COURT OF APPEAL FOR ONTARIO

CITATION: Heston-Cook v. Schneider, 2015 ONCA 875
DATE: 20151211
DOCKET: C60516

Sharpe, Cronk and Miller JJ.A.

In the Estate of Stephanie Aber, deceased

BETWEEN

Brunhilde Heston-Cook

Applicant (Appellant)

and

Ernestina Schneider

Respondent (Respondent)

Gregory M. Sidlofsky, for the appellant

Lisbeth A. Hollaman, for the respondent

Heard: December 2, 2015

On appeal from the order of Justice Barbara Conway of the Superior Court of Justice, dated May 5, 2015.

ENDORSEMENT

[1] This appeal is the latest proceeding in a long-running dispute between the appellant and her sister, the respondent, over their deceased mother's estate.

The facts and background to this appeal are set out in the previous endorsement of this court: *Heston-Cook v. Schneider*, 2015 ONCA 10 (CanLII).

[2] Briefly stated, the appellant commenced an action alleging that the respondent breached the fiduciary duty she owed to their mother, by keeping the mother in her home after she was too infirm to remain there, in order to secure a benefit under their mother's will. The will bequeathed "any residence in which I reside and own at the time of my decease [sic], and the contents thereof" to the respondent and the sum of $100,000 of the residue to the appellant.

[3] On a motion brought in January 2014, Morawetz R.S.J. determined that such a claim had to be advanced by the mother's estate of which the respondent is the sole trustee. This court explained the effect of that decision in its prior endorsement, at para. 10:

> It has been determined that the claim is that of the estate and whoever has carriage of the claim on behalf of the estate needs to be able to make an objective assessment of the overall interests of the estate and whether it is in the best interests of the estate to take this proceeding.

[4] This court's previous decision dismissed an appeal from Wilton-Siegel J.'s order dismissing the appellant's subsequent motion to replace the respondent as the Estate Trustee with herself or Theresa Scanga, described in that application as an Ontario resident and friend of the appellant who had no conflict of interest in relation to the claim.

[5] Following that appeal, the appellant commenced a further application to replace the respondent as Estate Trustee and appoint an independent Estate Trustee or Estate Trustee During Litigation. The respondent moved under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to have that application dismissed. Justice Conway granted that motion on the ground that the issue before her was identical to the issue decided on the previous motion before Wilton-Siegel J. and that the application was accordingly barred.

[6] We do not agree with the appellant that the motion judge erred in dismissing the application.

[7] In our view, the issue before the motion judge was substantially the same as that decided on the previous motion. Both involved the replacement of the respondent as Estate Trustee to allow the estate to pursue a claim on behalf of the estate based on the allegations made by the appellant.

[8] On the motion before Wilton-Siegel J., the appellant attempted to meet the requirement that the claim be brought in the proper manner by proposing herself or an alternate person as trustee. The alternate person was said to have “no known conflict of interest.” Having failed on that motion, the appellant is not allowed a second chance to accomplish the same end. In *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18, the Supreme Court of Canada states that litigants are “only entitled to one bite at the cherry”

and are required “to put their best foot forward to establish the truth of their allegations when first called upon to do so.”

[9] To permit the appellant to bring another application, this time to appoint an unnamed independent trustee, would be to allow her a second “bite at the cherry” on what is substantially the same issue. The question whether an unnamed independent trustee should be appointed could have, and should have, been raised on the previous application: see *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 at pp. 293-94 (Gen. Div.), aff’d (1997), 32 O.R. (3d) 651 (C.A.).

[10] Nor do we accept the appellant’s submission that the previous order was not final because both Wilton-Siegel J. and this court contemplated or gave guidance as to further proceedings on the same issue. We agree with the motion judge’s characterization of Wilton-Siegel J.’s observations about how the claim might be reconstituted being nothing more than *obiter* musings. As the respondent points out, had Wilton-Siegel J. intended to permit the appellant to proceed in some other manner, he would have followed the usual course of expressly making provision for that in his order. Nor do we agree that there is anything in the endorsement of this court that could reasonably be interpreted as permitting the appellant to re-litigate the same issue.

[11] Finally, we do not accept the proposition that the motion judge erred by failing to exercise her discretion to permit the appellant to proceed. The motion judge recognized that the appellant was being defeated on procedural grounds but concluded that "does not entitle her to continue re-litigating that very same issue."

[12] We agree with the respondent that, when all the circumstances are taken into account, the appellant has no tenable claim to discretionary relief from the preclusive effect of the prior proceedings. The respondent assumed sole responsibility for the care of their mother. The appellant was absent and took no part or interest in her mother's care. Her allegations of financial mismanagement against the respondent made on an application to have the respondent pass her accounts were rejected after a hearing in the Superior Court in 2003. Further allegations of mismanagement by the appellant made in the course of the respondent's application to pass accounts in 2013 were also rejected. An appeal from that decision to the Divisional Court in 2015 was largely unsuccessful. The appellant did not raise the allegation she now makes when her mother died in 2008 and she accepted the $100,000 bequest from the residue of the estate. It was not until 2013, five years after her mother's death, that the allegations of breach of duty were made. These are not circumstances that would lead a court to exercise its jurisdiction to relieve from the consequences of issue estoppel.

[13] Accordingly, the appeal is dismissed with costs to the respondent, fixed at $9,000, inclusive of disbursements and taxes.

“Robert J. Sharpe J.A.”

“E.A. Cronk J.A.”

“B.W. Miller J.A.”