COURT OF APPEAL FOR ONTARIO

CITATION: Johwel Investments Inc. v. Welton, 2023 ONCA 132
DATE: 20230301
DOCKET: C70873

Brown, Sossin and Copeland JJ.A.

BETWEEN

Johwel Investments Inc. and
Stonebrook II Limited Partnership

Applicants (Respondents)

and

Darlene Welton, Stonebrook Properties Inc.
and Davwel Investments Inc.

Respondents (Appellant)

Sara J. Erskine and Patrick Healy, for the appellant

Timothy Pinos and Meghan Rourke, for the respondents Stonebrook II Limited Partnership and Johwel Investments Inc.

David M. Golden, for Davwel Investments Inc.[1]

Heard: February 14, 2023

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated July 6, 2022, with reasons reported at 2022 ONSC 325 and 2022 ONSC 3148.

REASONS FOR DECISION

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[1] Davwel Investments Inc. was not named as a respondent in this appeal. Counsel for Davwel Investments Inc. appeared at the hearing of the appeal, but made no submissions.

Overview

[1] Over a decade ago, the appellant, Ms. Darlene Welton, was employed by Stonebrook Properties Inc. ("Stonebrook") to manage the sale of condominium units at a Mississauga condominium development known as the Stonebrook Development (the "Development").

[2] Stonebrook was owned equally by two brothers, John and David Welton, through their holding companies, Johwel Investments Inc. and Davwel Investments Inc. David was Ms. Welton's husband until his death in 2013.

[3] Title to the real property on which the two-tower condo Development was to be constructed was registered in the name of Stonebrook.

[4] One tower of the Development was built, and title to that portion of the property was transferred to a condominium corporation. The remaining portion of the property remained registered in the name of Stonebrook (the "Property").

[5] When Stonebrook did not pay Ms. Welton the commissions she thought due to her, she started an action for damages against it in 2012. She initiated a second action against Stonebrook in 2015 seeking similar relief. In neither action did Ms. Welton join the co-tenants, Johwel and Davwel, as defendants. The actions were tried together in 2019, resulting in a judgment in favour of Ms. Welton against Stonebrook of approximately $180,000, plus costs (the "Judgment"). Ms. Welton

sought to execute on her judgment. She obtained a writ of seizure and sale that she registered against title to the Property (the “Writ”).

[6] Since 2013, Johwel and Davwel had been locked in litigation over several matters, including their interests in the Development. They reached a settlement in 2019. Under the settlement, Johwel planned to transfer all of Davwel’s interests in the Development to the respondent, Stonebrook II Limited Partnership. However, Johwel and Davwel were unable to close a financing of the settlement due to the Writ registered against title to the Property.

[7] The respondents, Johwel and Stonebrook II, thereupon commenced this application seeking an order lifting the Writ from title and, if necessary, the ability to pay into court the amount of Ms. Welton’s Judgment. Hainey J. granted the order sought, allowing title to the Property to be conveyed, but he ordered counsel for the respondent Johwel to hold in trust the amount of $235,750 to the credit of the application.

[8] The issue of whether the Writ attached to the Property was then considered by the application judge. She concluded that the Writ did not attach to the Property held by Stonebrook and ordered the funds held in trust be released to the respondents (the “Order”).

[9] The basis of her decision was that Stonebrook held title to the Property as bare trustee for the two co-tenants, Johwel and Davwel. As a result, Stonebrook,

as bare trustee, had no interest in the property available for seizure by one of its execution creditors, such as Ms. Welton.

[10] Ms. Welton appeals. She advances three grounds of appeal.

First ground of appeal

[11] Ms. Welton submits the application judge committed a palpable and overriding error in finding that because Stonebrook was a bare trustee, it was not obligated to pay Ms. Welton's Judgment from Stonebrook's Development Property before the return of the Property to Johwel and Davwel. She contends that in making that finding the application judge failed to consider: (i) the evidence of the extent of the activities performed and obligations owed by Stonebrook, as nominee of the two co-tenants, Johwel and Davwel; (ii) the duties imposed on Stonebrook by several provisions of a Co-Tenancy Agreement entered into amongst the co-tenants and Stonebrook; and (iii) the duties Stonebrook undertook in practice for the Development as described by a representative of Stonebrook, Dan Welton, on his cross-examination. Those duties included hiring and paying employees for the Development. Ms. Welton argues that those activities imposed upon Stonebrook an obligation to pay her Judgment for unpaid commissions before releasing title to the Property to the co-tenants.

[12] Ms. Welton characterizes this ground of appeal as accepting the application judge's finding that Stonebrook was a bare trustee but arguing that the application

judge erred in failing to find that Stonebrook had various obligations as a bare trustee. However, in substance, this ground of appeal amounts to an attack on the finding that Stonebrook was a bare trustee. The obligations that Ms. Welton argues the application judge erred in failing to find would involve attributing to Stonebrook an exercise of independent discretion that is inconsistent with being a bare trustee.

