

COURT OF APPEAL FOR ONTARIO

CITATION: Citti v. Klein, 2024 ONCA 529

DATE: 20240704

DOCKET: C70327

Rouleau, Benotto and Thorburn JJ.A.

BETWEEN

John Citti and Lester Yamashita

Plaintiffs (Appellants)

and

Eric A. Klein, Evan L. Klein, Klein Property Group Inc.,  
Klein Capital Group and KPG Capital LP

Defendants (Respondents)

and

Cadman Capital Inc. and Giles Cadman

Third Parties

Bevan Brooksbank and Daphne Chu, for the appellants

Evan Klein and Eric Klein, acting in person and representing the corporate respondents

Heard: June 17, 2024

On appeal from the judgment of Justice Thomas McEwen of the Superior Court of Justice, dated January 13, 2022.

REASONS FOR DECISION

[1] The respondents were found in contempt of court for having violated the terms of a Mareva injunction. Contrary to the terms of that injunction, the respondents placed a mortgage in the amount of \$25,000 on a property that they were enjoined from dissipating, assigning, encumbering or dealing with. In addition, they failed to place several months of rental income from that property in trust as required by the Mareva order.

[2] The respondents then failed to make the required payments on this mortgage. Once it went into default, the respondents voluntarily surrendered the property to the mortgagee for a surrender fee of \$5,000. The mortgagee thereafter sold the property.

[3] The issue on appeal is the appropriateness of the sanction imposed by the motion judge for the respondents' contempt.

[4] At the sanctions phase of the contempt proceedings, the appellants sought a term of imprisonment of 120 days for the individual respondents and an order striking their amended statement of defence and counterclaim. They also sought costs of the motion on a substantial indemnity basis.

[5] The motion judge disagreed with the appellants' proposed sanction and determined that the appropriate sanction was an order that the respondents pay a fine to the court in the amount of \$35,000 and pay the appellants' outstanding costs of \$15,474.32, both within 60 days, failing which their amended statement of

defence and counterclaim would be struck. Although the motion judge awarded substantial indemnity costs for the portion of the proceedings dealing with the finding of contempt, he determined that, in the circumstances, the appellants should receive only partial indemnity costs for the sanctions portion of the contempt proceedings.

[6] On appeal the appellants argue that the motion judge erred in:

1. Failing to consider or give appropriate weight to the principles of deterrence and denunciation and the aggravating factors that he had identified in his contempt decision;
2. Imposing what amounted to no sanction at all in the event that the respondents paid the fine; and
3. Awarding partial indemnity costs rather than full or substantial indemnity costs.

[7] At the conclusion of the appellants' submissions on appeal, we called on the respondents to make submissions on the costs issue only.

[8] In our view, the appeal must be dismissed. The motion judge correctly set out the factors relevant to the determination of an appropriate sanction for civil contempt, including the importance of deterrence and denunciation. The motion judge carefully considered whether imprisonment was appropriate to this case. He explained that "incarceration for civil contempt is rare and should only be

undertaken where the breach of the Court Order is knowing and deliberate, continues over several days and the only response from the Defendants are defiant without remorse” (citations omitted). He found that here, however, the acts of contempt were fairly discrete in nature and involved a \$25,000 mortgage, approximately \$5,000 in rent and the retaining of a \$5,000 surrender fee, totalling roughly \$35,000. The contempt was committed at a time when the Kleins were undergoing financial strain. These were their only acts of contempt and they exhibited remorse, having provided an apology. The motion judge therefore concluded that imposing a period of incarceration, however brief, would be disproportionate particularly given the circumstances of the COVID-19 pandemic. He considered the contempt to be modest in nature and one that did not cause any direct financial loss to the appellants. This conclusion was open to him on this record.

[9] The motion judge considered the appellants’ submission that a fine would be inadequate as there was “no expectation that it would be paid”. He nonetheless determined that a fine was an appropriate sanction and went on to explain that it would be unfair to the appellants to have to pursue an action and defend a counterclaim if the respondents did not pay the fine and costs. In our view, the motion judge’s decision that the respondents’ pleadings should only be struck if the respondents did not pay the fine within 60 days is a reasonable one and we see no basis for this court to interfere.

[10] As noted by the appellants, the motion judge did not, in his reasons on the sanction, repeat the aggravating factors he had identified in his reasons for the contempt finding. However, we are simply not prepared to conclude, as the appellants urge, that the motion judge did not take these factors into account in reaching his decision as to the appropriate sanction.

[11] Further, we disagree with the appellants' submission that the respondents' prospective payment of the fine amounts to "no sanction at all". As a result of the fine, the respondents have been deprived of income generated by the disposition of one of their assets. The Mareva injunction prevented them from dealing with this asset, but had not deprived them of ownership or of the value of that asset.

[12] As a result of the imposition of the fine, the product of the disposition of that asset will have to be paid to the court and will not be available to the respondents for the purpose of satisfying any ultimate judgement the appellants may obtain, or to keep should the appellants' claim be dismissed.

[13] With respect to the appeal of the costs order, the appellants acknowledged in oral argument that although costs incurred in a contempt motion are presumptively awarded on a substantial or full indemnity basis, such an award is not mandatory, and the motion judge retains discretion to order lesser or no costs at all. They nevertheless argue that his reasons do not support deviating from this presumption. We disagree. The motion judge provided an explanation as to why

he considered partial indemnity costs to be appropriate for the sanctions phase. We see no basis to interfere with his exercise of discretion.

[14] As a result, the appeal is dismissed. The respondents filed materials in which they attach an account from their former solicitor that includes fees incurred in preparation for the appeal and in which they include dollar figures for the time Evan Klein devoted to the appeal while the respondents were self-represented. Having reviewed and considered these materials, we award costs to the respondents fixed costs in the amount of \$5,000, inclusive of disbursements and appropriate taxes.

“Paul Rouleau J.A.”

“M.L. Benotto J.A.”

“Thorburn J.A.”