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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES
CHANCERY DIVISION



No. CH-2018-000185

[2019] EWHC 1341 (Ch

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Wednesday, 3 April 2019

Before:

MR. JUSTICE HENRY CARR

B E T W E E N :

HAYES

Appellant

- and -

HAYES

Respondent

THE APPELLANT appeared in Person and was represented by Mr Butters a McKenzie Friend.

Mr. G. SIMS appeared on behalf of the Respondent.

J U D G M E N T

Mr Justice Henry Carr:

History of proceedings

1. This is an appeal against an order of Deputy ICC Judge Middleton made on 21 June 2018. The order of Deputy Judge Middleton set aside an order of Deputy Registrar Jones which was made on 17 November 2017 on the application of the appellant, Mrs. Hayes. The 17 November 2017 order stayed the enforcement of an order for costs made some four years earlier on 17 December 2013 by Deputy Registrar Jones, pending determination of case number 6CB00392 in the Central London County Court (the "harassment claim").
2. The order for costs was in the amount of £35,959.91 and was made in respect of a failed bankruptcy petition by Mrs. Hayes against the respondent, Mr. Hayes. Mr. Hayes applied to set Deputy Registrar Jones' order aside, the initial hearing was adjourned, and the application was heard on 23 April 2018 by Judge Middleton. As well as setting aside the order, Judge Middleton dismissed Mrs. Hayes' application for a stay of enforcement of those costs and ordered Mrs. Hayes to pay Mr. Hayes' costs of the application, including £5,000 on account.
3. This matter arises from a long-standing and extremely regrettable series of disputes originating in the divorce of Mrs. and Mrs. Hayes. The relevant starting point is March 2005, when Mrs. Hayes made Mr. Hayes bankrupt in respect of a debt of around £35,000. However, the debt was not provable at the time because it related to family proceedings and it survived the bankruptcy which was discharged in March 2006.
4. In November 2005, Mr. Hayes started proceedings for harassment against Mrs. Hayes and her partner, Mr. Butters, under the Protection from Harassment Act 1997. Both Mrs. Hayes, who was representing herself, and Mr. Butters who appeared as a McKenzie Friend, addressed me on this oral application.
5. Mr. Hayes' claim was amended in 2011 to plead further harassment up to 2011. There was also a counterclaim against Mr. Hayes, again for harassment. The trial of the harassment proceedings was fixed for the end of January 2019 in the Central London County Court with quantum to be fixed thereafter. It has now been heard and judgment is imminent.
6. Mrs. Hayes presented a second bankruptcy petition in 2012 on the basis of the same debt, which now amounted to £52,000 with interest. In June 2012, Mr. Hayes filed a schedule of loss in the harassment proceedings in an amount very significantly in excess of the petition debt. An attempt to strike out elements of the schedule failed, but the bankruptcy petition was not withdrawn. In May 2013, Mrs. Hayes applied in the harassment claim to plead that Mr. Hayes' claim was fraudulently exaggerated. This application has now been deferred until after determination of liability.
7. The second bankruptcy petition was dismissed on 17 December 2013 by Deputy Registrar Jones on the basis that Mr. Hayes had a claim in the harassment case, exceeding the sum claimed by Mrs. Hayes, about which there was a genuine and substantial dispute. Costs were ordered against Mrs. Hayes on a standard basis and it is this costs order that is the subject of the stay application against the rejection of which Mrs. Hayes seeks permission to appeal. I should add that the debt, the subject of the bankruptcy petition, was discharged in 2016.
8. Mrs. Hayes appealed Registrar Jones' decision, dismissing the second bankruptcy petition. That appeal was dismissed by Nugee J who ordered Mrs. Hayes to pay the costs of the appeal as well

as confirming the previous costs order. Nugee J also subsequently decided, on the application of Mr. Hayes' trustee in bankruptcy in the first bankruptcy, Steven Grant, that Mr. Hayes had valid causes of action in the harassment claim, rather than the whole claim being vested in the trustee, and refused to strike it out as an abuse of process.

