COURT OF APPEAL FOR ONTARIO

CITATION: Hrvoic v. Hrvoic, 2023 ONCA 27
DATE: 20230113
DOCKET: M53912 & M53914 (C70129)

Coroza J.A. (Motion Judge)

DOCKET: M53912

BETWEEN

Melissa Hrvoic

Respondent/Plaintiff
(Respondent/Moving Party)

and

Dag Hrvoic and 1427830 Ontario Corporation

Applicant/Defendants
(Appellant/Responding Party)

DOCKET: M53914

AND BETWEEN

Melissa Hrvoic

Respondent/Plaintiff
(Respondent/Responding Party)

and

Dag Hrvoic and 1427830 Ontario Corporation

Applicant/Defendants
(Appellant/Moving Party)

Gregory M. Sidlofsky, for the responding party (M53912)/moving party (M53914)

David A. Taub and Samuel Mosonyi, for the moving party (M53912)/responding party (M53914)

Heard: December 16, 2022

REASONS FOR DECISION

[1] The underlying action relates to a division of business built by the appellant, Dag Hrvoic, and respondent, Melissa Hrvoic. The trial judge was required to determine the respective shareholdings of the parties and the value of that shareholding. The trial judge determined that the respondent held 50 percent of the company and the value of the business was $10,800,000. Consequently, she ordered that the appellant pay the respondent $5,400,000 to purchase all her shares in the company. The appellant has appealed, and an automatic stay of that order was imposed pursuant to r. 63.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] There are two motions before the court. The first motion (M53914) is a motion by the appellant to file an extended factum of 45 pages. The respondent takes no position on this motion. I am persuaded by the appellant's submission that there is some complexity to this matter, and I am satisfied that the order should be made.

[3] In the second motion (M53912), the respondent requests that the automatic stay pending appeal be lifted in respect of $2,686,437.31. According to the respondent, this amount represents the appellant's "best position" were he to

succeed on all issues in the appeal. In other words, this is the amount that the appellant owes the respondent even taking into account his valuation advanced at trial. The respondent argues that she will suffer financial hardship if the stay is not lifted, and the appellant's appeal in respect of that amount is not meritorious.

[4] The appellant is opposed to this order. He submits that the respondent has not demonstrated financial hardship if the stay is not lifted. Furthermore, he submits that his best position, were he to succeed on all issues in the appeal, would be a finding that he pay $1,874,400 for her interest in the company, less the costs of the proceedings and the appeal.

[5] In support of the relief claimed, the respondent relies upon r. 63.01(5) of the *Rules*, which allows this court to lift an automatic stay imposed pursuant to r. 63.01(1).

[6] The case law is clear. An automatic stay should only be lifted in cases of demonstrable and unusual hardship to the respondent, and when a reasonable measure of protection can be afforded to the appellant to allow recovery if the appeal succeeds: *Ryan v. Laidlaw Transportation Ltd.* (1994), 19 O.R. (3d) 547 (Ont. C.A.), at pp. 549-50.

[7] The three principal factors that courts assess to determine whether to lift an automatic stay pending appeal are:

(1) the financial hardship to the respondent to the appeal if the stay is not lifted;

(2) the ability of the respondent to repay or provide security for the amount paid; and

(3) the merits of the appeal.

See *SA Horeca Financial Services v. Light*, 2014 ONCA 811, 123 O.R. (3d) 542, at para. 13.

[8] In *SFC Litigation Trust v. Chan*, 2018 ONCA 710, Brown J.A. summarized the principles governing a request to lift the automatic stay of enforcement pursuant to r. 63.01(5). He noted that in *Ryan v. Laidlaw Transportation Ltd.*, Austin J.A. described the perspective a judge should bring to a motion to lift a stay pending appeal. Austin J.A. quoted with approval the following comments made by Carthy J.A. in *Mortimer v. Cameron*, [1993] O.J. No. 4169 (C.A.), at para. 2:

> As an initial observation I express the view that motions under this rule should be restricted to cases of demonstrable and unusual hardship to the respondent, and where a reasonable measure of protection can be afforded to the appellants. The reason for the first standard is that the rule provides for a stay of money judgments and should be applied in all but unusual circumstances. The reason for the second standard is to protect appellants against payments which they may not eventually be obligated to make, thus putting them to the uncertainties of recovery. In most cases the merits of the appeal will have a bearing on these factors. [Emphasis added.]

[9] In reviewing the three factors noted above, Brown J.A. went on to hold that while the first factor goes to the respondent's need, the latter two factors reduce the risk that a successful appellant will be forced to bear the loss, rendering the appeal moot. The court may impose this risk on an appellant in an appropriate case, but there is no reason to do so absent evidence of significant prejudice to the respondent from the stay.

