COURT OF APPEAL FOR ONTARIO

CITATION: Leon v. Dealnet Capital Corp., 2023 ONCA 744
DATE: 20231107
DOCKET: M54495 & COA-23-OM-0185

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

John Leon

Appellant

and

Dealnet Capital Corp.

Respondent

and

Parkdale Community Legal Services

Intervenor

Ruth Wellen, for the intervenor

Craig R. Colraine and Freeman Choi, for the appellant

David N. Vaillancourt, for the respondent

Heard: November 3, 2023

REASONS FOR DECISION

Overview

[1] Parkdale Community Legal Services ("PCLS") brings this motion for leave to intervene as a friend of the court pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It is brought in the context of a motion for leave to appeal from a decision of a single judge of the Divisional Court dismissing an appeal of an order staying an action pursuant to s. 7(1) of the *Arbitration Act*, *1991*, S.O. 1991, c. 17 ("*AA*").

[2] The underlying motion for leave to appeal relates to an employment dispute. The moving party, Leon, was an employee of the responding party, Dealnet. After Leon resigned, a dispute arose relating to his entitlement to a performance bonus. The employment contract contained a binding arbitration clause, which provided that all disputes must be arbitrated. It also contained a "Governing Law" clause that said that the contract shall be subject to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and that "if the employee is entitled to any rights or payments under that legislation which are not referenced in this Agreement or which exceed the amounts payable under this Agreement, the provisions of that legislation shall supersede the provisions of this Agreement."

[3] Leon commenced a civil claim to recover a portion of the performance bonus. Dealnet brought a motion under s. 7(1) of the *AA* to stay the action on the basis that the dispute had to be resolved by arbitration. The action was stayed by

McAffee A.J. Leon appealed to the Divisional Court. The proposed intervener on the present motion, PCLS, sought and was granted intervener status in the Divisional Court. The Divisional Court found that the appeal was barred by s. 7(6) of the *AA*, which provides that there is no appeal of a s. 7 stay decision.

[4] Leon now seeks leave to appeal to this court. The primary issues in dispute, as framed by Leon in his factum, relate to:

> questions of law regarding the interpretation of legislation, the clarification of principles regarding the inability of employers to contract out of the provisions of the ESA, and the application or inapplication of the statutory bar to appeals of decisions made pursuant to the *AA* which are of public importance.
>
> If leave to appeal is granted, the issue as to whether s. 7(6) of the *AA* can apply to bar an appeal of a decision made on a motion pursuant to s. 7(1) of the *AA*, but to which the *AA* does not apply, will be settled.

[5] While appeals from decisions properly made pursuant to s. 7 of the *AA* are barred by virtue of s. 7(6) of the *AA*, Leon maintains that because the decision in this case was not properly made pursuant to the *AA*, the Divisional Court was wrong in finding that he was jurisdictionally barred from bringing an appeal. Leon maintains that, pursuant to this court's decision in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, 145 O.R. (3d) 181, the arbitration clause in his Employment Agreement is void in that it constitutes an impermissible attempt to contract out of the *ESA*. He contends that the authorities relied upon by the Divisional Court to find a lack of jurisdiction are distinguishable from this case.

[6] Leon argues that the questions raised on the leave to appeal motion "transcend the rights of the parties and engage issues of public importance relating to the enforceability of mandatory arbitration clauses in the employment agreements."

[7] The proposed intervener takes a similar position. PCLS argues that this court will need to determine how to interpret and reconcile its prior authorities and determine how they intersect and apply in this case.

[8] PCLS is a well-recognized community legal clinic that provides free legal services to members of the Parkdale and Swansea communities in the areas of employment, immigration, social assistance and housing. The clinic has a Workers' Rights Division, which assists workers in filing claims under the *ESA*. They also work on workers' movements, law reform campaigns, and policy advocacy.

[9] PCLS seeks leave to intervene on the leave to appeal application to make submissions on:

a. the impact that a narrow interpretation of Heller will have on vulnerable and low-wage workers;

b. the importance of the right to appeal decisions that bar vulnerable and low-wage workers from exercising statutory rights under the *ESA*;

c. the broad and remedial purpose of the *ESA*, which is designed to remedy unequal bargaining powers; and

> d. the distinct body of contractual interpretation principles that apply to agreements in the employment context.

[10] Though this motion is on the consent of Leon, and Dealnet does not oppose the motion, the parties were invited to make oral submissions about why PCLS's intervention should be permitted at this early stage, specifically on the motion for leave to appeal.

[11] In *McFarlane v. Ontario (Education)*, 2019 ONCA 641, at para. 3, Nordheimer J.A. made the following observation with which I agree: "[G]ranting intervener status on a motion for leave to appeal should be a rare and extraordinary event." In making that observation, he relied on *ING Canada Inc. v. Aegon Canada Inc.*, [2004] S.C.C.A. No. 50, at p. 601, where LeBel J. noted that interventions in support of leave to appeal applications should be "exceptional" and "should not be encouraged".

[12] The fact is that, in meeting the threshold test for leave to appeal to this court, the moving party must address a standard test, one that extends beyond whether there has been an error of law or mixed law and fact in the decision from which leave to appeal is sought. Where applicable, the moving party should also address other issues, including whether the proposed appeal raises an issue of public importance: *Re Sault Dock Co. Ltd. v. City of Sault Ste. Marie* (1973), 2 O.R. 479 (C.A.).

[13] PCLS argues that this case is more akin to *2016596 Ontario Inc. v. Ontario (Minister of Natural Resources)*, [2003] O.J. No. 2905 (C.A.). In that case, this court granted intervener status both on a motion for leave to appeal and, if leave to appeal were to be granted, on the appeal proper. In *2016596*, O'Connor A.C.J.O. specifically noted that there was an allegation by the respondent on the leave motion that the moving party had failed to provide evidence of the public importance of the proposed appeal. There is a similar allegation here, but it is not borne out by the record. Not only does the moving party's factum in this leave to appeal motion address the public interest, but there is also evidentiary support for the far-reaching consequences of the legal issue touching on Ontario employees that must be resolved should leave to appeal be granted. As such, with submissions of the moving party and the responding party, the panel hearing the motion for leave to intervene will be well equipped to determine if the motion meets the test for granting leave to appeal, which includes consideration of, but is not limited to, the public importance of the issue.

[14] While I would not rule out the possibility that extraordinary circumstances may arise where an intervener could assist with the question of public interest in the context of a motion for leave to appeal, this is not one of those very rare cases. Submissions on the public importance of this motion for leave to appeal are already made in the moving party's factum. In my view, the PCLS has not met the high onus of establishing that their contribution is necessary at this stage.

Disposition

[15] The motion for leave to intervene is dismissed. Nothing in these reasons should be interpreted as foreclosing PCLS from seeking leave to intervene on the appeal, should leave to appeal be granted. I order no costs.

"Fairburn A.C.J.O."