9. Mrs. Hayes made an application on 10 July 2017 in which she sought to set aside the 17 December 2013 costs order. This was heard by Deputy ICC Judge Kyriakides on 23 August 2017, who adjourned it with liberty to restore after final resolution of the County Court claim. The stay application was then made in November 2017.
10. In the decision appealed against, the Judge refused to set aside the order of Deputy Registrar Jones on procedural grounds and considered it on the merits. He approached the case on the basis that there was an outstanding application to set the costs order aside, on which no decision had been reached. As he understood Mrs. Hayes' arguments, she was saying that she would suffer prejudice if she paid Mr. Hayes, who is said to now be impecunious and living on benefits. If the set aside application was ultimately successful repayment would be problematic, because of Mr Hayes' financial position.
11. In the context of long-running litigation that was likely to continue for a further lengthy period, the Judge was not satisfied that it was appropriate to order a stay even if there was a risk of failure to repay in the event that the set aside application succeeded.
12. Since the application before Judge Middleton, Mr. Hayes' solicitor has indicated that if the money is paid over, he is prepared to hold the sum on account to be repaid in the event that the court so orders. Therefore, the question of the money not being repaid no longer arises.
13. The Judge considered that although various issues had been raised, including a question of unpaid, unassessed costs in respect of both parties, there had been no indication of any setoff being directed, and the assertions by Mrs. Hayes, were not particularised. In the circumstances, he considered that it was not unjust or inequitable to pay costs already ordered to be paid, and that Mrs. Hayes was not relying on an inability to pay and had not offered to pay the costs into court. Judge Middleton therefore set aside Deputy Registrar Jones' order and dismissed the application for a stay.

The grounds of appeal

14. Turning now to the grounds of appeal, Mrs. Hayes has relied on a number of matters. She has alleged that Mr. Hayes' claim for loss in the harassment case was inflated by fraud or dishonesty, and that fraud trumped everything else. There was also an abuse of process because Mr. Hayes had not paid the correct court fees in respect of the harassment claim. Deputy Judge Middleton wrongly stated that Mrs. Hayes had exhausted her rights of appeal when, in fact, she had not appealed the costs in the bankruptcy proceedings. Registrar Jones had agreed that there were compelling grounds for a stay and the decision to lift the stay rendered the earlier order by Deputy Judge Kyriakides to adjourn the setting aside of the costs order in August 2017 pointless. In addition, there were extant proceedings before the Central London County Court with a pending application to amend the defence and counterclaim to plead fraud, deceit and dishonesty in respect of Mr. Hayes' financial loss. The stay being sought was intended to await the outcome of that application.
15. Mr. Sims, who appeared on behalf of Mr. Hayes, pointed out that the decision by Judge Middleton was a case management decision and that, in such matters, the Judge has a generous ambit of discretion. He submitted that this decision was well within that ambit. This is an historic award

of costs and, for the reasons given by Judge Middleton, he was entitled to conclude that it was not appropriate to wait for the outcome of the harassment claim.

