COURT OF APPEAL FOR ONTARIO

CITATION: Weenen v. Biadi, 2018 ONCA 288
DATE: 20180321
DOCKET: M48284 (C61429)

Epstein, Hourigan and Paciocco JJ.A.

BETWEEN

Matthew Weenen

Plaintiff
(Respondent/Responding Party)

and

Graziano Biadi

Defendant
(Appellant/Non-Party)

Sarah Turney and Anastasia Reklitis, for the moving party, Fasken Martineau DuMoulin LLP

Yan David Payne, for the responding party, Matthew Weenen

Heard: In writing

REASONS FOR DECISION

OVERVIEW

[1] Fasken Martin DuMoulin LLP (the "Law Firm") successfully represented Matthew Weenen (the "Client") in an action against his neighbour, Graziano Biadi. The Client had sought damages against Biadi, for causing flooding on the Client's

property. After an 18-day trial, Mr. Biadi was ordered to pay the Client $390,000 in damages and $550,000 in costs. In June, 2017 this court dismissed Mr. Biadi's appeal of the damages award and ordered him to pay the Client his costs of the appeal in the amount of $50,000.

[2] After the appeal was dismissed, the Law Firm brought a motion to this court for a charge or lien in the amount of $360,836.88 on the funds Mr. Biadi has been ordered to pay the Client. The law firm seeks this remedy as either a charging order under s. 34(1) of the *Solicitors Act*, R.S.O. 1990, c. S.15, or a lien under the court's inherent jurisdiction. The sum of $360,836.88 is the remaining balance the Law Firm says it is owed out of the approximately $820,000 in fees and disbursements it charged the Client for representing him in these proceedings.

[3] The Client contests the amount owed to the Law Firm. He initiated an assessment process before the Law Firm brought this motion.

[4] When it initially brought its motion, the Law Firm sought only a charging order under s. 34 of the *Solicitors Act*. Section 34 provides as follows:

> 34. (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding.

[5] The motion was first heard by Brown J.A., sitting alone. However, Brown J.A. questioned this court's jurisdiction to grant a s. 34 charging order to secure solicitors' fees over the damages and costs awarded by the Superior Court. In the light of his concern, the matter was referred to the panel that heard the appeal.

[6] The Law Firm then sought to amend its notice of motion to add an alternative claim for a lien for its fees and disbursements based on the court's inherent jurisdiction. This request was allowed and the parties provided further submissions – on both the jurisdictional issue identified by Brown J.A. and the merits.

[7] For the reasons that follow, we are of the view that while this court has the jurisdiction to make either order, the Law Firm's motion for a charging order or a lien should nonetheless be dismissed.

ANALYSIS

(1) The legal framework

[8] Solicitors have special rights both under statute and at common law to facilitate payment of their client accounts: Edwin G. Upenieks & Robert J. van Kessel, *Enforcing Judgments and Orders*, 2d ed. (Toronto: LexisNexis Canada Inc., 2016), at s. 8.1. These include both charging orders, under s. 34 of the *Solicitors Act*, and solicitors' liens on funds, derived from the court's inherent jurisdiction: see *Halton Standard Condominium Corp. No. 627 v. Grandview Living*

Inc., 2017 ONSC 1761, at paras. 29-30; *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182, 349 D.L.R. (4th) 431, at paras. 84-89.

[9] This takes us to the question of jurisdiction raised by Brown J.A.

[10] A court's inherent jurisdiction to declare a lien on the proceeds of its *own* judgments is well-established: *Thomas Gold Pettinghill LLP*, at para. 89; *Re Tots and Teens Sault Ste. Marie Ltd.* (1976), 11 O.R. (2d) 103 (S.C.), at p. 108; *Welsh v. Hole* (1779), 99 E.R. 155 (K.B.), at pp. 155-56. It follows that this court has the inherent jurisdiction to grant, when warranted, a solicitor's lien over the $50,000 in costs awarded in favour of the Client on the appeal.

[11] In the light of this conclusion, the question remains as to whether this court has jurisdiction to issue a charging order under the *Solicitors Act* or a solicitors' lien over the damages and costs awarded by the Superior Court.

[12] In our view, it does. A judge of the Court of Appeal is, by virtue of his or her office, a judge of the Superior Court with all of the jurisdiction, power and authority of a judge of that court under s. 13(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and under s. 134(1) of that Act may make any order or decision that could have been made by the court appealed from. There is no dispute that a judge of the Superior Court has the jurisdiction, both pursuant to s. 34 of the *Solicitors Act* and, as previously indicated, under the court's inherent jurisdiction, to grant a charging order or lien on the damages and costs awarded in that court: e.g., *Dalcor*

Inc. v. Unimac Group Ltd., 2017 ONSC 945, 136 O.R. (3d) 585, at para. 14; *Thomas Gold Pettinghill LLP*, at para. 89. To the extent a Superior Court judge could order a charge or a lien, a Court of Appeal judge is accordingly empowered to do so the same.

[13] It follows that this Court has jurisdiction to issue a charging order over the amounts the trial judge ordered Mr. Biadi to pay the Client under s. 34(1) of the *Solicitors Act* or a lien under the court's inherent jurisdiction. What remains to be determined is whether this relief should be granted.

