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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ADELAIDE CAPITAL CORPORATION v. 412259 ONTARIO LIMITED, FRANK SPADAFORA, NICODEMO SCALI, DOMENIC VACCARO and NICODEMO BRUZZESSE

BEFORE: Master R. Dash

COUNSEL: Michael J. Reid, for the plaintiff

Nicodemo Scali, defendant in person

E N D O R S E M E N T

[1] This is a motion under rule 60.07(2) for leave to issue a writ of seizure and sale to enforce a judgment dated September 22, 1992. The plaintiff went bankrupt shortly after it obtained judgment. The assignee corporation took no steps to enforce the judgment after February 1994 and allowed the original writ of seizure and sale to expire. The motion is resisted by the defendant Nicodemo Scali ("Scali").

BACKGROUND

[2] The factual background is set out in two affidavits from Valerie McMullen, described as the plaintiff's agent, and from material filed by the defendant Scali. Although Scali's information is not provided in affidavit form, the plaintiff's solicitor has agreed that the court consider the information as if it were sworn, given that Scali is an unrepresented litigant.

[3] On September 22, 1992 the original plaintiff, Central Guaranty Trust Company ("Central Guaranty") obtained default judgment on a mortgage debt against the defendants for $69,603.71 inclusive of costs with postjudgment interest at 11.75% and filed a writ of seizure and sale. On November 19, 1992 the mortgaged premises were sold under power of sale leaving a deficiency on the judgment debt of $16,328.47. In or about December 1992, Central Guaranty went bankrupt and, although the exact circumstances were never explained, Adelaide Capital Corporation ("Adelaide") took an assignment of Central Guaranty's receivables, including this judgment debt. There were "thousands of files to be worked on" and a reduced staff. Two employees of Adelaide, including Richard Mellor, went through the files and determined "which should be proceeded upon for enforcement forthwith. The remaining files were to be diarised to be proceeded upon at a later date." A recovery officer of Adelaide sent a letter to Scali on March

4, 2003 advising of Adelaide's involvement and of the outstanding balance (which was then $18,013.55) and presenting settlement options. This was followed by two letters from Richard Mellor, the manager of Adelaide's recovery department, dated January 5, 1994 and February 10, 1994 requesting a proposal failing which an examination in aid of execution would be conducted.

[4] Nothing further was done by Adelaide to enforce the judgment for 12 years. The writ of seizure and sale filed by Central Guaranty expired in 1998 and had never been renewed. Although files not sent to immediate enforcement were diarised to proceed at a later date, Adelaide cannot explain why this did not happen other than the volume of files. Mr. Mellor is no longer employed at Adelaide. The only explanation given by Ms. McMullen is her statement: "I do not know why Richard Mellor did not renew the Writ or Writs of Seizure and Sale in this matter." She concludes with the bald assertion, but without explanation, that from conversations with John Richards, an officer of Adelaide, "the Plaintiff did not ever intend to abandon this matter."

[5] In January 2006 Ms. McMullen did a credit check revealing that Scali became one of the owners of 5255 Marcel Crescent, Niagara Falls (the "Marcel property"). A title search revealed that the Marcel property was purchased in September 2005 for $227,500 subject only to a $150,000 charge to the Bank of Nova Scotia. Title was taken in the name of Nick John Scali and his wife Sarah Scali. Nick John Scali is admittedly the same person as the defendant Nicodemo Scali. In February 2006 Adelaide obtained an order to continue under rule 11.02 and Adelaide's solicitor filed a notice of change of solicitors. On February 14, 2006 the solicitor for Adelaide wrote to Mr. Scali inviting settlement discussions. The judgment with postjudgment interest had by now more than doubled to $42,183.31. The plaintiff then brought this motion for leave to issue a writ of seizure and sale (and to amend the title of proceedings to include Scali's alternate names). The motion was adjourned several times to allow for settlement discussions upon Scali's undertaking before Master Peterson on April 6, 2006 not to sell or encumber the Marcel property pending disposition of the motion.

