2015 ONSC 3844
Ontario Superior Court of Justice (Divisional Court)

898967 Ontario Ltd. v. Veersammy

2015 CarswellOnt 8889, 2015 ONSC 3844, 254 A.C.W.S. (3d) 766

898967 Ontario Limited, Plaintiff (Respondent in Appeal) and Subryan Veersammy, Respondent (Appellant)

Then J.

Heard: April 29, 2015
Judgment: June 15, 2015
Docket: Toronto 190/15

Proceedings: additional reasons to *898967 Ontario Ltd. v. Veersammy* (2015), 2015 CarswellOnt 6853, 2015 ONSC 2989, Then J. (Ont. Div. Ct.); additional reasons at *898967 Ontario Ltd. v. Veersammy* (2015), 2015 ONSC 4908, 2015 CarswellOnt 10881, Then J. (Ont. Div. Ct.)

Counsel: D. Shiller, Jordan Epstein, for Plaintiff, Respondent in Appeal
Carol Shirtliff, Ben Hahn, for Respondent, Appellant

Subject: Civil Practice and Procedure; Property

Table of Authorities

Cases considered by *Then J.*:

Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd. (1983), 36 C.P.C. 305, 1 C.I.P.R. 46, [1983] R.D.J. 481, 2 D.L.R. (4th) 621, 50 N.R. 1, 75 C.P.R. (2d) 1, [1983] 2 S.C.R. 388, 1983 CarswellNat 98, 1983 CarswellNat 526 (S.C.C.) — referred to

Paul Magder Furs Ltd. v. Ontario (Attorney General) (1991), 3 C.P.C. (3d) 240, 85 D.L.R. (4th) 694, *(*sub nom. *Magder (Paul) Furs Ltd. v. Ontario (Attorney General))* 52 O.A.C. 151, *(*sub nom. *Ontario (Attorney General) v. Paul Magder Furs Ltd.)* 6 O.R. (3d) 188, 1991 CarswellOnt 403 (Ont. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114,

111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01 — considered

MOTION by landlord for stay of order reported at *898967 Ontario Ltd. v. Veersammy* (2015), 2015 ONSC 2989, 2015 CarswellOnt 6853 (Ont. Div. Ct.), permitting tenant to return to premises, pending hearing of appeal.

***Then J.*:**

1 The appellant, Veersammy, hereafter the "landlord" of the commercial premise at 2205 Kingston Road in Toronto seeks a stay of the formal order of Whitaker J. dated April 17, 2015, pending the hearing of the appeal.

2 Whitaker J. ordered, *inter alia*, that the tenant be permitted to return to the premises forthwith. The landlord seeks a stay of that order.

3 On this motion it is common ground that the court is required to determine three issues:

(i) Is there a serious issue to be determined on appeal?

(ii) If a stay is not granted, will the appellant suffer irreparable harm?

(iii) Will the appellant suffer greater harm than the respondent should a stay not be granted?

4 The motion was heard on April 29, 2015 and on May 8, 2015 the court made the following ruling:

> [5] On the issue of irreparable harm the appellant relies on his affidavit which outlines the concerns of the appellant with respect to the tenants' threats relating to the life, health and safety of him and his family as well as to the physical integrity of the premises. The tenant denies all of the allegations. However, paragraph 16 of the affidavit reads as follows:
>
> > 16. I am most concerned about the safety and well-being of my family as Bemister's threats have found their way into the consciousness of my family. On April 15, 2015 I had the scare of my life. My teenage daughter's high school guidance counsellor phoned me with very disturbing news that my daughter told her friends that she planned to commit suicide that weekend because Bemister was returning to the Premises. I

> am fortunate that her friends brought her to the guidance counsellor. The guidance counsellor advised that she be admitted to East General Hospital. My daughter was admitted to hospital on April 15, 2015. She has been diagnosed with depression and anxiety, has been taking medication to treat her diagnoses and is seeing a counsellor. A copy of a letter from the hospital stating the date of her entering the hospital is annexed and marked as exhibit "G".

[6] Exhibit G is a note dated April 20, 2015 from Daisy Galeano, Child and Youth Crisis Worker, Child and Adolescent Mental Health Services, which advises to whom it may concern that Vanessa Veersammy was seen in the E.R. of East General Hospital by the writer on April 15, 2015 and on two occasions on April 16, 2015 due to her emotional state.

[7] The court must obviously be concerned with the effect that the tenant's return to the premises may have on the health of Vanessa Veersammy. However, the affidavit of the landlord is replete with hearsay, as the landlord has no personal knowledge of the facts alleged. More significantly, there is no evidence as to who diagnosed her with depression and anxiety, nor whether this diagnosis in any way relates to suicidal tendencies which may occur if the tenant returns to the premises. Moreover, there is no evidence to indicate whether the medication and counselling will enable her to control any depression or anxiety relating to the return of the tenant to the premises.

