NOVA SCOTIA COURT OF APPEAL
Citation: *Gill v. Hurst*, 2010 NSCA 104

Date: 20101213
Docket: CA 338209
Registry: Halifax

Between:

Christopher Valentino Gill

Appellant/Applicant

v.

Christine Mary Hurst

Respondent

and

Wickwire Holm

Appellant

v.

Christine Mary Hurst &
Christopher Valentino Gill

Respondent

Judge: The Honourable Justice Fichaud

Motion Heard: December 9, 2010, in Chambers

Held: Application for stay of execution is dismissed with costs fixed at $750, payable by Mr. Gill to Ms. Hurst in any event of the cause.

Counsel: Raye Leier, agent for the appellant/applicant
Bradford Yuill, for the respondent Ms. Hurst
Kenzie MacInnon, for Wickwire Holm

Decision:

[1] Mr. Gill applies for a stay of execution of the financial provisions in his Corollary Relief Judgment.

Background

[2] Mr. Gill and Ms. Hurst married in August 1995. Their daughter was born in June 1996. Ms Hurst is a physiotherapist who practices from her own clinic in Truro. She earns about $100,000 per year. The couple separated in May 2008. Their divorce was tried in the Supreme Court of Nova Scotia before Justice Cindy Bourgeois, who issued a decision on October 8, 2010 followed by a Divorce Order and Corollary Relief Judgment ("CRJ") dated November 9, 2010.

[3] Mr. Gill had claimed, under s. 18 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, an amount for his contribution to Ms. Hurst's physiotherapy business. The judge's reasons (¶ 33-39) denied that claim and said that, during the marriage, Mr. Gill was compensated adequately for his contribution to Ms. Hurst's physiotherapy business, his compensation was "at a minimum $90,000" and "Mr. Gill has been significantly over-compensated in relation to his efforts".

[4] The judge valued the matrimonial assets and liabilities and approved an even division. Because of the situation of the assets and liabilities, that division required Mr. Gill to pay Ms. Hurst an equalization payment of $46,328.11. The principal matrimonial asset was the home, and the home's sale proceeds ($135,888.63) are still held in trust. Mr. Gill's former solicitors, Wickwire Holm, had obtained judgment against Mr. Gill for unpaid post-separation legal fees and disbursements. The judge ordered that Mr. Gill's share of the matrimonial net worth (after the equalization payment to Ms. Hurst) be paid to Wickwire Holm towards Mr. Hurst's judgment debt.

[5] The parties' daughter is in Ms. Hurst's primary care. The judge (¶ 79-84) found that Mr. Gill had not acted reasonably in his attempts to earn income after separation. Under s. 18(2)(a) of the Federal Child Support Guidelines, the judge imputed to Mr. Gill annual income of $25,000. The judge ordered Mr. Gill to pay $216 monthly, the table amount for that income.

[6] For spousal support, the judge considered various factors that are outlined in her reasons (¶ 85-106), including, in the judge's view, Mr. Gill's failure to act reasonably to earn income and the *Spousal Support Advisory Guidelines*. The judge ordered Ms. Hurst to pay Mr. Gill spousal support of $2,200 monthly from November 1, 2010 through May 1, 2012. Before the CRJ Ms. Hurst had paid $2,000 monthly as interim spousal support. The judge commented that, with the support paid by Ms. Hurst before the CRJ, this comprised four years of spousal support.

[7] Respecting costs, the judge (¶ 107-112) noted that Ms. Hurst had succeeded on the two principal issues - the child's care and Mr. Gill's claim to a share of the physiotherapy business. Further, she found that Mr. Gill had prolonged the pre-trial stage by failing to comply with an interim court order regarding the sale of the matrimonial home, to the detriment of Ms. Hurst who was financing Mr. Gill's occupancy of the home. The judge ordered Mr. Gill to pay $5,000 costs.

[8] Mr. Gill appealed. The appeal is scheduled for hearing on May 11, 2011. Mr. Gill brings this application for a stay of the financial provisions in the CRJ pending the court's decision on his appeal.

