COURT OF APPEAL FOR ONTARIO

CITATION: Business Development Bank of Canada v. Aventura II Properties Inc., 2016 ONCA 300
DATE: 20160422
DOCKET: M46240, M46279 M46303 (C61854)

van Rensburg J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicant

and

Aventura II Properties Inc., Pavilion Sports Clubs Inc., Pavilion Sports Ice Inc., Pavilion Sports Food and Beverage Inc. and Pavilion Aquatic Club Inc.

Respondents

Sean N. Zeitz, for Revital Druckmann and Jean-Jacques Myara

Kelli Preston, for the receiver Pollard & Associates Inc.

Catherine Francis, for DUCA Financial Services Credit Union Ltd.

Heard: April 5, 2016

ENDORSEMENT

A. THE MOTIONS

[1] There are three motions before the court, in respect of an appeal and proposed appeal of the order of Hainey J. dated March 4, 2016 made in the context of a court-appointed receivership (the "Order"). Pollard & Associates Inc.

is the court-appointed receiver (the "Receiver") of the debtor companies (the "Debtors"). A receivership order was granted by McEwen J. on September 8, 2014 (the "Receivership Order").

[2] The Order at issue on these motions extended a Mareva injunction against Revital Druckmann ("Revital"), who is the spouse of Johny Druckmann, the principal of the Debtors. The Order also directed that the Receiver is entitled to immediate possession or "repatriation" of certain monies, which are the proceeds of an HST refund paid to one of the Debtors and diverted in contravention of the Receivership Order. The Order dismissed the claim by Jean-Jacques Myara ("Myara") to an interest in the monies.

[3] Revital seeks leave to appeal the Order under s. 193(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*"). Importantly, she asserts no claim of her own to the monies in question and does not oppose the repatriation of the funds. Rather, she challenges the procedure followed by the Receiver in obtaining, on an *ex parte* motion, the original interim Mareva injunction against her.

[4] In his appeal, Myara claims that the monies are his and resists the repatriation of the funds. The Receiver and the secured creditor, DUCA Financial Services Credit Union Ltd. ("DUCA") each move for security for costs of Myara's appeal.

[5] For the reasons that follow, I dismiss Revital's motion and grant an order for security for costs against Myara in favour of the Receiver and DUCA.

B. BRIEF HISTORY

[6] The history of this matter is described in some detail in the reasons of the motion judge reported at 2016 ONSC 1545. For the purpose of these motions, the relevant facts are as follows.

[7] The Debtors and their representatives failed to advise a court-appointed monitor, contrary to its appointment order dated October 24, 2013 and a subsequent order dated January 23, 2014, that on December 4, 2013, one of the Debtors (Pavilion Sports Clubs Inc. or "PSCI") was issued an HST refund by the Canada Revenue Agency (the "CRA") in the sum of $986,594.96 (the "HST Refund").

[8] In September 2014, pursuant to an order dated August 20, 2014, the monitor made inquiries of the CRA and learned that the HST Refund had been issued to the Debtors eight months earlier. The monitor was then appointed as receiver by order dated September 8, 2014 in a contested receivership application. After obtaining an order dated October 28, 2014 requiring the Toronto-Dominion Bank ("TD") to release certain information, the receiver traced the HST Refund from a new TD account opened in the name of PSCI into a TD account in the name of "S. Stern" (Revital's sister), over which Revital had power

of attorney. That account had been debited by a bank draft issued to S. Stern in the amount of $1,016,007.50 on August 26, 2014.

[9] On April 17, 2015, Pollard & Associates Inc. was substituted as receiver of the Debtors. The Receiver learned from TD that the bank draft had been cashed on March 6, 2015 and deposited into an unknown account.

[10] On December 4, 2015, Hainey J. granted the Receiver's *ex parte* motion for an interim "freeze and disclosure" order against Revital (the "Mareva Order"). The Mareva Order provided that it would cease to have effect if Revital provided security by paying the sum of $1,016,007.50 into court. The Mareva Order was later extended on consent to January 29, 2016.

