

# COURT OF APPEAL FOR ONTARIO

CITATION: Abu-Saud v. Abu-Saud, 2020 ONCA 314

DATE: 20200522

DOCKET: M51538 (C67699)

Benotto J.A. (Motion Judge)

BETWEEN

Amneh Tawfic Abu-Saud

Applicant (Respondent/Moving Party)

and

Azam Asaad Abu-Saud

Respondent (Appellant/Responding Party)

William R. Clayton, for the responding party

Sharon E. Hassan, for the moving party

Heard: In writing with brief oral submissions on May 19, 2020

## REASONS FOR DECISION

[1] The appellant has not complied with the support order that he seeks to appeal. The respondent brings this motion to adjourn the appeal. She also requests a partial lifting of the automatic stay for a portion of the equalization payment, security for costs and an extension of time to file her factum.

## **BACKGROUND**

[2] The parties were married for 27 years. They have two adult children. The respondent was primarily responsible for child-rearing while the appellant pursued a career in tax preparation. He opened a business in 1992 that was operated from the family home with assistance from the respondent. The business eventually moved to an office, and the respondent assisted with the business while the children were in daycare or school. In 1996, the appellant registered as a mutual fund dealer and started a company, "Superstar Investment Corp". He is the sole shareholder and operating mind of Superstar.

[3] In 2002, the respondent stopped working for the family business and obtained a job at another company. In 2010 she was diagnosed with fibromyalgia, which required her to withdraw from the workforce. She has not worked since.

[4] The parties separated in 2015 and the respondent brought the underlying application seeking spousal support and an equalization of net family property. The highly contested litigation continued until 2019 when the trial judgment was released. In the meantime, in 2017, the appellant entered into an agreement with Monarch Wealth Corporation whereby this company became the dealer under which he sold mutual funds to his clients. Superstar was de-registered for the sale of mutual funds, but the appellant continued to carry on his business through Superstar and all fees and commissions were paid to it.

## **DECISION BELOW**

[5] The trial judge awarded the respondent spousal support retroactive to the date of separation. The support was ordered on both a compensatory and a needs basis, recognizing her important contribution to the management of the household and to the appellant's business.

[6] The main issue as to equalization was the value of the goodwill of Superstar. The trial judge accepted the evidence of the respondent's expert that the goodwill has a value because clients continue to seek the appellant's advice and he continues to earn money for that advice. Even though by the time of the trial, the appellant was de-registered as a mutual fund dealer, the application judge found that he continues to manage his clients' books of business. This was evidence of the goodwill value of Superstar at the valuation date for the purpose of calculating net family property and equalization. The trial judge rejected the evidence of the appellant's expert, which attached no value to the goodwill absent evidence of a special purchaser. The trial judge accepted the respondent's expert's methodology and value of Superstar's goodwill as \$172,500.

[7] The final Judgment released on October 30, 2019, with reasons reported at 2019 ONSC 6303, provided that:

1. The appellant pay spousal support in the amount of \$2,653 per month, commencing January 1, 2019;

2. The retroactive spousal support of \$94,305 be payable at a minimum rate of \$500 per month, commencing April 1, 2019;
3. The appellant pay an equalization payment of \$278,316.85, plus pre-judgment interest, with one-half being payable by April 30, 2019 and the remainder in equal instalments commencing January, 2020 and continuing until January, 2029;
4. The payments for support and equalization were secured against the appellant's holdings in Superstar.

#### **EVENTS FOLLOWING TRIAL**

[8] The delivery of a notice of appeal automatically 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: rule 63.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [Emphasis added.]

[9] The appellant has not paid the support ordered by the trial judge. The appellant did not pay the arrears in spousal support, retroactive spousal support, or increased monthly spousal support. Instead he initially paid spousal support of \$1,500 per month, pursuant to an interim order, instead of the increased monthly support of \$2,653. Then, in January 2020 he further reduced his monthly support payment to \$1,100. He acknowledges that he has not complied but submits that he pays "what he can afford to pay". He has not sought to stay the support provisions in the judgment.

[10] Six days after receipt the judgment, the appellant transferred his 50% interest in his home to his current wife for consideration of \$2. He did not transfer his liability under the mortgage to her, nor did she assume it.

[11] Counsel for the respondent wrote to Monarch Wealth advising the company of the order securing the payments against Superstar. On March 16, 2020 Monarch Wealth sent an email to counsel as follows:

This is to inform you that [the appellant] has recently redeemed 100% of the holdings in the account Superstar Investments Corp.

We had this account frozen due to the correspondence you provided to us; however [the appellant] sent his request directly to the fund company without our knowledge, which is against our policies and procedures.

[12] The respondent submits that this breaches the trial judge's order. The appellant admits that he withdrew \$200,000 from Superstar but says this was to assist with the purchase of his home, not to make himself judgment-proof. He says he still has the shares of Superstar so he has not violated the judgment provisions. He further submits that he was required pursuant to a pre-nuptial agreement with his current wife to make the payment for the home. The respondent points out that this alleged agreement was never disclosed to her or to the trial judge and this is the first time it has been mentioned.