[8] I appreciate that from the tenant's perspective there is a sense of urgency to this matter as he submits that he has been unjustly locked out of the premises for more than 4 months and that accordingly if the dangers to the health of Vanessa Veersammy are real the landlord should have put his best foot forward in his affidavit. Nevertheless, given the potential risk to Vanessa Veersammy, the court is required to take pro-active measures notwithstanding the deficiencies in the landlord's affidavit in the circumstances of this case.

[9] In my view, the issue of irreparable harm cannot properly be decided in the absence of further and better evidence from a health professional by way of a report with respect to the issues outlined above.

[10] Accordingly, I request that the appellant file with the court, with a copy to the respondent, a report from a health professional within 7 days and the submissions of counsel pertaining to the report within 10 days so that the court may properly determine the issue of irreparable harm.

5 In response to the Court's request, the appellant filed the affidavit of Melanie Veersammy on May 15, 2015.

6 She deposes that Vanessa's medical records will not be released absent her personal request and that the processing time would be 4 to 6 weeks in that event. She further deposes that Dr. Chad

who treated Vanessa in the emergency room was unavailable and that he hospital was not able to provide information as to when he would return to the hospital.

7 Doctor Reddick, the psychiatrist at Toronto East General that diagnosed Vanessa, was also unavailable and contact could not be made because her hospital hours are irregular and further contact information was not provided by the hospital. Finally, the high school guidance office has not provided information as it is not their policy to do so in absence of legal advice.

8 Melanie Veersammy did provide information from Dr. Jose to the effect that Vanessa suffers from a significant mood disorder with a severe anxiety component and that it is important that her home environment be kept as stress free to minimize the chance of exacerbating her condition.

9 She also provided a letter from Tiffany Boxx of Blake Boultbee Youth Outreach Services confirming that Ms. Boxx met with Vanessa on May 5, 2015, having been referred by Toronto East General Adolescent Mental Health Department for depression and anxiety. Ms. Boxx observed Vanessa to be very fragile and emotional and was of the view that any extra stress can worsen her condition but apparently has not been able to talk about what she is going through at the moment.

10 On the basis of his response to my preliminary ruling the landlord submits that Vanessa's mother has done her best to comply with the court's request and that the hospital and Doctors caring for Vanessa have cooperated as much as possible given their policies and legal concerns.

11 The landlord further submits that the return of the tenant to the premises will inevitably constitute a stressor in the home environment as contact between her and the tenant is unavoidable given that her residence and his business premises are adjacent. There is also the added stressor that the situation between the landlord and tenant remains volatile due to the matters still before the civil and criminal courts and accordingly the threat of a conflict between Vanessa's father and the tenant is both real and ever present to the detriment of her psychological state.

12 The tenant submits Melanie's affidavit and attachments do not establish that Vanessa's depression and anxiety or any alleged suicidal tendencies are related to the tenant's return to the premises nor is there any positive evidence that his return will constitute a stressor nor is there any evidence that her condition or stressors cannot be controlled by counselling and prescribed medication. The tenant submits that the landlord has the burden of proving that Vanessa's medical diagnosis includes suicidal tendencies and that those are related to the tenant's return to the premises. Quite apart from medical evidence, the landlord has not discharged his burden to establish irreparable harm by either tendering Vanessa's own affidavit or even affidavit evidence of her parents that Vanessa communicated to them her concerns with respect to the tenant or with respect to any suicidal tendencies related to the tenant's return to the premises.

13 Having canvassed the response of the parties to the preliminary ruling I return to the issue at hand, should a stay of the order of Whitaker J. returning to the tenant possession of the premises be granted?

(i) Serious Issue

14 The landlord's appeal before the Divisional Court raises several issues alleging that the application judge erred as follows:

(a) by not converting the application into an action as oral testimony was required;

(b) making findings of credibility without hearing oral testimony

(c) ignoring the effect of the Tenant's acceptance of the Landlord giving 9 month notice that the lease would not be renewed or extended on April 30, 2015;

(d) by not applying the three part test for relief from forfeiture; and

(e) by not considering uncontradicted evidence of breaches of the lease.

15 The tenant submits that the landlord has disentitled himself to a stay by not immediately complying with the decision of Whitaker J. and that this court should either dismiss the motion for a stay or adjourn the motion until the landlord complies. (See: *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* [1983 CarswellNat 526 (S.C.C.)] CanLii 30 at p.398; *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.).

