NOVA SCOTIA COURT OF APPEAL

Citation: *Brett v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93

Date: 20040719
Docket: CA 218741
Registry: Halifax

Between:

Bruce Brett and 2475813 Nova Scotia Ltd.

Appellant

v.

Amica Mature Lifestyles Inc.

Respondent

Judge: Fichaud, J.A.

Application Heard: July 15, 2004, in Halifax, Nova Scotia, In Chambers

Held: Application is dismissed.

Counsel: Blair Mitchell, for the appellant
David Coles, for the respondent

Decision:

[1] The appellants apply for a stay of execution under Rule 62.10.

Background

[2] On September 28, 1998 the appellants (together "Brett") borrowed $100,000 from the respondent ("Amica") and in return gave Amica a promissory note for payment within 90 days of demand. It is not in dispute that the note was properly executed, the funds were advanced, demand was made and Brett has not repaid.

[3] On November 26, 2001 Amica sued Brett under the note.

[4] Brett filed a Defence which stated, in its entirety:

> The defendants deny each and every allegation of facts set out in the statement of claim as if the same were specifically set out and traversed *seriatim* and claim set off and counter claim against the plaintiff.

[5] Amica applied for summary judgment. Brett opposed the summary judgment and filed cross applications to (1) amend the Defence and (2) consolidate with Amica's claim a separate action brought by Brett against Ishtar Investments Inc., a predecessor company to Amica (the "Brett action").

[6] Justice Hood granted Amica's application for summary judgment, and dismissed Brett's applications to amend and consolidate.

[7] Brett has filed a notice of appeal to this Court against the summary judgment and the refusal to consolidate. There is no appeal of the chambers justice's dismissal of Brett's application to amend the defence. The hearing of the appeal is scheduled for October, 2004.

[8] Brett requests a stay until the determination of this appeal. Brett suggests that Brett pay into court the sum of $125,000 on the condition Amica may execute against this amount if Brett's appeal fails.

The Tests

[9] In Nova Scotia, unlike some jurisdictions, an appeal does not automatically stay execution: Rule 62.10 (1). Rule 62.10(2) gives a judge discretion to issue a stay. This has been interpreted to mean that a successful litigant should not be deprived of the fruit of his judgment unless "required in the interests of justice": *Coughlan v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.), at p. 174 per Freeman J.A.

[10] In *Fulton Insurance Agent v. Purdy* (1990), 100 N.S.R. (2d) 341(C.A.), at para. 28, Justice Hallett stated the tests to govern an application for a stay of execution under Rule 62.10 (2):

> 28. In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> > (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.
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> 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.

[11] Counsel for Brett says that this application is based on both the primary and secondary tests from *Fulton*.

Primary Test

[12] The primary test requires that the applicant show an arguable issue, irreparable harm and favourable balance of convenience, standards similar to those which govern applications for interim injunctions: *Manitoba (Attorney General) v. Metropolitan Stores (MTS)* Ltd., [1987] 1 S.C.R. 110 at 127; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334. It is unnecessary to consider whether there is an arguable issue or favourable balance of convenience. Brett's application under *Fulton's* primary test fails because there is no irreparable harm.

[13] If the stay was denied, and if Brett paid the judgment but later succeeded on appeal, Brett would have to recover the amount of the judgment from Amica. Brett does not suggest, and there is no evidence, that Amica is insolvent or would be unable to satisfy such a debt. Amica is federally incorporated with a head office in British Columbia. Counsel for Brett acknowledges that, at least under the reciprocal enforcement of judgments legislation, Brett would be able to recover from Amica. Counsel for Brett says that the irreparable harm is the cost, delay and inconvenience of having to recover from Amica through reciprocal enforcement of judgment legislation, if necessary.

[14] I do not accept Brett's argument. If the applicant's only loss is financial, the applicant can afford to pay and the loss is quantifiable and recoverable, generally this is not "irreparable harm". There must at least be evidence of risk that the paid judgment would not be recovered. *Halifax (Regional Municipality) v. 3006128 Nova Scotia Ltd.* (2001), 198 N.S.R. (2d) 95 (C.A.), at 99 per Oland, J.A.; *Hiltz and Seamone Co. ltd. v. AGNS* (1998), 167 N.S.R. (2d) 353 (C.A.) At p. 355 per Cromwell, J.A.; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.) at paras. 20-22 per Cromwell, J.A.; *Campbell v. Jones and Derrick* (2001), 197 N.S.R. (2d) 196 (C.A.) at paras. 7 - 8 per Roscoe, J.A.