[6] Scali admits that he was served with the statement of claim in or about September 1992 and that he likely received the letters in January and February 1994 from Mr. Mellor which referred to a judgment debt. He heard nothing more about the judgment until Mr. Reid's letter to him in February 2006, some 12 years later. In February 2005 Scali and his wife borrowed $35,000 from CIBC to cover mortgage arrears on their previous home at 6424 January Drive, Niagara Falls ("the "January property"). It was repaid with a funds provided by the Scalis' daughter, Kara Scali in May 2005. The January property was sold in September 2005. It resulted in a surplus of $14,166, but this does not take into account the advance of money from Kara, which would result in a "net loss". The Marcel property was purchased at the same time for $227,500 using the following funds: $99,930 from the Bank of Nova Scotia, $11,722 net sale proceeds from the sale of the January property and $118,863 certified funds. The certified funds allegedly include money from Kara ($10,006 from a GIC, $67,181 from her bank account), from his son Jonathan Scali ($9,464 from a GIC) and from his mother-in-law Maria Grazia Biamonte ($30,000 from a GIC). Scali has provided bank records to document the source of the funds. Scali therefore claims that he has no "beneficial interest" in the property. I take that to mean that

once the monies loaned to him by his children and mother-in-law are taken into account there is no equity left in the property. No charge was registered on title to protect any interest these "lenders" may have as a result of their "loans" and no declaration of trust was registered.

[7] Scali has produced the sheriff's execution certificate obtained by his real estate solicitor at the time of closing showing no executions registered against Nick John Scali. Scali claims in his submissions that he relied on the fact that no executions were registered against him to take title in his name jointly with his wife. There is no specific evidence to that effect in Scali's written materials, however it is obvious that if the execution searches had revealed any writ of seizure and sale registered against Scali he would not have taken title in his name or he would have taken other steps to secure the family's "loans." If this motion is allowed and a writ of seizure and sale filed, the plaintiff will take priority over any unsecured interest of the family members subject to any determination that they have a beneficial interest held in trust by the registered owners.

THE LAW

[8] Rule 60.07(1) provides that a judgment creditor may obtain one or more writs of seizure and sale without court order, however pursuant to rule 60.07(2) leave of the court must be obtained if the writ is sought more than six years after judgment. Rule 60.07(2) provides:

> (2) If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of seizure and sale shall not be issued unless leave of the court is first obtained.

[9] The writ itself is in force for six years from the date of its issue: rule 60.07(6). The writ may be renewed without court order if a requisition is forwarded to the sheriff before its expiration: rule 60.07(8). If the plaintiff fails to renew with the sheriff before the expiration of the writ the plaintiff may seek leave of the court under rule 60.07(2) to issue the writ: *Colombe v. Caughell* (1985), 52 O.R. (2d) 767 (D.C.O.); *Canada (Attorney General) v. Palmer-Virgo*, [2003] O.J. No. 1238 (S.C.J.) This is sometimes referred to as an "alias writ" and such writ would be in effect only from the date of its issuance so as not to affect intervening rights of third parties. The criteria for the exercise of the court's discretion to issue the writ is "the interests of justice": *Colombe*, supra, at p. 770.

[10] In *Royal Bank of Canada v. Correia*, [2006] O.J. No. 3206 I set out the test for granting leave to issue a notice of garnishment under rule 60.08(2) more than six years after judgment. The section is almost identical to rule 60.07(2) and in fact *Royal Bank of Canada v. Correia* was based on a decision under rule 60.07(2): *Ballentine v. Ballentine* (1999), 45 O.R. 706 (S.C.J). In my view the test for the exercise of the court's discretion is the same under rules 60.07(2) and 60.08(2) and is set out in paragraph 6 of *Royal Bank of Canada v. Correia* as follows:

> Therefore, when a plaintiff seeks leave under rule 60.08(2) to issue a notice of garnishment more than six years after the date of judgment, he must adduce evidence explaining the delay such the court may conclude that the plaintiff has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The defendant may raise other grounds

> to convince the court that it would be inequitable to enforce the claim. For example the defendant could demonstrate that he has relied to his detriment or changed his financial position in reliance on reasonably *perceived* acquiescence resulting from the delay. Of course the onus would be on the defendant to adduce evidence of such reliance and detriment.

