COURT OF APPEAL FOR ONTARIO

CITATION: Doria v. Warner Bros. Entertainment Canada Inc., 2023 ONCA 321
DATE: 20230504
DOCKET: COA-22-CV-0024

van Rensburg, Paciocco and Thorburn JJ.A.

BETWEEN

Antonio Doria

Plaintiff (Appellant)

and

Warner Bros. Entertainment Canada Inc., Warner Bros. Television Group, Time Warner Inc., and 9818642 Canada Inc. operating as Bulletproof Location Support

Defendants (Respondents)

Shahen A. Alexanian, for the appellant

Joyce Tam and Natasha O'Toole, for the respondents, Warner Bros. Entertainment Canada Inc., Warner Bros. Television Group, and Time Warner Inc.

Amanda Perumal, for the respondent, 9818642 Canada Inc., operating as Bulletproof Location Support

Heard: April 28, 2023

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated July 29, 2022, with reasons at 2022 ONSC 4454.

REASONS FOR DECISION

OVERVIEW AND THE MATERIAL FACTS

[1] Pursuant to a “location agreement”, the appellant, Antonio Doria, rented his home to Renraw Productions Services Inc. (“Renraw”) for $27,500 to be used as a film set for a television show. The family room floor was scratched during filming. Renraw accepted liability for Mr. Doria’s damages, but the parties could not agree on the quantum. Mr. Doria invoked the arbitration clause in the location agreement and sought a damages award of more than $650,000. The arbitrator awarded damages of $49,668.38, including anticipated repair costs and displacement expenses for a 21-day repair period. Mr. Doria sought, unsuccessfully, to have the arbitral award set aside.

[2] After Renraw paid the arbitral award, Mr. Doria sued the respondents, Warner Bros. Entertainment Canada Inc., Warner Bros. Television Group, Time Warner Inc. (the “WB parties”) and 9818642 Canada Inc., operating as Bulletproof Location Support (“Bulletproof”), who are parties that were involved in the filming, for more than $500,000. The respondents moved successfully pursuant to r. 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to have Mr. Doria’s action dismissed as an abuse of process.

[3] In resisting the dismissal motion, Mr. Doria relied upon s. 139(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section, and s. 138, also relevant in this appeal, provide:

> 138 As far as possible, multiplicity of legal proceedings shall be avoided.
>
> 139 (1) Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.

[4] The motion judge summarized his decision at the outset of his Endorsement, as follows:

> Section 139 does not apply to circumstances like the one before me where the plaintiff has had a full opportunity to have his entire claim adjudicated in a first proceeding, was awarded judgment, and has fully collected on the judgment. The plaintiff is simply dissatisfied with the amount he was awarded. Section 139 does not give parties the right to relitigate issues simply because the adjudicator of the first proceeding did not award the level of damages that the plaintiff asked for.

[5] Mr. Doria appealed the dismissal order, raising numerous grounds of appeal. He also sought leave to appeal the costs award against him. At the end of oral argument, we dismissed the appeal and the request for leave to appeal the costs award, for reasons to follow. These are our reasons.

ISSUES AND ANALYSIS

A. THE APPEAL OF THE DISMISSAL ORDER

[6] In support of his appeal of the dismissal order, Mr. Doria argued in his factum that s. 139 provides him with a statutory right to bring an action against the respondents, despite his arbitral award against Renraw. He submitted that the motion judge exceeded his jurisdiction by purporting to use his inherent jurisdiction

to override the right conferred in s. 139. He also submitted that the motion judge erred by not giving effect to the plain meaning of s. 139, effectively amending it to confine its application to unsatisfied judgments, and by finding that s. 138 is "governing over section 139".

[7] During oral argument he disclaimed heavy reliance on s. 139 but did not formally abandon these arguments, so we will address them briefly. None of them have merit.

[8] Section 139 does not confer an affirmative or even a "presumptive" right to sue jointly liable parties separately. On its plain wording, it provides that separate suits against jointly liable parties are "not preclude[d]" if a judgment has been obtained against one of them. The fact that actions are "not precluded" by prior judgments against a jointly liable party does not mean that such actions must always be permitted to proceed, regardless of the circumstances. If a judge appropriately determines that the subsequent proceeding constitutes an abuse of process, that subsequent proceeding can be stayed or dismissed.

[9] The motion judge was not purporting to articulate or apply universal rules, or to read language into s. 139. When the decision is read as a whole it is clear that his determination was made on the particular facts of this case. He recognized explicitly that "each case will depend on its unique facts" and referred repeatedly to "the circumstances" of this case.

