

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120308

Docket: A-436-11

Citation: 2012 FCA 79

Present: PELLETIER J.A.

BETWEEN:

CALOGERAS & MASTER SUPPLIES INC.

Appellant

and

**CERES HELLENIC SHIPPING ENTERPRISES LTD.
and THE OWNERS and ALL OTHERS INTERESTED IN
THE SHIP "CAP LAURENT" and THE SHIP "CAP LAURENT"
and THE OWNERS and ALL OTHERS INTERESTED IN
THE SHIP "CAP ROMUALD" and THE SHIP "CAP ROMUALD"
and THE OWNERS and ALL OTHERS INTERESTED IN
THE SHIP "CAP GEORGES" and THE SHIP "CAP GEORGES"
and THE OWNERS and ALL OTHERS INTERESTED IN
THE SHIP "CAP LEON" and THE SHIP "CAP LEON"
and ALL OWNERS and OTHERS INTERESTED IN
THE SHIP "CAP JEAN" and THE SHIP "CAP JEAN"
and ALL OWNERS and OTHERS INTERESTED IN
THE SHIP "CAP DIAMANT" and THE SHIP "CAP DIAMANT"
and THE OWNERS and ALL OTHERS INTERESTED IN
THE SHIP "CAP PIERRE" and THE SHIP "CAP PIERRE"**

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 8, 2012.

REASONS FOR ORDER BY:

PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] Calogeras and Master Supplies Inc. (Calogeras) supplied goods and supplies to various vessels under the management of Ceres Hellenic Shipping Enterprises Inc. (Ceres). When the price of these goods and supplies was not paid, Calogeras sued Ceres and obtained a warrant for the arrest of Ceres' vessels. In order to avoid the arrest of its vessels, Ceres posted bail in the amount of \$1,600,000, secured by a bank guarantee.

[2] Because it had no assets in Canada to satisfy a claim for costs, Calogeras was ordered to pay into Court the sum of \$115,000 as security for costs of the trial, which it did.

[3] The trial of the claim was difficult. Calogeras eventually obtained judgment against Ceres in the amount of \$99,171 plus interest at the rate of 5% per annum from March 1, 2010. The trial judge set over the matter of costs at the request of the parties.

[4] Calogeras appealed from the decision of the Federal Court. This Court ultimately varied the judgment of the Federal Court by ordering interest to be paid at the rate of 5% beginning 60 days after the issuance of each of the invoices which was found to be unpaid and owing.

[5] In the interim, the Federal Court rendered its decision with respect to costs. Ceres had, in the course of the proceedings, made an offer to settle pursuant to Rule 420 of the *Federal Courts Rules* SOR/98-106 and, in the end result, it achieved a result which entitled it to enhanced costs from the date of the service of its offer to settle. Calogeras, as the successful party, was entitled to its costs, on a party and party basis, up to the date of service of the offer of settlement. As a result,

the Federal Court made an order of costs in favour of Calogeras in the amount of \$35,375, and an order in favour of Ceres in the amount of \$160,690. The Federal Court also ordered that Ceres had a right to set off the balance of costs owing to it, if any, in excess of the amount of the posted security for costs against any amount owing to Calogeras under the judgment pronounced in its favour by the Federal Court.

[6] When the cost awards in favour of and against Ceres are netted out, Ceres is entitled to costs of \$123,315. When the \$115,000 paid into court as security for costs is applied to this amount, Ceres has a claim for unpaid costs in the amount of \$8,315. By the terms of the Federal Court's judgment with respect to costs, Ceres is entitled to set this amount off against its judgment debt to Calogeras.

[7] After the close of trial but before the Federal Court rendered judgment, Ceres paid into escrow the sum of \$74,739.92, to be held in an interest bearing account and to be disposed of in accordance with a final judgment of the Federal Court or any Court sitting on appeal of that judgment. It appears that those funds have now been paid to Calogeras. The parties appear to be in agreement that a further amount of \$63,000 to \$67,000 (depending upon the interest calculation is owing to Calogeras).

[8] This complex history brings us to the present motion by which Ceres seeks a partial stay of execution of the judgment of the Federal Court with respect to principal and interest so as to protect its right of set off with respect to costs or, in the alternative, a further order for security for costs.

[9] Ceres could have claimed to exercise its right of set-off against the \$75,345.74 held in escrow, so that the money would have remained in escrow until all claims were liquidated and resolved, or the funds could have been paid out to Ceres to the extent of \$8,315 with the balance being paid to Calogeras. Given that Ceres had a concrete opportunity to exercise its right of set off and chose not to exercise it, I have difficulty concluding that the loss of the opportunity to exercise that right of set off constitutes irreparable harm. On that ground alone, the motion for a stay of execution fails.

[10] This leaves the motion for an order for security for costs. I am aware, of course, that such an order was made with respect to the trial of this matter. But this is a different proceeding and I have no evidence as to the current circumstances of Calogeras. As a result, I am unable to determine if the requirements of Rule 416 have been met.

[11] I would therefore dismiss the motion for a stay of execution or, in the alternative, for security for costs with costs to Calogeras.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-436-11

STYLE OF CAUSE: CALOGERAS & MASTER SUPPLIES
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: PELLETIER J.A.

DATED: March 8, 2012

WRITTEN REPRESENTATIONS BY:

Me André A Levesque

FOR THE APPELLANT /
APPLICANT

Jean-Marie Fontaine

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me André A Levesque, Bonaventure (Québec)

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FOR THE RESPONDENT
