

COURT OF APPEAL FOR ONTARIO

BEFORE: COROZA J.A.

HEARD: DECEMBER 12, 2024

DISPOSITION OF COURT HEARING:



COURT FILE NO.: M55584 & M55609
(COA-24-CV-1176)

TITLE OF PROCEEDING: EDDIE, MANDIE
v. LEPP, ROBERT

DATE RELEASED: JANUARY 10, 2025

Robert Lepp, acting in person
Gwendolyn Adrian, for the respondent Mandie Eddie

The appellant, Robert Lepp, seeks a stay of the order of Chalmers J. dated October 24, 2024.

In 2017, the respondent, Mandie Eddie, brought an action against the appellant for defamation. Both parties moved for summary judgment. On January 3, 2023, Pollak J. granted summary judgment in favour of the respondent and awarded her damages in the amount of \$550,000 as well as costs fixed on a substantial indemnity basis in the amount of \$51,298.54.

In January 2024, Gillese J.A. denied the appellant's motion for an extension of time to file his notice of appeal appealing the decision of Pollak J. Gillese J.A. found that the appellant failed to establish that he intended to file the notice within the prescribed time. She also found that his appeal was without merit. Costs were awarded to the respondent in the sum of \$5,000.

The appellant unsuccessfully sought leave to appeal to the Supreme Court of Canada.

The parties have also been involved in a second action. The appellant commenced an action against the respondent and several other parties. On September 18, 2023, Edwards R.S.J. dismissed the appellant's action as against the respondent because he found the claims against the respondent were *res judicata* as a result of Pollak J.'s order.

The appellant has not paid any portion of the judgment ordered by Pollak J., despite the respondent's attempts at enforcement. The appellant did not comply with the first court order obtained by the respondent compelling the appellant's attendance at an examination in aid of execution. When he did attend a later examination, he refused to answer questions, resulting in a certificate of non-attendance.

WARNING: This court's endorsements are usually provided to the parties only. The endorsements may be subject to a publication ban or other restriction(s) on public access. Those receiving these endorsements are responsible for ensuring any subsequent dissemination by them complies with any applicable bans or restrictions.

In September 2024, the respondent brought a motion for an order in equitable execution to have the appellant's modular detached dwelling (the "modular home") either transferred to her or sold to satisfy the outstanding judgment. On October 24, 2024, Chalmers J. found that an equitable execution was available to enforce payment of the judgment and ordered a judicial sale of the modular home. On November 13, 2024, the appellant delivered a notice of appeal to this court.

The parties could also not settle the terms of the judicial sale. On November 22, 2024, they appeared in front of Chalmers J. The appellant argued that his filing of an appeal in this court triggered an automatic stay under r. 63.01 of the *Rules of Civil Procedure*, which provides for an automatic stay of an order for the payment of money upon delivery of a notice of appeal. Chalmers J. held that his prior order was not an order for the payment of money, because it did not create a "fixed debt obligation"; it was the judgment of Pollak J. that created a fixed debt obligation. He found that there was no stay of the order, and that in the absence of a stay pursuant r. 63.02, the judicially ordered sale could go ahead. He then outlined the terms of the sale as proposed by the respondent, found them to be reasonable, and imposed them. He also granted the respondent a writ of possession, effective January 15, 2025, to facilitate the sale. As the respondent was successful on the motion, Chalmers J. ordered a cost award of \$12,000 to the respondent and a further \$2,000 to the landlord of the land where the modular home is situated for their attendance at the case conference.

The appellant now seeks a stay of the order pending the hearing of his appeal.

If the appellant is successful at obtaining a stay of Chalmers J.'s order, the respondent has filed a cross-motion for security for costs for the appeal in the amount of \$6,868.14 and that the appellant pay the following outstanding cost awards within 15 days:

- the costs award ordered by Chalmers J. on November 22, 2024, in the amount of \$12,000;
- the costs award ordered by Gillese J.A. on January 23, 2024, in the amount of \$5,000; and
- the costs award ordered by Pollak J. on January 3, 2023.

During the hearing of this motion, counsel for the respondent submitted that if a stay was denied then she was only seeking security for costs of the appeal.

Motion for a Stay

The test for obtaining a stay of a judgment pending appeal is well-settled:

- (1) Is there a serious question to be determined on appeal?
- (2) Will the moving party suffer irreparable harm if the stay is not granted?
- (3) Does the balance of convenience favour granting a stay?

The components of the test are not watertight compartments, but rather interrelated considerations such that the strength of one may compensate for the weakness of another: see *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at p. 677. The overarching consideration is “whether the interests of justice call for a stay”: *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 223 O.A.C. 102, at para. 15.

The appellant’s primary submission on this appeal is that the justice of the case requires a stay. The appellant argues that the modular home is his only significant asset and that without it, he cannot use his home office to operate his consulting business. As explained below, the request for a stay is denied.

