CITATION: Acrylic Fabrication Limited v. Paul Jeffrey, 2014 ONSC3676

COURT FILE NO.: CV-90-CQ044887

Heard: April 3, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Acrylic Fabrication Limited v. Paul Jeffrey et al.

BEFORE: Master Joan Haberman

COUNSEL: Hartman, M. for the moving party

Zuker, S. for the responding party

Tourgis, N. retained after the hearing for the responding party

REASONS

Master Haberman:

[1] Acrylic seeks leave to issue writs of seizure and sale against and garnishment notices in respect of the defendant, Paul Jeffrey ("Jeffrey"). The request flows from Acrylic's judgment against Jeffrey and others, obtained in **June 1993** – 21 years ago.

[2] The motion raises the following two issues:

1) Has Acrylic provided an adequate explanation for the delay in pursuing this relief; and
2) Even if it has, has its ability to pursue this relief been lost due to the expiry of a limitation period?

[3] In view of my finding regarding the first issue, there is no need for me to consider the second issue. I dismiss the motion on the basis of an appearance of waiver based on the substantial and significant gaps of time since judgment that have not been adequately explained.

BACKSTORY

[4] The action was commenced by statement of claim, issued on **January 18, 1990**. It does not appear to have been defended and proceeded to trial in June 1993. On **June 7, 1993,** Grossi J. signed judgment against four of the five defendants for:

- general damages of $77,000;
- punitive damages of $5,000; and
- pre-judgment interest of $34,030.90.

[5] The judgment declared liability to be joint and several against 4 of the defendants, including Jeffrey, for a total of $116,030.90.

[6] In addition, costs on a solicitor and client basis were ordered against Jeffrey, while the remaining defendants (except Ramjal, against whom the action was dismissed) were ordered to pay costs on a party-party basis, only.

HISTORY OF THE MOTION

[7] On **March 22, 2013**, this motion first came before Master Dash in an ex parte court, having been brought without notice. The evidence supporting it, in the context of this lengthy gap since judgment was obtained, was extremely flimsy, consisting of an affidavit of a little over a page in length, sworn by counsel.

[8] Counsel refers to the judgment and states that he was advised by Acrylic's president, Brian Mandelker, that no payments were made by Jeffrey or by any of the defendants towards its satisfaction.

[9] The only explanation for the lengthy delay in pursuing payment is contained in a single paragraph:

> *I am advised by Brian Mandelker that* ***prior to February 2011, the Plaintiff had no knowledge as to the whereabouts of any of the defendants****. I am further advised by Brian Mandelker that he received confirmation regarding the employment of the defendant Jeffrey, on or about February 15, 2013.*

[10] There is nothing to explain what was learned in February 2013 and from whom, and what information regarding Jeffrey's whereabouts was obtained between February 2011 and February 2013. There is also no evidence regarding what steps, if any, were taken before this time frame to locate Jeffrey, or any of the other judgment debtors, for that matter. Finally, there is no evidence to indicate why writs of search and seizure were never filed before.

[11] The affidavit concludes by stating that counsel was advised, again by Mandelker, that Jeffrey works at Americana Displays Corp., and an address is provided, along with a corporate search for that entity. There is no explanation in the materials explaining why Acrylic chose to file an affidavit that consists almost exclusively of hearsay evidence, and why Mandelker did not submit this evidence himself.

[12] The attached calculations suggest that, as of **March 22, 2013**, the debt, inclusive of post-judgment interest, stood at **$195,538.37.**

[13] Master Dash dismissed the motion, without prejudice, for two reasons. First, he noted that it had to be served on Jeffrey. Second, he held that the test for obtaining this relief has not been met. Counsel was instructed to bring a *fresh motion* ***on better evidence on notice*** *to the defendant against whom relief is sought*. The order could not have been clearer.

[14] Despite that, a new and improved motion record was filed and came before Master Muir on **April 23, 2013,** again without notice. Master Muir was asked to vary Master Dash's order and to dispense with service of the motion record as preliminary to granting the substantive relief sought.