[11] As a result of obtaining the Mareva Order, the Receiver traced the HST Refund through the S. Stern account (the draft had in fact been held and then re-deposited into that account on March 6, 2015) to, among other things, two non-registered mutual fund accounts with TD and Royal Bank of Canada ("RBC"), a personal account at RBC, and a 2015 Volkswagen Jetta, all in the name of Revital. Some funds remained in the S. Stern account.

[12] The Receiver brought a motion against Revital to repatriate the funds, also returnable on January 29, 2016. On January 26, 2016, counsel for Myara contacted the Receiver to advise that his client claimed an interest in the funds in the S. Stern account, and was seeking an adjournment.

[13] The motion to extend the Mareva Order and to repatriate the funds was heard on February 26, 2016. Myara attended at the motion. He sought intervener status, claiming to be a "former lender" to the Debtors. He claimed a beneficial interest in all the funds that were in the S. Stern account and in the two mutual fund accounts. He claimed to be an investor in the Debtors and referred to "loan advancements" totalling $1,241,290.01 made between March 2003 and August 2005 to Aventura II Properties Inc.[1] Myara said that after he wanted his money back in 2012, Johny Druckmann had promised to pay him the HST Refund, and he had directed it to be deposited into the S. Stern account. He had directed Revital to issue a bank draft in the name of S. Stern in August 2014, and seven months later to make investments on his behalf in her name. He claimed that internal records showing that he had been paid back were inaccurate.

[14] Of course, Revital's dealings with the HST Refund, that Myara claims occurred on his behalf, took place after the appointment of the monitor and in violation of court orders requiring the disclosure of the HST Refund. At no time prior to January 26, 2016 did anyone suggest that the HST Refund had been received but belonged to Myara. Revital's affidavit of December 28, 2015 stated that the mutual funds were her property.

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[1] Myara explained that the loans were recorded on the ledger of "Aventura Properties Inc.", which is not one of the Debtors, but claimed that this corporation and Aventura II Properties Inc. are in fact the same corporate entity.

[15] On March 4, 2016, Hainey J. granted the Order. He found that the diversion of the HST Refund was in breach of the order dated January 23, 2014, which required the Debtors to advise the monitor immediately on the receipt of any refund from the CRA and prohibited the deposit or disbursement of any refund received. The Debtors breached the order and Revital was party to the breach. They engaged in deliberate and blatant acts of fraud. Hainey J. also found that Revital was in breach of the Receivership Order. He referred to the Receiver's powers under that order and para. 4, which required anyone with notice of the order to advise the Receiver of any property of the Debtors in their possession or control and to deliver such property to the Receiver at the Receiver's request. He rejected Revital's arguments that the Mareva Order was procedurally defective.

[16] Hainey J. rejected Myara's claim, which he characterized as a fraudulent attempt to divert the HST Refund away from the Receiver. Even if Myara had a claim to the funds, it would be as an unsecured creditor of a bankrupt company, and his alleged interest would be subordinate to the Receiver's interest in the HST funds. He extended the Mareva Order until further order of the court, and granted the Receiver's motion to repatriate the funds.

C. REVITAL'S MOTION FOR LEAVE TO APPEAL

[17] Revital seeks leave to appeal the Order under s. 193(e) of the *BIA*. Leave is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, at para. 29.

[18] The second part of the test requires the applicant to convince the court that there are "legitimately arguable points raised so as to create a realistic possibility of success on the appeal": *Re Ravelston Corp.* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at paras. 28-29; see also *Osztrovics Estate v. Osztrovics Farms Ltd.*, 2015 ONCA 463, at para. 11. Although this is a relatively low bar, I am not persuaded that there is any arguable merit to Revital's proposed appeal.

[19] First, Revital does not claim any interest in the HST Refund, or in the funds in the S. Stern account, or, even now, the property and investments she acquired using such funds. As such, she does not and cannot appeal the repatriation part of the Order. Nor does Revital challenge the substantive grounds on which the

Mareva Order was made and extended. Rather, as her counsel acknowledges, Revital's concerns are strictly procedural.

[20] In her proposed appeal to this court Revital raises the same procedural issues she argued before the motion judge. She asserts that the motion judge erred in continuing the Mareva injunction against her because there were procedural defects in the *ex parte* Mareva Order dated December 4, 2015.