[11] The plaintiff argues that the judgment itself remains valid and it should not be denied the fruits of its judgment by denying it an enforcement mechanism. The judgment, at the time it was granted, was subject to the former *Limitations Act*, R.S.O. 1990, c. L.15 section 45(1)(c) which provided a limitation period of twenty years for actions on a judgment. Under the new *Limitations Act 2002*, S.O. 2002, c. 24 Schedule B section 16(1)(b) there is no limitation period to enforce an order of the court. Pursuant to section 24(4) the new "no limitation" provision applies provided that the earlier limitation period had not expired as of the date that the new act came into force. On the other hand, it appears that sections 15(1) and (2) of the new *Limitations Act* applies and there is an ultimate limitation period of 15 years despite any other limitation period established by the new act. It is not necessary for me to decide whether the limitation period is 15 years or 20 years or if there is no limitation period since it has been less than 15 years since the judgment. The limitation period for action on this judgment has not expired. This means that even if the judgment cannot be enforced by obtaining and renewing writs of seizure and sale either without court order because more than six years have passed or alternatively by obtaining an order of the court under rule 60.07(2) because leave is refused, the plaintiff may still bring action on the judgment and obtain a fresh judgment thereon: *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.) at paragraphs 23 to 25. If a new judgment were obtained the plaintiff could then cause the issuance of a writ of seizure and sale without court order.

[12] While the fact that the judgment remains in force is an important factor to consider, the court must still exercise its discretion in determining whether to grant an indulgence to the plaintiff by granting leave. As stated in *Palmer-Virgo*, supra, at paragraph 16:

> While I am still of the view that it is incongruous that the plaintiff should be seriously jeopardized in his efforts to realize the fruit of his judgments, which are in force for 20 years, because of a failure to comply with procedural requirements for enforcement, the granting of relief from procedural requirements still remains a matter of discretion.

[13] The test in *Royal Bank of Canada v. Correia* therefore sets a very low evidentiary threshold for a judgment creditor to obtain leave. The plaintiff need only explain the delay such that the court may conclude that the plaintiff has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment." It would be a rare case when a plaintiff could not meet that test. If the plaintiff meets the test the onus is then on the judgment debtor to convince the court that "he has relied to his detriment or changed his financial position in reliance on reasonably *perceived* acquiescence resulting from the delay."

CONCLUSIONS

[14] Mr. Reid suggests that the appropriate remedy is to grant leave but reduce the postjudgment interest rate to the average rate in the intervening years (approximately 6%). I disagree. In my view this is that rare case where the plaintiff has not met even the very low

evidentiary threshold set out in *Royal Bank of Canada v. Correia*. The volume of files and reduction of staff presenting to Adelaide following the bankruptcy of Central Guaranty in or about December 1992 and the diarising of files "to be proceeded upon at a later date" is the only "explanation" proffered for its failure to enforce the judgment for over thirteen years other than a few demand letters in 1993 and early 1994. This does not amount to an explanation at all of the delay or whether Adelaide had acquiesced in non-payment or otherwise waived its rights under the judgment. At best it is an explanation as to why it cannot provide an explanation. In fact, Ms. McMullen admits in her affidavit that she is unable to explain why Adelaide failed to enforce the judgment between the last demand letter in February 1994 and the new demand some twelve years later in February 2006 or why the writ was not renewed prior to its expiry. When Adelaide took an assignment of the "thousands" of files from Central Guaranty it had decisions to make – namely which debts to enforce, which debts not to enforce and which debts upon which to delay enforcement. It is clear that there was a initial deliberate decision not to undertake immediate enforcement of this judgment debt, but it is unclear whether enforcement was not revived for another twelve years as a result of a deliberate decision or inadvertence. The bald assertion by Ms. McMullen that from conversations with John Richards, an officer of Adelaide, she was able to conclude that the plaintiff "did not ever intend to abandon this matter" is insufficient. She does explain Richards' involvement, if any, with this file, what conversations she had with Richards and what evidence Richards has to support his contention. Richards has not provided his own affidavit. Further, Ms. McMullen does not attest to her belief in Richards' assertions contrary to rule 39.01(4). I am not able to conclude on the meagre evidence before me that Adelaide has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment."

