COURT OF APPEAL FOR ONTARIO

CITATION: Groia & Company Professional Corporation v. Cardillo, 2019 ONCA 165
DATE: 20190301
DOCKET: M49832 (C66100)

Lauwers J.A. (Motion Judge)

BETWEEN

Groia & Company Professional Corporation

Respondent (Plaintiff)
Moving Party

and

John Robert Cardillo and Medcap Real Estate Holdings Inc.

Appellants (Defendants)
Responding Parties

Bonnie Roberts Jones, for the moving party

F. Scott Turton, for the responding parties

Heard: February 5, 2019

REASONS FOR DECISION

[1] The moving party on this motion (the respondent law firm on the appeal), moves for an order under rule 61.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for security for costs. It submits that there are good reasons to believe the appeal is frivolous and vexatious and that the responding parties on this motion

(the former clients who are the appellants on the appeal), have insufficient assets in Ontario to pay the costs of the appeal.

[2] For the reasons that follow, I allow the motion and order the clients to post security for costs in the amount of $80,000, failing which the appeal will be dismissed.

Background

[3] A fuller factual background is set out in the reasons for judgment of Wilson J. dated October 1, 2018 with reasons reported at 2018 ONSC 5776. The law firm represented the clients in four pieces of litigation, but they did not pay all of the accounts rendered. The trial judge heard a simplified rules trial over four days and approved the accounts rendered without deduction in the amount of $184,891.39, the balance of the unpaid accounts, plus interest of $2,963.40. The order also provided for the payment of $60,000, as agreed, for the trial costs.

Discussion

[4] Rule 61.06 governs security for costs on appeal. An order to post security for costs is justified:

> (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;
>
> …

[5] (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.
>
> ...
>
> (2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal.

[6] For an order for security for costs to be granted under rule 61.06(1)(a), the motion judge must: (a) have good reason to believe the appeal has no merit and is therefore frivolous and vexatious, and (b) have good reason to believe the clients have insufficient assets in Ontario to cover the costs of the appeal: *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), 1995 CarswellOnt 154, at para. 15. As this court observed in *Schmidt*, at para. 16:

> A judge hearing a motion for security for costs may reach the tentative conclusion that an appeal appears to be so devoid of merit as to give "good reason to believe that the appeal is frivolous and vexatious" without being satisfied that the appeal is actually totally devoid of merit.

[7] The law firm also invokes rule 61.06(1)(c), and relies on *Henderson v. Wright*, 2016 ONCA 89, 345 O.A.C. 231, where Strathy C.J.O. stated at paras. 27 and 28:

> Appellate courts in Ontario have ordered security for costs when an appeal has a low prospect of success coupled with an appellant who has the ability to pay costs

> but from whom it would be nearly impossible to collect costs.
>
> This "good reason" balances the need to ensure an appellant is not denied access to the courts, with the respondent's right to be protected from the risk the appellant will not satisfy the costs of the appeal. (Internal citations omitted)

[8] The motion therefore raises three issues for determination: Do the clients have insufficient assets in Ontario to cover the costs of the appeal? Does the appeal have any merit? Is there any other good reason to order security for costs?

Do the clients have insufficient assets in Ontario to cover the costs of the appeal?

[9] The law firm's factum sets out four grounds for doubting that the clients have sufficient assets in Ontario to cover the costs of the appeal:

> (a) Mr. Cardillo stated in his affidavit dated April 17, 2018 that when he engaged Groia & Company his "financial circumstance were strained", that he was under "a near overload of financial and personal stresses", and that he had to pay his wife $1,500,000 to fund a settlement with her;
>
> (b) Mr. Cardillo advised Groia & Company in July 2016 that he would not be able to pay his outstanding legal fees until he sold certain Medcap-owned properties, which he expected to do that fall. Groia & Company understands that these properties have now been sold; however, Mr. Cardillo and Medcap have not disclosed any details of

the sales, including what, if any, equity they held in those properties and have still refused to pay Groia & Company;

(c) There are numerous encumbrances on the properties owned by Mr. Cardillo and/or Medcap and Mr. Cardillo has made several attempts to render himself judgment proof;

(d) There are numerous outstanding judgments and writs filed against Mr. Cardillo and Medcap.

