Court of King's Bench of Alberta

Citation: Bank of Montreal v Exclusive Hardwood Ltd, 2024 ABKB 322

Date: 20240530
Docket: 2303 21843
Registry: Edmonton

Between:

Bank of Montreal

Plaintiff

- and -

Exclusive Hardwood Ltd., Action Flooring Ltd., 811044 Alberta Ltd., and David Reid

Defendants

Endorsement
of the
Honourable Justice M. J. Lema

I. Introduction

[1] Where should the would-be new party or intervenor apply for that relief or to adjourn an upcoming application to allow for such a bid: the Commercial-List court or an applications judge?

[2] For the reasons below, the answer is the applications judge.

II. Background

[3] A lien-bond surety wants to step into lien-enforcement proceedings brought by two lien holders against the landowner. A special application on lien validity and claim quantification is scheduled for May 31, 2024 before an applications judge.

[4] Recently the landowner was placed into receivership, via order granted by Burns J. sitting on the Commercial List.

[5] On May 27, 2024 the lien holders applied to lift the stay of proceedings triggered by that order, to allow them to proceed with the May 31 application.

[6] The surety attended the application, via counsel, and asked me to add it as a party or intervenor to the upcoming application or, alternatively, to adjourn it to allow them to seek such relief. Per the surety, without their involvement, the lienholders' enforcement application will be unopposed, with the landowner in receivership, its counsel accordingly ceasing to act, and the receiver apparently planning not to participate.

[7] The surety did not file an application for the May 27th hearing, whether to be added to the lienholders' action, the upcoming application, or otherwise.

[8] I reserved my decision on the surety's requests to May 28, 2024 and delivered an oral version of this decision then.

III. Analysis

[9] I find that the add-as-party-or-intervenor request, along with the alternative adjournment request, should be made, via filed application, to an applications judge, for the following reasons.

[10] First, as noted, the upcoming application is scheduled before an applications judge. (It was initially set for January 2024, but was pushed back to May 31 because the landowner's counsel was ill.)

[11] It may be that an applications judge has already been assigned to hear the application. (At the May 27th hearing, counsel were unsure on that score.)

[12] In any case, an applications judge is the appropriate decision-maker here, with present or easily acquired insight into the lead-up steps to the application, the materials filed to date, the scheduling availability of an applications judge if an adjournment is granted, and the overall dynamic of the file i.e. in gauging whether the surety should be added. As Tallis JA observed in ***R v McCullogh***, 2000 SKCA 128 (in chambers):

> **… as a matter of practice, an application for an adjournment or a stay of the trial or any ancillary application should normally be made in the first instance to the trial judge designated to hear this matter.** In this case no recent application has been made to the trial judge for an adjournment of the trial or ancillary proceedings. A superior court of original jurisdiction is master of its own procedure and for that additional reason I would have declined to hear the application in the first instance. [fourth-last paragraph] [emphasis added]

[13] Second, nothing in the *Court of Queen's Bench Act*'s applications-judge provisions requires or suggests that such requests be made to a justice: see s. 9 ("Jurisdiction [of Applications Judges]"). With none of the jurisdictional carveouts applying here, "an applications

judge … has the same power and may exercise the same jurisdiction as a judge sitting alone in chambers …": para 9(1)(a).

[14] Third, I see no sign that an applications judge has, per s. 13, "refer[red] any matter before [her or him] to a judge for decision" (e.g. the surety's requests here) to me or any other King's Bench justice.

[15] Fourth, per Civil Practice Note 1 (current to February 1, 2023):

> **Applications for adjournment [of a special application]** after the Applicant's brief has been filed **should be made to the Judge or Applications Judge assigned to the application or, in the absence of or failing the assignment of that person, to another Judge or Applications Judge.**
>
> Notwithstanding paragraph 15, an adjournment sought more than 3 weeks prior to an assigned hearing date may, with the prior agreement of all parties, be obtained by telephone or email from the Court Coordinator but must be confirmed by fax or by letter, copied to all other counsel. [paras 15 and 16] [emphasis added]

[16] If an assignment judge has already been assigned (and that seems likely, with the application only three days away i.e. from May 28th), the adjournment application must be made to that AJ.

[17] Assuming no AJ assignment yet, I read the second half of paragraph 15 as requiring, in the circumstances here, an application to an AJ i.e. adjournment requests of AJ-assigned matters to an AJ, and such requests on justice-assigned matters to a justice.

[18] Here I note that the surety is seeking an adjournment of the May 31 application whether it succeeds in being adding to the proceeding or simply to push back that application to allow it to seek "add" relief.

[19] Fifth, both add-party and add-as-intervenor relief can be granted by "the Court", per Rules 2.10 and 3.74, i.e. "the Court of King's Bench of Alberta acting by a judge **or applications judge**", per the definition of "Court" in the Appendix to the *Rules of Court*.

[20] Sixth, despite the surety's submission otherwise, para 243(1)(c) of the *Bankruptcy and Insolvency Act* does not give the bankruptcy-jurisdiction court (here, in the justice-level receivership proceedings on the Commercial List) jurisdiction or authority over the ordinary-jurisdiction lien-enforcement proceedings. The bankruptcy court's current focus is limited to deciding whether the receivership stay should be lifted. At May 27's application, I approved the lift-stay request in principle, with the parties requiring more time to fine-tune the terms of the stay-lift order.

[21] With that relief granted, the bankruptcy court has no further role in or concerning the lien-enforcement proceedings, which can now continue (as before) at the applications-judge level.

[22] Paragraph 243(1)(a) *BIA*, which authorizes the bankruptcy court to enable a receiver to "take any other action that the court considers advisable", says nothing about the bankruptcy court's authority to adjourn, add parties to, or otherwise become involved in lien-enforcement or other creditor-rights-enforcement proceedings before an applications judge.

[23] Seventh, in ***Stratum Projects Alberta Inc v Aman Building Corporation***, 2017 ABQB 351 (cited by the surety), a surety was added to lien-enforcement proceedings in similar circumstances but only after **an application to an AJ for that relief**.

[24] Eighth, the surety obtained no leverage here by saying that its "no position" position on the lift-stay aspect was conditional on it being added as a party or intervenor and obtaining an adjournment on the lien-enforcement front. With Northbridge having no material stake in the receivership proceedings, it could not have plausibly taken any position other than "no position."

[25] Ninth, the surety obtained no boost via Rule 6.3(3) of the *Rules of Court*. Whether it is an "affected party" in the lien-enforcement proceedings and thus should have been served with the May 31 application materials may go to whether it should be added as a party or made an intervenor and, in any case, whether the application should be adjourned. But that rule does not provide a gateway for the surety to obtain any of that relief from the bankruptcy-jurisdiction court here.

IV. Conclusion

[26] For these reasons, I dismiss the surety's "add as party or intervenor" and adjournment requests, without prejudice to its possible right or opportunity to seek such relief from the assigned or other applications judge, as applicable.

V. Costs

[27] In line with my ruling delivered at the close of the oral delivery of these reasons earlier today, Mr. Turzansky's and Mr. Mavko's clients are entitled to Column 4 costs from the surety for an opposed chambers application, such costs not to affect the quantum of the surety's (possible) exposure under the lien bond.

Heard on May 27, 2024.
Decision rendered orally on May 28, 2024.
Dated at Edmonton, Alberta on May 30, 2024.

M. J. Lema
J.C.K.B.A.

Appearances:

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