CITATION: Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC, 2010 ONCA 137
DATE: 20100222
DOCKET: C51225/M38409
COURT OF APPEAL FOR ONTARIO
R.A. Blair J.A. (In Chambers)
BETWEEN:
Donaldson International Livestock Ltd.
Appellant/Respondent
and
Znamensky Selekcionno-Gibridny Center LLC
Respondent/Moving Party
Christopher Bredt and Margot Finley for the Moving Party
Jan-Paul Waldin for the Respondent
Heard: February 17, 2010
Motion for Security for Costs on Appeal
ENDORSEMENT

**Background**

[1] Znamensky Selekcionno-Gibridny Center LLC moves for security for costs of the appeal launched by Donaldson International Livestock Ltd. from the order of Pitt J. dated September 29, 2009. Pitt J. ordered that two international arbitration awards in favour of Znamensky be recognized and enforced in Ontario. In addition, he awarded costs in favour of Znamensky in the amount of $30,000.00.

[2] The dispute has its genesis in a contract providing for the supply of 8,505 pigs by Donaldson (a leading Canadian Ontario exporter of purebred pigs) to Znamensky (an agro-industrial Russian company). The contract contained an arbitration clause requiring all disputes between the parties to be decided by arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("ICAC") in Moscow. A dispute arose respecting the health of the pigs supplied and Znamensky filed a claim with the ICAC pursuant to the arbitration clause.

[3] Donaldson then commenced an anti-suit injunction proceeding in Ontario, seeking to stop the arbitration proceeding on the principal ground that death threats allegedly made by Znamensky prevented its witnesses from attending the arbitration in Moscow, thereby rendering the proceeding unfair. Znamensky sought an order staying the Ontario proceedings. On November 27, 2007, Gans J. dismissed the anti-suit injunction claim and granted the stay. For purposes of the appeal, and this motion, the two primary bases for this decision were the following:

> (1) Donaldson had not established the background of threats, on the materials before him, even on the balance of probabilities, and, in any event, the threat issue could not be resolved summarily but only on the basis of a *viva voce* hearing (which Donaldson did not request); and
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> (2) Znamensky's offer to move the arbitration out of Russia to a neutral spot all but eliminated, or at least minimized, the threat of intimidation and the prospect of apprehended harm to Donaldson and its witnesses by reason of the threats. He awarded costs against Donaldson in the amount of approximately $78,000.00 plus interest.

[4] The order of Gans J. was affirmed by this Court, which refused Donaldson's request that it

order the trial of the issue of the death threats: (2008), 305 D.L.R. (4th) 432 (Ont. C.A.), at para. 28. The Court said that the time to have requested the trial of the issue concerning the death threats was when the parties were before the motion judge. However, the Court also refused to grant an interim injunction prohibiting enforcement of any arbitration award, stating at para. 30 that:

Should Znamensky take steps to enforce its arbitral awards against Donaldson in the Ontario courts, then it would seem to me that Donaldson should be free to resist the enforcement of those awards on whatever basis it chooses, subject to the ruling of the presiding judge. … [T]he issue of enforcement must, at this stage, be dealt with at first instance and not in this court.

[5] The Court of Appeal awarded costs against Donaldson in the amount of $25,000.00. With interest, the costs outstanding with respect to the proceedings before Gans J. and the Court of Appeal ("the first Ontario proceedings") now approximate $115,000.00. They remain outstanding and unpaid.

[6] Znamensky then proceeded with the arbitration in Russia. Donaldson did not attend. In the result, on March 6, 2008 the ICAC panel awarded Znamensky $1,234,416.65 in damages together with $26,205.28 as compensation for the arbitration fee. On May 13, 2008, the panel made a further award in favour of Znamensky for $424,732.94 in damages and $9,006.21 as compensation for arbitration fees paid.[1]

[7] Znamensky applied to enforce the arbitration awards against Donaldson in Ontario. Pitt J. granted the order on essentially two bases: (1) Donaldson was precluded from raising the threat issue in defence to the enforcement proceedings on issue estoppel grounds; and (2) in any event, the finding of Gans J. that Znamensky's offer to alter the venue of the arbitration virtually eliminated the threats as a ground for vitiating the arbitration proceedings, was dispositive.

[8] Donaldson has appealed Pitt J.'s order. I am told the appeal is scheduled to be argued on April 7, 2010. In the meantime, Znamensky seeks security for costs of the appeal in the amount of $25,000.00.

[9] For the reasons that follow, I would not grant the order.

Analysis

[10] The motion is brought pursuant to rule 61.06(1), which states:

In an appeal where it appears that,

(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 rule 56.01; or

(c) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

[11] In its written materials filed in support of the motion, Znamensky founded its argument on subsection (1)(b) above, i.e., that an order for security for costs could be made against the appellant pursuant to rule 56.01(1)(c) or (d). Those provisions state that:

