Federal Court of Appeal  Cour d'appel fédérale

Date: 20190717

Dockets: A-171-19
A-183-19

Citation: 2019 FCA 207

Present: **WEBB J.A.**

Docket: A-171-19

BETWEEN:

WORLDSPAN MARINE INC.

Appellant

and

HARRY SARGEANT III and COMERICA BANK

Respondents

Docket: A-183-19

AND BETWEEN:

OFFSHORE INTERIORS INC. and
RESTAURANT DESIGN AND SALES LLC

Appellants

and

HARRY SARGEANT III and COMERICA BANK

Respondents

Heard at Vancouver, British Columbia, on June 26, 2019.

Order delivered at Ottawa, Ontario, on July 17, 2019.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] There are two motions requesting an order to stay the Order of Heneghan J. of the Federal Court dated April 30, 2019 (2019 FC 546) which provided that the proceeds from the sale of the vessel "QE014226C010" are to be paid to Harry Sargeant III (Sargeant).

[2] On February 29, 2008, Sargeant and Worldspan Marine Inc. (Worldspan) entered into a Vessel Construction Agreement (VCA) pursuant to which Worldspan agreed to design, construct, outfit, launch, complete, sell and deliver a 142 foot custom built luxury yacht to Sargeant. Construction began in March 2008 and the litigation related to unpaid accounts and the VCA began in July 2010. As noted by the Federal Court judge in paragraph 6 of her reasons "[m]uch litigation has ensued in respect of the VCA in this Court and in the British Columbia Supreme Court".

[3] The litigation is described in paragraphs 9 to 20 of the reasons of the Federal Court judge. For the purposes of this motion, it is important to note that ultimately an order was issued by the Federal Court for the sale of the vessel. The vessel was then sold for $5 million and the proceeds from the sale have been held in trust pending the determination of who is entitled to these proceeds.

[4] Sargeant had advanced $20 million under the VCA for the construction of the vessel. Since Worldspan owned the vessel, Sargeant had obtained a builder's mortgage from Worldspan. The priority of this builder's mortgage over the claims of the other creditors is at the heart of the

dispute that resulted in the Order dated April 30, 2019 which provided that the proceeds from the sale of the vessel are to be paid to Sargeant. Worldspan, Offshore Interiors Inc. (Offshore) and Restaurant Design and Sales LLC (Restaurant Design) have appealed this Order to this Court as well as the Orders dated the same day that dismissed their respective related motions.

[5] Worldspan had brought a motion for an order that Sargeant or Comerica Bank (Comerica) is in breach of the VCA as a result of the failure to pay the claims certificates to Worldspan when due. Offshore and Restaurant Design had brought a motion for a declaration that their claims ranked in priority over the claim of Sargeant.

[6] The stay that is requested in this motion is a stay of the Order to pay the balance of the sale proceeds to Sargeant until the appeals of Worldspan, Offshore and Restaurant Design have been determined by this Court.

[7] Sargeant submitted that the stay should not be granted because Worldspan and Offshore are in default of previous orders awarding costs to Sargeant and payable by Worldspan and Offshore. Although Sargeant also referred to an outstanding cost award payable by Restaurant Design, that Order was only issued very recently and arose as a result of the matter that is under appeal to this Court.

[8] Sargeant included, as part his motion record, a schedule listing the various amounts for costs payable by Worldspan and Offshore to Sargeant and the amounts payable for costs by him to Worldspan and Offshore. The schedule shows a net amount payable by Worldspan to Sargeant

of $7,267 and a net amount payable by Offshore to Sargeant of $9,750 as a result of various court orders. These amounts include $3,500 payable by Worldspan and $4,500 payable by Offshore as a result of the cost Orders issued in relation to the Orders that are currently under appeal. Following the hearing of this motion, the parties submitted letters related to the outstanding cost awards. There is a disagreement between Offshore and Sargeant with respect to the amount payable by Sargeant to Offshore as a result of a previous Order issued by Mosley J. However, this dispute is not the subject of this motion.

[9] The failure of a person to comply with a court order may be a basis for denying a stay that is requested by that person (*E. B. F. Manufacturing Ltd. v. White*, 2005 NSCA 103).

[10] The granting of a stay is discretionary (section 50 of the *Federal Courts Act*, (R.S.C. 1985, c. F-7) and Rule 398 of the *Federal Courts Rules*, (SOR/98-106)) and may be granted when "it is in the interest of justice that the proceedings be stayed" (paragraph 50(1)(b) of the Act). In my view, the conduct of one or more parties (Worldspan and Offshore) should not taint the right of another party (Restaurant Design) to obtain a stay. It would not be in the interests of justice to deny a stay requested by Restaurant Design simply because Worldspan and Offshore are in default of paying outstanding cost awards.

