COURT OF APPEAL FOR ONTARIO

DATE: 20160912
DOCKET: M46828
C62026

Roberts J.A. (In Chambers)

BETWEEN

George Samra

Plaintiff (Respondent)

and

7544405 Canada Inc. and Stella Kemdirim

Defendants (Appellants)

Stella Kemdirim, acting in person by way of teleconference

Ian Matthews, appearing as *amicus curiae*

Miriam Vale Peters, for the respondent

Heard: August 17, 2016

ENDORSEMENT

[1] Very ably assisted by *amicus*, the appellants move for an order extending the time to file their motion to review the July 20, 2016 order of LaForme J.A., requiring them to provide $37,000 as security for the respondent's appeal costs and $3,500 in costs, a stay of that order pending its review, and a stay of the judgment of Warkentin J. dated March 14, 2016, pending the appeal of that judgment.

[2] Given the imminent deadline to post security for costs, I released a brief Endorsement to the parties and *amicus* on August 19, 2016, indicating that for reasons to follow, the relief sought in the appellants' motion to extend the time to review and stay pending review LaForme J.A.'s security for costs order was dismissed. I granted the appellants an extension of time to August 29, 2016 to post security in accordance with LaForme J.A.'s July 20, 2016 order. I reserved my decision on the balance of the appellants' motion.

[3] These are my reasons on the entirety of the appellants' motion.

Background Facts

[4] It is helpful to set out briefly a summary of the background facts that inform the judgment sought to be stayed and the security for costs order sought to be reviewed.

[5] On October 11, 2013, the appellants placed a first mortgage and on April 7, 2014, a second mortgage in favour of the respondent on various properties. The appellants had made some payments of interest only on both mortgages but went into default on May 10, 2014 and have continued to be in default since that date.

[6] The respondent commenced an action on October 8, 2014, to seek possession of the mortgaged properties and payment of the monies owing on the

mortgage covenants. Notices of sale of the mortgaged properties were sent to the appellants on or about November 14, 2014.

[7] While the appellants took issue with the calculation of the mortgage debts, the appellants admitted in their statement of defence that they borrowed the funds and mortgaged the subject properties and that default occurred on May 13, 2014 on the first mortgage.

[8] The appellants' main defence in the action (as reiterated on appeal) was that the respondent had made an oral promise to the appellants to lift the second mortgage from some of the properties when the first mortgage to third party mortgagees was lifted. The appellants submit that if the respondent had done so, the appellants would have been able to refinance all of the properties and repay the amount owed on both mortgages to the respondent. According to the appellants' argument, by maintaining both a first and second mortgage on all properties, the respondent had effectively prevented the appellants from any opportunity to obtain alternate financing and thus caused the appellants' default.

[9] The respondent successfully moved for summary judgment in relation to both mortgages. The motion judge accepted the respondent's calculation of the debt owing under the mortgages. She rejected the appellants' evidence of an oral promise as not credible and preferred the respondent's denial that any promise had been made.

[10] On March 14, 2016, the motion judge granted judgment on the covenant in favour of the respondent in the amount of $915,295.80; ordered the appellants to deliver forthwith possession of the mortgaged properties to the respondent; and granted leave to the respondent to obtain a writ of possession for the mortgaged properties.

[11] On April 28, 2016, a writ of possession was issued for the mortgaged properties.

[12] The appellants commenced this appeal on April 13, 2016. On June 23, 2016, the appeal was dismissed by the Registrar for the appellants' failure to perfect it within the requisite time period under the rules.

[13] On July 20, 2016, the appellants' motion to set aside the Registrar's dismissal order and for a stay of the summary judgment pending appeal was heard. LaForme J.A. restored the appellants' appeal but dismissed the motion for a stay without prejudice to the appellants' renewing their motion on proper materials.

[14] Also on July 20, 2016, LaForme J.A. allowed the respondent's motion for security for costs and ordered the appellants to post security of $37,000 within 30 days and pay $3,500 in costs.

Analysis:

Extension of time to review the July 20, 2016 security for costs order

[15] In determining whether to grant an extension of time to review a single judge's order under r. 61.16(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court should consider: whether the applicant had an intention to seek a review of the order within the requisite time; the length of the delay, and any explanation for the delay; any prejudice to the respondent caused by the delay; and the justice of the case: *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15. This last factor is most important and requires a consideration of the merits of the proposed review.

[16] It is not disputed that the appellants have met the first two prongs of this test: they had the requisite intention to review the July 20th security for costs order and have adequately explained their very short delay in delivering and filing their motion materials. Nor does the respondent strenuously argue particular prejudice.

[17] As *amicus* submitted and respondent's counsel agreed, the real issue is the proposed merit of the review of the security for costs order and whether the justice of the case requires that an extension be granted. Notwithstanding *amicus*' able submissions, I am not persuaded that there is any merit to the proposed review that would warrant the requested extension.

