COURT OF APPEAL FOR ONTARIO

CITATION: Karatzoglou v. Commisso, 2023 ONCA 295
DATE: 20230426
DOCKET: M54178 (COA-23-CV-0085)

Harvison Young J.A. (Motion Judge)

BETWEEN

Philip George Karatzoglou

Applicant
(Respondent)

and

Rosetta Commisso

Respondent
(Appellant/Responding Party)

and

Evangelia Karatzoglou

Respondent
(Respondent/Moving Party)

Jared Teitel, for the moving party

Elliott Birnboim, for the responding party

Jerrod Grossman, for the respondent Philip George Karatzoglou[1]

Heard: April 17, 2023

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[1] Mr. Grossman appeared but made no written or oral submissions on behalf of the respondent.

ENDORSEMENT

[1] The respondent/moving party seeks an order that security for costs of the appeal in the amount of $15,000 be paid by the appellant/responding party.

[2] The appellant, Rosetta Commisso (“Rosetta”), and the respondent, Philip Karatzoglou (“Phil”), are former spouses. The respondent and moving party on this motion, Evangelia Karatzoglou (“Lisa”), is Phil’s mother and Rosetta’s former mother-in-law. Rosetta and Phil married in 1997 and separated in 2014. Phil commenced a divorce application in 2017 and Rosetta filed a reply in which she made a number of claims for corollary relief. One of the claims Rosetta advanced was a trust claim against Lisa in which she asserted that Phil was the beneficial owner of a house owned by Lisa during the marriage and that its value thus had to be included in the net family property for the purposes of equalization. Rosetta also advanced claims for an interest in the business that Phil developed in the course of the marriage, including the business premises owned by Lisa, as well as for spousal support.

[3] Lisa brought a motion for summary judgment, seeking the dismissal of Rosetta’s trust claims against her. That motion was heard and granted by Di Luca J. of the Superior Court of Justice. Rosetta has appealed from that order, and that is the appeal with respect to which Lisa seeks an order for security for costs.

[4] An order for security for costs as sought shall be granted for the following reasons.

[5] The test to be applied in considering a motion for security for costs is well known. Subrule 61.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides:

> In an appeal where it appears that,
>
> > (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
> >
> > (b) an order for security for costs could be made against the appellant under rule 56.01; or
> >
> > (c) for other good reason, security for costs should be ordered,
>
> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

[6] Subrule 38(26) of the *Family Law Rules*, O. Reg. 114/99 similarly provides:

> On a motion by the respondent for security for costs, the court may make an order for security for costs that is just, if it is satisfied that,
>
> > (a) there is good reason to believe that the appeal is a waste of time, a nuisance, or an abuse of the court process and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
> >
> > (b) an order for security for costs could be made against the appellant under subrule 24 (13); or

> (c) for other good reason, security for costs should be ordered.

[7] As the court observed in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 22, "[i]n deciding motions for security for costs judges are obliged to first consider the specific provisions of the Rules governing those motions and then effectively to take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront." Accordingly, even if the test set out under r. 61.06(1) has been met, the motion judge must "consider the justness of the order holistically, examining all the circumstances of the case and guided by the overarching interests of justice to determine whether it is just to make an order for security for costs": *FoodInvest Limited v. Royal Bank of Canada*, 2019 ONCA 728, at para. 8.

[8] The moving party relies on r. 61.06(1)(a) of the *Rules of Civil Procedure*. To succeed, she must satisfy the court, on a balance of probabilities, that there is good reason to believe that (1) the appellant is impecunious, and (2) the appeal is frivolous and vexatious. Subrule 38(26) of the *Family Law Rules* provides helpful guidance with respect to the second condition in the context of family proceedings by framing "frivolous" and "vexatious" appeals as a "waste of time", "nuisance", or "abuse of the court process".

