

Docket: CA 140176

Cite as *Morash v. Woodbridge Development Company*, 1997 NSCA 6

Decision Delivered:
September 5, 1997

**BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN,
IN CHAMBERS**

BATEMAN, J.A. (In Chambers):

This is an application under ***Civil Procedure Rule 62.10(2)*** to stay execution until an appeal is heard from a summary judgment on a counter-claim granted under ***Civil Procedure Rule 13***. The appeal will be heard on November 18, 1997.

The appellant, who has applied for the stay, has exclusive possession of the vessel *Aqua Gemini*, which was built and is owned by the respondent company. The appellant, among others, is a shareholder of the company. There are a number of shareholders' loans outstanding, including one to the appellant. While the material before me is sketchy, apparently the vessel is subject to a mortgage in favour of the Bank of Montreal. In the past, the company has received 30% of the boat share from the fishing proceeds of the vessel. Those funds have been applied to the mortgage payments, insurance premiums, Workers' Compensation payments and major repairs to the vessel. The respondent company maintains that since August 1996 the appellant, although fishing, has not provided the 30% share to the company. The company is thus unable to meet its obligation on the boat mortgage and other expenses. The

appellant commenced an action in the Supreme Court for repayment of his shareholders' loan. The defendant company counterclaimed for the unpaid portion of the fishing proceeds. It is in relation to these latter funds that the respondent obtained summary judgment in the amount of \$12,423.17 plus interest. The sheriff has apparently seized this amount from the appellant and plans to turn it over to the respondent in satisfaction of the judgment on September 26, 1997.

The appellant contends that the Chambers judge erred in granting summary judgment without taking into account the set off due the appellant on the shareholders' loan. He maintains, as well, that the company is insolvent and thus the appellant, if successful on the appeal, will be unable to recover the monies seized, causing irreparable harm.

Civil Procedure Rule 62.10 provides, in relevant part, as follows:

- (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.

(2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.

(3) An order under Rule 62.10(2) may be granted on such terms as the Judge deems just.

In **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.), Hallett, J.A., in Chambers, summarized the test to be applied on a stay application. At p. 346:

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:

(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.

On the material before me, the appellant has failed to meet any of the requirements of the **Fulton** test. I am not satisfied that there is an arguable issue raised in the grounds of appeal as framed in the Notice of Appeal. The funds, if any, owing to the appellant on the shareholders' loan, on the information before me, are not so closely related to the claim as to permit the appellant to hold on to the sum pending determination of the claim for set off. **(Purdy v. Fulton Insurance Agencies Ltd. (1991), 105 N.S.R. (2d) 421 (N.S.C.A.))** Nor am I satisfied that the appellant will suffer irreparable harm if the stay is not granted. The balance of convenience does not favour the appellant. There are clearly no exceptional circumstances.

Accordingly, the application for the stay is dismissed. Costs shall be in the cause.

Bateman, J.A

C.A. No. 140176

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

STEPHEN MORASH)	
)	
Applicant/Appellant)	
)	
- and -)	
)	
WOODBIDGE DEVELOPMENT)	BEFORE THE HON.
COMPANY LIMITED)	JUSTICE NANCY
.)	BATEMAN
)	(IN CHAMBERS)
)	
Respondent)	