COURT OF APPEAL FOR ONTARIO

CITATION: SA Capital Growth Corp. v. Mander Estate, 2012 ONCA 681
DATE: 20121010
DOCKET: C55588

Sharpe, Gillese and Watt JJ.A.

BETWEEN

SA Capital Growth Corp.

Applicant

and

Christine Brooks as Executor of the Estate of Robert Mander, deceased and E.M.B. Asset Group Inc.

Respondents

and

Peter Sbaraglia

Moving Party
(Appellant, Respondent by way of cross-appeal)

and

RSM Richter Inc. and Ontario Securities Commission

Responding Parties
(Respondent, Appellant by way of cross-appeal)

Kevin D. Toyne, for the appellant Peter Sbaraglia

Matthew Gottlieb and Shannon Beddoe, for the respondent RSM Richter Inc. (now Duff & Phelps Canada Restructuring Inc.)

Evan Cobb, for the applicant SA Capital Growth Corp.

Jennifer Lynch, for the respondent Ontario Securities Commission

Frank Lamie, for Tonin & Co. LLP and Peter Tonin

Heard: October 2, 2012

On appeal from the order of Justice L.A. Pattillo of the Superior Court of Justice, dated May 23, 2012, with reasons reported at 2012 ONSC 2800, 110 O.R. (3d) 765.

BY THE COURT:

[1] The appellant faces allegations before the Ontario Securities Commission ("OSC") related to an alleged Ponzi scheme. In an unrelated proceeding and at the suit of the respondent SA Capital Corp., a court-appointed receiver conducted an investigation of the appellant, his wife, and companies they controlled in relation to the alleged Ponzi scheme. The appellant sought and obtained from the Superior Court a third-party production order requiring the respondent, RSM Richter Inc. ("the receiver"), to produce materials the appellant claims he needs in order to make full answer and defence in the OSC proceedings.

[2] The appellant appeals that order, arguing that the Superior Court judge erred by failing to order further production. The receiver cross-appeals arguing that no production should have been ordered.

[3] For the following reasons, we conclude that the appeal should be dismissed, the cross-appeal allowed, and the order requiring the receiver to produce materials set aside.

Analysis

[4] The appellant submits that the third-party production order was justified on two grounds:

1. the appellant is an "interested person" in the receivership and is thereby entitled to production; and
2. the Superior Court has the authority to order third-party production to protect the appellant's right to make full answer and defence before the OSC.

[5] We are unable to accept either of these propositions.

1. "Interested person"

[6] In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceeding.

[7] The application judge recognized that in some circumstances, a party involved in a receivership can insist upon the production of documents and materials that have been obtained by the receiver. Reference was made to *Bennett on Receiverships*,3rd ed. (Toronto: Thomson Reuters, 2011) at p. 232:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. The

> receiver must produce all documents in its possession which are relevant to the issues in the receivership.

[8] The reach of the phrase "interested person" was discussed and applied by Greer J. in *Re Battery Plus* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J.), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc. (Re)* (2003), A.C.W.S. (3d) 790 (Ont. S.C.J.); *Impact Tool & Mould Inc. (Re)* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.), affirmed (2008), 41 C.B.R. (5th) 1 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 220; and *Anvil Range Mining Corp. (Re)* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J.). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose: see, for example, *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)* (2006), 79 O.R. (3d) 241 (C.A.); *GMAC Commerical Credit Corp. – Canada v. TCT Logistics Inc.* (2002), 37 C.B.R. (4th) 267 (Ont. S.C.J.).

[9] The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

[10] We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

2. Full answer and defence

[11] The application judge made the third-party production order on the basis that the appellant was entitled to the material he ordered produced to make full answer and defence to the allegations he faces before the OSC. The application judge applied, by way of analogy, the procedure contemplated by *R. v. O'Connor,* [1995] 4 S.C.R. 411 in criminal proceedings.

[12] In our view, the application judge erred. However, in fairness, we observe that the basis upon which we reach that conclusion does not appear to have been clearly articulated before the application judge.

[13] It was inappropriate for the Superior Court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC.

[14] Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case, it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with appropriate remedies.

[15] Further, resort to the courts on an interlocutory basis disrupts orderly decision-making by the tribunal. There is a long-established principle that ordinarily, neither appeals nor judicial review should be entertained until after the

tribunal proceedings have come to a final conclusion. Although this application did not take the form of an appeal or application for judicial review, it was inconsistent with that basic principle.

[16] In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

[17] We are aware of the fact that before the appellant brought his application before the Superior Court, a time when he was acting in person, he brought a motion before the OSC requesting third-party production from the receiver. The receiver was not served with that motion. The motion was heard by a single commissioner who ruled that the OSC "does not have the authority to order productions from the Receiver, who is an independent officer of the Court" and observed that, as Staff counsel had submitted, the respondent was not left without a remedy. The commissioner did not specify what remedy he had in mind, but we were informed during oral argument that the OSC Staff had pointed out that the appellant could seek a summons including an order for production of the material he seeks in the OSC proceeding or he could go to the Superior Court and ask for an order for third-party production pursuant to rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[18] The appellant did not challenge that ruling but instead commenced this Superior Court application for third-party production.

[19] We agree with the receiver that rule 30.10 could have no application to the appellant's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule plainly does not confer jurisdiction on the Superior Court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.

[20] We make no comment on whether the commissioner was right or wrong in his ruling. We observe, however, that the dismissal of the appellant's motion for third party production does not preclude the appellant from seeking an alternative remedy before the OSC. In any event, the refusal to order production within the OSC proceedings cannot confer authority on the Superior Court to make such an order if, as we find, there is no basis in law for the Superior Court to exercise that authority.

Conclusion

[21] For these reasons, the appeal is dismissed, the cross-appeal is allowed, and the order of the Superior Court is set aside. We have received the receiver's bill of costs for the application before the Superior Court and for this appeal. We will entertain brief written submissions in support of that request, to be submitted

within 7 days from the release of these reasons and responding submissions from the appellant within 7 days thereafter.

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