COURT OF APPEAL FOR ONTARIO

CITATION: Cashin Mortgages Inc. (Verico Cashin Mortgages) v. 2511311 Ontario Ltd. (Mortgages Alliance – Main Street Mortgages), 2024 ONCA 103
DATE: 20240213
DOCKET: COA-23-CV-0321

Benotto, Roberts and Sossin JJ.A.

BETWEEN

Cashin Mortgages Inc., operating as Verico Cashin Mortgages

Plaintiff/Responding Party (Respondent)

and

2511311 Ontario Ltd. operating as Mortgages Alliance – Main Street Mortgages, The Mortgage Alliance Company of Canada Inc., Roger Grubb

Defendants/Responding Parties (Respondents)

and

Orlando Catala, Gerald William (Jerry) Fragomeni, Nikos (Nick) Nicolaou, and Aimee Nanette Novack

Defendants/Moving Parties (Appellants)

and

Krystian Catala and Greenbrix Capital Inc.

Defendants by Third Party Claim/Moving Parties (Appellants)

Pierre N. Lermusieaux, for the appellants

Colin C.G. Pye, for the respondent, Cashin Mortgages Inc., operating as Verico Cashin Mortgages

Jennifer Sullivan, for the respondents, 2511311 Ontario Ltd. operating as Mortgage Alliance – Main Street Mortgages, and Roger Grubb[1]

Sam Campbell, for the respondent, The Mortgage Alliance Company of Canada Inc.[2]

Heard: January 31, 2024

On appeal from the order of Justice Marvin Kurz of the Superior Court of Justice dated February 13, 2023, with reasons reported at 2023 ONSC 1040.

REASONS FOR DECISION

[1] The appellants appeal the dismissal of their motion under r. 21.01(3)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, in which they alleged that the respondent lacked the legal capacity to bring its action; and the adjournment of their motion brought under r. 21.01(3)(c) and (d), in which they alleged that the action should be dismissed or stayed as an abuse of process under subrule (c) because there is another proceeding pending in Ontario between the parties in respect of the same subject matter and also under subrule (d) because the underlying action is frivolous or vexatious or is otherwise an abuse of process.

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[1] Jennifer Sullivan appeared but made no written or oral submissions on behalf of the named respondents, 2511311 Ontario Ltd. operating as Mortgage Alliance – Main Street Mortgages and Roger Grubb. According to these respondents' statement of defence and crossclaim, the statement of claim and order under appeal have incorrectly identified 2551311 Ontario Ltd. as 2511311 Ontario Ltd. Nothing turns on this for the purposes of the appeal.

[2] Sam Campbell appeared but made no written or oral submissions on behalf of the respondent, The Mortgage Alliance Company of Canada Inc.

[2] We begin with the issue of capacity and then address the allegation of abuse of process.

CAPACITY

[3] The individual appellants are mortgage agents who work under the trade name “Greenbrix”. From about June 2018 to April 2020, they worked as mortgage agents as independent contractors with the respondent, Cashin Mortgages Inc., operating as Verico Cashin Mortgages (“Cashin”), a mortgage brokerage. The appellants allege that, from about January 1, 2019, they started using the name “Greenbrix” in connection with their services. On February 21, 2019, allegedly unknown to the appellants, Cashin registered “Greenbrix Capital” as a business name in Ontario. On June 21, 2019, the appellant, Krystian Catala, incorporated the appellant, Greenbrix Capital Inc.

[4] The parties’ relationship ended in about April 2020. Since then, the appellants have continued to work under the Greenbrix name in association with named defendants, Roger Grubb and 2511311 Ontario Ltd.[3], another mortgage brokerage.

[5] Cashin sent multiple warning letters to some of the defendants, advising them to cease using the “Greenbrix” name in association with their business

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[3] See footnote 1, above.

activities and threatening legal action and disciplinary proceedings. Cashin's principal also accused them of engaging in fraudulent actions by using the name.

[6] On June 23, 2020, the appellants, Krystian Catala and Greenbrix Capital Inc., commenced an action in Toronto against Cashin and its principal ("the Toronto Action"). Cashin filed a statement of defence and counterclaim. The main dispute centres around the ownership of and right to use name, "Greenbrix".

[7] Following the completion of the discovery process in the Toronto Action, on March 1, 2022, Cashin commenced an action against some of the individual appellants and other named defendants in Milton ("the Milton Action"). The Milton Action also turns on the determination of the ownership of and right to use the name, "Greenbrix". The defendants in the Milton Action brought a motion under r. 21.01(3)(b), (c) and (d) of the *Rules of Civil Procedure* to have the Milton Action dismissed or stayed.

