COURT OF APPEAL FOR ONTARIO

DATE: 20190501
DOCKET: M50303

Feldman J.A. (Motion Judge)

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

Sherry A. Kettle, for the moving party

Paul N. Feldman, for the responding party

Heard: April 15, 2019

Motion for an order to extend the time to appeal from the order of Justice Russell M. Raikes of the Superior Court of Justice, dated January 28, 2019, with reasons reported at 2019 ONSC 716.

REASONS FOR DECISION

[1] The applicant, Transit Petroleum Inc. ("Transit"), moves for an order extending the time to file its notice of appeal from an order made on January 28, 2019. The respondent opposes the motion.

[2] In that order, the motion judge found that a pre-authorized debit ("PAD") taken by the applicant after the respondent, 1787930 Ontario Inc. ("Messenger"), filed a Notice of Intention to File a Proposal ("NOI"), constituted a "remedy" within

the meaning of s. 69(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “BIA”), and therefore the funds taken by Transit had to be returned to the respondent. When the motion judge later released his decision regarding the costs of the motion on March 13, 2019, Transit delivered a notice of appeal of the costs award within the time limited for appeal.[1]

Background

[3] Transit supplied fuel to Messenger, a truck freight delivery company. On July 2, 2018, Messenger filed an NOI, although Transit was not given any notice of it. At that time, Messenger owed Transit over $200,000 for fuel. The CRA had frozen Messenger's bank account in mid-June, 2018, but Transit's evidence was that Messenger had told it the account was frozen by the bank because of fraudulent transactions. On June 22, 2018, Transit and Messenger entered into discussions about continuing to supply and receive fuel based on a payment schedule that would see the arrears retired by the end of July. Pursuant to that schedule, the first payment of $83,734.05 was to be made by PAD on July 5.

[4] Before the motion judge, the parties disputed whether they had agreed to the payment schedule, or whether they had merely entered discussions. But, in any event, the PAD for $83,734.05 was processed on July 5.

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[1] It should be noted that Transit would have required leave to appeal from the costs order, though leave was not sought in the notice of appeal: see *BIA*, s. 193; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(b).

[5] Unbeknownst to Transit, however, Messenger had filed the NOI on July 2, and had entered into negotiations with another fuel supplier with which it later reached an agreement.

[6] Section 69(1)(a) of the BIA states:

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under s. 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[7] Transit argued that when it cashed the PAD on July 5, it was not taking a remedy within the meaning of s. 69(1)(a) because it was acting pursuant to an agreement with Messenger that included its agreement to continue supplying fuel, which it did until it was later told that Messenger had obtained an alternate supplier. The motion judge rejected this submission.

[8] He also found that on the record there was a dispute about the facts and whether the parties had reached an agreement about the PAD, but he did not need to resolve the dispute because it did not matter in law whether or not there was an agreement. He found that had it been necessary to resolve that issue, he would have ordered a trial.

Analysis

[9] On a motion to extend time, the court considers the following factors: whether the appellant formed the intention to appeal within the time limit, the reason for the delay, any prejudice to the respondent, the potential merit to the appeal, and the justice of the case: see *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23 C.P.C. (5th) 35 (Ont. C.A., in Chambers), at paras. 14-15. The overarching principle is that an extension should be granted if the justice of the case so requires: *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15.

[10] Both sides filed an affidavit on this motion to extend the time. In his affidavit, the principal of Transit does not address the issue of when it formed the intention to appeal or the reason for the delay. He says there is no prejudice to the respondent and that the appeal has merit on the legal issue. The principal of Messenger claims that the respondent will suffer prejudice from the extension because it will delay the financial restructuring of the respondent.

[11] It appears that the applicant formed the intention to appeal outside the appeal period. That factor, together with a failure to explain the delay, weighs against granting this motion. However, there was a timely appeal of the costs order. Counsel advised the court that she was ready to perfect the costs appeal

and that she could also perfect the main appeal forthwith, so that granting this motion would not cause any time delay.

[12] As to the potential merit of the appeal regarding the interpretation of s. 69(1)(a) of the BIA, neither side referred the court to a case on the point of the effect of an agreement to pay in the context of ensuring an ongoing supply – here of fuel – that was needed to keep the insolvent business going, and whether such an agreement is relevant to the application of s. 69(1)(a) and the meaning of "remedy": see generally E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161, at *WL pp. 1, 7-11. The issue is not a frivolous one, particularly in this factual context, and where a trial of the issue of the agreement would have been needed to find any relevant facts.

[13] The applicant also submits that the motion judge misapprehended the evidence regarding the proof of claim that Transit filed in Messenger's Proposal. He stated, at para. 28: "Transit filed a Proof of Claim in the amount of $202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5 through the PAD." The applicant submits that the proof of claim excludes the amount of $83,734.05 obtained by Transit on July 5 through the PAD.

[14] The trustee on the proposal took no position either on the original motion or on this motion to extend the time for the appeal. I understand the prejudice to the respondent is that it will continue to be in financial jeopardy for an extended time

while the appeal is heard, but that kind of prejudice will normally occur where an extension of time to appeal is granted and an obligation to pay is in dispute.

[15] In my view, weighing all the factors, it is in the interests of justice for the extension of time to be granted to file the notice of appeal. In accordance with counsel's advice at the hearing, the appeal shall be perfected by May 6, 2019. The applicant did not seek costs of the motion.

K Feldman J.A.