2002 CarswellOnt 490
Ontario Superior Court of Justice (Divisional Court)

Forestwood Co-operative Homes Inc. v. Pritz

2002 CarswellOnt 490, [2002] O.J. No. 550, 156 O.A.C. 359, 31 C.B.R. (4th) 243

Forestwood Co-operative Homes Inc., (Respondent) v. Gerald Pritz and Denise Christiansen-Pritz, (Appellants)

Then, McCombs, Epstein JJ.

Heard: January 16, 2002
Judgment: January 29, 2002
Docket: 01-BN-2750, 325/01

Counsel: *Louis Sokolov*, for Respondent
Joseph Kary, for Appellants

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — General principles

Husband and wife occupied unit in non-profit housing cooperative — Irreconcilable differences about perceived deficiencies in housing charge led cooperative to commence proceedings against husband and wife for arrears and writ of possession — Under consent order, husband and wife were to use best efforts to provide financial information and to pay regular housing charges on or before first of each month — Order contained provision whereby in event of default, husband and wife consented to judgment against them including writ of possession — Husband advised cooperative that he had made assignment in bankruptcy — Because payment by husband and wife was one day late and allegedly deficient, cooperative obtained ex parte order for writ of possession and arrears in housing charges — Husband and wife's motion to set aside order was dismissed — Motions judge held that cooperative's claim arose after date of husband's assignment in bankruptcy and was not subject to stay — Husband and wife appealed — Appeal allowed — Cooperative moved for arrears and possession as result of arrears that accumulated prior to date of bankruptcy — Separating writ of possession from money judgment for arrears was artificial and flew in face of wording of s. 69.3 of Bankruptcy and Insolvency Act — Claim for arrears was provable in bankruptcy — Proceeding in which cooperative was pursuing remedies for breach of contract was subject to automatic stay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.3(1).

Practice --- Judgments and orders — Ex parte orders — Evidence on application for

Husband and wife occupied unit in non-profit housing cooperative — Irreconcilable differences about perceived deficiencies in housing charge led cooperative to commence proceedings against husband and wife for arrears and writ of possession — Under consent order, husband and wife were to use best efforts to provide financial information and to pay regular housing charges on or before first of each month — Order contained provision whereby in event of default, husband and wife consented to judgment against them including writ of possession — Husband and wife's counsel wrote to cooperative claiming that they qualified for temporary subsidy — Counsel wrote again, on March 1, stating that because of cooperative's failure to provide its position regarding subsidy, husband and wife were calculating March housing charge themselves — As cooperative did not reply on March 2, husband and wife paid housing charge in amount they had calculated — Because payment by husband and wife was one day late and allegedly deficient, cooperative obtained ex parte order for writ of possession and arrears in housing charges — Husband and wife's motion to set aside order was dismissed — Husband and wife appealed — Appeal allowed — Cooperative failed to include correspondence by husband and wife's counsel in affidavit supporting ex parte motion — Party seeking ex parte relief had to make full and frank disclosure of relevant facts including facts that might explain opposing party's position — Any fact that would have been weighed or considered by motions judge in deciding issues, regardless of effect

of its disclosure on outcome, was material — Omitted and inaccurate information might have been relevant to motion judge's assessment of husband and wife's bona fides concerning their attempt to meet obligations under consent order.

APPEAL by husband and wife from dismissal of motion to reconsider ex parte order for possession of their residence and arrears in housing charges.

***Per curiam*:**

1 Gerald Pritz and his wife, Denise Christiansen-Pritz (the "appellants") appeal two decisions relating to their occupancy of their residence, a unit municipally known as unit 304, 1180-1190 Forestwood Drive Mississauga, Ontario (the "unit"). In a judgment rendered March 23, 2001 Dunn J. issued a writ of possession together with other relief in favour of the respondent, Forestwood Co-operative Homes Inc. Chapnik J. in her order of April 4, 2001, dismissed the appellants' motion to set aside the judgment.

2 The respondent is a non-profit housing co-operative. The contractual relationship between the appellants and the respondent with respect to the unit is governed by the respondent's by-laws. The by-laws address, among other things, the provision of geared-to-income housing subsidies to qualified members. In order to obtain housing charge assistance, members such as the appellants must supply income verification to enable the respondent to calculate and verify the correct amount of subsidy.

