COURT OF APPEAL FOR ONTARIO

CITATION: Storoszko & Associates v. 1489767 Ontario Limited, 2024 ONCA 147
DATE: 20240227
DOCKET: M54690 (COA-23-CV-0990)

Lauwers, Miller and Harvison Young JJ.A.

BETWEEN

Storoszko & Associates

Plaintiff
(Respondent/Moving Party)

and

1489767 Ontario Limited and Donald Barry Hughes*

Defendants
(Appellant/Responding Party*)

Robert B. Macdonald, for the respondent/moving party

Benjamin Salsberg, for the appellant/responding party

Heard: February 21, 2024

On appeal from the order of Justice Jamie K. Trimble of the Superior Court of Justice, dated August 4, 2023.

REASONS FOR DECISION

[1] On June 24, 2018, Trimble J. granted default judgment in this mortgage action in favour of Storoszko & Associates ("Storoszko"), which then sought to petition Donald Hughes into bankruptcy. Mr. Hughes moved to vary the judgment

under r. 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 on April 26, 2021, returnable on June 22, 2021. Trimble J. made an order dismissing the motion to vary, which Mr. Hughes has appealed to this court.

[2] The moving party on the motion before us, Storoszko, argues that this court lacks jurisdiction to hear Mr. Hughes' appeal because the order under appeal is interlocutory: *Gallen v. Sutherland*, 2023 ONCA 170, at para. 5; *Elguindy v. Elguindy*, 2021 ONCA 768, at para. 4. If the order is interlocutory, then any appeal is to the Divisional Court with leave of that court under s. 19 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[3] Although Mr. Hughes brought the motion to vary the original judgment under r. 59.06, we agree with his counsel that the motion judge dealt with it as a motion to vary the judgment under r. 19.08, which expressly permits a motion to vary a default judgment. While the motion judge mistakenly referred to r. 19.02 in his reasons, his analysis in substance reflects the proper approach under r. 19.08. The factors the motion judge listed and applied were the factors that this court has set out for the determination of whether a default judgment should be set aside or varied under r. 19.08: *Mountain View v. McQueen*, 2014 ONCA 194, 119 O.R. (3d) 561, at paras. 47-49.

[4] The dismissal of a motion to vary a final judgment is axiomatically itself a final judgment. Therefore, the appeal lies to this court. The motion to quash is dismissed.

[5] However, this court will not permit its process to be used and abused as an instrument for prolonging a procedural morass. We asked counsel to address whether the appeal should be summarily dismissed as an abuse of this court's process. Counsel for Mr. Hughes argued, among other things, that the bankruptcy court sanctioned this process and therefore it cannot be an abuse of process. We do not accept his arguments.

[6] The context is notable. Sitting as a bankruptcy court judge on a 9:30 a.m. appointment on May 3, 2021, Patillo J. gave this direction: "Adjourned to a date to be set by counsel for scheduling following completion of a motion that is set to be heard in Brampton on June 22/21." The motion Patillo J. was referring to was brought almost three years after Mr. Hughes was initially noted in default and led to the order under appeal. The motion judge found that Mr. Hughes provided no explanation for this lengthy delay and dismissed the motion in part on that basis. Mr. Hughes now seeks to delay further by appealing that order instead of addressing the matter in bankruptcy court. The delay resulting from these machinations has been considerable and does no credit to the civil justice system.

[7] In addition to the delay, this appeal also raises concerns of prejudice to Storoszko and judicial economy. The motion judge's findings on these points in his discussion of r. 19.08 are pertinent. On the issue of prejudice, the motion judge found that allowing the motion to vary the judgment would prejudice Storoszko because it would be forced to undertake two procedures in the same underlying dispute – the r. 19.08 motion and then the bankruptcy proceeding. He also found that sanctioning duplicative processes would negatively affect the integrity of the administration of justice. We agree.

[8] Even if Mr. Hughes is completely successful in his challenges to the amounts charged as shortfalls in the mortgage action, we understand that his liabilities will still exceed his assets and a date in bankruptcy court seems inevitable. On that basis, the proper venue for addressing a dispute about the final debt is the bankruptcy court, where Mr. Hughes will have the ability to have his challenges addressed. An appeal will simply add cost, complexity, and delay.

[9] To repeat for emphasis, this court will not permit its process to be used and abused as an instrument for prolonging a procedural morass. As this court explained in *Lochner v. Ontario Civilian Police Commission,* 2020 ONCA 720, at para 27, "Although a statutory court, this court has implicit powers that derive from its power to control its own process": citing *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695, 87 O.R. (3d) 660, at para. 24; and *R. v.*

Church of Scientology (1986), 1986 CanLII 4633 (ON CA), 25 C.C.C. (3d) 149 (Ont. C.A.), at pp. 150-151. The court's powers extend to "all powers that are reasonably necessary to accomplish its mandate" or, stated differently, "the powers necessary to perform its intended functions": *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 70.

[10] We dismiss the appeal summarily as an abuse of this court's process, without prejudice to Mr. Hughes' right to contest before the bankruptcy court the amounts owing under the mortgage that gave rise to the judgment under appeal.

[11] Costs are awarded to the respondent/moving party, Storoszko, in the amount of $6,000, all-inclusive.

"P. Lauwers J.A."
"B.W. Miller J.A."
"A. Harvison Young J.A."