

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **Lombardo v. Lombardo,**
2008 BCCA 21

Date: 20080118
Dockets: CA034889, CA034888, CA035365
CA034890, CA035364

Docket: CA034889

Between:

Lombardo's Ristorante & Pizzeria Ltd.

Respondent
(Plaintiff)

And

**Marcello Lombardo
Express Realty Ltd.
581787 B.C. Ltd.**

Appellants
(Defendants)

-and-

Docket: CA034890

Between:

Marcello Lombardo

Appellant
(Plaintiff)

And

Patricia Anne Lombardo

Respondent
(Defendant)

-and-

Docket: CA035365

Between:

Lombardo's Ristorante & Pizzeria Ltd.

Respondent
(Plaintiff)

And

**Marcello Lombardo
Express Realty Ltd.
581787 B.C. Ltd.**

Appellants
(Defendants)

-and-

Docket: CA034888

Between:

Patricia Anne Lombardo

Respondent
(Plaintiff)

And

Marcello Lombardo

Appellant
(Defendant)

-and-

Docket: CA035364

Between:

Patricia Anne Lombardo

Respondent
(Plaintiff)

And

Marcello Lombardo

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Prowse
(In Chambers)

J. Grieve Counsel for M. Lombardo, Express Realty
V. Stewart Ltd. and 581787 B.C. Ltd.

F.G. Potts Counsel for P.A. Lombardo and
T. Goepel Lombardo's Ristorante & Pizzeria Ltd.

Place and Date of Hearing: Vancouver, British Columbia
January 11, 2008

Place and Date of Judgment: Vancouver, British Columbia
January 18, 2008

Reasons for Judgment of the Honourable Madam Justice Prowse:

Nature of Applications

[1] Ms. Lombardo is applying for an order requiring Mr. Lombardo to post security for costs of the appeal, security for costs of the trial and security for the judgment at trial, including costs of a subsequent reconsideration hearing. The total amount of security sought at the outset of the hearing was in the range of two million dollars. (It is difficult to be more precise as to the amount since the orders have not been settled and costs have not been assessed.)

Background

[2] These applications have their genesis in three actions in the Supreme Court which were ordered to be heard at the same time. All three actions arose from the breakdown of the marriage between Mr. and Ms. Lombardo. The “family action” included issues of child support (Ms. Lombardo had custody of the three children of the marriage), imputation of income to Mr. Lombardo and financial non-disclosure; the “corporate action” involved financial issues between companies controlled by Mr. and Ms. Lombardo, respectively; and the “defamation action” involved allegations by Mr. Lombardo that Ms. Lombardo had defamed him by placing posters in the area of their restaurant businesses stating that he was a “deadbeat dad”.

Decisions of the Trial Judge

[3] After a 55 day trial that extended over 18 months, the trial judge issued lengthy reasons for judgment (192 pages, excluding attachments) on February 28, 2007. These reasons may be found at 2007 BCSC 284. In those reasons, the trial judge granted leave to Mr. Lombardo to make further submissions with respect to his income and the quantum of child support for 2006 and 2007. At the ensuing hearing, Mr. Lombardo sought a reconsideration of many of the issues at trial, with particular emphasis on the determination of his income for the purposes of child support. The trial judge dismissed Mr. Lombardo’s application for reconsideration and, effectively, reaffirmed his earlier decision. His reasons for judgment on the reconsideration hearing were issued on July 31, 2007, and may be found at 2007 BCSC 1167.

[4] The trial judge’s conclusions in the three actions, including the reconsideration hearing, may be summarized as follows:

(1) Mr. Lombardo’s defamation action was dismissed on the basis that he had not established that Ms. Lombardo had put up the posters and that, in any event, the defence that the statement was true, or substantially true, applied as Mr. Lombardo could fairly be described as a “deadbeat dad”.

(2) In the family action, Mr. Lombardo was ordered to pay child support arrears of \$702,804, plus interest, to the end of 2005 and \$178,404 from January 1, 2006 to February 2007. He was also ordered to pay \$14,368 per month from March 1, 2007 until further order, based on an imputed income to Mr. Lombardo of \$900,087.51. As a result of the reconsideration hearing, the total amount of the arrears and interest as of February 28, 2007 was \$980,570.18.

(3) In the corporate action, Mr. Lombardo was ordered to pay \$290,000 to Ms. Lombardo’s company. Mr. Lombardo and one of his companies were held jointly and severally liable to Ms. Lombardo’s company to the extent of \$200,000 of that amount, plus interest. The total amount owing by Mr. Lombardo, inclusive of interest, was approximately \$370,539.55.

(4) Mr. Lombardo was ordered to pay special costs of the entire proceedings.