[15] If the financial burden from payment could cause the applicant severe financial distress, or prevent the applicant from carrying forward the appeal, deprive the applicant of indispensable assets or damage the applicant's reputation or employment prospects, this might constitute irreparable harm: *Leddicote v. Nova Scotia (Attorney General)* (2001), 198 N.S.R. (2d) 101 (C.A.) at para. 11 per Roscoe, J.A.; *Jensen v. Jensen* (1991), 108 N.S.R. (2d) 120 (C.A.) at pp. 121 - 22

per Freeman, J.A. There is no evidence or suggestion that Brett would suffer harm of this nature from paying this judgment.

[16] Brett's application under *Fulton's* primary test fails.

Secondary Test

[17] In *Fulton*, Justice Hallett described the secondary test as "exceptional circumstances that would make it fit and just that the stay be granted in the case."

[18] In *Fulton*, Justice Hallett granted the stay based on this secondary test, for the following reasons:

> [29] While I have reservations on the issue, I am persuaded that notwithstanding the applicant cannot meet the primary test as it would appear that the respondent could pay a damage award in favour of the appellant if the summary judgment was set aside on appeal but after the respondent had executed on the appellant's property, there are exceptional circumstances in this case that warrant the granting of the stay. The exceptional circumstances consist of three factors. First, the judgment was obtained in a summary proceeding rather than after trial. Second, on the face of the pleadings, the appellant raises what appears to be an arguable issue and thus may be successful on the appeal from the granting of the summary judgment. Third, the appellant's counterclaim and the claim to a setoff have not yet been adjudicated upon by the Trial Division. Therefore, the proceedings (as in the Associated Freezers case) have not been completed and it is premature to execute on the summary judgment. The combined effect of these factors creates an exceptional circumstance that makes it just that the application for a stay of execution of the summary judgment pending the disposition of the appeal from that judgment be granted but on terms.

[19] Counsel for Brett says that, as in *Fulton*, this appeal is from a summary judgment and Brett's defence of set off has not been tried.

[20] In my view, this is not an exceptional case under *Fulton's* secondary test.

[21] *Fulton* does not stand for the principle that every summary judgment is "exceptional" under the secondary test.

[22] There is no comprehensive definition of "exceptional circumstances" for *Fulton's* secondary test. But several guidelines have emerged from the case law.

First the secondary test applies only when "required in the interests of justice", the overarching principle stated by Justice Freeman in *Coughlan*. Second the test is "exceptional": generally speaking, it applies when the circumstances are not addressed by the primary test. The secondary test permits the court to avoid an injustice in circumstances which escape the attention of the primary test.

[23] An application for a stay of a monetary judgment will, in most cases, stand or fall with the primary test. If the appellant is insolvent, the immediate payment of the judgment may cause irreparable harm to the appellant. If the respondent is insolvent, the irreparable harm may be the risk of non-recovery if the appeal succeeds. Either way, the "irreparable harm" branch of the primary test addresses the concern. The authorities have stated that, in most cases, payment of a judgment from a solvent plaintiff to a solvent defendant will not attract a stay under either *Fulton* test. *Pelot v. Prudential of America* (1995), 143 N.S.R. (2d) 367 (C.A.) per Hallett, J.A. at para. 27; *Lienaux v. Toronto-Dominion Bank* (1997), 161 N.S.R. (2d) 236 (C.A.), at p. 240 per Bateman, J.A.; *Earle v. Coltsfoot Publishing Co.* (2000), 183 N.S.R. (2d) 396 (C.A.), per Glube, C.J.N.S. at paras. 17 - 20; *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSCA 114, at paras. 30, 33 - 7, per Oland, J.A.; *R. v. Innocente*, 2001 NSCA 97 at para. 36, per Oland, J.A.; *Oceanart Pewter Canada Ltd. v. Hartlen*, Docket CA 156289, June 3, 1999, at para. 8 per Cromwell, J.A.; *Halifax Regional Municipality v. 3006128 Nova Scotia Ltd.*, 2001 NSCA 140 at para. 26 per Oland, J.A.; *Royal Bank of Canada v. Woloszyn*, [1999] N.S.J. No. 58, at para. 8 per Cromwell, J.A.

