Date: 20060524

Docket: ITA-872-01

Citation: 2006 FC 639

In the matter of the *Income Tax Act*,

- and -

In the matter of an assessment or assessments established by the Minister of National Revenue under one or more of the following acts: the *Income Tax Act, Canada Pension Plan* and the *Employment Insurance Act*,

AGAINST:

GUY GAUTHIER

Judgment debtor

and

MARCEL GAUTHIER

Opposing party

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] A ruling is to be rendered in this case on an opposition brought under article 597 of the *Code of Civil Procedure* (C.C.P.) by the opposing party, Marcel Gauthier, against the seizure on October 10, 2001, of a building located at 55 Noble Street in the city of Waterloo (the building).

[2] The opposing party, who is the brother of the judgment debtor, is seeking the cancellation of the seizure made in this case on the grounds that he is the real owner of the building and that his brother is only the lessee of the building, as is shown in certain documents.

[3] Meanwhile, the judgment creditor vigorously contests this allegation by the opposing party and submits that at all relevant times the opposing party (as well as several of the judgment debtor's acquaintances) were only front men for the judgment debtor in connection with transactions concerning the building. Finally, there is simulation within the meaning of article 1451 of the *Civil Code of Québec* (C.C.Q.) because, as far as third parties are concerned, the opposing party was held out to be the owner of the building while in reality the real owner was the judgment debtor.

[4] According to the seizing creditor, his motion record filed to counter the opposition in question includes, in favour of the numerous affidavits it contains, the exhibits annexed to these affidavits and the stenographer's notes from the examination on affidavit which the opposing party underwent, serious, precise and concordant presumptions, in other words, circumstantial evidence that must lead us to conclude that the opposing party is actually a *prête-nom* for his brother, the judgment debtor. Therefore, the seizing creditor asks that the opposition to the seizure be dismissed with costs.

[5] For the reasons that follow, and after studying the records filed by the parties for this motion, I reach the conclusion that the opposing party has not established to my satisfaction that he is the true owner of the building and that the argument of the seizing creditor is the one which, on a balance of probabilities, must prevail in this case.

Analysis

[6] It seems to me that when the opposing party filed his first affidavit on November 16, 2001, he should have underlined all the factors that were favourable to his position. However, in this supposedly detailed affidavit, dated November 16, 2001, the opposing party simply claimed, by making short statements, that the building belonged to him (paragraph 6 of the affidavit) and that his brother is a lessee in this building (paragraphs 7 and 12). The opposing party attached to this affidavit the deed of sale of the building (Exhibit O-3) in which it was specified that he purchased the building from a certain Marcel Rousseau on March 1, 2001. The lease apparently signed with his brother (the judgment debtor) on August 11, 2001, was also filed as Exhibit O-4.

[7] The seizing creditor examined the opposing party on this first affidavit on October 18, 2002.

[8] In spite of this situation and with the consent of the seizing creditor and of this Court, as a complement to the motion record filed on March 17, 2003, the opposing party filed an affidavit dated March 10, 2003, to which was annexed a series of exhibits, O-5 to O-17.

[9] By this affidavit dated March 10, 2003, the opposing party tried to explain in a manner that is sometimes laborious to follow that he acted as a real owner would have acted in connection with the building.

[10] However, some of the affirmations in this affidavit either contradict what the opposing party stated in his examination on affidavit in October 2002 or are not really or clearly supported by the exhibits to which the opposing party refers us.

[11] For example, at his examination in October 2002, the opposing party stated that, when the building was purchased in March 2001, there was no lessee present in the building. However, in his affidavit dated March 10, 2003, he stated at paragraph 8 that a lessee was already living there. In fact, in my opinion, the results of the seizing creditor's investigation clearly show that, at least from March 1, 2001, the date the building was apparently purchased by the opposing party, the judgment debtor and his spouse at that time, Lynne Barré, were living there. The opposing party never lived in the building, because at all relevant times he was residing and domiciled on Potvin Street, in Farnham.

[12] As far as exhibits O-10, O-14, O-16, O-8 and O-11 are concerned, a review of these exhibits does not really satisfy the Court as to the truth of the points mentioned in the corresponding paragraphs of the opposing party's affidavit. In some cases, the exhibits referred to actually contradict the allegations made. For example, Exhibit O-1 does not refer to a situation happening at the time of the purchase in March 2001, but to a situation that happened on August 1, 2000. Exhibit O-8 refers to an application for insurance made by Ms. Barré, the judgment debtor's spouse, rather than to something done by the opposing party.

[13] Another contradiction concerns Exhibit O-7—which was in reality dated March 2, 2001, and not March 28, 2001, as alleged in paragraph 14 of the affidavit of the opposing party—which was submitted in support of the allegation to the effect that the opposing party allegedly wrote a cheque for $1500 payable to Ms. Barré to reimburse her for the cost of renovations made to the building. However, the same affidavit, at paragraph 6, establishes that it was on July 28, 2001, that Ms. Barré allegedly became a lessee of the building. As far as this aspect of the renovations is concerned, the Court deduces that if Ms. Barré was reimbursed on March 2, 2001, for the cost of these renovations, it was because she undertook this work even before March 2, 2001, from

August 2000 to March 2001, when her spouse, the judgment debtor, according to the results of the investigation by the seizing creditor, was already acting like the real owner.

[14] As far as the financing obtained by the opposing party on February 28, 2001, (Exhibit O-13) is concerned, the results of the investigation conducted by the seizing creditor show that it was for the judgment debtor that it was finally obtained after attempts in September and December 2000 and after the judgment debtor's other brothers, Alain and Raymond Gauthier, also tried to do so.

