

COURT OF APPEAL FOR ONTARIO

CITATION: Nicoletti v. Nicoletti, 2015 ONCA 163

DATE: 20150312

DOCKET: C59276

Lauwers, Hourigan and Pardu JJ.A.

BETWEEN

Bruna Nicoletti

Respondent/Appellant

and

Giovanna Nicoletti

Applicant/Respondent

and

Vittoria Nicoletti by her litigation guardian,
The Public Guardian and Trustee and Pietro Nicoletti

Respondents/Respondents

No one present for the appellant

Tony N. Nguyen, for Giovanna Nicoletti

Donald Kim, for the Public Guardian and Vittoria Nicoletti

Heard: March 5, 2015

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated July 31, 2014.

ENDORSEMENT

[1] The appellant did not appear for the argument of this appeal. Her appeal is therefore dismissed as abandoned, with costs fixed in the amount of \$15,000 all-inclusive payable to the respondents, and \$1,250 payable to the Public Guardian and Trustee.

[2] The appellant sought an adjournment of the argument of this appeal by e-mail correspondence. Her request was refused for the reasons that follow.

[3] This appeal was originally scheduled to be heard on February 26, 2015, but Ms. Nicoletti did not appear. According to Laskin J.A.'s endorsement, she sent an email requesting an adjournment on the basis that she had a dental problem which was causing her pain. Counsel for the respondents, Giovanna Nicoletti and the Public Guardian and Trustee, opposed the adjournment.

[4] Justice Laskin noted that this was the third time the appellant had requested an adjournment. His endorsement adjourned the matter to March 5, 2015, "peremptory to the appellant," with costs payable to the respondents. A copy of the endorsement was sent to the appellant.

[5] On February 27, 2015, the appellant requested another adjournment. At the president's request, the appellant provided a medical note from a dentist, a Dr. Guido. The dental note provided no information on the appellant's current

pain levels and when she might be able to argue the appeal. The president requested an explanation as to the relationship between Dr. Guido and the appellant, whose married name is Guido, but got no answer. (At the hearing counsel advised that Dr. Guido was a cousin of the appellant's spouse.)

[6] The appellant's request for an adjournment was sent to counsel for the other parties. They opposed the adjournment on the basis that the endorsement of Laskin J.A. provided that the hearing date was peremptory, and that there was prejudice. Counsel for Giovanna Nicoletti stated in correspondence:

My client, Giovanna Nicoletti, who has been caring for her elderly mother, Vittoria Nicoletti, for the past five years is carrying significant costs as a result of the constant delays from the adjournment request by the appellant. The respondent is now close to 90 years old with declining health and any further delay will simply put further stress and financial burden on my client. This not only puts immense stress on my client but it also impacts her husband and family.

We note that as a result of the appeal, my client has not been reimbursed \$54,800 for expenses which she incurred on behalf of her mother and approved in her passing of accounts application.

It is the appellant who has brought this appeal, which the respondent submits is without merit, yet she has not acted reasonably to move this appeal with reasonable diligence. This is now her fourth adjournment request.

[7] Based on the exchange of correspondence, on March 4, 2015, court staff advised the appellant that the president of the panel had denied the adjournment

request, but invited the appellant to review her adjournment request before the full panel. In the morning on March 5, 2015, the appellant advised court staff that she would not appear at the appeal.

[8] The panel heard submissions from counsel for the respondents and for the PGT, which enlarged on the submissions in the correspondence. The record throughout is replete with the appellant's desire to delay the final disposition of this matter. Penny J. observed that "this litigation has dragged on quite unnecessarily for a long time". He noted that a last minute motion was brought by the appellant "in an effort to delay and complicate matters and to add to the already significant costs in controversy in this litigation." As a result of the stay of the order under appeal, the respondent Giovanna Nicoletti has been obliged to absorb the costs of caring for her mother, Vittoria Nicoletti.

[9] The appeal itself is nothing more than an effort to re-litigate the issues heard by Penny J., particularly relating to credibility findings, which are subject to a high standard of review of palpable and overriding error. No such error is evident from the written material filed by the appellant.

[10] Based on the conduct of the appellant and the material considered by the court, including the submissions received on the adjournment, which have been placed in the record of the court, the court exercised its discretion to refuse the requested adjournment.

“P. Lauwers J.A.”

“C.W. Hourigan J.A.”

“G. Pardu J.A.”