PricewaterhouseCoopers v. Morse, 2000 NWTSC 8

Date: 2000 01 21
Docket: CV 08197

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the *Reciprocal Enforcement of Judgments Act* and in the matter of a judgment of the Ontario Court of Justice (General Division) obtained by Coopers & Lybrand Limited, Receiver and Manager of the Toronto Airport Marriott Hotel Limited Partnership, against John Morse and dated March 6, 1998

MEMORANDUM OF JUDGMENT

[1] This is an application by the judgment debtor, John Morse, to set aside the ex parte registration of an Ontario judgment.

[2] The judgment in question, dated March 6, 1998, was registered in the Northwest Territories pursuant to the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988, c. R-1.

[3] Upon service on him of notice of the registration, Mr. Morse applied within the time limit in s. 6(1)(b) of the *Act* to set aside the registration.

[4] On behalf of Mr. Morse it is argued that the judgment creditor did not provide to the Court on its ex parte application information relevant to s. 2(4)(b) of the *Act*, which states the following:

> 2. (4) No order for registration shall be made if it is shown to the Supreme Court to which the application for registration is made that
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;

[5] On the ex parte application, the information placed before the Chambers Judge was that the judgment creditor had obtained judgment against Mr. Morse pursuant to a Statement of Claim issued out of the Ontario Court of Justice on September 8, 1997. The Statement of Claim alleged that Mr. Morse, as a limited partner, was indebted to the Toronto Airport Marriott Hotel Limited Partnership for unpaid committed capital pursuant to the terms of a limited partnership agreement.

[6] In the material submitted to the Chambers Judge, it was stated that Mr. Morse was personally served with a copy of the Statement of Claim in Yellowknife. No reference was made to any of the factors in s. 2(4)(b) of the *Act*.

[7] In his affidavit filed on this application to set aside the registration, Mr. Morse acknowledges that he was a limited partner in the Limited Partnership. He states that he made an assignment into bankruptcy on February 21, 1991 and that at that time, his interest in the Limited Partnership was included as an asset under the control of his trustee. He was discharged from bankruptcy by court order on October 19, 1992. He states that since then, he has had no further involvement with the Limited Partnership. He asserts that his obligations to the Limited Partnership ended with his bankruptcy.

[8] Attached as an exhibit to his affidavit is a letter dated September 20, 1997 from Mr. Morse to the Ontario counsel for the judgment creditor. In that letter, Mr. Morse advised counsel that he had consulted with his trustee in bankruptcy and was supplying copies of documents confirming the bankruptcy and discharge from same and that the Limited Partnership was named as a creditor in the bankruptcy. Mr. Morse says that he received no response to that letter.

[9] Default judgment was signed against Mr. Morse in the Ontario action on March 6, 1998.

[10] Mr. Morse takes the position that it was incumbent on the judgment creditor to bring the issue of the bankruptcy to the attention of the Chambers Judge when the ex parte application was made. It was argued that there is an obligation on a judgment creditor applying for an ex parte registration order to address the factors in s. 2(4).

[11] The judgment creditor disagrees that it had the obligation of addressing the various factors and takes the position that at this stage, under s. 2(4), the onus is on Mr. Morse to show that circumstances exist which stand in the way of registration of the

judgment. The judgment creditor also argues that the relevant time for carrying on business under s. 2(4)(b) is the time when the cause of action arose, not when the proceedings that led to the judgment were commenced. Although counsel for the judgment creditor did not specify when he considers the cause of action to have arisen, I understood him to mean that it was sometime prior to the bankruptcy.

[12] The first issue that arises is the extent of the obligation to disclose relevant facts on an ex parte application. Earlier decisions in this Court have dealt with that issue. In *Harvey Fulton Whse Carpet Sales Ltd. v. Pye*, [1990] N.W.T.R. 143, also a case involving the ex parte registration of an extra-territorial judgment, de Weerdt J. said (at p. 145):

> Applicants seeking relief from the court on an ex parte basis are, however, under the duty of disclosing all facts material to their applications for relief, more particularly those facts which may reflect adversely on their applications. This duty is one to be zealously performed on their behalf by members of the legal profession (and students-at-law) representing such applicants. Likewise, members of the profession and their students have a duty to bring to the attention of the chambers judge any statutory or other authority which may reflect adversely on an ex parte application. In this case, neither the fact of service ex juris in the Alberta action nor the related fact of non-attornment to the Alberta court's jurisdiction were brought to this court's attention when registration was sought ...

[13] The second issue is the time when the judgment debtor must carry on business in the jurisdiction where the judgment is obtained in order for it to be enforceable under the *Act*. The Albert Court of Appeal has held that the crucial time is the time when the proceedings were commenced: *Wilson v. Hull*, [1995] A.J. No. 896. That decision is, of course, highly persuasive in this jurisdiction.

[14] In this case, the proceedings were commenced in 1997. At the time the ex parte order was sought, the Ontario counsel for the judgment creditor had, in the correspondence sent to him by Mr. Morse, information that Mr. Morse might no longer hold an interest in the Limited Partnership. Apart from his status as a limited partner, it was not suggested by counsel that there is any other basis upon which it could be found that Mr. Morse was carrying on business in Ontario at the time the proceedings were commenced there. Nor is there any suggestion that he was ordinarily resident in Ontario at the relevant time or that he voluntarily appeared or otherwise submitted during the proceedings to the jurisdiction of the Ontario court.

[15] In my view, it was incumbent on counsel for the judgment creditor to disclose to the Court on the ex parte application that there was an issue as to whether Mr. Morse was still a limited partner in September of 1997, when the Statement of Claim was filed in Ontario, and to make its submissions on that issue and on whether Mr. Morse was carrying on business in Ontario. The Court would then have had the information with which to decide whether the matter should be heard ex parte or whether instead notice should be given to Mr. Morse of the application for registration or whether registration was possible at all.

[16] In my view, the failure in these circumstances by the judgment creditor to disclose and deal with the s. 2(4)(b) issue requires that the ex parte registration be set aside.

[17] To the extent that counsel for Mr. Morse took the position that it was up to the judgment creditor to address all of the factors in s. 2(4) on the ex parte application, I disagree. In my view, the duty to address those factors arises only where the judgment creditor has some knowledge of facts relevant to s. 2(4). Obviously the expiry of the appeal period and the filing of an appeal are factors within the knowledge of the judgment creditor and should be addressed, as they were in this case. Otherwise, if the judgment creditor has no such knowledge, then under s. 2(3), it need only show that the judgment creditor was personally served in the original action. If the ex parte order is obtained, the onus is then on the judgment debtor on an application under s. 6(1)(b) to show the court that the factors listed in s. 2(4) exist.

[18] In this case, Mr. Morse has raised the bankruptcy issue but it was clear from the submissions made before me by both counsel that they were not agreed as to the legal effect of the bankruptcy on Mr. Morse's status as a limited partner and were not prepared to address that question. My ruling on this application does not decide that issue.

[19] Accordingly, I order that the ex parte registration is set aside. The judgment creditor has leave to bring on a further application for registration, on notice to Mr. Morse. That application may be brought before any Judge of this Court.

[20] I also order that any further documents filed in this proceeding are to have the following style of cause:

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BETWEEN:

PRICEWATERHOUSECOOPERS INC.

Applicant

- and -

JOHN MORSE

Respondent

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories this
21ST day of January, 2000.

Counsel for the Judgment Creditor: Graham Watt
Counsel for John Morse: Nathan Paul

CV 08197

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MEMORANDUM OF JUDGMENT BY
THE HONOURABLE JUSTICE V. A. SCHULER