

COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian Bank of Canada v. Bernier, 2018 ONCA 23

DATE: 20180115

DOCKET: C62124

Doherty, Benotto and Huscroft JJ.A.

BETWEEN

The Laurentian Bank of Canada

Plaintiff (Respondent)

and

Mary A. Bernier and Frank J. Bernier

Defendants (Appellant)

Kevin Scullion, for the appellant

James M. Butson and Cristina Internicola, for the respondent

Heard: December 22, 2017

On appeal from the order of Justice Michael R. Gibson of the Superior Court of Justice, dated January 27, 2016.

REASONS FOR DECISION

[1] The appellant appeals an order dismissing her motion to set aside an order for summary judgment granted May 12, 2011. She brings a fresh evidence application in support.

[2] The appellant was sued by the respondent bank for a shortfall when it repossessed and sold a motorcycle that had been purchased by her husband,

Frank Bernier. The respondent was named as co-defendant because the loan document bore her signature as guarantor of the loan. Frank Bernier filed a statement of defence on behalf of both defendants, but neither contested the motion and the respondent was granted summary judgment for \$15,912.72, plus interest and costs.

[3] The respondent took steps to enforce the judgment debt and scheduled an examination of the appellant. The appellant retained counsel and the matter was adjourned, but the appellant failed to attend two examinations scheduled subsequently. The respondent then brought a motion to compel her attendance. The appellant did not attend and an order of costs was made. The appellant did not pay and has not paid any outstanding costs orders.

[4] In January 2016, the appellant brought a motion to set aside the judgment and swore an affidavit alleging that Frank Bernier, who died in 2011, entered the contract to purchase the motorcycle and forged her signature. No supporting evidence was adduced.

[5] At the hearing of the appeal, the parties agreed that because the order under appeal concerns a payment of not more than \$50,000, the appeal properly lies to the Divisional Court. In order to spare the parties further expense, at our request, the Chief Justice of the Superior Court appointed the members of this panel as judges of the Divisional Court in order to hear this appeal.

[6] In our view, the motion judge properly applied the test set out by this court in *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, 391 D.L.R. (4th) 374. On the motion, the appellant proffered no expert evidence to support her claim that her signature had been forged. She provided no adequate explanation for her delay in moving to set aside the judgment – a delay of two and one-half years, even accepting her account. Finally, the motion judge found that the respondents would be prejudiced given the four-year delay in attempting to realize on the judgment.

[7] The onus was on the appellant to demonstrate that the order should be set aside. Ultimately, the motion judge was not satisfied that she met her burden. His discretionary decision is entitled to deference. There is no basis for this court to interfere with it.

[8] The appellant's fresh evidence application comes far too late in the day. The evidence was available when the motion was brought and it was incumbent on the appellant to produce it at that time. We do not think it could reasonably be expected to have affected the result in any event.

[9] The fresh evidence application is dismissed. The appeal is dismissed.

[10] The respondent is entitled to costs, fixed in the amount of \$4,000 inclusive of taxes and disbursements.

"Doherty J.A."

"M.L. Benotto J.A."

"Grant Huscroft J.A."