

COURT OF APPEAL FOR ONTARIO

CITATION: Potofsky v. Chen, 2024 ONCA 862

DATE: 20241127

DOCKET: COA-23-OM-0344

Roberts J.A. (Motions Judge)

BETWEEN

Jeffrey Potofsky

Appellant/Tenant (Moving Party)

and

Jinlin Chen

Respondent/Landlord (Responding Party)

Jeffrey Potofsky, acting in person

Delaram M. Jafari, for the responding party

Heard: November 15, 2024

ENDORSEMENT

[1] On November 15, 2024, I heard and dismissed, with reasons to follow, Mr. Potofsky's motion for an extension of time to file a notice of motion for leave to appeal and for a stay of the October 1 and 3, 2024 orders of Charney J. and of an eviction order that was to be enforced on November 18, 2024. These are my reasons for dismissing Mr. Potofsky's motion.

[2] On October 1, 2024, Charney J. imposed monetary terms as a condition of the stay arising from Mr. Potofsky's appeal of the August 13, 2024 order of the

Landlord and Tenant Board (“the Board”) that allowed the responding party landlord’s application for an eviction order, including that Mr. Potofsky pay rent and make payments towards the substantial rental arrears. The October 1, 2024 order was crystal clear that Mr. Potofsky’s failure to comply with the conditions would result in the stay being lifted and the eviction order being enforced. There is no dispute that Mr. Potofsky did not comply with any of those terms. On October 3, 2024, Charney J. ordered that the stay be lifted, and that the eviction proceed. On October 4, 2024, Mr. Potofsky was served with a notice to vacate by November 18, 2024 at 8:30 a.m. Mr. Potofsky seeks leave to appeal and to stay Charney J.’s orders and the eviction.

[3] I start first with Mr. Potofsky’s request to extend the time to seek leave to appeal. The principal consideration on an extension motion is whether it is in the interests of justice to grant the extension. Factors commonly considered on this determination are: 1) whether the moving party had the requisite intention to appeal within the prescribed deadline under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; 2) the length of and explanation for the delay; 3) prejudice to the responding party; 4) the merits of the proposed appeal. The latter factor can be determinative especially where the moving party seeks an extension of time to bring a motion for leave to appeal rather than an appeal. See: *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at paras. 15-16.

[4] I am not persuaded that it is in the interests of justice to allow the requested extension.

[5] Under r. 61.03.1(3)(a) of the *Rules*, Mr. Potofsky was required to commence his motion for leave to appeal the October 1 and 3, 2024 orders of Charney J. within 15 days, namely and respectively, on October 16 and 18, 2024. Mr. Potofsky failed to do so and did not bring a motion to extend the time until he served the present motion on November 7, 2024. On November 8, 2024, he was instructed by the court office what he was required to file. He did not seek to file his motion until November 12, 2024. He has not provided any evidence demonstrating that he had an intention to appeal during the requisite time period or explaining the reason for the delay.

[6] The prejudice to the responding party by the delay is the loss of finality and the necessity of having to respond to a meritless motion. The responding party has been embroiled in protracted proceedings with Mr. Potofsky since the responding party first commenced the application to evict Mr. Potofsky for non-payment of rent and the water bill. Mr. Potofsky waited until the last minute to bring this motion. It was heard on an urgent basis because of the impending eviction order. As Charney J. noted in his October 1, 2024 reasons, Mr. Potofsky did not dispute that arrears in rent totalled \$89,900 as of July 31, 2024. However, he has constantly maintained that he does not have to pay the arrears because of alleged damages owed to him by the responding party.

[7] Mr. Potofsky's motion for leave to appeal is meritless and doomed to failure. There is no likelihood that leave will be granted. Leave to appeal is granted sparingly where there is an issue of public importance involving the interpretation of a statute or a principle of law, where there are special circumstances or a clear error: *Sault Dock Co. Ltd. v. Sault Ste. Marie (City)*, [1973] 2 O.R. 479 (C.A.). Mr. Potofsky has not raised any issue that transcends the particular dispute between the parties nor is there any error in Charney J.'s orders.

[8] There is no question that Mr. Potofsky owes rental arrears of over \$100,000 as of today's date. As Charney J. found, his alleged claim against the responding party does not relieve him from paying rent: "rent is to be paid unless and until the Board grants a rent abatement": *Shearer v. Oz*, 2021 ONSC 7844 (Div.Ct.), at para. 13. Moreover, he has not raised any error in Charney J.'s order. Again, there is no question that Charney J. had the discretion to impose the monetary conditions that he did as a condition to continue the stay of the eviction order of the Board. There is also no dispute that Mr. Potofsky has not complied with Charney J.'s orders.

[9] The justice of the case favours the responding party. No extension of time to file a motion for leave to appeal is granted.

[10] My determination that an extension is not warranted disposes of the motion. Unless there is a motion for leave to appeal, there is no jurisdiction to grant a stay

because there is no proceeding before this court. However, for completeness, I also conclude that there is no basis for granting a stay.

[11] The test for a stay of an order under appeal is well established. Again, the overarching criterion is whether the requested stay is in the interests of justice. Informing that determination are the following factors: 1) whether there is a serious issue to be tried on the appeal; 2) whether the moving party will suffer irreparable harm if the stay is not granted; and 3) whether the balance of convenience favours the requested stay. See: *RJR-Macdonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334. The noted factors are not water-tight: the strength of one factor can compensate for the weakness of another: *Louis v. Poitras*, 2020 ONCA 815, 59 C.P.C. (8th) 297, at para. 16.

[12] I am not persuaded that Mr. Potofsky meets any of the criteria for a stay.

[13] For the reasons earlier expressed, the proposed appeal is without merit. Mr. Potofsky does not meet the relatively low threshold of a serious issue to be tried.

[14] Mr. Potofsky has not demonstrated that he will suffer irreparable harm if the stay is not granted. He has known of the eviction order for some time. He did not comply with the monetary conditions imposed by Charney J., even though the consequences of failing to do so were clearly spelt out in Charney J.'s October 1 order. Mr. Potofsky has not provided any evidence that he was unable to do so.

Nor is there any evidence that Mr. Potofsky cannot secure alternate accommodation.

[15] The balance of convenience clearly favours the responding party. As I earlier detailed, the responding party, an individual, has been dealing for years with Mr. Potofsky's refusal to pay rent or arrears. The responding party is owed substantial monies. Given Mr. Potofsky's refusal to pay anything and his engagement in fruitless litigation for more than two years, the responding party will presumably have great difficulty collecting anything from Mr. Potofsky. Without the eviction, the responding party cannot start to mitigate damages by renting the premises to another tenant.

[16] Again, the justice of the case clearly favours the responding party. A stay is not warranted or granted.

[17] For these reasons, I dismissed Mr. Potofsky's motion with costs to the responding party in the all-inclusive amount of \$1,500.

“L.B. Roberts J.A.”