

COURT FILE NO.: 06-CV-311330CP
DATE: July 21, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

2038724 ONTARIO LTD. and 2036250 ONTARIO INC.

Plaintiffs

- and -

**QUIZNO'S CANADA RESTAURANT CORPORATION,
QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC,
GORDON FOOD SERVICE, INC. and GFS CANADA COMPANY INC.**

Defendants

Proceeding under the Class Proceedings Act, 1992

COUNSEL:

Allan D.J. Dick for the Plaintiffs

Geoffrey B. Shaw for the Defendants Quizno's Canada Restaurant Corporation, Quiz-Can LLC, The Quizno's Master LLC

REASONS FOR DECISION

PERELL, J.

Introduction

[1] By an endorsement dated June 9, 2008, I awarded costs to the defendant Quiznos (more precisely, Quizno's Canada Restaurant Corporation, Quiz-Can LLC, and The Quizno's Master LLC) in the amount of \$225,329.01 plus tax for its success on a motion for certification that I had dismissed.

[2] Simultaneously with the award to Quiznos, I awarded the Plaintiffs the sum of \$51,635.85 plus tax for their success on a cross-motion to stay the action that had been brought by Quiznos, which I also had dismissed. Given that the award to Quiznos overtopped the award to the Plaintiffs, had there been no appeals, it would have followed that the Plaintiffs should have paid Quiznos around \$175,000.00.

[3] But there was an appeal by the Plaintiffs, which automatically stayed the costs award made against them. The appeal was successful, and by decisions dated April 27, 2009 and July 16, 2009, the Divisional Court conditionally certified the action as a class action, awarded the Plaintiffs \$85,000, all inclusive, for the costs of the appeal, and referred the issue of their costs of the certification motion to me for determination.

[4] Given that there was now no overtopping costs award in favour of Quiznos, it would follow that Quiznos should pay the Plaintiffs \$51,635.85 plus tax. However, it is not that simple.

[5] In the convoluted jurisdictional circumstances that I will describe below, Quiznos now moves for an order staying execution of my \$51,635.85 costs order pending a consideration by a panel of the Court of Appeal of Justice Goudge's decision not to grant Quiznos an extension of time to appeal the dismissal of its motion for a stay of the action.

[6] Quiznos submits that if a stay of execution is not granted it may suffer irreparable harm. It submits that there is irreparable harm because the Plaintiffs will not be able to repay should: (a) Quiznos be granted an extension of time to appeal; and (b) should it successfully prosecute the appeal.

[7] For the reasons that follow, I dismiss Quiznos' motion on jurisdictional grounds.

Factual Background

[8] Before I begin an account of the factual background, I will make three observations that may be helpful in understanding the current state of affairs.

[9] The first observation is that the purpose of Quiznos' original motion to stay the action was to prevent the certification of the Plaintiffs' action as a class action. The major thrust of its argument is that the class members have contracted out of a right to bring a class action. Had this argument originally succeeded, then Quiznos would not have needed to succeed on the certification motion. The motion to stay the action was, in effect, an alternate way to defeat the certification motion.

[10] The second observation is that under the *Class Proceedings Act, 1992*, S.O. 1992, c. C6, s. 31, when an action is certified, the defendant may appeal to the Divisional Court only with leave of a judge of the Superior Court, but if the action is not certified - which is what occurred in the case at bar - the plaintiff does not require leave to appeal to the Divisional Court.

[11] The third observation is that Quiznos had a right to appeal to the Court of Appeal from the dismissal of its motion for a stay of the action and had it appealed in a timely way, then under the operation of s. 6 (2) and (3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court of Appeal would have heard Quiznos' appeal and also the Plaintiffs' appeal, which would have been transferred from the Divisional Court.

[12] With those observations, the account of the factual background, which I will interrupt with few more observations, may begin with the events after March 2008 when

I dismissed the Plaintiffs' motion for certification and Quiznos' motion for a stay of the action. Those events are described by Justice Goudge in paras. 5-7 of his Reasons for Decision, mentioned below, as follows:

5. On April 3, 2008, Quiznos served the respondents with a notice of appeal to the court from dismissal of their stay motion. Quiznos chose not to file the notice with this court [the Court of Appeal], but indicated to the respondents that they proposed to proceed with the appeal only if the respondents [the Plaintiffs] overturned the dismissal of the certification motion in the Divisional Court, or, if unsuccessful there, obtained leave to appeal to this court. In response, the respondents invited Quiznos to file their notice of appeal in this court to allow this court pursuant to s. 6 (2) of the *Courts of Justice Act*, to consider the stay and the certification together. Quiznos declined to do so.

6. This left the respondents to appeal the dismissal of the certification motion to the Divisional Court. On April 27, 2009, they were successful. That court (Justice Swinton dissenting) allowed the appeal and granted the certification order, conditional on a revised litigation plan. In its reasons, the Divisional Court noted that Quiznos had moved unsuccessfully to stay the action, but had not appealed that decision.

7. Quiznos has now sought leave to appeal the decision of the Divisional Court to this court. At the same time, Quiznos moves before me for an order extending time to appeal from Justice Perell's order of March 4, 2008 dismissing Quiznos' motion to stay the action.

[13] Under rule 64.14 (2) a party who serves a notice of appeal and does not file it within 10 days after service shall be deemed to have abandoned the appeal, unless the court orders otherwise. Under rule 64.14 (3), when an appeal is abandoned, the appeal is at an end unless a judge of the appellate court orders otherwise.

[14] I pause here to observe that Quiznos, for whatever reason, rejected an invitation to deliver their notice of appeal. Had it delivered its notice of appeal, its appeal of the motion to stay the action and the Plaintiffs' appeal of the dismissal of the certification of the action would have been heard together by the Court of Appeal.