The Legal Principles

[9] Rules 90.41(1) and (2) say:

> 90.41 (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
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> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[10] The test under the new *Rule* remains that stated under the former *Rule* 62.10(2) by Justice Hallett in *Fulton Insurance Agency v. Purdy* (1990), 100 N.S.R. (2d) 341, ¶ 28-30:

> **[28]** In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

> **[29]** (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience, or
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> **[30]** (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

Application of Principles

[11] Under *Fulton*'s primary test, Mr. Gill must show he has an arguable ground of appeal. Mr. Gill's grounds of appeal principally challenge the judge's factual findings. Without a transcript, it is difficult to assess those grounds. In the end, it is unnecessary to address arguability because Mr. Gill's application for a stay does not satisfy the second branch of the test- that denial of the stay would cause him irreparable harm.

[12] The issues on the appeal are financial. In *Myatt v. Myatt*, 2004 NSCA 124, ¶ 9-11, I said the following about irreparable harm in a stay application on an appeal from the financial provisions of a corollary relief judgment:

> [9] In *Amica Mature Lifestyles Inc. v. Brett*, [2004] NSCA 93 at paras. 14-15, I said this about irreparable harm:
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> > [14] I do not accept Brett's argument. If the applicant's only loss is financial, the applicant can afford to pay and the loss is quantifiable and recoverable, generally this is not "irreparable harm". There must at least be evidence of risk that the paid judgment would not be recovered. *Halifax (Regional Municipality) v. 3006128 Nova Scotia Ltd.* (2001), 198 N.S.R. (2d) 95 (C.A.), at 99 per Oland, J.A.*; Hiltz and Seamone Co. Ltd. v. AGNS* (1998), 167 N.S.R. (2d) 353 (C.A.) At p. 355 per Cromwell, J.A.; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.) at paras. 20-22 per Cromwell, J.A.; *Campbell v. Jones and Derrick* (2001), 197 N.S.R. (2d) 196 (C.A.) at paras. 7 - 8 per Roscoe, J.A.

> [15] If the financial burden from payment could cause the applicant severe financial distress, or prevent the applicant from carrying forward the appeal, deprive the applicant of indispensable assets or damage the applicant's reputation or employment prospects, this might constitute irreparable harm: *Leddicote v. Nova Scotia (Attorney General)* (2001), 198 N.S.R. (2d) 101 (C.A.) at para. 11 per Roscoe, J.A.; *Jensen v. Jensen* (1991), 108 N.S.R. (2d) 120 (C.A.) at pp. 121 - 22 per Freeman, J.A. There is no evidence or suggestion that Brett would suffer harm of this nature from paying this judgment.

> [10] The applicant for a stay must prove irreparable harm by evidence. General conclusory statements are insufficient*: Cape Breton (Regional Municipality) v. Cape Breton & Central Nova Scotia Railway Ltd.* (2003), 211 N.S.R. (2d) 368 (C.A.), at para. 17 per Oland, J.A.; *Dalhousie University v. Dalhousie Faculty Association* (2001), 195 N.S.R. (2d) 198 (C.A.) at para. 15 per Hallett, J.A.; *Leddicote v. Nova Scotia (Attorney General)* (2001), 198 N.S.R. (2d) 101 (C.A.), at para. 11 per Roscoe, J.A.

> [11] Counsel for Mr. Myatt submits that if Mr. Myatt pays Ms. Myatt under the corollary relief judgment then, if the appeal succeeds, there is a risk that those amounts may not be repaid. There is no evidence on this application to support the conclusion that Ms. Myatt could not or would not repay. Mr. Myatt's testimony on the Chambers hearing did not discuss this matter. Ms. Myatt was not cross-examined on her affidavit. In any case, there would be an option of setoff against Mr. Myatt's ongoing spousal support payments.

[13] I find that, if Mr. Gill's appeal succeeds, then Ms. Hurst would be able to reimburse Mr. Gill for any net amount owing to Mr. Gill as a result of the Court of Appeal's decision.

[14] Mr. Gill's affidavit says "I have no reason to believe that Ms. Hurst would be able to respond financially to any variation" in the CRJ by the Court of Appeal. Ms. Hurst's affidavit, on the other hand, says that, if the Court of Appeal varies the CRJ "I would have the ability to respond financially to any such variations and there is no risk of irreparable harm to the Appellant". Ms. Hurst was cross examined on her affidavit. I accept her evidence. From the trial judge's findings and from the evidence before me, it appears that, during the marriage and since separation, Ms. Hurst has responsibly shouldered virtually the entire financial burden of the marriage, I have no doubt she would continue to act responsibly. To be specific, I do not believe that, if the proceeds of the home sale were paid out

now further to the CRJ, Ms. Hurst would squander her share over the next few months and disable herself from repayment should this court vary the award after hearing the appeal in May 2011.

