

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WEST YORK SALES AND LEASING INC. v. ALTOMARE

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: September 18, 2024 [in person]

COUNSEL: N. Sidlar, for the for moving party/plaintiff
Robert Altomare, defendant/responding party, appearing on his own behalf

ENDORSEMENT

[1] The plaintiff brings this motion for:

- a) interim recovery of a black 2009 Regal, Model 2750 motorboat (the “Boat”) currently in the possession of the defendant; and,
- b) an order striking the defendant’s Statement of Defence for the defendant’s failure to comply with the July 30, 2024 Order of Associate Justice La Horey removing the defendant’s lawyer of record and requiring the defendant to appoint a new lawyer of record or serve a Notice of Intent to act in person within 30 days of service (the Removal Order).

[2] At the hearing of the motion today I gave an oral ruling granting the plaintiff’s motion for interim recovery with costs, and adjourning the motion to strike pleadings to December 13, 2024. I indicated that reasons for my decision would follow by way of endorsement. This is my endorsement.

[3] The defendant, Robert Altomare, attended today on his own behalf to oppose the motion. He did not serve or file any evidence or responding materials. With respect to the motion to strike the defence, the defendant advised that he has now hired a lawyer but that lawyer was not able to be here today. He advised that his new lawyer expected to serve a Notice of Change of Lawyer by the end of this week. Plaintiff’s counsel advised that this was the first time she had heard that the defendant had retained a new lawyer and that no new lawyer had contacted her office as at the time of the hearing. If the defendant has retained a lawyer and the lawyer is aware of the motion today, one would have expected the lawyer to have reached out to plaintiff’s counsel.

[4] Although the defendant has not complied with the Removal Order, he claims to have taken steps to do so. In the circumstances, I am prepared to give the defendant another two weeks to comply with the Removal Order. The defendant shall appoint a new lawyer of record by serving a notice of change of lawyer or serving a Notice of Intent to Act in Person by no later than October 2, 2024. The plaintiff’s motion to strike the statement of defence is adjourned to December 13,

2024 for a 60-minute virtual hearing before me. The motion to strike shall proceed only if the defendant has failed to comply with the Removal Order by October 2, 2024.

[5] The defendant also requests an adjournment of the motion for interim possession of personal property so that his lawyer can attend. The defendant's ability to respond to this motion with or without a lawyer was specifically contemplated by Associate Justice La Horey in granting the Removal Order. In her July 30, 2024 endorsement, Associate Justice La Horey noted that the defendant has known about the motion for interim recovery of the Boat since March 8, 2024 and held:

Mr. Altomare should not expect the associate judge hearing the motion on September 18, 2024, to adjourn the motion. He has approximately six weeks to prepare to respond to that motion with or without a lawyer should he wish to do so. If he wishes to oppose the motion, he needs to act immediately.

[6] The defendant attended the hearing before Associate Justice La Horey and was aware of the endorsement. He did not act immediately as Associate Justice La Horey directed. He says he attempted to file unspecified material with the court last week but that it was rejected for being improperly formatted. He has not sent any responding materials to the plaintiff, notwithstanding advising plaintiff's counsel by email on September 6, 2024 that he or a lawyer would send "something" on Monday, September 9, 2024.

[7] Consistent with Associate Justice La Horey's endorsement, I denied the defendant's adjournment request and proceeded to hear the motion based on the record presently before the court.

[8] The procedure and test on a motion for interim recovery of personal property are set out in Rule 44, and in Section 104 of the Courts of Justice Act, as follows:

104 .- (1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

Rule 44.01(1) An interim order under section 104 of the Courts of Justice Act for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

- (a) a description of the property sufficient to make it readily identifiable;
- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.

44.03(1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
- (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or
- (c) make such other order as is just.

[9] The affidavit filed by the plaintiff on this motion satisfies the content requirements of subrule 44.01(1). The Boat is readily identifiable from its make, model, colour and HIN. The plaintiff's evidence is that it is the owner of the Boat having purchased the Boat from the defendant and then leased it back to him. The value of the boat at the time it was purchased by the plaintiff was \$65,000. According to the affidavit filed, the plaintiff is entitled to possession in accordance with the Boat Lease Agreement between the parties as a result of the defendant's default in lease payments. The affidavit details the plaintiff's efforts to repossess the boat starting in 2021 and the defendant's conduct in thwarting such repossession attempts. The conduct described, if proven, would constitute wrongful detention of the property by the defendant.

[10] To be successful on a motion for interim recovery of property, the plaintiff need not prove its claim to the property, only that there are "substantial grounds" for the claim. [see *Gignac v. Move Me Again Transportation Inc.*, 2021 ONSC 3374 (Master) at para 20, citing *Clark Door of Canada Ltd v. Inline Fiberglass Ltd.*, 45 C.P.C (3d) 244 (Ont. SCJ)]. The test to met by the moving plaintiff on a motion under Rule 44.01(1) and s. 104 of the Courts of Justice Act and was set out by Justice C. J. Brown in *Baca v Tatarinov*, 2017 ONSC 2935 (CanLII) (at para 28):

1. There are substantial grounds for the plaintiff's assertion that it is the legal owner or entitled to possession of the property;
2. There are substantial grounds for its claim that the property is being unlawfully detained by the defendants; and
3. The balance of convenience favours the plaintiff.

[11] On the record before me, the plaintiff has met all three parts of this test. There are substantial grounds for the plaintiff's assertion that it is the legal owner of the Boat, having purchased the boat from the defendant on September 21, 2012. The defendant in his submissions today disputed the plaintiff's ownership of the Boat. He points to the fact that the Pleasure Craft License obtained by the plaintiff and attached to the plaintiff's affidavit indicates on its face that it is "not a title document". The plaintiff does not rely on the Pleasure Craft License as proof of title. The document proving ownership relied on by the plaintiff is the September 21, 2012 Purchase Agreement entered into by the parties transferring ownership of the Boat from the defendant to the plaintiff. The defendant admitted on examination for discovery that ownership of the Boat transferred to the plaintiff when he signed that agreement. In my view, that admission on its own provides substantial grounds for the plaintiff's claim that it is the legal owner of the Boat.

[12] There are also substantial grounds for the plaintiff's claim that the Boat is being wrongfully detained by the defendant after having defaulted on the lease. The defendant's obstruction of the plaintiff's lawful efforts to repossess the Boat are documented in the plaintiff's motion record.

[13] I also find that the balance of convenience favours the plaintiff. The plaintiff requires possession of the Boat so that it can exercise its ownership rights and rights of possession under the lease agreement. The defendant has filed no evidence of any prejudice or inconvenience he might suffer if the order is granted.

[14] The plaintiff's motion for interim possession of the Boat motion is granted. As it was successful on the motion the plaintiff should have its costs. The plaintiff filed a costs outline seeking \$12,791 on the partial indemnity scale. That costs outline includes time spent on the motion to strike the statement of defence, which I have adjourned. Costs of the motion to strike are reserved to the return of that motion. The partial indemnity costs that appear to be associated with the motion for interim possession in the costs outline total approximately \$5,000. Given the work reasonably done by counsel for the plaintiff on this motion and the importance of this motion to the litigation as a whole, I find that \$5,000 is within the parties' reasonable expectations.

[15] The defendant submits that he cannot currently afford to pay a \$5,000 costs award and asks for time to pay. He shall have 90 days. The defendant shall pay to the plaintiff its costs of the motion for interim possession fixed in the amount of \$5,000 and payable within 90 days. Order to go as electronically amended and signed by me.



D. Michael Brown, Associate Judge

DATE: September 18, 2024