[18] The appellants' principal submission is that the proposed review is meritorious because the bases under r. 61.06(1) for the order for security for costs are unclear. If made under r. 61.06(1)(a), the order is incorrect because the appeal is not frivolous and vexatious; if under r. 61.06(1)(b), it could only have been made against the corporate appellant under r. 56.01(1)(d); and if under r. 61.06(1)(c), it is in error because the appellants are impecunious.

[19] The appellants also submit that the dismissal of their request for an adjournment of the security for costs motion was unfair and therefore erroneous in the circumstances.

[20] I first set out the reasons for the security for costs order and then deal with each of the appellants' arguments in turn.

[21] On July 20, 2016, LaForme J.A. refused the appellants' request for an adjournment of the respondent's motion for security for costs because they had had the respondent's motion materials since May 16, 2016; there was no evidence to support the request for an adjournment; and Ms. Kemdirim (who had been allowed to represent the corporate appellant) could properly respond to this motion, as she had adequately argued the appellants' companion motion, which was partially successful.

[22] Noting the absence of any evidence from the appellants, LaForme J.A. granted the respondent's motion, requiring the appellants to post security for

costs of their summary judgment motion and appeal in the amount of $37,000, within 30 days, failing which their appeal would be dismissed. LaForme J.A. gave the following reasons for allowing the respondent's motion: "First, the appeal is wholly without merit. Second, there is no reason to believe that [the] respondents have the means to pay costs". He ordered costs in the amount of $3,500 payable to the respondent.

[23] Starting with the appellants' last submission first, this proposed ground of review has no merit. The decision to allow or dismiss the request for an adjournment was entirely discretionary. All of the conclusions made were open to LaForme J.A. on the record before him. The appellants point to no error that would allow for any interference with this decision.

[24] With respect to the appellants' principal argument for the review of the security for costs order, r. 61.06(1) provides as follows:

> 61.06(1) In an appeal where it appears that,
>
> (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
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> (b) an order for security for costs could be made against the appellant under rule 56.01; or
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> (c) for other good reason, security for costs should be ordered,

> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

[25] Respectfully, in my view, this argument is also without merit. That the specific section under r. 61.06(1) was not specified is immaterial given the clear reasons provided for the order. LaForme J.A. found that the appeal is wholly without merit; and, as the appellants admitted, they do not have the means to satisfy an order for costs.

[26] An appeal that is wholly without merit is frivolous and vexatious: *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (Ont. C.A.), at p. 7; *Henderson v. Wright*, 2016 ONCA 89, 345 O.A.C. 231, at para. 16.

[27] On that basis, the present case can be distinguished from the cases cited by *amicus* for the appellants where the court was of the view that there was at least *some* merit to the appeal, albeit very low, and, therefore the court required something more before concluding that there was good reason to believe that the appeal was frivolous and vexatious: *Baker v. Rego,* 2013 ONSC 3309, 31 R.F.L. (7th) 323, at paras. 21-22, discussing *Perron v. Perron*, 2011 ONCA 776, 345 D.L.R. (4th) 513 and *Szpakowsky v. Kramar*, 2012 ONCA 77, 19 C.P.C. (4th) 274.

[28] It is also important to note that under r. 61.06(1)(a), the motion judge does not have to be satisfied that the appeal *is in fact* frivolous and vexatious. Rather, the court must be satisfied that the appeal appears so devoid of merit as to give

good reason to believe that it is frivolous and vexatious: *Schmidt*, at p. 7; *Szpakowsky*, at para. 14.

[29] As a result, this order meets all of the criteria under r. 61.06(1)(a). It is therefore not necessary for me to consider the other criteria under r. 61.06(1).

[30] Accordingly, I conclude that the justice of the case does not warrant an extension of time for the appellants to seek to review the security for costs order.

Stay of the security for costs order pending review

[31] The appellants only seek a stay of the security for costs order pending the review of this order. Given my decision not to extend time for the review of the security for costs order, this issue is now moot because there will be no review of the security for costs order.

[32] As the appellants requested a simple extension in their notice of motion and because of the looming deadline of August 22, 2016, I granted them until August 29, 2016 to post the security ordered.

Stay of the March 14, 2016 judgment of Warkentin J.

[33] The appellants brought a motion for a stay of the summary judgment which was dismissed by LaForme J.A., also on July 20, 2016. In his reasons, LaForme J.A. noted that the appellants had failed to file anything and allowed them to renew their motion.

[34] The appellants submit that a stay of the summary judgment should be granting pending the disposition of their appeal.

[35] I agree with *amicus*' submission for the appellants that until the disposition of the appeal, there is an automatic stay under r. 63.01(1) of the provisions of the order for the payment of money (the money judgment on the covenant and costs); however, there is no automatic stay of the writ of possession or its enforcement: *Toronto Dominion Bank v. Charette*, (2003), 33 C.P.C. (5th) 21 (Ont. C.A.), at para. 1.

[36] The cases cited by the *amicus* can be distinguished on the basis that they do not involve the exercise of a mortgagee's power of sale remedy under a mortgage. In *Hanemaayer v. Freure*, [2004] O.T.C. 705 (S.C.), the court had ordered that one party be permitted to purchase shares from another, and the stayed provision set the price to be paid. In *Jolley v. Jolley*, [1995] O.J. No. 86 (C.J.), referenced in *Hanemaayer*, the stayed provision, directing the sale of a matrimonial home, was in relation to an order for equalization payments.