[15] Master Muir rightly noted that it was not appropriate for him to be asked to second guess another master. He adjourned the motion for notice to be given to Jeffrey, making no comment on the evidentiary record filed at that time.

[16] This time, Mandelker swore the evidence. He explains that default judgment was obtained on the basis of a claim for theft and conversion committed by the defendants. Jeffrey, an Acrylic employee, along with the other defendants, was arrested in 1989 while in the course of stealing Acrylic's property. About a year after the arrest, Mandelker states that he was advised by the arresting officer that all charges were dismissed. He suggests that this was due to the time it had taken to get to trial.

[17] I have no evidence to that effect, aside from what Mandelker states and I must say I find his evidence on this point difficult to accept. The usual order is to stay charges that have been "Askov'ed" rather than to dismiss them outright. Also, a one-year gap between charges and trial is not unusual and would generally not lead to such a result.

[18] In terms of what transpired after judgment was obtained, Mandelker states that he **did not hire anyone to locate Jeffrey** or any of the other judgment debtors. Instead, he claims that he, current and *former employees made enquiries within the Indian and Pakistani immigrant communities* without success. There is no evidence as to when these inquiries began, what they consisted of, who was involved and how long they continued.

[19] Mandelker filed more evidence about the inquiries made in subsequent affidavits but at no time has he provided details about inquiries having been made within the two ethnic communities he initially identified or explains the efforts he purportedly made personally.

[20] Mandelker's evidence then skips from 2013 and back to 2011 so it is not easy to follow. He states that an unnamed former employee of Acrylic advised him that in **early 2011** that Jeffrey worked for Americana Displays. On **February 2, 2011**, Acrylic's counsel conducted a corporate search of that company and it disclosed a

mailing address at **Firglen Ridge**, Woodbridge. The corporate search revealed that the sole officer and director of that entity was Richard Jeffrey, residing on Caldari Road in Concord.

[21] Mandelker states that his investigation at that time revealed that this judgment debtor *was not located at this address* and no other addresses were found using *other* searches, including Canada 411. Neither this investigation nor any indication of what searches were undertaken or what they did yield is included in the evidence.

[22] It seems nothing further was done for about two years. Mandelker states that *earlier this year (2013)* he received information indicating that Americana is located at 150 Strada Drive in Woodbridge, He does not say how he got this information but, based on how he expresses himself, it does not appear that he actively sought it out.

[23] This new information led to a further corporate search which confirmed the data and demonstrated that Pablo Jeffrey Delrey was the sole officer and director of the company.

[24] On **April 10, 2013**, after his counsel's attendances before both Master Dash and Master Muir, Mandelker contacted his former employee, Chris Volney, and learned that approximately 15 years earlier, while he was still working for Acrylic, Volney contacted *as many acrylic fabrication plants in and around Toronto as he could* and that he had made phone calls to *various other fabrication plants and other people that he knew in the* industry in an effort to locate Jeffrey. Volney also visited two of these plants, looking for Jeffrey.

[25] According to Mandelker, this would have been done around 1998, so 5 around years post judgment. There is no affidavit from Volney, himself, particularizing what he actually did so the evidence on point is hearsay and very sketchy.

[26] Also on **April 10, 2013**, Mandelker contacted Grantis Cudjoe, a current Acrylic employee, who advised him that about 10 years earlier, he had conducted his own investigations after hearing that Jeffrey was working at Associated Acrylic Displays. Apparently, Cudjoe sat in his car outside the premises of that company at closing

time and waited to see if Jeffrey or any of the other judgment debtors emerged but none of them did. This would have been around 2003. There is also no affidavit from Cudjoe, though he is a current Acrylic employee.

[27] Mandelker states that he did not receive any monies in payment of the judgment from any of the judgment debtors. He adds that he has not waived his entitlement under the judgment nor acquiesced in its enforcement. That is an issue for this court to resolve.

