DCCJ 5603/2018

[2018] HKDC 1581

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 5603 OF 2018

BETWEEN

EDUARDO RABINOVICH — Plaintiff

and

PENGHAI (HK) TRADE CO., LIMITED — Defendant

Before: His Honour Judge MK Liu in Chambers (Open to Public)

Date of Hearing: 21 December 2018

Date of Decision: 21 December 2018

DECISION

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1. By an inter partes summons filed on 12 December 2018 ("the summons"), the plaintiff applies for a Mareva injunction against the defendant. On the basis of the evidence on service produced by the plaintiff, I am satisfied that the writ of summons herein, the summons, and the plaintiff's affidavit in support of the summons ("the supporting affidavit") have been duly served on the defendant.

The facts

2. The plaintiff's case as set out in the supporting affidavit is that the plaintiff is the victim of a fraudulent scheme. The plaintiff is a Brazilian residing in Brazil. A fraudster or some fraudsters for some reason got to know the business dealings between the plaintiff and a yacht charterer, hacked the system of latter and deployed some fake but very similar email addresses to deceive the plaintiff. As a result of the fraud, the plaintiff has transferred sums ("the transfers") to an account in the Bank of China (Hong Kong) ("the account") on or about 15 May 2018 and 30 May 2018. The total of the sums transferred is US$162,555. The defendant is the holder of the account.

3. In or about mid-June 2018, the plaintiff discovered the fraud and instructed a US law firm to handle the matter. In mid-July 2018, the US law firm reported the matter to the Hong Kong Police.

4. On or about 6 August 2018, amongst other things, the Hong Kong Police informed the plaintiff that:-

(1) US$103,945.46 was found in the account;

(2) US$62,644.47 of the US$103,945.46 had already been frozen by another investigation team in Hong Kong for another scam; and

(3) the remaining unfrozen funds, ie US$41,267.99, had been frozen upon receiving the plaintiff's complaint.

5. On or about 2 September 2018, the Hong Kong Police provided the account holder's information to the plaintiff.

6. In the supporting affidavit, the plaintiff said that he had communication with his US lawyer and the Hong Kong Police regarding the fraud. He had also diligently instructed lawyers in Hong Kong to prepare papers to make this application. Since the plaintiff is a Brazilian residing in Brazil, it is understandable that after knowing the information of the account holder in early September 2018, he would need some time to engage lawyers in Hong Kong, to seek advice from them and to instruct them to commence these proceedings to apply for an injunction. I accept that there is no undue delay in making this application.

Analysis

7. In order to obtain a Mareva injunction, a plaintiff has to establish:-

(1) that he has a good arguable case on a substantive claim over which the court has jurisdiction;

(2) there are assets within the jurisdiction;

(3) the balance of convenience is in favour of granting the

injunction; and

(4) there is a real risk of dissipation of assets, or removal of assets from the jurisdiction, which would render the plaintiff's judgment of no effect.

See *Hong Kong Civil Procedure 2019*, Volume 1, §29/1/65.

8. Based upon the evidence now available, I am satisfied that the plaintiff has demonstrated a good arguable case against the defendant. The plaintiff may argue that the defendant has to return the US$162,555 to the plaintiff on the ground of unjust enrichment. Obviously, the defendant has been enriched, and the defendant has not provided any consideration in exchange for this sum or any part thereof. The Hong Kong Police's investigation and intervention (ie freezing the account) is evidence showing that the money in the account might have been obtained by some unlawful activities. All these are factors in support of the unjust element.

9. There is money in the account. Clearly there are assets in Hong Kong which can be frozen by an injunction granted by this court.

10. The Hong Kong Police's investigation and intervention is evidence showing that the transfers might well be procured by some unlawful activities. The defendant may have taken part in these activities. In the circumstances, if no injunction is granted, there would be a real risk that the judgment obtained by the plaintiff would go unsatisfied by reason of the disposal by the defendant of their assets.

11. On the one hand, there is a real risk of dissipation of assets if the injunction sought is not granted. On the other hand, there is no evidence showing that the defendant would suffer any irreparable damage if the injunction is granted. I am satisfied that the balance of convenience is in favour of granting the injunction.

Disposition

12. I am satisfied that the plaintiff is entitled to have the injunction sought in the summons. The injunction would remain in force until the conclusion of the trial unless it is varied or discharged by a further order of the court.

13. The plaintiff is also seeking an order requiring the defendant to disclose all their assets of an individual value of HK$10,000 or more in Hong Kong at once. I am prepared to give this disclosure order, but would allow the defendant to have 14 days to make the disclosure. The defendant would need to make the disclosure within 14 days after the order has been served on them.

14. Costs of the summons be the plaintiff's costs in the cause, with a certificate for counsel.

15. I make an order in terms of the draft order annexed to the summons, with the amendments and additions indicated in this decision.

16. I thank counsel for the assistance rendered to this court.

(MK Liu)
District Judge

Mr Foster Yim, instructed by Payne Clermont Velasco, for the plaintiff

The defendant was not represented and did not appear