

CITATION: Ernst & Young Inc. v. Aquino, 2020
COURT FILE NO.: CV-19-630908-00CL and CV-20-00636754-00CL
DATE: 20200915

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST
BETWEEN:**

RE: ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited, Applicant

AND:

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, LUCIA COCCIA a.k.a. LUCIA CANDERLE, THE ESTATE OF MICHAEL SOLANO, GIOVANNI ANTHONY SIRACUSA a.k.a. JOHN SIRACUSA, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, 2420595 ONTARIO LTD. a.k.a. STRADA HAULAGE, 2304288 ONTARIO INC., 2466601 ONTARIO INC. a.k.a. MMC CONTRACTING, 2420570 ONTARIO LTD. a.k.a. MTEC CONSTRUCTION, TIME PASSION, INC. and RCO GENERAL CONTRACTING LTD., Respondents

AND BETWEEN:

KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED, Applicants

AND:

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, THE ESTATE OF MICHAEL SOLANO, LUCIA COCCIA a.k.a. LUCIA CANDERLE, DOMINIC DIPEDE, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, MMC GENERAL CONTRACTING, MTEC CONSTRUCTION, STRADA HAULAGE, 2104664 ONTARIO INC., and 2304288 ONTARIO INC., Respondents

BEFORE: Dietrich J.

COUNSEL: *Alan Merskey* and *Evan Cobb*, for the Applicant Ernst & Young Inc., in its capacity as the Monitor of Bondfield Construction Company Limited

Jeremy Opolsky and *R. Craig Gilchrist*, for the Applicant KSV Kofman Inc., in its capacity as Trustee-in-Bankruptcy of Forma-Con

Michael Citak and *Chris Junior*, for the Respondent John Aquino

George Corsianos, for the Respondent Marco Caruso

Terry Corsianos, for the Respondents Giuseppe Anastasio and Lucia Coccia-Canderle

Brian Belmont, for the Respondent 2104664 Ontario Inc.

HEARD: September 14, 2020

ENDORSEMENT

[1] In these applications, the court-appointed Monitor seeks a declaration that various payments from Bondfield Construction Company Limited (“Bondfield”) to the Respondents, totaling more than \$35.7 million, were transfers under value made with intent to defraud, defeat or delay Bondfield’s creditors, and it seeks compensation for those transfers. The Monitor alleges that the transfers took place through a false invoicing scheme and a fund cycling scheme involving the Respondent 2304288 Ontario Inc. (“230”), a personal holding company of Bondfield’s president, the Respondent John Aquino (“Mr. Aquino”). The Trustee-in-Bankruptcy for 1033803 Ontario Inc. and 1087507 Ontario Limited (collectively “Forma-Con”) (the “Trustee”) seeks to set aside a series of transfers under value, made through a false invoicing scheme perpetrated by the Respondents that drained \$11.4 million from Forma-Con, and to recover those funds for the benefit of Forma-Con’s creditors.

[2] Mr. Aquino brings this preliminary motion at the outset of the outset of these applications to be heard together as one, seeking an order converting the combined application into an action. The motion is opposed by both the Monitor and the Trustee.

[3] Mr. Aquino and other Respondents brought a similar motion before Justice Hainey on February 28, 2020. Justice Hainey dismissed the motion on the basis that the moving parties before him had not adduced any evidence to support their request for a conversion of the application into an action. However, the dismissal was made without prejudice to the moving parties to adduce persuasive evidence of the need for a trial of an issue at the hearing of this application. I, as the application judge, am able to order the trial of an issue pursuant to rule 38.10(b) of the *Rules of Civil Procedure*. Mr. Aquino seeks an order converting the entire application to an action now, at the outset of the hearing, as opposed to allowing the application to proceed and ordering the trial of an issue, if necessary, in the course of, or following the hearing of the application.

[4] On the motion before Justice Hainey, he concluded that, based on the evidence, none of the moving parties provided any explanation for the impugned transactions; none of them denied their involvement in the impugned transactions, none of them denied their connection with the suppliers, who were not suppliers of Bondfield, or that they were non-arm’s length with Bondfield; none of them denied that that they personally benefitted from the impugned transactions; none of them asserted that Bondfield received any value from the impugned transactions; and none of them provided any evidence to rebut the “badges of fraud” used by the Monitor in support of its application.

[5] Justice Hainey also found that the moving parties baldly asserted, without particulars, that there were material facts in dispute and issues of credibility to be resolved. He found that none of the alleged factual disputes on credibility issues pertained to the merits in dispute. Justice Hainey's decision is under appeal.

[6] The moving party Mr. Aquino asserts that much has changed since the motion before Justice Hainey. Mr. Aquino submits that when Justice Hainey heard the motion, none of the Respondents had filed any responding material. Mr. Aquino further submits that the record now before the court raises material facts in dispute and credibility issues that cannot be properly addressed without a trial.

[7] For the reasons that follow, I find that Mr. Aquino has not demonstrated that the application should be converted to an action.

