CITATION: Hevey v. Hevey, 2024 ONSC 1138
DIVISIONAL COURT FILE NO.: DC-23-38 and DC-23-39
DATE: February 23, 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Kurke, O'Brien and MacNeil JJ.

BETWEEN:	)	
	)	
LYNNE MARIE HEVEY	)	*A. Drury*, for the Respondent
	)	
Applicant (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
CHARLES JAMES HEVEY	)	*R. Haas,* for the Appellant
	)	
Respondent (Appellant in Appeal)	)	
	)	**HEARD:** November 20, 2023 in
	)	London by videoconference

REASONS FOR DECISION

MacNeil J.:

[1] The appellant, Charles James Hevey, is a respondent in a family law proceeding. In that litigation, Desotti J. made orders on June 27, 2022 and November 29, 2022 requiring a forensic audit of the appellant's assets for a 17.5-year period, additional financial disclosure, and other relief. The appellant brought motions for leave to appeal those orders. Leave was granted by a panel of the Divisional Court on June 23, 2023. The appellant subsequently delivered notices of appeal.

[2] Within the context of the two Divisional Court appeals, the respondent, Lynne Marie Hevey, brought motions for security for costs. Those motions were heard by Schabas J. ("the motion judge") on August 16, 2023, in his capacity as a single judge of the Divisional Court.

[3] By his decision, dated August 25, 2023, the motion judge ordered the appellant to pay to the respondent outstanding costs totaling $68,631.32 (including costs awarded both in the family law litigation and in a companion commercial action) and to post $25,000 as security for costs, payable within 30 days of the release of his decision, failing which the appellant's Divisional Court appeals would be dismissed ("the Order").

[4] The matter now comes to this court for a review of the Order pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("the *CJA*").

STANDARD OF REVIEW

[5] The standard of review for a motion pursuant to s. 21(5) is that the reviewing panel should not interfere with the decision of the motion judge unless there is an error of law or a palpable and overriding error on matters of fact or mixed fact and law: see *Stewart v. Ontario (Office of the Independent Police Review Director)*, 2014 ONSC 6150, at para. 13; *Stamm Investments Limited v. Ryan*, 2016 ONSC 6293, at para. 10.

[6] Ordering security for costs under Rule 61.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 is permissive, not mandatory. In an appeal, there is no entitlement as of right to an order for security for costs. Even where the requirements of the rule have been met, a motion judge has discretion to refuse to make the order. It involves the consideration of the criteria under Rule 61.06(1) and an assessment of whether it would be just to order security in the circumstances of the case and the interests of justice. A decision on security for costs is entitled to deference: see *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at paras. 18-20; *Susin v. Susin*, 2018 ONCA 220, at para. 10.

[7] Generally speaking, when a motion judge is exercising discretion, an appellate court will not interfere unless the moving party shows that the court making the impugned decision misdirected itself or was "so clearly wrong that it amounts to an injustice", or where the judge "gives no or insufficient weight to relevant considerations." While a proceeding under s. 21(5) of the *CJA* is not an appeal, similar considerations apply: see *Windrift Adventures Inc. v. Chief Animal Welfare Inspector*, 2023 ONSC 1802, at para. 34.

ANALYSIS

Issue 1: Fresh evidence

[8] The appellant seeks to admit his 2022 income tax return as fresh evidence on this motion to set aside. He submits that the motion judge relied on his 2021 return, which indicated a "household income" of over $500,000. However, his 2022 income tax return indicates a dramatically reduced income of $18,169 and only became available after the hearing of the security for costs motion. The appellant contends that his reduced income puts his ability to participate in the family law appeals at risk and so it should be taken into consideration.

[9] The admissibility of this evidence is governed by the test set out by the Supreme Court of Canada in *R. v. Palmer* (1979), [1979] S.C.J. No. 126, [1980] 1 S.C.R. 759, at para. 22:

(i) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
(ii) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue;
(iii) the evidence must be credible in the sense that it is reasonably capable of belief; and
(iv) the evidence must be such that, when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the result.

