COURT OF APPEAL FOR ONTARIO

CITATION: Cardillo v. Medcap Real Estate Holdings Inc., 2024 ONCA 278
DATE: 20240415
DOCKET: M54764 (COA-23-CV-1187)

Harvison Young, Coroza and Gomery JJ.A.

In the Matter of the Bankruptcy of Medcap Real Estate Holdings Inc.
of the City of Brampton, in the Province of Ontario

BETWEEN

John Cardillo, 2503866 Ontario Inc., 1869541 Ontario Inc.
and Bodypro Gym Inc.

Respondents
(Moving Parties/Appellants)

and

B. Riley Farber Inc., Trustee in Bankruptcy of the Estate of Medcap Real Estate Holdings Inc.*; Bennington Financial Corp.; Heffner Investments Limited; Scott Wilson and Physiomed Health Holdings Inc.

Applicants
(Responding Party*/Respondents)

F. Scott Turton, for the moving parties

Brandon Jaffe, for the responding party, B. Riley Farber Inc., Trustee in Bankruptcy of the Estate of Medcap Real Estate Holdings Inc.

Michael Krygier-Baum, for the respondents Bennington Financial Corp., Heffner Investments Limited, Scott Wilson and Physiomed Health Holdings Inc.

Heard: April 4, 2024

REASONS FOR DECISION

[1] In this motion, the moving parties/appellants (the “Cardillo Parties”) asked this court to review a decision made by a single judge of this court. The chambers judge allowed the motion brought by the Trustee in Bankruptcy of Medcap Real Estate Holdings (“Medcap”), B. Riley Farber Inc. (the “Trustee”), holding that the Cardillo Parties do not enjoy an automatic right of appeal to this court from the decision of Kimmel J., under ss. 193(a)-(d) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“BIA”), and denying leave to appeal pursuant to s. 193(e) of the BIA.

[2] At the end of the hearing before the panel, the Cardillo Parties were advised that their motion was dismissed with brief reasons to follow. These are those reasons.

FACTS

[3] The chambers judge set out the factual context for this motion in his reasons and it need not be repeated in detail here. In short, this motion relates to Medcap’s bankruptcy proceedings, which are taking place on the Toronto Region Commercial List.

[4] John Cardillo is Medcap’s principal. Medcap’s largest known asset is a commercial building located in Hamilton (the “Property”). Five mortgages are registered against the Property and the Property has been leased to 1869541 Ontario Inc. (“186”).

[5] Within the bankruptcy proceedings, the Trustee has brought a motion challenging the lease to 186 as a transfer at undervalue (the “TUV Motion”).

[6] In addition to the bankruptcy proceedings, the Cardillo Parties brought an action in Hamilton (the “Foreclosure Action”) relating to their alleged rights under several of the mortgages, including a mortgage allegedly assigned to 2503866 Ontario Inc. (“250”). The Trustee and the respondents (all of whom are respondents to the Foreclosure Action) challenged 250’s rights under this mortgage, described by Kimmel J. as the “250 Mortgage Dispute”.

[7] The Trustee brought a motion before Kimmel J. to transfer the Foreclosure Action, or the aspects of it involving the 250 Mortgage Dispute, to the Toronto Region Commercial List to be adjudicated by the same judge at the same time as the Trustee’s TUV Motion in the bankruptcy proceeding.

[8] The Cardillo Parties brought a cross-motion to transfer the TUV Motion (and the entire bankruptcy proceeding) to Hamilton, where it could be case managed alongside the Foreclosure Action and other Hamilton litigation involving the Property.

[9] Kimmel J. found the factors favouring consolidation of the Foreclosure Action, the 250 Mortgage Dispute and the TUV Motion to be compelling. She rejected the cross-motion that the bankruptcy proceeding and the TUV Motion be transferred to Hamilton. She found that the just, most expeditious, and least

expensive determination of the disputes between the parties would be to order the 250 Mortgage Dispute to be adjudicated as a trial of an issue in the bankruptcy proceeding in Toronto. She also ordered that the 250 Mortgage Dispute in the Foreclosure Action be stayed.

