COURT OF APPEAL FOR ONTARIO

CITATION: M & M Homes Inc. v. 2088556 Ontario Inc., 2020 ONCA 134
DATE: 20200218
DOCKET: M51177, M51186 (C67632)

Paciocco J.A. (Motions Judge)

BETWEEN

M & M Homes Inc.

Plaintiff (Respondent)

and

2088556 Ontario Inc., Royal Lepage Real Estate Services Ltd., John Redvers, 697350 Ontario Limited, 1375051 Ontario Limited, Dorothy Kushner, Sam Goldman, Frank Goodman, Lillian Goodman, Dinapet Holdings Limited, 614921 Ontario Limited, Maria Traina, Howard Brian Goldman, Joseph Burdi, Doris Miller, Carole Greenspan, Community Trust Company, 2178875 Ontario Inc., Jong Suk Im, Sung Ran Lee, Yeon Hee Huh and In Hee Woo

Defendants (Appellant)

Robert S. Choi and Gina Rhodes for the appellant, responding party on M51177, and moving party on M51186

Elliot Birnboim, for the respondent, moving party on M51177, and responding party on M51186

Heard: February 5, 2020

REASONS FOR DECISION

OVERVIEW

[1] The appellant, 2088556 Ontario Inc. (“208 Ontario”), as vendor, and the respondent, M & M Homes Inc. (“M & M Homes”), as purchaser, entered into an

agreement of purchase and sale (APS) relating to development land. The sale did not close, and litigation ensued. In the trial decision appealed from, the respondent purchaser, M & M Homes, prevailed, receiving an order for specific performance to be enforced through a vesting order (the "vesting order"), and costs on a substantial indemnity basis. 208 Ontario is appealing both the vesting order and the costs order.

[2] There are now two interconnected motions before me, arising out of that appeal.

[3] In motion M51177, M & M Homes moves to "set aside" a certificate of stay relating to the costs order that was issued by the registrar of this court, pursuant to r. 63.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[4] In motion M51186, 208 Ontario moves for a stay of the vesting order and the costs order pending appeal.

[5] I address both motions in this decision after setting out the material facts, most of which are common to the two motions. For the reasons below, I find that the costs order was automatically stayed under r. 63.01 and do not set aside the certificate of stay issued by the registrar. I also find that it is in the interests of justice to stay the vesting order.

MATERIAL FACTS

[6] The respondent, 208 Ontario, under the directing mind of Mr. Lam, severed land for development purposes. 208 Ontario initially retained one part of that land for residential development (the “residential property”). On September 14, 2012, 208 Ontario entered an APS to sell the other part of that land to M & M Homes (the “commercial property”), for a purchase price of $2,150,000.

[7] Under the APS, 208 Ontario was obliged to bring municipal services to the land and obtain written confirmation from the municipality relating to those services. This was not accomplished by the initial closing date, leading to closing extensions being mutually granted.

[8] Ultimately, litigation ensued, with M & M Homes seeking specific performance of the APS and an abatement relating to the costs of bringing the required services to the land. M & M Homes filed a Certificate of Pending Litigation (the “CPL”) on title.

[9] After the CPL was filed, 208 Ontario transferred the property to CRC Sutton Inc. (“CRC”), another corporation controlled by, and under the directing mind of, Mr. Lam. In addition, collateral mortgages were placed on the commercial property as additional security for loans on the residential property.

[10] M & M Homes prevailed at trial, securing an order for specific performance and two abatements (a “services abatement” and a “management fee abatement”) together amounting to close to two-thirds of the agreed purchase price. The trial

judge provided for enforcement of the specific performance order by specifying that upon payment into court of an adjusted purchase price and other adjustments that may be ordered on motion in writing brought before her, the commercial property would vest in M & M Homes.

[11] Although the relief requested in the litigation would affect CRC and CRC was not a party to the litigation, the trial judge found that CRC had adequate notice through Mr. Lam to protect its interests, had it wished to do so.

[12] In her judgment, the trial judge specified the amount of the adjusted purchase price, $713,979.05, that M & M Homes would have to pay into court to secure its vesting order. That adjusted purchase price was arrived at after itemizing the services abatement and the management fee abatement.

[13] In para. 129 of her judgment the trial judge wrote:

> [M & M Homes] also seeks its costs in this action, and submits that any costs awarded should be payable, in the first instance, as an abatement of the purchase price. [Trial counsel for 208 Ontario] has not responded to this submission. Costs will be determined after review of the written submissions. Absent a r. 49 offer from the defendant that could trigger r. 49.10(2), the plaintiff will have its costs in this action. I agree that these costs should be deducted from the adjusted purchase price prior to payment into court.

