

COURT OF APPEAL FOR ONTARIO

CITATION: Zuk v. Atkinson, 2015 ONCA 96

DATE: 20150210

DOCKET: C59163

MacFarland, Hourigan and Benotto J.J.A.

BETWEEN

Marek Zuk

Plaintiff/Appellant

and

Joy Atkinson and Edward Atkinson

Defendants/Respondents

Jillian Van Allen, for the appellant

Theresa Hartley, for the respondents

Heard and released orally: January 28, 2015

On appeal from the order of Justice Gordon D. Lemon of the Superior Court of Justice, dated July 8, 2014.

ENDORSEMENT

[1] Marek Zuk appeals from the order of Lemon J. dated July 8, 2014, dismissing his motion to set aside the order of Murray J., dated August 10, 2012 and to extend the time for compliance with the orders of O'Connor J., dated February 16, 2012 and Wein J. dated May 29, 2012.

[2] Justice O'Connor made an order setting a deadline of April 2, 2012 for the appellant to comply with outstanding undertakings. The appellant was also ordered to pay costs of \$1,000 forthwith.

[3] The appellant did not comply with the order of O'Connor J. Wein J. then made an order extending the time to answer undertakings to June 29, 2012 and requiring the appellant to pay the costs awarded by O'Connor J., plus an additional \$2,400 by that date. Justice Wein also ordered that if the appellant did not comply with her order, the respondents could move without notice to dismiss the action. The appellant did not comply with the order of Wein J. and the respondents brought a successful *ex parte* motion before Murray J. to dismiss the action.

[4] The appellant then brought a motion before Lemon J. to set aside the order of Murray J. That motion was dismissed. Justice Lemon found that there was no adequate explanation for the delay in bringing the motion before him. He held that there was nothing in the explanation offered by the appellant for his noncompliance with the previous court orders that would have made any difference in the motion before Murray J.

[5] Further, the motion judge was satisfied that there was some prejudice to the respondents because certain outstanding undertakings were required to allow them to properly respond to the claim. He went on to observe that tactical

decisions by counsel to avoid their obligation to answer undertakings should be discouraged by the court.

[6] The grounds of appeal are that the motion judge erred in: (i) finding that the appellant's counsel deliberately did not comply with the orders of O'Connor and Wein JJ.; (ii) finding that the delay resulted in prejudice to the respondents; and (iii) basing his decision on a perceived litigation context beyond the facts of this case.

[7] We would not give effect to any of these grounds of appeal.

[8] There was no reasonable explanation for the noncompliance with the orders. Indeed, the appellant's counsel admitted that he did not comply because he did not anticipate that the respondents would demand strict compliance.

[9] The lack of explanation made the issue of prejudice suffered by the respondents less of a factor on the motion before Lemon J. However, the motion judge did find prejudice to the respondents and we see no error in his conclusion.

[10] Finally, we are not satisfied that the motion judge based his decision to dismiss the motion on his observations regarding the practice of some counsel to avoid their obligation to answer undertakings.

[11] The appeal is therefore dismissed, with costs to the respondents in the agreed upon amount of \$5,000, inclusive of disbursements and H.S.T.

“J. MacFarland J.A.”

“C.W. Hourigan J.A.”

“M.L. Benotto J.A.”