[10] The Cardillo Parties filed a Notice of Appeal in this court and the Trustee brought a motion to dismiss the appeal on the basis that the Cardillo Parties did not have an automatic right of appeal under ss. 193(a) or (c) of the BIA, but rather required leave, and that leave should be denied. The Cardillo Parties argued that they did have an automatic right of appeal and that granting the relief requested by the Trustee would "finally determine" their appeal, which can only be done by a three-judge panel.

DECISION BELOW

[11] The chambers judge allowed the Trustee's motion, finding that there was no automatic right of appeal and denying the Cardillo Parties leave to appeal.

[12] The chambers judge found that Kimmel J. had simply directed where the adjudication of certain rights should take place, and that this was a procedural determination. He found that the case law was clear that there is no right of appeal in s. 193(a) and (c) from procedural determinations: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at

paras. 15, 18; *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635, at paras. 20-23, 54-58.

[13] The chambers judge found that there is well-established jurisprudence accepting that a single judge has authority to determine whether a party has a right of appeal under ss. 193(a)-(d) of the BIA or whether leave is required under s. 193(e), and, if leave is required, whether it should be granted: see e.g., *Pine Tree Resorts*; *Robson (Re)* (2002), 33 C.B.R. (4th) 86 (Ont. C.A.). He rejected the Cardillo Parties' assertion that a three-judge panel was required pursuant to r. 61.16(2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and s. 7(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). Section 193(e) of the BIA explicitly grants a single judge the authority to grant or deny leave to appeal, while r. 61.16(2.2) of the *Rules* (and s. 7(3) of the CJA) requires that a motion in this court for an order that finally determines an appeal, other than an order dismissing the appeal on consent, must be heard by a three-judge panel. The chambers judge found that the doctrine of paramountcy operates to resolve the conflict between these provisions in favour of the federal BIA.

[14] The chambers judge further found that determining whether there is a right of appeal under ss. 193(a)-(d) of the BIA is a necessary preliminary step in the judicial process of deciding whether to exercise the statutory authority conferred by s. 193(e) on a single judge to grant leave.

[15] Finally, the chambers judge denied leave to appeal. He found that the appeal did not raise any issue of general importance to the practice of bankruptcy or insolvency matters, that the proposed appeal lacked merit, and that it would hinder the progress of the bankruptcy proceedings.

ANALYSIS

[16] The Cardillo Parties raise two main issues on this motion: first, whether the chambers judge was correct that a single judge can make an order that an appeal is not of right but rather requires leave and then go on to deny leave; and second, whether it was procedurally unfair that the chambers judge denied leave to appeal without affording the Cardillo Parties an opportunity to have a leave motion.

[17] With respect to the first issue, the Cardillo Parties argue that there is no conflict between s. 193(e) of the BIA and r. 61.16(2.2) because, while s. 193(e) of the BIA deals with motions for leave to appeal, r. 61.16(2.2) does not.

[18] In their view, a single judge is permitted to determine whether leave to appeal should be granted where a motion is brought under s. 193(e) of the BIA because, at that stage, no appeal exists until leave is granted. A decision by a single judge under s. 193(e) of the BIA does not, therefore, “finally determine” an appeal, since there is no appeal when the decision is made. As such, r. 61.16(2.2) is not engaged in that circumstance.

[19] On the other hand, the Cardillo Parties say that where a party appeals as of right and no leave to appeal is requested, an appeal has come into existence. Any motion to dismiss it, even by arguing that it requires leave, would finally determine the appeal, therefore requiring a panel pursuant to r. 61.16(2.2).

[20] On this view, since the Cardillo Parties did not file a motion for leave to appeal, they argue that their appeal has come into existence and the chambers judge, by denying leave to appeal, “finally determined” the appeal, which only a panel can do.