16 Alternatively, the tenant submits that notwithstanding the low threshold with respect to the serious issue to be tried for granting a stay, the landlord has not discharged his burden as he has not demonstrated that with respect to the exercise of his discretion in granting relief from forfeiture the trial judge either erred in principle, was clearly wrong in the result or has caused serious injustice.

17 I accept the submission of the landlord with which the tenant does not quarrel that based on *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994 CarswellQue 120 (S.C.C.)], 1994 CanLii p.337 the serious question to the tried threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case and that once satisfied that the application is neither vexatious nor frivolous the motions judge should proceed to consider that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is neither necessary nor desirable.

18 I have considered the record in this case, the decision of the trial judge, the grounds of appeal and the submissions of counsel. I am satisfied that the appeal is neither vexatious nor frivolous nor is it clear if the appeal is unlikely to succeed.

19 In my view, the landlord has discharged his burden with respect to the first factor of the test for a stay.

20 In my view, the tenant's submission that the landlord flouted the order of Whitaker J. is a matter for consideration under Rule 57.01 with respect to costs.

Irreparable Harm

21 It is common ground based on *R.J.R. MacDonald Inc.*, *supra* at p.311 that irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured.

22 The landlord submits that the nature of the harm in this matter is connected with the safety and security of the landlord, his wife and three daughters and his property. More specifically, the landlord and his family live adjacent to the commercial premises of the tenant who bears ill will toward the landlord and has threatened to kill the landlord and his family and to set fire to the premises. Moreover, it is alleged that the landlord's daughter has threatened to commit suicide and is in treatment for anxiety and depression as a result of the tenant's possible return to the premises. From a monetary point of view the unwillingness of the tenant to purchase insurance has exposed the landlord to liability.

23 The tenant submits that the concerns of the landlord regarding the tenant's alleged threats to the safety of the landlord's family are both unfounded and disingenuous. Not only has the tenant denied such threats in his affidavit but the landlord's letter of April 7, 2015 demonstrates that the landlord was prepared to have the tenant return to the premises provided certain conditions were met that had nothing to do with his safety concerns.

24 The tenant submits that Melanie Veersammy's affidavit adds little in response to the court's concern with respect to the risks to Vanessa's health should the tenant return to the premises. There is nothing in her affidavit that substantiates that Vanessa suffers from suicidal tendencies or that her medical condition is in any way related to the tenant's return to the premises or that her medical condition cannot be controlled by medication. The tenant submits that the burden is on the landlord to establish irreparable harm and that he has failed to do so by the material tendered and in particular by not tendering Vanessa's own affidavit.

25 In my view, notwithstanding the court's concern with respect to Vanessa's health as it relates to the return of the tenant to the premises and the opportunities given to the landlord to adduce further and better evidence, no new information either from medical professionals or Vanessa herself has been adduced by the landlord relating to Vanessa's depression and anxiety or any resulting suicidal tendencies related to the return of the tenant to the premises or to any alleged threats that he has made to the safety of the Veersammy family. In the absence of medical evidence

or the affidavit of Vanessa herself I am not satisfied on the basis of the affidavits of the landlord and his wife that they have discharged the burden on the landlord that he will suffer irreparable harm.

26 On the other hand, given the history of the relationship between the parties and the observation of Dr. Jose I am prepared to infer that the litigation between the landlord and the tenant has caused substantial tension in Vanessa's home environment for a number of months, that the tension will probably increase if the tenant returns to the premises and that the tension in the home environment will not abate until this litigation is resolved. In my view, given the observation of Dr. Jose that tension in the home environment will exacerbate her depression and anxiety the situation demands that the appeal be expedited and that this litigation be concluded as quickly as possible.

Balance of Convenience

27 The landlord relies primarily on the threatened harm to his family's safety and the psychological harm to Vanessa's state of anxiety and depression.

28 The tenant submits that the landlord has wrongly kept the tenant out of the premises for four months, an additional one month in violation of the order of Whitaker J. Moreover, as the tenant's affidavit indicates the tenant will be put out of business if the stay is granted as he has been unable to collect accounts receivable, he will lose the services of his employees, and he will forfeit the work that normally is available at the busiest time of the year.

29 On the basis of the record before me I am not satisfied that the appellant will suffer greater harm than the respondent should a stay not be granted.

30 The motion for a stay is dismissed. As I have indicated, it is in the interests of justice that the appeal be expedited and I have instructed the staff of the Divisional Court to specifically accommodate any such request from the landlord as quickly as possible.

31 If the parties cannot agree as to costs the tenant shall file written submissions and serve the landlord within 10 days and the landlord shall serve and file his submissions 7 days thereafter.

Motion dismissed.

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