[11] If a stay is granted as a result of the motion brought by Restaurant Design, it would mean that the sale proceeds would remain in trust until the appeal filed by Restaurant Design is determined. Since the motions under appeal were all heard at the same time with one set of common reasons, it is logical that the appeals of Restaurant Design, Worldspan and Offshore

would be heard at the same time. Therefore, there would be no need to grant another stay based on the motion of Worldspan or Offshore if a stay is granted as a result of the motion brought by Restaurant Design. Any second order for a stay would be redundant. As a result, it is only necessary to address the stay motion brought by Restaurant Design, who is not in default of any outstanding cost orders issued prior to the order that is under appeal.

[12] The Supreme Court set out a three-stage test in *RJR-MacDonald Inc. v. Canada,* [1994] 1 S.C.R. 311, at p. 334, 16 N.R. 1 to determine if a stay should be granted:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. …

I. Serious Question

[13] In *RJR-MacDonald*, the Supreme Court noted, at pages 337 - 338, that:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. …
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[14] Sargeant argued that none of the appellants had raised a serious issue to be tried. Sargeant submitted that the issues raised by Worldspan have already been determined by this Court. However, since the motion being considered is the one brought by Restaurant Design, whether the issues raised by Worldspan have already been determined is not relevant.

[15] Restaurant Design essentially raises two issues in its notice of appeal. It alleges that the Federal Court judge erred by not allowing the affidavits of David Kelly dated November 29, 2017 and Fred Lillian dated November 30, 2017 to be admitted. It also alleges that the Federal Court judge erred in ruling that its claim does not have priority over the builder's mortgage held by Sargeant. There is no decision of this Court related to the admissibility of the evidence in question and the decision of the Federal Court judge on the priority of the claim being made by Restaurant Design is the matter that is the subject of the appeal that is related to this motion.

[16] Sargeant noted that the Federal Court judge issued a direction and not an order that the affidavits of David Kelly and Fred Lillian were not admissible. Sargeant therefore argued that since no appeal can be made from a direction, there is no serious question to be decided. Whether the admissibility of the affidavits can be reviewed by this Court following the rendering of a decision by the Federal Court that was made without such affidavits is a matter that should be resolved by the panel hearing this appeal.

[17] I am satisfied that the appeal of Restaurant Design is neither frivolous nor vexatious.

II. Irreparable Harm

[18] With respect to irreparable harm, the issue is whether Restaurant Design has established that it will suffer irreparable harm if the stay is not granted and it is ultimately successful on appeal. In *RJR-MacDonald*, the Supreme Court noted, at page 341, that:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …

[19] In his written representations filed in relation to this motion, Sargeant confirms that he is a resident of Florida. Sargeant also does not dispute that other than his right to receive the proceeds from the sale of the vessel (which is the subject of the appeal related to this motion for a stay) Sargeant does not have any assets in Canada.

[20] As support for its position that it would suffer irreparable harm if the stay is not granted and it is successful in its appeal, Restaurant Design submitted the affidavit of Rodrigo Da Silva, an attorney in Miami, Florida. He acted for Mohammad Al-Saleh who obtained a $28.8 million USD judgment against Sargeant in Florida in 2011. The judgment was for civil fraud committed by Sargeant against Al-Saleh as it related to a US Department of Defence contract to supply fuel to American troops in Iraq.

[21] Sargeant objected to the admissibility of this affidavit on the basis that it contains “unsourced hearsay, speculation, and opinion”. However, Mr. Da Silva was the attorney for Mohammad Al-Saleh and therefore would have personal knowledge of the steps taken to collect

the judgment that was rendered. His affidavit includes excerpts from decisions rendered by the courts in Texas and from submissions made by Sargeant to the Federal Court. In my view, at least for the portions of his affidavit to which I refer below, the affidavit is admissible.

[22] In his affidavit, Rodrigo Da Silva stated that after all avenues of appeal were exhausted, Sargeant did not pay the amount awarded by the Florida judgment. He indicated that:

> 22. …It took millions of dollars in legal fees and expenses to enforce the judgment.
>
> 23. Instead of paying the Al-Saleh $28.8 million dollar fraud judgment, Sargeant ensured that he was judgment proof. It was necessary, on Al-Saleh's behalf, to mount a multi-jurisdictional offensive against the interests of Sargeant worldwide.
>
> **TEXAS COURT ENJOINS 21.8 MILLION DOLLARS**
>
> 24. The enforcement efforts against Sargeant included obtaining an injunction from a Texas court that froze 21.8 million dollars on the basis that BTB Refining LLC, a Texas limited liability company, which owned a refinery in Corpus Christi, was an alter ego of Sargeant.

