COURT OF APPEAL OF YUKON

Citation: *MacNeil v. Hedmann*,
2014 YKCA 11

Date: 20140825
Docket: 14-YU734

Between:

Cynthia Lynn MacNeil

Respondent
(Plaintiff)

And

David George Clinton Hedmann

Appellant
(Defendant)

Before: The Honourable Mr. Justice Frankel
(In Chambers)

On appeal from: Orders of the Supreme Court of Yukon, dated March 18 and June 12, 2014 (*MacNeil v. Hedmann*, 2014 YKSC 16 and 2014 YKSC 29, Whitehorse Registry 09-D4165).

Acting on his own behalf: D.G.C. Hedmann

Counsel for the Respondent: D.P. Hoffman

Place and Date of Hearing: Vancouver, British Columbia
August 15, 2014

Place and Date of Judgment: Vancouver, British Columbia
August 25, 2014

Summary:

Partial stay of execution granted pending appeal.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] David George Clinton Hedmann applies for an order staying the execution of two formal judgments against him pending the determination of his appeal. Those judgments were made in litigation between Mr. Hedmann and his former spouse, Cynthia Lynn MacNeil. The first judgment deals with the division of matrimonial property; the second deals with costs. The reasons for those judgments are indexed, respectively, as 2014 YKSC 16 and 2014 YKSC 29.

[2] For the reasons that follow, I would grant a partial stay of the judgments under appeal.

Factual Background

[3] The trial of this matter lasted approximately three weeks. It was a second trial, as the order made at the first trial was set aside on appeal: *Hedmann v. MacNeil*, 2012 YKCA 11.

[4] A contentious issue at the trial was which of three marriage contracts—the first being a pre-nuptial agreement—governed the disposition of property between the parties. The trial judge resolved that issue in a manner favourable to Ms. MacNeil, holding the second agreement to be the operative one. He found the third agreement invalid based on Mr. Hedmann having pressured Ms. MacNeil into signing it.

[5] The trial judge held that two residential properties in Whitehorse registered to Ms. MacNeil belonged solely to her and ordered the removal of any caveat or certificate of pending litigation registered against them by Mr. Hedmann. He dismissed Mr. Hedmann’s claim to an interest in a sole proprietorship operated by

Ms. MacNeil. In addition, the judge dismissed numerous other claims advanced by Mr. Hedmann for the first time in his written submissions.

[6] The trial judge found Mr. Hedmann responsible for one half of certain debts owing by Ms. MacNeil. Those items are dealt with as follows in the formal order:

> 9. David Hedmann shall make payment to Cynthia MacNeil in the amount of $8,993.83 for his 50% share of the debt outstanding on Cynthia MacNeil's CIBC Visa on June 25, 2009 ("Separation"). David Hedmann shall pay post judgment interest to Cynthia MacNeil at 19.5%, which is the rate charged by CIBC Visa.
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> 10. David Hedmann shall make payment to Cynthia MacNeil in the amount of $20,576.69 for his 50% share of the debt outstanding on the CIBC Line of Credit debt at Separation. David Hedmann shall pay post judgment interest to Cynthia MacNeil at 4.75% which is the rate charged by CIBC on outstanding balances incurred on the Line of Credit.

[7] With respect to costs, the trial judge awarded Ms. McNeil costs on Scale C ("for matters of more than ordinary difficulty"). In addition, he applied a multiplier of 1.5 to one third of the units claimed in her bill of costs; the total costs awarded being $60,690.00. As well, during the course of the trial, the judge made three other costs orders against Mr. Hedmann totalling $1,325.00. Those amounts have not been paid.

[8] The following grounds of appeal are set out in Mr. Hedmann's "Amended Amended Notice of Appeal":

> 1. The trial judge erred in his statements of fact in his reasons for judgment.
>
> 2. The trial judge did not allow the Defendant to secure legal representation <u>for a trial originally set down for five days but ended only after 14 days.</u>
>
> 3. The trial judge erred in application of law in his reasons for judgment.
>
> 4. The trial judge erred in his arithmetic calculations.
>
> 5. That the findings of fact were entirely unreasonable to make on the evidence.
>
> 6. The reasons for judgment omitted many of the facts essential to the case and important to the Defendant.

7. Other reasons as will be disclosed by the Defendant.

[Emphasis in original.]

[9] Mr. Hedmann has not yet filed his factum. On July 21, 2014, a judge of this Court extended the time for the filing of that factum to August 22, 2014. Contemporaneous with seeking a stay of execution, Mr. Hedmann applied to have that time further extended to September 29, 2014. That extension was sought because, according to the affidavit filed by Mr. Hedmann on that motion, it was not until August 1, 2014, that he discovered 72 pages of his cross-examination for Ms. MacNeil were missing from the electronic version of the trial transcript. He further deposed that: (a) those pages were missing from the electronic transcript which he sent on May 7, 2014 to the lawyer who is writing his factum; (b) he obtained a complete electronic transcript on August 6, 2014, and immediately emailed it to his lawyer; and (c) his lawyer is now unable to complete the factum until September 29, 2014. There is no affidavit from the lawyer.

[10] Mr. Hedmann has been in possession of the electronic transcript since at least May 7, 2014. On the hearing of his motion to extend time, he stated he has long had a complete hardcopy of the transcript, i.e., one containing the 72 pages. He was unable to provide an adequate explanation as to why he only recently noticed the electronic transcript was missing evidence he says is "vital" to his appeal.

