Court File No. CV-23-00710795-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

and

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C., 1985 C, B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, C.43, AS AMENDED

BOOK OF AUTHORITIES OF THE RESPONDENTS

December 20, 2023

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INDEX

TAB 1

1987 CarswellOnt 383
Ontario Supreme Court, In Bankruptcy

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)

1987 CarswellOnt 383, [1987] O.J. No. 2315, 16 C.P.C. (2d) 130, 3 A.C.W.S. (3d) 426

RYDER TRUCK RENTAL CANADA LTD. v. THORNE, ERNEST & WHINNEY, INC. TRUSTEE IN BANKRUPTCY FOR 568907 ONTARIO LTD. et al.

Salhany L.J.S.C.

Judgment: February 19, 1987
Docket: No. 1751

Counsel: *Thomas F. Delorey*, for plaintiff (moving party).
Ross Earnshaw, for 658273 Ontario Limited, defendant responding party.
No one appearing for the other defendants.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor
Headnote
Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor
Receivership — Motion to appoint a receiver to collect accounts or to restrain debtor from disposing of any of its assets — Debtor corporation winding down its affairs — No dispute that money owed by debtor to plaintiff — No evidence that debt will not be paid — Ontario Courts of Justice Act, S.O. 1984, c. 11, s. 114(1).
The debtor corporation was in the process of winding down its affairs. The plaintiff creditor moved for the appointment of a receiver for the purpose of calling in, collecting and retaining the accounts receivable of the defendant corporation or in the alternative for an injunction restraining disposition of its assets. There was no evidence that the debts would not be paid.
Held:
The motion was dismissed.
It could probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence that the creditor's right to recovery is in serious jeopardy. In this case, there was no such evidence.
Table of Authorities
Cases considered:
Bank of Montreal v. Appcon Ltd. (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. S.C.) — *referred to*

Cdn. Commercial Bank v. Gemcraft Ltd. (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) — *referred to*
Cantamar Holdings Ltd. v. Tru-View Aluminum Products (1979), 23 O.R. (2d) 572, 6 B.L.R. 209 (Ont. H.C.) — *referred to*
Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (Ont. C.A.) — *considered*
Simon v. Simon (1984), 45 O.R. (2d) 534, 38 R.F.L. (2d) 198, 42 C.P.C. 133, 50 C.B.R. (N.S.) 161, C.E.B. & P.G.R. 8166, 7 D.L.R. (4th) 128, 2 O.A.C. 299 (Ont. Div. Ct.) — *referred to*

Statutes considered:

Courts of Justice Act, S.O. 1984, c. 11 —

s. 114(1)

MOTION for the appointment of a receiver or for an interlocutory injunction prohibiting the defendant from disposing of any of its assets.

***Salhany L.J.S.C.*:**

1 This motion is for an order appointing a receiver to call in, collect and retain the accounts receivable of the defendant 658273 Ontario Limited or, alternatively, for an interlocutory injunction prohibiting that defendant from disposing of any of its assets.

2 The factual background leading up to this application is this. On January 30, 1986, the plaintiff entered a truck lease and service agreement with a numbered company operating as Mid Industries under which the plaintiff leased 1986 Mack trucks, trailers and equipment to Mid. That agreement was dated December 19, 1985. To secure faithful performance of its obligations under that agreement, Mid was required to sign a security deposit agreement dated December 19, 1985, which it did and deposited $20,000. On January 13, 1986, Mid signed a second security deposit agreement and deposited $15,000 with the plaintiff. On February 2, 1986, a third security deposit agreement was signed by Mid [which] deposited $15,000 with the plaintiff as security for the performance of its obligations.

3 On May 4, 1986, Mid assigned to Marlic Car Rentals Limited its rights and obligations under the truck lease and service agreement and the plaintiff consented to the transfer. Marlic also entered into a fourth security deposit agreement dated September 18, 1986 and paid to the plaintiff $10,000. On November 10, 1986, Marlic assigned to the defendant 658273 Ontario Limited, operating as Continental Systems, all of its right, title and interest in the truck lease and service agreement and the plaintiff consented to the assignment.