3 The record discloses a long history of difficulty between the appellants and the respondent concerning the amount and timeliness of the housing charges paid by the appellants to the respondent. Irreconcilable differences about perceived deficiencies in the appellants' housing charge obligations led the respondent to commence, on October 19, 1999, proceedings for arrears and a writ of possession.

4 This proceeding was resolved by Minutes of Settlement dated November 3, 2000, which were incorporated into a consent order of Dunn J. on February 15, 2001. The order contained terms that required the appellants to use their "best efforts" to provide certain financial information including income tax returns and to pay regular housing charges on or before the first of each month. The order further contained a provision whereby the appellants consented to judgment against them, including a writ of possession and judgment for arrears then outstanding, in the event of default. However, the judgment would not be issued and entered unless and until the respondent filed an affidavit stating the nature of the default and the fact that it had occurred, together with proof of service on the appellants.

5 Subsequent to the execution of the Minutes of Settlement the appellants proceeded to attempt to obtain financial information and provide it to the respondent upon which unresolved arrears could be calculated. To this end, during the month of February 2001, there was extensive correspondence between the parties, directly and through their counsel.

6 Then, on February 20, Mr. Pritz advised the respondent that he had made an assignment into bankruptcy.

7 On March 1, 2001 the appellants' counsel wrote two letters to counsel for the respondent both of which asked for further information from the respondent. One letter is particularly relevant for the purposes of this appeal. In this letter Mr. Kary, counsel for the Pritzs, addressed his clients' then bleak financial circumstances and noted that Mr. Pritz had advised the respondent on February 6 that he felt he qualified for a temporary subsidy for the month of March. The letter went on to say that the respondent had failed to provide the appellants with its position in this regard and that accordingly they had no choice but to calculate the March housing charge themselves. In his letter of March 1, Mr. Kary further said, "If there is a discrepancy between his calculations and those of the Co-op, please let us know so that a proper adjustment can be made."

8 The respondent did not reply to this letter. In the absence of a reply, the appellants paid the March housing charge the next day, on March 2, 2001, in the amount they had calculated.

9 As a result of the payment's being one day late and the fact that the respondent took the position that the amount was deficient, the respondent moved, *ex parte*, on March 15, 2001 before Dunn J. for arrears of housing charges and a writ of possession. The motion was supported by an affidavit sworn by Mr. Reitsma, the respondent's financial co-ordinator.

10 Counsel for the respondent did not appear before Dunn J. There is no evidence that either the appellants or their counsel were made aware of the motion. The uncontradicted evidence of Mr. Pritz is that his lawyer was sent a copy of the Reitsma affidavit and nothing else. On March 23, 2001, Dunn J. granted judgment in favour of the respondent for arrears and a writ of possession, without reasons.

11 Once the order came to the appellants' attention they moved before Chapnik J. to set it aside on two bases relevant to this appeal. They argued that the proceeding in which the judgment was granted had been automatically stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* (the "*Act*") and rule 11 of *the Rules of Civil Procedure*. They also took the position that the respondents had failed to make full and fair disclosure in the material filed in support of the *ex parte* motion and that accordingly the judgment should be set aside on that basis.

12 Chapnik J. dismissed the motion in reasons delivered April 4, 2001. First, she held that the default that triggered the judgment took place on March 2, 2001, *after* Mr. Pritz's assignment into bankruptcy. Chapnik J. further held that there was no material non-disclosure by the respondent in the evidence filed in support of the *ex parte* motion before Dunn J.

13 Against this background, the issues that we are required to determine are:

1. Did Chapnik J. err in failing to find that the respondent's claims dealt with by Dunn J., were stayed by the operation of s. 69.3(1) of the *Act* and by rule 11 of the *Rules of Civil Procedure*?

2. Did Chapnik J. err in law in finding that there had not been material non-disclosure to justify setting aside the order of Dunn J?

Analysis

14 We are of the view that Chapnik J. erred in failing to find that the respondent's claims as advanced in the proceedings commenced on October 19, 1999, claims that were the subject of the *ex parte* motion before Dunn J. were stayed by the operation of s. 69.3(1) of the *Act*. Accordingly, the appeal should be allowed and the judgment of Dunn J. should be set aside.

15 Although this conclusion disposes of the appeal, we would have allowed the appeal and set aside the judgment of Dunn J. based on material non-disclosure.

16 As a result, the appeal should be allowed and the *ex parte* order set-aside on both grounds.

(1) The application of the Act

17 Section 69.3 (1) provides as follows:

> Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until the trustee has been discharged.