[14] The parties could not agree on costs. In a separate Reasons for Decision on Costs, the trial judge awarded M & M Homes $210,000 in substantial indemnity costs based on her finding that 208 Ontario had misconducted itself in its dealing

with the land despite the CPL having been registered on the property, and again repeatedly misconducted itself during the trial proceedings. The Reasons for Decision on Costs makes no mention of the costs being deducted from the adjusted purchase price, as referenced in para. 129 of the judgment, above.

[15] 208 Ontario now appeals the specific performance order (C67632). As part of that appeal, 208 Ontario has also appealed the costs decision, but it has not sought leave to appeal the costs order.

[16] After filing its notice of appeal, 208 Ontario requisitioned a certificate of stay from the registrar of this court relating to the costs order, which was granted.

[17] In response, M & M Homes moves in motion M51177 to have that certificate of stay set aside.

[18] In response to that motion, 208 Ontario has applied for a stay of the vesting order and the costs order. A stay of the vesting order would forestall the risk of M & M Homes seeking to enforce the vesting order pending appeal by paying the full $713,979.05 adjusted purchase price set out in the judgment and taking its chance on collecting the costs award without the benefit of the abatement referred to by the trial judge in para. 129 of the judgment, reproduced above.

MOTION M51177 FOR AN ORDER STRIKING THE CERTIFICATE OF STAY

[19] The primary argument M & M Homes offers in support of an order setting aside the registrar's certificate of stay is its contention that a certificate of stay can

only properly be issued, absent an order for a stay pending appeal, if an automatic stay is in place. It argues that r. 63.01, the relevant rule, does not automatically stay the costs award in this case because the trial judge did not make an "order for the payment of money" within the meaning of r. 63.01. Instead, M & M Homes contends that the trial costs are ordered to be collected through an abatement from the money required to be paid into court when M & M Homes triggers the vesting order. In its view, the registrar's certificate of stay was therefore improperly issued.

[20] 208 Ontario disputes M & M Homes' contention that the trial judge ordered the costs abatement. 208 Ontario points out that when the trial judge set out the adjusted purchase price in her judgment, she did not include a deduction for the costs order, and she made no mention of such a deduction in the Reasons for Decision on Costs she provided. Neither party has taken out a formal order that can be consulted to resolve this dispute.

[21] In my view, it does not matter whether the trial judge ordered an abatement from the adjusted purchase price for the costs order she made. The costs order itself is an order for the payment of money and is automatically stayed under r. 63.01, even if provision was made to deduct the costs award from the adjusted purchase price.

[22] Rule 63.01 provides as follows:

> 63.01(1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of

> the order for the payment of money, except a provision that awards support or enforces a support order.

[23] There is authority supporting the notion that a costs order is an order for the payment of money within the meaning of r. 63.01(1): see *City Commercial Realty (Canada) Ltd. v. Backich*, [2005] O.J. No. 6443 (C.A.) (In Chambers). I agree with this, and it remains true even where a trial judge orders the costs awarded to be collected through an abatement. M & M Homes conceded during the hearing that a proper formal order in this case would have to specify the costs order of $210,000, even if an abatement relating to the costs order had been ordered. That concession was correct, since it is through the costs order that the debt obligation that permits the abatement would arise. It necessarily follows that the costs order is a provision for the payment of money, even where a short-cut mechanism such as an abatement is provided for in a judgment to ensure the payment of this debt obligation.

[24] For this reason, I also reject M & M Homes' ancillary argument, that it was misleading for 208 Ontario not to disclose the abatement in its requisition. In my view, because r. 63.01 automatically stayed the costs order, mention that the costs order was enforceable by way of abatement was immaterial to the requisition request. There was nothing misleading on the part of 208 Ontario in failing to mention this unimportant detail to the registrar when seeking the certificate of stay relating to the costs order.

[25] It is evident that I reject, as well, M & M Homes' alternative argument that the automatic stay of a costs order under r. 63.01 operates only if the substantive order under appeal is itself automatically stayed by r. 63.01. In *Backich* the substantive order did not provide for the payment of money. The appeal was from an order dismissing a claim for unpaid commission, yet Lang J.A. said: "By rule 63.01, the trial judgment, insofar as it awards costs to the moving party, is automatically stayed pending the outcome of the appeal", at para. 4.