1. Serious Question to be Determined

This is a low threshold, but in my view, the appellant has not cleared this hurdle. I see no error in the reasons of Chalmers J. that would suggest this court would interfere with his decision.

Chalmers J. reviewed the general principles underlying the remedy and found that the modular home is an asset that is not exigible at common law, that there is a benefit if the order in equitable execution is made and that the relative equities between the parties supported the remedy sought by the respondent. Rather than ordering a direct transfer of the modular home from the appellant to the respondent, Chalmers J. quite reasonably ordered a judicial sale so that it would benefit both parties.

For the sake of completeness, I also wish to address the appellant’s claim that there is an automatic stay in place that is triggered by Chalmers J.’s order. I disagree and see no error in the reasons Chalmers J. gave in rejecting this argument. The observations of Chalmers J. are consistent with the jurisprudence of this court that holds that a declaration that may have the indirect effect of leading to a payment of money is not subject to the automatic stay: see *Sistem Mühendislik A.S. v. Kyrgyz Republic*, 2014 ONCA 576, 325 O.A.C. 198, at paras. 8-9. Rather, the debt obligation in this case is the judgment of Pollak J.

2. Irreparable Harm

The appellant has not demonstrated that he will suffer irreparable harm if the stay is not granted. To be sure, I appreciate that being evicted from one’s home is significant, but the appellant has known since September that this was a possibility. Nor is there any evidence that the appellant cannot secure alternate accommodation.

3. Balance of Convenience

In my view, the balance of convenience favours the respondent. The context of this motion is important. She has been embroiled in protracted litigation with the appellant. If I were to grant the appellant's motion, there will be a delay of the judicially ordered sale and the respondent will have to respond to what I view as a meritless appeal. The respondent is owed substantial monies from costs awards that have not been paid. Although the appellant asserts that he is impecunious and it is that impecuniosity that brings him to court, it seems to me that the decision by Chalmers J. would permit the parties to move on and permit the respondent to mitigate her damages. I also observe that there is no further right for the appellant to challenge the judgment of Pollak J. He simply owes a debt to the respondent and a delay in enforcement because the appellant has filed a meritless appeal is prejudicial to her.

The justice of the case favours the respondent. The appellant's request for a stay is denied.

Motion for Security for Costs

A judge of this court has discretion to award security for costs of an appeal as well as the costs of the underlying motion or trial. Security for costs may be ordered in three categories of cases, as set out in r. 61.06(1) of the *Rules of Civil Procedure*:

- (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
- (b) an order for security for costs could be made against the appellant under r. 56.01; or
- (c) for other good reason, security for costs should be ordered.

The overarching principle to be applied to all the circumstances is the justness of the order sought: *Pickard v. London Police Services Board*, 2010 ONCA 643, 268 O.A.C. 153, at para. 17; *Galustian v. Skylink Group of Companies Inc.*, 2010 ONCA 645, 268 O.A.C. 157, at para. 26; and *Novak v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2018 ONCA 219, 25 C.P.C. (8th) 225, at para. 7.

As noted above, the respondent's position is that if a stay is denied then security for costs in the amount of \$6,868.14 should be ordered.

The appellant does not dispute that he is impecunious. He claims that "the impecuniosity of the appellant is not in question, nor is it challenged". He goes on to state that his monthly income is \$2,610 and that his debts greatly exceed the cash value of his assets.

Having considered the matter, I am of the view that the appellant should pay for costs of the appeal he brings to this court, given the history of this matter. In my view, the order requested falls squarely within r. 61.06(1)(a). I have reached the tentative conclusion that this appeal appears to be so devoid of merit as to give "good reason to believe that the

appeal is frivolous and vexatious": *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (ON CA). As I have outlined above, the appellant faces an uphill climb to convince a panel that Chalmers J. erred. Furthermore, it also appears that his appeal is "vexatious" in the sense that its purpose is to annoy the respondent. Given the history of the matter, the appellant's conduct in filing the appeal appears to be an attempt to delay the inevitable.

Even if I am wrong, in ordering security under r. 61.06(1)(a), then the respondent would be entitled to such an order under the residual category under r. 61.06(1)(c). I will not repeat what I have outlined above but given the conduct of the appellant in the respondent's efforts for post-judgment enforcement and the lack of merit to this appeal, there is "other good reason" to grant the respondent a measure of protection for costs of the appeal. Given the history of non-payment of costs awards in other litigation, the respondent has outlined a compelling case to protect her from needlessly incurring further costs that she will not recover in responding to this appeal.

In conclusion, in all the circumstances of the case, it is just and appropriate to order security for costs. The appellant shall pay into court security for costs of the appeal in the amount of \$6,868.14 within 30 days.

The respondent is entitled to her costs. I fix those costs at \$6,100 all-inclusive for both motions.

S. COROZA J.A.