[13] Ms. Welton submits that the following key findings made by the application judge in her February 2022 reasons are tainted by palpable and overriding error:

- In the Co-Tenancy Agreement, Stonebrook is not assigned any authority to independently manage the operation or the affairs of the Development (para. 64);
- There was no evidence that Stonebrook had any discretion to decline to carry out the instructions of the Management Committee composed of the principals of the beneficial owners (para. 65); and
- The activities undertaken by Stonebrook regarding the Development were on the direction of the beneficial owners and not through an exercise of its own discretion (para. 65).

[14] We are not persuaded by this ground of appeal.

[15] In her analysis of whether Stonebrook held the Property as bare trustee for the co-tenants, the application judge considered: (i) provisions of the Declaration of Trust (at paras. 23 and 24); (ii) terms of the Co-Tenancy Agreement about the

relationship between the co-tenants and Stonebrook, including responsibilities for the payment of expenses (at paras. 22, 25, 42, 54, 62); (iii) evidence given by Dan Welton on his cross-examination about Stonebrook's activities and operations (at paras. 56-57); (iv) and evidence by Ms. Welton about Stonebrook's business activities (at paras. 58-60). The application judge's reasons disclose that she did not ignore evidence about how Stonebrook carried on its business, as contended by Ms. Welton.

[16] We see no palpable and overriding error in the application judge's key factual findings, set out in para. 13 above, that Stonebrook was a bare trustee of the Property because it had no independent powers, discretions or responsibilities: *Trident Holdings Ltd. v. Danand Investments Ld.* (1988), 64 O.R. (2d) 65 (C.A.), at p. 75. Those findings were amply supported by the evidence reviewed by the application judge at paras. 51 to 65 of her February 2022 reasons, which included consideration of provisions of the Co-Tenancy Agreement. Ms. Welton does not argue that the application judge applied incorrect legal principles to the facts she found. Accordingly, we see no basis to interfere with the application judge's finding that Stonebrook held the Property as bare trustee for its beneficiaries, Johwel and Davwel.

[17] Ms. Welton acknowledged that the application judge correctly stated, at paras. 66 to 71 of her reasons, that a writ of seizure and sale to enforce a judgment does not attach to real property held by the judgment debtor in trust as a bare

trustee. We do not see any error of fact or mixed fact and law in the application judge's conclusion that the Writ seeking to execute on the Judgment obtained by Ms. Welton against Stonebrook could not attach to the Property held by Stonebrook, as bare trustee, for the beneficial owners.

[18] We would observe that that conclusion would apply equally had Ms. Welton's judgment resulted not from a claim of breach of employment contract but from an allegation that the bare trustee, Stonebrook, had breached an obligation in the Co-Tenancy Agreement to pay expenses, an allegation Ms. Welton now proposes as an alternative basis for some further claim. That a property held in trust by a bare trustee is not available to satisfy a judgment against the bare trustee results from the character of the relationship between the bare trustee and the beneficial owners of the property – the bare trustee's lack of independent powers, discretion or responsibilities – not from the specifics of the contractual claims upon which a judgment against the bare trustee may rest.

[19] Accordingly, we are not persuaded by Ms. Welton's first ground of appeal.

Second and Third Grounds of Appeal

[20] Ms. Welton advances two further grounds of appeal. She argues that the application judge erred in: (i) concluding that Ms. Welton was precluded from commencing future proceedings against the co-tenants as principals for the failure of their agent, Stonebrook, to pay compensation to her because Ms. Welton had

obtained judgment against Stonebrook as agent; and (ii) determining that a future claim against the co-tenants was barred by the expiration of a limitation period.

[21] Both grounds of appeal suffer from a fundamental flaw: they attack comments made by the application judge in her June 2022 reasons but do not attack any portion of the application judge's Order.

[22] The Order identified the issues determined and the result: the Writ did not attach to the Property held by Stonebrook as bare trustee (para. 2); and the funds held in trust by respondent's counsel were to be released to the respondents (para. 3). The Order did not contain any provision concerning Ms. Welton's ability to commence future proceedings against the co-tenants for the recovery of compensation due to her by their agent, Stonebrook.

[23] As explained in John Sopinka, Mark A Gelowitz and W. David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed. (LexisNexis, 2018, Toronto), at §1.11:

> It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order. Although the appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal, and not the correctness of the reasons. An appeal directed at only a portion of the reasons, as opposed to the correctness of the order, is liable to be quashed. [Footnotes omitted.]

[24] In the present appeal, the Order said nothing about Ms. Welton's ability to bring future proceedings against the co-tenants as principals responsible for the conduct of their agent, Stonebrook. Nor were the application judge's *obiter* comments regarding any applicable limitation period contained in the Order. Accordingly, it is not necessary to address Ms. Welton's second and third grounds of appeal as they do not relate to provisions of the Order.

[25] For the reasons set out above, the appeal is dismissed.

[26] The parties agree that the successful party is entitled to its costs of the appeal in the amount of $20,000, inclusive of disbursements and applicable taxes. Consequently, Ms. Welton shall pay that amount to the respondents.

"David Brown J.A."
"L. Sossin J.A."
"J. Copeland J.A."