CITATION: Cao v. Monkhouse Law Professional Corporation, 2024 ONSC 196
COURT FILE NO.: CV-19-00629462-0000
DATE: 20240110

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Suyi Cao, Plaintiff/Moving Party

-and-

Monkhouse Law Professional Corporation, Defendant/ Moving Party

BEFORE: L. Brownstone J.

COUNSEL: *M. Olanyi Parsons*, for the Plaintiff

Mathieu Bélanger, for the Defendant

HEARD: January 8, 2024

ENDORSEMENT

[1] These two motions arise out of Monkhouse Law Professional Corporation's work for Ms. Cao in a wrongful dismissal action. Ms. Cao owes Monkhouse $45,000 for its work. She asks the court to stay enforcement of the order requiring her to pay that amount until her breach of contract action against Monkhouse is concluded. Monkhouse asks that her motion be dismissed, and brings its own motion to dismiss her action against it as an abuse of process.

[2] Monkhouse was engaged through a contingency fee agreement to represent Ms. Cao in a wrongful dismissal action against her former employer in 2016. In 2017, Ms. Cao received an offer to settle the wrongful dismissal action, which Monkhouse advised her to accept. Ms. Cao did not want to accept the offer. Relations between Monkhouse and Ms. Cao broke down and in August 2017 Monkhouse gave notice that it was terminating its retainer. Monkhouse issued an invoice to Ms. Cao, who referred the account to an assessment officer. Ms. Cao opposed the confirmation of the assessment report on the basis that the assessment officer had no jurisdiction over a contingency fee agreement. The Superior Court agreed with her jurisdictional argument, and then conducted its own assessment after which it ordered Ms. Cao to pay Monkhouse $45,000 inclusive of HST and disbursements. This decision of Dawe J. (as he then was), reported at *Cao v. Monkhouse Law Professional Corporation*, 2020 ONSC 1088, was affirmed by the Divisional Court whose decision is reported at *Cao v. Monkhouse Law Professional Corporation*, 2021 ONSC 7894. The Court of Appeal and Supreme Court of Canada both denied Ms. Cao's motions for leave to appeal.

[3] In the meantime, in 2019, Ms. Cao started an action for breach of contract against Monkhouse.

Ms. Cao's motion to stay

[4] Ms. Cao asks the court to stay the enforcement of the order of Dawe J. pending the disposition of her civil suit against Monkhouse. She relies on s. 101 of the *Courts of Justice Act* and Rule 40 of the Rules of Civil Procedure. Section 101 permits the court to grant an interlocutory injunction.

[5] Ms. Cao argues that she meets the test for an interlocutory injunction set out in *RJR MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 that there is a serious issue to be tried, that failure to order the stay will result in irreparable harm and that the balance of convenience favours the granting of the stay.

[6] I note that Ms. Cao is not seeking an interlocutory injunction in an action or application in which she seeks an injunction as a final order. She seeks an order staying the enforcement of an order in a case that is final – it has been affirmed by the Divisional Court, and leave to appeal to both the Court of Appeal and the Supreme Court of Canada has been denied.

[7] I agree with the defendant that Ms. Cao is asking this court to stay a final order made by a different court. The defendant argues that this court does not have the jurisdiction to do so: *Lynch v Segal*, 2007 CanLII 56485 (ON SC) at paras. 43-47.

[8] I find that the court does have the authority to do so under s. 106 of the *Courts of Justice Act* RSO 1990 c. C.43. As Chalmers J. recently stated in *2650795 Ontario Inc. v. 2524991 Ontario Corporation et al*, 2023 ONSC 3139:

> [27] Section 106 of the *CJA* applies to a stay of a final order or judgment: *1852998 Ontario Ltd. v. Halton Condominium Corp.*, 2021 ONSC 6566, at paras. 24-42. The Court of Appeal recently confirmed that the general authority of the court to stay a proceeding, pursuant to s. 106 of the *CJA*, can be applied to the enforcement of a judgment: *Peerenboom v. Peerenboom*, 2020 ONCA 240, at para. 30.
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> [28] In the case of a stay of final order, a more stringent test than the ordinary three-part *RJR-McDonald* applies: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, [2003] O.J. No. 6300 (Div. Ct.); aff'd [2005] O.J. No. 118 (CA) (*Carlisle*), at para. 10. The stay of the execution of a judgment may be granted in rare circumstances, where the moving party establishes the following:
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> 1. Continuance of the proceeding through execution would amount to injustice because it would be oppressive, vexatious or an abuse of the Court's process; and,

> 2. The stay does not cause an injustice to the party entitled to judgment: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, at para. 30, and *Peerenboom v. Peerenboom*, at para. 34.

