reasons to follow on both. These are the reasons.

[7] On the date of the hearing, I also signed the Receiver's draft order with respect to approval of the fees and Report and dismissal of 902's motion as well as an award of costs in the amount of $6,200 payable by 902 to the Receiver. The costs order against 902 was made after giving oral reasons based on the parties' submissions on the day of the motion.

BACKGROUND

[8] The Debtor carried on business for 20 years as "Holistic Blend," a wholesale distributor of pet food and health care products. The Debtor sold and distributed products under the names "Holistic Blend" or "Holistic Blend My Healthy Pet."

[9] 902 was incorporated in 2014. 902 also sells pet food products to buyers, wholesalers, and consumers. There is no dispute that Ms. Debbie Pelczynski is the directing mind of 388 and 902. 902 also has the same head office as 388. Ms. Pelczynski's evidence was that she incorporated 902 for estate and tax planning reasons and on the advice of her accountant and lawyer.

[10] The Debtor was incorporated on April 18, 2001, and Debbie Pelczynski was the sole officer and director of the Debtor at all material times. The Applicant provided financing to the Debtor by way of Term Sheet dated May 24, 2015, a master factoring agreement, and a demand grid promissory note dated June 19, 2015. The Debtor also granted to the Applicant a General Security Agreement ("the GSA") dated June 19, 2015 over all of its present and after-acquired property as security for payment of its indebtedness and obligations to the Applicant. As a result, the Applicant has a first ranking security interest over all of the Debtor's personal property.

[11] In paragraph 1(iv) of the GSA, the secured property of the Debtor includes:

> (iv) all patents, industrial designs, trademarks, trade secrets, and know-how including without limitation confidential information, trade-names, goodwill, copyrights, software, and all other forms of intellectual and industrial property, and any registrations and applications for registration of any of the foregoing (collectively "Intellectual Property") and including, without limitation, the Intellectual Property listed in Schedule "A" attached hereto;

[12] Schedule "A" of the GSA, which lists the Intellectual Property referred to above, has no listed items. It simply says "nil."

[13] There are two trademarks in issue on this motion. The Word Trademark, Holistic Blend ("the Word Trademark") and the Design Trademark, Holistic Blend My Healthy Pet ("the Design Trademark" and together "the Trademarks").

[14] The ownership and assignment of the Trademarks is in dispute. According to the Canadian Intellectual Property Office ("CIPO"), the Debtor is the registered owner of both the Word and Design Trademarks. CIPO records show that the Debtor has owned the Word Trademark since 2005 and renewed it in April 2015. The Word Trademark is also registered with the United States Patent and Trademark Office ("USPTO") and shows the Debtor as the owner since 2009 with a renewal in May 2019. The Design Trademark was formally registered with CIPO on May 21, 2016.

[15] On September 30, 2014, the Debtor purported to assign the Word Trademark to 902 by way of a trademark assignment agreement. On May 1, 2015, the Debtor purported to assign the Design Trademark to 902 by way of a trademark assignment agreement. The consideration allegedly paid to the Debtor by 902 in both assignment agreements was $10.00. Neither the CIPO nor the USPTO records were updated to reflect the assignment agreements.

[16] On May 2, 2015, Ms. Pelczynski, on behalf of both 388 and 902, signed an End User License Agreement ("the License Agreement"), which purported to grant a non-transferable and perpetual license from 902 to 388 to use the Trademarks.

[17] The Applicant submits that Ms. Pelczynski, on behalf of the Debtor, never disclosed that 902 was the owner of the Trademarks used in 388's business. At the time the assignment agreements were signed, the Debtor owed Royal Bank approximately $637,000. Ms. Pelczynski's evidence on behalf of the Debtor was that she did not advise Royal Bank about the assignment of the Trademarks to 902.

[18] In April 2019, the Debtor began to experience serious financial problems. It was at this time that the Applicant first became aware of the alleged transfers, only two months prior to the Applicant having the Court appoint a Receiver over the Debtor's property, and at a time when the Debtor was insolvent.

THE POSITIONS OF THE PARTIES

The Applicant

[19] The Applicant submits that Ms. Pelczynski, on behalf of the Debtor, lacks credibility. Her evidence should not be accepted, and the Trademarks should be included in the Debtor's property, which is subject to the Receivership proceeding.