[24] Since *Fulton*, there have been exceptions where, in the interests of justice, a monetary judgment has been stayed. In *Hiltz and Seamone*, the Court stayed execution of punitive damages, although Justice Cromwell was careful to state that the stay was based on all of the circumstances in that case, and that punitive damages will not automatically attract a stay. In *Coughlan*, at p. 175, Justice Freeman stated that if the judgment under appeal "contains an error so egregious that it is clearly wrong on its face" this would be an exceptional circumstance justifying a stay under *Fulton's* secondary test.

[25] Applying these principles to the present case: (1) the primary test addresses the circumstances of these parties and it is inappropriate to resort to the secondary test; (2) in any case, a stay is not "required in the interests of justice".

[26] This is a monetary judgment payable by a solvent appellant to a solvent respondent. There are no exceptional heads of damages, such as punitive damages. There is no egregious error in the decision of the Chambers justice.

[27] The "irreparable harm" branch of the primary test addresses this situation. I say this notwithstanding that Brett failed to establish irreparable harm on the facts. It is unnecessary to move to the residual "exceptional" test.

[28] Neither is a stay required in the interests of justice.

[29] Brett borrowed the money, signed a demand promissory note and did not repay after demand. Brett's defence rests on set off and counterclaim as stated in the single paragraph of the Defence. The rolled up plea in the Defence states no particulars of the set off or counterclaim. Brett did not appeal to this Court from that portion of Justice Hood's order which dismissed Brett's application to amend its Defence. For purposes of this appeal, there are no pleaded particulars of the Defence.

[30] Brett includes in the materials for this application a copy of the Statement of Claim in the Brett action. Brett has appealed Justice Hood's dismissal of its application to consolidate the Brett action with the Amica action against Brett. A consolidation would permit the two actions to proceed concurrently, but would not amend Brett's Defence to Amica's claim.

[31] Given Brett's skeletal pleaded Defence, it is impossible on this application to fasten on a substantial issue from which I may conclude that interests of justice require a stay of execution.

[32] Brett's position does not improve if I assume that the Statement of Claim in the Brett action states the particulars of the pleaded set off and counterclaim in the Amica action.

[33] Brett's Statement of Claim in the Brett action alleges that Amica (under its former name Isthar Investments Inc.) breached its obligation to Brett to provide equity and access to financing for the project. Paragraphs 11 and 12 of that Statement of Claim state:

> 11. On or about September 20, 1998 when Brett sought to access Isthar's equity and its access to financing to prepare for closing, Manji then advised Brett that Isthar was not able to provide any equity and had no access to any financing for the construction of the facility.
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> 12. Brett says and the fact is that Isthar was bound by a contract to Brett to provide equity and financing for the development of the facility in September 1998 and thereafter and that Isthar breached this contract with Brett causing each of Brett and 2475813 Nova Scotia Limited to suffer loss and damage.

[34] So Brett has alleged that on September 20, 1998 Brett was advised that Isthar (i.e., Amica) repudiated its obligations under the alleged contract.

[35] Eight days later, on September 28, 1998, Brett signed the demand promissory note for $100,000.00 which is the basis of Amica's claim.

[36] According to Brett's pleading in the Brett action, it appears that Brett was aware of the alleged breach by Isthar (Amica) before Brett borrowed the money from Isthar and signed the demand promissory note. After obtaining the money, Brett says that it need not repay the loan under the plain terms of the promissory note because of Isthar's breach which was known to Brett beforehand. I make no comment on the merits of the issues which will be tried in the Brett action. But Brett's position does not impress me as requiring a stay in the interests of justice.

[37] For these reasons, I dismiss the application for the stay. Amica is entitled to costs of $1000.00 plus disbursements.

Fichaud, J.A.