[8] With respect to the relief sought under r. 21.01(3)(b), the motion judge concluded that it was not plain and obvious that Cashin did not have legal capacity to bring the Milton Action. We see no error in the motion judge's determination of this issue.

[9] The appellants argue that the concept of legal capacity for the purposes of r. 21.01(3)(b) comprises the question of a party's legal status to sue and be sued, as well as the question of a party's standing to pursue a cause of action: see e.g.,

Western Delta Inc. v. Zurich Indemnity Company of Canada, 1999 CanLII 2386 (Ont. C.A.), at para. 4, and *Goldentuler v. Simmons Dasilva LLP*, 2021 ONCA 219, at para. 13. The appellants do not dispute Cashin is an active corporation that can sue and be sued. They contest that Cashin has standing to bring a claim with respect to its claimed ownership of the Greenbrix name.

[10] In our view, the appellants' argument conflates the question of legal standing with the question of whether or not Cashin's claim to ownership has any merit. As the motion judge noted, the appellants did not bring a motion to strike Cashin's statement of claim in the Milton Action as disclosing no reasonable cause of action, nor a motion for summary judgment, whereby the court could possibly adjudicate the merits of the Milton Action. Whether or not Cashin ultimately prevails on its assertion that it owns the Greenbrix name remains to be determined. This is not a determination that can be made on this motion or record. We therefore dismiss this ground of appeal.

THE ABUSE OF PROCESS

[11] The motion judge addressed the abuse of process submissions and made findings that should have led to a determination that the action was an abuse of process, but then adjourned that part of the motion *sine die*. We conclude that, under the circumstances here, the motion judge made a reversible error by

appearing to determine the issue of abuse of process but then adjourning the issue *sine die* such that it may or may not ever be dealt with.

[12] The motion judge erred in not completing the motion. His failure to consider the issue before him resulted in a confusing order: the issued and entered order simply adjourns *sine die* the appellants' motion under r. 21.01(3)(c) and (d), without any formal direction about next steps, such as a transfer motion, or clarification as to whether the return of the appellants' motion is before the Toronto court or the motion judge.

[13] The general principle of r. 1.04 ensures that the rules are construed in the most expedient and economic way, having regard to the costs and delay to the litigants and the waste of precious judicial resources. Discoveries are complete in the Toronto Action but had not begun in the Milton Action at the time of the motion. The effect of the motion judge's decision is to create additional delay and expense while the parties engage in further motions that would have been unnecessary had the motion judge determined the issues before him.

[14] The motion judge had all of the material before him and even appears to have made a determination. He said:

> [43] Here, the parties agree that the determination of the single issue of entitlement to use the "Greenbrix" name is the central issue in their dispute. There is a strong risk that the issue could be determined inconsistently in the two proceedings; raising the related issue of double recovery. Further, as a stated above, the scope of

> persons that [Cashin] wishes to be subject to its injunctive relief in the Toronto Action is so broad that it potentially includes all of the Defendants in this action. That is the case even though they are not named parties in the Counterclaim.
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> [44] So, even though this case may not be strictly covered by Rule 21.01(3)(c), it comes within its spirit. I note of course that Rule 1.04 calls for the Rules to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".
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> [45] I add that I have been offered no viable explanation for [Cashin]'s decision to commence a separate proceeding in Milton rather than to include the claims in its statement of claim as part of the Counterclaim. It certainly does not appear to meet the goals of Rule 1.04 or to represent proportionate use of scarce judicial resources.
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> [46] Thus, while it is possible that this proceeding is an abuse of process or may even be caught within a liberal interpretation of Rule 21.01(3)(c), the parties have now agreed that if this action is not dismissed for a want of capacity, it should be transferred to Toronto and joined to the Toronto action.
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> [47] The parties are at liberty to bring a transfer motion in the Toronto proceedings under Rule 13.01.02. If they do so, they will be required to follow the directions of the Provincial Practice Direction, and in particular para. 47-51 of that Practice Direction.

[15] The motion judge failed to recognize that the Milton Action was an abuse of process. His failure to grapple with this issue led him to treat the Milton Action as a mere procedural irregularity that could be cured by its transfer to and joinder with the Toronto Action. As a result, he failed to give effect to his own findings that the Milton Action replicated the core issue and potentially the injunctive relief sought

in the Toronto Action, and, importantly, that there was no "viable explanation" for the commencement of the Milton Action.

