COURT OF APPEAL FOR ONTARIO

CITATION: Jewish Foundation of Greater Toronto (Re), 2023 ONCA 268
DATE: 20230417
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Lauwers, Paciocco and Thorburn JJ.A.

In the Matter of the Bankruptcy of Jewish Foundation of Greater Toronto of the City of Toronto, in the Province of Ontario

Wojtek Jaskiewicz and Michael Ly, for the appellant The Joseph Lebovic Charitable Foundation

Matthew P. Gottlieb, Paul Fruitman and Xin Lu (Crystal) Li, for the respondent Jewish Foundation of Greater Toronto

Heard: March 31, 2023

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated April 6, 2022, with reasons at 2022 ONSC 2120.

REASONS FOR DECISION

FACTS

[1] The appellant is a non-share capital corporation designated by the Canada Revenue Agency as a private foundation. It was controlled by its founder, Joseph Lebovic, until his death on May 1, 2021, when his brother and executor, Wolf Lebovic, took over. The appellant donated to the respondent through a donor advised fund ("DAF"). Once donated, the DAF became part of the respondent's

assets, which it then invested and distributed to charities. Between 2011 and 2016, the appellant donated over $19 million to the DAF. The appellant received an acknowledgement confirming each donation as an irrevocable gift.

[2] A DAF can designate an advisor to recommend distributions, but the recipient is not required to follow or consider those recommendations. Joseph Lebovic was the advisor to the DAF before his death and made recommendations as to distributions. The respondent generally accepted his recommendations and made 146 distributions totaling over $11 million.

[3] Shortly after Joseph Lebovic's death, Wolf Lebovic instructed the respondent to distribute the remaining funds in the DAF to specific named charities. When the respondent did not follow his instructions, the appellant commenced an action against the respondent, seeking an order compelling the respondent to make the distributions.[1] That proceeding was ongoing at the time this application was heard.

[4] A few months later, the appellant brought the application underlying this appeal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The basis for the application was that the respondent has ceased to meet its liabilities generally as they come due, and that it has failed to meet its obligations to the appellant in the six months preceding the filing of the application. The respondent

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[1] Superior Court File No.: CV-21-00002743-0000.

brought a motion to dismiss the application as frivolous and raising no reasonable cause of action.

THE DECISION BELOW

[5] The motion judge granted the motion and dismissed the application as raising no reasonable cause of action under the *BIA*, because there is no evidence of a debt, nor any act of bankruptcy, nor special circumstances that would justify granting a single-creditor application.

[6] The motion judge held that a gift cannot be revoked unless there is an express power of revocation, which did not exist in this case. When making the donations, Joseph Lebovic signed a form stating that he received no benefit as a result of the gift. The motion judge found that there is no debt and no debtor/creditor relationship between the parties.

[7] The motion judge also found that there were no special circumstances that could warrant granting a single-creditor bankruptcy application. There were no repeated demands for repayment, there is no significantly large debt accompanied by fraud or suspicious circumstances, and no admission of an inability to pay creditors generally.

[8] Since the grounds for the application were not proven, the motion judge found that the application must be dismissed under s. 43(7) of the *BIA*, which states that where the court is not satisfied with the proof of the facts alleged, it shall

dismiss the application. In the alternative, the motion judge would have exercised her discretion to dismiss the application as an abuse of process. She found that the application was brought for a collateral purpose, namely, to put pressure on the respondent to pay the amounts demanded by Wolf Lebovic to the charities he had named, even though such amounts are not debts and the appellant has no actual authority to direct the distributions.

[9] In the further alternative, the motion judge would have struck the application under r. 21 of the *Rules of Civil Procedure* as being frivolous, vexatious or an abuse of process. The motion judge found that the claim has no reasonable chance of success and allowing it to proceed "would be futile".

[10] The motion judge ordered the appellant to pay elevated costs to the respondent. She awarded $100,000, compared to the respondent's full indemnity amount of $133,303.84 and substantial indemnity amount of $120,002.28. She did so on the basis that the application was an abuse of the court's process and that the respondent charity should not be left "to defend this litigation and use money to do so that would otherwise be earmarked for charitable purposes."

ANALYSIS

[11] On appeal, the appellant submits that the respondent's entire operation should be subject to effectively a full-scale audit to determine whether any of the appellant's allegations are true. This is not the purpose of the *BIA*. The motion

judge found that the appellant's claims have utterly no merit. We agree. The motion judge's reasons are careful and are rooted in the facts and the law. The appellant has identified no palpable and overriding error of fact and no errors of law.

[12] On the issue of costs, the appellant argues that it was improper for the motion judge to fix a higher scale of costs based on unproven allegations of "false statements" on the part of Wolf Lebovic. However, we note that the motion judge made no such findings. The only reference in her decision to "false statements" was made when she was recounting submissions made by the respondent. She based her costs ruling entirely on her finding that the application was an abuse of the court's process. She noted:

> Full indemnity costs are reserved for cases with the most egregious facts or allegations that a litigant has deliberately prolonged or undermined the court process. That is not the case here. However, a higher scale of costs must be considered where an abuse of the court process is found.

[13] The appellant also challenges the sheer amount of the costs awarded at $100,000. The motion judge stated:

> The amounts sought by the Foundation are high given that the motion was argued in under two hours with no cross-examinations. Proportionality must also be a consideration of this Court on the issue of costs no matter its findings. Finally, there is the issue that the Foundation is a charity which has had to defend this litigation and use money to do so that would otherwise be earmarked for charitable purposes.

[14] Counsel for the respondent argued that the motion judge's costs award is "entitled to a very high degree of deference" even if the members of the appeal panel would have exercised their discretion differently: *Frazer v. Haukioja*, 2010 ONCA 249, 101 O.R. (3d) 528, at para. 75. Counsel added that the degree of deference is even higher in abusive bankruptcy proceedings, citing *Dallas/North Group Inc. (Re)* (2001), 148 O.A.C. 288, at para. 14:

> There are special policy considerations to take into account when dealing with abuse of process in bankruptcy court because bankruptcy proceedings are quasi-criminal in nature and a petition in bankruptcy can destroy a person's financial standing and reputation. A harsher consequence in costs against a person who misuses the bankruptcy court for an improper collateral purpose is therefore justified.

[15] Counsel for the respondent argued that a charity's financial standing is similarly important to donors, especially for one as "large and embedded in the community" as the respondent. He submitted that, "given the stakes at issue, the appellant had to expect a full-throated response to the application". The motion judge specifically invoked *Dallas/North Group* in crafting the costs award. She was alive to the reputational concerns at play here, and appropriately considered them in fixing costs.

[16] We see no reason to interfere with the motion judge's exercise of discretion regarding costs.

DISPOSITION

[17] The appeal is dismissed with costs payable by the appellant to the respondent. If the parties are unable to agree on costs, then the respondent may file a written submission no more than three pages in length within seven days of the date of the release of these reasons and the appellant may file a written submission no more than three pages in length within seven days of the date the respondent's submission is due.

"P. Lauwers J.A."
"David M. Paciocco J.A."
"Thorburn J.A."