COURT OF APPEAL FOR ONTARIO

DATE: 20221114
DOCKET: M53642 (C70644)

Benotto J.A. (Motions Judge)

BETWEEN

The Calbot Group Ltd. and 2649106 Ontario Inc. cob Synergy Capital

Plaintiffs (Appellant/Responding Party)

and

NSR Toronto Holdings Ltd., NSR Canada Development Ltd., New Silk Road Culturaltainment Limited, Dapeng Wang, Sha Huang, aka Sam Huang, Sunny Communities (Markham Gold) Inc., Patrick O'Hanlon, Christopher O'Hanlon, Sunny Development Holdings Inc., 11105639 Canada Inc., Bill K. Chen and Wuzheng Zhang, aka Jian Zhang

Defendants (Respondents/Moving Parties)

Melanie Zetusian, Lars Brusven and Nadia Campion, for the moving parties

Antonio Conte, for the responding party

Heard: November 1, 2022

REASONS FOR DECISION

[1] The moving parties, NSR Canada Development Ltd. ("NSR"), and New Silk Road Culturaltainment Limited ("New Silk Road"), are foreign corporations. New

Silk Road is incorporated in Bermuda and domiciled in Hong Kong. It does not hold assets or carry on business in Ontario, or in Canada generally. NSR is owned by New Silk Road and is incorporated and domiciled in Hong Kong. Together, the two corporations are referred to as the "foreign respondents". They move for security for costs.

[2] The underlying action was brought by the appellants (a corporation and its sole officer and director) against various individuals and corporations for an order securing $5 million from the sale proceeds of a project. The appellants alleged an entitlement to a "success fee" for consulting on a project and bringing a purchaser to it. On June 25, 2021, the appellants' claims against certain parties, including NSR Toronto Holdings Ltd. ("NSR Toronto"), was struck pursuant to r. 21. The appellants appealed. The dismissal was upheld by this court. The motion judge had ordered the appellants to pay costs of $70,000. This court ordered that they pay costs of the motion in the amount of $9,000. Those costs have not been paid.

[3] The foreign respondents then brought a motion for a stay of the action on the basis that the Ontario court lacked jurisdiction *simplicer*. The motion judge granted the order, having determined that there was no real or substantial connection to Ontario, that the foreign respondents both were not parties to a contract made in Ontario and did not carry on business in Ontario. Costs of $75,000 were awarded to the foreign respondents. None of the costs have been paid.

[4] The appellants now appeal the jurisdiction order.

[5] The motion for security for costs is brought pursuant to r. 61.06(1)(b), which incorporates r. 56.01(d). They also rely on r. 61.06(1)(c).

[6] Rule 56.01(d) provides that security for costs may be ordered if the appellant is a corporation and there is good reason to believe that it has insufficient assets to pay the costs of the respondent. The appellant is a corporation. Catherine Headon, the sole director and officer of the corporation, essentially confirmed that there were no assets to pay the costs of the respondent. In her affidavit in response to this motion, she said:

> It is true that there were costs ordered against my company in a previous proceeding involving a wholly owned subsidiary of these foreign Defendants, but my company does not have the money to pay for these costs … Nor am I able to personally pay those costs without being paid for my consulting work.

[7] Since it is admitted that the appellants have insufficient assets in Ontario, the respondent is *prima facie* entitled to security for costs and the onus shifts to the appellants. They are required to show either that there are, in fact, sufficient assets in Ontario or it is impecunious and an injustice would result if it were not allowed to proceed with the appeal. Complete financial disclosure is required with supporting documentation, or the appellant will not have discharged its burden: *Unique Labeling Inc. v. GCAN Insurance Company,* 2009 ONCA 591, 98 O.R. (3d) 233, at para. 16.

[8] The appellants have provided no financial disclosure. They submit that they will only have assets if they are successful on appeal.

[9] Therefore, I turn to the merits of the appeal (it is acknowledged that the merits pass the “not frivolous” threshold).

[10] The appeal essentially contests the factual findings of the motion judge. The motion judge determined, based on the evidence, that the Memorandum of Understanding (MOU) relied on by the appellants was either not signed or forged.

[11] The motion judge said:

> As set out above, Calbot effectively concedes that the MOU is not genuine. As such, Calbot must demonstrate, relative to a potential contractual connection to Ontario, that there is a verbal contract between the plaintiffs and the Foreign NSR Defendants. Calbot is considerably hampered by its pleading on this issue. The alleged verbal agreement is not pled, nor are the material facts that would have to be pled and shown in the evidence in order to establish such a deal. Moreover, the same evidence that undermines the alleged MOU also eviscerates the claimed verbal contract; most of the factors listed above as reasons why the alleged MOU is untenable apply equally to a purported verbal agreement.
>
> With respect to the assertion that the Foreign NSR Defendants carry on business in Ontario, there is uncontroverted and unchallenged evidence in the record from Philip Ng, the Company Secretary of New Silkroad, that none of the Foreign NSR Defendants hold assets or carry on business in Ontario. Mr. Ng was not cross-examined.

[12] The appellants submit that the foreign respondents operate in Ontario through their subsidiary, NSR Toronto (recall the action against NSR Toronto was dismissed). This court has held that, to pierce the corporate veil, the appellant must show complete control over the subsidiary such that it is a "mere puppet": *10948420 Canada Inc. v. CY Best Group Inc.,* 2020 ONSC 6504, at para. 36, citing *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, at paras. 65-66; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, 460 D.L.R. (4th) 487, at para. 46. This was neither pleaded nor demonstrated on the evidence.

[13] The motion judge's overall conclusions were summarized when considering the request of the appellants for a perseveration order:

> As noted, the plaintiff's claim here is in essence a breach of contract claim, seeking damages flowing from the alleged breach. The case began with a demand letter and a statement of claim relying almost entirely on the alleged MOU. Given the serious problems with the MOU and the likelihood that it contained a forged signature, Calbot has effectively conceded that it cannot rely on the MOU and instead now maintains that there was an oral agreement (although the Amended Statement of Claim does not provide a basis for this position). Calbot's only witness, Ms. Headon, has no first-hand information about the alleged verbal agreement, but instead relies on hearsay evidence from Mr. Bell, who has disappeared, and whose evidence (about which there are reasons for concern) cannot be tested.

[14] While the appeal is not frivolous, in light of these findings, the appellants have a low prospect of success. Low prospect of success is a factor under r. 61.06(1)(c).

[15] The foreign respondents submit that, as per r. 61.06(1)(c), there is “other good reason” to award security for costs. The reason must be related to the purpose of ordering security for costs. In other words, a respondent is entitled to a measure of protection for costs in the appeal.

[16] The overarching principle is the justness of the order sought, considering all the circumstances of the case. Considering the history of the action and merits of the proposed appeal, I conclude that the justness of the case requires that the respondents be protected for their costs. This strikes the appropriate balance by protecting both the right of appeal and the respondents’ cost recovery.

[17] The respondents requested that the appellants post security for costs in the amount of $50,000. I do not accept this amount. The appellants are to post $25,000 within 30 days of the date of this Order. If the security is not posted when required, the appeal date of February 3, 2023, will be vacated and the foreign respondents will be entitled to move to dismiss the appeal under r. 61.06(2) and assess their costs of the appeal, including of this motion.

[18] The respondents requested an order extending the deadline to deliver responding material on the appeal to 60 days after the posting of security. Since the appeal is scheduled for February 3, 2023, the responding material is to be filed by January 10, 2023.

[19] Costs of this motion are reserved to the panel hearing the appeal or the judge hearing the motion under r. 61.06(2).

M. L. Benotto J.A.