CITATION: Gambin Estate v. Di Battista Gambin Developments Limited, 2022 ONSC 3379
DIVISIONAL COURT FILE NO.: 958-21 (Toronto)
DATE: 2022-06-06

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Anthony Zanardo in his Capacity as the Estate Trustee for the Estate of Luigi Gambin v. DiBattista Gambin Developments Limited, Ray Di Battista, Anthony Di Battista, Julia Babensky, Whitwood Developments Ltd. and Greystar Developments Inc.

BEFORE: Pomerance, Kurke, and Davies JJ.

COUNSEL: *R. Malen*, for the Appellant Julia Babensky

Matthew P. Sammon and Katelyn Leonard, for the Respondent Estate of Luigi Gambin ("the Estate")

E.F.B. Lamek, for the Intervenor Liquidator Zeifman Partners Inc. ("the Liquidator")

HEARD virtually at Toronto: June 6, 2022

ENDORSEMENT

[1] The appellant appeals against the Order of L. Pattillo J. of November 30, 2021 (2021 ONSC 7835) dismissing the appellant's request to remove the Liquidator of DiBattista Gambin Developments Limited ("DBG") and approving the Liquidator's most recent account.

[2] The appellant attacks the motion judge's factual findings and submits that the motion judge erred by not finding that the Liquidator was improperly aligned with the Estate of Luigi Gambin, one of the two shareholders of DBG, against the other, the appellant, and should therefore have been removed. Although the respondents have argued that the issues on this appeal are interlocutory and premature, we have heard the appellant's arguments on all issues. Assuming without deciding that this is a final order, the appeal cannot succeed on the merits. We therefore decline to make a finding on whether leave ought to have been sought.

[3] In her submissions the appellant raises a number of factual issues that had also been raised before the motion judge, including a March 23, 2021 finding by Gilmore J. in a related motion that the Liquidator was "clearly aligned with the Estate." The appellant argued that Pattillo J. was bound by the ruling of Gilmore J. and erred by not agreeing with it. We disagree with this position, as it was open to Pattillo J. to make his own findings on the different evidentiary record that was before him.

[4] It was and is the submission of the appellant that the Liquidator collaborated with the Estate, was not neutral, and should be disqualified from continuing to act. These issues were raised

before the motion judge, who made clear factual findings that were in his discretion to make and dismissed the appellant's motion. Absent palpable and overriding errors of fact, it is not the place of an appeal court to interfere with findings in the court of first instance and to retry the case. We find no basis to interfere with the motion judge's factual findings, for which he offered thorough and compelling reasons.

[5] The appellant further argues that the respondents had a duty to put forward evidence to show that their communications leading up to the motion before Gilmore J. were innocent and had no collaborative or preferential intent. In the appellant's submission, the motion judge should have drawn an inference adverse to the continuation of the Liquidator in its service from the failure of the Liquidator and the Estate to file evidence explaining the communications between them.

[6] We disagree. There is normally a heavy onus on a party seeking to remove a liquidator, who is a court-appointed officer like a receiver, to demonstrate that the liquidator has engaged in blatant intentional actions contrary to the interest of one or more parties: *Kraner v. Kraner*, [2012] O.J. No. 4051 (Sup. Ct.), at para. 25; *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd*., [1992] O.J. No. 729, at para. 5 (O.C.G.D.).

[7] There was nothing in the record to support the sinister inference urged by the appellant. The motion judge found (at para. 31), as he was entitled to do, that "Liquidator's counsel's action in communicating with counsel for the Estate in respect of the [motion before Gilmore J.] did not come close to the type of conduct required for removal." It was open to the motion judge to reach this conclusion on the whole of the evidence. The absence of evidence cannot be equated with positive evidence of bad faith or wrongdoing. Moreover, concerning the drawing of adverse inferences against a responding party, it was noted by the Ontario Court of Appeal in *Dwyer v. Mark II Innovations Ltd*., [2006] O.J. No. 1189, "[a]n adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof."

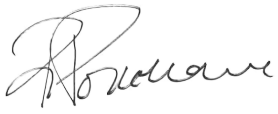
[8] The decision to draw an adverse inference or not to do so lies in the discretion of the trier of fact and is a matter of judicial discretion. We see no palpable and overriding error in the motion judge's refusal to draw the inference urged on him by the appellant.

[9] Finally, in her factum, the appellant submits that the motion judge erred by finding that the approval of earlier accounts of the Liquidator and counsel disqualified the appellant from objecting to the sixth account that the Liquidator was seeking to approve and to reduce it by a third.

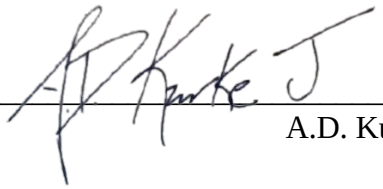
[10] We disagree. It was open to the motion judge to find that in the absence of an earlier objection to the many prior accounts tendered by the Liquidator the appellant's complaint at this juncture was untimely and abusive: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc*., [2009] O.J. No. 5474 (Sup. Ct.), at para. 20. This is not a case such as *Bank of Nova Scotia v. Diemer (c.o.b. Cornacre Cattle Co.)*, 2014 ONSC 365, where there had been approval of prior accounts of a receiver, but the court had ordered a return to court to assess further fees and disbursements by the receiver. In any event, the motion judge also found, as he was entitled to do, that the amounts in the account that was tendered were "fair and reasonable and should be approved" (para. 39).

[11] For the above reasons, the appeal is dismissed.

[12] On prior agreement of counsel, the appellant shall pay costs to the respondent Estate of $20,000 all inclusive. The intervenor Liquidator is entitled to its costs and has claimed costs of $28,809.35, which shall be assessed pursuant to paragraphs 22-24 of the order of Dunphy J. of August 16, 2018.



R.M. Pomerance J.



A.D. Kurke J.

B. Davies J.

Date: June 6, 2022