## **THE APPEAL**

[13] The appellant submits that the trial judge erred in his determination of the equalization payment owing and support.

[14] The equalization payment error alleged is that the trial judge accepted the respondent's expert evidence as to the value of the goodwill of Superstar. He says that the equalization payment award of \$278,316.85 should instead have been \$150,685.22.

[15] He submits as well that the trial judge erred by awarding retroactive support and by imputing income to him of \$90,000 in order to arrive at the *Guidelines* amount of support.

## **DISCUSSION**

[16] Against this background, I address the respondent's motion.

### **Support arrears**

[17] I begin with the appellant's failure to pay the support ordered in the judgment. Compliance with an order for support is not optional. Support payments are not stayed pending appeal. If the appellant seeks relief from this requirement, the procedure is to bring a motion to stay the support. The procedure is not to decide for yourself how much to pay. This court has repeatedly admonished payors who do not pay the support pending appeal. In *Murphy v. Murphy*, 2015 ONCA 69, 56 R.F.L. (7th) 257, the court refused to entertain submissions from a party who had

not paid support pending appeal. To do otherwise “would be to reward his deliberate and willful misconduct”: at para. 6.

[18] The court may also refuse to hear an appeal when the appellant is in arrears until the arrears are cured. (See: Laskin J.A. in *Dickie v. Dickie* (2006), 78 OR (3d) 1 at para. 21, endorsed by the SCC in *Dickie v. Dickie* 2007 SCC 8, [2007] 1 S.C.R. 346, at para. 6; *Brophy v. Brophy*, 180 O.A.C. 389, at paras. 11-12; *A.A. v. Z.G.*, 2016 ONCA 660; *Siddiqui v. Anwar*, 2018 ONCA 965).

[19] The appellant’s failure to pay is flagrant. Currently he owes more than \$17,000. He acknowledges that he has the funds to pay.

[20] Until his payments are brought up-to-date and he complies with the judgment, his appeal will not be listed for hearing. This is the just result and consistent with the approach of Laskin J.A. in *Dickie* at para. 21, and then endorsed by the SCC:

It is worth noting that requiring an appellant to comply with outstanding support orders, as a condition of proceeding with an appeal, does not make an appellant's appeal pointless. If the appellant is successful on appeal, the court's disposition can take into account the extent to which the support payments made have exceeded the level of support ordered on appeal.

### **Equalization payment**

[21] I turn to the equalization payment. The appellant has conceded that he owes a portion of the equalization payment. The respondent calculates the conceded

amount to be \$57,448.68<sup>1</sup>. The judgment provides that half of the equalization was to be paid on April 1, 2019.

[22] Rule 63.01(5) provides that this court may order that the stay provision in r. 63.01(1) does not apply. Usually, the court looks to the merits of the appeal, the need for funds, and whether there is a danger that the payment will not be made: *Popa v. Popa*, 2018 ONCA 972, at para. 7. This is not a case like *Popa*. Here the appellant acknowledges that a portion of the equalization payment is owed. There is therefore no dispute about the funds requested by the respondent. In light of all the circumstances, it is just that the funds be paid now. The automatic stay on the equalization payment is hereby lifted to the extent of half of the admitted amount owing. Therefore \$28,724.34 plus pre-judgment interest is payable now.

### **Support arrears and partial equalization to be paid**

[23] The appellant is to pay the respondent the support owed together with the portion of the equalization set out above. These payments are to be paid, together with outstanding interest, no later than June 19, 2020.

### **Security for costs and an extension of time**

[24] The respondent has not had the funds necessary to address the appeal and has not filed a responding factum. Consequently, she seeks security for costs and

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<sup>1</sup> The difference between what the trial judge ordered and what he says it should have been less a payment already received by the respondent.



an extension of time to file the factum on the appeal. I will consider these requests immediately after June 19, 2020 or when the above payments are made, whichever is earlier.

## **Summary**

[25] In conclusion:

1. The appeal is stayed until the appellant complies with this order.
2. The appellant is to comply with judgment by bringing support payments up to date with a payment of \$17,071 to the respondent no later than June 19, 2020.
3. The appellant is to pay the respondent \$28,724.34 plus pre-judgment interest to the respondent no later than June 19, 2020.
4. If the payments are not made, the respondent has leave to apply to a panel of this court to quash the appeal.
5. If the payments are made, then I will address the portion of the motion dealing with an extension of time for the respondent to file her factum and security for costs. I therefore ask counsel to advise the motions office of the status of the payments.
6. Costs of this portion of the respondent's motion are payable to her in the amount of \$3500 inclusive of HST and disbursements.

Released: May 22, 2020

"M.L. Benotto J.A."