CITATION: Galsan Holdings Inc. v. Davalnat Holdings Inc., 2018 ONSC 3600
COURT FILE NO.: CV-17-573294
DATE: 20180608

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Galsan Holdings Inc. and Peter Gallo	)	Maurice Neirinck, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	John Lo Faso and David Morawetz, for the
Davalnat Holdings Inc., Antonio Calvano,	)	Respondents, Davalnat Holdings Inc. and
Seabrook Homes Inc. and	)	Antonio Calvano
1329282 Ontario Inc.	)	
Respondents	)	
	)	
	)	
	)	**HEARD:** March 22, 2018

REASONS FOR DECISION

NISHIKAWA J.

Overview

[1] The Applicants, Galsan Holdings Inc. ("Galsan") and Peter Gallo, bring an application for partition and sale of two industrial rental properties owned by corporations in which the Applicants are shareholders. One property is owned by Seabrook Properties Inc. ("Seabrook") and the other is owned by 1329282 Ontario Inc. ("132").

[2] The issue in this Application is whether, under the *Partition Act*, R.S.O. 1990, c. P.4 (the "*Act*"), the Applicants are entitled to partition of properties owned by corporations in which they hold shares. For the reasons that follow, I dismiss the application.

Factual Background

The Parties

[3] Mr. Gallo is the sole director, shareholder and decision-maker of Galsan.

[4] The Respondent, Antonio Calvano, is the sole director, shareholder and decision-maker of the Respondent, Davalnat Holdings Inc. ("Davalnat") (together, the "Calvano Respondents.")

[5] The Respondent, Seabrook Properties Inc., was incorrectly named "Seabrook Homes Inc." in the Notice of Application. The title of proceedings is to be amended accordingly. Seabrook and 132 are named Respondents in this application, but for reasons that will become apparent, they have not appeared in this proceeding.

The Four Valley Property

[6] The Applicants seek partition of the property municipally known as 380 Four Valley Drive, Concord, Ontario (the "Four Valley Property"), which is owned by Seabrook. Seabrook purchased the Four Valley Property on October 28, 2003. Title was originally held in the name of a numbered company that later became Seabrook. The Four Valley Property is Seabrook's main asset, other than some cash and advances to related companies.

[7] The shares of Seabrook are held by Galsan and Davalnat, with each holding fifty percent of the shares. Mr. Calvano is the President of Seabrook, and Mr. Gallo is the Secretary. There are no other directors, officers or decision-makers. No other party owns shares or has an interest in Seabrook.

[8] A mortgage was registered on the Four Valley Property on November 17, 2009 for the amount of $1.4 million. At present, there is approximately $856,000 owing on the mortgage.

[9] The parties retained an appraiser to appraise both properties, but disagree on the terms upon which the appraiser was retained, including whether they agreed to be bound by the appraiser's valuation. The Four Valley Property was appraised for a market value of approximately $4,420,000 as of June 19, 2017. The equity in the property is thus approximately $3,564,000. Mr. Gallo maintains that the current market value of each property is likely $200,000 higher than the appraised value.

[10] The Four Valley Property is leased to a single tenant. The current lease term ended on February 28, 2018, with an option to renew for three years. On August 29, 2017, the tenant exercised its option to renew the lease.

The Romina Property

[11] The Applicants also seek partition of the property municipally known as 56 Romina Drive, Concord, Ontario (the "Romina Property"), which is owned by 132. Other than some cash, the Romina Property is 132's main asset.

[12] Galsan and Davalnat each own fifty percent of the shares of 132. Mr. Gallo is the President of 132, and Mr. Calvano is the Secretary. There are no other directors, officers, decision-makers or shareholders of 132.

[13] 132 acquired title to the Romina Property on February 19, 2009. A mortgage in the amount of approximately $1.7 million was registered on that date. At present, there is approximately $756,000 owing on the mortgage.

