COURT OF APPEAL FOR ONTARIO

CITATION: Comfort Capital Inc. v. Yeretsian, 2020 ONCA 846
DATE: 20201230
DOCKET: C67460

Feldman, Simmons and Harvison Young JJ.A.

In the Matter of Section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. b-3, as amended and section 101 of the *Courts of Justice Act,* R.S.O. 1990 c. c.43, as amended

BETWEEN

Comfort Capital Inc., The Bank of Nova Scotia Trust Company, E. Manson Investments Ltd., Fenfam Holdings Inc., 593651 Ontario Ltd., 1031436 Ontario Inc., Alrae Investments Inc., Barry Spiegel, Sharon Nightingale, David Sugar, Phyllis Sugar, National Tire Ltd., 1119778 Ontario Limited, 1415976 Ontario Limited, Alrae Investments Inc., Bamburgh Holdings Ltd., Beverley Gordon, Diane Grafstein, Richard Gruneir, B. & M. Handelman Investments Ltd., Ridgeway Occupational Consultants Inc., Yerusha Investments Inc., Mihal Tylman, A. Eliezer Kirshblum, 593651 Ontario Limited, The Bank of Nova Scotia Trust Company in Trust for Bailey Levenson, The Bank of Nova Scotia Trust Company in Trust for Rosemonde Kelly, Anne Handelman, Yerusha Investments Inc., Celmar Investments Corp., Beverley Gordon, Philgor Investments Ltd., Brilliant Investcorp Inc., Maxoren Investments, 2227046 Ontario Limited, Dast Properties Limited, Tova Markovzki, Joseph Suckonic and B. & M. Handelman Investments Limited

Applicants

and

Annie Yeretsian, Terry Wilson, 2457674 Ontario Inc., 2399029 Ontario Inc., and Moss Development Ltd.

Respondents

James Zibarras, for the appellant Canada Investment Corporation

Doug Bourassa, for the respondents Stanbarr Services Limited, Janodee Investments Ltd., Meadowshire Investments Ltd., Regard Investments Ltd., 1563503 Ontario Limited, Beaver Pond Investments Ltd., The Canada Trust Company, Rita Rosenberg and 527540 Ontario Limited

Eric Golden and Elsir Tawfik, for Rosen Goldberg Inc., in its capacity as court-appointed receiver in the within proceeding

Heard: November 2, 2020, by videoconference

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated September 13, 2019, with reasons reported at 2019 ONSC 5303, 73 C.B.R. (6th) 294.

REASONS FOR DECISION

[1] Canada Investment Corporation ("CIC") appeals from an order of the Commercial List motion judge made in the context of a court-ordered claims process in the receivership of a debtor of CIC. The order directs that surplus proceeds held for CIC arising out of a receivership sale of one of the debtor's properties be paid to particular creditors of CIC (Stanbarr Services Limited and eight other parties, collectively the "Stanbarr claimants"), as recommended by the Receiver in its Tenth Report to the court.

[2] The receivership order was made on February 28, 2018 under s. 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Properties under receivership were sold and proceeds recovered. The applicants held first mortgages against six properties owned by the debtors. Various related corporations, including CIC, held subsequent mortgages on various of the six properties.

[3] Around the time of the receivership, a principal of CIC and the related corporations holding subsequent mortgages was charged with fraud. Resulting

publicity led to *Mareva*-like claims being advanced in the receivership to freeze surplus proceeds arising from the sale of any of the six properties.

[4] As a result of these claims, a claims process was established on consent by orders dated August 3, 2018 and January 25, 2019 under which claimants could prove a direct claim against one of the subsequent mortgagee corporations on a balance of probabilities, entitling the claimant to a pro rata unsecured claim against surplus proceeds to which the particular mortgagee corporation was entitled.

[5] CIC held a second mortgage on one of the six properties (the Caldwell property). The receivership sale of the Caldwell property yielded surplus proceeds totaling $784,843 to which CIC was entitled.

[6] In June 2018, the Stanbarr claimants moved in the receivership for an order requiring the Receiver to pay the surplus proceeds from the Caldwell sale to which CIC was entitled into court, to meet its claim against CIC arising out of an action they were pursuing against CIC (the Scollard action).

[7] The Scollard action arose out of a sale under power of sale conducted by CIC in June 2014, which yielded proceeds of sale of $5,875,000. CIC held the first mortgage on the Scollard Street property forming the subject of the action and the Stanbarr claimants held 11 subsequent mortgages. Following the sale of the Scollard property, CIC failed to account to the Stanbarr claimants for the proceeds of the sale.