[26] Finally, I will not entertain M & M Homes' oral submissions relating to whether the certificate of stay should be removed after consideration of factors analogous to those in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. When M & M Homes made these submissions, I understood it to be responding to Ontario 208's argument that M & M Homes was advancing the wrong test when challenging the propriety of the certificate of stay, and that a similar standard to that used in *RJR-MacDonald Inc.* should apply. I do not decide this motion on the basis that M & M Homes used the wrong test and should have used the *RJR-MacDonald Inc.* test, and so I need not consider this further. Moreover, M & M Homes did not plead this theory as an alternative basis for setting aside or removing the certificate of a stay.

[27] The motion to set aside the certificate of say is therefore denied.

MOTION M51186 FOR A STAY PENDING APPEAL

[28] 208 Ontario brings a motion for a stay of both the vesting order and the costs order pending appeal. I would stay the vesting order.

[29] The overarching consideration in whether to grant a stay is the interests of justice: *Zafar v. Saiyid*, 2017 ONCA 919, at para. 18. This is determined by a holistic consideration of the factors identified in the *RJR-MacDonald Inc*., at p. 334, for assessing whether an interlocutory injunction should be granted, namely:

(1) A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;

(2) It must be determined whether the applicant would suffer irreparable harm if the application were refused; and

(3) An assessment of the balance of convenience must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision of the merits.

[30] Although M & M Homes concedes for the purpose of this motion that the first factor has been satisfied given its low standard, it urges that 208 Ontario has not met its burden of showing that it would suffer irreparable harm if its application were refused, and that the balance of convenience lies with M & M Homes, rather than 208 Ontario.

[31] M & M Homes also asks that 208 Ontario's motion be denied because 208 Ontario does not come forward with clean hands: see *Morguard Residential v.*

Mandel, 2017 ONCA 177, at paras. 26-28. M & M Homes relies on the findings of the trial judge that 208 Ontario misconducted itself by dealing with the commercial property in ways designed to complicate M & M Homes' recovery in the face of a CPL, and by being "spectacularly inattentive" to its litigation obligations both before and at trial. Counsel for M & M Homes also relies upon allegations it makes that 208 Ontario misled the registrar in seeking the certificate of stay, and by presenting the registrar with a false affidavit of service.

[32] I will begin by noting that I have considered but am not materially influenced by clean hands considerations in resolving this motion.

[33] I have already rejected the claim that 208 Ontario misled the registrar through non-disclosure when requisitioning the certificate of a stay. Nor am I persuaded that the evidentiary foundation supports the allegation that counsel for 208 Ontario filed a false affidavit of service.

[34] Moreover, the most central findings relied upon by the trial judge to impose substantial indemnity costs against 208 Ontario are going to be before this court during the appeal, including whether the post-CPL transactions were improper. This court will have to consider whether the trial judge misapprehended the evidence and argument in finding that 208 Ontario attempted to "hoodwink" the court relating to the status of the servicing to the commercial property. Since these

findings are the subject of the appeal, they should not be held against 208 Ontario in deciding an interlocutory issue relating to that appeal.

[35] Finally, the conduct of counsel for M & M Homes itself has been questioned. As indicated, on M & M Home's behalf, unproven allegations of misrepresentation against opposing counsel were made, and such allegations were communicated to the registrar of this court in email exchanges. There may also have been a lapse in expected standards of civility that occurred when counsel for M & M Homes called Mr. Lam an egregious liar at the end of his cross-examination on this motion.

[36] In my view, this motion therefore turns on the traditional *RJR-MacDonald Inc.* factors, and the holistic assessment of the interests of justice.

[37] As indicated, M & M Homes concedes that there are serious issues to be tried in this appeal. That concession was well-taken. The appeal is not frivolous and warrants consideration on its merits.

[38] I do agree with M & M Homes that some of 208 Ontario's "irreparable harm" submissions are unimpressive, and there are complications in finding that 208 Ontario, itself, would be prejudiced if a stay is not ordered.

[39] Specifically, 208 Ontario's main claim relating to the harm it would experience is that if the vesting order is triggered, the encumbrancers who registered their mortgages after the CPL could lose their mortgage security on the commercial property, and those mortgagees would immediately enforce their

debts against 208 Ontario, causing the insolvency of 208 Ontario. I need not decide whether the evidentiary foundation for this risk has effectively been established before me because were this to happen, 208 Ontario would be the author of its own misfortune. When the litigation began, it was not exposed to the risks these mortgages may present. Knowing that it could lose the commercial land in litigation, it made a conscious choice to encumber that land, thereby courting the risk of defaulting on its financial obligations if that commercial land was lost in the pending litigation. It does not lie in the mouth of a litigant who did not face the risk of irreparable harm from the enforcement of a pending claim, to voluntarily assume such risk after the litigation is pending, and then rely upon that risk to impede the enforcement of that claim after it succeeds.

