COURT OF APPEAL FOR ONTARIO

CITATION: Alami v. Haddad, 2024 ONCA 300
DATE: 20240419
DOCKET: M54995 (COA-24-CV-0138)

Roberts J.A. (Motion Judge)

BETWEEN

Mounia Hassani Alami

Applicant (Appellant/Responding Party)

and

Fadi Jamil Haddad

Respondent (Respondent/Moving Party)

Charles Baker, for the moving party/respondent

Alami Mounia[1], acting in person

Heard: April 16, 2024

ENDORSEMENT

[1] The respondent seeks security for his costs of the appeal brought by the appellant from the order of Bruhn J. dated January 10, 2024. Bruhn J. ordered the equalization of the parties' net family property and determined that the respondent had a 50 percent ownership interest in the matrimonial home by way of a resulting trust. She ordered the sale of the matrimonial home with the caveat that it was not to interfere with the mortgagee's sale of the matrimonial home under its notice of

[1] The appellant listed her name in this way on the counsel slip.

sale. She further ordered that the amount of $33,190.07 in unpaid costs orders owed by the appellant to the respondent (the “outstanding costs orders”) and the amount of $23,832.75 in outstanding child support arrears owed by the respondent to the appellant (the “outstanding child support arrears”) be paid from their respective shares of the sale proceeds from the matrimonial home.

[2] At the beginning of the motion, the appellant sought an adjournment to permit her to retain counsel. Given the vagueness of the retainer and the uncertainty of the availability of proposed counsel on any date before June, I dismissed the request for the adjournment. There had been sufficient time from service of the motion materials for the appellant to prepare for this motion.

[3] The respondent relies on r. 61.06(1)(a), (b), and (c) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. He submits there is good reason to believe that the appellant’s appeal is frivolous and vexatious because it is devoid of merit, and she has insufficient assets to pay his costs of the appeal if she is unsuccessful. He highlights her failure to pay outstanding costs orders that are not related to her appeal. The respondent asks that the appellant be required to post $25,000 as security for his costs and pay the outstanding costs orders as a condition of her being permitted to continue with her appeal. He also requests that the matrimonial home be sold to comply with the order of the application judge.

[4] The criteria under r. 61.06(1)(a) are conjunctive: *York University v. Markicevic*, 2017 ONCA 651, at para. 33. The respondent must therefore satisfy all of the criteria: there is good reason to believe that the appellant's appeal is frivolous *and* vexatious *and* that she has insufficient assets in Ontario to pay the costs of the appeal. I am not persuaded that there is good reason to believe the appellant's appeal is frivolous and vexatious and that she has insufficient assets in Ontario to pay the appeal costs.

[5] Generally, a frivolous appeal is one devoid of merit and with little prospect of success; a vexatious appeal is one that is brought to annoy or harass, is conducted in a vexatious or "less than diligent" manner, or is pursued in bad faith or for an oblique purpose: *Lavallee v. Isak*, 2022 ONCA 290, at paras. 19, 25.

[6] The appellant's main ground of appeal is that the application judge erred in ordering a resulting trust because the respondent did not contribute to the matrimonial home. As such, the appellant essentially challenges the application judge's findings of fact about the respondent's contributions without identifying errors in principle or palpable and overriding errors that would permit appellate interference. Given the deference generally owed to the application judge's findings of fact, the appellant faces a stiff uphill battle on her appeal. The likelihood of the appellant's appeal being successful is low. However, as her grounds are nevertheless arguable, I cannot say that the appeal is so devoid of merit that it is frivolous.

[7] Even if it were frivolous, I am not persuaded that there is good reason to believe that the appeal is vexatious: the appellant is exercising her right to appeal and has to-date conducted her appeal in accordance with the *Rules*; there is no evidence that she is bringing the appeal to annoy or harass the respondent, although he may feel annoyed or harassed by the fact of it; and there is no evidence that she is pursuing her appeal for a bad faith or oblique purpose.

[8] Nor am I convinced that there is good reason to believe that the appellant has insufficient assets in Ontario to pay the appeal costs. In accordance with Bruhn J.'s order, the appellant has at present a 50 percent interest in the matrimonial home. While the ongoing incurment of costs may erode it, there is no evidence that the equity of the home will not be sufficient to satisfy any appeal costs from the appellant's share once the home is sold.