Discussion

16. I shall begin first by addressing the points raised by Mrs. Hayes. Although an allegation of fraud is a very serious one, it is not an allegation which has yet been proved. It is an allegation strongly denied by Mr. Hayes and it cannot be determined until he has had a proper opportunity to address it. That is an issue with which the County Court will deal in due course in the harassment claim. Furthermore, the allegation of fraud was not raised at the petition hearing, although the allegation had already been made at that stage and an application had been made to amend the defence and the harassment claim to plead fraud.
17. The existence of the allegation does not mean that the harassment claim fell away. Furthermore, even if it were made out, the time to address that claim was when the bankruptcy petition was being considered. In my view, it is not appropriate to reopen it now, subject to what the County Court may ultimately say.
18. The question of possible unpaid court fees is not a reason to grant permission to appeal. I cannot see that it has any relevance to the assessed costs which had been ordered against Mrs. Hayes. The question of the cost order in the bankruptcy proceedings was also considered by Nugee J on appeal against the dismissal of the bankruptcy petition. I refer to his judgment at *Hayes v Hayes* [2014] EWHC 2694 (Ch), in particular, from paragraph [58] onwards. It is therefore incorrect to say that the costs award has not been considered on appeal. Mrs. Hayes has had the opportunity for it to be reviewed, and it has been reviewed. Her rights of appeal against the costs award are exhausted.
19. In addition, whilst Registrar Jones was prepared to order a stay, that was in response to a without-notice application. The order of Deputy ICC Judge Kyriakides was to adjourn the application to set aside, and was not a finding in Mrs. Hayes' favour. It did not prevent Deputy ICC Judge Middleton from reaching the decision he reached. Therefore, if nothing relevant had occurred since Falk J refused permission to appeal on paper, I would have dismissed this appeal.
20. However, I now need to update the account of the proceedings that I have so far given with more recent events. The relevant facts are not in dispute. First, the trial of liability in the harassment claim has now been concluded. Judgment is expected in the very near future, possibly in the next few weeks. If Mr. Hayes is successful in those proceedings, then it is likely, indeed inevitable, that the costs liability of Mrs. Hayes will increase very substantially. There will also be a damages inquiry at a subsequent hearing.
21. On the other hand, if Mr. Hayes is unsuccessful in the harassment claim, then it is very likely that a costs order will be made against him and, very probably, a payment on account of costs. Mr. Sims very fairly accepted that had this application been heard in a few weeks' time, then the position might have appeared very different. This is because if Mr. Hayes loses the harassment claim, the cost order made against Mr. Hayes would be likely very substantially to reduce the costs owed by Mrs. Hayes, even if it did not extinguish those costs entirely.
22. In the interim, I am concerned that Mrs. Hayes' position should be protected against the possibility of harm which cannot be repaired, or which would be extremely difficult to put right in the event that the harassment claim is unsuccessful.

23. Mr. Hayes has sought to enforce the costs order by petitioning for bankruptcy against Mrs. Hayes. He has also applied for an interim charging order on her dwelling house, the application for which will be heard next week. It would, in my view, be most unfair if Mrs. Hayes were made bankrupt or forced to sell her dwelling house before judgment on liability has been given in the harassment claim. Therefore, I have considered, in the light of the circumstances which now apply, whether it would be just to grant a very short stay of the enforcement of the costs order until judgment on liability in the harassment claim.
24. I am of course conscious that this is an appeal and that the judge had a wide margin of discretion and I also agree that the grounds of appeal which were considered by Falk J have no reasonable prospect of success for the reason which I have outlined. However, I note from paragraph [11] of the judgment of Judge Middleton that he considered that it was not unjust or unequitable for Mrs. Hayes to pay the assessed costs that she had been ordered to pay because of the passage of time that was likely to take place before the set aside application was finally determined. He had in mind that the stay applied for would last until final resolution in the harassment claim, not just of liability but also of quantum, including any appeals. He considered, rightly, that given the history of the litigation between the parties, it seemed likely that a final resolution could be some considerable time away. He did not consider whether it would be just to grant a much shorter stay only until the determination of liability in the harassment proceedings.
25. In the circumstances of this case, I consider that there is a possibility of a material change of circumstance which will need to be considered if Mr. Hayes loses the harassment claim.
26. In the event, I have reached the conclusion that it is unnecessary for me to grant even a short stay in light of undertakings to the court which had been offered by Mr. Hayes through his counsel, Mr. Sims. In particular, Mr. Hayes has undertaken to the court that he will not seek to obtain any substantive enforcement order on the costs orders which are the subject of this appeal until determination of liability in the harassment claim. That will not prevent directions being obtained in the bankruptcy proceedings, nor will it prevent the continuance of an interim enforcement order. However, it will prevent the enforced sale of Mrs. Hayes' house and it will prevent any substantive bankruptcy order being made against her, pending determination of liability in the harassment claim. It has also been clarified that this undertaking will extend until the making of any order consequent on the judgment of the County Court on liability in the harassment claim.
27. In the circumstances, I believe that the correct course in the light of those undertakings is to adjourn the hearing of this appeal until after determination of the order consequent upon the judgment on liability in the harassment proceedings.
28. I should make it clear that if Mrs. Hayes loses the harassment proceedings or does not obtain a significant costs order, the appeal will be dismissed. On the other hand, if she succeeds in those proceedings and obtains a substantive costs order, the question will need to be reviewed further.
29. For those reasons, I intend to adjourn this appeal.

CERTIFICATE

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****This transcript has been approved by the Judge ****