COURT OF APPEAL FOR ONTARIO

CITATION: Comfort Capital Inc. v. Yeretsian, 2023 ONCA 282
DATE: 20230424
DOCKET: COA-23-OM-0050

van Rensburg J.A. (Motion Judge)

In the Matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43, as amended

BETWEEN

Comfort Capital Inc., The Bank of Nova Scotia Trust Company, E. Manson Investments Ltd., Fenfam Holdings Inc., 593651 Ontario Ltd., 1031436 Ontario Inc., Alrae Investments Inc., Barry Spiegel, Sharon Nightingale, David Sugar, Phyllis Sugar, National Tire Ltd., 1119778 Ontario Limited, 1415976 Ontario Limited, Alrae Investments Inc., Bamburgh Holdings Ltd., Beverley Gordon, Diane Grafstein, Richard Gruneir, B. & M. Handelman Investments Ltd., Ridgeway Occupational Consultants Inc., Yerusha Investments Inc., Mihal Tylman, A. Eliezer Kirshblum, 593651 Ontario Limited, The Bank of Nova Scotia Trust Company in trust for Bailey Levenson, The Bank of Nova Scotia Trust Company in trust for Rosemonde Kelly, Anne Handelman, Yerusha Investments Inc., Celmar Investments Corp., Beverley Gordon, Philgor Investments Ltd., Brilliant Investcorp Inc., Maxoren Investments, 2227046 Ontario Limited, Dast Properties Limited, Tova Markovzki, Joseph Suckonic and B. & M. Handelman Investments Limited

Applicants

and

Annie Yeretsian, Terry Wilson, 2457674 Ontario Inc., 2399029 Ontario Inc. and Moss Development Ltd.

Respondents (Responding Party)

Jordan Goldblatt, Peter Smiley, and Morgan McKenna, for the moving party Money Gate Corporation

James Zibarras and Craig Mills, for the responding parties 2399029 Ontario Inc. and World Corporation Inc.

Eli Karp, for the responding party Curah Capital Corporation

Eric Golden and Chad Kopach, for the responding party Rosen Goldberg Inc., in its capacity as court-appointed receiver of 2399029 Ontario Inc. and World Corporation Inc.

Heard: March 8, 2023

ENDORSEMENT

INTRODUCTION

[1] This is a motion by Money Gate Corporation ("MGC") for an extension of time to file its notice of appeal and for a declaration that it has an appeal as of right under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3 (the "BIA"), or alternatively for leave to appeal under s. 193(e).

RELEVANT FACTS

[2] The judgment under appeal arises in the receivership of World Corporation Inc. and 2399029 Ontario Inc. ("029"). Rosen Goldberg Inc. was appointed pursuant to s. 243(1) of the BIA and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as receiver and manager of the assets, undertaking and property of the debtors. 029 was the owner of a commercial property on Malmo Court in Vaughan, Ontario (the "Malmo Property"). A claims process was established to determine entitlements arising under the receiver's sale of the debtors' assets.

[3] MGC brought a motion in the receivership proceeding seeking payment of the sum of $1,159,517.66, plus additional interest from December 10, 2021, from the proceeds of sale of the Malmo Property. MGC asserted that, as a trustee for private investors, it was the owner by assignment of the second mortgage registered on title to the property. 029 and Curah Capital Corp. (“Curah”), which holds the third and fourth charges on the Malmo Property, opposed the motion.

[4] On November 24, 2022, the motion judge dismissed MGC’s motion. He observed that the receiver had given an opinion that the second mortgage constituted a legal, valid and binding obligation of 029: at para. 11. After conducting a detailed review of the evidence, consisting of affidavits, transcripts of cross-examinations, and documents produced and missing from additional production that was ordered by the court, the motion judge drew an adverse inference from MGC’s refusal to provide responsive answers to certain questions asked by 029. At para. 56, he stated:

> I rely on this adverse inference to conclude that none of MGC’s money, whether raised from private investors or otherwise, was used to purchase the interests of the four mortgage holders [of the second mortgage]. Because no value was given by MGC, as trustee for private investors, to the four mortgage holders, MGC did not take an enforceable assignment of the second mortgage.