[23] Sargeant unsuccessfully attempted to obtain *mandamus* relief in relation to the injunction. As part of the court process in Texas, Mr. Da Silva noted in paragraph 27 of his affidavit that the Texas court found that:

> BTB was originally a Florida limited liability company but was converted to a Texas limited liability company on June 25, 2011, <u>two days before entry of the $28,800,000 judgment against Sargeant.</u>
>
> (emphasis in the affidavit)

[24] Mr. Da Silva also stated, in paragraph 34 of his affidavit that, in upholding the injunction, the Texas Court of Appeals noted that:

> …The temporary injunction at issue in these causes prevented Sargeant and BTB from transferring approximately $21 million dollars in assets to other persons or entities or transferring that amount out of the jurisdiction of the court. The temporary injunction was issued on grounds that BTB was Sargeant's alter ego and BTB was attempting to transfer assets out of the country to another entity as a "transfer made with the intent to delay, hinder, and defraud."
>
> (emphasis in the affidavit)

[25] Sargeant does not deny that he took steps to avoid paying the judgment that was issued in Florida. Rather, as noted by Mr. Da Silva at paragraph 32 of his affidavit, in written submissions filed with the Federal Court on July 14, 2014 in relation to one of the matters arising in this dispute related to the vessel, Sargeant stated:

> 24. In fact, Al-Saleh's Florida counsel recently stated that Sargeant lives an extravagant lifestyle including living in a mansion in Palm Beach County, Florida and owns a separate Palm Beach, Florida condominium. Sargeant's lack of payment to date is therefore equally consistent with an unwillingness to pay, and cannot be taken as proof of insolvency for the purpose of challenging the Assignment.
>
> (emphasis in the affidavit)

[26] Sargeant submitted that if the stay is not granted and Restaurant Design is successful in its appeal, it could obtain a judgment in Florida. However, since the evidence (which Sargeant does not dispute) is that Sargeant has demonstrated an unwillingness to pay a Florida judgment, in my view Restaurant Design has established that it would suffer irreparable harm if the stay is not granted and it is successful in its appeal.

III. Balance of Convenience

[27] The balance of convenience weighs in favour of granting the stay. As noted above, if the stay is not granted and Restaurant Design is successful in its appeal, the prior history of Sargeant's efforts to avoid paying a Florida judgment and the difficulty that Restaurant Design may encounter in attempting to collect that judgment outweigh the inconvenience that will be experienced by Sargeant in waiting for his money if he is ultimately successful and the stay is granted. His inconvenience is also reduced somewhat by the interest, albeit probably minimal, that is being earned on these funds.

[28] As a result, in my view the stay should be granted. Sargeant submitted that the claim of Restaurant Design is less than the amount that is being held in trust. However, the determination of the amount of the claim of any particular party and whether any other claims may be affected if Restaurant Design is successful in its appeal is beyond the scope of this motion. Since these are appeals from motions, these appeals should proceed without delay. Therefore, the delay should be minor and, in my view, the amount that is held in trust should be maintained until the appeals have been determined. As well, since the amount is being held in the trust account of counsel for Restaurant Design and would be subject to the rules of the Law Society of British Columbia, there is no compelling reason why this should change until the appeals have been determined.

[29] Sargeant, in the letter from his counsel dated July 2, 2019, requested that security for the outstanding cost awards should be provided if the stay is granted. However, security for costs is

for costs for future litigation, not security for outstanding cost awards. Costs that have already been awarded are payable under the particular order that awarded such costs. Since Restaurant Design is not in breach of any previous order for costs (other than the cost Order issued in relation to the Orders under appeal), there is no basis to award security for any costs that may be awarded as a result of its appeal as a condition for granting the requested stay.

[30] As a result, the motion of Restaurant Design for a stay is granted and the Order dated April 30, 2019 which provided that the balance of the sale proceeds shall be paid out to Sargeant, is stayed pending the disposition of its appeal in file number A-183-19. Costs of this motion shall be in the cause. The motion brought by Worldspan is dismissed with the costs of that motion to also be in the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

MOTION TO STAY AN ORDER OF THE FEDERAL COURT DATED APRIL 30, 2019, CITATION NUMBER 2019 FC 546 (DOCKET NUMBER T-1226-10)

DOCKET:	A-171-19
STYLE OF CAUSE:	WORLDSPAN MARINE INC. v. HARRY SARGEANT III and COMERICA BANK
AND DOCKET:	A-183-19
STYLE OF CAUSE:	OFFSHORE INTERIORS INC. and RESTAURANT DESIGN AND SALES LLC v. HARRY SARGEANT III and COMERICA BANK
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 26, 2019
REASONS FOR ORDER BY:	WEBB J.A.
DATED:	JULY 17, 2019

APPEARANCES:

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