[28] The motion first came before me on **September 11, 2013**. Although Jeffrey had been personally served with the record on **June 24, 2013**, he filed no responding materials. Instead, his counsel attended court that day and sought an adjournment.

[29] Jeffrey's counsel advised that his client only attended at his office for the first time on Monday of that week and, at that time, without the motion record that had been served on him 2 ½ months earlier. Counsel only received the record the day before the hearing.

[30] Though I refused to adjourn the motion at Jeffrey's request I did adjourn it, of my own accord, as the evidence that had been filed by Acrylic still left far too much unclear. In my endorsement, I set out some of the clarification that was required before I would consider granting the relief sought.

[31] I also made it clear in my endorsement that as this adjournment was *unrelated to the defendant's request to adjourn which I denied*, the defendant shall file no evidence in response to Mandelker's affidavit of April 18, 2013. I added:

> *However, in that a supplementary affidavit will be filed,* ***I am prepared to allow evidence responding to that affidavit, as well as a factum and brief of authorities regarding what Mr. Tangi (Jeffrey's counsel) tells me is a limitation defence****.*

[32] The motion was adjourned to **April 3, 2014** and Acrylic served their supplementary affidavit on **November 1, 2013**. Jeffrey served nothing. Despite the reference to the expired limitation period, neither side filed either a factum or a brief of authorities.

[33] The motion returned before me on **April 3, 2014**. At that time, Jeffrey's counsel arrived in court at 11:20 without explanation, and then tried to hand up a responding record. In view of my last endorsement and the fact that counsel had been served with the supplementary record months earlier, I refused to accept the evidence at the outset of the hearing. No explanation for this delay was provided and no adjournment was sought at that time. I made it clear that no submissions of a factual nature that conflicted with the evidence filed by Acrylic or that purported to add to it could be made.

[34] Though no factums or briefs of authority had been filed, counsel handed up two cases dealing with the limitation issue, along with partial sections of the current statute. I was not given any part of the former statute, nor the transition provisions.

[35] When I sat down to write a decision, I felt severely hampered in view of the minimal approach that had been taken with respect to the law. On **April 4, 2014,** counsel were therefore advised to file factums and briefs to assist me in rendering a decision thereafter.

ADDITIONAL EVIDENCE NOW BEFORE THE COURT

[36] Mandelker had filed a new affidavit, sworn **October 31, 2013**, to address the gaps I had identified in his earlier evidence. This evidence, along with the two previous records, was before the court in April 2014. He began by clarifying that it was Chris Volney who had told him in early 2011 that Jeffrey was working for Americana Displays Corp.

[37] In terms of what investigations he conducted in **February 2011**, Mandelker indicates that he sent Grantis Cudjoe to see if he could locate Jeffrey at the Caldari Road or **Firglen Ridge** addresses. As they had worked together he believed Cudjoe would

know him on sight. Of course, they hadn't worked together for about 22 years by then and there is no evidence to indicate if they had seen one another in the interim.

[38] It was Rommel Guiam, a current Acrylic employee, who advised Mandelker in **March or April 2013** that he knew Jeffrey and knew where he worked as he had done some freelance work for him.

[39] Acrylic also filed the affidavit of their counsel's assistant, Antoinette Depinto who advises that counsel asked her to perform a series of searches, which she did in **February 2011**. These included a PPSA search; a property and related searches; execution searches and a corporate search for 2257884 Ontario Inc., the owner of the Strada Drive property.

[40] A third affidavit was filed at this time, this one from Michael Kril-Mascarin, Acrylic's counsel's articling student. He states that the defendant owns the property located at 335 **Firglen Ridge**, Woodbridge. This address was identified in a search conducted of what was believed to be Jeffrey's employer in February 2011. According to Mandelker, his investigations, which he has not detailed in any way, indicate that Jeffery did not reside at that address.

[41] These investigations have now been set out in Mandelker's most recent affidavit and in Ms. Depinto's evidence. Mandelker states that he sent his employee, Grantis Cudjoe, to this address to try to find Jeffrey. He does not say what happened or indicate why he did not hire a professional to do this work. In his earlier affidavit, Mandelker states that Cudjoe did not find the company, American Display, at this address.

