CITATION: Universal Settlements International Inc., v. Duscio, 2010 ONSC 5438
COURT FILE NO.: CV09-394439
DATE: 20101001

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF AN ABITRATION

BETWEEN: UNIVERSAL SETTLEMENTS INTERNATIONAL INC., THE BROKERWISE GROUP INC., 1508211 ONTARIO INC., responding parties/claimants

AND:

ANTONIO DUSCIO and MARTINA CAPITAL CORPORATION, moving parties/respondents

BEFORE: Stinson J.

COUNSEL: *Kevin D. Sherkin*, for the moving parties/respondents Duscio et al

William McNamara and *R. Agarwal* for the responding parties/claimants *Universal Settlement et al.*

HEARD: September 22, 2010

ENDORSEMENT

[1] This is a motion brought to stay enforcement of an arbitration award, pending the disposition of an application to set aside that award. The moving parties are Antonio Duscio ("Duscio") and his holding company Martina Capital Corporation ("Martina") (collectively the "Duscio Group") and the responding parties are Universal Settlements International Inc. ("USI"), The Brokerwise Group Inc. ("Brokerwise") and 1508211 Ontario Inc. ("150") (collectively the "USI Group"). In the arbitration proceeding USI Group were the claimants and the Duscio Group were the respondents. The Duscio Group has brought an application to set aside two particular decisions of the arbitrator: March 16, 2010 in which the arbitrator struck out the Duscio Group's defence and noted them in default, paving the way for the balance of the arbitration proceedings to be conducted without the Duscio Group's participation; and August 22, 2010, being the final award of the arbitrator. The application to set aside is scheduled to be heard on November 25 and 26, 2010.

[2] The proceedings leading up to the March 16, 2010 and August 22, 2010 decisions have a lengthy history. Both sides have blamed the other for delay. The matter was complicated on

several occasions by insolvency proceedings involving Duscio, Martina, and USI. In view of the conclusion I have reached concerning the motion to stay, I do not consider it necessary to review that history in detail. Moreover, I am conscious of the fact that this is a preliminary motion only, not one to decide the merits – that is the purpose of the two full days of hearing set aside in November.

[3] Briefly stated, this dispute has its origins in a shareholders' agreement among Brokerwise, 150 and Martina, each of which was a shareholder in USI. A deterioration in relations among the shareholders led to Martina exercising a "shotgun" buy-sell in which it sought to force Brokerwise and 150 to sell their shares to Martina. Litigation ensued, which was stayed in light of an arbitration provision in the shareholders' agreement. In due course, Brokerwise and 150 were permitted to exercise the "shotgun", forcing Martina to sell its shareholding in USI to them at a price in the order of $1 million.

[4] The arbitration also included claims by Brokerwise and 150 that Duscio had mismanaged the affairs of USI and was accountable for a significant sum of money. Over a number of years (beginning in 2007) the arbitration sputtered forward, interrupted from time to time (as I have noted) by the insolvency of various parties, changes of counsel and CCAA proceedings involving USI. Throughout most of this time, the $1 million purchase price paid by Brokerwise and 150 remained in an escrow account with the Gowlings law firm. At one point, Duscio obtained an order from the arbitrator permitting him to draw approximately $290,000 from that account to enable him to pay legal fees and other expenses. Subsequently, however, the USI Group successfully moved to set aside that order and obtain an order requiring Duscio to repay those funds, alleging fraudulent conduct on Duscio's part. At the time he made the repayment order was made on December 16, 2008, the arbitrator declined to make a finding of fraud as against Duscio. In December 2009, the arbitrator made a further order as to costs of the repayment motion, requiring Duscio to pay costs of almost $300,000. Once again, the arbitrator declined to make a finding of fraud.

[5] Duscio was thus, by March of 2010, on the wrong side of two significant orders for payment made during the course of the arbitration, totalling almost $600,000. At that stage he was an undischarged bankrupt. He did not pay these orders, and he asserts that his bankruptcy have the effect of extinguishing his liability for them.

[6] In the face of Duscio's non-payment of these two orders, the USI group moved before the arbitrator for an order under rule 60.12 to strike out his defence. The parties had agreed that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, would govern the procedural aspects of the arbitration.

[7] Despite having previously declined to make a finding of fraud as against Duscio, on the motion to strike the arbitrator declined to accept Duscio's argument that his bankruptcy extinguished his liability in relation to the two orders in question. As a result, he held that Duscio had failed to comply with the orders and struck out his defence. The arbitrator also noted Duscio in default. Thereafter the arbitration proceeded by way of a default proceeding.

[8] In December 2009, following the release of the costs decision, Duscio had commenced an application to disqualify the arbitrator. Following the decision striking out his defence, Duscio amended his application, seeking to attack that order, as well.