[14] The Romina Property was appraised for a market value of approximately $4.85 million as of June 19, 2017. The equity in the property is thus approximately $4.1 million.

[15] The Romina Property is approximately 23,059 square feet in area, of which an area of 4,191 square feet is being leased to a tenant whose lease expires on January 5, 2019. There are also two related-party tenants at the Romina Property, Somerlyn Trim and Doors Inc. and Gaplin Lumber Inc. Galsan and Davalnat each own one half of the shares in Somerlyn. Mr. Gallo and Mr. Calvano's spouses, Sandra Gallo and Natalie Menard, each own 44.44 percent of the shares in Gaplin. The remaining 11.11 percent of the shares are owned by an unrelated third party.

[16] The mortgage on the Romina Property is guaranteed by Somerlyn and Gaplin, and by Mr. Calvano and Mr. Gallo personally.

The Parties' Relationship

[17] The Applicants allege, and the Calvano Respondents do not deny, that there has been a breakdown in the business relationship between Mr. Gallo and Mr. Calvano. Since 2016, Mr. Gallo has not wanted to have anything to do with Mr. Calvano and Davalnat. Because each of their companies owns a fifty percent share in Seabrook and 132, they are at an impasse on any decisions regarding the affairs of those entities.

[18] The Calvano Respondents have not accepted the Applicants' proposal to sell the properties and split the proceeds between them. They have also rejected the Applicant's proposal that each party take title to one of the properties, make equalization payments as appropriate and wind-up the affairs of Seabrook and 132.

Procedural Background

[19] In December 2017, after commencing this Partition Application, the Applicants commenced an application on the Commercial List for an oppression remedy and seeking, among other relief, the winding up of Seabrook and 132, pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "Winding Up Application"). The Applicants claim that the Winding Up Application was necessitated by the evidence submitted by the Calvano Respondents in this Partition Application, alleging improper conduct on the part of the Applicants in the context of their various businesses.

[20] The Applicants then attempted, in a chambers appointment in February 2018, to have this Partition Application transferred to the Commercial List, to be heard together with the Winding Up Application. The Calvano Respondents objected, and the chambers judge directed that the Application proceed as scheduled.

[21] The Calvano Respondents now take the position that this Application should be dismissed as duplicative of the relief sought in the Winding Up Application.

[22] At the conclusion of the hearing of this Partition Application, Applicants' counsel invited me to remit this matter to the Commercial List for disposition with the Winding Up Application.

[23] The issue before me is a discrete legal question about whether the Applicants are entitled to an order for the partition and sale of the two properties. The chambers judge was of the view that the Application should proceed, and the parties argued this Application fully on the merits. I decline to defer this issue to the Commercial List proceeding. I consider only the evidence that is relevant to this Application.

Analysis

[24] The Applicants argue four principle grounds in support of their Application: (i) the parties' relationship has broken down beyond repair; (ii) the parties are at a stalemate with respect to the management of the properties; (iii) the properties are investment properties; and (iv) the properties are at an optimum value given the current state of the real estate market.

[25] The Calvano Respondents argue that the Applicants are not entitled to partition because each of the properties is owned by a single corporate entity, and consequently, Mr. Gallo and Galsan have no interest in the land. In other words, the Calvano Respondents argue that the Applicants do not have an interest in land that would give them a *prima facie* right to partition.

Are the Applicants Entitled to Partition under the *Partition Act*?

[26] Section 2 of the *Act* reads as follows:

> All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

[27] Subsection 3(1) of the *Act* permits any person interested in land in Ontario to "make an application for partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested." In applying s. 3 of the *Act*, the Court of Appeal has held that a person with an interest in land has a *prima facie* right to compel partition and sale of property, and shall not be deprived of such right absent malice, oppression or vexatious intent: *Greenbanktree Power Corp. v. Coinamatic Canada Inc.* (2004), 75 O.R. (3d) 478 (C.A.), at paras. 1, 3.