[10] The 2022 income tax return fails the *Palmer* test for the following reasons:

(a) Concerning the first factor, the security for costs motions were heard in mid-August 2023. As a result, the appellant should have been in a position to tender some evidence concerning his 2022 taxable income at that time, even if he did not have the income tax return in hand. He did not do so. As the motion judge indicated, the appellant did not provide "details of his financial situation to support" his claim that he has limited access to funds. This failure falls solely within the appellant's responsibility with the result that the information contained in the 2022 income tax return must be seen as something that, with due diligence, he could have put into evidence at the time of the motions.

(b) Concerning the fourth factor, the motion judge's decision to order security for costs was rooted in the evidence and based on findings that the appellant has insufficient assets in Ontario. Even if the fresh evidence is believed, it could not reasonably be expected to have affected the result when taken with the other evidence adduced before the motion judge since it does not cast doubt on the finding that the appellant has insufficient assets in Ontario to pay costs.

[11] Therefore, the motion to introduce fresh evidence is dismissed.

Issue 2: Should the Order be set aside or varied?

[12] The appellant proffers four main reasons why the Order should be set aside or varied:

(a) the motion judge did not have jurisdiction to impose a date by which the Divisional Court appeals would be dismissed failing payment of the costs orders or posting of security;

(b) the costs order of $15,000 was automatically stayed pursuant to Rule 63.01(1);

(c) the commercial action costs were payable to four defendants, not just to the respondent; and

(d) there was an agreement between the parties, made before Desotti J. on January 6, 2023, that the costs in the related family law proceeding would be paid from the funds being held to the credit of the commercial action.

Discussion

[13] In his reasons, the motion judge correctly identified the applicable rule as being Rule 61.06 of the *Rules of Civil Procedure*. He applied this rule, its jurisprudence and legal test on the motions before him. Rule 61.06(1) reads:

61.06 (1) In an appeal where it appears that,

(a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;

> (b) an order for security for costs could be made against the appellant under rule 56.01; or
>
> (c) for other good reason, security for costs should be ordered,
>
> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

[14] The motion judge noted that, in light of the fact that leave to appeal had been granted, the appeal could not be considered frivolous or vexatious under Rule 61.06(1)(a). But he went on to explain why several of the factors in Rule 56.01 did apply, including that: the appellant resides in Florida and so is ordinarily resident outside of Ontario; the appellant has unpaid orders for costs made against him totalling $102,840.09; and there is good reason to believe that the appellant has insufficient assets in Ontario to pay the costs since (i) he owns no property in Ontario, and (ii) the funds being held in trust in the commercial action are being held in trust to the credit of that dispute and no determination has been made that such funds belong to the appellant. Those findings were open to the motion judge to make based on the record before him.

[15] The motion judge also took into account whether there was "other good reason" that security for costs should be ordered. Again, he correctly identified the legal test, including that he, as the motion judge, must "take a step back" and consider the justness of the order sought: see *Heidari v. Naghshbandi*, 2020 ONCA 757, 153 O.R. (3d) 756.

[16] In analyzing the circumstances of the case before him, the motion judge considered not only findings made by other judges concerning the appellant's conduct, but also that:

> (a) the appellant had not provided details of his financial situation to support the claim that he has limited access to funds such that he would be prevented from pursuing the appeals if he was ordered to post security for costs;
>
> (b) the appeals were on interlocutory issues and would not finally resolve the proceeding; and,
>
> (c) it would be appropriate and just to provide the respondent a "measure of protection" by way of an order for security for costs.

The motion judge concluded that the criteria listed in Rule 56.01(1) applied and supported an order for security for costs.

[17] It was open to the motion judge on the record before him to conclude that security for costs should be ordered. His decision in this regard is thoroughly explained and the appellant has not demonstrated an error of law in the motion judge's exercise of his discretion.

[18] With respect to the specific grounds raised by the appellant, each is addressed, in turn, below.