[29] A stay is to be used only in rare circumstances. As stated by Cunningham A.C.J. in *Carlisle*:

> There is good reason for the bar to have been set so high. As the earlier authorities have so often stated, judgments ought to be considered final and creditors should have unencumbered rights of enforcement. For a defendant to be able to raise equitable grounds at that stage would derogate from the notice of finality. It would frustrate commercial enterprise and needless to say would encourage a whole new area of litigation.
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> […]
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> Accordingly, we have concluded that in very rare circumstances there is discretion under s. 106 of the *CJA* to stay the enforcement of a final judgment. This discretion ought to be used very sparingly and only in circumstances where it could not be found that not only would it be oppressive or vexatious or an abuse of process of the court, but also in circumstances where it would not cause an injustice to the plaintiff: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, at paras. 7 and 10.

[9] That is, it is not the test in *RJR MacDonald* that applies to Ms. Cao's request for a stay, but the high bar established by the two-part test enunciated above. To stay the enforcement of a final order, the court must find that permitting execution would amount to an injustice because it would be oppressive, vexatious or an abuse of the Court's process and that the stay does not cause an injustice to the party entitled to judgment. Ms. Cao must satisfy both branches of that test.

[10] I find she has satisfied neither.

[11] Ms. Cao argues that it would be oppressive, vexatious or an abuse of process to permit Monkhouse to enforce its order. She points to Monkhouse's plan to have her residence, which she owns jointly with her elderly parents, sold to satisfy its judgment as evidence of its vexatious conduct. She states that selling the house would cause irreparable harm, and that in this respect it differs from enforcement proceeding such as wage garnishment. She further argues that Monkhouse's move to find her in contempt for not attending examinations in aid of execution are oppressive and vexatious.

[12] These arguments ignore the following facts.

[13] Monkhouse indicated it would proceed with the sale of the residence when Ms. Cao did not offer to satisfy her debt in any other way. Ms. Cao failed to attend three examinations in aid of execution. Monkhouse may therefore be limited in its knowledge of other assets on which the debt owing to it can be realized.

[14] Further, as noted above, "judgments ought to be considered final and creditors should have unencumbered rights of enforcement" except in rare cases. Monkhouse is seeking to obtain funds for work done in 2016 and 2017 that were adjudged in 2020 as being owed to them. Ms. Cao asked the Divisional Court not to make the order enforceable until her underlying wrongful dismissal action was concluded and/or until the civil suit for breach of contract (this action) was finally disposed of. It declined to do so. She asked the Supreme Court of Canada to stay the order pending appeal or pending the final disposition of her breach of contract case. No such order was forthcoming. There can be nothing abusive or vexatious about Monkhouse seeking to enforce this final order. This is not a case like that in *2650795 Ontario Inc.* where it appeared that the party seeking enforcement was inhibiting the debtor's ability to realize upon an asset that would allow it to pay its debt.

[15] Nor do I accept Ms. Cao's argument that a stay would not cause an injustice to Monkhouse. She claims that Monkhouse put forward no evidence that the impact of the granting of a stay would have on it, while she put forward evidence that failure to grant a stay would cause her irreparable harm. I find that there is injustice to Monkhouse in being unable to enforce a judgment it obtained in 2020 until the outcome of a separate action. Monkhouse has a final court order permitting it to receive payment for work it did in 2016 and 2017. It has responded to an appeal of that order and to two further leave applications in respect of that order. As Dawe J. noted in February 2020 in denying Ms. Cao's request to adjourn the assessment until after her employment case was completed, "the further delay Ms. Cao seeks would be manifestly unfair to Monkhouse, which has already waited for more than two years to be paid for the extensive work it did on Ms. Cao's behalf." It is now well over six years since Monkhouse got off the record in Ms. Cao's action.

[16] In sum, I do not find that this is one of those rare cases where enforcement of a final judgment should be stayed. I do not find that Ms. Cao has met either branch of the conjunctive test set out above.

[17] Her motion to stay the enforcement of the order is dismissed.

Monkhouse's motion to dismiss Ms. Cao's claim

[18] Ms. Cao's Statement of Claim seeks damages for breach of contract and breach of fiduciary duty against Monkhouse, in addition to punitive damages, costs and interest. She asserts that Monkhouse wrongfully terminated the solicitor-client relationship contrary to its obligations under the Law Society's Rules of Professional Conduct. She claims Monkhouse had no legitimate reason to withdraw its services, nor should it have threatened to terminate its contingency fee retainer agreement if she did not accept a settlement offer.

[19] Monkhouse moves to dismiss Ms. Cao's claim against it under Rule 21.01(3)(d) or under the court's inherent jurisdiction to control its own process. It states that the claim is an abuse of

process as it is an attempt to relitigate issues that have already been determined by the court. It argues that collateral attacks on prior court orders are an abuse of process, and that Ms. Cao seeks to collaterally attack the order of Justice Dawe. Further, Monkhouse argues that Ms. Cao's claim is barred by issue estoppel.

[20] In the alternative, Monkhouse asks the court to strike out the claim under Rule 21.01(b) as disclosing no reasonable cause of action. Monkhouse argues that it is plain and obvious that Ms. Cao's action has no reasonable chance of success.

[21] Issue estoppel applies where the same question has been previously decided, where the judicial decision said to create the estoppel was final, and where the parties to the decision are the same as the parties in the proceeding where estoppel is raised: *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514.