[15] In applying the law to the facts of this case, I adopt without further ado the following analysis made by the seizing creditor at paragraphs 2 to 8 of his written submissions in the motion record he filed on April 29, 2004, to counter the opposing party's opposition:

> [TRANSLATION]
>
> 2. Although the opposing party, Marcel Gauthier, claims to be the owner of the building located at 55 Noble Street in the Township of Shefford, he acted as a *prête-nom* for his brother, the judgment debtor, Guy Gauthier.
>
> 3. There is simulation, as Marcel Gauthier is the apparent owner, while Guy Gauthier is the real owner.
>
> 4. Article 1415 C.C.Q. defines simulation as follows:
>
>   "**1451**. Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter letter.
>
>   Between the parties, a counter letter prevails over an apparent contract."
>
> 5. In his book entitled *Les obligations*,[1] Mr. Justice Baudouin describes simulation as being an operation that [TRANSLATION] "includes two distinct contracts: on one hand an apparent contract which represents what the parties want a third party to believe and, on the other hand, a secret contract or counter-letter, which represents their real intent and which

must have been concluded before or at the same time as the apparent contract . . . . Simulation is often used to commit fraud contrary to law, that is, to avoid a legal prohibition or to indirectly do what the law does not authorize doing directly”.[2]

6. In this specific case, the simulation takes the form of an interposition by persons, whereby [TRANSLATION] “a contracting party, to avoid contracting directly with another contracting party, signs a contract with a third party who, by counter-letter, agrees to give that other contracting party the benefit of the intervening contract. Everything happens as if the third party were the real contracting party, although in fact the third party is merely a secret mandatary. **This type of simulation, also known as a contract of *prête-nom* in the broader sense of the term, is used** to avoid legal prohibitions concerning incapacity or **sometimes simply to avoid revealing the identity of the real beneficiary of the contract**”.[3]

7. As concerns third parties, simulation can be proven by any type of evidence:

---

1 Jean-Louis BAUDOUIN, *Les obligations*, 5th ed., Cowansville, Les Éditions Yvon Blais Inc., 1998.

2 *Ibid.*, No. 489, page 394.

3 *Ibid.*, No. 492, pages 395-396; see also Jean PINEAU, Serge GAUDET, *Théorie des obligations*, 4th ed., Montréal, Éditions Thémis, 2001, page 566.

> [TRANSLATION] "**507** – *Evidence of a counter-letter* – A distinction must be made on the basis of whether it is the parties or third parties who seek to adduce this evidence. Between the parties, unless there is an admission, and by the parties in respect of third parties, the general rules concerning testimony, especially those established under articles 2860 *et seq*. of the Civil Code, must be followed. This has the effect of practically excluding testimonial evidence of a counter letter. However, such evidence is permitted in a case of fraudulent simulation. **As far as third parties are concerned, because the contract is a simple juridical fact, all forms of evidence are available to them, even presumptions of fact".**[4]

8. In *Nu-Bone Corset Co. v. Bérubé*,[5] the Court noted that [TRANSLATION] "authors and the case law are unanimous to the effect that, as far as third parties are concerned, simulation may be proven by witnesses or by presumptions, provided such presumptions are **serious, precise and concordant**".[6]

---

4 J.-L. BAUDOUIN, *op. cit.*, Footnote 1, No. 500, pages 399-400.
5 [1953] R.L. 444; see also *Brien* v. *Brunet*, [1953] R.L. 70.
6 *Nu-Bone Corset Co.* v. *Bérubé*, *supra*, Note 5, 447-448.

[16] At the hearing of the opposition on May 15, 2006, the opposing party's lawyer argued for the first time that the deed of sale (Exhibit O-3) could not be ignored except as a result of an improbation proceeding under articles 223 and 223.1 of the C.C.P.

[17] This argument must fail, for two reasons.

[18] First of all, it was submitted exceptionally late. This argument should have been mentioned in his written submissions in November 2001 or even in those made in March 2003 and not orally at the hearing on May 15, 2006.

[19] Secondly, in the circumstances, improbation was not a proceeding that the seizing creditor needed to rely on to establish and support its theory of the case.

[20] Moreover, at the hearing on May 15, 2006, counsel for the opposing party raised for the first time the fact that the tragic death on September 11, 2001, of Alain Gauthier, the brother of the opposing party and judgment debtor, prevented the opposing party from relying on testimony that was pivotal to his theory.

[21] This argument, too, must fail. First of all, this argument, just like the one concerning improbation, is invoked much too late. Secondly, this death, no matter how tragic it may be, affects both parties in this case. On this point, the seizing creditor obtained the written testimony of Alain Gauthier's spouse, which does not in any way help the opposing party's theory.

[22] For these reasons, the opposing party's motion under article 597 C.C.P. will be dismissed with costs. An order will be issued accordingly.

"Richard Morneau"
Prothnotary

Montréal, Quebec
May 24, 2006

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	ITA-872-01
STYLE OF CAUSE:	INCOME TAX against: GUY GAUTHIER and MARCEL GAUTHIER
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 15, 2006
REASONS FOR ORDER BY:	PROTHNOTARY MORNEAU
DATED:	May 24, 2006

APPEARANCES:

Claude Bernard	FOR THE JUDGMENT CREDITOR
Robert Jodoin	FOR THE OPPOSING PARTY

SOLICITORS OF RECORD:

Claude Bernard Department of Justice	FOR THE JUDGMENT CREDITOR
Jodoin Huppé Granby, Quebec	FOR THE OPPOSING PARTY