[8] At a hybrid trial in that action, the Stanbarr claimants successfully challenged the validity of the notice of sale on two bases: first, the notice of sale was not served on them; second, the $2,988,966.14 amount claimed in the notice of sale was improperly inflated by more than $1.1 million in expenses plus interest CIC claimed it had incurred prior to obtaining an assignment of the first mortgage. The trial judge, Matheson J., did not, however, determine the final amount owing on the mortgage as of the date of closing, which CIC had claimed was $6,010,856.32, holding that the propriety of post-acquisition expenses CIC claimed remained to be determined. As a result, the Stanbarr claimants did not obtain a money judgment against CIC arising out of this trial.

[9] In the context of the Receivership proceedings, by July 27, 2018, CIC and the Stanbarr claimants agreed that the funds that would otherwise have been paid by the Receiver to CIC from the sale of the Caldwell property, would be paid to the Accountant of the Superior Court of Justice to the credit of the Scollard Action, obviating the need for a *Mareva* injunction.

[10] In its Tenth Report to the court, relying on Matheson J.'s findings in the Scollard action, the Receiver determined that at most, CIC could have been entitled to $4,848,383.54 from the Scollard Street proceeds, leaving a minimum balance owing to the Stanbarr claimants of $920,449.12. In those circumstances, the Receiver recommended that, subject to various costs deductions, the Caldwell

surplus proceeds of $784,843 belonging to CIC, which had already been paid into court on consent, should be paid to the Stanbarr claimants.

[11] The motion judge accepted this recommendation.

Analysis of Issues

[12] The issues CIC raises on appeal are the same issues raised before the motion judge and addressed by him. Therefore, on the appeal, the issue before the court is whether the motion judge made a reviewable error.

[13] First, CIC argues that the motion judge erred by making an order in Stanbarr's favour for payment when it never submitted a claim by way of statement of claim. All it did was move for a *Mareva* injunction. It was therefore entitled to no more than that remedy.

[14] The motion judge rejected that argument. He referred to the rules of the claims process established by the order of Chiappetta J. that a party making a claim to surplus proceeds would have to prove on a balance of probabilities that it had a direct claim against CIC. Both Stanbarr and CIC chose to rely on affidavits from the earlier *Mareva* stage of the proceedings. The *Mareva* issue had been resolved by the payment into court. The only issue left was determination of the claims. The process was a consent process in which all parties participated. There was no confusion that Stanbarr's participation was based on its claim to the surplus of the sale of the Caldwell property.

[15] We see no error in the motion judge's analysis. The consent procedure was followed. There was no requirement for a statement of claim.

[16] Second, CIC submits that the motion judge erred by holding that it bore an onus to demonstrate why the Receiver's recommendation should not be followed when the claims procedure clearly required the Stanbarr claimants to prove their claim on a balance of probabilities.

[17] The motion judge held that the onus was on the party disputing the Receiver's recommendation, relying on two cases, *Coast Capital Savings Credit Union v. Symphony Development Corp.*, 2011 BCSC 333, 75 C.B.R. (5th) 221, and *DBDC Spadina Ltd. v. Walton,* 2015 ONSC 5608, 30 C.B.R. (6th) 308. The onus of proof on the claimant, provided for in the claims process rules, was for the purpose of the Receiver's report and recommendation. On the review, the onus shifts to the party disputing that recommendation to show sufficient reason why it should not be followed. In *DBDC Spadina*, Newbould J. stated the rule at para. 3:

> On an appeal from a disallowance of a claim, the court should only intervene in the case of an error of law or a palpable and overriding error of fact. See Houlden, Morawetz and Sarra, *2015 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters Canada Limited) at §G109(1).

[18] We agree with the motion judge. He applied the correct onus on the review.

[19] Third, CIC argues that the motion judge erred in accepting the Receiver's recommendation that a finding in the Scollard trial judge's reasons was dispositive

of the Stanbarr claim when the final amount owing under the CIC mortgage in the Scollard action was left as an outstanding issue yet to be determined in a further proceeding in the Scollard action.

[20] In the Scollard action between the Stanbarr group and CIC over the sale proceeds from a mortgaged property on Scollard (not part of the receivership), at the outset of the trial the parties agreed that the following issue would be determined by the trial judge, Matheson J.:

> Is the amount of the [CIC] mortgage set out in the Notice of Sale dated November 28, 2013, overstated by the inclusion of those expenses set out in exhibits A and B of the Supplemental Affidavit of George Safarion sworn August 10, 2014, excluding those expenses incurred after August 2013?