(1) The appellant does not have sufficient assets in Ontario to cover the costs of an appeal should she not succeed

[9] The appellant herself, through her experienced counsel, acknowledges that she is impecunious. There is no evidence or indication that she has any assets in the jurisdiction. It appears that a family member is covering her legal costs, which, as I will discuss below, have been very significant given the length of time and the number of appearances that have taken place. She is in receipt of social assistance and at least one cost order against her remains outstanding. It is indeed difficult to see much if any prospect for the respondents to recover their costs in the event that the appeal is resolved in their favour: *Froehlich-Fivey v. Fivey*, 2016 ONCA 833, 85 R.F.L. (7th) 301, at para. 29; *Grimm v. Ontario (Children's Lawyer)*, 2023 ONCA 161, at paras. 26-28. There can be no doubt that Lisa clears this hurdle on the motion.

(2) There is good reason to believe that the appeal is frivolous and vexatious

[10] There is less consensus between the parties as to whether the applicant has established that there is good reason to believe that the appeal is frivolous and vexatious.

[11] As the respondent Rosetta submits, the bar is a high one. In my view, this is a close call, but I am satisfied that Lisa has established that there is good reason

to believe the appeal lacks merit. That is largely because the appeal does not raise errors of law and is instead likely to turn on challenges to findings of fact made by the judge below: see *Groia & Company Professional Corporation v. Cardillo*, 2019 ONCA 165, 50 C.P.C. (8th) 55, at paras. 31-33.

[12] On behalf of Rosetta, Mr. Birnboim insists that there is considerable merit to the appeal. He submits that the summary motion judge committed a number of fatal legal errors. First, he argues that the trial judge ignored the claim that there was an express trust. Second, he argues that the motion for summary judgment turned on issues of credibility requiring a trial. Third, he says that the summary motion judge erred in granting partial summary judgment, thereby increasing the cost and expense of going to trial on the other issues. He says that the trust issue is inextricably related to Rosetta's claim to an interest in the business in the husband's name. Moreover, he argues, even if Phil succeeds in overcoming the first two limbs of the test, the motion should fail on the basis that the overarching principle is the justice of such an order.

[13] I do not agree with any of these arguments.

(a) The summary motion judge's findings of fact were dispositive of the express trust claim

[14] To begin with, Rosetta repeatedly attempts to characterize the summary motion judge's factual findings as errors of law. This distorts the standard of review

to be applied by this court in considering the appeal: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hickey v. Hickey*, [1999] 2 S.C.R. 518.

[15] The central issue on the motion for summary judgment was whether Lisa held her house and the business premises in trust for Phil. Rosetta's position is that *Morris v. Nicolaidis*, 2021 ONSC 2957, which formed the legal basis of the holding that Rosetta did not have standing to assert the trust claims, is distinguishable because she asserted an express trust claim as opposed to a constructive or resulting trust claim. But the summary motion judge's factual findings precluded this argument.

[16] With respect to the house Phil and Rosetta lived in during their marriage, the summary motion judge found as follows at para. 48 of his reasons:

> When viewed cumulatively and in context, the evidence does not support an inference that Phil, Lisa and Christos entered into a sham trust agreement to shield the home from Rosa. Lisa and Christos bought the home and leased it to Phil so that Phil and his family would have a nicer place to live in. At the time, Phil and Rosa were in no position to buy the home on their own. This all happened well before the marriage ended or was coming to an end.

[17] With respect to the premises in which Phil operates his business, the motion judge found as follows at paras. 39-40 of his reasons:

> First, there can be no suggestion that the business property was the subject of either an actual or sham trust. The business property was purchased by Lisa and Christos when Phil was 15 years old. Christos operated

> his business out of the property until his death. The property passed to Lisa when Christos died. Phil continued operating his father's business after his mother gifted him the business name. Phil incorporated the business in 2007. Lisa has no involvement in the business.
>
> There is a huge difference between owning a business and owning the property the business operates out of. Phil owns the business. His mother owns the property. The agreement between them is that he pays all the expenses of the business premise in exchange for using the property. This was how the business operated when it was a sole proprietorship operated initially by Christos and later by Phil. None of these facts give rise to an actual or sham trust claim to the business premise.

