COURT OF APPEAL FOR ONTARIO

CITATION: Jagtoo & Jagtoo, Professional Corporation v. Grandfield Homes Holdings Limited, 2023 ONCA 214
DATE: 20230328
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Tulloch, Thorburn and George JJ.A.

BETWEEN

Jagtoo & Jagtoo, Professional Corporation

Applicant/Respondent by way of cross-motion

(Appellant)

and

Grandfield Homes Holdings Limited

Respondent/Moving Party by way of cross-motion

(Respondent)

James Jagtoo and Frances Jagtoo, for the appellant

Michael Doyle and Sarah Jamshidimoghadam, for the respondent

Heard: November 14, 2022

On appeal from the judgment of Justice Howard Leibovich of the Superior Court of Justice, dated November 1, 2021, with brief reasons reported at 2021 ONSC 7230 and supplementary reasons reported at 2021 ONSC 7355, and from the costs order, dated November 23, 2021, with reasons at 2021 ONSC 7747.

Motion for leave to appeal from the costs order of Justice Jill C. Cameron of the Superior Court of Justice, dated November 19, 2021, with reasons at 2021 ONSC 7675.

REASONS FOR DECISION

A. OVERVIEW AND FACTS

[1] At the conclusion of the oral hearing, we dismissed the appeal with reasons to follow. These are our reasons.

[2] The appellant is a small law firm. The appellant's counsel, Mr. James Jagtoo, is a partner at the firm. The respondent was the landlord of the premises in which the appellant ran its business.

[3] The lease between the appellant and the respondent was set to expire on October 31, 2021. The lease included a renewal clause, which stipulated that the appellant could renew the lease for three years provided the parties agreed on the basic rent. The clause stipulated that the basic rent had to be "based on the then market rate". Failure to reach an agreement on the basic rent would result in the renewal option being revoked.

[4] The appellant and respondent were not able to agree on the appropriate market rate. The respondent had initially offered to set the new rental rate at $17 per square foot, whereas the appellant had been prepared to pay $9.75 per square foot.

[5] After several months of negotiations, on September 1, 2021, the appellant offered $14 per square foot for a three-year term. A week later, on September 8, 2021, the respondent made a formal offer to settle. The lease would be renewed at $14.50 per square foot for three years, and it would also resolve all issues

relating to previous renovations of the property, the thermostat in the rental unit, and the calculation of additional rent.

[6] This offer was not accepted. As such, the lease was not renewed.

B. PROCEDURAL HISTORY

(1) The Appellant's Application

[7] In April 2022, during the course of negotiations on the basic rent, the appellant filed an application against the respondent. The appellant requested, among other things, that the court (a) find that it had jurisdiction to set the market rate for the basic rent; (b) set the market rate and extend the lease for three years; and (c) find that the respondent breached its duty to act in good faith.

[8] The application was dismissed. The application judge noted that the lease had a "failure clause" – that is, in the event of a failure to agree on the basic rent, the lease would terminate. This "failure clause" meant that the respondent could not be compelled to accept a renewal tenancy at a rate that it did not agree to. As such, unless there was a breach of the duty to act in good faith, the court could not set the market rate and extend the lease.

[9] In his supplementary reasons, the application judge explained that the respondent did not breach its duty to act in good faith. The appellant had relied, in part, on disturbances caused by construction in the unit next door as evidence of the respondent's bad faith. However, the parties had resolved this dispute in

November 2020, with the respondent financially compensating the appellant. The application judge noted that this showed “the opposite” of malice and misconduct toward the appellant. The parties had come together to resolve the issues, showing the respondent was responsive to the appellant’s complaints. The appellant also argued that the fact Mr. Jagtoo was not granted a meeting to negotiate with the president of the respondent was evidence of bad faith. The application judge rejected this argument noting that the duty to negotiate in good faith does not require negotiating personally.

[10] The application judge also dismissed the appellant’s argument that the respondent was manipulating the market rate by raising the listed rate for other units it owned. The application judge noted that the listed rate is only relevant if someone actually paid that rate – if the unit stood empty while listed at the higher rate, then that would be evidence that the higher rate was not the market rate. The application judge similarly found no merit in the appellant’s challenge to the integrity of the respondent’s expert evidence on the current market rate.

[11] Finally, the application judge looked at the negotiations as a whole. He noted that the parties had started over $7 apart on the rent per square foot, and this gap had significantly narrowed overtime. The application judge rejected the appellant’s submission that the difference of 50 cents between the parties’ final offers was evidence of bad faith. He opined that if the respondent had not lowered its ask, the appellant would have equally pointed to that as evidence of bad faith. While the

appellant had a right not to accept the additional stipulations in the respondent's final offer (i.e., relating to the thermostat and other issues), the fact that the respondent proposed them did not constitute bad faith.

[12] The appellant had also sought compensation for renovations made to the unit on the basis that the respondent would otherwise be unjustly enriched by these improvements. The application judge denied the requested relief. He noted that the lease specifically required that the tenant pay for any renovations it made, and moreover, the appellant made no written or oral submissions on this issue.

[13] In his costs order, the application judge acknowledged that the respondent, as the successful party, was entitled to its costs. He agreed with the appellant that the respondent should not get costs for an earlier unsuccessful cross-motion to have Mr. Jagtoo removed as counsel (discussed below). However, the application judge rejected the appellant's submission that his offer to settle for $14 per square foot should be considered. Since the appellant obtained a worse outcome after the hearing, that offer was an irrelevant consideration.