[21] Revital says that Hainey J. erred in granting the Order because (a) the Receiver had not made full and frank disclosure on the original *ex parte* motion; (b) he did not require an undertaking for damages from the moving party or grant an order dispensing with that requirement; and (c) the Order could not be made against her as a "third party" where there was no pending or intended proceeding against her.

[22] I do not see any merit to any of Revital's arguments.

[23] There is no question that the Receiver, in moving for the *ex parte* order, was required to make full and frank disclosure of material facts, and to inform the court of any material facts or points of law that favoured the other side: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(6); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.); *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.). Revital's complaint is not with respect to the *facts* that were put to the court; rather, she says that the Receiver ought to have delivered a factum

and provided the court with legal authorities on Mareva injunctions, in particular referring to the need for an undertaking as to damages and a pending legal action against the target of the order.

[24] First, the obligation on a moving party to file a factum in an injunction motion applies in contested, but not *ex parte*, motions: see r. 40.04(1). Second, the motion judge's granting of the Mareva Order was based on the application of settled principles and entirely justified by the evidence placed before him. And, as I will explain, the points that Revital raises were not in fact impediments to the relief granted by the court in this case.

[25] As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed receivership. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel. 24), 4th ed. (Toronto: Canada Law Book, 2012), at para. 2.470. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the receivership order and to act honestly and in the best interests of all parties, including the debtor: *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), at para. 30, leave to appeal refused, [2001] S.C.C.A. No. 217. The Receiver has a duty to recover the

property of the Debtors, including the HST Refund, and the order sought was in aid of powers granted to the Receiver by court order. The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.

[26] Finally, Revital says that the Mareva Order should not have been issued against her because there was no existing or proposed action in which she was a defendant. She relies on cases stating that such orders cannot be made in the absence of a law suit or "litigation process" in which she could assert her defences: see e.g. *Standal Estate v. Swecan International Ltd.* (1989), 26 C.P.R. (3d) 421 (Fed. C.A.). Without commencing proceedings against her, Revital says it was impossible for the Receiver to meet the "strong *prima facie* case" requirement for a Mareva order.

[27] Again, this argument has little merit, and I reject entirely the suggestion that the Receiver had an obligation to sue Revital in a separate action for recovery of the funds before moving for a Mareva injunction.

[28] In the typical "Mareva" case, the moving party seeks security for a future judgment, where neither liability nor the amount of the judgment has been determined. Here, however, the order granted was contemplated by and expanded upon powers granted to the Receiver under the Receivership Order. Those powers authorize the Receiver to take possession and control of the

Debtors' property and proceeds from such property, receive and collect all monies owing to the Debtors, and apply to the court for assistance in carrying out its duties: see especially paras. 2, 3(a), 3(f), 12 and 28 of the Receivership Order. The Receiver had the duty and right to collect the HST Refund, and Revital was in breach of the Receivership Order when she placed it beyond the Receiver's reach and failed to disclose its existence. Indeed, the misappropriation of the HST Refund precipitated the appointment of the Receiver and part of the Receiver's mandate was to find and recover the HST Refund.

[29] The Mareva Order was granted on the basis of overwhelming evidence. The Receiver not only had a strong *prima facie* case that Revital had misappropriated the HST Refund proceeds, but had directly traced the monies into the S. Stern account, the mutual fund accounts, Revital's personal RBC account, and the automobile. Revital admitted she had used or disposed of the remaining funds. Any requirement for a pending action is met by the fact that the motion was brought in the context of the receivership proceedings. This is the framework in which the Mareva Order was made, and contrary to Revital's assertions, this was the forum in which she could assert any available defences.

[30] While this is sufficient to dispose of Revital's motion for leave to appeal, I also note that there is nothing in her proposed appeal that raises any issue of general importance to bankruptcy and insolvency practice or the administration of justice. Contrary to Revital's submission, the motion judge did not apply a new

test for the order he granted, exempting receivers from the usual requirements for a Mareva injunction. The motion judge applied settled legal principles to the facts of the case that demanded the relief he granted.

D. SECURITY FOR COSTS MOTIONS

[31] The Receiver and DUCA are respondents to Myara's appeal and both move against him for security for costs of his appeal. Their motions are under r. 61.06(1)(a). The moving party must establish that there is "good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal."