[21] The Cardillo Parties further argue that their Notice of Appeal also based jurisdiction of this court on Kimmel J.’s stay order in the Foreclosure Action. They argue that this is a final order in a non-bankruptcy proceeding and that they have an automatic right of appeal under s. 6 of the CJA.

[22] With respect to the second issue, the Cardillo Parties argue that Kimmel J.’s decision was not simply procedural because the stay order affected the Cardillo Parties’ ability to enforce their mortgages. They further submit that it was procedurally unfair for the chambersjudge to deny leave to appeal when they had not had a chance to bring a motion for leave. They argue that they have not done so because the motion for leave was not properly heard until there was a signed and entered order of Kimmel J.

[23] We do not agree with these submissions.

[24] It is well established that, on a panel review of the order of a single judge pursuant to s. 7(5) CJA, the panel may interfere with the order if the chambers judge failed to identify the applicable principles, erred in principle or reached an unreasonable result: *DeMarco v. Nicoletti*, 2017 ONCA 417, at para. 3; *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 21; *Struik v. Dixie Lee Food Systems Ltd.*, 2018 ONCA 22, at paras. 5-6. *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 18.

[25] None of these grounds exist here.

[26] In the course of extensive and careful reasons, the chambers judge addressed every ground raised by the Cardillo Parties. He specifically considered whether his decision would “finally determine” the appeal and found that it did not, relying on the clear provisions of s. 193(e) of the BIA. As such, he found that an order denying leave to appeal under s. 193(e) of the BIA would not fall within the language of r. 61.16(2.2). Moreover, as he found, even if it did, r. 61.16(2.2) could not be given effect in the circumstances due to the constitutional doctrine of paramountcy, which he referred to as the “more important reason” that r. 61.16(2.2) cannot affect the authority of a single judge under s. 193 of the BIA. There is no error in principle with these findings.

[27] The fact that the issue of leave was raised via a challenge to the asserted right of appeal, rather than by way of a motion for leave to appeal, does not affect

a single judge's authority to make a determination of whether leave should be granted. That decision is still made pursuant to s. 193(e) of the BIA and therefore any conflict with r. 61.16.(2.2) is resolved in favour of the federal BIA.

[28] This analysis does not change simply because the Cardillo Parties have also appealed the stay order in the non-bankruptcy proceeding. As the chambers judge found, paramountcy operates to give a single judge the power to make a determination of whether to grant or deny leave where the BIA is involved. Since the appeal in this case also stems from an order under the BIA, paramountcy applies and a panel is not required, notwithstanding that the order affected a non-bankruptcy proceeding.

[29] We similarly do not agree that the chambers judge made any error in finding that Kimmel J.'s decision was purely procedural. The motion before Kimmel J. was straightforward. There was a complex network of mortgage and bankruptcy proceedings and the only issue before her, as she put it, was "how, where and when the 250 Mortgage Dispute underlying both the Foreclosure Action and the TUV Motion should be adjudicated."

[30] We agree with the chambers judge's assessment that the resolution of this issue "did not determine any substantive rights of the parties" and was "a run-of-the-mill procedural order designed to move a specific dispute along to a final adjudication on the merits in the most expeditious and least expensive manner."

[31] Finally, we do not agree that there was any procedural unfairness by the chambers judge determining the issue of leave before the Cardillo Parties had brought a motion for leave. This argument was raised before the chambers judge. The Cardillo Parties were therefore aware that a determination of whether leave should be granted might be made by the chambers judge and had an opportunity to make submissions on the merits of this issue at that stage.

DISPOSITION

[32] The appeal is dismissed.

[33] As agreed between the parties, costs of $5,500 are payable by the Cardillo Parties to the Trustee.

"A. Harvison Young J.A."
"S. Coroza J.A."
"S. Gomery J.A."