CITATION: Giancola v. Dobrydnev, 2019 ONSC 5372
COURT FILE NO.: CV-17-132347
DATE: 20190917

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ANTONIO GIANCOLA AND ANGELINA GIANCOLA	)	Mr. Belsito, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
ALEXANDRE DOBRYDNEV	)	Mr. Arkadi Bouchelev, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** August 30, 2019

REASONS FOR DECISION

EDWARDS J.:

Overview

[1] It has often been said that the finality principle reflected in the doctrine of *res judicata* is an important principle of our rule of law. There are, however, always exceptions to the rule. The Court of Appeal in *Tsaoussis v. Baetz*, [1998] O.J. No. 3516, reminds us that:

> The limitations on the res judicata doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality concerns.

[2] The litigation in this case demonstrates the limitations to those exceptions.

[3] On December 21, 2018, I heard the Plaintiffs' motion seeking summary judgment. While the Defendant was not physically present in the courtroom, he sought an adjournment based largely on a note from his chiropractor that he could not attend in person. I denied

the adjournment request and granted summary judgment, as reflected in my Reasons of January 2, 2019.

[4] The Defendant, as was his right, appealed my decision to the Court of Appeal, and in addition sought relief in this Court under Rule 37.14(1)(b). The Defendant's appeal has been dismissed. The motion under Rule 37.14(1)(b) was dismissed pursuant to an Order of Charney J. dated August 16, 2019.

[5] The Defendant now moves pursuant to the provisions of Rule 59.06(2)(a) for an order setting aside my previous order granting summary judgment in this matter.

The Facts

[6] As reflected in my Reasons for Decision of January 2, 2019, the parties entered into an Agreement of Purchase and Sale ("the Agreement") on March 12, 2017, for the purchase of the Plaintiffs' residence municipally known as 34 View North Court, Vaughan, Ontario ("the Residence"). The closing date for the transaction was July 28, 2017.

[7] The Agreement was not conditional on an inspection of the Plaintiffs' residence. In this regard, the Defendant in his affidavit sworn August 2, 2019 filed before me on the motion under Rule 59, states at para. 9:

> Prior to making an offer I inspected the property myself. I have been working in the home renovation business since 2006.

The Defendant goes on in his affidavit at para. 11 and states:

> At the time of the inspection I did not notice any deficiencies.

[8] As the time for the closing of the transaction approached, email communications were exchanged between the parties' real estate lawyers and between the Defendant and the Plaintiffs directly, in which the Defendant asked the Plaintiffs for a vendor take-back mortgage in the amount of $150,000. The Plaintiffs refused to provide the vendor take-back mortgage.

[9] Subsequent communications took place in which the Defendant sought a reduction in the purchase price of the property from $1,167,000 to $999,000, as well as an extension of the closing date. Further communication followed in which the Defendant alleged that there were material deficiencies in the property, including flooding and cracks in the basement which had been concealed and not disclosed to him by the Plaintiffs. These allegations were denied, and the Plaintiffs insisted that the transaction close in accordance with the terms of the Agreement. The Agreement did not close on July 28, 2017, and the Plaintiffs re-listed their property which was sold on March 6, 2018 for $925,000. The transaction closed on May 9, 2018.

[10] As reflected in my Reasons, this litigation has been protracted. The statement of claim was issued on August 24, 2017, with the Defendant responding with his statement of defence

on September 30, 2017. Throughout the litigation in this court until the motion under Rule 59, the Defendant has been self-represented.

[11] The Defendant explains in his motion materials filed before me with respect to the Rule 59 motion, that he did not attend the cross-examinations that had been ordered by Sutherland J., nor did he attend the summary judgment motion before me on December 21, 2018, for reasons related to injuries that he suffered in a fall off a ladder as well as a motor vehicle accident that he was involved in on August 22, 2018. The medical records arising out of those incidents, together with medical reports from treating physicians that substantiate the Defendant's injuries, were filed by the Defendant as part of the Rule 59 motion.

[12] The Defendant also explains the inadequacy of the motion materials filed in opposition to the Plaintiffs' motion for summary judgment. The inadequacy of those motion materials are alleged to have been as a result of the Defendant's inability to provide a proper response due to the injuries suffered in the fall from the ladder and the motor vehicle accident.

[13] Subsequent to the motion for summary judgment and the release of my Reasons, the Defendant filed a notice of appeal with the Court of Appeal. The grounds for appeal listed in the notice of appeal are as follows:

> 1. The Honourable Justice Edwards made an error of law or mixed fact in law in granting judgment to the Plaintiffs on a summary judgment motion despite the Defendant's inability to appear at the hearing because of the state of his health;
>
> 2. The Honourable Justice Edwards made an error of law or mixed fact in law in refusing to adjourn the hearing of the Plaintiffs' summary judgment motion to another date;
>
> 3. The Honourable Justice Edwards made an error of law or mixed fact in law in awarding $306,130.54 in damages and $9,000 in costs to the Plaintiffs Antonio Giancola and Angelina Giancola.

