COURT OF APPEAL FOR ONTARIO

CITATION: Nutrition Guidance Services Inc. v. Schwartz, 2024 ONCA 636
DATE: 20240823
DOCKET: M55300 (COA-24-CV-0768)

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Sossin J.A. (Motion Judge)

BETWEEN

Nutrition Guidance Services Inc., Dr. Earl Schwartz, Rosie Schwartz and Dr. Earl Schwartz Professional Corporation

Plaintiffs (Appellants/Moving Parties)

and

Dr. Martin Schwartz and Susan Schwartz

Defendants
(Respondents/Responding Parties)

Jordan Goldblatt and Rachel Allen, for the appellants/moving parties

Robert B. Macdonald and Teodora Obradovic, for the respondents/responding parties

Heard: August 20, 2024

ENDORSEMENT

BACKGROUND

[1] This is motion for a stay of an order of Akazaki J., following a summary judgment motion. The appellants, Dr. Earl Schwartz, Rosie Schwartz, and two corporate entities own 75% of a commercial property at 249 St. Clair Avenue West, in Toronto, and had sought to buy out the respondents, Dr. Martin Schwartz and Susan Schwartz, who own 25% of the property, through the mechanism of the *Partnerships Act,* R.S.O. 1990, c. P.5. The respondents counter-claimed for a sale

of the property under the *Partition Act,* R.S.O. 1990, c. P.4. The motion judge found for the respondents, granting them the unilateral right to sell the commercial property at its highest market value, for a period of 90 days, failing which the parties could contact the court to seek an extension or resolve any impediments to sale. The appellants now move to stay this remedy, pending their appeal.

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ANALYSIS

[2] The test for granting a stay pending appeal is well-settled and not in dispute. Based on the Supreme Court's framework in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, in order to obtain a stay, the moving party must establish that:

a) there is some merit in the appeal;

b) the moving party will suffer irreparable harm if the stay should be refused; and

c) the balance of convenience favours the stay.

[3] Further, the court's power to grant a stay is discretionary, guided by what is in the interests of justice.

[4] These prongs to the test are not watertight compartments. The conclusions on one prong may affect the analysis of another. With this in mind, I turn now to a consideration of this framework in the circumstances of this appeal.

(a) The merits of the appeal

[5] The threshold for the merits prong of the test for a stay is a low one. It will be met where an appeal is not frivolous or vexatious, and where there is "some reasonable prospect of success": see *Fiala v. Hamilton*, 2008 ONCA 784, O.J. No. 4653, at para. 15.

[6] The appellants raise two main grounds of appeal. First, they argue the motion judge failed to reach key findings to support his conclusion that the parties were co-owners of the commercial property, rather than parties to a partnership. Second, they assert the motion judge imposed an improper remedy that neither party asked for or addressed as part of the summary judgment motion. The appellants also take issue with the costs award of the motion judge.

[7] Turning to the first ground, the appellants acknowledge that the motion judge correctly identified the test for determining if a partnership existed. The appellants had to establish that there was: (i) a business; (ii) carried on in common; and (iii) with a view to profit: see *Backman v. Canada*, 2001 SCC 10, at para. 18. The appellants contend that the motion judge made palpable and overriding errors in the application of this test, particularly with failing to explain the reasoning underlying his apparent conclusion that the business was not intended to be run for a profit, and with respect to misapprehending the evidence in the record. I need not examine these arguments in detail. While arguments founded on inadequate

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reasons and/or the misapprehension of evidence generally face an uphill climb on appeal, I am not able to say these arguments fail to cross the low threshold of the test for a stay.

[8] The appellants are on firmer ground with their second ground of appeal, relating to the motion judge's imposition of a remedy not sought by any party. The appellants raise fairness concerns with the motion judge considering a course of action without the parties having an opportunity to address it, as well as with the basis for the motion judge's view that a 90-day period was sufficient to complete a sale. Further, the motion judge appears to have contemplated a completed sale without the consent of the appellants. Both parties in oral argument on this motion shared the view that such a sale in the context of co-owners could not be completed with the consent of only one co-owner, and that, at a minimum, a further vesting order or court proceeding will be necessary for the sale to be complete. The motion judge specifically adverted to the possibility that the parties may return to him for further direction, but only in the context of the sale not being completed in the 90-day period. In these circumstances, while the respondents argue the remedy selected was certainly open to the motion judge, the appellants' challenge to the remedy more than meets the low threshold of a serious issue on appeal for a stay.

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(b) Irreparable harm

[9] The appellants raise two bases for their argument of irreparable harm if a stay is not granted. First, they rely on affidavit evidence from Dr. Earl Schwartz that he is not prepared to relocate if he cannot continue his practice at the commercial property, and instead will retire. Second, the appellants argue that their appeal will be moot if the respondents are able to complete the sale of the property in the 90-day period as ordered by the motion judge.

[10] The respondent takes issue with the first argument on the basis that it is self-serving of the appellants to rely on Earl Schwartz's affidavit evidence. His choice to retire, rather than relocate, does not fall within the ambit of irreparable harm. Further, the proposed offer raised by the respondent from the real estate developer, North Drive, contemplates a 2-year period within which the co-owners could continue in the present use of the property, mitigating any harm flowing from Earl Schwartz's stated desire to retire if he is no longer able to continue his practice in the property. In my view, the respondent's position is persuasive on this point.

[11] The appellants' second argument, on its face, is compelling. The motion judge's order contemplates a completed sale within 90 days, after which the appellants' challenge to the remedy imposed by the motion judge would be moot. The respondents rely on the shared understanding that some further vesting order or court proceeding will be needed in order to actually complete the sale, and have

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provided an opinion from Ronald Melvin, a real estate expert, dated August 6, 2024, to substantiate this view.

[12] While I accept that a further step may be needed in order to render the sale complete, the appellants have no guarantee that the motion judge (or another judge) would not complete that step prior to any appeal being heard. The risk of the appeal becoming moot if the stay is not granted, remains real. Further, in my view, that risk of the appeal becoming moot is sufficient to constitute irreparable harm.

(c) Balance of convenience

[13] Finally, turning to the balance of convenience, the appellants submit that, in light of the strength of their appeal, and the irreparable harm that would be caused by the appeal becoming moot, the balance of convenience favours the stay.

[14] The respondents submit that the fact of a time-sensitive offer from North Drive to purchase the property for $4.25 million demonstrates the balance of convenience favours not granting the stay. I note this offer was before the motion judge, who declined to consider it as evidence of the market valuation of the property, though he did admit it as evidence that the property represented a development opportunity. I am reluctant to treat the offer as determinative with respect to the balance of convenience. The respondents assert that if the deadline passes, the North Drive offer will be “lost” and “will not come around again.” I am

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not in a position to conclude that the offer would be lost and not extended or reactivated in the event the appellants are unsuccessful in their appeal, or that an equivalent or better offer would not arise at that time.

[15] In these circumstances, I conclude that the balance of convenience favours the granting of a stay.

DISPOSITION

[16] Taking into consideration the analysis above on each of the prongs of the test for a stay, and with the interests of justice as an overriding concern, the appellants have met the threshold for a stay, and the motion is granted.

[17] The appellants are entitled to their costs of this motion, which will be in the amount of $12,000, all-inclusive.

[18] Finally, in response to a request for clarity on this point from the appellants, I confirm that the deadline for the appellants to perfect the appeal is September 12, 2024.

“L. Sossin J.A.”

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