

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH
QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ, and
CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

**NOTICE OF MOTION
(Dismissal of Frivolous, Vexatious, Abusive Motion)**

KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all the assets, undertakings and properties of Xela Enterprises Ltd. (“**Xela**”), will bring a motion to a panel of the Divisional Court on April 4, 2022, or as soon after that time as the motion can be heard at 130 Queen St. West, Toronto, ON M5H 2N5.

PROPOSED METHOD OF HEARING: The motion may be heard in writing.

THE MOTION IS FOR:

- (a) An Order dismissing the motion of Juan Guillermo Gutierrez (“**Juan Guillermo**”) to stay the Orders of McEwen J. dated August 28, 2020 and October 27, 2020 (the

“**Production Orders**”) and to stay the Orders and Endorsements of McEwen J. dated March 25, 2021 and March 25, 2022 (the “**Compliance Orders**”) pending a motion for leave to appeal the March 25, 2022 endorsement (Juan Guillermo’s motion being the “**Stay Motion**”);

- (b) An Order dismissing the motion of Juan Guillermo for leave to appeal the March 25, 2022 endorsement (the “**Leave Motion**”);
- (c) The costs of this motion on a full indemnity basis; and
- (d) Such further and other relief as to this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Overview

- (a) The Stay Motion and the Leave Motion are frivolous, vexatious, or otherwise an abuse of process of the Court;
- (b) Juan Guillermo has not complied with the Production Orders;
- (c) Juan Guillermo brought a motion to this Honourable Court for leave to appeal the first Compliance Order, raising several of the same arguments now raised;
- (d) On July 9, 2021, this Honourable Court dismissed the motion for leave to appeal with costs;
- (e) The second Compliance Order dated March 25, 2022 requires compliance with the Productions Orders and with the March 25, 2021 Order that was upheld by this Court;

- (f) The Stay Motion and Leave Motion are an attempt to re-litigate issues that have been previously decided by the Superior Court and this Honourable Court; and
- (g) The Stay Motion and Leave Motion have no chance of success.

Background

- (h) On January 18, 2011, Margarita Castillo (“**Margarita**”) commenced an application in the Ontario Superior Court of Justice against Xela, her brother (Juan Guillermo), and her now-deceased father, Juan Arturo Gutierrez (collectively, the “**Respondents**”). Judgment in her favour was granted on October 28, 2015. The total due under the judgment debt was approximately \$5 million (the “**Judgment Debt**”);
- (i) On December 30, 2016, this Honourable Court dismissed the Respondents’ appeal of the judgment;
- (j) On July 6, 2017, McEwen J. dismissed Juan Guillermo’s application for a stay of execution of the Divisional Court Order dated December 30, 2016;
- (k) Most of the Judgment Debt remains outstanding;
- (l) On January 15, 2019, Margarita made an application to appoint KSV as the Receiver of Xela;
- (m) On July 5, 2019, the Superior Court appointed KSV as the Receiver of Xela (the “**Appointment Order**”);

Receivership Proceedings

- (n) Following its appointment, the Receiver learned that:
- (i) In 2016, certain wholly-owned, indirect subsidiaries of Xela were transferred to a trust in Barbados (the “**Trust**”) to the benefit of Juan Guillermo’s wife, Juan Guillermo’s mother, and Juan Guillermo’s four children (the “**EAI Transaction**”);
 - (ii) In 2018 and 2020, through two different transactions (one of which was completed during the pendency of the receivership), another wholly-owned indirect subsidiary of Xela transferred Xela’s last material asset to a company owned by the Trust—and, thus, to the benefit of Juan Guillermo’s wife, mother, and children (together with the EAI Transaction, the “**Reviewable Transactions**”);
 - (iii) As a result of the Reviewable Transactions, Xela became insolvent and unable to satisfy any of its obligations to Margarita, its creditors (including hundreds of thousands of dollars in unpaid legal bills owed to Ontario law firms) or its other securityholders;
- (o) The Receiver requested information from Juan Guillermo about the Reviewable Transactions, but Juan Guillermo repeatedly disclaimed knowledge about their details;

- (p) The Superior Court issued the two Production Orders on consent (August 28, 2020 and October 27, 2020), which required Juan Guillermo to give the Receiver access to the data on Juan Guillermo's iPhone and iPad (the "**Devices**");
- (q) The August 28, 2020 Order prevented Juan Guillermo from asserting privilege against the Receiver in respect of any of the Company's documents and devices;
- (r) The October 27, 2020 Order directed Juan Guillermo to deliver his Devices for imaging within seven business days of the Order;
- (s) The October 27, 2020 Order contained a protocol for the review of Juan Guillermo's Devices, which would allow Juan Guillermo to review and object to the production of documents on his Devices;
- (t) A day before the October 27, 2020 hearing (at which the consent order would be issued), Juan Guillermo left Canada and went to Guatemala;
- (u) Juan Guillermo returned to Canada on December 17, 2020 but did not advise the Receiver until two days later. Thereafter, he refused to immediately meet the Receiver's IT agent to permit them to image his Devices;
- (v) Finally, on January 5, 2021, Juan Guillermo permitted the Receiver's IT agent to image his Devices on the condition that the images be uploaded to a password-protected hard drive to which only he and his counsel, Brian Greenspan, have the password (the "**JG Hard-Drive**"), which was contrary to the October 27, 2020 Order;