[10] Nor did the motion judge find that s. 138 “governs” s. 139. He explicitly recognized that there are cases where s. 139 “would properly allow duplicative litigation” and he offered several illustrations. The motion judge did not err in making the innocuous and doubtlessly correct observations that s. 138 and s. 139 must be read together and that s. 138’s role in discouraging duplicate litigation is served by preventing abusive separate proceedings from being undertaken.

[11] In addition, Mr. Doria argued that the motion judge erred by treating the private Renraw arbitration proceeding as binding on other parties, and by effectively treating Mr. Doria as having waived his rights against other parties through the Renraw location agreement. We rejected these submissions because they are not accurate characterizations of the motion judge’s decision. The motion judge did not purport to rest his decision on the legal effect of the arbitration decision or of the Renraw location agreement. The motion judge’s decision was based on the fact that, after enjoying a full opportunity to assert his claim for damages and after obtaining a final award that was paid in full, Mr. Doria had no need for the imposition of joint liability against others. Yet he sought to pursue litigation against others for essentially the same damages in the hope of achieving a different and more favorable award. We see no error in the fact that the motion judge found this conduct to be abusive. The fact that the arbitral award was secured privately does not insulate the case from considerations of “judicial

economy, consistency, finality and the integrity of the administration of justice", the principles that inspired the motion judge to arrive at the decision he did.

[12] We did not accept Mr. Doria's submission that the motion judge erred in treating the action as re-litigation even though it raised distinct liability issues not raised during the arbitration. The fact that liability issues would differ in the two proceedings was immaterial to the motion judge's decision. His reasoning centred on his conclusion that Mr. Doria was effectively attempting to re-litigate damages claims through the court proceeding, after his arbitral damages award had been upheld and those damages had been collected.

[13] Nor were we persuaded by Mr. Doria's submission that the motion judge erred by "purporting to extinguish Mr. Doria's claim on the grounds of political expediency", by relying on resource-based considerations. Once again, these submissions do not fairly reflect the motion judge's decision. It did not turn on resource-based considerations but on the nature of the action, in all of the circumstances. The motion judge recognized explicitly that "judicial economy cannot undermine substantive rights" and expressed "confidence" that dismissing the proceeding "causes no injustice".

[14] It also bears note that the Supreme Court of Canada recognized in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 35-53, that the principle of "judicial economy" supports the use of the abuse of process

doctrine in appropriate cases by precluding re-litigation, even where the strict requirements of issue estoppel are not met: see also *402 Mulock Investments Inc. v. Wheelhouse Coatings Inc.*, 2022 ONCA 718, at para. 19; *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, at paras. 7-8, leave to appeal refused, [2020] S.C.C.A. No. 38899. The motion judge did not err in noting that considerations of judicial economy would be served by dismissing the action that he judged to be abusive.

[15] Mr. Doria also argued that the motion judge erred by effectively treating the r. 21.01(3)(d) motion as if it was a summary judgment motion, by weighing evidence and considering the merits of the case and making factual findings on an incomplete record, thereby ambushing Mr. Doria, "regarding Mr. Doria's subjective state of mind regarding the [p]rivate [a]rbitration, the extent of the [d]amages, and whether Mr. Doria in fact had suffered losses not covered by the [p]rivate [a]rbitration". We did not accept this argument.

[16] The plaintiff's purpose in bringing an action is a relevant consideration in identifying abusive proceedings, and no reasonable issue can be taken with the motion judge's conclusion that Mr. Doria instituted the proceedings against the respondents because he was dissatisfied with the arbitral award. Mr. Doria's dissatisfaction was clear and obvious on the face of the claim, examined in the undisputed context in which it was brought. No weighing of evidence was required to make this determination, nor did it stretch the motion judge's function in a

pleadings motion. Mr. Doria received a fraction of the damages he claimed at the arbitration. Then he tried to set the arbitral award aside. When that failed, he instituted the current action in which he made claims for damages comparable to those he failed to secure in the arbitration. The motion judge's conclusion was both reasonable and available to him.

[17] The motion judge did not make the other "factual findings" that Mr. Doria identifies. His decision to embed in his endorsement a photograph of the damage to Mr. Doria's floor from the uncontested evidence when narrating the facts of the underlying litigation is not equivalent to a finding on his part as to the extent of the damage, notwithstanding that, on its face, the photograph leaves the powerful impression that the damage claims advanced by Mr. Doria were excessive. The motion judge did not make this kind of comment, nor did he base his decision on it.