[42] Among the searches conducted by Depinto against Jeffrey's name were writ searches. It seems a writ was registered by the Ministry of Community and Social Services against Jeffrey in March 2004, and his address at that time was listed as 335 *Firglen Ridge*. Thus, although two sources identified in searches conducted in February 2011 revealed this address, no one was ever retained to confirm that this was Jeffrey's residence or to try to serve Jeffrey at that location. IT was a further

two years before the matter was even brought before the court. The student's affidavit does not address this further gap.

[43] The student has included as exhibits to his affidavit various documents from Jeffrey's matrimonial proceedings, including written submissions that appear to have been filed on behalf of his wife. The factual summary indicates that Jeffrey has owned the **Firglen** property since 1998. Though title to the house was taken in the names of his wife and her brother, the property was transferred to Jeffrey's name in 2008.

[44] This evidence also shows that Americana Displays was started in November 2004. Jeffrey is not an employee but the sole officer and director.

[45] The wife apparently placed a certificate of pending litigation against the property, which she sought to remove on August 31, 2012 so that the property could be sold.

[46] It is not clear if that has occurred as the parcel registry included with the material is stale, dating from October 2013. It appears, however, that instead of selling the property after the CPL was discharged, Jeffrey further encumbered it, getting a mortgage loan from the TD Bank in the amount of $227,500 in November of 2012.

[47] It is not clear why this third affidavit was filed as it simply introduced the exhibits attached to it without comment. What these exhibits show is that Jeffrey could have been found through Americana or American Displays as early as 2004 and at the **Firglen** address at least as far back as 2008 and possibly back to 1998.

[48] Throughout all of this evidence there is no explanation as to why writs were not filed at the time judgment was obtained, or at any time. Knowing where a judgment debtor is is not a pre-condition to taking this step. This is a motion for leave to allow writs to be issued, not renewed. This is an important point.

THE LAW

EXPLANATION for DELAY

[49] The motion is brought under two Rules. Rule 60.07(2) governs the issuance of writs of seizure and sale where more than six years has elapsed since the date of judgment, and Rule 60.08(2) deals with issuance of writs of garnishments after the same gap in time from judgment.

[50] While both Rules provide that leave of the court is needed when there has been a delay excess of 6 years since judgment, neither Rule sets out a test to assist the court in deciding when leave should be granted or when it is more appropriate that it be withheld. For that, we turn to case law.

[51] There appears to be general agreement among the various cases where the issue was considered that there must be some explanation provided for the lapse of time between judgment and motion. The focus must therefore be on the evidence needed filed to explain the delay.

[52] In *Ballentine v. Ballentine* (1999), 45 OR (3d) 707, Cullity J. stated that whether delay should justify a dismissal of the motion should be governed by the principles of equity, particularly those that apply to enforcement of legal and equitable remedies:

> *It (delay) should be relevant only where, and to the extent that, it supports a finding of waiver or acquiescence or a finding that it would otherwise be inequitable to enforce the claim. Delay is only a factor to be considered along with others including evidence of detrimental reliance or change of position.*

[53] Master Dash relied on this passage as a starting point for his comments in *Royal Bank of Canada v. Richard Correia* 2006 CarswellOnt 4823. There, he concluded that a plaintiff seeking what is effectively an extension of the six-year period within which to take these enforcement measures *must adduce evidence explaining the delay.*

[54] In his view, this was a mandatory requirement that the moving party satisfy the court that there has been no acquiescence or waiver by the plaintiff of its rights. Once a plaintiff satisfies that onus, a defendant can then adduce evidence of his own to show detrimental reliance.

[55] In *Davidson Estate v. Martel*, 2013 CarswellOnt 2817, Master Hawkins pointed out that, notwithstanding that the outstanding judgment obtained is an important factor for the court to consider, granting leave in these cases amounts to an indulgence to the plaintiff, such that it is a discretionary matter for the master from whom the request is sought.