[32] The second part of the test is not in dispute. Myara lives in Florida and apparently owns a casino in Peru. There is no evidence that he has assets in Ontario.

[33] The first part of the test involves a consideration of "[t]he apparent merits of the appeal, the presence or absence of an oblique motive for the launching of the appeal, and the appellant's conduct in the prosecution of the appeal" as well as other factors that may be specific to the case: *Schmidt v. Toronto Dominion Bank* (1995), 24 O.R. (3d) 1 (C.A.), at para. 18.

[34] The moving parties rely on the fact that the motion judge found Myara's version of events had no air of reality and did not accord with common sense, and that his "story" was simply another fraudulent attempt to divert the HST

Refund away from the Receiver. They say there is no merit to his appeal and that its purpose is to simply further delay the Receiver's recovery of the Debtors' property.[2]

[35] Myara contends that his appeal has merit. He says that, because he was not cross-examined on his affidavit, his evidence about his claim to the HST Refund was uncontroverted and ought to have been believed by the motion judge. He argues that DUCA lacks standing to bring the motion for security for costs. Finally, he says that an order for security for costs should not be made against him because he was "forced into" the jurisdiction: see *Diversitel Communications Inc. v. Glacier Bay Inc.* (2004), 181 O.A.C. 6, at para. 8 (C.A.).

[36] I am satisfied that each of the Receiver and DUCA is entitled to security for costs of Myara's appeal. The appeal appears to have little chance of success. Myara seeks to overturn the motion judge's factual findings, which were made on a compelling record with little, if anything, to support Myara's claim and much to contradict it.

[37] The fact that DUCA is a respondent to Myara's appeal and that Myara seeks costs of the appeal and of his motion in the court below from DUCA, is sufficient to satisfy the standing requirement for its motion for security for costs.

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[2] They also contend that Myara has no standing to appeal the repatriation order. That issue was directed by Roberts J.A. on consent to be heard by the panel hearing the appeal.

[38] Myara's reliance on the *Diversitel* case is misguided. In that case, this court considered a motion for security for costs of an appeal under r. 61.06(1)(b), which allows this court to make an order for security for costs where it appears that "an order for security for costs could be made against the appellant under rule 56.01". Interpreting the combined effect of those provisions, this court in *Diversitel* held that r. 61.06(1)(b) is confined to making an order for security for costs against an appellant who was the plaintiff or applicant in the initial proceeding. A respondent on appeal may not rely on rule 61.06(1)(b) to obtain an order for security for costs against an appellant who was the defendant or respondent in the initial proceeding. Armstrong J.A. explained that "[t]he policy rationale is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others." See also *Donaldson International Livestock Ltd. v. Znamensky Selekcionno Gibridny Center LLC*, 2010 ONCA 137.

[39] Here, the motions are brought under r. 61.06(1)(a), which permits security for costs to be ordered against an appellant where there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal. Application of this subrule is not restricted to appeals by appellants who were plaintiffs or applicants in the initial proceedings. In any event, Myara was not "forced into" court by

anyone. He brought himself into the jurisdiction to assert a claim to the HST Refund proceeds, by attempting to intervene in the motion below.

[40] I fix the amount to be paid by Myara as security for the costs of his appeal in the sum of $15,000 for each of the Receiver and DUCA. This is a reasonable estimate of the party and party costs each of these respondents might expect to recover if successful in responding to Myara's appeal.

E. DISPOSITION

[41] For the foregoing reasons, Revital's motion for leave to appeal the Order is dismissed and the Receiver's and DUCA's motions for security for costs are granted. I order Myara to pay into court as security for the costs of his appeal the sum of $30,000 on or before May 2, 2015, failing which a judge of this court may dismiss the appeal on motion. No assets covered by the Receivership Order may be disposed of or pledged in order to post security for costs.

[42] The Receiver and DUCA shall have their costs of responding to Revital's motion fixed in the sum of $10,000 each, inclusive of HST and disbursements. The Receiver and DUCA shall have their costs of their motions for security for costs against Myara fixed in the sum of $5,000 each, inclusive of HST and disbursements. These costs amounts are inclusive of the costs of the March 27, 2016 attendances before Roberts J.A.

K. van Rybroek J.A.