

COURT OF APPEAL FOR ONTARIO

SHARPE, GILLESE and ARMSTRONG J.J.A.

B E T W E E N :)
)
GAETANO LO FASO and 588147) J. Gardner Hodder for the appellant
ONTARIO INC.) Gaetano Lo Faso
)
Plaintiffs)
(Appellants))
)
- and -)
)
KELTON & FERRACUTI) Alan J. Davis for defendant Tom
CONSULTANTS LIMITED,) Lekushoff
ANTHONY (aka) TONY FERRACUTI,)
MALLT CONSTRUCTION INC.,) Constantine Alexiou for defendants
THOMAS (aka TOM) LEKUSHOFF,) Ferracuti Consultants and Anthony
MINDEN GROSS GRAFSTEIN &) Ferracuti
GREENSTEIN, MORRIS ROSE)
LEDGETT, MAX SHAFIR, and)
JULIAN HELLER)
)
Defendants)
(Respondents)) Heard: November 26, 2004

On appeal from the Order of Justice Ernest Loukidelis of Superior Court of Justice dated February 3, 2004, [2004] O.J. No. 446, dismissing the appellants' claims pursuant to Rule 21.

SHARPE J.A.:

[1] This appeal involves the capacity of an execution creditor of a dissolved corporation to sue upon a claim allegedly alive at the time the corporation was dissolved.

[2] The appellant Lo Faso, a businessman and a practicing lawyer, was the principal of 588147 Ontario Inc. ("588"), a corporation that was dissolved in 1995 for failure to pay its corporate taxes. The corporation has not been revived. Lo Faso obtained a

consent judgment against 588, executed upon that judgment, and now asserts the right to sue, in his own name, upon 588's claims against the respondents.

[3] This appeal is the latest stage in a prolonged battle between the parties stemming from a contractual dispute and a construction lien registered by Mallt Construction Inc. ("Mallt") and Kelton & Ferracuti Consultants Limited ("Kelton") against property owned by 588 in the late 1980s. 588 was largely successful in resisting the claims. The lien itself was found to be invalid and 588 was awarded substantial costs as well as damages pursuant to s. 35 of the *Construction Liens Act* on the ground that the lien claimants had registered an excessive construction lien. The defendants appealed, but the appeal was never perfected and was dismissed with costs by the Divisional Court in 1995. The judgment for damages and costs has not been paid.

[4] Lo Faso obtained a consent judgment against 588 in an unrelated action commenced in 2001. He then executed upon that judgment. Upon execution, the Public Trustee relinquished to Lo Faso any and all rights of the dissolved corporation that were vested to the Crown upon 588's dissolution.

[5] On April 19, 2001, the Lo Faso and 588 commenced this action in tort alleging, *inter alia*, abuse of process, slander of title, conspiracy and intentional infliction of economic harm against Mallt, Kelton, the individual principals of those entities and the lawyers who were involved in the original construction action. The claims against the lawyers were dismissed on an earlier motion. This court upheld the dismissal and leave to appeal to the Supreme Court was denied.

[6] The respondents then moved to have the appellants' action against them dismissed as well. The respondents raised several grounds. They submitted, pursuant to rule 21.01, that the action was *res judicata* and barred by the expiry of the limitation period. They also submitted, pursuant to rule 21.01(3)(b), that both appellants lacked legal capacity to bring the action. The motion judge ruled that evidence would be required to determine the issues raised pursuant to rule 21.01 and refused leave to admit evidence pursuant to rule 21.01(2). However, he ruled that both 588 and Lo Faso lacked capacity to sue and dismissed their claims against all the remaining defendants pursuant to rule 21.03(3)(b). The motion judge found that Lo Faso's action against 588 was a nullity and that Lo Faso lacked capacity to sue whether in respect of his own claim or in respect of 588's claim. Both Lo Faso and 588 appeal to this court. Prior to oral argument, 588 abandoned its appeal.

[7] In my view, the motion judge erred in finding that Lo Faso lacked capacity to sue. My conclusion, of course, is solely based upon the facts as pleaded in the statement of claim, which must, for the purposes of the Rule 21 motion, be taken as true.

[8] With respect to the claims Lo Faso advances for alleged wrongs against himself personally, I can see no basis for the argument that Lo Faso lacks capacity. The substantive and procedural defences asserted by the respondents against Lo Faso may, in the end, prove valid in law, but they do not pertain to Lo Faso's capacity to sue. The respondents did not cross-appeal the motion judge's dismissal of the relief sought under rule 21.01(2) with respect to those defences and the scope of this appeal is restricted accordingly.

[9] The motion judge erred in finding that Lo Faso's action against 588 was a nullity. The *Business Corporations Act*, R.S.O. 1990, c. B.16, ("BCA") s. 242(1)(b), as amended by S.O. 1998, c. 18, Sch. E, s. 27, allows civil actions against dissolved corporations.

242(1) Despite the dissolution of a corporation under this Act,

...

(b) a civil, criminal or administrative action or proceeding may be brought against the corporation as if the corporation had not been dissolved....

Accordingly, Lo Faso was entitled to sue 588 despite its dissolution.

[10] The property owned by 588 at the time of its dissolution remained available to execution pursuant to *BCA* s. 242(1)(c).

242(1) Despite the dissolution of a corporation under this Act

...

(c) any property that would have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for such purpose....

[11] A chose in action is property that may be taken in execution pursuant to the *Execution Act*, R.S.O. 1990, c. E.24, s. 19(2): see *Re Attorney-General for Ontario and Royal Bank of Canada*, [1970] 2 O.R. 467 (C.A.).

[12] When 588 was dissolved, all of its property vested in the Crown pursuant s. 244(1) of the *BCA*, as amended by S.O. 1994, c. 27, s.71.

244 (1) Any property of a corporation that has not been disposed of at the date of its dissolution is immediately and upon such dissolution forfeit to and vests in the Crown.

[13] The Crown's interest fell within the jurisdiction and control of the Public Guardian and Trustee. After Lo Faso obtained consent judgment against 588, he executed upon his judgment. Counsel for the Public Guardian and Trustee responded to the writ of delivery executed by the Sheriff in the following manner: "...the Public Guardian and Trustee hereby relinquishes any and all rights of now-dissolved Ontario corporation defendant 588147 Ontario Inc. to the plaintiff Gaetano Lo Faso."

[14] In my view, it follows, that on the facts as pleaded in the statement of claim, Lo Faso did acquire from the Public Guardian and Trustee, upon execution of his consent judgment against 588, any rights that 588 had at the point of its dissolution against the respondents. I conclude, therefore, that Lo Faso does have legal capacity to advance 588's claim in this action.

[15] The respondents advance various arguments to undermine or deny Lo Faso's claims. They argue that the consent judgment was obtained in a sham proceedings and that, in any event, 588's claims are defeated by limitations defences and by *res judicata*. I make no comment on the validity of those arguments as they may not be advanced here given the narrow scope of the appeal from the rule 21.03(3)(b) order relating exclusively to Lo Faso's capacity.

[16] Accordingly, I would dismiss 588's appeal as abandoned but allow Lo Faso's appeal and set aside the order dismissing his claims. The motion judge awarded the respondents, who were successful before him, \$11,514.42 and \$11,442.00 respectively. I would award the appellant Lo Faso his costs against the respondents jointly and severally fixed at \$11,000 below and \$7,500 in this court, inclusive of GST and disbursements.

"Robert J. Sharpe J.A."

"I agree E.E. Gillese J.A."

"I agree R.P. Armstrong J.A"

RELEASED: December 07, 2004