[20] The Applicant raises the following in support of its position that the Debtor owns the Trademarks:

a. Ms. Pelczynski deposed that she told representatives of the Applicant about the transfer of the Trademarks at the time the GSA was signed in 2015. However, she was unable to produce any documents, notes, or e-mails to support this contention. There is only the bald assertion at paragraphs 40 and 41 of her affidavit sworn October 18, 2019 that 388 did not own the Trademarks and that there were "a number of e-mail communications to Bridging where I specifically explain 388's relationship to 902 and the trademark usage." While Ms. Pelczynski did produce some e-mails to Bridging, none mention the Trademarks. The first time she mentioned the Trademarks was in response to Mr. Champ's question about My Healthy Pet in April 2019, long after the GSA was signed. Interestingly, Ms. Pelczynski initially tells Mr. Champ that both Trademarks are owned by 388 but sends another e-mail two minutes later correcting that to say that the Marks *were* owned by 388 but are now owned by 902.

b. The consideration ($10.00) set out in both of the assignment agreements is nominal and there is no evidence it was actually paid.

c. Ms. Pelczynski renewed the Word Trademark with CIPO in April 2015 which post-dates the signing of the assignment agreement in September 2014.

d. Ms. Pelczynski renewed the Word Mark with the USPTO in May 2019.

e. No steps were taken to change the ownership of the Word Mark with either CIPO or the USPTO.

f. The Design Mark was approved for advertising in Trademark journals by CIPO in June 2015. The Design Mark was not formally registered with CIPO until May 21, 2016. Therefore, the alleged assignment of the Design Mark was done at a time when Ms. Pelczynski was not the formal owner of the Design Mark.

g. The term "Vendor" and "Licensee" are used throughout the licensing agreement. However, those terms are never defined in the agreement. The document is unclear as to who is licensing to whom.

h. While stating in cross-examination that the assignments and the licensing agreement were prepared by and on the advice of her accountant and lawyer, she could not remember the name of those professionals, nor could she produce any e-mails or notes contemporaneous with their drafting.

i. No financial statements of 902 were provided showing the Trademarks as an asset of that corporation.

j. Ms. Pelczynski advised during her cross-examination that when things became financially difficult, she attempted to sell 388 to a private equity company ("Horizon") and that she advised Horizon that 902 owned the Trademarks. However, the e-mails produced by Ms. Pelczynski between her and Horizon do not reveal any such discussion.

k. Ms. Pelczynski deposed in her affidavit that she advised her previous lender, Royal Bank, that the Trademarks were to be "carved out" from the security given to RBC. However, the commitment letter from RBC makes no mention of such an exception.

l. Ms. Pelczynski takes the position that the Receiver shares the view that 902 is the owner of the Trademarks. However, the Receiver has been clear that references in its report to this issue are based solely on information provided to it by Ms. Pelczynski.

m. Ms. Pelczynski withdrew her claim for occupation rent the day before this motion and then withdrew her supplementary affidavit sworn January 8, 2020 on the day of the motion. The Applicant submits that the affidavit contained significant inconsistencies and that a negative inference should be drawn as to Ms. Pelczynski's conduct in this litigation.

The Position of the Debtor

[21] Ms. Pelczynski, on behalf of the Debtor, takes the position that the Applicant relies on suspicion and inferences and has failed to meet its burden. There is good evidence of the ownership of the Trademarks by 902 as follows:

a. Updating the CIPO and USPTO registers to reflect the assignment is not determinative and has no impact on the validity or enforceability of the assignment.

b. 902 became the owner of the Trademarks prior to any relationship between the Debtor and the Applicant. Trademarks as assignable in law and the Applicant does not challenge the agreements as false or invalid.

c. While the license agreement may not contain a definition of who is the Vendor and who is the Licensee, that is not fatal. The parties understood their rights under the agreement.

d. Schedule "A" to the GSA is reflective of the parties' discussions that 388 did not own any Intellectual Property. There is no evidence that the Applicant did any due diligence to determine if the "nil" notation was accurate. The Applicant could have searched the CIPO database but did not.

e. The Applicant has not provided any evidence of e-mails between its agents and Ms. Pelczynski with respect to any discussions, or lack thereof, in relation to the Trademarks.

ANALYSIS AND ARGUMENT – THE OWNERSHIP ISSUE

[22] I find that the Applicant has met its burden and proven that the Trademarks are the property of the Debtor. The evidence of Ms. Pelczynski on behalf of the Debtor is not credible and is rejected for the following reasons:

(1) The Applicant was not informed of the transfers until years after the signing of the GSA and at a time when the Debtor was insolvent. The fact that the Intellectual Property in Schedule A of the GSA is shown as Nil is therefore not determinative. I find that Ms. Pelczynski did not advise the Applicant about the Trademarks and therefore the Debtor cannot now rely on that omission. While purporting to have had both e-mail and verbal communication to confirm her discussions with the Applicant's agents, she is unable to provide any of those corroborating documents.