[14] In order to obtain a charging order or a lien on the monies in issue, the onus is on the solicitor to demonstrate that a charging order or lien is warranted. The decision is discretionary: *Taylor v. Taylor* (2002), 60 O.R. (3d) 138 (C.A.), at para. 34; *Foley v. Davis* (1996), 49 C.P.C. (3d) 201 (Ont. C.A.), at p. 202. In deciding whether or not to exercise that discretion, courts must "balance the circumstances and equities of each case and client": *Taylor*, at para. 34.

[15] The test for a charging order under s. 34 is clear. To obtain a s. 34 charging order a solicitor must demonstrate that:

i. the fund or property is in existence at the time the order is granted: *Langston v. Landen*, [2008] O. J. No 4936 (Ont. S.C.J.), at paras. 28-29;

ii. the property was "recovered or preserved" through the instrumentality of the solicitor; *Kushnir v. Lowry*, [2003] O.J. No. 4093 (C.A.), at para. 2;

iii. there must be some evidence that the client cannot or will not pay the lawyer's fees; *Kushnir*, at para. 2; see also *Guergis v. Hamilton*, 2016 ONSC 4428, at para. 6; *Thomas Gold Pettinghill LLP*, at para. 88; *Foley,* at p. 202.

[16] Charging orders exist alongside, and in addition to, a court's inherent jurisdiction to grant a solicitor's lien. Although distinct, they are two sides of the same coin, and overlap significantly in purpose and effect. As this court observed in *Taylor*, at para. 28, s. 34 of the *Solicitors Act* is a codification of a court's "inherent jurisdiction in equity to declare a lien on the proceeds of a judgment where there appears to be good reason to believe that the solicitor would otherwise be deprived of his or her costs."

[17] In our view, the conceptual differences between the two orders, such as how and when they are acquired, do not justify the application of different tests. The two types of charges cover the same circumstances and have identical objectives. Regardless of which of the two remedies is sought, it is our view that the three elements outlined above must be established.

(2) The application of the framework

[18] Here, the first element is satisfied. The judgments in favour of the Client exist. As a *chose in action* or judgment debt, those judgments are a property right against which the charge or lien may attach: *Fancy Barristers P.C. v. Morse Shannon LLP*, 2017 ONCA 82, at para. 9; *Pino v. Vanroon* (1998), 28 C.P.C. (4th) 274 (Ont. Gen. Div.), at para. 10; *Mpampas v. Steamatic Toronto*, 2009 CanLII 61417 (Ont. S.C.), affirmed 2010 ONCA 373.

[19] The second element is also satisfied. There is no dispute that the Law Firm was instrumental in recovering the monies owed under the judgments.

[20] The only branch of this test that is seriously contested is the third element – whether the evidence supports a finding that it is likely that the Law Firm will not be paid what is ultimately found owing by the Client: *Taylor,* at para. 34.

[21] The Client has paid more than $460,000 in legal fees to the Law Firm. This includes payments of $55,000 since January 5, 2016, including a payment of $10,000 on June 7, 2017, only a few weeks before the appeal was dismissed and the Client initiated assessment proceedings.

[22] The Law Firm submits that the Client has had financial difficulties in the past that have prevented him from being able to pay his outstanding accounts. The Law Firm has rendered 51 accounts to the Client throughout these protracted proceedings. Twelve remain unpaid. The Law Firm contends that it has demanded

payment of the outstanding amounts owed from the Client, but to no avail. It points to the fact that the Client had to refinance his home in order to pay an earlier account, arguing that it has every reason to believe that the Client cannot or will not pay what it owes the Law Firm.

[23] The Client says that the evidence does not support either proposition. The Client attests to the fact that he has sufficient liquid assets to pay the Law Firm the amount the Assessment Officer determines should be paid – even if it is the full amount the Law Firm says is owing, as set out above. The Client says his willingness to pay can be demonstrated by the regular flow of payments he has made during the time when the Law Firm represented him in this matter.

[24] In our view, the Law Firm has not discharged its burden of establishing that it will likely not be paid without a charging order or lien: see *Taylor,* at para. 34.

[25] The correspondence between the parties demonstrates that the Law Firm has asked the Client for instalment payments toward the outstanding accounts on at least four occasions over the past several years. Tellingly, the Client has made payments on three of those four occasions. The Law Firm does not appear to have requested the full amount due on the outstanding accounts or a corresponding refusal or inability to pay. There is, of course, the pending assessment but, in our view, the fact that the Client contests the amount he owes the Law Firm is not evidence of his inability or unwillingness to pay.

[26] The evidence supports a finding that the Client owes money to the Law Firm for unpaid accounts. However, this in and of itself does not justify a charging order or lien.

[27] On this record, we are of the view that the Law Firm has not satisfied us that we should exercise our discretion to grant the requested charging order or lien. The motion is therefore dismissed.

[28] Finally, we note that originally, the Law Firm also sought an order pursuant to rule 72.05(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that the $50,000 in costs of the appeal currently being held by the Accountant of the Superior Court as security not be dealt with except on notice to the Law Firm. We have been advised that this money has already been paid out. The motion for an order pursuant to rule 72.05(1) is therefore also dismissed, as moot.

[29] If the parties cannot agree on costs, they may provide the court with brief written submissions not exceeding three pages within 14 days of the release of these reasons.

J.A.

J.A.

J.A.