[56] The cases agree that the plaintiff has a very low evidentiary threshold to meet. The evidence filed by the plaintiff need only demonstrate that they have not waived their rights under the judgment, or otherwise acquiesced in non-payment. However, a bald statement to the effect that a judgment creditor has not waived his rights will not suffice – it is for the court to assess that party's conduct and make a finding based on what was and was not done and within what time frame.

[57] It is important to note that, in this case, Acrylic does not seek leave to renew writs that they have previously filed and that have expired through inadvertence. This appears to be the first time they have turned their minds to filing writs of execution, now 21 years post judgment. As a result, a closer look at the case law filed is in order.

[58] In the *Royal Bank of Canada* case, supra, the plaintiff had proceeded to garnishee the judgment debtor's wages immediately after having obtained judgment but then lifted the garnishment when an arrangement for payment was worked out. When the judgment debtor failed to pay as agreed, the matter was handed over to one collection agency, then a second and, as a result, the judgment debtor again started to make payments. By the time that those payments had stopped, however, it was already more than 6 years post judgment.

[59] The master found as follows:

> *In this case the plaintiff may not have been as proactive as it could have been, and there is a lack of specificity as to the steps taken between September 2001 and November 2004, but* ***there is some evidence of ongoing attempts to enforce its judgment for most of the time since the judgment was obtained and evidence that the defendant was aware of the judgment and the plaintiffs' attempts to collect. The delay was not excessive.***

[60] The order sought was granted, with full post-judgment interest.

[61] In *Davidson*, supra, judgment was obtained in June 1997. A writ of seizure and sale was filed and a notice of garnishment issued and served in January 1999, so about 1 1/2 years later.

[62] A very small part of the judgment was received a few days after the notice of garnishment was served through that process. In 2002, the judgment creditor passed away. His widow only learned of the outstanding debt from a family member in 2011 and she immediately retained counsel to assist her. They undertook searches and obtained an order allowing her to continue with the matter. An order was also obtained from Master Graham, in July 2011, granting the widow leave to issue and file further writs of seizure and sale and notices of garnishment.

[63] The judgment debtor then moved to vary Master Graham's order granting leave, obtained 14 years post judgment. While it was not clear before Master Graham why there had been a 10 year delay in efforts to enforce from 2002 onwards, this has been explained in the evidence Master Hawkins.

[64] He concluded by stating that the three years of silence from the success and then ultimate failure of the garnishment process and the death of the judgment creditor explained the delay for that period of time. Further, having seized the debtor's bank account and having found nothing in it, there was nothing more the judgment creditor could have done at that time, as he was not aware of any further accounts.

[65] In discussing the widow's failure to renew the 1999 writs, the master held that there was no evidence that renewing the writs would have done any good or that the

widow knew where to find the judgment debtor, who had already been examined in aid of execution in 1999. She spoke with a few people and asked if they knew where to find him but this produced no results.

[66] What is clear from the cases is that the court will look at the sum total of the evidence, from the time of judgment forward, to see what steps were taken when, in order to satisfy itself that the test, even on the basis of a low evidentiary threshold, has been met. Some evidence of early efforts to safeguard rights appears to be required, so that even when a judgment debtor cannot be found for an examination in aid of execution, at the very least, writs should be filed.

ANALYSIS and CONCLUSION

[67] As I pointed out earlier, this is not a motion seeking leave to renew writs of search and seizure and a notice of garnishment. It appears that these steps were never taken in this action. This is also a case involving a very large delay in coming forward with these requests for the first time, though knowing Jeffrey's whereabouts was not a necessary prerequisite to filing writs.

[68] As a result, the factual matrix that the plaintiff must build to demonstrate their genuine interest in retaining their rights, rather than acquiescing, is required. The longer the period of inactivity on the part of the plaintiff, the more evidence is needed to explain it.