4 On January 12, 1987, the plaintiff received a letter from Thorne, Ernst & Whinney Inc. confirming that a receiving order had been made on January 5, 1987 adjudging Mid Industries as bankrupt and appointing Thorne, Ernst & Whinney Inc. as trustee. The letter went on to put the plaintiff on notice that the security deposit of $50,000 paid by Mid Industries was not to be paid out without their written authorization. The plaintiff, naturally, was concerned that $50,000 of its $60,000 security deposit was now in jeopardy and contacted Continental with a view to obtaining a new security deposit of $50,000. The plaintiff's position is that an agreement was reached whereby Continental would deposit $48,000 in three payments but subsequently refused to honour its commitment. Continental's position is that no such agreement was reached. In any event, nothing turns on whether an agreement was or was not reached because on January 26, 1987, Continental decided to wind down [its] business operations and returned the leased vehicles and trailers to the plaintiff. Continental is now in the process of collecting its receivables and paying its outstanding accounts. Continental says that it has received invoices from the plaintiff of $30,000 which it has paid. It is conceded by Continental that it has received an "open invoice" from the plaintiff indicating a total estimated indebtedness of $72,413.90 (which includes the $30,000 paid), part of which is disputed. It is also common ground that the plaintiff intends to assert a claim for general damages because of the early termination of the lease agreement.

5 Section 114(1) of the Courts of Justice Act, S.O. 1984, c. 11, authorizes the Court to grant an interlocutory injunction or appoint a receiver "where it appears to a judge of the court to be just or convenient to do so". Mr. Delorey's submission, simply put, is that it is "just or convenient" to appoint a receiver to collect the accounts receivable because there is no dispute that Continental owes the plaintiff money and that there is a risk that the plaintiff may not be paid. He relied upon *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. S.C.); *Cdn. Commercial Bank v. Gemcraft*

Ltd. (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) and *Cantamar Holdings Ltd. v. Tru-View Aluminum Products* (1979), 23 O.R. (2d) 572, 6 B.L.R. 209 (Ont. H.C.). It was submitted that those authorities suggest that where the appointment of a receiver is sought, it is not necessary for the applicant to demonstrate that there are some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. It need only be established that it is "just or convenient" to grant the order.

6 There is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy. As was pointed out by MacKinnon A.C.J.O. in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (Ont. C.A.):

> The courts must be careful to ensure that the 'new' Mareva is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial.

7 Mr. Delorey argued that this is not a situation where Continental would be unable to carry on its operations because it has, in fact, ceased to operate. By appointing a receiver or, at least, granting an interlocutory Mareva injunction preventing the defendant from disposing of its assets, the plaintiff will be ensured recovery. Mr. Earnshaw, on the other hand, pointed out that there is no need to appoint a receiver which will result in added costs to Continental when it is perfectly capable of collecting the receivables itself. Nor should an injunction be issued restraining disposition of assets because Continental has paid every invoice submitted to date and disputes the balance claimed to be due and owing. He also points out that the plaintiff is secured for the balance of its account from the deposit held and also has a right to look to previous lessees of the truck lease and service agreement on their covenant to pay.

8 I do not think that the authorities relied upon by Mr. Delorey support the general proposition that the test to support the appointment of a receiver is less stringent than that where a Mareva injunction is sought. For example, in *Bank of Montreal v. Appcon Ltd.*, supra, Anderson J. appointed a receiver even though there was no evidence or real risk that the defendant was removing his assets from the jurisdiction, because the applicant had the right to appoint a receiver under a debenture but had taken the more conservative course of applying to the Court. In *Cdn. Commercial Bank v. Gemcraft Ltd.*, supra, a receiver and manager was appointed because the acceleration clause in one of the debentures had been triggered and the applicant's security was in jeopardy.

9 It was not suggested that the plaintiff's security was in serious jeopardy. More importantly, there is no evidence of a real risk that any judgment awarded to the plaintiff may not be realized. Although it may be "convenient" to have Continental's assets tied up until the amount owing to Ryder is established, it would not be, in my view, "just" to do so. I recognize, of course, that the two criteria are disjunctive but I think that the authorities are clear that they are to be read and interpreted conjunctively: see *Simon v. Simon* (1984), 45 O.R. (2d) 534, 38 R.F.L. (2d) 198, 42 C.P.C. 133, 50 C.B.R. (N.S.) 161, C.E.B. & P.G.R. 8166, 7 D.L.R. (4th) 128, 2 O.A.C. 299 (Ont. Div. Ct.).

10 For these reasons, the application will be dismissed.

11 Mr. Delorey argued that while normally costs would follow the successful party, cl. 11(c) of the truck lease and service agreement obligates the customer to pay for all legal expenses incurred in enforcing any of the plaintiff's rights under that agreement. The specific words are "customer agrees to pay Ryder all Ryder's 'costs and expenses, including reasonable attorney's fees, incurred in collecting amounts due from customer or in enforcing any rights of Ryder hereunder' ". I do not interpret those words as obligating the customer to pay costs for an unsuccessful application such as this. However, in the circumstances I do not think that any costs should be awarded to either party.

Motion dismissed.

1987 CarswellOnt 383, [1987] O.J. No. 2315, 16 C.P.C. (2d) 130, 3 A.C.W.S. (3d) 426

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RCP-E 4C (May 1, 2016)