The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remains unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs

of the defendant or respondent.
[12] In this regard, Znamensky's argument was that Donaldson has not paid the outstanding costs orders totalling $115,000 and, in addition – based on information obtained on an examination of Donaldson in aid of execution respecting those unpaid orders –there is good reason to believe that Donaldson has insufficient assets in Ontario to pay the costs of Znamensky if the latter is successful on the appeal. The evidence suggests, at least, that Donaldson's net assets are worth about $125,000 as against the outstanding costs orders of $115,000 in connection with the first Ontario proceedings plus the outstanding costs order of $30,000 from below.
[13] However, based on the line of authority in this Court establishing that a respondent on appeal may not rely on rule 61.06(1)(b) to obtain an order for security for costs of an appeal as against a defendant/appellant, Mr. Bredt fairly concedes that he cannot resort to subsection (1)(b) and rule 56.01 in the circumstances. The policy rationale behind this line of jurisprudence is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others to defend themselves. See *Diversitel Communications Inc. v. Glacier Bay Inc*., [2004] O.J. No. 10, 181 O.A.C. 6 (C.A.), at para 8; *GEAC Canada Ltd. v. Craig Erickson Systems Inc*., [1994] O.J. No. 1061, 26 C.P.C. (3d) 355 (C.A.); *Toronto Dominion Bank. v. Szilagyi Farms Ltd*., (1988), 65 O.R. (2d) 433 (C.A.). In *Szilagyi Farms*, Morden J.A. expressed the rationale in these terms, at p. 440:
… it has for a long time been the accepted position that no party should have to give security for costs as a condition of simply defending itself (see *Re Percy and Kelly Cobalt & Chrome Iron Mining Co.* (1876), 2 Ch. D. 531, 24 W.R. 1057) and, in this regard, it can be said that an appeal is simply a step in the proceeding in which the defendant appealing is continuing to defend itself.
[14] Here, the position is that Donaldson is the impecunious defendant – or at least arguably so – who was simply defending itself against Znamensky's enforcement proceedings and now simply seeks to take another step in the proceeding by continuing to defend itself through the appeal.
[15] Mr. Bredt also candidly concedes that he is not seeking refuge under rule 61.06(1)(a). He does not argue the appeal is frivolous or vexatious, although he does submit (with an eye on subrule (1)(c), to which I will turn in a moment, no doubt) that "it is not the strongest appeal." Mr. Waldin, on the other hand, submits that the appeal is "very strong" (no doubt with an eye on the same subrule).
[16] The motion therefore turns on the application of rule 61.06(1)(c). In my view, Znamensky is not entitled to succeed on that basis.
[17] First, the wording of rule 61.06(1)(c) is clear: where it appears that "for *other* good reason" security for costs should be ordered, the judge may make such an order. This must mean good reason *other than* those already encompassed in rule 61.06(1)(a) or (1)(b) – and, through (1)(b), those encompassed in rule 56.01. In other words, a party seeking an order for security for costs under rule 61.06(1)(c) may not resort to what are in effect the same grounds that would support a rule 56.01 order when it is barred by the line of jurisprudence cited above from relying on subrule (1)(b), the gate through which it must travel to have access to rule 56.01. Here, Mr. Waldin submits, that is precisely what Znamensky is attempting to do – "back door" itself into rule 56.01(c) and (d) through rule 61.06(1)(c) when it is forbidden from accessing it through rule 61.06(1)(b). Stripped to its essentials, Znamensky's motion is founded on the still-unpaid costs orders and Donaldson's impecuniosity. I agree.
[18] Mr. Bredt acknowledges this difficulty. However, he contends that the significant unpaid costs orders and Donaldson's insufficient assets are nonetheless relevant to the rule 61.06(1)(c)

argument. Why? Because Znamensky is akin to the foreign party that is forced to come into the jurisdiction to defend itself, having had to respond to Donaldson's unsuccessful anti-suit injunction proceedings and the appeal from the order of Gans J., and having incurred the substantial costs of that proceeding as reflected (partially) in the unpaid costs orders. Moreover, the issues dealt with in the first Ontario proceedings and resolved in Znamensky's favour – principally, the threat allegations – were integral to the issues raised by Donaldson in the proceedings before Pitt J., and form a substantial part of the issues raised on the appeal from the order of Pitt J. In that sense, Mr. Bredt says, *Donaldson* is, in effect, the "plaintiff" who brought the foreign party into proceedings in Ontario and is simply seeking to protect its original position through the appeal. Donaldson is not, therefore, an impecunious defendant seeking only to defend itself. It is an impecunious party that has caused Znamensky to incur considerable – as yet unpaid – costs by dragging it into Ontario proceedings, and now seeks to expose Znamensky to the risk of even further losses in this respect if unsuccessful on the appeal. To this mix, Mr. Bredt adds his submission that the appeal – while he cannot say it is frivolous – is "not the strongest" appeal.

[19] Skilfully put as this argument is, I do not accept it.

[20] While there may be a connection between the issues dealt with here and below in the first Ontario proceedings and the issues raised before Justice Pitt and on the appeal of his order, the fact is that Znamensky would have had to come to Ontario to enforce its awards whether the earlier proceedings had taken place or not. *Znamensky* is therefore the "plaintiff" and Donaldson the defendant seeking to defend the enforcement claim being asserted against it. The rationale underpinning the *Szilagyi Farms* line of authorities precluding access to rule 61.06(1)(b) against defendant/appellants remains relevant. Apart from the contention that the appeal is "not the strongest", Znamensky's claim for security for costs continues to rest on the arguments that there are substantial unpaid costs orders outstanding and that Donaldson does not have sufficient assets to pay them if it is unsuccessful on the appeal. These arguments are the stuff of rule 56.01(c) and (d), which cannot be accessed by a respondent in the position of Znamensky, disqualified as it is from passing through the forbidden rule 61.06(1)(b) gate.

[21] The motion must therefore be dismissed.

[22] Donaldson is entitled to its costs of the motion. If counsel cannot agree they may file brief submissions, not to exceed five pages in length, within two weeks of the release of these reasons.

[1] These figures are in U.S. dollars.