[69] The judgment indicates that submissions were made on behalf of the plaintiff by counsel, so presumably they had access to legal advice and were or ought to have been advised that even if they did not know where Jeffrey lived or worked at that time, they could still file writs in Toronto and in nearby municipalities to protect their rights in the interim. There is no evidence before the court to explain why no writs were ever filed anywhere at any time and why no writ searches were performed before February 2011, when the **Firglen Ridge** address came up.

[70] I am required to look at the totality of time since judgment was issued in order to assess if the explanation that has been provided shows that sufficient efforts to collect were made to conclude that there was no waiver of rights or acquiescence.

[71] In my view, what takes place during the initial period following judgment having been obtained and the 6-year deadline provided by the Rules is particularly important in this context. A party should not be permitted to simply sit on its rights for many years and then on an unexplained whim, take up the cause again.

[72] Although no evidence has been filed by the responding party here, the court can take judicial notice of the fact that a party might arrange his financial affairs differently if he is aware that he has a large outstanding debt. While I am not about to speculate as to how that might have impacted on this judgment debtor, no doubt, this motion coming so long after judgment with no word from Acrylic in all the intervening years had to have come as quite a shock.

[73] The evidence indicates that no one was ever hired to locate any of the defendants and that no writs of search and seizure were ever filed with respect to any of them. The only activity before 2011 appears to have been some calls and inquiries that Mandelker had one of his employees make about 5 years post judgment, to no avail, and some further inquiries made by a second employee about 5 years after that which also failed to produce results. All of this information is hearsay.

[74] In the end, the information that assisted the plaintiff in locating the defendant was information brought to Mandelker, not information he actively sought out. Further, though Jeffrey has been living in the same house since 1998, on and off, and has owned it since 2008, he was never located there, as the plaintiff was not actively looking for him.

[75] Further, the plaintiff has had the **Firglen** address from two sources since 2011, yet even then, took no steps to hire anyone to confirm it or to seek leave to issue a writ at that time. This all goes back to Mandelker's in his first affidavit, where he says that prior to February 2011, the Plaintiff had no knowledge of whereabouts of any of the defendants.

[76] While that explains why no notices of garnishment were issued and why no examinations in aid of execution were arranged, it does not address two things: why no writs were issued and why no real and immediate efforts were made to satisfy the judgment once obtained?

[77] Enforcement efforts appear to have been kept to a minimum. Even when counsel was retained to bring this motion, it was walked into two courts, on the basis of inadequate evidence. I was the third master to deal with it, yet no factum or case law was filed at any time, though Acrylic's counsel was aware that a limitation argument was going to be made before me.

[78] Having had three kicks at the proverbial can, as well as the benefit of my comments after two records had been filed, I find the plaintiff has still not met their evidentiary burden of showing an adequate explanation for the extremely lengthy delay in this case.

[79] While I can understand the concept of not wanting to "throw good money after bad", no such evidence has been filed here. Acrylic appears to have had little or no hope of ever collecting on this judgment so they threw no funds at enforcement, using their own staff to ask around and posting them to sentry duty outside Jeffrey's suspected places of work. All the while, Jeffrey was there to be found and it is quite possible that a professional could have managed to find him far earlier.

[80] The failure to file writs at the outset or within the first 6 years of getting judgment, absent evidence to explain the omission or circumstances that are self-explanatory, amounts to a basis from which the court can infer waiver. Evidence explaining the gap could have displaced that inference easily but there was none. Further the evidence filed regarding steps that have been taken are, is, for the most part, hearsay, imprecise and without detail, until 2011. There is very little evidence regarding the front end of this delay – 18 years had already passed since judgment by February 2011.

[81] The failure to file writs within the first 6 years, when taken together with the total absence of any evidence to explain this gap and the vast period of time that has passed since judgment, is, in my view, fatal to this motion.

[82] The motion is therefore dismissed. I can be spoken to regarding costs within 30 days if the parties are unable to agree on that issue.

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Master Joan M. Haberman

Released: June 17, 2014