

COURT OF APPEAL FOR ONTARIO

BEFORE: DAWE J.A.

DATE: TUESDAY, MAY 21, 2024

DISPOSITION OF COURT HEARING:



COURT FILE NO.: COA-24-OM-0142

TITLE OF PROCEEDING: ATRIUM
MORTGAGE INVESTMENT
CORPORATION ET. AL. V. STATEVIEW
HOMES (NAO TOWNS II) INC., ET. AL.

DATE RELEASED: JUNE 6, 2024

The moving party in this motion, Ms. Dharmi Mehta, is the proposed representative plaintiff in a class action that has been commenced on behalf of all pre-construction purchasers of homes from a group of related corporations that includes Stateview Homes (Nao Towns II) Inc. (“Nao II”). I will refer to these companies collectively as “the Stateview corporations”.

The Stateview corporations, including Nao II, are now in receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The respondent KSV Restructuring Inc. is the Receiver appointed under the *BIA*. Atrium Mortgage Investment Corporation (“Atrium”) is one of Nao II’s secured creditors.

Ms. Mehta moves for an extension of time within which to file a notice of appeal from an order that was made in the bankruptcy proceedings in March 2024. The respondents consent to this relief being granted, and an order will go accordingly.

The disputed issue between the parties concerns Ms. Mehta’s further request for an order extending the time with which she must perfect her appeal. Specifically, she seeks to extend her perfection deadline until 30 days after the release of the decision on another related motion in the bankruptcy proceedings, which has not yet been heard, with a view to having her appeal joined with a potential appeal from this future motion decision. The respondents oppose this request, and argue that her appeal should simply proceed to a hearing in the ordinary way without further delay.

Background

Some background facts are necessary for context.

The proposed class action consists of pre-construction purchasers who paid deposits to Nao II and the other Stateview corporations. One disputed issue is whether the purchasers should be entitled to recover some part of their deposits in priority to the claims of the secured debt holders.

The pre-construction properties at issue were all organized as common elements condominiums, under which purchasers acquire both title over a specific land parcel and an ownership claim over an undivided common interest.

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Ms. Mehta, on behalf of the proposed class, contends that the because some portion of the purchasers' deposits was attributable to their purchases of shares of the common interest, the developers were statutorily required to hold a fractional part of the deposit funds in trust under the *Condominium Act, 1998*, S.O. 1998, c. 19, ss. 81 and 138(4)(a).

Section 67(1)(a) of the *BIA* excludes from “[t]he property of a bankrupt divisible among his creditors” any “property held by the bankrupt in trust for any other person”. Ms. Mehta’s position is that some portion of the assets of Nao II should accordingly be held back by the Receiver, and not paid to the secured creditors (including Atrium) because this money represents funds that Nao II was statutorily obliged to hold in trust for the purchasers.

The purchasers are also entitled to seek compensation for their lost deposits from the Tarion Warranty Corporation under the deposit insurance scheme established by the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31.

In February 2024, the Receiver sought a court order from a judge of the Superior Court of Justice commercial list authorizing it to distribute the sale proceeds from the Nao II project. In response, Ms. Mehta brought a cross-motion seeking, among other things, a declaration that some portion of this money was trust property under the *Condominium Act*, and accordingly should not be distributed. This cross-motion was originally scheduled to be heard in March 2024, but it was adjourned and has not yet been rescheduled. The parties have referred to this motion as the “Merits Motion”.

Black J., who sits on the commercial list, initially made an interim order requiring the Receiver to hold back from distribution 20% of the deposits that had been received on the Nao II project, which came to approximately \$1.5 million. However, on March 5, 2024, he varied his order and reduced the holdback amount to \$37,195.65. Black J. did so on the grounds that the purchasers would be able to collect the difference from Tarion by making warranty claims.

Ms. Mehta seeks to appeal from Black J.’s March 5, 2024 order. Under the applicable appeal provisions of the *BIA*, she was required to file her notice of appeal within 10 days. She missed this deadline by one day, and her notice of appeal was accordingly not accepted for filing. The respondents are now consenting to an order that would permit her to file her notice of appeal, which will allow her appeal to proceed and be decided on its merits.

Ms. Mehta also seeks an order permitting her to delay perfecting her appeal until 30 days after a decision has been rendered on the Merits Motion. Her justification is that she anticipates that once a decision in the Merits Motion has been rendered one of the parties is likely to appeal. Her goal is to have her appeal from Black J.’s March 5, 2024 order joined with this other potential future appeal.