[14] The Defendant was self-represented when he filed his notice of appeal with the Court of Appeal. The Defendant remained self-represented throughout the time period that the Court of Appeal dealt with the Defendant's notice of appeal. While he was self-represented in the Court of Appeal he was, nonetheless, contemporaneously being represented by Mr. Bouchelev in connection with his Rule 37.14 and Rule 59 motions.

[15] On March 5, 2019, the Registrar of the Court of Appeal gave notice to the Defendant of the Registrar's intention to dismiss the Defendant's appeal for delay if it was not perfected by March 27, 2019.

[16] On March 29, 2019, the Deputy Registrar for the Court of Appeal emailed the Defendant advising that his appeal would be dismissed for delay unless the Defendant provided a consent from Plaintiffs' counsel with a specific date for the perfection of the appeal.

Presumably no such consent was forthcoming and as a result, on April 2, 2019 the Defendant's appeal was dismissed for delay.

[17] On April 9, 2019, the Defendant filed a notice of motion with the Court of Appeal seeking an order setting aside the Registrar's order dismissing his appeal for delay, and to provide an extension of time to perfect his appeal. In support of his motion, the Defendant filed his own affidavit in which he referred to the injuries that he had suffered in a car accident. By implication, the Defendant purported to explain his non-attendance in Court on December 21, 2018.

[18] Concurrently with the Defendant's appeal in the Court of Appeal, the Defendant served a notice of motion on counsel for the Plaintiffs on March 1, 2019, seeking an order under Rule 37.14(1)(1) to set aside my judgment of January 2, 2019. The primary ground for that motion arose out of the Defendant's inability to attend the summary judgment motion due to poor health. The Defendant was represented with respect to the motion under Rule 37.14 by Mr. Bouchelev.

[19] When the Defendant brought his motion to set aside the Order of the Registrar of the Court of Appeal dismissing his appeal for delay, counsel for the Plaintiffs and Mr. Bouchelev exchanged various emails addressing a concern of the Plaintiffs, that in the words of Mr. Belsito's email of April 26, 2019 to Mr. Bouchelev:

> Your client is not permitted to pursue both streams. This is an abuse of process which is being facilitated by your office. Once your client's appeal has been properly dismissed, I will agree to a timetable for the hearing of your motion.

[20] On May 17, 2019, the Defendant's motion came before Trotter J.A. In his Endorsement, Trotter J.A. noted:

> The respondents vigorously oppose this motion, and understandably so. However, in all of the circumstances, this is an appropriate case to set aside the order so that the applicant may have a hearing on the merits.

[21] Further in his Endorsement, Trotter J.A. states:

> I was advised that, in addition to launching this appeal, the applicant has also brought a motion in the Superior Court to set aside the judgment against him (R. 37.14). This is scheduled to be heard on August 16, 2019. Ms. McMillan, amicus counsel, brought to my attention authority that suggests that the outstanding R. 37.14 motion precludes making the order sought by the applicant. I am satisfied that the circumstances of this case are distinguishable and I exercise my discretion to decide this case on the merits. The application is allowed.

[22] In making the decision that he did, Trotter J.A. gave the Defendant until June 21, 2019 to perfect his appeal, otherwise it would be "deemed dismissed as abandoned".

[23] The Defendant has sworn three affidavits since the hearing of the motion for summary judgment. The first is his affidavit sworn on August 2, 2019. The second is sworn August 14, 2019, and the last affidavit is sworn on August 21, 2019. In his affidavit sworn on August 14, 2019, he references his appeal to the Court of Appeal and the pending Rule 37.14 motion. At para. 19 of this affidavit he states:

> I was hoping that the Rule 37.14(1)(b) motion would be heard before the time for the perfection of the appeal had expired. However, the subject motion could not be heard before August 16, 2019.

[24] The Defendant goes on in his affidavit of August 14, 2019, to state:

> The appeal ended up being dismissed for delay. I then brought a motion to set aside the automatic dismissal. I also asked Mr. Bouchelev to write to the Plaintiffs' counsel Christopher Belsito ("Mr. Belsito"), to propose that the hearing of the motion to set aside the administrative dismissal be adjourned until after the hearing of the subject motion. That way the Plaintiffs would not have to incur any costs in connection with the appeal prior to the hearing of the subject motion. Mr. Belsito did not agree to the proposed adjournment.

[25] The Defendant concludes his affidavit of August 14, 2019, as follows:

> As the appeal was administratively dismissed for delay, there was no hearing on any of the issues that are relevant to the subject motion.

