C.A. No. 135146

NOVA SCOTIA COURT OF APPEAL
Cite as Lienaux v. Campbell, 1997 NSCA 2

BETWEEN:

CHARLES D. LIENAUX and KAREN L. TURNER-LIENAUX The Applicant, Charles D. Lienaux appeared in person Applicants - and - WESLEY G. CAMPBELL and THE TORONTO-DOMINION BANK Respondents	)	C. Gavin Giles for the Respondent, Wesley G. Campbell Dufferin R. Harper for the Respondent, The Toronto-Dominion Application Heard: February 27, 1997 Judgment Delivered: March 6, 1997

BEFORE: The Honourable Mr. Justice G.B. Freeman in chambers.

FREEMAN, J.A.:

The applicant has appealed a Supreme Court order consolidating

separate actions against the respondents, Wesley G. Campbell and the Toronto Dominion Bank, and seeks a stay of the order of the chambers judge that she pay costs forthwith of $2,700 to Mr. Campbell and $1,000 to the bank.

The appeal is scheduled for hearing on April 17, 1997. The applicant is represented by her husband, Charles Lienaux, a lawyer, but not in his capacity as barrister. The Lienauxes were deeply involved in development of a senior citizens' residence known as The Berkeley. Mr. Campbell was one of a group of investors. The Lienauxes signed collateral security second and third mortgages totalling some $333,000 on their home, which has been appraised at $650,000. The Berkeley went into receivership. Mr. Lienaux asserts he and his wife lost all their liquid assets totalling about $500,000 in addition to the mortgages. Mr. Lienaux declared personal bankruptcy.

The building was sold on behalf of the bank to a company owned by Mr. Campbell. In settling with the bank, Mr. Campbell bought the mortgages against the Lienaux home for $2,000. Mrs. Turner-Lienaux brought actions against Mr. Campbell and the bank which are before the courts. The claims against Mr. Campbell include allegations of fraud and abuse of process.

An application on behalf of Mr. Campbell for security for costs in that action is to be heard March 6, 1997. The stay application was heard in appeal court chambers on February 27, 1997 and I reserved judgment. Ordinarily that would be delivered as of the next chambers day, which is also March 6. Mr. Lienaux applied for and I granted an interim stay pending delivery of my judgment.

Mr. Lienaux asserted that he and his wife had no money to pay the $3,700 costs order short of selling off their personal possessions at distressed prices. He argued that if the costs judgment was not stayed and remained unpaid on March 6, the outstanding order would be considered by the Supreme Court judge hearing the application for security for costs.

Civil Procedure Rule 42.01 includes unpaid costs obligations among circumstances to be considered in determining whether an order for security for costs would be just.

Mr. Lienaux argued that the applicant could not satisfy a substantial order for security for costs. That could prejudice her right to have her action against Mr. Campbell heard on the merits, causing her irreparable harm. Counsel for Mr. Campbell argued that the stay would be immaterial because of an undischarged judgment against Mrs.Turner-Lienaux for $59,000 costs resulting from unrelated litigation several years ago.

While I appreciate the frankness of the parties as to their objectives, the present stay application must be determined on its own merits. The procedures of this court may be used to influence the outcome of proceedings in another court, otherwise than by precedent.

Filing a notice of appeal does not stay execution of the judgment appealed from in Nova Scotia. A stay is an exception which may be granted in the discretion of a judge of this court, on such terms as he or she deems just, under **Civil Procedure Rule** 62.10(1), (2) and (3). Relevant matters to be considered in the exercise of that discretion were set out by Hallett, J.A. of this court in **Fulton Insurance Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341 as follows:

> A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
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> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can

either:

> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
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> (2) failing to meet the primary test, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

Mr. Lienaux asserts that he has discovered fresh evidence in the main action; I have not considered its relevance to the issues in the present appeal. The arguable issue referred to in **Fulton** must, of course, relate to the judgment appealed from. For present purposes I will assume without deciding that the first of the three criteria in the first test can be met, and that arguable grounds exist for the appeal.

My concern is with the second criterion, irreparable harm. The costs award was clearly within the discretion of a chambers judge determining an interlocutory matter. In the context of the major litigation of which it formed a part,

it cannot be viewed as unusually high or unforeseeable. It is understandable that the applicant would wish to pay it or be relieved of the obligation to pay it in advance of the March 6 security for costs hearing. If it remains unpaid however, that is a matter to be weighed within the discretion of the chambers judge hearing that application in the Supreme Court. I am not persuaded that it is a consideration relevant to irreparable harm. The present application before me is to stay the execution of the judgment -- to relieve the applicant of the risk that the respondents will seek execution to recover the money between now and the appeal. Even if that should occur, the harm it might cause the applicant would be irreparable only "it is difficult to, or cannot, be compensated for by a damage award." The obligation is a monetary one; while I can appreciate the applicant's difficulties in her present straitened circumstances, money can be repaid. On the evidence before me I see little analogy with the imminent prospect of the forced sale of unique or irreplaceable real or personal property. I am not satisfied that the applicant has demonstrated irreparable harm. The criteria set out in the first **Fulton Insurance** test are not alternatives -- each must be satisfied.

The secondary test, which is an alternative, permits a stay in exceptional circumstances. On the evidence before me, I am not satisfied that exceptional circumstances exist.

I therefore dismiss the applicant's application for a stay with costs in the appeal which I would fix at $500 to each of the respondents. The interim stay granted while my decision was pending is vacated.

Freeman, J.A.

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Applicants

- and -

WESLEY G. CAMPBELL and THE TORONTO-DOMINION BANK

Respondents

REASONS FOR JUDGMENT BY:

FREEMAN, J.A.