(2) While not determinative, it cannot be ignored that Ms. Pelczynski did not update the CIPO or USPTO registers to reflect any assignment. In fact, she renewed the Design Mark on behalf of 388 as recently as last year. Third parties searching those databases would have no knowledge of any transfer.

(3) While claiming that all of the agreements were prepared by, and on the advice of her lawyer and accountant, she can provide no proof of this. There are no drafts, letters, e-mails, or notes which would confirm any form of retainer or account for such services. Further, Ms. Pelczynski signs all of the agreements on behalf of the Debtor and 902. These were not arm's length transactions.

(4) The Licensing Agreement was signed in May 2015 and the Word Mark was assigned to 902 in September 2014. This means that 388 would not have been able to use the Mark for some seven months before the Licensing Agreement was signed. There is no evidence that the Debtor stopped using the Word Mark for any period of time.

(5) The Licensing Agreement does not identify who the Vendor is. One might assume it is 902, but it is only identified as the party of "First Part." I reject the Debtor's position that the parties "understood their rights." How can that be when there is confusion about which party is the vendor?

(6) There is no evidence that Ms. Pelzynski advised either RBC or Horizon about the Trademarks.

(7) Ms. Pelzynski purported to assign the Design Mark at a point in time when it had not yet been officially registered by CIPO.

(8) Ms. Pelzynski's credibility was also in issue with respect to 902's motion. She failed to respond to the Receiver's requests for information about the O'Kat invoice. There is also suspicion raised by the Receiver about an alleged "disappearance" of accounts receivable after the Receiver's appointment and an alleged "confusion" about the inventory of the Debtor becoming the inventory of 902 after the receivership.

(9) An act of registration does not determine the validity of an assignment. Registration is not necessary to perfect the assignment of a trademark (*Wilkinson Sword (Canada) Ltd. v. Juda* (1966), 34 Fox Pat. C. 77 (Can. Ex. Ct.)). The "owner" of a registered trademark has the exclusive right to its use whether or not they appear on the register as owner (ibid). In *Wilkinson Sword (Can.) Ltd.*, the court held that the effect of a transfer of a trademark is twofold: 1. the transferor, the former owner, immediately ceases to have any right to use the trademark to distinguish their goods because the exclusive right has, by virtue of ss. 19 and 47 [now s. 48], become vested in the transferee; and 2. the exclusive right to use the trademark in respect of the goods for which it was registered becomes vested in the transferee.

At common law, "no particular form is needed for an equitable assignment" of a trademark (Bourbonnais & Odutola, Odutola on Canadian Trade-mark Practice and Procedure, ch. 12, "Evidence of Transfer"). While there is no prescribed type of evidence to demonstrate an assignment, "Whatever the [assignment's] form, it must show transfer of rights in and to a trademark." (ibid, "Nature of Evidence"). Thus, while there are few formal requirements to create a valid trademark assignment, it appears that, based on the evidence, 388 acted in ways inconsistent with the claimed ownership of the trademarks.

[23] Overall, I find that Ms. Pelzynski lacks credibility. Her tendency was to make sweeping statements that her lenders knew about the Trademark, that 902 owned the Trademarks, and that all of the agreements were created based on professional advice. However, there was no evidence to support any of those statements other than Ms. Pelzynski's bald assertions in her affidavit.

THE FRAUDULENT CONVEYANCE RELIEF

[24] If I am wrong with respect to ownership of the Trademarks, I find that they were fraudulently conveyed by the Debtor. My reasons are set out below.

[25] The *FCA* is a remedial legislation and its language is to be given a broad interpretation. For s. 2 of the *FCA* to apply, there must be a "conveyance" of property, an "intent" to defeat; and, a "creditor or other" towards whom the intent is directed (*Indcondo Building Corporation v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160, at paras. 44, 49).

[26] For the first part of the test, 902 argues that the definition of property in the *FCA* does not include Trademarks. I disagree. In *Hydrotech Chemical Corporation v. Min-Chem Ltd.*, 1999 CanLII 4684 (Ont. C.A.), the court did not question the inclusion of a trademark as property under the *FCA*.

[27] It is also not necessary for the Applicant to show that there was any debt owed to it at the time of the impugned conveyance (see *Indcondo,* at paras. 47-48).

[28] As to the second part of the test, the Applicant must show that there was intent on the part of the Debtor to defeat the Applicant as a creditor. It is, of course, difficult to obtain evidence about intent, and as such, the case law has developed a list of factual circumstances which allow a court to draw an inference that such an intent existed. Those circumstances are often called "badges of fraud" and include situations in which:

a. The donor continued to use the property as her own;

b. The transaction was secret;

c. The consideration is grossly inadequate; and

d. A close relationship exists between the parties to the conveyance. (See *Indcondo*, at paras. 50-52.)