[10] The support for each of these paragraphs is considerable in the record. The responding party does not grapple with the issue except to say that where "the appeal is not frivolous or vexatious the issue of insufficient assets is not reached." Counsel asserts in his factum that there is evidence in the law firm's motion record that "discloses considerable real estate assets and no valuation opinion suggesting that their value is inadequate."

[11] In my view, the law firm has demonstrated beyond a reasonable doubt that Mr. Cardillo has taken many steps to render himself judgment proof, and that his assets are not readily exigible. This ground on which an order for security for costs may be granted is adequately made out.

Does the appeal have any merit?

[12] The supplementary notice of appeal specifies five grounds of appeal:

(a) The Reasons of the trial judge are not responsive to the case's live issues and the parties' key arguments, are in respect of many core issues conclusory, and are as a result insufficient;

(b) While the learned trial judge correctly stated the factors to be taken into account in assessing legal accounts of the respondent law firm, she failed to apply them in any meaningful way;

(c) The learned trial judge made significant misapprehensions of central facts, particularly regarding the Harrison Matter;

(d) The learned trial judge failed to address most of the issues raised by the appellants;

(e) The learned trial judge made legal errors regarding the ambit of issues that were relevant to the assessment of the respondent lawyer's legal accounts, and in particular erred in not addressing issues regarding the skill of the lawyers and the results achieved due to the case not being an action for solicitor's negligence.

[13] Mr. Turton argues that the trial judge's reasons do not pass muster under the principles applied by this court in *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474, at paras. 20-25. He submits, in particular, that the trial judge failed to resolve confused or contradictory evidence on key issues, and failed to pay due regard to the submissions of counsel and the evidence put before her.

[14] The responding parties' major complaint relates to the "Harrison matter," which ultimately accounted for about $160,000 of the accounts rendered. Fees and disbursements at issue in the other three matters on which the law firm acted for

the respondents are a small proportion of the amounts at issue on the appeal. Any merit in these would not be sufficient to offset the lack of merit on the Harrison matter.

[15] The Harrison matter was an application for an oppression remedy under the *Business Corporations Act*, R.S.O. 1990 c. B.16 against two companies that leased and operated a fitness club. The application was heard by McSweeney J., who made the following unopposed order on September 12, 2016:

> THIS COURT DECLARES that with respect to 1615574 Ontario Limited ("Leaseco"),
>
> (a) The applicants are complainants within the meaning of s. 245 of the OBCA;
>
> (b) That Maria Catenacci holds 75% of the shares of Leaseco in trust for John Cardillo or his designate;
>
> (c) That the respondent John Harrison be removed as a director of Leaseco and that John Cardillo or his designate be appointed as the sole director of Leaseco;
>
> (d) That John Cardillo or his designate be granted unfettered access to the books and records of Leaseco;
>
> (e) That an accounting be conducted with respect to any monies paid to John Harrison and/or Sharon Harrison, or companies under their control, by Leaseco since September 2015.

[16] The application judge reserved the balance of the application, and released an endorsement on January 13, 2017. She ordered the trial of an issue of 1.5 days

in length “on the threshold issue of the ownership of” 1860331 Ontario Inc. (the operating company), for the following reason:

> Based on the contradictions and inconsistencies on key points in and between the evidence of Mr. Cardillo and Mr. Harrison, the credibility of each of the parties is squarely an issue. I find that there is a genuine issue for trial which cannot be resolved on the basis of the record filed.

[17] Mr. Turton argues that the trial judge simply failed to address the arguments and the evidence, and notes that the trial judge did not even distinguish between the operating company and the leasing company in her reasons.