[14] The application judge ordered partial indemnity costs up to the amount of the respondent's final offer to settle in September 2022, and substantial indemnity costs thereafter. He held that the appellant's "decision to reject the September 8th offer and risk so much for so little was remarkable and cannot be condoned or encouraged." He fixed costs at $40,356.

(2) The Respondent's Cross-motion

[15] In addition to responding to the appellant's motion, the respondent had filed a cross-motion against the appellant, seeking to remove Mr. Jagtoo as the appellant's counsel or to compel the appellant to appoint a solicitor of record.

[16] The cross-motion was heard and decided before the appellant's application. The motion judge dismissed the motion and ordered costs to the appellant on a partial indemnity basis, and at a fraction of what had been requested. This was because the costs submitted by the appellant were "grossly inflated", and almost all of them involved preparation for the main application. Furthermore, the motion judge disagreed that the respondent had acted vexatiously and without merit in bringing forth the cross-motion. Accordingly, costs were fixed at $2,000.

C. ANALYSIS

[17] On appeal, the appellant submits that the application judge erred in: (1) finding the respondent did not breach its duty to act in good faith; (2) dismissing the appellant's objection to the respondent's expert evidence without providing reasons for doing so; (3) refusing to exercise the court's equitable jurisdiction to compensate the appellant for the cost of renovations; and (4) ordering substantial indemnity costs to the respondent for the application.

[18] The appellant also seeks leave to appeal the costs order from the dismissed cross-motion.

[19] We would dismiss all of the appellant's grounds of appeal. We will first address the appellant's appeal of the application and then proceed to address the request for leave to appeal the costs order from the cross-motion.

(1) Appeal of the Application

[20] The appellant submits that the application judge misapprehended the evidence to find that the respondent acted in good faith. We disagree. The application judge appreciated and carefully weighed both parties' evidence. He was alive to the parties' respective final offers to settle, as these were documented in his reasons. He also properly applied the principle of good faith from *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 and *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 73 D.L.R. (4th) 400, 50 B.C.L.R. (2d) 126 (C.A.) and ultimately found that the respondent was not in breach of this duty. We find no reversible error in the application judge's reasons and would therefore not interfere with his findings.

[21] We would similarly not give effect to the appellant's argument regarding the application judge's use of the expert evidence. The application judge's reasons for rejecting the appellant's objection to the evidence is set out in his supplementary reasons. He was clear that the appellant's attack on the honesty and credibility of the expert on market rate was "wholly devoid of merit and should not have been made."

[22] In regard to the application judge's refusal to compensate the appellant for the costs of improving the unit, we find no reversible error in his decision. The appellant failed to provide any written submissions to the application judge on this alternative relief being sought. It was open to the application judge to dismiss this request for relief, and there is no basis to interfere with his decision.

[23] Finally, it was reasonable and within the application judge's discretion to award costs on a substantial indemnity basis following the respondent's offer to settle for $14.50 per square foot in September 2021. We do not accept the appellant's submission that the application judge should have considered its offer to settle for $14 per square foot from August 2021. As the application judge explained in his reasons, this offer had not been accepted by the respondent, and it was a worse outcome than the actual disposition of the application. It was therefore not a relevant consideration.

[24] Consequently, the appellant's appeal of the application judge's judgment and costs order is dismissed.

(2) Leave to Appeal Costs Order from the Cross-motion

[25] The appellant also seeks leave to appeal the costs order from the respondent's unsuccessful cross-motion. The appellant submits that, pursuant to s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 61.03.1(17) of

the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the request for leave can be joined with the main appeal as of right.

[26] However, this is not a proper application of r. 61.03.1(17). As noted above, the cross-motion was heard and decided before the application. Its dismissal resulted in a final order. Consequently, the cross-motion is separate from the application, which is the main proceeding under appeal. As this court explained in *Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc.* (2003), 62 O.R. (3d) 647 (C.A.), at para. 16, a costs order from a separate or collateral proceeding constitutes its own appealable judgment, governed by its own procedures:

> On the basis of this analysis, the CJA and the Rules of Civil Procedure clearly contemplate that a costs judgment, when the subject of a separate or collateral proceeding as in this case, is a separate determination rather than a part of the main merits proceeding. As such, it is a separate appealable judgment governed by its own procedure. [Emphasis added.]

[27] It is, therefore, not permissible for the appellant to join its request for leave to appeal the costs order from the cross-motion with its appeal of the application. Nevertheless, given the lack of prejudice to either party, and for the purpose of expediency, we will grant the appellant an indulgence and decide the matter.

[28] Leave to appeal a costs order will not be granted save in obvious cases where the party seeking leave establishes that there are “strong grounds upon which the appellate court could find that the judge erred in exercising his

discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92.

[29] The appellant has not met this threshold. It was well within the discretion of the motion judge to order partial indemnity costs to the appellant. It was also open to the motion judge to reduce the costs requested by the appellant, as the appellant had "grossly inflated" them and conflated the costs of the cross-motion with the costs of the application.

[30] Accordingly, leave to appeal costs is refused.

D. DISPOSITION

[31] We dismiss the appeal and refuse leave to appeal the costs of the cross-motion.

[32] The appellant shall pay costs to the respondent on a partial indemnity basis in the amount of $20,000, inclusive of disbursements and HST.

"M. Tulloch J.A."
"J.A. Thorburn J.A."
"J. George J.A."