

CITATION: Giardino (Re), 2011 ONCA 312

DATE: 20110420

DOCKET: M39688 M39269 C52277

COURT OF APPEAL FOR ONTARIO

Cronk, Gillese and MacFarland JJ.A.

BETWEEN

In the Matter of the Bankruptcy of
Nicolino Giardino
of the City of Guelph
in the County of Wellington
in the Province of Ontario

Jeff Van Bakel, for the appellant/responding party Anthony M. Speciale

Melvyn L. Solmon and Raffaele Sparano, for the former bankrupt (respondent) Nicolino Giardino

Harry Van Bavel, for the trustee

Heard and released orally: April 14, 2011

Motion to dismiss the within appeal and cross-motion for leave to appeal and other relief.

ENDORSEMENT

[1] There are two motions before us: a motion by the respondent to dismiss the within appeal and for related relief, and a cross-motion by the appellant for leave to appeal, if necessary.

[2] In his Notice of Appeal, the appellant purports to appeal three “costs endorsements of the Honourable Mr. Justice Little dated May 27, 2010, July 17, 2008 and September 9, 2009.” The next 11 paragraphs of the Notice of Appeal set out the incidental relief requested resulting from the setting aside of those three orders.

[3] This appeal arises from a bankruptcy that began in November 1998. Prior to the respondent’s assignment in bankruptcy, the appellant was the lawyer for the bankrupt Giardino, members of Giardino’s family and an associated company.

[4] The appellant represented Giardino in proceedings against his former business partner, Pina Marfisi, and it was the loss of those proceedings that led Giardino to make an assignment in bankruptcy on November 12, 1998. The appellant and Marfisi were appointed Inspectors of Giardino’s estate in bankruptcy.

[5] Giardino’s discharge hearing was set to proceed on September 28, 1999. The appellant filed a Notice of Opposition to the discharge on the basis that Giardino had failed to disclose all his actual or potential income. Just prior to that date, the appellant also delivered a Motion to Annul purportedly on behalf of the bankrupt estate. He conducted lengthy and protracted examinations of Giardino, members of his family and others in 1999 and 2000. The Motion to Annul was scheduled and adjourned on numerous occasions until 2008. Each side blames the other for delay.

[6] In 2007, an order required the appellant to bring on his motion forthwith, but he failed to do so. The Trustee attempted to schedule the discharge hearing in 2008, but the

appellant served his Motion to Annul with claims for other relief, including an order to remove the Trustee and an order for contempt against Giardino. Again, the appellant argued his motion was based on his knowledge that Giardino had not made full disclosure. The motion was scheduled for July 16, 2008.

[7] Prior to the hearing, Giardino retained counsel and served a cross-motion to have the appellant removed as an Inspector and to have the discharge hearing immediately following the Motion to Annul.

[8] On return of the motions, the appellant attempted to introduce a new affidavit of Marfisi and sought an adjournment in order to cross-examine Giardino on his affidavit.

[9] On July 17, 2008, Little J. refused the adjournment request, dismissed the Motion to Annul, ordered the motion for other relief to be set before the Deputy Registrar on August 19, 2008, to be disposed of, if necessary, depending on the outcome of the discharge hearing set for that same date and ordered costs payable to Giardino by the appellant of the denied request for adjournment and the dismissed Motion to Annul on a substantial indemnity basis unless otherwise ordered by the Deputy Registrar. On Giardino's cross-motion, he ordered that the discharge hearing be adjourned to the Deputy Registrar to proceed on August 19, 2008, without further adjournment, that the appellant, on consent, resign as an Inspector and that the appellant pay costs to Giardino of the motion to remove the appellant fixed in the sum of \$750.00 (the first Little order).

[10] The appellant purported to appeal the first Little order and took the position that filing the appeal stayed the discharge hearing ordered to proceed August 19, 2008.

[11] Giardino moved before this court to deal with the stay issue and took the position that leave to appeal was required under s. 193 of the *Bankruptcy and Insolvency Act*. The appellant then brought a motion for leave to appeal if necessary.

[12] The motion came on before Watt J.A. on August 14, 2008. He held there was no stay because the relief sought did not fall under s. 193(a) through (d) of the *Bankruptcy and Insolvency Act* and, accordingly, the mandatory stay provisions of s. 195 did not apply. He denied leave to appeal and ordered costs to Giardino payable by the appellant in the sum of \$7,500.00. There was no motion to set aside or vary the order of Watt J.A. – an order now approaching its third anniversary. The time for bringing such a motion is long past. The order of Watt J.A. finally disposes of any appeal in relation to the first Little order.

[13] The second order of Little J. made September 9, 2009, fixed costs against the appellant in favour of Giardino in relation to the Motion to Annul in the sum of \$59,771.09 and in relation to the additional relief in the sum of \$7,718.97, both on a substantial indemnity basis (the second Little order).

[14] The appellant attempted to appeal the second Little order, but his appeal was properly rejected by the Deputy Registrar of the Court of Appeal because he had attempted to include an appeal of the July 17, 2008 order, which appeal had been finally

disposed of by the order of Watt J.A. on August 14, 2008. The appellant did not submit any amended materials. The time for appealing the second Little order is also long past. While there is some evidence of the appellant's intention to appeal this order, within time, there is no satisfactory explanation for the extraordinary delay. In our view, even if an application to extend the time to appeal was made, the test for such relief is not met.

[15] Accordingly, for these reasons, we would allow the motion to dismiss in respect of the first two Little orders and dismiss the appeal in relation thereto.

[16] Finally, we turn to the order of May 27, 2010, which required the appellant to pay costs fixed in the sum of \$13,000.00 to Giardino in respect of the costs assessment hearing held on September 9, 2009 (the third Little order). This appeal was filed on time and arguably falls within s. 193 of the *Bankruptcy and Insolvency Act*. While it is arguable that leave to appeal is not required (see *Rockwell Developments Limited v. Newtonbrook Plaza Ltd.*, [1972] 3 O.R. 199-214 (C.A.) and *Elliot v. Toronto (City)* (1999), 43 O.R. (3d) 392 (C.A.)), in the event that it is, we would grant leave. We would

therefore dismiss that part of the motion to dismiss that relates to the third Little order dated May 27, 2010 and permit that aspect of the appeal to continue. Put another way, the appeal may continue only in respect of the third Little order.

[17] As to the motion for security for costs, the appellant has paid none of the many costs orders made against him throughout these lengthy and protracted proceedings. Having dismissed the appeal in relation to the orders of July 17, 2008 and September 9, 2009, those orders are now finally resolved and the costs awarded are now payable. Those orders awarded costs of \$750 and \$67,490.06 respectively and together total \$68,240.06. The order of Watt J.A. required costs to be paid in the sum of \$7,500.00, making the total owing \$75,740.06.

[18] The motion for security for costs seeks the sum of \$75,000, being \$50,000 for the costs below and \$25,000 for the costs of the appeal, which is a reasonable sum in our view. Unless the sum of \$75,000 is paid into court within 30 days, that part of the appeal which remains shall be dismissed.

[19] An order shall therefore issue in accordance with these reasons, granting the motion to dismiss in part and the cross-motion in part.

[20] The respondent Giardino is entitled to his costs of the motion to dismiss, net of costs in Motion No. M39688, the motion brought on behalf of the appellant, and inclusive of costs on the motion before Juriansz J.A. of this court, in the aggregate amount of \$20,000, inclusive of disbursements and all applicable taxes.

“E.A. Cronk J.A.”

“E.E. Gillese J.A.”

“J. MacFarland J.A.”