[29] Badges of fraud exist in this case. 902 and the Debtor have the same directing mind, the transfer was completed for nominal consideration, the Debtor continued to use the Trademarks and remains their registered owner as per the CIPO registry, and the Debtor assigned the Trademarks without informing RBC, Horizon, or the Applicant.

[30] 902 argues that the Marks were transferred well before this proceeding began and the assignments were made in good faith and for valid consideration. Yet, Ms. Pelczynski deposes in her cross-examination that the transfers took place for "tax and estate planning purposes." She states she did not understand what this meant and relied solely on the advice of her advisors. But she is unable to produce any evidence about this advice.

[31] This court has already found that Ms. Pelczynski is not a credible witness. It is difficult to accept that she would have made the assignments to 902 based on professional advice, presumably paid for that advice, but had no idea why she was doing it. The more realistic interpretation is that she assigned the Trademarks to ensure they would stay out of the hands of her. The fact that she made the assignments prior to the Applicant's involvement is not determinative as per *Indcondo*.

[32] Given all of the above, and if I am wrong with respect to the ownership of the Trademarks, the assignment of the Trademarks was a conveyance of property intended to defeat the Debtor's creditors and is declared void as against the Applicant.

902'S MOTION FOR DISGORGEMENT OF FUNDS

[33] This motion was dismissed with costs at the conclusion of the hearing. My brief reasons follow.

[34] According to 902, in August 2019 it issued an invoice to one of its Taiwanese customers, O'Kat for $27,795.19. O'Kat is a customer of both 388 and 902, and according to 902, O'Kat erroneously paid the invoice amount to 388.

[35] 902 wrote to the Receiver with a copy of the purchase order, invoice and Bill of Lading, and a letter from the CEO of O'Kat confirming an administrative error and requesting that the funds be redirected to 902.

[36] The Receiver argued that 902 has not sought the required leave for this motion as is required. The Receivership Order specifically precludes any enforcement process or proceeding against the Receiver without the written consent of the Receiver or leave of the court.

[37] The Receiver argued that the purchase order makes no reference to either 388 or 902. As O'Kat did business with both entities it would be logical that the purchase order showed which company was supplying the goods.

[38] In response to 902's request for funds, the Receiver sent a letter to both 902 and O'Kat in October 2019. The letter to 902 specifically requests all records relating to the business relationship between O'Kat and the Debtor given that O'Kat did business with both companies. It sought copies of agreements, invoices, and transaction histories. There was never any response to this letter by either 902 or O'Kat nor was there any mention of the letter in Ms. Pelzynski's affidavit sworn shortly after the date of the letter.

[39] In addition, the Receiver relies on an Answer to Undertaking given by the Debtor in which a spreadsheet shows a projected sale to O'Kat in August 2019 by 388 for the same items listed in the purchase order. While it is possible that 902 had an arrangement to provide exactly the same items to O'Kat, the Debtor never provided any documents to support that possibility.

[40] The Receiver submitted that the Debtor had failed to satisfy it that funds were owed to 902 and is now concerned about the Debtor directing 388's business through 902.

[41] It is this court's view that there is simply no documentation which would support the relief sought by 902. The invoice makes no reference to either 902 or 388. The bank transfer information from Bank Sinopac references "3886727 Canada Inc o/a Holisticblend," and the spreadsheet provided as an undertaking shows an anticipated sale to 388 for the same products. Finally, there is the failure of 902 to respond to the specific information requested by the Receiver.

[42] I also find that 902 was obligated to obtain leave of this court before bringing their motion but failed to do so. Given all of the above, 902's motion was dismissed.

ORDERS

[43] There shall be a declaration that any and all intellectual property used by the Debtor (3886727 Canada Inc.) is the property of the Debtor and is subject to the Applicant's security interest and the Receivership proceeding.

[44] All issues relating to 902's motion were dealt with by way of an order signed on January 9, 2020.

[45] The parties on the Applicant's motion may provide written submissions on costs of no more than two pages (exclusive of any Bill of Costs or Offers to Settle) on a seven-day turnaround after the release of these reasons and commencing with the Applicant. Costs shall be submitted electronically to my assistant at Therese.Navrotski@ontario.ca. If no costs submissions are received 35 days from the release of these Reasons, costs shall be deemed to be settled.

C. Gilmore J.

Released: January 28, 2020

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COURT FILE NO.: CV-19-00620981-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Bridging Income Fund LP by its general partner SB Fund GP Inc.

Applicant

– and –

3886727 Canada Inc. carrying on business as Holistic Blend

Respondent

REASONS FOR DECISION

C. Gilmore, J.

Released: January 28, 2020