[18] The summary motion judge rejected the argument that there was an express trust, not because he preferred Lisa's evidence but because there was no evidence advanced by Rosetta that supported that position. Instead, the factual record showed that the house was purchased by Lisa well before Phil and Rosetta encountered marital difficulties and separated. Phil was never on title. Lisa let the young couple live in the house to assist them as they could not afford to buy their own house. Although Rosetta disputes that Phil continuously paid rent to Lisa for the house, the summary motion judge found that he "paid rent for many years, including a lengthy period of time after Rosa left." Indeed, the record on the motion for summary judgment showed that Lisa had received $304,700 in rent from Phil from 2008 to 2021. In August 2021, more than seven years after Rosetta and Phil separated in February 2014, Lisa sold the house and gifted half of the net proceeds to Phil as an advance on his inheritance. While Rosetta regards this as proof that

the house was held in trust for Phil as a way of avoiding an equalization payment, in part because Lisa's other son did not receive a similar gift, the summary motion judge saw it differently. He accepted Lisa's evidence that she had arranged for her current house to go to Phil's brother upon her passing. He was entitled to accept this explanation. Similarly, the summary motion judge found that the business property was purchased long before the parties were married, when Phil was still a teenager, and that there was no evidence in support of Rosetta's claim that it was the subject of an express trust.

[19] These findings were open to the trial judge. Many of them were based on uncontested evidence. They were dispositive of the express trust claim.

(b) The motion for summary judgment did not turn on issues of credibility that should have required a trial

[20] Nor do I accept the related argument that the summary motion judge made numerous credibility findings that should have required a trial. This was not a "he said/she said" case. Rather, it was a case in which Rosetta made allegations that the summary motion judge found to have been entirely unsupported by any evidence. For example, the summary motion judge rejected Rosetta's claim that the house and business premises were held in an express trust for Phil's benefit because "there [was] simply no evidence before the court of any express trust agreement in relation to either property." Accordingly, Rosetta's claims could "only

be based on resulting or constructive trust principles". While he was not bound by *Morris*, the summary motion judge concluded that it was persuasive authority preventing Rosetta from advancing a trust claim on behalf of her former spouse. Rosetta does not argue that *Morris* is wrong as it relates to resulting or constructive trusts.

(c) Partial summary judgment was appropriate

[21] Mr. Birnboim's expressed concern about the perils of partial summary judgment determinations are not applicable here. The litigation has been protracted already and the issue of a trust relating to the house and business premises is readily extricable from Rosetta's claim that she has an interest in Phil's business. The summary motion judge did not err in observing that any claim to a trust over the real property is extricable from the question of any value of Phil's business to be included in the net family property.

(3) Conclusion

[22] The underlying problem with Rosetta's position on this security for costs motion is that it is premised on her assertion of an indirect trust claim which, as the authorities have recognized, effectively undermines the equalization scheme as established by the *Family Law Act*, R.S.O. 1990, c. F.3. As McGee J. wrote in *Morris*, at para. 40, which the summary motion judge cited, it is not open to a spouse to step into the other spouse's shoes and advance a trust claim against a

third-party on their behalf in the context of equalization proceedings. However, a spouse “could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*”: *Morris*, at para. 40.

[23] It is important to underline the fact that the assessment of the merits (or lack thereof) for a security for costs motion does not require the court to make an affirmative finding or actually determine that the appeal is frivolous or vexatious and that the appellant lacks sufficient Ontario assets to pay the appeal costs. Rather, “good reason to believe” suggests a tentative conclusion of absence of merit and assets: *Pickard v. London Police Services Board*, 2010 ONCA 643, at para. 18; *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), at p. 5; and *McKee v. Di Battista, Gambin Developments Ltd.* (1995), 22 O.R. (3d) 700 (C.A.), at pp. 702-3. As I have indicated, I see no errors of law. The appeal appears to turn only on findings made on the evidence that are subject to a high level of deference and with respect to which I see no reversible error on the part of the summary motion judge.

[24] In my view, the order sought is just. The record supports the applicant’s submission that the respondent has incurred significant costs through delay and there are outstanding cost orders. I do not accept that the matter is trial ready or that the pattern of delays and further motions will not continue absent the order sought. It would be unjust to permit this.

[25] The motion is allowed. Costs of this motion are payable to the respondent Lisa by the appellant Rosetta in the agreed amount of $5,000.

"A. Harvison Young J.A."