

Date: 20080908

Docket: T-1694-04

Citation: 2008 FC 1004

Ottawa, Ontario, September 8, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROBERT MORGAN, d.b.a KONA CONCEPT INC.,

**Applicant
(Judgment Creditor)**

and

GUIMOND BOATS LIMITED

**Respondent
(Judgment Debtor)**

and

**CORY GUIMOND HOLDINGS INC., and
MILLENIUM MARINE INC.**

Garnishees

REASONS FOR ORDER AND ORDER

[1] By Order dated July 23, 2008, Prothonotary Morneau granted the following relief in favour of the Applicant:

IT IS ORDERED that all sums owing or accruing from the above-named Garnishees to the above-named Judgment Debtor by virtue of the Lease and Sublease referenced above are hereby attached, to

answer the Judgment against the said Judgment Debtor in favour of Robert Morgan, d.b.a. Kona Concept Inc.

IT IS ORDERED that each of the Garnishees appear before this Court sitting at 82 Westmorland Street, City of Fredericton, Province of New Brunswick on Tuesday, the 19th day of August, 2008 at 9:30 o'clock in the morning to declare under oath:

All sums owing or accruing by either of the Garnishees to the Judgment Debtor pursuant to the Lease and Sublease referenced above and that each of the Garnishees at the time and place named show cause why respectively either should not pay to the Judgment Creditor the respective debt due from either of them to the Judgment Debtor or so much thereof as may be sufficient to satisfy the Judgment;

IT IS ALSO ORDERED that the Garnishees and each of them not dispose of the said sums until this Court has ruled on this matter;

[2] Prothonotary Morneau's Order was made *ex parte* and without personal appearance. The authority for the Order is Rule 449(1) of the *Federal Courts Rules* which reads as follows:

449. (1) Garnishment -
Subject to rules 452 and 456,
on the *ex parte* motion of a
judgment creditor, the Court
may order

(a) that

(i) a debt owing or accruing
from a person in Canada to
a judgment debtor, ...

...

449. (1) Saisie-arrêt - Sous
réserve des règles 452 et 456,
la Cour peut, sur requête *ex
parte* du créancier judiciaire,
ordonner :

a) que toutes les créances
suivantes du débiteur
judiciaire dont un tiers lui
est redevable soient saisies-
arrêtées pour le paiement
de la dette constatée par le
jugement :

(i) les créances échues
ou à échoir dont est
redevable un tiers se
trouvant au Canada, ...

(b) that the person attend, at a specified time and place, to show cause why the person should not pay to the judgment creditor the debt or any lesser amount sufficient to satisfy the judgment.

b) que le tiers se présente, aux date, heure et lieu précisés, pour faire valoir les raisons pour lesquelles il ne devrait pas payer au créancier judiciaire la dette dont il est redevable au débiteur judiciaire ou la partie de celle-ci requise pour l'exécution du jugement.

[3] These reasons and Order follow the show cause hearing held in Fredericton, New Brunswick, on August 19, 2008.

THE PARTIES AND BACKGROUND

[4] Guimond Boats Limited (“Boats”) lost an action commenced by the Applicant. On December 8, 2006, the Federal Court of Appeal rendered judgment in favour of the Applicant against Boats in the amount of US \$430,396.93. It remains unpaid.

[5] Following a judgment debtor examination, the Applicant learned that Boats owned real property which it leases to Cory Guimond Holdings Inc. (“Holdings”) under a lease dated October 1, 2003 (the “Head Lease”). Holdings, in turn, leases the property to Millenium Marine Inc. (“Marine”) under a lease dated October 1, 2003 (the “Sublease”).

[6] The Head Lease provides that Holdings is to pay rent of \$3,000 per month, in advance to the Respondent, Boats. The Sublease effectively provides that Marine, as the subleasee steps into the

shoes of Holdings, the Headleasee, with Marine agreeing to pay directly to Holdings the rent that Holdings is required to pay to Boats under the Headlease.

ANALYSIS

[7] Affidavits were filed by Cory Guimond on behalf of Holdings and Marine, (collectively the “Garnishees”). The Applicant cross-examined Mr. Guimond on his affidavits at the show cause hearing. Cory Guimond is the President and sole Director of Boats, Holdings and Marine. As a result, it is fair to say that there is a very co-operative arrangement among these corporate entities.

[8] Mr. Guimond acknowledged and confirmed the existence of the lease arrangements between Boats and Holdings and between Holdings and Marine. However, he testified, that while these leases stipulate that rent payments are to be made, the reality is otherwise. He testified that while Boats is owed \$3,000 per month in rent payments, neither Holdings nor Marine provides a monthly payment to Boats. Instead, over the year, Holdings and Marine pay certain of the debts which Boats incurs – presumably those identified by Boats to be paid. In any event, Boats has not asked that either Garnishee pay its debts to the Applicant. At the end of the year there is an accounting done by an accountant and a paper entry indicated on these three companies’ books as to which of the corporations owes what and to whom.

[9] That being said, as is evident from the following exchange, Mr. Guimond acknowledged in cross-examination that Boats is owed \$3,000 each month from one of the Garnishees:

- Q. So let's put it this way. One of the two parties, Cory Guimond Holdings or Millenium Marine, owes \$3,000 every month to Guimond Boats.
- A. Correct.