The Receiver, joined by Atrium, both oppose this latter request.

Analysis

Assuming that the decision on the Merits Motion is ultimately appealed, there is some merit to Ms. Mehta's argument that there would be efficiencies in having the two appeals heard together, since there is some potential factual and legal overlap between the issues raised in Ms. Mehta's present appeal and the issues that remain to be determined in the Merits Motion.

However, for several reasons, I agree with the respondents that the balance of convenience does not favour extending Ms. Mehta's perfection deadline indefinitely, to wait for the determination of the Merits Motion and the possibility that the decision on that motion might be appealed.

First, it is unclear when the Merits Motion will be heard and decided. It was originally scheduled to be heard on March 5, 2024, but was adjourned because Ms. Mehta had not properly served the creditors of the other Stateview corporations, who are potentially affected. It has not yet been rescheduled.

Second, there is no guarantee that the Merits Motion decision will ultimately be appealed. The situation would in my view be different if there was a second related appeal now before the court. In that scenario, I might well agree that it would be in the interests of efficient appeal management to either have both appeals heard together, or have them heard separately but by the same panel, even if this would cause some delay in having Ms. Mehta's appeal from Black J.'s March 5, 2024 order heard and decided. Atrium's concern that it does not want to be dragged into participating in a broader appeal that raises issues that are not its concern could perhaps have been addressed by keeping the two appeals separate, but having them heard by the same panel.

However, at this point there is no second appeal, and there is no certainty that there ever will be an appeal from the Merits Motion. This distinguishes this case from *Correct Building Corporation v. Lehman*, 2022 ONCA 723, on which Ms. Mehta relies, since in that case a panel of this court granted an extension of time to permit one appeal to be rejoined with a second appeal from the same decision that the appellants were already bringing against a different respondent. The appellants had originally intended to bring both appeals as a single appeal, and the appeals only become bifurcated because a single judge of this court had granted an extension of time only in relation to the appeal as against one of the respondents.

Third, while the Merits Motion arises out of the same factual matrix as the decision on appeal, it is not clear on the record before me to what extent the issues that are likely to actually be in dispute on the Merits Motion will overlap with the issues in

Ms. Mehta's appeal from Black J.'s March 5, 2024 order. The Merits Motion may end up focusing on issues relating to the tracing of deposit funds and the valuation of real estate, which will have little or no discernible overlap with the issues in Ms. Mehta's present appeal.

In these circumstances, I conclude that the balance tips in favour of not postponing the perfection of Ms. Mehta's appeal. While I agree with Ms. Mehta that the prejudice the creditors would suffer from the appeal being delayed is mitigated to some extent by the fact that the holdback funds are presumably generating interest, the creditors understandably would prefer their entitlement to this money to be determined sooner rather than later.

There are also two factors that I do not think have any real bearing on the analysis, one way or the other.

First, I do not find it necessary to delve into the question of which of the parties is most to blame for the delay in moving the Merits Motion forward. The more important facts are that this motion has not yet been heard, or even scheduled, and that there is no guarantee that the motion decision will ultimately be appealed once it is rendered.

Second, I do not see anything as turning on the merits of Ms. Mehta's appeal. This might be an important factor if I were deciding whether to permit her appeal to proceed at all. However, the respondents are now consenting to an order allowing her to file her notice of appeal. As a result, her appeal will be heard and decided on its merits. The only disputed question before me is whether it should be heard relatively quickly, on its own, or whether it should be delayed to possibly be heard later, with the Merits Motion appeal. The underlying merits of her legal position has no bearing on this question.

Disposition

Ms. Mehta's motion is granted in part. On consent, an order will go extending the time within which she may file her notice of appeal. Specifically, she seeks an order that would extend the filing deadline to March 18, 2024, *nunc pro tunc*.

Ms. Mehta shall perfect her appeal within 15 days of the release of this endorsement. If she believes she requires additional time to prepare her materials, I will remain seized of this matter and the motion may be brought before me, in writing.

On the issue of costs, the Receiver seeks its costs on a partial indemnity basis. Although counsel for Atrium attended the hearing and made brief oral submissions, Atrium did not file any materials and does not ask for costs. Costs are fixed in the amount of \$3,912.06 all inclusive, payable by the appellant, Ms. Mehta, to the Receiver, KSV Restructuring Inc.

A handwritten signature in blue ink, appearing to read "J.A.", with a large, stylized flourish extending to the left.