[15] Even if I had determined that Adelaide had satisfied this low evidentiary threshold, I would still refuse to exercise my discretion and grant leave to issue a writ of seizure and sale since Scali has satisfied me that having heard nothing for twelve years, he clearly "relied to his detriment…in reliance on reasonably perceived acquiescence resulting from the delay." He would never have taken title to his home in his own name had the execution search received prior to closing revealed a writ of seizure and sale against him. Further, or in the alternative, he would have taken steps to secure the interest of family members who advanced the purchase funds. It would not be in the interests of justice to now grant leave to the plaintiff to issue a writ of seizure and sale in these circumstances.

[16] The plaintiff of course is not without remedy. Even though the plaintiff may be prevented from enforcing the current judgment, it may still bring action on the judgment (*Lax v. Lax*, supra) and if a new judgment is obtained it may obtain a writ of seizure and sale without leave of the court. The defendant Scali may then raise various defences including laches and acquiescence. In the interim, given the absence of a writ of seizure and sale, Scali may take steps to undo the damage from his detrimental reliance, for example by securing the interests of his family members. If the plaintiff obtains a new judgment and challenges any transfer or encumbrance on title, for example on the basis that Scali had a beneficial interest in the funds provided by his children or that the encumbrances constitute a fraudulent preference, that will be the subject matter for another court at another time.

[17] The motion for leave to issue a writ of seizure and sale is denied. Even if I had granted leave, I would have done so on the condition that no interest run from the date of expiry of the writ of seizure and sale to the date of its renewal, as was done in *Palmer-Virgo*, supra, at paragraph 5. I would have allowed interest to run on the new writ only at the postjudgment interest rate in effect for current judgments.

ANCILLARY RELIEF AND COSTS

[18] The plaintiff also moves to amend the title of proceedings and the writ of seizure and sale to indicate that the defendant Nicodemo Scali is also known as Nick John Scali and Nicholas Scali. I am satisfied on the evidence of the plaintiff and of the defendant that Scali has used and is known by the name Nick John Scali and the title of proceedings will be amended accordingly. Scali does not oppose such amendment. As leave was denied to issue a writ of seizure and sale there is no writ to amend. There is no evidence that Scali has used the name Nicholas Scali.

[19] The solicitor for the plaintiff submits that whether the order is granted or refused I should make an ancillary order to vacate the order of Master Peterson dated April 6, 2006. The operative part of that order is simply an order adjourning the motion. The concern of course is the recital in the preamble that the order adjourning the motion was on consent "on the undertaking" of Scali to preserve the Marcel property and "that he will not facilitate the sale or encumbrance of that home pending the disposition of this matter or further Order of the Court." The undertaking does not form part of the operative part of the order. The order was then registered on title on May 2, 2006 pursuant to an "Application to Register Court Order" presumably to give notice of Scali's undertaking to non-parties who may wish to deal with the land. In my view the appropriate disposition is to vacate registration of the order, rather than setting aside the order itself. For greater certainty I also order that Scali is now relieved from his undertaking. If a further order is required to give effect to the intent of my disposition I may be spoken to.

[20] Although the defendant Scali was successful on the motion it does not appear to be an appropriate case for costs, particularly as Scali has apparently made no effort to satisfy even the principal portion of the judgment. Further, Scali was self represented on this motion. Although a self represented litigant may be awarded costs in the discretion of the court for work that would normally be done by a solicitor, he must demonstrate that he "incurred an opportunity cost by forgoing remunerative activity": *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.) at p. 339-340. Nonetheless either party should have the opportunity to make submissions. If costs cannot be agreed, I would be prepared to receive submissions from either party, supported by a Costs Outline and applicable receipts and other documentation. If submissions are not received within 14 days there shall be no costs of the motion. If costs submissions are made, any responding submissions must be received within seven days thereafter.

ORDER

[21] It is hereby ordered as follows:

(1) The plaintiff's motion for leave to issue a writ of seizure and sale is dismissed.

(2) The defendant Nicodemo Scali is hereby relieved from his undertaking recited in the order of Master Peterson dated April 6, 2006.

(3) Registration of the Application to Register Court Order receipted as SN118948 on May 2, 2006 attaching the order of Master Peterson dated April 6, 2006 shall be vacated from title.

(4) The title of proceedings is amended by adding after the name of the defendant Nicodemo Scali the words “also known as Nick John Scali”.

(5) Submissions as to costs may be made within 14 days and any responding submissions within seven days thereafter.

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Master R. Dash

DATE: October 18, 2006