(5) The trial judge seized himself of any consequential applications, including Ms. Lombardo’s applications for security for child support.

[5] The total pecuniary award against Mr. Lombardo and his companies, exclusive of special costs, was approximately \$1,171,208. Counsel for Ms. Lombardo has estimated special costs at approximately \$805,000. As earlier noted, those costs have not yet been assessed.

[6] In March 2007, the trial judge heard Ms. Lombardo’s applications for security for retroactive child support. By order dated March 16, 2007, he provided that two properties in which Mr. Lombardo had an interest on Commercial Drive in Vancouver stand as security for the full amount of retroactive child support and for prospective child support and that Ms. Lombardo be at liberty to file the order against title to those properties. He also made an order precluding Mr. Lombardo from dealing with shares or securities in four named companies in which he held an interest absent written agreement of the parties or order of the court. Ms. Lombardo subsequently registered the order against the Commercial Drive properties.

[7] Mr. Lombardo’s counsel advised during the hearing of the applications for security that the combined equity in the two Commercial Drive properties is not less than \$1.2 million dollars.

The Appeals

[8] Mr. Lombardo issued five notices of appeal with respect to the decisions of the trial judge; one for each of the family, corporate and defamation actions, and one each for the dismissal of his applications in the reconsideration hearing relating to the family and corporate actions. There is no appeal from the order of March 16, 2007 providing that the two Commercial Drive properties stand as security. The orders in these actions have not been settled, but I was advised that none of the disagreements between counsel in that regard have any bearing on these applications for security for costs.

[9] During the course of the hearing before me, I took the liberty of advising counsel that, in my view, there should be only three orders entered in these matters (one for each of the family, corporate and defamation actions) and that the results of the decision on the reconsideration hearing should be incorporated in those orders. Thus, I treated the applications for security for appeal costs as relating to three appeals, rather than five, with a consequent reduction in the amount sought as security for costs of the appeals. Counsel indicated that they were in agreement with this view and that they would take steps to settle the orders and regularize the notices of appeal accordingly.

[10] At the time of this hearing, the Appeal Record and Transcripts had been filed, the Appeal Books were in the process of being prepared for filing, and the only step which remained was the preparation and filing of the factums. Assuming that Mr. Lombardo would comply with any order for security fixed by this Court, three dates were reserved for the hearing of this appeal, June 16, 17 and 18, 2008. Counsel for Mr. Lombardo also agreed that Mr. Lombardo would be in a position to file his factum by mid-March.

[11] The grounds of appeal which Mr. Lombardo proposes to pursue on appeal are set out in the affidavit of one of Mr. Lombardo's counsel as follows:

- (a) The learned trial judge erred in failing to reasonably impute income to ... Mr. Lombardo on both the evidence that was before him at trial and the evidence tendered during Mr. Lombardo's subsequent application including the report of Mr. Michael Bowie of KPMG;
- (b) The learned trial judge was unduly influenced by his views of the behaviour of Mr. Lombardo which affected the way in which the learned trial judge imputed income and his refusal to consider evidence and documents tendered during Mr. Lombardo's subsequent application which demonstrated that the initial judgment was flawed;
- (c) The learned trial judge erred in imputing income to Mr. Lombardo at the level he did as a result of his [a] misapprehension of the Squirrel records system;
- (d) The learned trial judge erred in punishing Mr. Lombardo by way of special costs and by unreasonably imputing income, and by refusing to reconsider the evidence and/or admit evidence to demonstrate that the trial reasoning was flawed;
- (e) There are obvious errors relating to amortization and double counting of the loan payments in the judgment that were brought to the attention of the learned trial judge that he refused to consider;
- (f) The lengthy delay in the first reasons, together with the learned trial judge's refusal to hear and appropriately consider current evidence as to the circumstances of the children, has taken away from Mr. Lombardo any ability to adjust child support in accordance with his current income and to seek a variation based on a material change such as a change in income or one or more children ceasing to be a child of the marriage.
- (g) The learned trial judge erred in law in failing to properly apply the law relating to child support for adult children and the law relating to incomes over \$150,000 and erred in fact in failing [to] apply the law to the facts and circumstances before him including failing to take into account the monies earned by the adult child and her actual expenses.
- (h) The learned trial judge erred in failing to vary, reconsider or in the alternative reopen the trial

to adjust child support, Mr. Lombardo's income including current income and to determine the amount due to the Plaintiff in action S032754, including to admit new evidence.

- (i) The learned trial judge erred in law in failing to consider the changed circumstances of the parties and their children with respect to ongoing child support following the trial.

