In the Court of Appeal of Alberta

Citation: Anoa Marketing Inc v Gohel, 2024 ABCA 394

Date: 20241205
Docket: 2301-0260AC
Registry: Calgary

Between:

Anoa Marketing Inc., Loraine Oxley, and Gordon Oxley

Appellants

- and -

Hitesh Gohel and Chestermere Trade Centre Inc.

Respondents

The Court:

The Honourable Justice Dawn Pentelechuk
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice J. Sidnell
Dated the 2nd day of October, 2023
Filed on the 3rd day of November, 2023
(Docket: 2101 03865)

Memorandum of Judgment

The Court:

[1] This appeal concerns whether a provision in a March 18, 2021 order issued by an applications judge is an attachment order granted pursuant to the *Civil Enforcement Act*, RSA 2000, c C-15 or an injunction order.

Background

[2] The appellants are in the business of importing and selling semi-precious stone slabs and large format porcelain tiles for interior design. Believing they had a verbal lease agreement in relation to a commercial space located in Calgary, the appellants opened a showroom and sales office in October 2020 where they also stored inventory and other assets used in their business (the "Assets").

[3] Disputes arose between the parties and the appellants were advised that Chestermere Trade Centre Inc had "taken over" the commercial space effective January 1, 2021. Chestermere also demanded that the appellants pay a monthly storage fee of $1,750 failing which they would not be permitted to remove their Assets.

[4] Anoa Marketing Inc filed a statement of claim seeking damages as compensation for the value of the Assets being withheld, among other relief. Chestermere filed a statement of defence and counterclaim asserting a common law possessory lien or a warehouser's lien over the Assets and seeking damages for unpaid storage fees.

[5] Anoa filed a replevin application to repossess the Assets that were being held in the commercial space. On March 18, 2021, the applications judge adjourned the replevin application because Chestermere had not yet filed its materials and questioning on affidavits had to be concluded. At Chestermere's request, the applications judge's March 18 order included the following at paragraph 3:

> In the interim, the Applicants and the Respondents, Chestermere and Unique, are restrained from dealing with the Assets listed at Schedule "A" to the Application and proposed form of Order filed in this Action on February 11, 2021 in any manner, including moving, selling, or dissipating the Assets.

The characterization of the relief provided in this paragraph is the central issue on appeal.

[6] The appellants learned that Chestermere, through its directing mind Hitesh Gohel, had sold a portion of the Assets contrary to paragraph 3 of the March 18 order. The respondents were found to have breached the March 18 order and were cited in contempt of court by a chambers judge on

April 11, 2023. The respondents were directed to purge their contempt by paying to the appellants the sum of $5,675.25 within 60 days of the order. Neither order was appealed.

[7] The respondents did not purge their contempt, prompting the appellants to file an application to have the respondents' pleadings struck. That application was heard by a different chambers judge on October 2, 2023. The respondents did not attend the application despite having been served. At that point, the respondents had not taken any steps in the litigation for some time. Ultimately, the chambers judge refused to strike the respondents' pleadings because she was of the view that the applications judge granted injunctive relief in the March 18 order, which was outside of her jurisdiction.

Procedural history before this Court

[8] The oral hearing of this matter was scheduled to proceed on October 9, 2024. The respondents did not file any materials, nor did they attend on that date.

[9] At the outset of the hearing, counsel to the appellants alerted the panel to a possible service issue. The panel asked the Clerk of the Court to contact the respondent, Mr Gohel, by telephone. The panel was able to speak with Mr Gohel who asked that the oral hearing be adjourned so that he could have time to prepare a submission. Appellants' counsel was directed to re-serve all appeal documents, commencing with the Notice of Appeal, on Mr Gohel at an email address he confirmed was valid. Mr Gohel was then given until November 18, 2024, to file a factum on behalf of the respondents, if he wished. He was advised that the panel would determine the appeal in writing, whether he chose to file a factum or not.

[10] The appellants filed an affidavit of service on November 26, 2024 confirming compliance with the panel's direction issued on October 9. Mr Gohel did not file a factum and as a result, the panel decided this matter based on the existing record.

Analysis

[11] The chambers judge did not have the benefit of the record available to us, including the March 18 order, when considering whether the applications judge issued an attachment order or injunction order. Notably, counsel to Anoa in the court below referred to paragraph 3 of the March 18 order as the "injunction order" or "injunctive relief" which may have contributed to the chambers judge's misapprehension of the nature of the relief in question.

[12] A draft order included in Anoa's application material sought enforcement of the relief it claimed through a "civil enforcement agency and/or bailiff". In an email dated March 2, 2021, Chestermere's counsel responded to receipt of Anoa's application material, saying he was seeking and expected instructions to cross apply for an "attachment order". Chestermere's counsel also suggested in that email that Anoa's application could not proceed as scheduled on March 18 because further steps needed to be taken and a special chambers hearing would be required. We

can discern from the language used that counsel were considering relief under the *Civil Enforcement Act* when the applications were heard and Chestermere proposed that paragraph 3 be included in the March 18 order as an interim measure.

[13] As recognized by the chambers judge, it is uncontroverted that applications judges have jurisdiction to issue attachment orders which are "limited in that they are designed to preserve property and are of limited duration": *Proprietary Industries Inc v Workum*, 2006 ABCA 225 at para 22; *Civil Enforcement Act*, s 5(2)(a). Having reviewed the entirety of the record from the court below, we conclude that paragraph 3 of the March 18 order was in substance and intent an attachment order.

[14] Rule 14.75(1)(c) of the *Alberta Rules of Court*, Alta Reg 124/2010, provides that the Court of Appeal may, when deciding an appeal, give any judgment or order that ought to have been made by the court appealed from. The transcript from the court below shows that the chambers judge was prepared to grant the requested order but for her concern regarding the applications judge's jurisdiction at first instance. Accordingly, we allow the appeal and direct pursuant to rule 10.53(1)(d)(i) that the pleadings of the respondents, Mr Gohel and Chestermere, in the consolidated action, filed under Court of King's Bench Action Number 2101-03865, be struck.

Written submissions only filed May 23, 2024

Memorandum filed at Calgary, Alberta
this 5th day of December, 2024

Pentelechuk J.A.

Ho J.A.

Kirker J.A.

Appearances:

A.M. Poburan
for the Appellants

Respondents, H. Gohel and Chestermere Trade Centre Inc.