

CITATION: Tiernan v. Dietrich, 2011 ONCA 263

DATE: 20110405

DOCKET: M39190 & M39260 (C52537)

COURT OF APPEAL FOR ONTARIO

Laskin J.A. (In Chambers)

BETWEEN

Peter K. Tiernan, M.D.

Applicant (Respondent in Appeal/
Responding Party in M39190
Moving Party in M39260)

and

Edgar J. Dietrich

Respondent (Appellant in Appeal/
Moving Party in M39190
Responding Party in M39260)

Edgar J. Dietrich, acting in person, appellant/moving party in M39190/responding party in M39260

Edmund J. Stevens, for the respondent/responding party in M39190/moving party in M39260

Heard in writing

On appeal from the order of Justice John Murray of the Superior Court of Justice, dated July 30, 2010 and on a motion for a stay pending appeal (M39190) and on a motion for security for costs (M39260).

ENDORSEMENT

[1] The appellant, Edgar Dietrich, seeks a stay of the order of Murray J. dated July 30, 2010, pending his appeal of that order. The respondent, Peter Tiernan, opposes the stay, and seeks security for the costs of the appeal. The appeal is scheduled to be heard by this court in late May.

Background

[2] Dietrich is a former attorney in Michigan. In May 2007, after a 3½-week jury trial, Tiernan obtained a judgment in Michigan against Dietrich for approximately \$2.1 million. Tiernan then sought to register and enforce the judgment in Ontario. The parties entered into Minutes of Settlement, which were incorporated into the order of O’Connell J., dated November 16, 2007. Under that order, the Michigan judgment against Dietrich was registered in Ontario as a judgment of the Superior Court. However, under paragraph 2 of the order, enforcement of the judgment was stayed pending Dietrich’s appeal in the State of Michigan.

[3] On March 31, 2010, the Court of Appeals for the State of Michigan dismissed Dietrich’s appeal. Dietrich has sought leave to appeal the dismissal to the Michigan Supreme Court. That motion was pending at the time of the argument of the motions before me. Nonetheless, following the dismissal of Dietrich’s appeal by the Michigan Court of Appeals, Tiernan moved to set aside the stay of the enforcement of the Ontario judgment ordered by O’Connell J. As I have said, under paragraph 2 of his order, O’Connell J. stayed enforcement pending Dietrich’s appeal. As this appeal had been

dismissed, Murray J. lifted the stay of the enforcement of the Michigan judgment in Ontario. Dietrich has appealed Murray J.'s order. It is this appeal that will be heard in late May and is the subject of the motions before me.

[4] The reason why Tiernan seeks to enforce his Michigan judgment in Ontario is to execute against a property in Kincardine, valued, according to his affidavit material, at \$525,000. Dietrich was at one time a joint tenant of the Kincardine property, and after the death of the co-joint tenant in April 2006, became the sole owner.

[5] However, in November 2008, Dietrich both made an assignment in bankruptcy in Michigan and on the same day, conveyed title to the Kincardine property to his grandson, Eric Justin Dietrich, for nominal consideration. In July 2009, Dietrich arranged for his grandson to grant a life interest in the Kincardine property to Dietrich's former wife.

[6] In June 2010, a judge of the United States Bankruptcy Court in Michigan declared the conveyance to Eric Justin Dietrich fraudulent and void. The Bankruptcy Court held that the property belonged to the bankruptcy estate subject to Tiernan's lien rights.

[7] Finally, three judges of the Superior Court have made costs orders against Dietrich. None of the costs orders have been paid. Against this background, I turn to the two motions before me.

1. Dietrich's request for a stay

[8] Dietrich argues that his appeal automatically stays the order of Murray J. Alternatively, he seeks a stay of that order. Dietrich's appeal is not an appeal of a money

judgment but rather of the lifting of the stay of the enforcement of a money judgment. In effect, Dietrich seeks to reinstate the stay that Murray J. lifted. I am inclined to the view that Dietrich's appeal does not automatically stay Murray J.'s order. In other words, his appeal does not automatically reinstate the stay ordered by O'Connell J.

[9] And, in my opinion, Dietrich's request for a stay has no merit for the simple reason that he has no interest in the Kincardine property. His bankruptcy estate controls title to the property. Even if I were to disregard the bankruptcy proceedings in Michigan, Dietrich himself voluntarily conveyed title to the Kincardine property to his grandson. On either basis, he has no standing to claim a stay of enforcement proceedings against that property. Accordingly, his motion for a stay is dismissed.

2. Security for costs of the appeal

[10] Tiernan seeks security for costs of the appeal. Under rule 61.06(1)(a) of the *Rules of Civil Procedure*, a judge of this court may order security for costs where there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets to pay the costs of the appeal. Tiernan meets both prongs of rule 61.06(1)(a).

[11] I see no merit in Dietrich's appeal. His appeal in Michigan was dismissed. That dismissal justifies lifting the stay ordered by O'Connell J. Dietrich's motion for leave to the Michigan Supreme Court does not afford any basis to overturn Murray J.'s order.

The order of O’Connell J. contemplated solely the appeal to the Michigan Court of Appeals, and Dietrich was unsuccessful on that appeal.

[12] Dietrich has no assets in Ontario. He has failed to pay three costs orders. He conveyed away the Kincardine property, which apparently was his sole asset in this province. Even if he had maintained title to it, the value of the property is but one quarter of the judgment against him.

[13] Thus, in my view, Tiernan is entitled to an order for security for costs. He has not filed a proposed bill of costs. I order that Dietrich pay \$5,000 for security for the costs of the appeal. That amount must be paid at least seven days before the hearing of the appeal.

[14] Tiernan is entitled to the costs of these motions, which I fix in the amount of \$750, inclusive of disbursements and applicable taxes.

“John Laskin J.A”