[18] Nor did he find that Mr. Doria had not suffered damages that were not covered by the arbitral award. Instead, he focused on the reach of the relative claims before determining that Mr. Doria had a full opportunity to have his entire damages claim adjudicated during the first proceeding.

[19] Finally, we were not persuaded that the motion judge erroneously distinguished the authorities that Mr. Doria relied upon. We found no error in his reasoning. For example, although *Telus Communications Inc. v. Wellman*, 2019

SCC 19, [2019] 2 S.C.R. 19, recognizes that the operation of a private arbitration regime may require the bifurcation of proceedings where there are other potentially jointly liable defendants, the motion judge was correct in noting that *Wellman* does not support the proposition that there will always be a right to proceed with separate proceedings whenever one of the claims may have to resolved by arbitration. Indeed, *Wellman* does not even engage the discretionary determination of judges that the particular proceedings before them are an abuse of process.

[20] As indicated, the abuse of process doctrine may operate to prevent re-litigation even where the strict requirements of issue estoppel are not met. Moreover, determinations of abuse of process are discretionary, attracting deference on appeal: *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 24, leave to appeal refused, [2019] S.C.C.A. No. 38746. We saw no basis for interfering with the motion judge's determination that Mr. Doria was engaging in abusive re-litigation.

B. THE APPLICATION FOR LEAVE TO APPEAL COSTS

[21] Mr. Doria sought leave to appeal the costs awards in favour of the respondents, arguing that the costs awarded were out of proportion at this early stage of the proceedings, and that the motion judge committed errors of principle in awarding costs to Bulletproof.

[22] Mr. Doria is not well-situated to argue that the $14,863.24 awarded to the WB parties was unreasonable, given that he did not object to the amount they sought before the motion judge.

[23] Nor is the exercise of discretion by the motion judge to award costs to Bulletproof of $6,083 plainly wrong. Since costs were being awarded on a successful motion to dismiss the action Mr. Doria had commenced, Bulletproof was entitled to recover its costs incurred in the action. Although Bulletproof did not bring a separate motion, it was served with and attended the motion brought by its co-defendants seeking a dismissal of the action, and it supported the relief WB was seeking. Bulletproof's rights were directly affected by the dismissal, and upon dismissal it was presumptively entitled to its costs of the action from Mr. Doria.

[24] Significant deference is owed to the motion judge's decision based on reasonableness considerations and leave should be granted only in "obvious cases where there are strong grounds upon which the appellate court could find that the judge erred": *Carroll v. McEwen*, 2018 ONCA 902, 143 O.R. (3d) 641, at para. 58 (citations omitted). We see no basis for interfering with the motion judge's assessments.

[25] Mr. Doria's submissions that the motion judge committed errors of principle in arriving at the costs award for Bulletproof fares no better. The fact that this costs award exceeded the costs that Mr. Doria sought even though Mr. Doria was more

active in the r. 21.01(3)(d) proceeding is not an error in principle. Successful parties are generally entitled to "reasonable" costs from the unsuccessful party: *Feinstein v. Freedman*, 2014 ONCA 205, 119 O.R. (3d) 385, at paras. 51-52. The range of reasonable costs obviously varies. So long as the costs awarded to the successful party are reasonable, it is not determinative that the unsuccessful party has asked for less.

[26] Nor, for the same reason, did the motion judge err when rejecting Mr. Doria's attempt to rely on the relative costs claims by observing that Bulletproof was "represented by a larger firm with different overhead and a different costs structure than that of a sole practitioner" who represented Mr. Doria. We do not understand the motion judge to have been ruling that larger firms are entitled to have their costs measured using a different scale of reasonableness than smaller firms, which would have been an error in principle. We understand the motion judge to have been responding to a submission made by Mr. Doria by explaining why Bulletproof's costs may be higher than the costs Mr. Doria was seeking. Since Bulletproof's costs were reasonable despite being higher than Mr. Doria's, there is no basis to intervene.

CONCLUSION

[27] For the foregoing reasons we dismissed the appeal.

[28] We are persuaded that the costs sought by the respondents in this appeal are reasonable, notwithstanding the submissions by Mr. Doria to the contrary. Costs in this appeal are payable to the WB parties in the amount of $9,917.65, and to Bulletproof in the amount of $3,522.21, inclusive of disbursements and applicable taxes.

"K. van Rensburg J.A."
"David M. Paciocco J.A."
"J.A. Thorburn J.A."