(a) Jurisdiction to impose a dismissal of appeals

[19] The appellant submits that the motion judge did not have jurisdiction to impose a date by which the Divisional Court appeals would be dismissed failing payment of the costs orders or posting of security. He argues that Rule 61.06(2) of the *Rules of Civil Procedure* provides that an appeal may only be dismissed by way of a separate motion before a judge of the appellate court, in the event an appellant fails to comply with a security for costs order. The appellant says that the respondent did not seek an order before the motion judge that the appeals be dismissed in the event that any security or outstanding costs were not paid; and no submissions were made by the parties regarding a date by which the appeals would be dismissed if the amounts were not paid. He asserts that no grounds exist for an order that costs in the commercial action first be paid, as a condition for the Divisional Court appeals to be heard. The appellant submits that he will be unable to make the required payment within 30 days and, as a result, his appeals will be improperly dismissed.

[20] I do not agree that the motion judge lacked jurisdiction to direct that the appeals shall be dismissed if the payments are not made within 30 days. The motion judge had the power to make such an order by application of the *Rules of Civil Procedure*. Rule 61.06(1) provides that, on a motion for security for costs, the judge may make such order "as is just". Rule 56.04, which applies with necessary modifications, provides that the amount and form of security and the time for paying shall be determined by the court. In any event, I am satisfied that the language used by the motion judge does not direct an automatic dismissal by the registrar of the appellant's appeals. If the appellant fails to comply with the security for costs order, Rule 61.06(2) still requires the respondent to bring a motion to dismiss the appeal, as counsel for the respondent acknowledged before us. The appellant's complaints about his inability to make the payments directed by the Order can be taken up with the judge hearing any motion to dismiss the appeals.

(b) Stay of $15,000 because appeal filed

[21] The appellant contends that the motion judge failed to consider that the interlocutory orders and the findings of contempt made against him had been appealed and were pending. More specifically, the appellant submits that with the delivery of his notice of appeal dated June 28, 2023, respecting the November 29, 2022 order of Desotti J., the costs order of $15,000 made therein was automatically stayed pursuant to Rule 63.01(1) of the *Rules of Civil Procedure*. That rule states that an appeal "from an … order stays … any provision of the order for the payment of money, except a provision [relating to a support order]". As a result, the motion judge should not have considered the costs order to be "unpaid" under Rule 56.01(1)(c), and the $15,000 amount should not have been included as a term of the Order.

[22] In his reasons, the motion judge indicated that the respondent sought security for costs of the appeals in the amount of $152,840.09, which included payment of prior costs awards in the family litigation and the commercial proceeding, as well as $50,000 security for costs of the appeal: at para. 8.

[23] With respect to the costs order of $15,000, I accept that that award was technically stayed at the time of the hearing before the motion judge by virtue of Rule 63.01(1), since the appellant had served his notice of appeal prior to the said hearing. However, the granting of security for costs is discretionary. Rule 61.06(1) specifically gives the motion judge jurisdiction to award security for costs

of the appeal that includes costs awarded in the proceedings below. There is nothing prohibiting the court from ordering costs that had been awarded below pending the appeal if it is in the interests of justice that such security be ordered: see *Aegis Biomedical Technologies Ltd. v. Jackowski* (1996), 28 O.R. (3d) 558 (C.A.), at paras. 9-10.

[24] The motion judge recognized that security for costs orders are not to be made routinely: at para. 22. In this case, though, he found that it was in the interests of justice that security for costs be ordered, including the payment of certain costs ordered below. I am not persuaded that he made an error in principle in so finding. In exercising his discretion, the motion judge made findings supported by the evidence and applied the principles set out in Rule 61.06 and the related jurisprudence. I see no reason to interfere with his finding.

(c) Commercial action costs payable to four defendants

[25] The appellant submits that the $38,631.32 costs ordered by Nicholson J. to be paid by the appellant in the commercial action were payable to four defendants, not just to the respondent herself, and there is no distinguishing what portion may be payable to her. Therefore, the full amount of those costs should not have been ordered by the motion judge to be paid to the respondent.