[28] In determining what constitutes an interest in land under the *Act*, the Court of Appeal has stated that "the law is clear: only persons entitled to the immediate possession of an estate in

property may bring an action or make an application for its partition or sale": *909403 Ontario Ltd. v. DiMichele*, 2014 ONCA 261, 319 O.A.C. 72, at para. 77.

[29] In *Tzembelicos v. Tzembelicos*, 2003 CarswellOnt 4327 (C.A.), four brothers carried on a business in partnership, and owned and leased lands through a corporation that held title to the lands in trust for the partnership. The applicant brother, as a beneficiary of the trust, was a person "interested in land in Ontario" and had standing to seek partition. However, he had no *prima facie* right to partition because the interest was "not a possessory one."

[30] In *Di Felice v. 1095195 Ontario Ltd*, 2013 ONSC 1, the parties, who were the beneficiaries of a trust, agreed that the corporation with title to one of the properties at issue held the property as a bare trustee, and partition was ordered.

[31] In this case, the Four Valley Property is owned by a single entity, Seabrook. Galsan holds shares in Seabrook, but it has no possessory interest in the property. It is trite law that the assets of a corporation are owned by the corporation not the corporation's shareholders. As a result, Galsan has no *prima facie* right to partition of the properties.

[32] Similarly, the sole owner of the Romina Property is 132. Galsan holds shares in 132, but has no possessory interest in the property. As a result, Galsan has no *prima facie* right to partition of the properties.

[33] Mr. Gallo is a further step removed from both properties. He holds shares in a corporation, Galsan, that holds shares in corporate entities, Seabrook and 132, that own the properties. It is clear that he has no possessory interest in the properties, and therefore no *prima facie* right to partition.

[34] The corporate entities that hold title to the properties, Seabrook and 132, are distinct legal persons under the law. As a shareholder of Seabrook and 132, Galsan has no possessory rights to the Four Valley Property or the Romina Property. Mr. Gallo and Mr. Calvano have chosen to organize their businesses and property holdings through corporate entities. While two individuals are the principals behind the various corporations, the corporate structure cannot be disregarded.

[35] Unlike the cases where a corporation held the property as a bare trustee, the Applicants did not argue, and there was no evidence before me, that the Four Valley Property and the Romina Property are held by Seabrook and 132 in trust for the Applicants in their personal capacities.

[36] Accordingly, the Applicants are not entitled to partition under the *Act*.

Conclusion

[37] For the foregoing reasons, I dismiss the Application for partition and sale.

[38] Counsel for the parties submitted their costs outlines at the hearing. While Respondents' counsel seeks costs on a substantial indemnity basis, there is no basis to make a punitive costs order.

[39] The total costs for Respondents' counsel on a partial indemnity basis is $36,027.39, including disbursements and taxes. However, this sum appears to include time spent on all matters between the parties, including the Winding Up Application, which should be excluded.

[40] Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.). Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the factors to be considered by the court when determining the issue of costs.

[41] I have considered these factors, as well as the principle of proportionality in R. 1.04(1.1) of the *Rules of Civil Procedure*, while keeping in mind that the court should seek to balance the indemnity principle with the fundamental objective of access to justice. This Application related to a single issue that was not particularly complex. In respect of the conduct of the parties, Respondents' counsel had advised Applicants' counsel early on that he thought the Application unlikely to succeed because the Properties were each owned by a single entity. While the legal issue was narrow, extraneous evidence was submitted, even after the Winding Up Application was commenced. At the hearing, it became apparent that the parties failed to agree to have the applications heard together because each sought their costs of this Application. Neither party assisted in shortening this proceeding or eliminating the need for the two applications to be heard.

[42] Given the foregoing, I fix costs at $10,000.00, inclusive of disbursements and HST, payable by the Applicants to the Respondents within 30 days of the date of this order.

Nishikawa J.

Released: June 8, 2018

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REASONS FOR JUDGMENT

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