C.A. No. 106484

NOVA SCOTIA COURT OF APPEAL

Cite as Sklar-Peppler Furniture Co. v. George C. Sweet Agencies Ltd. 1994 NSCA 6

BETWEEN:

SKLAR-PEPPLER FURNITURE CORPORATION for the appellant Appellant	)	T. Arthur Barry
- and -	)	Thomas P. Donovan, Q.C. for the respondent
GEORGE C. SWEET AGENCIES LTD. Respondent	)	Application Heard: August 4, 1994 Decision Delivered: August 4, 1994

BEFORE THE HONOURABLE CHIEF JUSTICE LORNE CLARKE, IN CHAMBERS

Application dismissed for stay of execution pending appeal - any funds recovered by respondent on the judgment pending determination of the appeal ordered to be held by respondent's solicitors in an interest bearing trust account - application by respondent for security of costs dismissed.

CLARKE, C.J.N.S.: (orally, in Chambers)

This is an application by the appellant for a stay of execution pending appeal, which is scheduled for hearing on December 5, 1994 at 10:00 o'clock in the forenoon. In addition, the respondent seeks an order for security of costs. The appellant is a furniture manufacturer and the respondent agency had been engaged in commission sales of the appellant's products until the agency agreement was terminated by the appellant in 1992. After trial before Justice Saunders and a jury, the jury found that there was no just cause for the termination and awarded $216,000. as damages in lieu of notice. The trial judge also ordered the appellant to pay pre-judgment interest and costs, so that the total amount payable as a result of the order is $250,632.

The application for the stay of execution is made pursuant to Rule 62.10 which provides:

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

The test that must be applied in determining whether or not to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> " 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.
>
> 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."

The grounds of appeal in this case relate mainly to the length of the notice period and the assessment of damages. Although many of the issues raised appear to be questions of fact, the ground of appeal relating to the method of calculating the damages and whether the calculation should have been based on net rather than gross commissions does, in my view, satisfy the first part of the test, that is, that it raises an arguable issue.

On the second arm of the **Fulton** test, the appellant has filed an affidavit of its Vice President, Finance, which provides a detailed picture of the appellant's financial situation which is described as "precarious". The appellant submits that if it must pay the judgment prior to the hearing of the appeal, it will be in default of an agreement with its bank which could lead to its immediate receivership or bankruptcy, thus suffering irreparable harm. It is also submitted that the respondent corporation has few assets and
if successful on appeal, it will be difficult to ensure the funds will be repaid. In response to the latter submission, the respondent has agreed to hold any amounts paid by the appellant in an interest bearing trust account pending the hearing of the appeal.

In my view, although the appellant has shown that it is in a precarious financial situation, the amount of the judgment is small relative to its overall operations. For example, it forecasts sales of $30 million in 1994. It is apparent that it was already in default of its agreement with its bank prior to the judgment herein.

When an appellant pleads its own financial insecurity as a reason for granting a stay, it can be a double-edged sword. It runs the risk of the court becoming

concerned that the respondent, if successful on appeal, will never reap the benefits of the litigation if the stay is granted.

Given the respondent's offer to hold whatever is collected on the judgment in trust pending the appeal, the balance of convenience dictates that the application for a stay be dismissed. I will order, however, that any amount paid by the appellant on the judgment be held by the respondent's solicitors in trust in an interest bearing account pending the determination of the appeal.

I have considered the arguments and the case law submitted on the application for security for costs and have decided that this is not a case where there are special circumstances that warrant such an order. The appellant is an active corporation doing business throughout Canada, it has proven its appeal is neither frivolous nor vexatious, and it is not a nominal party.

Since success has been divided, there will be no costs to either party.

C.J.N.S.