[9] Rule 61.06(1)(b) allows an order for security for costs of an appeal to be made if it could be made against the appellant under r. 56.01. In addition to the arguments made under r. 56.01(1)(e), which mirrors r. 61.06(1)(a), dealt with above, the respondent relies on r. 56.01(1)(c) because of the outstanding costs orders. However, Bruhn J. ordered that those costs be payable to the respondent from the appellant's share of the proceeds from the sale of the matrimonial home. As a result, the respondent has the benefit of the protection provided by the appellant's share of the home for the outstanding costs orders and, further, for the appeal costs if appeal costs are ordered in his favour.

[10] Rule 61.06(1)(c) allows an order for security for costs to be made “for other good reason”. Jamal J.A. (as he then was), sitting as a motion judge, explored what “other good reason” means in *Heidari v. Naghshbandi*, 2020 ONCA 757, 153 O.R. (3d) 756, at para. 23, as follows:

> Although the list of reasons justifying security under this residual category is not closed, the “other good reason” must be: (1) consistent with the purpose for ordering security – namely, that the respondent is entitled to a measure of protection for costs; and (2) fairly compelling, because the residual category is only engaged where the respondent cannot meet the requirements of rr. 61.06(1)(a) or (b). [Citations omitted.]

[11] As Strathy C.J.O., sitting as a motion judge, observed in *Henderson v. Wright*, 2016 ONCA 89, at para. 28, the ”other good reason“ criterion “balances the need to ensure an appellant is not denied access to the courts, with the respondent’s right to be protected from the risk the appellant will not satisfy the costs of the appeal.”

[12] In the present case, the appellant’s appeal is weak. It effectively invites the Court of Appeal to redo the application judge’s factual findings at the trial, which is not this court’s function. However, while the appellant has failed to pay outstanding costs orders, those orders are secured by her portion of the sale proceeds from the matrimonial home. Moreover, the risk that the appellant might not satisfy the costs of the appeal is attenuated by her 50 percent ownership of the matrimonial home.

[13] It is well-established that an order for security for costs is discretionary. In addition to the criteria under r. 61.06(1) that I have just reviewed, I must also step back and consider whether it is just to order security for costs in the circumstances of this case and the interests of justice: *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, 2021 ONCA 474, 156 O.R. (3d) 551, at para. 17. Consideration of these issues requires me to heed the caution of this court in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 23, that "[c]ourts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits".

[14] In weighing all the factors, the strongest point in favour of the respondent's request for security for costs is that the appellant's appeal appears weak. However, I am not persuaded that it is frivolous or vexatious. Further, the appellant's share of the matrimonial home sale proceeds provides protection for the appeal costs, as well as the prior outstanding costs orders. I also consider that the respondent is indebted to the appellant for the outstanding child support arrears. Aside from effectively reducing the appellant's indebtedness to the respondent for the outstanding costs orders to less than $10,000, I find it inconsistent for the respondent to rely on the appellant's failure to pay the outstanding costs orders as a reason to order security for costs when he is in arrears of child support. If it is acceptable for him to wait until the matrimonial home is sold to satisfy his outstanding child support obligations, why is the same not true for the appellant?

Moreover, as child support is a parent's fundamental obligation to one's children, the respondent's arrears tell against the exercise of equitable discretion in his favour.

[15] As a result, I am not prepared to order security for costs.

[16] The respondent also seeks payment of the outstanding costs orders, as well as the sale of the matrimonial home. I decline to make either order.

[17] First, as explained above, Bruhn J. ordered that the outstanding costs orders be paid from the appellant's share of the sale proceeds from the matrimonial home. Aside from the unfairness of ordering payment of the outstanding costs but not the outstanding child support arrears, as a single judge of this court, I have no jurisdiction to interfere with Bruhn J.'s order, which, in any event, has not been appealed by the respondent.

[18] Further and relatedly, Bruhn J. also ordered that the sale of the matrimonial home not interfere with the mortgagee's sale of the property. Notwithstanding there is no stay of Bruhn J.'s sale order, I have no evidence as to the status of the mortgagee's sale proceedings and therefore cannot make an order that may be inconsistent with Bruhn J.'s order that the sale she ordered shall not interfere with the mortgagee's sale. If the mortgagee has no objection, it is open to the respondent to take whatever other steps are appropriate to seek to enforce Bruhn J.'s sale order.

Disposition

[19] Accordingly, the respondent's motion is dismissed. I make no order as to costs.

"L.B. Roberts J.A."