[22] There is no question that Dawe J.'s decision is final and that the parties are the same. Both parties agree that the question to be determined by the court is whether Dawe J.'s decision on the assessment has already decided the issues Ms. Cao seeks to litigate in this action. To determine this, I will review the Statement of Claim and the decision of Dawe J.

[23] Ms. Cao claims that Monkhouse wrongly threatened to withdraw services and to issue an invoice, and that it tried to pressure her into accepting the settlement offered by her former employer. She claims Monkhouse wrongfully terminated the contingency fee agreement and had no legitimate reason to withdraw its services. She pleads that Monkhouse's actions constituted a breach of the implied duty of good faith and honest dealing. Ms. Cao acknowledges in her pleading that the retainer agreement permitted termination if the client failed to follow Monkhouse's advice, did not co-operate with a reasonable request, or did not reply within a reasonable time. She claims that Monkhouse would have to prove that she engaged in any of the behaviours that would permit it to terminate the contract and that it is unable to do so. Therefore, Monkhouse breached the contract. Ms. Cao also pleads that Monkhouse breached its fiduciary obligations to her and the duties of good faith and honest dealing for the same reasons.

[24] Ms. Cao argues that Dawe J.'s decision was primarily concerned with the issue of jurisdiction and whether the retainer agreement was a contingency agreement, and states that he did not deal with the issues she has pleaded about Monkhouse's conduct.

[25] Certainly, the jurisdictional question was the focus of the initial part of Dawe J.'s decision. However, having found that the agreement was a contingency agreement, and that the assessment officer therefore lacked jurisdiction, Dawe J. went on to conduct his own assessment. He did so over Ms. Cao's objections, who wished the assessment to be determined by a different judge after her wrongful dismissal action was determined. Dawe J. relied extensively on the factual findings of the assessment officer, to which Ms. Cao did not object.

[26] Dawe J. noted that the contingency agreement did not comply with certain requirements of the *Solicitors Act*, R.S.O. 1990, c. S.15, but held he did not need to determine whether the agreement was therefore entirely unenforceable. This was because whether Monkhouse was entitled to fees under the agreement or on a *quantum meruit* basis, the same factors would be

considered and weighed. These factors include the time expended, the complexity of the matter, the degree of skill and competence demonstrated by the solicitor and the reasonable expectation of the client as to the amount of fees.

[27] Dawe J. found that the terms of the retainer agreement were clearly laid out for Ms. Cao in writing, and there was no suggestion that she was duped or pressured into agreeing to its terms. He adopted the assessment officer's analysis that Ms. Cao, as a sophisticated and well-educated client, would have understood that her decision not to take Monkhouse's advice to accept the offer would entitle Monkhouse to terminate the retainer and bill her based on work actually done. He also accepted "that Ms. Cao would have known that this would trigger 'higher cost implications'". Dawe J. also referred to the following findings of the assessment officer:

> There is no doubt that [Ms. Cao] was a "demanding client" as evidenced by the extensive amount of communications. There is no doubt that [Ms. Cao] ultimately, and with ample warning, caused the termination of the retainer agreement and brought on the higher cost implications upon herself.

[28] I find that Dawe J. dealt with the matter of breach of the retainer agreement. Ms. Cao's claims are all based on what she states was a wrongful termination of the agreement by Monkhouse. However, Dawe J. found that Ms. Cao's conduct caused the termination of the agreement. Justice Dawe also found that Ms. Cao's actions entitled Monkhouse to terminate the agreement and that Ms. Cao understood that her decision not to take Monkhouse's advice to accept the offer would entitle Monkhouse to terminate the retainer, in accordance with the agreement. Implicit in his finding is his conclusion that Monkhouse's decision to terminate the retainer was not wrongful. It was Ms. Cao's conduct that Dawe J. found to be the basis for the fees that he assessed and awarded. These findings of Dawe J. cannot co-exist with a finding by a different court that Monkhouse wrongfully terminated the agreement.

[29] Despite the able arguments of counsel for Ms. Cao, I therefore find that the same questions that Ms. Cao seeks to put forward in her Statement of Claim have already been decided by Dawe J. Therefore, the elements of issue estoppel are satisfied, and it would be an abuse of process to permit the claim to proceed. The action is therefore dismissed.

[30] I note that having determined the action is dismissed, Ms. Cao's motion for a stay pending the disposition of the action would have become moot. However, I have dealt with that motion on its merits to make it clear that even if I had not stayed the action, I would have dismissed Ms. Cao's motion for a stay of enforcement of the order in the assessment proceedings.

Conclusion

[31] Ms. Cao's motion for a stay is dismissed. Monkhouse's motion to dismiss Ms. Cao's actions is granted.

[32] The parties are encouraged to agree upon costs. If they are unable to do so, the defendant may send a maximum of three pages of submissions, plus any offers to settle, to my assistant within 7 days. The plaintiff may respond with the same page limits within 7 days thereafter. There will

be no reply submissions without leave. Submissions may be sent to my assistant at linda.bunoza@ontario.ca

L. Brownstone J.

Date: January 10, 2024