



**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

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From:	Nina Dixon Divisional Court	Date:	December 12, 2012	
Re:	File # DC 306/12	No. Pages:	7	
Urgent	For Review	Please Comment	Please Reply	Please Recycle

Enclosed, please find a copy of the endorsement for the motion heard on December 12, 2012 by the Honourable Justice Lederer.

If you require further assistance please contact Nina Dixon at 416-327-5100.

Thank you kindly,


N. Dixon
Divisional Court

COPY

CITATION: Lombardi and Pogachar v. Ontario Securities Commission, 2012 ONSC 7109
DIVISIONAL COURT FILE NO.: 306/12
DATE: 20121212

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)	
)	
PAOLA LOMBARDI and L. JEFFREY)	<i>No One Appearing</i>
POGACHAR)	
)	
Appellants)	
)	
- and -)	
)	
ONTARIO SECURITIES COMMISSION)	<i>Matthew H. Britton, for the Respondent</i>
)	
Respondent)	
)	
)	
)	HEARD at Toronto: December 12, 2012

LEDERER J. (ORALLY)

Background

[1] This is a motion seeking security for the costs of an appeal brought by the appellants in respect of the Reasons for Decision on Sanctions and Costs of the Ontario Securities Commission (the "Commission") issued on May 17, 2012, which the Amended Notice of Appeal says includes the decision of the Commission dated January 20, 2012. The latter was followed by the Reasons for Decision on the Merits Hearing dated March 28, 2012.

[2] The Hearing Panel of the Commission determined that the appellants perpetrated a fraud on investors contrary to subsection 126.1(1)(b) of the *Securities Act*, R.S.O. 1990, c. S.5 as amended, traded securities without being registered to trade securities contrary to subsection 25(1)(a) and as officers and directors of the company involved, authorized permitted or acquiesced in the breach of Ontario securities law contrary to s. 129.2 of the *Act*. Among other sanctions, the Hearing Panel ordered the appellants to pay the Commission's investigation and hearing costs in the amount of \$257,756.32. Nothing has been received in compliance with this order.

[3] On June 20, 2012 the appellants filed the Amended Notice of Appeal with this court.

The Applicable Rule

[4] Rule 61.06(1) of the *Rules of Civil Procedure* dictates when the security for costs of an appeal may be ordered. It states:

61.06(1) 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.

[Emphasis added]

The Applicable Law

[5] The Court of Appeal has commented on the general considerations and policy concerns involved in interpreting the rule:

The language of Rule 61.06 is permissive, not mandatory. A respondent is not entitled as of right to an order for security for costs for the appeal. The permissive 'may' and not the imperative or mandatory 'shall' frames the authority to make the order. Even if the respondent meets the requirements in the applicable paragraph of Rule 61.06(1), the permissive 'may' would seem to reserve to the motion judge a vestige of discretion to refuse the order. The overarching principle to be applied to all the circumstances is the justness of the order sought.

The modifier 'good reason to believe' applies to both requirements in Rule 61.06(1)(a):

- the appeal is frivolous and vexatious
- the appellant has insufficient assets in Ontario to pay the costs of the appeal

The standard imposed by 'good reason to believe' does not demand that the motion judge reach a definitive conclusion, make an affirmative finding or actually determine that the appeal is frivolous and vexatious and that the appellant lacks sufficient Ontario assets to pay the appeal costs. ...

(*Pickard v. London (City) Police Services*, 2010 ONCS 643 at paras. 17 and 18)

Analysis

Appeal is frivolous and vexatious

[6] The appellants did not take part in the hearing. The appellant, Paola Lombardi, appeared before the Hearing Panel to seek an adjournment of the hearing in order that she could retain counsel. The matter had already been adjourned on several occasions and had been ordered to be peremptory to the appellants before this court. The Hearing Panel noted that Paola Lombardi had already had 13 months to retain counsel. In the circumstances, the request for the

adjournment was denied. The appellants wrote to the Commission advising that they would not attend the hearing without counsel. The hearing as to the merits proceeded and the allegations against the appellants were proven. The appellants had the opportunity to contest the allegations made against them before the Hearing Panel but declined to do so. In such circumstances the ability to meaningfully prosecute an appeal will be limited. Moreover, the Amended Notice of Appeal is perfunctory and fails to reveal any substantial basis for an appeal.

[7] I find there is good reason to believe that the appeal is frivolous and vexatious.

Assets in Ontario

[8] The appellants transferred funds from the accounts of the business that was in issue before the Commission to a bank account in the Bahamas. The funds were used to purchase assets for the personal use of the appellants in the Bahamas and Ontario. These assets included a piece of real estate and luxury automobiles in Ontario. These assets were recovered by the receiver on behalf of the companies. It appears that the appellants no longer reside in Ontario. In the fall of 2008 they left this province. They are now identified with an address in the Bahamas.

[9] I find there is good reason to believe the appellants no longer have any assets in Ontario.

Conclusion

[10] In the circumstances, I exercise the discretion of this court to order:

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1. that the appellants, Paola Lombardi and L. Jeffrey Pogachar deposit with the Registrar security for costs in the amount of \$20,000 in a form satisfactory to counsel for the Commission;
2. that the security is to be deposited no later than January 31, 2013;
3. that the appellants, Paola Lombardi and L. Jeffrey Pogachar shall pay to the Commission its costs of this motion in the amount of \$1,575.00; and,
4. that the Commission will serve the appellants, Paola Lombardi and L. Jeffrey Pogachar with a copy of these reasons and a copy of the order, by ordinary mail, within 7 days of it being issued.



LEDERER J.

Date of Reasons for Judgment: December 12, 2012

Date of Release: **DEC 12 2012**

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DIVISIONAL COURT FILE NO.: 306/12
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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LEDERER J.

BETWEEN:

PAOLA LOMBARDI and L. JEFFREY POGACHAR

Appellants

- and -

ONTARIO SECURITIES COMMISSION

Respondent

ORAL REASONS FOR JUDGMENT

LEDERER J.

Date of Reasons for Judgment: December 12, 2012

Date of Release: **DEC 12 2012**