[26] I am not persuaded that this consideration supports setting aside or varying the Order. Since Nicholson J. did not order a division of the costs award amongst the four defendants, any one of them could arguably enforce payment jointly or severally. The appellant is obliged to pay the entire costs amount. At any rate, in paragraph 31 of his reasons, the motion judge provided for a potential adjustment of funds to account for costs paid in the event of a settlement as it pertains to the commercial action.

(d) Existence of agreement to pay costs from funds held in trust

[27] The appellant asserts that there was an agreement between the parties, made before Desotti J. on January 6, 2023, that the costs in the related family law proceeding would be paid from the funds being held to the credit of the commercial action. Given this agreement, there would be no prejudice to the respondent because her costs will be secured by the funds held in trust.

[28] I am not persuaded that this consideration supports setting aside or varying the Order for two reasons. First, the existence of an agreement in this regard is disputed by the respondent. Moreover, the appellant effectively acknowledges that the respondent does not agree there is an agreement stating, at paragraph 53 of his affidavit sworn September 29, 2023 (Tab 2, Motion Record of the Appellant):

> "The security order made reference to the costs order of Justice Nicholson in the companion action … as indicated, over $1 million is being held in trust at Harrison Pensa for me that already secures the costs in that action. Further, the parties in the companion action have brought no claim for security for causing [*sic*] that action (presumably because their costs are already secured). Further, I have proposed that the costs in the companion action be paid out of the funds held at Harrison Pensa. <u>The Respondents will not agree</u>" [emphasis added].

[29] Second, there is no clear evidence of such an agreement. In support of the appellant's position, he relies on the statement made by the respondent's counsel, Mr. Drury, "I'm content with that, Your Honour", as reflected in the transcript of the parties' attendance before Desotti J. on January 6, 2023, at pages 22-23. In my view, in the context of counsels' more fulsome exchange before the court that day, it is simply not evident what Mr. Drury is referring to by this particular statement – either the order in which participants would address the court or the appellant's proposal about the use of funds to pay costs.

[30] I also note paragraph 35 of the appellant's affidavit, sworn September 29, 2023 (Tab 2, Motion Record of the Appellant), wherein he indicates that he understood an agreement was reached that the outstanding costs in the family court proceeding would be paid from the trust funds, but that "[f]or reasons unknown to me, this agreement was not reflected in his Honour's endorsement of January 25, 2023". Still further, paragraph 15 of the appellant's other affidavit sworn September 29, 2023 (Tab 3, Motion Record of the Appellant), wherein he states: "[w]hy won't Lynne agree to take the money being held in trust at Harrison Pensa, as I have proposed; and as we had agreed before Justice Desotti on January 6, 2023. …", raises doubt that there was a firm agreement. As a result, I am not satisfied that there is evidence of a discernible agreement between the parties as to the costs of the family law proceeding being paid from the funds being held in trust respecting the commercial action.

Conclusion

[31] Based on the foregoing, the appellant has failed to identify any error on an extricable point of law, or any misapprehension of material fact or palpable and overriding error. There is no basis upon which to set aside or vary the Order of Schabas J., dated August 25, 2023.

DISPOSITION

[32] In the result, the appellant's motion is dismissed.

[33] The parties agreed that the successful party would be paid $5,000 costs on this motion. As the respondent is the successful party, the appellant shall pay her $5,000 in costs, all inclusive.

B. MacNeil J.

B. MacNeil J.

I agree

A.D. Kurke J.

A.D. Kurke J.

I agree

S. O'Brien J.

S. O'Brien J.

Released: February 23, 2024

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B E T W E E N:

Lynne Marie Hevey

Applicant (Respondent in Appeal)

- and –

Charles James Hevey

Respondent (Appellant in Appeal)

REASONS FOR DECISION

Kurke, O'Brien and MacNeil JJ.

Released: February 23, 2024