[21] The expenses referred to are the expenses alleged to have been incurred before the assignment of the first mortgage to CIC on August 9, 2013 for $779,720.86, which Matheson J. found was full value, not discounted. She found that the pre-assignment expenses claimed in the amount of “more than $1.1 million” were invalid. However, she left the final determination of the amount to which CIC was entitled to a future hearing because the validity of the post assignment expenses had not yet been adjudicated. Matheson J. also found that the Notice of Sale of the Scollard property was not valid. An appeal was taken from the latter finding, but although the original notice of appeal also challenged the finding of invalidity of the pre-assignment expenses, the appellant, CIC, abandoned that portion of the appeal.

[22] The Receiver used the figures found by Matheson J. quantifying the disallowance of the pre-assignment expenses to find that CIC received an amount from the Scollard sale that should have gone to the Stanbarr claimants on their second mortgage. The amount owed to the Stanbarr claimants was greater than the proceeds of the Caldwell sale being held for CIC in the receivership. As a result, the Receiver concluded that the Caldwell proceeds should be paid to the Stanbarr claimants on their claim against CIC.

[23] CIC argued before the motion judge, as it does on the appeal, that the issue of the quantification of the pre-assignment expenses was not finalized by Matheson J. but left for a future further hearing. Therefore, the Caldwell proceeds paid into court to the credit of CIC cannot be paid out to the Stanbarr claimants in the claims process, but must await the further hearing in the Scollard action.

[24] The motion judge rejected this argument. Using the findings from the Scollard trial, the Receiver was able to calculate precisely the amount of the invalid pre-assignment expenses, which CIC did not challenge in the claims process. As there was no appeal from the decision of Matheson J. on the issue of the pre-assignment expenses, the quantification based on her findings was *res judicata*. More precisely, the doctrine of issue estoppel applies. Issue estoppel precludes the re-litigation of issues previously decided in court in another proceeding: *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2019 ONCA 761, 439 D.L.R. (4th) 385, at para. 22. The validity of the pre-assignment expenses was squarely

before Matheson J. and CIC attempted to justify its pre-assignment expenses during that proceeding. Matheson J. considered and rejected CIC's arguments. The only matter left for a future hearing was the quantification of any post-assignment expenses, and using both quantifications, the determination of the final amount owing to CIC on its Scollard mortgage.

[25] We agree with the motion judge. There is no basis to interfere with his findings on the effect of the hearing before and the reasons of Matheson J. in the Scollard action, which was to partially quantify the amount owing to the Stanbarr claimants by CIC from the proceeds of the Scollard property sale. He therefore made no error by accepting the recommendation of the Receiver that the surplus funds from the Caldwell sale be paid out to the Stanbarr claimants in respect of their claim against CIC in the Scollard case.

Post Hearing Issue

[26] After reserving its decision, the court sought written submissions from all parties on the following issue: Because this claims process only included claimants who had sought a *Mareva* injunction against CIC in order to freeze the funds held by the Receiver that were payable to CIC, is there prejudice to the rights of any creditors of CIC who were not part of the process, including any judgment creditors who may have filed a writ of execution with the sheriff?

[27] This was an unusual process implemented to expeditiously adjudicate the entitlement to funds that were collected in the context of a receivership but were

not the funds of the debtor. The issue of whether this process should include other potential creditors of CIC who did not seek a *Mareva* injunction to preserve funds collected by the Receiver of a debtor of CIC was not addressed. The claims of any such creditors are not barred by this process. The only effect is that they have no access to CIC's Caldwell funds.

[28] In its written submissions, CIC advises that it currently has solvency issues. In order to protect the rights of any judgment creditor of CIC that has filed a writ of execution with the sheriff, the Receiver shall pay the funds out of court to the Stanbarr claimants after conducting a bankruptcy search and determining that there are no writs of execution filed against CIC. If there are any writs filed, then the Receiver may return the issue of entitlement or priority to the motion judge.

Conclusion

[29] The appeal is dismissed with costs payable by CIC to the respondent Stanbarr, fixed in the agreed amount of $10,000 inclusive of disbursements and HST.

"K. Feldman J.A."
"Janet Simmons J.A."
"Harvison Young J.A."