[5] In the final four paragraphs of his reasons the motion judge addressed an alternative argument made by Curah. He held that, because MGC was not registered as owner of the second mortgage on the register of title to the Malmo

Property, under s. 101(5) of the *Land Titles Act*, R.S.O. 1990, c. L.5 the four holders of the registered second mortgage were deemed to remain the owners of the second mortgage. At para. 63, the motion judge stated:

> Even if MGC had shown that, as trustee for private investors, it provided valuable consideration to the four holders of the Second Mortgage, MGC does not have a registered interest as owner of the Second Mortgage that ranks in priority to the registered third and fourth charges owned by Curah. For this reason, as well, MGC's motion must be dismissed.

[6] MGC served a notice of motion for leave to appeal to the Divisional Court on December 2, 2022, before concluding that its appeal lay to this court. It served a notice of appeal to this court on December 13, 2022. The notice of appeal claims a number of things, including an order declaring MGC the owner of the second mortgage and an order authorizing the receiver to make the distribution. The grounds of appeal assert that the motion judge misapprehended the facts and the evidence and misapplied the *Land Titles Act*.

[7] On January 20, 2023, MGC served a notice of motion to this court for an order extending the time to file its appeal, a declaration that the appeal is as of right under s. 193(c) of the BIA, and an alternative request for leave to appeal under s. 193(e).

[8] The responding parties oppose this motion. 029 opposes MGC's request for an extension of time, the request for a declaration that the appeal falls under s. 193(c), and the alternative request for leave to appeal. Curah does not oppose the

extension of time but contends that there is no right to appeal and that leave to appeal should be refused. Both responding parties seek to have the appeal quashed.

EXTENSION OF TIME

[9] The time to file a notice of appeal in a matter falling under the BIA is ten days from the order under appeal or "within such further time as a judge of the court of appeal stipulates": *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the "BIA Rules"), r. 31(1). Section 187(11) of the BIA provides for the court to extend any time limit under the BIA or the BIA Rules.

[10] The test for an extension of time is whether it is in the interests of justice that the extension be granted: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 3.02(1); *2363523 Ontario Inc. v. Nowack*, 2018 ONCA 286, at para. 4. Relevant factors include: whether the appellant intended to appeal within the relevant period; the length of and explanation for the delay; prejudice to the opposing party from extending the time; and the merits of the appeal. The enumerated factors are not exhaustive and may vary in importance depending on the circumstances. The overriding consideration is whether the justice of the case requires an extension: *Denomme v. McArthur*, 2013 ONCA 694; 36 R.F.L. (7th) 273, at para. 7; *Oliveira v. Oliveira*, 2022 ONCA 218, at para. 14.

[11] MGC contends that it meets the test for an extension of time. It submits that it had a *bona fide* intention to appeal before the expiration of the appeal period, that its counsel's honest misapprehension of the applicable rules is a full explanation for the very short delay in appealing to this court, and that there is no prejudice to the responding parties.

[12] 029 opposes the extension. 029 concedes that MGC formed an intention to appeal but asserts that MGC has not provided an explanation for the delay in serving its notice of appeal once it realized that it had filed in the wrong court. More importantly, the core of 029's submission on the extension of time is that the merits of MGC's appeal are so weak that leave to extend the time should be refused. In this regard, 029 submits that MGC is sure to fail in its challenge to the motion judge's refusal to consider certain evidence as inadmissible hearsay, and in its challenge to the motion judge's alternative holding relying on s. 101(5) of the *Land Titles Act.*

[13] 029's opposition to the extension of time is ill-conceived. As this court observed in *Correct Building Corporation v. Lehman*, 2022 ONCA 723, at para. 11, the merits factor will traditionally "be used to support granting an extension when the other factors do not favour the applicant, but because there may be some potential merit to the case, it is still in the interests of justice that the applicant's right of appeal not be removed, just because of lateness". The court went on to endorse statements of this court in *Duca Community Credit Union Ltd. v.*

Giovannoli (2001), 142 O.A.C. 146 (C.A.), at para. 14 and *40 Park Lane Circle v. Aiello*, 2019 ONCA 451, at para. 8, that the question is whether there is "so little merit in the proposed appeal that the appellant should be denied its important right of appeal", and further, that "even where it is difficult to see the merits of a proposed appeal, a party is entitled to appeal and should not be deprived of that entitlement where there is no real prejudice to the other side".