[15] Respecting support, the CRJ elevates Ms. Hurst's spousal support by $200 per month (from the earlier interim order's $2,000 per month) but requires Mr. Gill to pay child support at $216 per month. If I stayed support payments under the CRJ, then by the time of this court's decision on the appeal, Mr. Gill would have paid about $100 less net support than he would pay under the CRJ. I do not anticipate Ms. Hurst would have any difficulty handling such an adjustment.

[16] The real impact of the CRJ on Mr. Gill will be after May 2012, when the spousal support ends. But the result of this appeal will be known well before then so that impact is not irrreparable harm for this stay application.

[17] Mr. Gill says that he would suffer irreparable harm from the discontinuance of his coverage on Ms. Hurst's medical plan. I disagree. The CRJ requires Ms. Hurst to continue Mr. Gill's coverage "for so long as spousal support is payable" - ie. until May 1, 2012. The hearing of Mr. Gill's appeal will occur in May 2011, a year before the expiry of his medical coverage. There is no irreparable harm here to justify a stay of the CRJ.

[18] In *Myatt*, I said this about the application of *Fulton*'s secondary test-exceptional circumstances:

> [15] *Fulton*'s secondary test refers to "exceptional circumstances that would make it fit and just that the stay be granted in the case."
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> [16] In *Amica v. Brett* I stated:
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> > **[23]** An application for a stay of a monetary judgment will, in most cases, stand or fall with the primary test. If the appellant is insolvent, the immediate payment of the judgment may cause irreparable harm to the appellant. If the respondent is insolvent, the irreparable harm may be the risk of non-recovery if the appeal succeeds. Either way, the "irreparable harm" branch of the primary test addresses the concern. The authorities have stated that, in most cases, payment of a judgment from a solvent plaintiff to a solvent defendant will not attract a stay under either *Fulton* test. *Pelot v. Prudential of America* (1995), 143 N.S.R. (2d) 367 (C.A.)

> per Hallett, J.A. at para. 27; *Lienaux v. Toronto-Dominion Bank* (1997), 161 N.S.R. (2d) 236 (C.A.), at p. 240 per Bateman, J.A.; *Earle v. Coltsfoot Publishing Co.* (2000), 183 N.S.R. (2d) 396 (C.A.), per Glube, C.J.N.S. at paras. 17 - 20; *Smith's Field Manor Development Ltd. v. Campbell*, [2001] N.S.J. No. 273, 2001 NSCA 114, at paras. 30, 33 - 7, per Oland, J.A.; *R. v. Innocente*, [2001] N.S.J. No. 223, 2001 NSCA 97 at para. 36, per Oland, J.A.; *Oceanart Pewter Canada Ltd. v. Hartlen*, [1999] N.S.J. No. 192, Docket CA 156289, June 3, 1999, at para. 8 per Cromwell, J.A.; *Halifax Regional Municipality v. 3006128 Nova Scotia Ltd.*, [2001] N.S.J. No. 374, 2001 NSCA 140 at para. 26 per Oland, J.A.; Royal Bank of Canada v. Woloszyn, [1999] N.S.J. No. 58, at para. 8 per Cromwell, J.A.
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> [17] Mr. Myatt's alleged loss is financial. This is addressed by the "irreparable harm" branch of *Fulton*'s primary test. This is not an exceptional case where a monetary loss triggers the secondary test from *Fulton*. The stay application stands or falls with the primary test, and the secondary test is inapplicable.

[19] In my view, this comment applies to Mr. Gill's application for a stay. His application stands or falls on *Fulton*'s primary test. It invokes no exceptional circumstance where reparable monetary loss might trigger the secondary test.

[20] I would dismiss Mr. Gill's application with costs of $750, payable to Ms. Hurst in any event of the cause. I have taken into account the several chambers appearances to date respecting this stay application.

[21] Ms. Hurst's counsel asked that I order costs against Wickwire Holm because of an earlier appearance in chambers when Wickwire Holm asked to be added as a party to the appeal. On that occasion, I granted Wickwire Holm's request. I see no basis for a costs award at this stage on that matter. The interlocutory costs between Ms. Hurst and Mr. Gill, on the one hand, and Wickwire Holm can be dealt with in the cause after the May 2011 panel hearing.

Fichaud, J.A.