[8] The determination of whether an application ought to be converted to an action requires an "assessment of whether or not 'the forensic machinery of a trial' is required for a fair and just process": *Niro v. Caruso*, 2015 ONSC 7446, having regard to the following principles:

- (a) Where the Legislature has stipulated that a proceeding may be by application, there is a *prima facie* right to proceed in that way and the matter should not be converted into an action without good reason to do so;
- (b) Where an application is statutorily authorized, the court should not convert it into an action unless: (i) material facts are in dispute; and (ii) the court cannot properly resolve the material facts without the benefit of a trial;
- (c) In determining whether to convert an application into a trial of an issue, the court will consider such factors as: (i) whether there are material facts in dispute; (ii) the presence of complex issues; (iii) whether there is a need for the exchange of pleadings and discovery; and (iv) the importance and nature of the relief sought by the application; and
- (d) The court should consider whether the affidavits and the transcript of the cross-examination are sufficient to decide any credibility issues or whether a trial is required: *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542, at paras. 48-51.

[9] Each of the Monitor's and the Trustee's application relies on the provisions set out in s. 96 of the *Bankruptcy and Insolvency Act*. The default procedural rule for a s. 96 claim is to proceed by way of application.

[10] I must then consider whether there are material facts in dispute; and whether the court cannot properly resolve them without the benefit of a trial.

[11] Mr. Aquino asserts that there are material facts in dispute as well as issues of credibility, each of which require a trial. Specifically, Mr. Aquino asserts that there are material facts in dispute relating to the intent of the directing minds of Bondfield and Forma-Con, and complex issues that require expert evidence and the weighing of that evidence. Mr. Aquino asserts that it was not he alone, as president of Bondfield, who was the directing mind, but that his father Ralph Aquino (“Ralph”) and his brother Steven Aquino (“Steven”) were also directing minds.

[12] Mr. Aquino further asserts that the Monitor and the Trustee have not acted with an even-hand in identifying impugned transactions and have ignored significant evidence which would expose both Ralph and Steven to potential liability in this proceeding. Mr. Aquino argues that the application process, unlike an action, precludes him from issuing a third-party claim against another, such as his father or his brother, who had a significant role in the impugned transactions.

[13] Mr. Aquino also asserts that Ralph and Steven ought to be parties to the proceeding because, as directing minds of Bondfield, their evidence is necessary to determine whether there was an intent by Bondfield to defraud, defeat or delay creditors. He further asserts that there is evidence of each of Ralph and Steven having participated in the false invoicing scheme at Bondfield, but if they are not parties, and I find that there were transfers under value, they could not be held accountable. Mr. Aquino argues that this omission would unfairly leave him with a greater responsibility for any damages awarded. Mr. Aquino also asserts that by adding Ralph and Steven as parties to the proceeding, there would be further examinations and likely credibility issues that would require a trial.

[14] I do not accept Mr. Aquino’s arguments that the application should be converted to an action to permit Mr. Aquino to claim against Ralph and Steven. Mr. Aquino has been aware of the claims against him since November of 2019. He was not precluded from bringing his own action against Ralph or Steven or commencing his own application. He could have applied to the court to lift any stay that may have impeded such action. Related matters can be dealt with in the same process, much as this application combines the applications of each of the Monitor and the Trustee.


[15] The Monitor submits that the examples of false invoicing in which Ralph and Steven may have participated are not included in the transactions under value that form part of this application. The Monitor also submits that it was necessary for it to determine, based on the resources available, and based on the guidance from the court, which harms it would pursue and in what order. This court authorized Phase II of the investigation that identified the fraud covered by this application. Both the Monitor and the Trustee reject Mr. Aquino’s argument that the Monitor or the Trustee circumscribed the scope of its mandate to focus on Mr. Aquino’s activities and not the activities of Ralph or Steven. I agree that these allegations against the Monitor and the Trustee, each of which is an officer of the court, are without merit. I accept the Monitor’s submission that in bringing its claims, it connected responsibility to the persons known to be involved. The only evidence that Mr. Aquino has adduced to connect Ralph and Steven to the transactions involving 230, of which Mr. Aquino is the sole director and shareholder, is that the former CFO of Bondfield,

Dominic DiPede, testified that Ralph and Steven may know something about transactions involving that company. I agree with the Monitor that this connection would not make them privies to the transactions. I accept the Monitor's submission that it is pursuing the most obvious harms by the persons who most obviously caused them and that, for the purpose of this application, it has nothing against which to find Ralph and Steven responsible.

[16] Based on the record, I am satisfied that the process in this application has been fair. Mr. Aquino has had the Phase II report since November of 2019. He has had plenty of opportunity to question the Monitor and the Trustee and to participate in examinations, including an examination of the former CFO.

[17] Mr. Aquino contends that because he has now filed an expert report by Ross Hamilton, a trial is required. The Monitor disagrees and submits that Mr. Hamilton's report is of limited utility. The Trustee agrees. The report speaks to the financial condition of Bondfield, which is relevant to the determination of whether Bondfield had an intent to defeat, defraud or delay creditors, but it is only one factor. Further, Mr. Hamilton admitted that he is not an expert in insolvency. The Monitor's evidence is that Mr. Hamilton did not consider a number of relevant factors in assessing the financial condition of Bondfield and therefore his report cannot be relied on.

[18] I find that Mr. Aquino has not produced sufficient evidence to persuade me that there are material facts in dispute or credibility issues that cannot be resolved without the benefit of a trial. At the heart of the application is the question of whether the impugned transactions were carried out with intent to defraud, defeat or delay creditors. The facts relevant to this fundamental question remain much the same as they were at the time Justice Hainey heard the moving parties' motion. If anything, the application has become less complex because the Respondents have now admitted that the transfers (other than the transfers relating to 230) occurred at undervalue, and they do not dispute any of the details or the operation of the false invoices scheme. Accordingly, the motion is dismissed.



Dietrich J.

Date: September 15, 2020