

Colombe v. Caughell et al.

52 O.R. (2d) 767

ONTARIO
DISTRICT COURT OF ONTARIO
MACDONALD D.C.J.
27TH NOVEMBER 1985.

Debtor and creditor -- Execution -- Renewal -- Alias writ --
Writ of seizure and sale issued -- Writ expiring after six
years -- Court having jurisdiction to issue alias writ -- Rule
60.07.

Cases referred to

Holtite Rubber Co. Ltd. v. Sussman, [1960] O.W.N. 252;
Peterboro Dist. Co-Op. Services v. Raison, [1960] O.W.N. 495;
Lowson v. Canada Farmer's Mutual Ins. Co. (1882), 9 P.R. (Ont.)
309; Zacks v. Glazier et al., [1945] O.W.N. 205; Re Solicitor,
[1959] O.W.N. 8

Rules and regulations referred to

Rules of Civil Procedure, rules 2.01, 2.03, 60.07(2), (8)
Rules of Practice, Rule 546

APPLICATION for an order renewing a writ of seizure and sale
or in the alternative for the issuance of an alias writ.

J. P. DiFiore, for applicant.

J. Curtis McDonnell, for respondent.

MACDONALD D.C.J. (orally):-- Counsel for the plaintiff has asked for the renewal of a writ of seizure and sale under rule 60.07 in circumstances in which the renewal was not filed within the six years as required by law. Alternatively, he has asked for the issuance of an alias writ.

The sheriff gave notice of the expiration of the original writ in accordance with the rules. However, due to delays in correspondence that were not his fault, the writ was not presented to him for renewal until two days after its expiration date.

Under subrule 60.07(2) a writ of seizure and sale may be issued in the first instance after six years, with leave of the court. However, there is no provision for the sheriff to renew a writ under subrule 60.07(8) after its expiration. Is there, then, a remedy in respect of an expired writ where the sheriff cannot renew it but the court could grant leave for the issuance of an original writ?

Under the old rules, the remedy granted, on occasion, in such circumstances was by way of the issuance of an alias writ.

C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, Carswell (1981), describes an alias writ at p. 363 as follows:

In addition to the power to issue writs concurrently, the judgment creditor has the right to obtain new writs despite the issue of an earlier one. The power to issue successive writs flows from the common law and has been used, for example, to issue a replacement of an earlier writ which has been lost. The second writ is often called an "alias writ" and differs from the ordinary writ by the addition of the recital of the words "as before we have commanded you" or sometimes by the mere addition of the word "alias".

At p. 373 he states further:

The legislation regarding renewal of writs has given rise to

some problems which can only be noted here. Where a creditor has failed to renew execution within the relevant time period, he may nevertheless be able to issue an alias writ. There is some dispute whether or not it is necessary to get leave after the elapse of six years from the judgment when execution was first issued within the six year period. Where a writ expires and a new or alias writ is issued after the lapse of a period of time, the better view would appear to be that the rights of third parties arising in the gap take precedence over those of the writ holder.

In support of his motion, counsel for the plaintiff made reference to the case of *Holtite Rubber Co. Ltd. v. Sussman*, [1960] O.W.N. 252, in which the senior master granted leave to issue an alias writ of execution against the defendant stating that it was always considered that Rule 566 (later Rule 546 and now subrule 60.07(2)) gave the court power to grant leave to issue an alias writ if six years had elapsed since the judgment was signed. Counsel also referred to *Peterboro Dist. Co-Op. Services v. Raison*, [1960] O.W.N. 495, in which the master declined to extend the time for renewal of a writ stating the reason for the express provisions in the rules requiring a writ to be renewed before its expiry was to ensure a stable practice which would obviate difficulties arising respecting the priority of the execution and existing or new charges against lands bound by the execution. If an extension was granted, some means would have to be provided to protect persons acquiring an interest in the land in the meantime. Therefore, the time for renewal should not be extended but rather the judgment creditor could re-establish his execution by obtaining an alias writ under the predecessor of subrule 60.07(2).

Counsel for the defendant referred to *Lowson v. Canada Farmer's Mutual Ins. Co.* (1882), 9 P.R. (Ont.) 309, in which it was held by the master that a writ of fieri facias could not be renewed nunc pro tunc. I should think that, at least in the circumstances of the present case, where there is no fault on the part of the sheriff, this case would reflect the current law.

The Lawson case does not consider the question of an alias writ. This question was considered in another case referred to by counsel for the defendant, Zacks v. Glazier et al., [1945] O.W.N. 205. In that case, a motion for leave to issue an alias writ was refused where the writ had expired through an oversight. However the reason for the refusal was not because it was inappropriate to issue an alias writ but because the motion was brought ex parte and the defendants were available to be served. Similarly, in Re Solicitor, [1959] O.W.N. 8, an application for the issue of a new writ after the expiration of an original one was refused but the master stated that the proper practice was an application for an alias writ.

I gave some thought last night to the various rules, both old and new, particularly since counsel for the defendant, in his supporting material, pointed out that there is no reference to an alias writ in the new rules and I questioned whether the issuance of an alias writ would constitute a perpetuation of an outmoded practice. I think not. There is also no reference to alias writs in the old rules. However, leave to issue alias writs was granted under those rules in some of the cases to which I have referred. Further, in the cases where issuance was refused, the reason was other than lack of authority to issue an alias writ in circumstances such as the present ones.

In considering whether the remedy of an alias writ continues, I gave thought to the spirit and intent of the new rules. While subrule 60.07(2) is expressed in the negative, whereas its predecessor, Rule 546, is expressed in the positive, I do not think the new expression precludes the remedy of issuing a new writ with leave of the court; after the expiration of the old one. This is particularly true when rule 60.07 is read in conjunction with the curative rules 2.01 and 2.03 which give the courts wide powers to grant relief and to dispense with compliance with the rules.

The criteria for relief is "the interests of justice". While the interests of justice would, in most circumstances, preclude the renewing of a writ nunc pro tunc so as to upset intervening rights, the issuance of an alias writ that would not affect third party interests that may have arisen between the date of

the expiration of the original writ and the issuance of a further writ would appear to be consistent with the interests of justice. I, therefore, hold that I have the power to issue an alias writ. Further, on the merits of this motion, I exercise my discretion to grant leave to the plaintiff to issue an alias writ in this action.

In view of the comments of counsel, there will be no order as to costs.

Order accordingly.