Applications for Security

1) Security for Costs of the Appeals

[12] The principles governing applications for security for costs of an appeal are set forth by Mr. Justice Lowry in *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285, at para. 9, as follows:

The jurisdiction to order security for costs of an appeal is found in s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. The appellant against which such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4 (C.A. Chambers), Smith J.A. Generally, the considerations are the appellant's ability to post security and the likelihood of costs awarded being recovered from it, as well as the merits and the timeliness of the application: [citations omitted].

[13] Mr. Lombardo does not oppose an order that he post security for costs of the appeals. He suggests an amount of \$31,000, while counsel for Ms. Lombardo suggests \$45,000. After adjusting Ms. Lombardo's proposed figures to reflect my view that there will be only three appeals and a 2-3 day hearing, and adjusting further for overlap in some of the amounts claimed, I would order that Mr. Lombardo post \$40,000 as security for costs of the appeals. (I suggest that there be only one factum to deal with all three appeals, with each party having liberty to apply to file a factum in excess of 30 pages. At this point, I see no need for each factum to exceed 45 pages.)

2) Security for the Judgment and for Trial Costs

[14] The principles governing applications for security for a judgment and for costs awarded at trial are set out in *Creative Salmon*, *supra*, at paras. 10-12, as follows:

The jurisdiction to order security for a judgment and for the costs awarded by the trial court, as recognized in *Cadinha v. Chemar Corporation Inc.* (1995), 17 B.C.L.R. [(3d)] 347 (C.A. Chambers), Lambert J.A., and *Paz v. Hardouin (c.o.b. Fiesta Travel and Fiesta Wayfarer)* (1995), 10 B.C.L.R. (3d) 232 (C.A. Chambers), Lambert J.A., respectively, can be found under s. 10 of the *Act*:

10(2) In an appeal or other matter before the court, a justice may do one or more of the following:

(b) make an interim order to prevent prejudice to any person; ...

From the several authorities of this Court cited, which include [citations omitted], the principles that govern the exercise of discretion in ordering that security be posted under s. 10(2)(b) can be said to be as recently stated in *Kedia v. Shandro Dixon Edgson*, *supra*, at para. 14, quoting from *Aikenhead v. Jenkins*, 2002 BCCA 234, 166 B.C.A.C. 293 at para. 30 (Chambers) Ryan J.A.:

1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
2. The applicant must show prejudice if the order is not made.
3. In determining the interests of justice the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

An appellant which is without the financial ability to post security will not for that reason alone be precluded from pursuing a meritorious appeal. But adverse financial circumstances will generally

not defeat an application for security where an appeal is virtually without any merit. A successful plaintiff should not be required to respond to an unmeritorious appeal when there is no real prospect of recovery: *Richland Construction Inc. v. Manningwa Developments Inc.* (1996), 71 B.C.A.C. 311 at paras. 12-13 (C.A. Chambers), Finch J.A. (as he then was).

[15] The amount sought as security for the judgment is approximately \$1,426,747.73. In addition, counsel for Ms. Lombardo submits that the estimate of special costs of the trial is \$805,000.

[16] In determining whether it is in the interests of justice to order posting security for the trial judgment and/or trial costs, and whether Ms. Lombardo would be prejudiced if an order is not made, some of the factors I have considered are as follows:

- (1) Mr. Lombardo has not applied for a stay of the trial judgment and Ms. Lombardo has taken no steps in execution of her judgment. It is open to her to take execution proceedings should she choose to do so.
- (2) Ms. Lombardo already has an order for partial security for the judgment registered against the Commercial Drive properties in which Mr. Lombardo has an interest by virtue of the trial judge's order of March 16, 2007.
- (3) There is \$100,000 held in the Supreme Court as security for costs of the trial and counsel for Mr. Lombardo has stated that Mr. Lombardo has consented to an unconditional payment out of that amount to Ms. Lombardo.
- (4) Mr. Lombardo has agreed to take a mortgage on one of his Commercial Drive properties in the amount of \$300,000 and to use the proceeds in partial payment of the trial judgment, subject to Ms. Lombardo agreeing to lift her security on that property to the extent necessary to permit him to do so. Counsel are satisfied they can make arrangements for that to occur within the next couple of weeks.
- (5) Ms. Lombardo has already realized approximately \$90,000 on the trial judgment from monies garnished into court during trial.
- (6) Mr. Lombardo is current in making child support payments since the trial in the amount of \$14,368 per month, and has paid \$158,048 in that regard.
- (7) Ms. Lombardo has not sought to have her special costs at trial assessed. Her counsel advises she has chosen not to do so to avoid having to waive confidentiality over her file pending the determination of these appeals.
- (8) Mr. Lombardo continues to operate a restaurant out of one of the Commercial Drive properties where he is earning a good living. During the reconsideration hearing, he admitted to income in 2006 of approximately \$470,000 (as compared with the income of almost \$900,000 imputed to him by the trial judge).
- (9) There is no evidence that Mr. Lombardo owns other properties.
- (10) The appeals can be heard in mid-June.