[15] In proceeding in the way it did, Quiznos gave up the opportunity of having a second way to defeat certification, which opportunity it is now trying to regain by seeking an extension of time for an appeal that would have been available to it as of right and is now deemed to have been abandoned.

[16] Quiznos obviously hoped that Justice Goudge would grant the extension of time for it to appeal my decision refusing to grant a stay of the action. However, for reasons released on June 28, 2009, Justice Goudge dismissed Quiznos' motion for an extension.

[17] Technically, or properly speaking, there is no right of appeal from Justice Goudge's order. However, under s. 7 (5) of the *Courts of Justice Act*, "a panel of the

Court of Appeal may, on motion, set aside or vary the decision of a judge who hears and determines a motion.” On June 30, 2009, under rule 61.16 (6) of the *Rules of Civil Procedure*, Quiznos served a notice of motion for a review of Justice Goudge’s order at a date to be fixed by the Registrar.

[18] On July 2, 2009, the Plaintiffs served a notice of motion returnable before Justice Goudge for a declaration that the costs order is enforceable notwithstanding the motion by Quiznos to a full panel to set aside Justice Goudge’s order. Justice Goudge will hear this motion in August 2009.

[19] On July 17, 2009, Quiznos served the notice of motion now before me for an order staying enforcement of the costs award pending final disposition of Quiznos’ motion to extend the time to appeal.

Analysis

[20] Rule 63.01 of the *Rules of Civil Procedure* provides for an automatic stay from some orders. Rule 63.01 (1) states, with emphasis added:

63.01 (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order.

[21] Under rule 1.03 (1) “deliver” means serve and file with proof of service and “delivery” has a corresponding meaning.

[22] To this date, Quiznos has not “delivered” a notice of appeal from my decision dismissing its motion to stay the action. It served a notice of appeal, but it has never filed the notice with proof of service. Because of the operation of rules 61.14 (2) and (3), Quiznos is deemed to have abandoned the appeal, unless the court orders otherwise.

[23] The reason that Quiznos brought a motion before Justice Goudge was that the time for delivering its notice of appeal had expired and its appeal was at an end. Had Justice Goudge granted the motion then Quiznos’s notice of appeal could have been delivered.

[24] Justice Goudge’s order “practically speaking” has been appealed to a full panel of the Court of Appeal (See *Lee v. Lee*, [1995] O.J. No. 1196 (Div. Ct.) at paras. 18-19) but there is no automatic stay of Justice Goudge’s order, which is not an order for the payment of money. It is rather an order dismissing a motion for an extension of time to file a notice of appeal.

[25] It follows that there has been no delivery of a notice of appeal that would stay the costs award of the motion to stay the action and rule 63.01 (1) does not provide a basis for the order sought by Quiznos.

[26] Rules 63.02 (1) and (2) provide for a stay by order. As I read rules 63.02 (1) and (2), they do not provide me with jurisdiction to grant the order sought by Quiznos. These rules states:

By trial court or appeal court

63.02. (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

Expiry of trial court stay

(2) A stay granted under clause (1)(a) expires if no notice of motion for leave to appeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired.

[27] For me to have jurisdiction under rule 63.02, there must be an order “to be appealed.” However, in the case at bar, at the present moment, there cannot be an order to be appealed because the time for delivering a notice of appeal has expired and under rule 61.14 (3) any appeal is at an end, unless a judge of the appellate court orders otherwise.

[28] If I am wrong in that reading and I do have the jurisdiction to grant a stay, then any stay would immediately expire; visualize: if I grant a stay under rule 63.02 (1)(a), then under rule 63.02 (2), the stay would immediately expire because no notice of appeal has been delivered and the time for delivery has expired and, in any event, the appeal is at an end unless a judge of the appellate court orders otherwise.

[29] In *Bijowski v. Caicco*, [1985] O.J. No. 1550 (C.A.), Justice Finlayson stated at para. 11 (with emphasis added):

In my respectful view, the purposes of R. 63.02 is to confer a restricted jurisdiction upon the trial judge or another judge of that court in his absence to stay an order which is not automatically stayed because of the provisions of R. 63.01 (2). The order that he makes is only effective until a notice of appeal is delivered or the time for appeal expires, whichever is earlier. The rule really contemplates the maintenance of the status quo during the time available to the unsuccessful party to appeal. Once an appeal is launched, the jurisdiction is then in the Court of Appeal to determine whether it would be appropriate for the longer term before the appeal is disposed of to interfere with the judgment or order that is under appeal.

[30] Applying *Bijowski*, my analysis leads me to the conclusion that in the current state of affairs, I do not have the jurisdiction to grant the relief requested by Quiznos.

[31] It may be that Quiznos' request for a stay could be made under 63.02 (1)(b) to a "judge of the court to which ... an appeal has been taken." In other words, it may be that Quiznos' request could be made by way of a cross-motion to the motion now pending before Justice Goudge. However, I do not believe that it would be proper for me to comment about what jurisdiction a judge of the appellate court may have. I simply conclude that I do not have the jurisdiction to grant the relief requested.

[32] Because the jurisdiction to grant a stay may exist elsewhere, I also believe that it would not be proper for me to assume that I have jurisdiction and then say how I would exercise it. I, therefore, will say nothing about Quiznos' arguments that the principles for the granting of a stay as set out by the Supreme Court of Canada in *RJR MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 have been satisfied.

Conclusion

[33] Accordingly, I dismiss Quiznos' motion on jurisdictional grounds.

[34] If the parties cannot agree with respect to the matter of costs, they may make submissions in writing beginning with the Plaintiffs within 20 days of the release of these Reasons for Decision to be followed by Quiznos' submissions within a further 20 days.

[35] Order accordingly.

Perell, J.

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