[11] Because Mr. Hedmann was unable to provide an adequate explanation for why he only recently noticed the electronic transcript was incomplete, or why his lawyer now needs another month to complete the factum, I declined to extend the time for the filing of his factum until September 29, 2014. However, with a view to keeping this appeal on track to be heard when the Court sits in Whitehorse during the week of November 17, 2014, I granted Mr. Hedmann an extension to September 5, 2014. I also set dates for the filing of Ms. MacNeil's factum and any reply factum Mr. Hedmann may wish to file.

[12] Mr. Hedmann contends he has a meritorious appeal and that he would suffer irreparable harm if Ms. MacNeil were to be able to take steps to realize on the judgments before that appeal is heard. Ms. MacNeil's position is the appeal is without merit and that Mr. Hedmann has failed to establish that he would suffer irreparable harm. She says that, as the successful party, she is entitled to the fruits of that success.

Analysis

[13] The factors to be considered on an application to stay the execution of a judgment are discussed in *Bea v. The Owners, Strata Plan LMS 2138*, 2010 BCCA 463 at para. 19, 94 C.P.C. (6th) 117, wherein Madam Justice Smith quoted with approval the following from the reasons of Mr. Justice Legg in *Roe v. McNeil* (1994), 49 B.C.A.C. 247 (Chambers):

> [6] The relevant factors to consider on whether to grant a stay are these:
>
> 1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (*Voth Bros. Construction (1974) Ltd. v. National Bank* (1987), 12 B.C.L.R. (2d) 44).
> 2. The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances (*Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd*. (1982), 42 B.C.L.R. 141 at 142).
> 3. In the exercise of its discretion the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise and grant the stay on terms it considers appropriate (*Rogers Foods (1982) Ltd. v. Federal Business Development Bank* (1984), 57 B.C.L.R. 344 at 347).
> 4. A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success (*Rogers* at 347 and *Mikado Resources Ltd. v. Dragoon Resources Ltd.* (1990), 46 B.C.L.R. (2d) 354 at 357.

See also: *Whitehorse (City) v. Darragh*, 2008 YKCA 19 at para. 18 (Chambers), 264 B.C.A.C. 139; *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (Chambers).

[14] The threshold for determining whether an appeal has merit is “a low one”, as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; “[a] prolonged examination of the merits is generally neither necessary nor desirable”: *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338.

[15] In the affidavit he filed in support of this application, Mr. Hedmann sets out six grounds of appeal with respect to division of property issues. The majority of those grounds challenge findings of credibility and findings of fact made by the trial judge. With respect to the costs order, Mr. Hedmann alleges a number of errors, including “possible bias” by the trial judge.

[16] Although I am unable to say that Mr. Hedmann’s grounds are totally devoid of merit, at best his appeal is a weak one. To a large extent, it appears that he will seek to have this Court retry the matter and substitute its view of the evidence for that of the trial judge.

[17] Turning to irreparable harm, “‘irreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”: *RJR – MacDonald Inc.* at 341.

[18] In his affidavit, Mr. Hedmann states he will suffer irreparable harm because he will have to sell his home to satisfy the judgments against him. He deposes that he runs two home-based businesses and that selling his home would result in a substantial loss of income and could possibly render him insolvent.

[19] My difficulty with Mr. Hedmann’s assertions with respect to irreparable harm is that they are entirely conclusory. He has provided no information with respect to such matters as: (a) his current assets and liabilities; (b) his equity in his home; and (c) why he cannot, through a mortgage or loan, obtain funds with which to pay all or part of what he owes on the judgments. In addition, he has not satisfied me he

would be unable to recover any monies paid to Ms. MacNeil, should he succeed on the appeal.

[20] In her affidavit, Ms. MacNeil states that to this point she has incurred over $80,000.00 in legal fees and without payment of the judgments she will have to sell one of her properties to pay those fees and to finance this appeal. She says that if she is unable to pay those fees she may find herself without counsel for the appeal. She also states she expects Mr. Hedmann will continue to file motions which will cause her to incur additional legal expenses.

[21] This brings me to the balance of convenience. In that regard, the following from *RJR – MacDonald* at 342 is germane:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in [*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*] [1987] 1 S.C.R. 110] at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".

[22] Having regard to all of the circumstances, Mr. Hedmann has failed to satisfy me that Ms. MacNeil should be denied all of the fruits of her judgments. His appeal appears to be weak and the evidence he has presented to support his assertion that he will suffer irreparable harm is far from compelling. Indeed, it appears to me that the greater harm will be suffered by Ms. MacNeil if a stay is granted.

[23] Having said that, I am mindful of the fact that this appeal can be heard by mid-November if Mr. Hedmann files his factum by September 5, 2014. In light of that, I consider a partial stay appropriate.

[24] I, therefore, make the following order:

Execution of the judgments made in this action on March 18, 2014 and June 12, 2014 are stayed subject to the following conditions.

<u>Conditions</u>

1. Mr. Hedmann shall file and serve his appellant's factum on or before September 5, 2014.

2. By September 5, 2014, Mr. Hedmann shall pay to Ms. MacNeil's solicitors, in trust, $35,000.00 on account of the aforesaid judgments.

3. If this appeal is not heard during the week of November 17, 2014, then Ms. MacNeil is at liberty to apply to vary or set aside this order, on two clear days' notice to Mr. Hedmann.

This order shall expire on the release of this Court's reasons for judgment on this appeal.

[25] Costs of this application will be in the appeal.

"The Honourable Mr. Justice Frankel"