[18] I select the three most significant grounds pursued by Mr. Turton in his appeal factum, on which he relied in argument. First, the law firm made no request in the notice of application, in the factum, or in argument of the application for a term in the “interim order that Harrison continue to cause the operating company to pay the rent on the lease of the fitness club”.

[19] The result, Mr. Turton argues, is that the operating company and the leasing company became valueless because no order was obtained requiring Harrison to continue paying the rent. He observes that the trial judge, apart from failing to distinguish between the operating company and the leasing company in her reasons, also made no reference to the fact that the fitness club was lost while the application judge’s decision was under reserve.

[20] The trial evidence on this issue was contradictory. Mr. Groia deposed that after McSweeney J. granted the interim relief on September 12, 2016, he told Mr. Cardillo that “as he now had control over Leaseco and the lease he needed to take steps to protect his position.” A follow-up email to that effect was sent to Mr. Cardillo. But Mr. Cardillo deposed that he requested Mr. Groia to seek that relief in the application.

[21] The trial judge said:

> I have no doubt that the application involved complex issues and was of great importance to Cardillo. Despite his attempts to minimize the success of Groia and Sischy on the application, the order of Justice McSweeney of September 12, 2016 was clearly a victory for Cardillo. On this point, I accept the evidence of Sischy that Cardillo was pleased with the outcome of the application. The fact Groia encouraged Cardillo to settle with Harrison and he declined to do so does not mean that the outcome of the application was of little or no value to him.

[22] The trial judge added the following observations:

> The interim relief that was obtained while Groia & Co. were his counsel was advantageous to Cardillo. While Cardillo asserts that the Groia firm "accomplished nothing" in the Harrison matter, I do not agree. It was necessary to bring the application, which was responded to by Harrison. The fact that Harrison did not oppose some of the relief sought on the return date of the application does not mean the work done was worthless or did not result in Harrison changing his position. Clearly, Cardillo had not been successful in his negotiations with Harrison and that is why he retained Groia to launch legal proceedings.

> While Cardillo now complains that the leasing company ended up being worthless, it is important to note that after the hearing of the application and before the judge released her decision, time was spent attempting to settle the entire matter. Cardillo did not wish to follow his lawyers' recommendations on settlement, which was his prerogative. By November, the relationship between Groia & Co. and Cardillo had deteriorated to the point where both sides agreed Cardillo should retain new counsel. What happened with the company after the retainer of Groia & Co. ceased is not a factor for my consideration when determining whether the fees charged are fair and reasonable.

[23] The second complaint relates to the evidence. The responding material filed by Harrison quoted previous testimony given under oath by Mr. Cardillo in other proceedings in which he had stated that he had no ownership interest in the fitness club, a statement that flatly contradicted the position Mr. Cardillo was taking in the application. Mr. Cardillo's credibility came under fire, which led McSweeney J. to order the trial of an issue, but it never took place because the asset disappeared.

[24] Mr. Turton argues that the law firm "failed to take reasonable steps to address this credibility problem in the context of proceeding with an application on a paper record."

[25] Mr. Groia and David Sischy, Mr. Groia's associate, gave evidence on this issue. Mr. Groia disputed Mr. Turton's assertion in questioning him that the "glaring inconsistency in evidence" could not be resolved on a paper record, "because Mr. Cardillo kept assuring us that his answers in the matrimonial litigation had been

taken out of context." He added his view that in the post-Hyrniak era, application judges were more likely to make a credibility finding on transcripts than in the past.

[26] Mr. Sischy was also cross-examined. He said that he identified the issue and discussed it with Mr. Cardillo "at length," and "he assured me that it is not what he meant". He added: "Our plan didn't change, our plan was to always to seek an early and expedited hearing date. And, that was directly in accordance with his desire to get it – to put a maximum pressure on the Harrisons." On re-examination, Mr. Sischy added that the decision to proceed in the face of the inconsistent evidence that had been raised by the Harrisons was made in conjunction with Mr. Groia and Mr. Cardillo.

