

COURT OF APPEAL FOR ONTARIO

DATE: 20140312
DOCKET: M43512 (C58425)

Doherty J.A. (In Chambers)

BETWEEN

Home Trust Company

Applicant

and

2122775 Ontario Inc.

Appellant (Respondent))

Harvin D. Pitch, for the appellant (respondent)

Calvin Ho, for the applicant

Lisa S. Corne, for Collins Barrow Toronto Limited as Receiver of 2122775
Ontario Inc.

Jack B. Berkow and Adam J. Wygodny, for Urbancorp (Downtown)
Developments Inc.

Heard: March 10, 2014

ENDORSEMENT

[1] The motion by the appellant and the Receiver's cross-motion can be considered together.

[2] The essential question on both motions is whether the order of Brown J. should be stayed pending the appeal. The appellant claims it has a right of appeal under the *Bankruptcy and Insolvency Act* and, as such, the order is stayed unless the respondents can convince me to set aside that stay. The respondents argue that the appeal is properly brought under the *Courts of Justice Act* and that under the relevant rules there is no stay of the order of Brown J. unless the appellant can convince me that I should direct a stay.

[3] Counsel for the appellant, no doubt on the assumption that the burden of proof seldom determines the outcome, was prepared to proceed on the basis that the onus was on him to show why the order of Brown J. should be stayed. I have proceeded on that basis and, as anticipated by counsel, the outcome does not turn on the placement of the burden of proof.

[4] Counsel for the appellant submits that there is merit to this appeal and that unless a stay is granted, the sale of the property will be completed and the appeal will be moot. He further submits that considered in the context of the brief time period needed to perfect and argue the appeal (two to three weeks), the balance of convenience favours the appellant, particularly in light of its willingness to both pay certain ongoing costs of the respondents and post a reasonable amount as security for costs of the appeal.

[5] I think counsel is correct in his assertion that if no stay is granted, the appeal is in all likelihood pointless. Given that reality, the merits of the appeal become important. An appellant should not be denied the opportunity to pursue a potentially meritorious appeal, especially when the appellant is prepared to have the appeal heard in a very short time period.

[6] The appellant's appeal is based on the claim that it was denied procedural fairness in the proceedings before Brown J. Counsel argues that Brown J. denied the appellant a reasonable opportunity to respond to the Receiver's report that was filed the day before the hearing. That report identified various inadequacies in the funding commitments underlying the appellant's proposal to redeem the mortgage. Most notably, the report indicated that the commitments fell significantly short of the amount needed to redeem the mortgage and pay out the Receiver's costs.

[7] The appellant submits that it should have been given an opportunity to address the allegations of the inadequacies in the commitments before Brown J. ruled on the motion. The appellant further contends that the error is significant in that Brown J. relied on those parts of the report in dismissing the appellant's motion to stay the sale process and in granting the order approving the sale and vesting title in the purchaser.

[8] Brown J. did refuse to allow the appellant to call *viva voce* evidence relating to the report. It is, however, clear from the terms of the proposed commitments placed before Brown J. by the appellant and the appellant's correspondence postdating the hearing before Brown J., which the appellant included in this motion, that the appellant was not seeking an opportunity to call *viva voce* evidence that the Receiver's report was inaccurate, but was seeking further time to address the deficiencies in the proposals identified by the Receiver.

[9] The merits of the appeal fall to be determined, therefore, on the basis that Brown J. refused an adjournment of the motion to allow the appellant, an insolvent mortgagor, more time to produce a proposal for the redemption of the mortgage that would be sufficiently attractive to require the rejection of the sale arrived at through the court ordered sale process.

[10] Put bluntly, I see no possibility that this court would hold that Brown J. erred in the exercise of his discretion by refusing to delay the sale process to allow the applicant a further opportunity to come up with a better proposal to redeem the mortgage. The real time demands of commercial litigation are well understood. Last second adjournments to allow one party or another to attempt to improve upon a proposal or an offer while sometimes appropriate, will inevitably undermine the overall effectiveness of the commercial list.

Commercial lists judges are understandably weary of granting such adjournments.

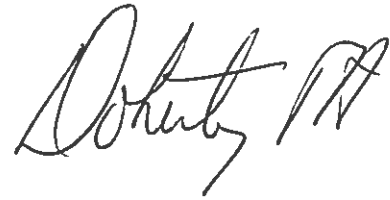
[11] In this case, the Receiver was seeking an order approving a sale arranged under a process established by the court and meticulously adhered to by the Receiver. Both the Receiver and the purchaser were entitled to anticipate that the sale would be completed in accordance with that process. Delays in that process to allow the mortgagor, who had been in default for several months, more time to try and salvage its position, would come at significant financial costs to the Receiver and the purchaser. In addition, the integrity of the sale process established under the court order would suffer. In those circumstances, it is difficult to see how this court might characterize Brown J.'s exercise of his discretion as unreasonable.

[12] I see no realistic possibility that this court would hold that Brown J. erred in the exercise of his discretion. Consequently, I cannot say that there is a serious issue to be litigated on the appeal. I would not grant a stay of the order of Brown J., and if the order is stayed under the *Bankruptcy and Insolvency Act*, I would set aside that stay. As indicated earlier, I arrive at that conclusion regardless of which side carries the burden.

[13] The respondents are entitled to costs of this motion. I award costs to Receiver in the amount of \$5,000 and to Urbancorp (Downtown) in the amount of

\$5,000. Those costs are inclusive of disbursements and any relevant taxes.

There are no costs for or against Home Trust Company.

A handwritten signature in black ink, appearing to read "Doherty PA". The signature is written in a cursive style with a large initial "D" and a stylized "PA" at the end.