[40] Nor am I impressed by the risks to the post-CPL mortgagees themselves. They too chose to run the risk that 208 Ontario or its assignees could lose the land in this litigation. The materialization of that accepted risk does not qualify as irreparable harm. In any event, the vesting order cannot be triggered without the competing priorities being determined. Those holding encumbrances on the land are entitled to participate and protect their legitimate interests in a priority hearing.

[41] I do accept, however, that there is a material risk that irreparable harm will be caused by now enforcing a vesting order remedy that may be overturned in the future. By its very nature, the enforcement of that vesting order will deprive the owners of the land, which M & M Homes itself contends is unique enough to

warrant a specific performance remedy. There is no assurance that should 208 Ontario prevail on appeal, it will be possible to reverse the enforcement of a vesting order pending appeal. If the vesting order is enforced pending appeal, M & M Homes will be entitled to transfer the land, putting it out reach of restoration. Or, a party holding title after the vesting order could make changes to the land that diminish its value, or that may require costly reinstatement. Or, improvements could be made to the land that could require settlement negotiations or litigation that ensnares the owners of the land. Or, liens could be placed on the land, impeding effective restoration.

[42] I appreciate that there is an impediment to 208 Ontario relying on the risks of prejudice that I have described. As counsel for M & M Homes stresses, technically, such harm will not be caused to 208 Ontario, the moving party, or applicant, because 208 Ontario no longer owns the land. CRC does. If the second *RJR-MacDonald Inc.* factor – relating to irreparable harm to the applicant - was a strict precondition to staying an appeal, this would prove fatal to the current motion. However, irreparable harm to the applicant is not a strict precondition to a stay. The ultimate test for granting the stay is the interests of justice, and the *RJR-MacDonald* considerations are factors, not prerequisites. In the unusual circumstances of this case, the absence of irreparable harm to the applicant does not undercut this motion.

[43] First, as a matter of law, the risk of irreparable harm that I describe does not evaporate simply because 208 Ontario no longer owns the land. Those risks obtain, and are faced by the current owner, CRC.

[44] Second, substance cannot be ignored. CRC currently owns the land as a legal vehicle to facilitate a development plan involving several parties. The enforcement of the vesting order and the loss of the control of the land that this would entail would pose risk of prejudice not only to CRC but to the principals of CRC and the participants in the development project.

[45] Finally, M & M Homes cannot have it both ways. It obtained an order of specific performance against 208 Ontario even though 208 Ontario is not the owner, on the clear premise that, in substance, 208 Ontario is sufficiently connected to the land that such order is just. It is not equitable for M & M Homes to now resist a stay of that remedy on the premise that 208 Ontario is not sufficiently connected to the land for material prejudice to arise.

[46] I am therefore persuaded that there is a risk of irremediable harm, if not to 208 Ontario, then to CRC and others associated with the development project. Regardless of whether the irreparable harm to these third parties is to be considered under *RJR-MacDonald Inc.*'s irreparable harm head, or under the balance of convenience inquiry, these interests warrant consideration.

[47] Of importance, M & M Homes has not presented evidence that it would be prejudiced by delaying the enforcement of the vesting order until the appeal can be resolved on its merits. Its sole claim is that a stay will obstruct or scuttle the priorities hearing that is scheduled. This is not material prejudice. If the vesting order is reversed on appeal, that hearing will prove to have been moot. The priorities hearing can wait.

[48] Any other inherent prejudice there may be can adequately be remedied by an order expediting the appeal, which both parties agree to do.

[49] Given the balance of convenience and the irreparable harm that may arise, I am persuaded that it is in the interests of justice to stay the vesting order. I have already found that the costs order is automatically stayed pending appeal, but I would also have stayed the costs order pending appeal, in any event, had that not been so.

[50] I therefore allow 208 Ontario's motion and stay the vesting order made by the trial judge, pending determination of the appeal. However, I order that this appeal be expedited. As suggested by counsel for M & M Homes, the appellant must perfect its appeal within 45 days of receipt of notice that the required transcripts have been transcribed. The respondent must serve and file the respondent's factum and compendium within 30 days of service of the appeal book, compendium, exhibit book, transcript and appellant's factum.

COSTS

[51] I am reserving a decision on the costs of these motions. The parties may file written costs submissions, not to exceed 5 pages, along with supporting bills of costs, on the following deadline: ten business days after the release of this decision for the appellant, 208 Ontario, and five business days after the receipt of the appellant's written costs submission by the respondent, M & M Homes.

[52] I direct that this decision be filed in both motion records, M51177 and M51186.

"David M. Paciocco J.A."