[27] The trial judge did not directly refer to this credibility contest, but her evaluation of the circumstances makes it clear that she accepted the evidence of Mr. Groia and Mr. Sischy. She said: "I accept the evidence that Cardillo instructed Groia that he wanted an aggressive stance to be mounted with Harrison, who would likely 'cave' after being served with an application." She added "Cardillo retained Groia because of his reputation as an aggressive litigator in the area of shareholder disputes."

[28] The third complaint relates to the clients' claim for damages. Mr. Turton points out that while the application claimed financial compensation or damages, the law firm failed to identify the legal basis on which the clients were so entitled.

Further, “the Groia firm failed in cross-examination of Harrison to request or obtain financial statements, bank statements, accounting documents, or other financial information upon which a request for financial compensation could be based.”

[29] Mr. Turton argues that the issue was not addressed by the trial judge. Frankly, I do not see how this figures into the decision under appeal.

[30] The trial judge stated: “While counsel for the defendant submits that the various matters ought to have been handled differently, this is not a solicitor’s negligence case.” In discussing her responsibilities in the case, the trial judge noted: “It is not my job to determine if the legal advice given to Cardillo by Groia & Co. was the best advice in the circumstances; nor is it appropriate to approach this case as if it were a solicitor’s negligence action.” However, she added: “The evidence indicates that the legal work that was done was skillful and what one would expect from a firm specializing in shareholder disputes and other types of commercial litigation.” I see no error in the trial judge’s approach; she properly considered the relevant factors such as the results achieved, the skill of the lawyers, and the reasonableness of the costs incurred and did not improperly expand the scope of her review into the more detailed analysis of counsel’s conduct required in a solicitor’s negligence case.

[31] In my view, there is good reason to believe the appeal has no merit. It does not raise any arguable error in law. The appeal really only challenges the trial

judge's findings of fact and credibility. As Strathy C.J.O. observed in *Henderson*, at para. 16: “This appeal does not raise any arguable error in law, and challenges findings of fact and credibility for which the trial judge set out detailed, facially sound reasons. This court has held that such appeals appear to have no merit”. He went on to say that “[i]n such cases, there is almost no possibility of successfully overturning the result.”: at para. 19.

[32] To succeed, the clients must ultimately demonstrate that the trial judge made a number of palpable and overriding errors in her findings, of which I see no evidence.

[33] The appeal lacks merit, and the law firm has satisfied this branch of the test under rule 61.01(1)(a) for security for costs.

Is there any other good reason to order security for costs?

[34] Mr. Turton argues that the trial judge paid too much attention to Mr. Cardillo’s behaviour, and that this was not an appropriate consideration. In her reasons for decision, the trial judge set out the argument made by counsel for the clients: “He was a difficult and abusive client, which added to the amount of time required to do the work and his conduct ought not to be sanctioned by the court.” In her conclusion, she noted that Mr. Cardillo “agreed to pay the invoices after selling the property in the fall of 2016. He failed to do so and it was only after the breakdown

in the relationship between the parties that Cardillo became abusive and critical of Groia and Sischy."

[35] It is not possible to discern from the trial judge's reasons how much weight she attached to Mr. Cardillo's behaviour in deciding the case, if any at all. However, I am satisfied that the moving party has also made out the ground under r. 61.06(1)(c), as set out by Strathy C.J.O. in *Henderson*, where he noted that "Appellate courts in Ontario have ordered security for costs when an appeal has a low prospect of success coupled with an appellant who has the ability to pay costs but from whom it would be nearly impossible to collect costs." I consider this observation to apply to the clients. Chief Justice Strathy pointed to "the respondent's right to be protected from the risk the appellant will not satisfy the costs of the appeal," a factor that also applies to the clients.

[36] I therefore order that the responding parties post security for costs in the amount of $80,000, $60,000 relating to the costs of the judgment under appeal, and $20,000 relating to the appeal itself. The costs are to be posted by March 29, 2019. The costs of this motion are payable to the moving party by the responding parties in the amount of $5,000, all-inclusive, forthwith.

"P. Lauwers J.A."