[16] Ordinarily the discretionary decision of the motion judge to adjourn part of the appellants' motion would attract deference from this court. However, the motion judge's errors are errors of law. As a result, we owe no deference to the motion judge's adjournment decision and will consider this issue afresh: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[17] Both r. 21.01(3)(c) and (d) invoke the doctrine of abuse of process. The doctrine of abuse of process has been applied to prevent a multiplicity of proceedings or the re-litigation of an issue, such as in the commencement of another proceeding that replicates the same or similar issues and is against some or all the same parties. Various policy grounds are cited in the application of the doctrine of abuse of process: to ensure that no one should be "twice vexed by the same cause", to "uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 38 citing Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham: Butterworths, 2000). It is a flexible doctrine that "evokes the 'public interest in a fair and just trial process and the proper administration of justice'", and, as a result, "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly

unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Behn Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39 and 40, citing *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, per McLachlin J. (dissenting) and *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A. (dissenting).

[18] In *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at paras. 15-16, this court reviewed the analytical framework to be applied in the court's exercise of its discretion when considering whether an action should be dismissed or stayed under r. 21.01(3)(c) as an abuse of process:

> [15] The determination of whether a stay of proceedings should be granted because another proceeding is pending between the same parties involves an exercise of discretion, taking into consideration the circumstances of the particular case. The moving party must demonstrate that the continuation of the action would cause it substantial prejudice or injustice (beyond inconvenience and expense) because it would be oppressive or vexatious or would otherwise be an abuse of the process of the court, and that the stay would not cause an injustice to the responding party: *Farris v. Staubach Ontario Inc*. (2004), 32 C.C.E.L. (3d) 265 (Ont. S.C.), at para. 15. Factors relevant to prejudice include: the likelihood and effect of the two matters proceeding in tandem, the possibility and effect of different results, the potential for double recovery, and the effect of possible delay: *Farris*, at para. 16.
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> [16] The fact that another proceeding is pending between the same parties in respect of the same subject matter does not automatically lead to an order dismissing or staying the claim. Rather, the order is discretionary and the judge hearing the motion must be satisfied that the

> stay or dismissal is warranted in the particular circumstances of the case. While a multiplicity of proceedings may constitute an abuse of process which warrants an order staying or dismissing a proceeding (see e.g., *Maynes v. Allen-Vanguard Technologies Inc. (Med-Eng Systems Inc.)*, 2011 ONCA 125, 274 O.A.C. 229, at paras. 36, 46), that is not necessarily always the case. All of the circumstances must be considered to determine whether, in the interests of justice, a stay or dismissal should be granted. [Emphasis added.]

[19] Having regard to the relevant circumstances (including the motion judge's findings), the Milton Action is clearly vexatious and an abuse of process. These circumstances include that the Milton Action replicates the Toronto Action in subject matter and, effectively, in the persons against whom relief is being sought; there is no "viable explanation" for the unnecessary commencement of the Milton Action following the close of pleadings and completion of the discovery process in the Toronto Action; the acrimonious relationship that exists between the parties; Cashin's surreptitious registration of the business name; and its aggressive and threatening letters to the appellants.

[20] Without any viable explanation and notwithstanding the state of the Toronto Action, Cashin deliberately commenced the Milton Action where the likelihood of inconsistent findings and of unnecessary delay and expense was inevitable. In the absence of any "viable explanation" and seen in the context already reviewed, the only reasonable inference to be drawn from Cashin instigating a second action involving the same principal issue and effectively the same parties is to put the

appellants to the inconvenience, delay and expense of a second action in order to intimidate them into submission. The appellants' rights are clearly prejudiced. Allowing Cashin to seek to transfer the Milton Action condones its vexatious actions and abuse of process. This prejudices the due administration of justice.

[21] The only just response in these circumstances is to dismiss the Milton Action.

DISPOSITION

[22] For these reasons, we dismiss the appellants' appeal from the dismissal of their motion under r. 21.01(3)(b). We allow the appellants' appeal from the motion under r. 21.01(3)(c) and (d) and dismiss the Milton Action.

[23] The appellants are entitled to costs of the appeal in the agreed upon amount of $5,000. Costs of the motion below are reversed so that the appellants are entitled to the amount of $10,000. Both amounts are inclusive of disbursements and taxes.

"M.L. Benotto J.A."
"L.B. Roberts J.A."
"L. Sossin J.A."