

COURT OF APPEAL FOR ONTARIO

CITATION: Auciello v. Yao, 2023 ONCA 199

DATE: 20230320

DOCKET: M53478 (C70627)

Roberts, Nordheimer and Thorburn JJ.A.

BETWEEN

Vito Auciello

Applicant

(Respondent/Responding Party)

and

Wei Yao

Respondent

(Appellant/Moving Party)

Wei Yao, acting in person

Vito Auciello, acting in person

Heard: March 16, 2023

REASONS FOR DECISION

[1] The appellant, Ms. Yao and the respondent, Vito Auciello were spouses and have one daughter.

[2] Ms. Yao seeks a panel review of the decision by a motion judge of this court, dated May 20, 2022. The motion judge refused to stay the trial judge's order that Ms. Yao vacate the house at 21 Yewfield Crescent, Toronto ("the property"), pending appeal. The trial judge had ordered Ms. Yao to vacate the property so that it could be sold.

[3] Ms. Yao claims the motion judge did not appreciate or address the serious issues under appeal, the irreparable harm Ms. Yao would suffer if the property were sold, or the balance of convenience as between the parties. At the conclusion of the hearing, we dismissed the motion for review with reasons to follow. We now provide our reasons.

[4] The background evidence is as follows:

I. THE EVIDENCE

[5] Vito Auciello, brought an action seeking an order for the sale of the property. The property was purchased in or about February 2008. Ms. Yao had been living there since the parties separated in 2013.

[6] Ms. Yao occupied the property knowing that Mr. Auciello wanted it sold, and in the face of six court orders that the property be sold. One of those orders was on consent.

[7] Ms. Yao did not pay occupation rent. She claimed Mr. Auciello had been unjustly enriched and that the property was part of a joint family investment venture.

[8] Mr. Auciello claimed he purchased the property through his company, Network Cash Mart, as his own investment.

[9] Mr. Auciello applied to the Superior Court for relief and the trial took place in early 2022.

II. THE TRIAL JUDGE'S DECISION

[10] The trial judge found that Ms. Yao was unable to establish a causal, substantial, or direct link between the contributions she made to the parties' relationship and the acquisition, maintenance, or improvement of the investment properties. Accordingly, the trial judge held there was no unjust enrichment.

[11] She further found there would have been no joint family venture as there was no mutual effort regarding the investment properties, no economic integration, and the structure of their relationship did not indicate they had a joint family venture.

[12] The trial judge held that notwithstanding the numerous court orders for sale of the property, Ms. Yao remained in the property, the property had not been sold, and Mr. Auciello had a *prima facie* right to sell the property.

[13] The trial judge noted that it seemed Ms. Yao was delaying the sale of the property until her new condominium was ready, but that while moving may be costly and stressful, there was no evidence that if she were forced to vacate the property, it would result in oppression.

[14] The trial judge concluded that the only way the sale would proceed in a timely manner was to order vacant possession. She therefore ordered that the property be sold and that Ms. Yao provide vacant possession of the property within 30 days of the date of the judgment.

III. THE MOTION JUDGE'S DECISION

[15] Ms. Yao then brought a motion before this court to stay the order that she vacate the property. While the Notice of Appeal was not included in the appellant's Motion Record, a comprehensive factum was filed by counsel for Ms. Yao setting out her request for relief and reasons therefore.

[16] The motion judge held that it was doubtful this case passed the serious question threshold to grant a stay. He underscored the trial judge's finding that it was necessary to order vacant possession to give effect to the order to sell the property.

[17] Second, the motion judge held that Ms. Yao had not established irreparable harm as she had clearly known for several years that the house was ordered to be sold but had not appealed any of the court orders requiring the sale of the property.

The motion judge further held that although Ms. Yao claims the sale would disrupt her daughter or require her to attend a different school, the parties have a shared parenting arrangement. The parties' daughter regularly resides with Mr. Auciello who lives within the school's catchment area and could do so for a longer period if necessary.

[18] Third, the motion judge held that the balance of convenience favours Mr. Auciello, who has been unable to obtain the equity from sale of the property for several years, despite several court orders. Accordingly, he concluded that Ms. Yao failed to establish that a stay should be granted.

IV. ANALYSIS AND CONCLUSION

[19] A panel review of a motion judge's decision is not a *de novo* determination: *Van Delst v. Hronowsky*, 2022 ONCA 782, at para. 2. This court may only interfere with the order of a single judge of this court if the judge "failed to identify the applicable principles, erred in principle or reached an unreasonable result": *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 18.

[20] Ms. Yao has provided no basis upon which to interfere with the motion judge's order. She largely relitigates the issues that were argued before the motion judge and she has not articulated any errors of fact or law that would warrant the intervention of this court. The motion judge's reasons clearly and succinctly addressed the issues before him.

[21] For these reasons, the appeal of the order to review the motion judge's order was dismissed. Mr. Auciello does not seek costs and none are awarded.

"L.B. Roberts J.A."

"I.V.B. Nordheimer J.A."

"J.A. Thorburn J.A."