[37] That leaves the question as to whether a stay should be granted under r. 63.02(1)(b) with respect to the writ of possession and its enforcement. Notwithstanding *amicus*' helpful submissions, I am not persuaded that the appellants have met the well-known criteria for a stay set out in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, which are

applied as the test for a stay on appeal: *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.).

[38] First, they have not demonstrated that there is a serious issue that merits appellate review.

[39] The appellants admitted that they entered into mortgages with the respondent. They admitted default under these mortgages. While taking issue with the ultimate calculation of the amounts due under the mortgages, the appellants have admitted that they owe $821,675.00.

[40] The summary judgment motion judge's decision was based on the appellants' admissions and on the evidence before her. The motion judge was entitled to accept this evidence which led inexorably to her judgment in favour of the respondent.

[41] The motion judge was also entitled to reject the appellants' argument, which the appellants reiterate is "the crux of this case", that the respondent promised to lift the second mortgage from some of the properties in order to allow the appellants to find refinancing.

[42] This was an issue of credibility that the motion judge was entitled to resolve and did determine in favour of the respondent on the basis of the record before her. The appellants have not filed any evidence on this motion that would disturb those findings. The motion judge's decision on this issue is entitled to

considerable deference. Absent error of law, overriding or palpable error by the motions judge, this court cannot retry the issue or otherwise interfere with the motions judge's decision. The appellants have not identified any such error.

[43] Further, the criteria of irreparable harm and balance of convenience do not favour a stay.

[44] The appellants claim the following irreparable harm in Ms. Kemdirim's August 9, 2016 affidavit: Ms. Kemdirim and her children "do not have any other place to stay"; they have been "traumatized by the power of sale proceedings and eviction at this point, would not only add to their mental and emotional stress, but would cause financial hardship"; Ms. Kemdirim suffers unspecified "health issues" that will be negatively impacted if the stay is not granted; and the appellants are in the process of "imminently refinancing" the properties, which will be negatively impacted if the stay is not granted.[1]

[45] First, there is no evidence that Ms. Kemdirim cannot afford to rent another home and will be homeless if the stay is not granted. Ms. Kemdirim simply makes the bald statement in her affidavit filed on this motion that they have no other place to stay. That statement does not satisfy the appellants' onus with respect to showing irreparable harm.

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[1] The issue of the allegedly late delivery of a case provided by respondent's counsel on July 20th was also raised in Ms. Kemdirim's affidavit but is not relevant to the hearing of this motion and, in any event, does not constitute irreparable harm.

[46] Similarly, while I understand that her situation renders her anxious and upset, Ms. Kemdirim's broad statements about the distress to her and her children do not demonstrate irreparable harm. Notwithstanding that she has known since July 20th that she could renew her motion for a stay, she has not filed any medical evidence in support of her statements, although she claims such evidence is available.

[47] Finally, that the appellants may be on the cusp of obtaining financing does not amount to irreparable harm if the stay is not granted. No concrete details were provided about the steps taken by the appellants or the nature of the financing to be obtained. It is impossible on this evidence to ascertain how imminent financing actually is and why not granting the stay would prevent it.

[48] With respect to the balance of convenience, it favours the respondent. The appellants are in no different a position than they were in when the respondent loaned them the monies that were secured by the subject mortgages.

[49] There is no dispute that the appellants were in default under their prior mortgages when they obtained financing from the respondent. They have not tried to bring the present mortgages into good standing, nor have they produced credible evidence that they have made sincere and real efforts to secure alternate financing. Again, there is only Ms. Kemdirim's bald statement in her

affidavit that refinancing is imminent. In my view, that evidence is not sufficient to satisfy this criterion.

[50] The appellants do not dispute the validity of the mortgages, their default, or their indebtedness under them, at least to an amount that well surpasses the value of the properties according to the evidence filed by the respondent. There is no basis to interfere with the respondent's right to possession of the properties under the mortgages and the summary judgment.

[51] Accordingly, the appellants' motion for a stay is dismissed.

Disposition

[52] For these reasons, the appellants' motion to extend the time to review and for a stay of LaForme J.A.'s July 20, 2016 order for security for costs is dismissed. The appellants were required to post security for costs in the amount of $37,000 and pay the $3,500 in costs to the respondent by August 29, 2016, failing which their appeal would be dismissed.

[53] The appellants' motion for a stay is dismissed. While the payment of monies under the March 14, 2016 order of Warkentin J. is automatically stayed by the appellants' appeal under rr. 63.01 and 63.03, the writ of possession and its enforcement is not. The respondent may proceed to take possession of and sell the properties in accordance with his notices of sale and the summary judgment.

[54] With respect to the costs of this motion, the respondent was entirely successful and is entitled to his costs in the amount of $4,185.12. The appellants shall pay these costs to the respondent within 30 days of the release of this Endorsement.

L.B. Roberts J.A.