[9] Counsel for the parties appeared in triage court on May 28, 2010. The earliest available date for a two day hearing for Duscio's application was November 25 and 26, 2010 and thus the matter was set down for a hearing then.

[10] Thereafter, counsel for Duscio requested counsel for the USI Group to agree not to take any further steps in the arbitration proceeding pending the outcome of the application. That request was rejected. As a result, counsel for Duscio commenced a motion to stay enforcement of the arbitration award pending the outcome of the application. Counsel once again attended in triage court on June 25, 2010 to seek an early date for this motion. September 22, 2010 was assigned by the triage court judge as the date for the hearing of the motion to stay.

[11] On August 23, 2010, the arbitrator rendered a final award, awarding damages to the USI Group in the amount of approximately $6.1 million dollars on the basis of fraud and fraudulent misappropriation by Duscio. As of that date no stay of the arbitration process had been granted either by the court or the arbitrator, although the court motion to stay was served and pending. Despite the pending motion and without notifying counsel for Duscio, upon receipt of the final award counsel for USI forwarded the decision to Gowlings, the escrow agent, together with a direction re funds requiring the balance of the escrow funds to be paid to Ogilvy Renault LLP (counsel for USI) in trust. Indeed, counsel for Duscio was unaware of the release of the final award by the arbitrator or the steps taken by counsel for USI to obtain payment of the escrow funds until the last minute. Before he could take any steps, the remaining escrow funds were paid over by Gowlings to Ogilvy Renault on August 25, 2010. Counsel for USI advises that the funds remain in his law firm's trust account.

[12] Against the foregoing backdrop, Duscio seeks an order staying any further steps in relation to the enforcement of the arbitration award pending the outcome of his application to set it aside. In effect, he seeks to have the remaining funds paid into court or maintained in the Ogilvy Renault trust account. According to counsel, if the stay is not granted, the funds will be used to help to "defray" USI's litigation costs and/or will be paid to USI's court appointed monitor for distribution to creditors of USI. Duscio therefore argues that the money (which was the purchase price for his shareholdings in USI) will be gone if he succeeds on his application to set aside the decisions of the arbitrator. Counsel for the USI group argues that there is no evidence of impecuniosity on the part of either Brokerwise or 150; he furthers notes that USI has emerged from CCAA.

[13] Despite those submissions, I am inclined to agree with Duscio that the funds set aside in escrow to pay for the sale of his shares is in jeopardy of being disbursed and there is no guarantee that, if Duscio eventually succeeds, he will collect anything. Up until now, he has had security for his claim to payment for his shares. I therefore conclude that he would be prejudiced

were the funds to be disbursed as contemplated prior to the determination of Duscio's application to set aside the arbitrators' decisions.

[14] The parties are agreed that neither the stay provisions under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 nor those under the *Rules of Civil Procedure* have any application to a stay of an award by a private arbitrator. Although neither side was able to point to specific authority on the point, both counsel agreed that the test on a motion to stay such an award pending disposition of an application to set it aside, is the strong *prima facie* test. In other words, the party seeking the stay must show that it has a strong *prima facie* case on the merits of the application.

[15] There are at least two lines of argument being pursued by the Duscio Group in support of its application to set aside the arbitrator's decisions. I need deal with only one, since in my view it satisfies the test. Simply stated, Duscio argues that the arbitrator exceeded his jurisdiction and denied natural justice and the right to be heard to the Duscio Group when, in the face of Duscio's bankruptcy, he made the award of costs and held that Duscio was liable to have his defence struck out for non-compliance with the repayment order and the costs order,. There having been no finding of fraud at that stage, liability to pay those sums did not survive his bankruptcy. As a result, his failure to pay and non-compliance with those orders cannot amount to grounds under r. 60.12 (b) to strike out his defence. Thereafter, Duscio was denied the opportunity to participate in the proceedings, which gave rise to the final award that the USI group now seeks to enforce.

[16] I am not called upon to decide this issue, since it is one of the ultimate questions to be decided on the application. At this stage, however, I believe it has significant merit: on the face of it, absent a finding of fraud, Duscio's bankruptcy discharged his prior liabilities. The arbitrator twice declined to make a finding of fraud, although he had been asked to do so. As a consequence, I hold that Duscio has demonstrated that there is good reason to doubt the correctness of the arbitrator's actions and thus he has satisfied the strong *prima facie* case test.

[17] I therefore grant the stay sought. It may be complied with by an undertaking from Ogilvy Renault LLP to the court to retain the remaining funds in its trust account pending the disposition of the application. Failing such undertaking, the remaining funds should be paid into court.

[18] The parties may make brief submissions as to costs (no more than 3 double spaced pages) within fifteen days.

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Stinson J.

Date: October 1, 2010