

CITATION: Gray v. Rizzi, 2011 ONCA 436

DATE: 20110607

DOCKET: C52222

COURT OF APPEAL FOR ONTARIO

Doherty, MacFarland JJ.A. and Hoy J. (*Ad hoc*)

BETWEEN

Nadine Ellen Gray

Applicant (Respondent in Appeal)

and

Mario Rizzi

Respondent (Appellant)

Peter Cozzi, for the appellant

Hugh MacKenzie, for the respondent

Heard and released orally: May 13, 2011

On appeal from the order of Justice R. Cary Boswell of the Superior Court of Justice dated May 18, 2010.

ENDORSEMENT

[1] The facts are not in dispute and are set out in the reasons of the motion judge.

[2] The appellant moved before Boswell J. for an order changing and setting aside the orders of Loukidelis J. of November 1, 2005, and Nelson J. of March 15, 2006, pursuant

to Rule 25(19)(b) of the *Family Law Rules*. While the appellant did not frame his motion as it relates to the order of Loukidelis J. as a request to set aside a default judgment, Boswell J. considered whether, had he done so, the judgment would be set aside. Boswell J. focussed on the fact that the appellant delayed four years before challenging the order of Loukidelis J.

[3] The appellant argues that Boswell J. failed to take the contextual approach required by *Scaini v. Prochnicki* on a motion to set aside a default judgment. This argument can only apply to the order of Loukidelis J. as the order, of Nelson J., which is in fact the operative order was made on notice. Moreover, applying a contextual approach on the record before him Boswell J. was correct on this issue.

[4] The appellant further argued before the motion judge that the “mistake” in the order of Loukidelis J. was that the issues of spousal and child support had already been decided by the early order of Salmers J. He says, because the Salmers’ order had not been issued and entered, Salmers J. remained seized of those matters and accordingly Loukidelis J. was without jurisdiction when he made the order he did on November 1, 2005.

[5] Without passing on the merits of those arguments, they go to the correctness of the order – arguments which can only be made on appellate review. They are not the type of “mistakes” contemplated by Rule 25(19)(b). We agree with Boswell J. when he said:

The Rule was not, in my view, intended to apply to cases of alleged legal errors, such as the suggestion that the court

exceeded its jurisdiction in making the order. Mistakes, or errors, in law are appealable errors and are not subject to correction under Rule 25(19).

[6] He dismissed the appellant's motion and properly so in our view. The appeal is dismissed.

[7] The costs of the appeal are to the respondent fixed in the sum of \$6,000.00 inclusive of disbursements and applicable taxes.

“Doherty J.A.”

“J. MacFarland J.A.”

“Alexandra Hoy J. *ad hoc*”