[17] Another relevant factor on an application for security for the trial judgment and for costs of the trial is the merits of the appeals. Mr. Lombardo faces significant hurdles in that regard. He has substantial findings of fact against him in all three appeals and, more importantly, he is the subject of the most negative comments concerning credibility that I have ever seen in a judgment. An example of those comments can be found at paras. 29-30 of the trial judge's reasons on the reconsideration hearing:

... It must be clearly borne in mind that Mr. Lombardo was no mild or occasional prevaricator. He was not someone who occasionally lied out of fear or desperation. His entire approach to the case was an assault upon the trial process itself. Its fundamental premises, that witnesses who are sworn

to tell the truth will do so; that documents put before the court are what they purport to be; and that orders intended to preserve evidence will be obeyed, among others, were assiduously undermined by Mr. Lombardo. He is in a position where he has so often and so brazenly lied that nothing he says can be taken at face value by this court.

Mr. Lombardo now seeks to reopen the case he attempted to frustrate because he is unhappy with the outcome. His new solicitors have repeatedly insinuated that part of what has happened is that somehow the court has taken such a dim view of Mr. Lombardo's conduct that it has in various ways lost sight of its responsibilities, and is "punishing" Mr. Lombardo. Although this was a sustained theme of the submissions, I will deal with it once, and once only. It is a serious misreading of my reasons to equate attempts to describe manifestly outrageous conduct as expressions of judicial outrage. My task, as I made clear in my reasons, was to attempt to do justice to both parties despite behaviour, which ranged, on Mr. Lombardo's part, from lack of assistance, to active resistance. [Emphasis in original.]

[18] Counsel for Mr. Lombardo concedes that the adverse findings of fact and credibility present formidable obstacles to a successful appeal or appeals. He submits, however, that even in the face of these findings, he has a basis for establishing that the trial judge erred in several respects, including the manner in which he imputed income to Mr. Lombardo and in his application of the child support guidelines.

[19] Given the length of this trial and the number of issues raised, it is not possible (or useful) to comment to any significant extent on the merits except to say that Mr. Lombardo's challenges to the trial judge's findings in the defamation action and the order with respect to special costs appear weak, at best, but that he appears to have tenable arguments worthy of hearing with respect to the issue of his income and the application of the child support guidelines. In other words, I do not agree with counsel for Ms. Lombardo that Mr. Lombardo's appeals should be classified as hopeless.

[20] After taking into account all of these factors, and the submissions of counsel, I am satisfied that it is appropriate to make a further order for security for the judgment and for trial costs in the amount of \$260,000. Thus, the total amount of security to be posted, inclusive of security for costs of the appeal, is \$300,000. (This amount is in addition to the payments totalling \$400,000 to be made to Ms. Lombardo as set forth at paras. 16(3) and (4) of these reasons.) In making this order, I contemplate that Ms. Lombardo may be required to lift her security on one of the Commercial Drive properties in order to permit Mr. Lombardo to use the equity in the property to secure part of this order. I appreciate that the effect of allowing him to do so is, to some extent, to allow Mr. Lombardo to substitute one form of security for another, but given the indications that execution on the judgment will prove difficult, expensive and time-consuming, I am satisfied that such an order is appropriate.

Conclusion

[21] I would order Mr. Lombardo to post security for costs of the appeals in the amount of \$40,000 and security for the trial judgment and costs of the trial in the amount of \$260,000, for a total of \$300,000. This order contemplates that Ms. Lombardo will cooperate in lifting her security on one of the Commercial Drive properties for the sole purpose of enabling Mr. Lombardo to use no more than \$200,000 of the equity therein (in addition to the \$300,000 he has already agreed to pay) to enable him to post security pursuant to this order. I leave the details of how that is to be accomplished to counsel. Mr. Lombardo will have to raise the other \$100,000 required as security through other means at his disposal.

[22] I would also order that Mr. Lombardo post security on or before February 15, 2008 and that his appeals be stayed until such time as security is posted. Since his properties are tied up in the meantime, and since he is paying child support based on an imputed income which he suggests is almost twice as much as his actual income, he has an incentive both to post security and to get on with his appeals.

[23] Assuming Mr. Lombardo posts the security in a timely fashion, counsel should agree on a schedule for filing factums and any other materials necessary to ensure that the appeals can be heard on the dates reserved. Counsel may request a pre-hearing conference if they require assistance in that regard.

“The Honourable Madam Justice Prowse”