- (w) Juan Guillermo's sons (Andres and Thomas) are the directors and officers of Arturo's Technical Services Ltd. ("ATS"). In 2017, Xela's information technology, assets, employees, customers, and data were transferred to ATS;
- (x) In addition to bringing a motion to compel Juan Guillermo to give the Receiver the passwords to JG Hard-Drive, the Receiver sought to compel ATS to provide it with Juan Guillermo's emails on ATS's servers. On March 25, 2021, McEwen J. granted this relief with detailed reasons;
- (y) Juan Guillermo and ATS brought a motion for leave to appeal the March 25, 2021 Compliance Order to this Honourable Court;
- (z) The motion for leave to appeal was dismissed with costs on July 9, 2021;
- (aa) Since that time, the Receiver has sought the passwords to the JG Hard-Drive and Juan Guillermo's emails on ATS' servers;
- (bb) Juan Guillermo and ATS have refused to comply;
- (cc) Between September 17, 2021 and February 17, 2022, the parties attended before the case management judge five times to address a promise of imminent funding of the judgment debt by Juan Guillermo so that Juan Guillermo could argue that the Receiver could be discharged (even though the promised funding was insufficient to satisfy all Xela's securityholders);

- (dd) On February 28, 2022, the Receiver finalized its Fifth Report in which it recommended that the Court enforce its Production Orders and the March 25, 2021 Compliance Order;
- (ee) On March 2, 2022, McEwen J. directed Juan Guillermo and ATS to comply with the March 25, 2021 Order. They did not;
- (ff) On March 17, 2022, the Receiver consented to the application of the protocol contained in the October 27, 2020 Order to Juan Guillermo's emails on ATS's server;
- (gg) Justice McEwen issued an endorsement to that effect on the same day. His Honour noted that "nothing in this endorsement alters or amends my previous orders";
- (hh) Juan Guillermo continued to refuse to provide the Receiver's IT expert with the passwords;
- (ii) ATS continued to refuse to transfer Juan Guillermo's emails to the Receiver's IT expert, being Epiq Global;
- (jj) On March 23, 2022, the Receiver reported, as requested, to McEwen J. as to the status of compliance with the Orders;
- (kk) Following receipt of the Receiver's correspondence, McEwen J. directed the parties to re-attend and scheduled a case conference for March 25, 2022 at 10:30 am;

- (ll) On March 25, 2022, at 9:42 am, Juan Guillermo's counsel served a notice of motion for an injunction/stay on the enforcement of and compliance with the Production Orders and the March 25, 2021 Compliance Order;
- (mm) No evidence was delivered in support of that motion;
- (nn) At the case conference later that morning, McEwen J. declined to stay the Production Orders or the March 25, 2021 Compliance Order. His Honour issued an endorsement (the second Compliance Order), directing Juan Guillermo and ATS to provide the Receiver's IT expert with the passwords and emails in the manner suggested by the Receiver's IT expert by 5 pm on March 28, 2022;
- (oo) Neither Juan Guillermo nor ATS complied with the March 25, 2022 Compliance Order;
- (pp) Instead, on March 28, 2022 at 4:08 pm, Juan Guillermo's counsel delivered the Stay Motion;
- (qq) On March 31, 2022, Juan Guillermo's counsel delivered the motion record for the Leave Motion;

The Stay Motion and Leave Motion

- (rr) Juan Guillermo's Stay Motion and Leave Motion are an attempt to re-litigate issues that have been previously decided by the Superior Court and this Honourable Court;
- (ss) The allegations made against the Receiver are devoid of merit and unsupported by credible evidence;

- (tt) Despite Juan Guillermo's unsupported allegations to the contrary, the Receiver has acted as an impartial officer of the Court throughout these proceedings and has attempted to have Juan Guillermo and ATS comply with the orders issued throughout these proceedings;
- (uu) The relief sought by Juan Guillermo is unavailable. Directing a party to comply with prior court orders (that have already been the subject of appeal) is not a reviewable error;
- (vv) It is plain and obvious that neither the Stay Motion nor the Leave Motion have any chance of success;
- (ww) The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including, but not limited to, rr. 2.1.02, 21.01, 25.06, 25.11, 38.12; and
- (xx) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) Affidavit of Grace Tsakas to be sworn; and
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

April 4, 2022

LENCZNER SLAGHT LLP

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

Tel: (416) 865-2921

Email: pgriffin@litigate.com

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Email: mjilesen@litigate.com

Derek Knoke (75555E)

Tel: (416) 865-3018

Email: dknoke@litigate.com

AIRD & BERLIS LLP

Brookfield Place
181 Bay Street, Suite 1800 Toronto, ON
M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Lawyers for the Receiver, KSV Restructuring Inc.

TO: **THE SERVICE LIST**

MARGARITA CASTILLO
Applicant

-and- XELA ENTERPRISES LTD. et al.
Respondents

Divisional Court File No.: 189/22

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PROCEEDING COMMENCED AT TORONTO

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LENCZNER SLAGHT LLP

Barristers

130 Adelaide Street West, Suite 2600

Toronto ON M5H 3P5

Peter H. Griffin (19527Q)

pgriffin@litigate.com

Tel: (416) 865-2921

Monique J. Jilesen (43092W)

mjjilesen@litigate.com

Tel: (416) 865-2926

Derek Knoke (75555E)

dknoke@litigate.com

Tel: (416) 865-3018

AIRD & BERLIS LLP

Brookfield Place

181 Bay Street, Suite 1800 Toronto, ON M5J 2T9

Kyle Plunkett

Email: kplunkett@airdberlis.com

Sam Babe

Email: sbabe@airdberlis.com

Tel: (416) 863-1500

Fax: (416) 863-1515

Lawyers for the Receiver, KSV Restructuring Inc.