[14] I have concluded that an extension of time is in the interests of justice in this case. Having reviewed MGC's grounds of appeal in its factum on this motion and in oral argument, I would not regard the grounds of appeal as frivolous. More importantly, I am not persuaded that the appeal has so little merit that MGC should lose its right of appeal by filing its notice of appeal in this court a few days late, after having proceeded, on notice to the responding parties, in the wrong court. In these circumstances, there is no real prejudice to the responding parties.

[15] Accordingly, I will extend the time to appeal, provided that I am satisfied that there is a right to appeal to this court, whether under s. 193(c) or by leave.

RIGHT TO APPEAL UNDER S. 193(c) OF THE BIA

[16] MGC asserts that it has a right to appeal the order of the motion judge under s. 193(c) of the BIA, which provides for an automatic right of appeal "if the property involved in the appeal exceeds in value ten thousand dollars". MGC argues that the motion judge's refusal to recognize its ownership of the second mortgage

registered on title and the dismissal of its claim for a distribution of over $1,000,000 from the proceeds of sale of the Malmo Property well exceeds the subsection (c) threshold and finally determines its entitlement to property (i.e., the second mortgage).

[17] The responding parties contend that MGC has no right to appeal under s. 193(c). 029 asserts that the motion judge's decision involved a procedural issue, and that the value of the property is not involved in the appeal in the sense contemplated by s. 193(c) because the order sought to be appealed turns on a determination of a priorities dispute between two mortgagees. Moreover, since the motion judge found that MGC's purported assignment was not registered on title, 029 argues that MGC never had the right to assert a claim under the mortgage and so any loss suffered by MGC is a result of the non-registration of the assignment and not the order under appeal.

[18] Curah's position is much the same as 029's. Curah says that the motion judge's alternative basis for dismissing the motion, in which he stated that the failure to register the assignment meant that MGC would not take priority over Curah's registered third and fourth mortgages, demonstrates that this is a priorities dispute, which does not fall under s. 193(c).

[19] The proper scope and interpretation of s. 193(c) has been the subject of numerous reported decisions of this court and the courts of other provinces. It is

unnecessary for the purpose of this motion to engage in any detailed review of the cases. I note however the approach outlined in *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd*., 2016 ONCA 225, that has been consistently followed in this province. In *Bending Lake* Brown J.A. concluded that s. 193(c) of the BIA does not provide a right of appeal from orders that: (i) are procedural in nature; (ii) do not bring into play the value of the debtor's property; or (iii) do not result in a gain or loss (in the sense of involving "some element of a final determination of the economic interests of a claimant in the debtor"): at paras. 53, 61.

[20] In a more recent decision, *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, at para. 35, Brown J.A., writing for a panel of this court, endorsed the statement in *MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439, at para. 61, that the primary task when examining whether an automatic right of appeal exists under s. 193(c) is to "determine whether the property involved in the appeal exceeds $10,000", which may be determined by comparing the order appealed against the remedy sought in the notice of appeal. The focus of the inquiry is the amount of money at stake. In describing the approach to be taken in determining whether s. 193(c) applies to an appeal, Brown J.A. stated, at para. 42:

> What is required … is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into the effect of the order under appeal therefore is a fact-specific one; it is also an

> evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal.

[21] Justice Brown went on to say, at para. 45, that although the cases under s. 193(c) explain the interpretative task using differing language, "at their core [they] share common ground in attempting to discern the operative effect of the order sought to be appealed: does the order result in a loss or gain, or put in jeopardy value of property, in excess of $10,000?" (emphasis added).

[22] The responding parties seek to characterize the motion judge's decision in this case as the determination of a priorities dispute, that would not fall under s. 193(c) of the BIA. The case most often cited as authority for the principle that an order that determines priorities does not fall under s. 193(c) is *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 17 C.B.R. (6th) 91. In that case, Strathy J.A. (as he then was) was dealing with an attempt to appeal an order respecting competing claims to the proceeds of sale of a property by a receiver, resulting in a payment to a mortgagee in priority to a construction lien claimant. The order was appealed on the basis that the motion judge incorrectly interpreted the priority scheme in s. 78 of the *Construction Lien Act*, R.S.O. 1990, c. C.30. In concluding that s. 193(c) did not provide a right of appeal, Strathy J.A. determined that, at its core, this was a priority dispute: the issue before the motion judge was only a matter of which claim should be paid first. There was no issue as to the value of the claims or their validity: at paras. 41-42.

