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STAY OF EVICTION REFUSED WHERE OWNERS CORPORATION OWED SUBSTANTIAL LEVIES

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The Supreme Court of NSW has recently held in two cases involving JS Mueller & Co. that a bankrupt lot owner will not be entitled to a stay of an eviction from their strata unit where it is clear that the owner has made no attempt to pay overdue strata levies.

El-Cheikh Case

In Pascoe -v- El-Cheikh [2014] NSWSC 273 (El-Cheikh) an owners corporation sued Mr. El-Cheikh in the Local Court for payment of overdue levies in respect of the unit he owned. Mr. El-Cheikh did not defend the claim made against him resulting in a judgment being entered in favour of the owners corporation. The owners corporation then bankrupted Mr El-Cheikh relying on the Local Court judgment.

Subsequently, the trustee in bankruptcy (Mr. Pascoe) started legal action in the Supreme Court to obtain an order entitling him to take possession of the unit so that the unit could be sold and the sale proceeds used to pay the levies that were owed to the owners corporation. The trustee obtained an order for possession, and the NSW Sheriff's Office then scheduled a date to evict Mr. El-Cheikh from the unit.

Mr. El-Cheikh then applied to the Supreme Court seeking a stay of the eviction. He told the Court that he had a good defence to the Local Court claim for the overdue levies and that he was intending to apply to have the Local Court judgment set-aside. He also sought orders to set-aside the Supreme Court's order for possession granted to the trustee, Mr. Pascoe.

Mr. El-Cheikh claimed that his eviction from the unit should be stayed because he did not have to pay any strata levies in circumstances where the owners corporation had failed to fulfill its duty to maintain and repair common property and therefore he was entitled to cross-claim against the owners corporation for damages for breach of its statutory duty under the Strata Schemes Management Act 1996.

The Supreme Court refused Mr. El-Cheikh's application to stay the eviction. The Court held that Mr El-Cheikh had waited too long because some 21 months had passed since he was first served with the Local Court claim and he had done nothing about it. The Court also concluded that Mr El-Cheikh did not have a defence to the claim for levies because in The Owners – Strata Plan 50726 -v- Thoo [2013] NSWCA 270, it was established that a lot owner can no longer claim damages for an alleged breach of duty by an owners corporation to maintain and repair common property.

The Judge said at paragraph [15] of his judgment that:

“The only right [Mr. El-Cheikh] had was to make application under the Strata Schemes Management Act 1996 for an adjudicator to determine his grievances as far as the body corporate was concerned”.



On the second day of the hearing Mr El-Cheikh changed his tact by claiming hardship and he requested further time to find alternative accommodation. The Court held, citing Johnson J in an earlier case of *GE Capital Finance v Smith* [2006] NSWSC 889, at paragraph [25] that:

“where an indulgence is sought for a stay, particularly on the basis of hardship, the fact that no moneys have been paid to the plaintiff by the person seeking the stay will be significant factor affecting the discretion to grant a further stay”.

Lyons Case

In the second case of *Pascoe -v- Lyons* [2015] NSWSC 308 (Lyons), the grounds for a stay were slightly different to El-Cheikh. The bankrupt lot owner, Mr Lyons, sought a stay on the basis that his trustee in bankruptcy (Mr. Pascoe) should be replaced. Mr. Lyons alleged that Mr. Pascoe was not doing his job properly. Mr Lyons sought a stay of his eviction from the unit to allow a creditors meeting to be held at the request of five unsecured creditors in the hope that at the meeting the creditors would vote to replace Mr. Pascoe and appoint a new bankruptcy trustee who would not sell the unit.

In Lyons (much like in El-Cheikh) no steps were taken by Mr. Lyons to challenge the Local Court judgment which resulted in him becoming a bankrupt. In fact the Supreme Court observed that Mr. Lyons had failed to pay any levies to the owners corporation since 2006 and at the date of the hearing there was approximately \$25,000.00 owing to the owners corporation in outstanding levies.

In refusing Mr. Lyon’s application for a further stay of the eviction the Judge remarked:

“In circumstances where the strata levies have been outstanding for such a lengthy period of time and there are other debts owing to public utilities, such as Council and water, there does not seem to me to be any basis for staying the writ for any further time. It would simply be a matter of delaying the inevitable in the hope that some increased purchase price would be obtainable.”

Conclusion

These two cases show that generally the Supreme Court will not stay an eviction of a bankrupt lot owner from his or her unit particularly where substantial strata levies are owed and no steps have been taken to pay those levies (or other creditors) before seeking a stay. Indeed, even where an eviction will cause the owner hardship, the Court will be reluctant to stay the eviction where overdue levies remain unpaid.



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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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