Financial Hardship to the Respondent

[10] The appellant argues that the respondent has not provided evidence of financial hardship. I disagree. The respondent's unchallenged affidavit on this motion states that on March 1, 2020, the appellant removed her as an officer and director of the business in order to unilaterally run it, and dismissed her. The respondent has commenced a separate lawsuit against the business and the appellant for damages for wrongful dismissal, unpaid salary, and unpaid vacation pay, among other things. She states that the trial judge's finding about her stake in the business raises the question about whether the appellant had any legal authority to terminate her from the business. Significantly, the respondent asserts in her affidavit that since her termination, the COVID-19 pandemic made it difficult for her to find a new job because she had been working in a highly specialized field with the business since 1998. She had no income following her termination from the business for more than two years until she began a new job in April 2022. These assertions stand unchallenged.

The Ability of the Respondent to Provide Security for the Amount Paid

[11] With respect to the second requirement, the respondent has not proposed any means of ensuring that the proceeds realized from lifting the stay pending the appeal's outcome will be secured. That said, this factor supports the respondent's request in the context of this appeal. That is because the appellant's own position advanced in his draft factum on the appeal, is that the judgment should be set aside, and the appellant should be required to pay $1,874,400 for the respondent's interest in the company.

[12] As I understand his argument, the appellant asserts that any amount owing to the respondent, even on a successful appeal will be offset by substantial costs in the court below and on the appeal. The appellant claims that he incurred costs in the proceeding below in the amount of $507,327.13 and to date, the costs of the appeal are at about $125,000. I note that the trial judge awarded costs payable to the respondent in the amount of $325,000.

[13] At the end of the day, even accepting the appellant's argument that he should be awarded full recovery of these costs if he is successful on appeal, that would still leave a payment of a substantial amount of money to the respondent. Therefore, the rationale of ensuring that the appellant's prospect of recovering monies owed to him if he is successful on an appeal through the mechanism of an automatic stay does not apply when, by his own admission, he will not have to

bear the loss, because he acknowledges that this is money that is owed to the respondent to purchase her interest.

Merits of the Appeal

[14] Finally, with respect to the merits of the appeal, while I do not find this appeal to be frivolous or vexatious, this appeal is not a particularly strong one. The majority of the grounds of appeal all take issue with the trial judge findings of fact together with alleged errors of law in making the finding that the respondent was entitled to a 50 percent ownership interest in the business. As I see it, these grounds of appeal are all grounded in factual findings and unlikely to succeed.

[15] In sum, if the automatic stay imposed by r. 63.01 is intended to offer some protection to an appellant against payments which it might not eventually be obligated to make, thus putting it to the uncertainties of recovery, then the exercise of this court's discretion to lift that stay in respect of an amount is appropriate if the risk that the automatic stay seeks to prevent is non-existent.

[16] The context of the appeal is important. The appellant acknowledges that he will pay to the respondent a substantial amount of money even if he is successful on the appeal. I also take into account the merits of the appeal and the respondent's evidence that she had no income following her termination until she found new employment in April 2022.

[17] Overall, I am satisfied that it is in the interests of justice to lift the stay to release some funds to the respondent. That said, the final order of the trial judge required the appellant to purchase the respondent's shares. I observe that the notice of motion and the factum filed by the respondent does not contemplate a purchase of shares but only a lifting of the stay to award the respondent a substantial sum of money.

[18] In my view, if I am lifting the stay then shares should flow back to the appellant for any money he pays out to the respondent. Indeed, during oral argument counsel for the respondent clarified that the payment of money should be subject to a transfer of shares in the company.

Disposition

[19] Accordingly, for these reasons, the appellant's motion (M53914) to file a factum exceeding 30 pages is granted. The appellant is permitted to file a factum that is 45 pages in length. The respondent is also granted permission to file a respondent's factum that is 45 pages in length.

[20] The respondent's motion (M53912) to lift the automatic stay is granted. I lift the stay in respect of the amount awarded to the respondent for her interest in the company so, and to the extent that the respondent receives $1,874,400 within 30 days. I would not offset any amount for costs incurred by the appellant, it is for the panel to determine the costs of the underlying appeal. This payment will be

credited against the ultimate amount that the appellant is found to be required to pay to the respondent after the determination of the appeal.

[21] To determine the shares that the appellant should receive at this point in exchange for the payment I will, for the purposes of this motion, rely on the valuation of the company as determined by Steele J. − $10,800,000, and on her finding that the respondent owns 50 percent of the total shares, determinations that are presumed correct unless varied on appeal. Accordingly, once the appellant pays the respondent $1,874,400, the respondent is to forthwith transfer to the appellant 17.35 percent of the company's shares, being the same proportion of shares to total shares as $1,874,400 is to $10,800,000. The shares transferred will be credited against the ultimate obligation of the respondent to transfer her shares to the appellant after the determination of the appeal.

[22] Costs of this motion are reserved to the panel hearing the appeal.

"S. Coroza J.A."