18 The appellants contend that the proceeding that arose out of the dispute between them and the respondent was continued in the motion before Dunn J. that resulted in the impugned order and that the respondent was seeking a remedy against them. As such, the proceeding and the pursuit of the remedy is stayed, at least against Mr. Pritz, by his bankruptcy.

19 The respondent acknowledges that the claim for arrears is one provable in bankruptcy and therefore governed by the *Act*. However, in this court the respondent states that it does not intend to pursue the arrears and that the claim for a writ of possession can and should be separated from the money judgment. The respondent submits that the appellants' possessory interest in the unit is based on membership in a co-operative and therefore is not an interest "provable in bankruptcy" as its value cannot be quantified. Accordingly, the claim is not stayed by virtue of s. 69.3 (1) of the *Act*.

20 First, there is an issue of timing to be addressed. Chapnik J. held that the respondent's claim against the appellants arose after the date of Mr. Pritz' assignment into bankruptcy. The motions judge then, relying on the law that a claim that arises after the filing of a proposal is not affected by the stay of proceedings provided for in s. 69 of the *Act*, held that the claim was not subject to a stay.

21 With respect, this analysis is based on a misapprehension of the respondent's claim. The law upon which Chapnik J. relied relates to indebtedness incurred after bankruptcy, which is not the case here. The respondent moved before Dunn J. for arrears and the remedy of possession as a result of arrears that accumulated prior to the date of Mr. Pritz' bankruptcy.

22 The respondent's primary argument as to why the claim for possession is not caught by the automatic stay in s. 69.3 (1) of the *Act* involves a misconception of the nature of its claim and the way in which the section is intended to operate. In the proceeding in which Dunn J. gave his judgment, the respondent claimed arrears and a writ of possession based on an alleged default under the contractual relationship between the parties.

23 It is beyond dispute that the claim for arrears is provable in bankruptcy. To separate the request for a writ of possession from the money judgment for arrears is artificial and flies in the face of the wording of the section. Specifically, the section dictates that the "proceeding" that involves a claim provable in bankruptcy is stayed. The proceeding in which the respondent was pursuing remedies against the appellants for breach of contract is subject to the automatic stay.

(2) The Failure to Make Full Disclosure on the ex parte Motion before Dunn J.

24 It was acknowledged by counsel for the respondent, that the information presented to Dunn J. on the *ex parte* motion was incomplete and inaccurate. Specifically, the respondent failed to include in the correspondence attached to Mr. Reitsma's affidavit a letter dated February 12, 2001 from the respondent to the appellants dealing with the timing of providing income verification information. Secondly, and in our view more significantly, the respondent failed to include Mr. Kary's letter of March 1. Finally, Mr. Reitsma, in his affidavit says that the appellants had failed to provide their 1999 income tax returns. That statement was clearly wrong. In fact the appellants provided their 1999 returns between the time the Reitsma affidavit was drafted and when it was sworn. Counsel or Mr. Reitsma had apparently not observed the error.

25 In the absence of the normal safeguards of the adversarial system, the party seeking *ex parte* relief must make full and frank disclosure of the relevant facts, including facts that may explain the defendant's position if known to the plaintiff. This well-established common law principle has been codified in rule 39.01(6) of the *Rules of Civil Procedure* that states: "Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application."

26 Counsel for the respondent submits that the information omitted would not have affected the result. In our view, any fact that would have been weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material. See: *Bardeau Ltd. v. Crown Food Services Equipment Ltd.* (1982), 38 O.R. (2d) 411 (Ont. H.C.) and, *Pazner v. Ontario* (1990), 74 O.R. (2d) 130 (Ont. H.C.)

27 While not necessarily determinative, the omitted and inaccurate information in question may have been relevant to the motion judge's assessment of the appellants' bona fides concerning their attempt to meet their obligations under the settlement. As a consequence of the respondent's failure to include relevant correspondence between the parties and erroneously advising the court that the appellants had not provided their 1999 income tax returns, the order of Dunn J. must be set aside. See: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.).

Conclusion

28 For these reasons the appeal from Chapnik J. is allowed and the judgment of Dunn J. is set aside.

29 Based on the parties' submissions as to costs following the hearing of the two appeals, the appellants are entitled to their costs of the appeals and of the hearing before Lamek J. fixed in the amount of $3,500 payable forthwith.

Appeal allowed.

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