

COURT OF APPEAL FOR ONTARIO

CITATION: Rathod v. Chijindu, 2024 ONCA 317

DATE: 20240425

DOCKET: M54997 & M54998 (COA-24-CV-0272)

Roberts J.A. (Motions Judge)

BETWEEN

Harsha Rathod

Plaintiff (Respondent/Moving Party)

and

Christian Chukwuedozie Chijindu*, Nkiruka Chijindu also known as Nkiruka Ochei, Joy Chijindu*, Ijeoma Chijindu*, The Chijindu Law Firm, Autopoietic Telemetric Solutions Ltd., RVL Masonry Ltd., 2153801 Ontario Ltd. cob as The Leon Group, Meridian Credit Union Limited, YDB Investments Corp., Bluekat Capital Corp.**, Great Northern Insulation Contracting Ltd., Obuba Law Firm and Peter Obuba Kalu.

Defendants (Appellants*/
Responding Parties*/Respondent**/Moving Party**)

Amandeep Sidhu, for the moving party, Harsha Rathod

Brian Belmont, for the moving party, Bluekat Capital Corp.

Christian Chukwuedozie Chijindu¹, acting in person/responding party and for the responding parties, Nkiruka Chijindu also known as Nkiruka Ochei also known as Joy Chijindu and Ijeoma Chijindu

Heard: April 17, 2024

¹ Nkiruka Chijindu, also known as Nkiruka Ochei also known as Joy Chijindu, and Ijeoma Chijindu did not appear, although properly served. Their last-minute request for an adjournment at the outset of the hearing of the motions was denied. I was not persuaded without corroborating evidence that they could not attend the hearing that was conducted over Zoom. In any event, there was no prejudice because Mr. Chijindu confirmed that, as he had done in the past, he could make submissions on their behalf. I also note that the responding parties' factum in response to this motion was a joint factum on behalf of all three of them.

ENDORSEMENT

[1] These motions for security for costs arise out of mortgage disputes. The responding parties (appellants on the appeal), Christian Chukwuedozie Chijindu, Nkiruka Chijindu, and Ijeoma Chijindu, borrowed considerable sums from the moving parties (respondents on appeal) and gave them mortgages over two properties, 740 West Shore Boulevard, Pickering and 6210 Solina Road, Clarington. The mortgages went into default. The properties were sold under power of sale and the net proceeds, after the payment of the first mortgages and related expenses, were paid into court. The responding parties appeal the February 13, 2024 judgment of the motion judge who ordered payment of the monies paid into court to the moving parties in satisfaction of their respective mortgages and several outstanding costs orders that the responding parties failed to pay.

[2] The moving parties' motions for security for costs of the appeal were heard together. Their requests for security were in the amounts of \$22,385.12 for Ms. Rathod and \$30,000 for Bluekat Capital Corp. Included in the amount for Ms. Rathod is an amount for the costs for this motion for security for costs. Ms. Rathod's bill of costs submitted on April 17, 2024 indicates that the costs for this motion were \$6,780.00. The amount of \$15,605.12 (\$22,385.12 – \$6,780.00) is therefore claimed as security for Ms. Rathod's appeal costs. I find Ms. Rathod's estimated appeal costs to be reasonable. I do not understand why Bluekat Capital

Corp.'s estimated appeal costs are twice as much as Ms. Rathod's estimate; I find that \$20,000 is a more reasonable estimate.

[3] There is no automatic entitlement to security for costs of an appeal under r. 61.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Even when the criteria under r. 61.06 are met, a motion judge may refuse to make the order. In determining whether to exercise discretion to make the order, "the overarching principle to be applied to all the circumstances is the justness of the order sought": see *Yaiguaje et al. v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at paras. 18-19, citing *Pickard v. London Police Services Board*, 2010 ONCA 643, 268 O.A.C. 153, at para. 17.

[4] The moving parties rely on r. 61.06(1)(a), (b), and (c). As I shall explain, I am persuaded that it is just to order security for costs under r. 61.06(1)(a) and (c). Security for costs is not available here under r. 61.06(1)(b) because security could not have been ordered under r. 56.01 against the responding parties who were defendants in the proceeding because of the rationale that "no party should have to give security for costs as a condition of simply defending itself ... and, in this regard, it can be said that an appeal is simply a step in the proceeding in which the defendant appealing is continuing to defend itself": *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2010 ONCA 137, 101 O.R. (3d) 314, at para. 13, citing to *Toronto Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.), *per* Morden J.A., at p. 440 (citations omitted).

[5] The moving parties have met the conjunctive criteria under r. 61.06(1)(a).

[6] First, there is good reason to believe that the appeal is frivolous and vexatious. As this court stated in *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), at p. 6: “The apparent merits of the appeal, the presence or absence of an oblique motive for the launching of the appeal, and the appellant’s conduct in the prosecution of the appeal”, as well as other factors, may all be relevant to determining whether there is good reason to believe that an appeal is frivolous and vexatious.

