COURT OF APPEAL FOR ONTARIO

CITATION: Sutton v. Sutton, 2023 ONCA 192
DATE: 20230317
DOCKET: M54113 (COA-22-CV-0290)

Lauwers J.A. (Motion Judge)

BETWEEN

Jason Sutton

Applicant (Appellant)

and

Alison Sutton

Respondent (Respondent)

Mr. Jason Sutton, acting in person

Ms. Tracy Garton, for the respondent

Heard: March 16, 2023

ENDORSEMENT

A. BACKGROUND

[1] The underlying judgment was that of Vallee J., dated January 26, 2022, with reasons reported at 2021 ONSC 8129. Mr. Sutton's appeal to this court was dismissed on January 12, 2023, with reasons reported at 2023 ONCA 16. This court upheld Vallee J.'s award and described it at paras. 2-3:

> The trial judge awarded the respondent an equalization payment of $362,703.28, which was to be partially satisfied by a transfer from the appellant's pension. She also awarded the respondent a lump sum of $199,144 for

> retroactive and ongoing spousal support. She ordered that the balance of the equalization payment and the lump sum support were to be paid out of the proceeds of the sale of the matrimonial home, which she ordered be listed for sale. She gave the respondent the right to register a charge against the matrimonial home to secure payment of these amounts.
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> The trial judge also awarded the respondent costs of $105,930, and gave her the right to register a charge against the matrimonial home to secure their payment.

[2] Mr. Sutton sought leave to appeal to the Supreme Court of Canada on February 24, 2023: see [2023] S.C.C.A. No. 40630.

[3] Justice Vallee heard an urgent motion brought by Ms. Sutton on February 28, 2013 and issued an endorsement dated March 3, 2023. Justice Vallee noted that in his grounds for the motion to the Supreme Court, Mr. Sutton stated: “The delivery of a notice of appeal from an interlocutory or final order made under the *Residential Tenancies Act, 2006* stays, until the disposition of the appeal, any provision of the order, (a) declaring a tenancy agreement terminated or evicting a person.” She added that this statement was mistaken, because, as she noted:

> No order has been made under the *Residential Tenancies Act, 2006* to evict the respondent. He is not a tenant. He holds title to the matrimonial home. In his leave application, he states that the issues in his family law proceedings, (which included equalization of net family property, spousal and child support) are of national importance.

[4] In aid of execution, Vallee J.’s order dated March 3, 2023 contains the following terms: Ms. Sutton is granted a writ of possession against the matrimonial

home; after enforcing the writ of possession, she shall be permitted to transfer the property from Mr. Sutton's name to her name solely without further notice to Mr. Sutton or his consent; and once the property is vested in Ms. Sutton's name, she shall be permitted to list the property for sale with a realtor of her choice within 30 days, dispose of Mr. Sutton's furnishings and belongings at Mr. Sutton's expense, and retain the services of a real estate lawyer to assist in the transfer of the property at Mr. Sutton's expense.

[5] The court has authority to grant a stay pending an appeal to the Supreme Court of the order being appealed, which is Vallee J.'s January 26, 2022 judgment. For the purpose of this motion, I will assume that the appeal sweeps up the enforcement order of March 3, 2023.

B. THE GOVERNING PRINCIPLES

[6] The governing principles are set in numerous cases. Laskin J.A. described the test for a stay pending appeal in *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321, at para. 16,:

> The moving party ... must show that it has raised a serious issue to be adjudicated, that it will suffer irreparable harm if a stay is not granted, and that the balance of convenience favours a stay. These three components of the test are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay.

[7] The “serious issue” factor is modified when the party is seeking a stay of a decision pending an application for leave to appeal under the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 65.1: *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395, 131 O.R. (3d) 784, at para. 7.

[8] Justice Gillese explained that the application judge “must make a preliminary assessment of the merit of the leave application, taking into consideration the stringent leave requirements in the *Supreme Court Act”*: *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corporation*, 2016 ONCA 616, aff'd 2016 ONCA 687, at para. 17.

[9] Justice Paciocco J.A. noted: “Since the Supreme Court of Canada typically grants leave only in cases of public or national importance, an application judge must consider whether these considerations are apt to be met”: *Alectra Utilities Corp. v. Solar Power Network Inc.*, 2019 ONCA 332, 145 O.R. (3d) 794, at para. 12. He added, at para. 13: “To be sure, the threshold on both the merits and the national or public importance considerations remains low”, citing *Livent Inc.*, at paras. 8-9. In his view, which I adopt, a low likelihood that the Supreme Court will grant leave “will militate against the imposition of a stay”: at para. 13.

C. THE GOVERNING PRINCIPLES APPLIED

[10] Mr. Sutton’s appeal to the Supreme Court of Canada bears none of the indicia of a case in which that court would ordinarily grant leave. There were no

legal issues in the appeal, let alone legal issues that rise to the level of public or national importance so as to attract the attention of the Supreme Court: *BTR*, para. 18.

[11] Mr. Sutton's appeal to this court was rooted in the facts, as the court noted in *Sutton v. Sutton*, 2023 ONCA 16, at paras. 4-5:

> Each of the dispositions made by the trial judge resulted from her factual findings. The appellant does not call into question the legal principles that the trial judge applied to the facts she found. The appellant questions the trial judge's factual findings, pointing to other evidence and explanations that, he submits, should lead us to substitute different factual conclusions for those reached by the trial judge. He also seeks to introduce fresh evidence on the appeal.
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> It is not, however, the role of this court to retry the case. In our view, the appellant has not identified any reversible error committed by the trial judge that would justify appellate interference with any of her orders.

[12] Mr. Sutton relies on *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, for the proposition that "spousal support should not be paid out of a pension which has already been divided as part of asset division between the spouses". That articulation does not elevate the individual issues between these two parties to matters of national importance. The facts of *Boston* are also readily distinguishable from the present case.

[13] Moreover, Mr. Sutton has not met the other two parts of the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. He has not

established irreparable harm, nor that the balance of convenience favours a stay. Over a year has passed since the matrimonial home was ordered to be sold. Mr. Sutton has had ample time and opportunity to secure alternative accommodations. He has not made any spousal support payments whatsoever or paid the outstanding costs awards owed to Ms. Sutton, over that lengthy period. At the same time, Ms. Sutton continues to incur legal fees. Granting the stay would result in further prejudice to her.

D. DISPOSITION

[14] Accordingly, I dismiss Mr. Sutton's application for a stay pending the outcome of his appeal to the Supreme Court, with costs to the responding party.

[15] The responding party may make costs submissions in writing no more than three pages in length within seven days and Mr. Sutton may make responding costs submissions in writing no more than three pages in length within an additional seven days.

"P. Lauwers J.A."