[23] An argument similar to the one made by the responding parties in this case was rejected in an earlier decision in this receivership, *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217 ("*Comfort Capital ONCA 2019*"). The order under appeal in that case determined competing claims to certain proceeds of sale of a property (the "Caldwell property") by a mortgagee ("CIC") and certain creditors of CIC who were entitled, through a claims process, to establish a claim to monies owed to CIC. The creditor claimants were successful in obtaining an order directing that they be paid the funds that would otherwise be payable to CIC from the proceeds of sale of the Caldwell property.

[24] In rejecting the receiver's argument that the order did not involve a loss because it was no different than an order that settles a priority dispute between creditors of an insolvent, Zarnett J.A. stated at para. 19:

> In my view, this case is not a priority dispute, the resolution of which does not give rise to an appeal as of right in the sense used in [*Ontario Wealth*]. In *Ontario Wealth*, the priority contest was between two creditors of the debtor with valid claims against the debtor's assets … The order did not cause a loss to either party as the inability to pay both creditors flowed not from the order but from the "reality that there [were] insufficient funds in the estate to repay both creditors": at para. 41. The decision in that priority contest was not appealable as of right.

[25] By contrast, Zarnett J.A. observed that the reason CIC was not receiving the payment was due to the order under appeal, and not because of an insufficiency of assets. The core issue was whether the claimants had the claim they alleged,

and if so, its value. Zarnett J.A. concluded that "[t]he order finally determined the economic interests of CIC in the assets of the debtors in receivership resulting from the sale of the Caldwell property": at para. 20.

[26] Similarly, in this case, the order under appeal finally determined the economic interests of MGC in the proceeds of sale of the Malmo Property. The motion judge concluded that MGC did not have a claim because it did not hold a valid assignment of the second mortgage. As in *Comfort Capital ONCA 2019*, the reason the appellant is not entitled to a payment in the receivership is due to the order under appeal, and not because of an insufficiency of assets. The operative effect of the order is that MGC is shut out from recovering any amount in the receivership against the proceeds of sale, resulting in a loss of over $1.1 million.

[27] This is the case whether one considers the main part of the motion judge's reasons or the alternative ground that was addressed in the final paragraphs of his reasons. Section 101(5) of the *Land Titles Act* does not speak to priorities. It provides that the transferor of a charge "shall be deemed to remain owner of the charge until registration of the transfer of charge has been completed in accordance with [the] Act". While the motion judge stated that the failure to register the assignment of the second mortgage under the *Land Titles Act* meant that MGC did not have a registered interest as owner of the second mortgage "that ranked in priority to the charges owned by Curah", the core determination made by the motion judge's use of s. 101(5) was to find that, as a result of the failure of

registration, the four holders of the registered second mortgage were deemed to remain the owners of the second mortgage.

[28] In other words, the motion judge did not determine that Curah's third and fourth charges had priority over the second mortgage. He determined that the failure to register the assignment would have the same result as the failure to prove the assignment for value: Curah would have a claim to the funds while MGC would not. One reason was that MGC had not given value for the assignment of the second mortgage and the other was that, as a result of the failure to register the assignment, the second mortgagees were deemed to remain the owners of that mortgage.

[29] The motion judge did not determine a priorities dispute within the meaning of *Ontario Wealth*. He did not determine that the third and fourth charges had priority over the second mortgage. Rather, he determined that MGC was not the right party to be making the claim. The decision under appeal resulted in a loss when it finally determined the economic interests of MGC in the proceeds of sale of the Malmo Property.

CONCLUSION AND DISPOSITION

[30] For these reasons the motion to extend time, together with a declaration that MGC has a right to appeal under s. 193(c), is granted. If the parties cannot agree

on costs of the motion, they may provide their written submissions not exceeding three pages within ten days of these reasons.

“K. van Rensburg J.A.”