[7] The appeal appears frivolous. While the responding parties’ grounds of appeal allege various errors of law, at their core, they challenge the motion judge’s careful and thorough findings of fact and adverse findings of credibility made against them, which were open to her on the record. As the motion judge rightly found, the evidence supporting the moving parties’ claims was extensive, and the evidence submitted by the responding parties was “entirely untrustworthy and unreliable, such that it would be unsafe to rely upon any evidence presented by them, that is not corroborated by independent evidence, or the evidence of [the moving parties].” In my view, the responding parties’ appeal is doomed to failure.

[8] There is also good reason to believe that the appeal is vexatious in that the responding parties’ appeal is devoid of merit and appears to be brought for the collateral purpose of delaying payment to the moving parties. Moreover, the

responding parties repeat their unfounded allegations of fraud and deceit against the moving parties and their lawyers, notwithstanding the motion judge's findings that:

[The moving parties] overwhelmingly proved on the basis of the record, that [the responding parties] are not credible witnesses in this proceeding, have not provided reliable evidence, and further they have colluded with one another with the shared and common intent to defraud their mutual creditors, including [the moving parties], for their personal benefit.

[9] Second, there is good reason to believe that the responding parties have insufficient assets to pay the appeal costs. I reject the responding parties' submission that there is sufficient surplus remaining after the mortgages are paid out to provide protection for the appeal costs. The amount of the moving parties' mortgages, including accruing interest and costs (the outstanding costs orders and the trial costs orders), exceeds the amounts paid into court. Further, there is no evidence that the responding parties have any available assets to pay the appeal costs if they are unsuccessful. Indeed, the responding parties stated at para. 41 of their joint factum that the moving parties "rightly calculated that the appellants do not have cash at hand, therefore, cannot pay the \$52,385.12 'security for costs' they request." They do not own the property at which they presently reside. Certainly, their failure to pay anything on the mortgages that they allowed to go into default and their failure to pay the outstanding costs orders substantiate that

there is good reason to believe that they have insufficient assets to pay the appeal costs.

[10] If all the criteria under r. 61.06(1)(a) are not satisfied, security for costs may be granted “for other good reason” under r. 61.06(1)(c). The breadth of “for other good reason” is wide. In *Henderson v. Wright*, 2016 ONCA 89, at para. 27, Strathy C.J.O. explained that appellate courts have ordered security for costs “for other good reason” “when an appeal has a low prospect of success coupled with an appellant who has the ability to pay costs but from whom it would be nearly impossible to collect costs.” Consideration of these factors as “other good reason” does not duplicate the specific criteria under r. 61.06(1)(a) but “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”: *Henderson*, at para. 28.

[11] Here, if not frivolous and vexatious, the responding parties’ grounds of appeal have a very low prospect of success. Moreover, even if the responding parties have sufficient assets to pay appeal costs as they allege, their past failures to pay their mortgages and the outstanding costs orders demonstrate that they will not voluntarily pay appeal costs and that it will be “nearly impossible to collect” those costs.

[12] Following this court's guidance in *Yaiguaje*, at para. 25, I step back "to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made." In light of all the relevant circumstances that I have reviewed, I conclude that it is.

Disposition

[13] Accordingly, I order that:

1. The responding parties post security for costs of the appeal by May 27, 2024, in the following amounts: \$15,605.12 as security for Ms. Rathod's appeal costs and \$20,000 as security for Bluekat Capital Corp.'s appeal costs.
2. The responding parties cannot take any further step in the appeal until the security ordered is posted.
3. If the responding parties fail to post the entire amount of the security ordered by May 27, 2024, the moving parties may bring an *ex parte* motion to dismiss the appeal, with proof of the responding parties' failure to post the ordered security.

[14] For the reasons noted by the motion judge, the moving parties are entitled to the costs of their motions on a full indemnity basis. Ms. Rathod claims \$6,780.00 inclusive of HST (12.5 hours x \$475/hour, plus 0.5 hours x \$125/hour) for the

motion for security for costs. Bluekat Capital Corp. claims \$23,843.00 (38.6 hours x \$500/hour) inclusive of HST, disbursements, and an estimated \$1,500 fee for appearance. While I find Ms. Rathod's costs to be reasonable, I find that Bluekat Capital Corp.'s are more than the losing parties would expect to pay if unsuccessful; \$15,000 is fair and reasonable for Bluekat Capital Corp.'s costs. As a result, I order that the responding parties pay \$6,780.00 to Ms. Rathod for the costs of her motion and \$15,000 to Bluekat Capital Corp. for the costs of its motion.

"L.B. Roberts J.A."