[10] The Garnishees submitted that notwithstanding the lease agreements, neither Holdings nor Marine should pay the rents over to the Applicant as those funds are subject to a trust in favour of a third party, Caisse Populaire de Baie Sainte-Anne Ltée. (the "Caisse Populaire"). Counsel for the Caisse Populaire attended the show cause hearing but took no active part in it. There is a collateral mortgage dated March 25, 2004, between Boats and Caisse Populaire that covers the real property that is subject to the lease agreements involving Boats, Holdings and Marine. One of the terms of that collateral mortgage is relied on by the Garnishees and the Respondent as evidence of this trust.

Paragraph 7(b) of the Supplementary Optional Covenants and Conditions provides as follows:

..AND IT IS HEREBY COVENANTED AND AGREED by and between the parties hereto:

....

(b) that the tenants under the said leases or agreements, or any of them, shall not be required to pay the rents, or any part thereof, to the Mortgagee, unless and until the Mortgagee advises them in writing that the rents, or any parts thereof, are payable to the Mortgagee; PROVIDED HOWEVER that the rents, or any part thereof, received by or on behalf of the Mortgagor shall be deemed to be held in trust for the Mortgagee, subject to the proviso for redemption set forth herein;

[11] The Applicant submits that paragraph 7 of the collateral mortgage is effectively an assignment of rent clause that becomes operative if and only if the Mortgagee, the Caisse Populaire,

requires the tenants, Holdings and Marine, to remit the rent payments to it, rather than to Boats. I agree. There is no evidence of any such direction. Further, there has been no payment of rent directly to Boats and as such no trust created in favour of the Caisee Populaire.

[12] The Respondent and Garnishees also submitted that there is a debenture in the amount of \$250,000 given by the predecessor of Boats to the predecessor of Holdings that creates an impediment to the rent payments being a debt owed to Boats that can be attached by the Applicant. Again, I agree with the Applicant that the debenture provided is a floating charge that has not yet crystallized and, as such, is no impediment to the garnishment of the rent payments.

[13] In summary, Holdings and Marine have failed to discharge the onus on them to show cause that they should not pay to the Applicant the monthly rent payments owed to Boats under the lease agreements, up to the amount required to satisfy the judgment registered in this Court.

COSTS

[14] The Applicant seeks, and I find that it is entitled to, its costs of the show cause hearing. I fix costs in its favour, inclusive of disbursements and GST, at \$2,500, such amount to be added to the amount payable to the Applicants out of the garnisheed funds.

ORDER

WHEREAS according to a Judgment of the Federal Court of Appeal dated December 8, 2003, against Guimond Boats Limited, the Judgment Debtor, it is condemned to pay to Robert Morgan, d.b.a Kona Concept Inc., the Judgment Creditor, the Canadian dollar equivalent, as of July 26, 2004, of the sum of US \$430,396.93, with interest at the commercial rate compounded semi-annually;

AND WHEREAS the said sum of US \$430,396.93 and the said interest remain owing and unpaid;

AND WHEREAS there is a lease dated October 1, 2003, between the Judgment Debtor and Cory Guimond Holdings Inc.;

AND WHEREAS there is a sublease dated October 1, 2003, between Cory Guimond Holdings Inc. and Millenium Marine Inc.;

AND WHEREAS pursuant to the said lease and sublease either Cory Guimond Holdings Inc. or Millenium Marine Inc. owes the Judgment Debtor the sum of \$3,000 on the first day of each month of the lease;

AND WHEREAS Cory Guimond Holdings Inc. and Millenium Marine Inc. have failed to show cause why the said lease payments should not be paid to the Applicant in partial satisfaction of the debt owed to it by the Judgment Debtor;

IT IS ORDERED THAT:

1. All sums owing or accruing from and after July 23, 2008, from Cory Guimond Holdings Inc. and Millenium Marine Inc. (the Garnishees) to the Judgment Debtor by virtue of the lease and sublease referenced above are attached and are to be paid over to the Judgment Creditor to answer the judgment debt of the Judgment Debtor in favour of the Judgement Creditor, up to the amount required to satisfy the judgment debt of the Judgment Debtor;
2. The said sums are to be paid “in trust” to Clark Drummie, 40 Wellington Row, P.O. Box 6850, Saint John, New Brunswick, E2L 4S3, or to such other person as the Judgment Creditor directs, in writing; and
3. Any payment made by the Garnishees pursuant to this Order shall be first applied to the Applicant’s costs of this motion, which are fixed, inclusive of disbursements and GST, at \$2,500.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1694-04

STYLE OF CAUSE: ROBERT MORGAN, d.b.a KONA CONCEPT INC., v.
GUIMOND BOATS LIMITED

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: August 19, 2008

**REASONS FOR ORDER
AND ORDER:** ZINN J.

DATED: September 8, 2008

APPEARANCES:

M. Robert Jette, Q.C. FOR THE APPLICANT

Lee McKeigan-Dempsey FOR THE RESPONDENT AND
GARNISHEES

Erin Hardy FOR THE CAISSE POPULAIRE DE BAIE
SAINTE-ANNE LTÉE.

SOLICITORS OF RECORD:

Clark Drummie FOR THE APPLICANT
Saint John, New Brunswick

Ellsworth Johnson Phillips FOR THE RESPONDENT AND
Moncton, New Brunswick GARNISHEES