[26] When the Defendant swore his affidavit of August 14, 2019, he did not disclose to the court the proceedings that took place before Trotter J.A., nor did he provide the court with a copy of the Endorsement prepared by Trotter J.A., the relevant extracts of which I have reproduced above.

[27] The Defendant's motion under Rule 37.14 was heard by Charney J. on August 16, 2019. Rule 37.14 provides the court with authority to set aside an order if it can be established that the Defendant failed to appear at a motion "through accident, mistake or insufficient notice". On the motion before Charney J., the Defendant argued that Rule 37.14 applied to the facts of this case because he failed to appear on the December 21, 2018 motion "through accident". It was argued that he was unable to attend the summary judgment motion before me because of his health and belief that the note from his chiropractor was sufficient in order to obtain an adjournment.

[28] The Defendant's Rule 37.14 motion was dismissed by Charney J., in part, for the following reasons:

> As I advised counsel at the hearing of this motion, it is my view that Rule 37.14(1)(b) has no application to this case. Rule 37.14(1)(b) applies in those cases in which the party fails to appear. It does not apply where a party appears (either in person or in writing) and requests an adjournment

> and the adjournment is denied. It is clear that the Defendant was well aware of the December 21, 2018 hearing date. He provided correspondence to the Court requesting an adjournment. His request was denied.

[29] In his Reasons, Charney J. then goes on to briefly address the possible application of Rule 59.06. Having dismissed the Defendant's motion under Rule 37.14, Charney J. concluded his reasons as follows:

> Accordingly, while I am dismissing the Defendant's motion under Rule 37.14, I do so without prejudice to his right to bring the motion back before Edwards J. under Rule 59.06 if he is of the view that he can meet the test set out in the *Tsaoussis* case.

Analysis

[30] Rule 59.06 provides:

> 59.06 (2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> may make a motion in the proceeding for the relief claimed.

[31] As a general rule, motions under Rule 59.06(2)(a) should proceed before the judge who made the original order: *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, at para. 21.

[32] The test under *Tsaoussis v. Baetz*, 1998 CanLII 5454 (ON CA), referenced in the Reasons of Charney J., is summarized by Doherty J.A. at page 11 of the Court's Reasons as follows:

> …the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final.

[33] Earlier in his decision, Doherty J.A. at page 6 comments on the doctrine of *res judicata* as follows:

> The importance attached to finality is reflected in the doctrine of res judicata. That doctrine prohibits the re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated…
>
> That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the res judicata doctrine will be relaxed… The limitations on the res judicata doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality concerns.

[34] Doherty J.A. then goes on to state:

> Attempts, whatever their form, to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line.

[35] In this case the test that I must apply, absent the appeal taken by the Defendant, is as follows:

1. Has the Defendant provided new evidence which could not have been put forward by the exercise of reasonable diligence when I heard the summary judgment motion?

2. If the Defendant's evidence meets the first test as set forth above, I am to evaluate the "cogency" of the new evidence as well as to consider any delay in moving to set aside my Judgment, any difficulty in re-litigating the issues and any prejudice to the Plaintiffs.

[36] Dealing first of all with any delay, I am satisfied that the Defendant has moved as quickly as the court schedule would allow him to have moved to set aside my judgment. There does not appear to be any evidence of any difficulty in re-litigating the issues raised by the summary judgment motion, and apart from the prejudice suffered by the Plaintiffs by reason of the delay in terms of being able to enforce the judgment as well as possible costs thrown away, I am not satisfied that there is any real evidence of prejudice to the Plaintiffs.

[37] As for the new evidence itself, I am satisfied that had I been aware of the injuries suffered by the Defendant when he fell off the ladder and his subsequent motor vehicle accident, that an adjournment would have been granted to the Defendant on terms. The terms of the

adjournment would likely have dealt with the timetabling of when the Defendant would have to file responding motion materials and the return date for the motion.

[38] The Defendant's motion to set aside my Judgment is granted. The Defendant has sought an indulgence of the court. There will be no costs of this motion. The Plaintiffs' motion for summary judgment shall be heard during the three week civil sittings commencing November 18, 2019. The trial coordinator will notify counsel of the date for the hearing of the motion. The Defendant shall file his responding motion materials no later than October 10, 2019. The Plaintiffs may file any reply motion materials no later than October 20, 2019. All cross examinations are to be completed by November 11, 2019. The parties are to file factums with the court no later than November 15, 2019. These dates are peremptory on the Defendant.

Justice M.L. Edwards

Released: September 17, 2019

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANTONIO GIANCOLA AND ANGELINA GIANCOLA

Plaintiffs

– and –

ALEXANDRE DOBRYDNEV

Defendant

REASONS FOR DECISION

Justice M.L. Edwards

Released: September 17, 2019