

COURT OF APPEAL FOR ONTARIO

CITATION: Del Vecchio v. Del Vecchio, 2018 ONCA 334

DATE: 20180404

DOCKET: C64660

MacFarland, Huscroft and Nordheimer JJ.A.

BETWEEN

Angela Del Vecchio

Applicant (Respondent)

and

Mark Del Vecchio

Respondent (Appellant)

M. Susan Balz, for the appellant

Karen Ballantyne, for the respondent

Heard: March 23, 2018

On appeal from the order of Justice Victor Paisley of the Superior Court of Justice, dated October 13, 2017.

REASONS FOR DECISION

[1] The appellant appeals the order of Paisley J. dated October 13, 2017 striking his pleadings and permitting the respondent to proceed to an uncontested trial. After hearing from counsel for the appellant, we dismissed the appeal with reasons to follow. We now provide our reasons.

[2] In its essence the appellant is attempting to appeal the underlying order of Horkins J. made July 27, 2017 – which order was the basis for the Paisley J. order – the subject of this appeal. The appellant did not appeal the Horkins J. order, nor did he ever apply for any extension of the deadlines imposed by that order. This contentious family law litigation has been ongoing for much longer than it should primarily because of the appellant's refusal to obey orders of the court.

[3] His pleadings were struck initially in January 2016. That order was set aside in April 2016 and the appellant given another chance. The equalization order that had been made was set aside and the support order (based on an income of \$250,000) was changed from final to temporary. The appellant was required to pay costs. There followed numerous conferences and motions – most of which the appellant lost and was ordered to pay costs (see para. 22 of the respondent's factum).

[4] In July 2016 a second motion to strike for failure to make financial disclosure was brought. Hood J. adjourned that motion to August 16, 2016 to enable the appellant to retain new counsel and submit responding materials. He required the appellant to pay costs of \$5,000.

[5] On August 16, 2016 the respondent's motion to strike came on before Myers J. who convened a case conference and adjourned the motion on terms:

- There was to be a two-hour settlement conference on September 21, 2016 and failing

settlement the motion would proceed September 22, 2016

- The appellant was required to file his most recent corporate financial statement and tax return prior to the conference
- The appellant was to provide an expert valuation of his interest in Venture and an income report prior to September 21, 2016
- The appellant was to pay costs of \$2,500.

[6] The parties agreed to adjourn the settlement conference to December 9, 2016 on terms that required the appellant to produce an income analysis, a business valuation, an updated financial statement and corporate financial statement for March 31, 2015 and March 31, 2016 six weeks before the new court date – by October 28, 2016.

[7] The business valuation and income analysis, although dated August 5, 2016 were not produced until November 15, 2016 and the income analysis was only current to March 31, 2015. The balance of the material was late and incomplete.

[8] Again, Myers J. on December 9, 2016 made a further order requiring the appellant to produce certain financial disclosure by certain dates, to pay ongoing child and spousal support (based on an income of \$362,000) and to pay support arrears. He did not provide all required disclosure nor pay all of the support arrears. The appellant neither appealed this order of Myers J. nor sought any extension of time to comply with its terms.

[9] On February 13, 2017, the return date – the appellant had still not complied with the December 9 order, yet Myers J. gave the appellant another chance – he had to March 17, 2017 to provide certain required financial information – again he neither appealed this order of Myers J. nor did he comply with it.

[10] The respondent renewed the motion to strike returnable May 16, 2017. On that date the appellant's then lawyer got off the record. The appellant produced an income report (one of the documents he had been required to produce in several prior orders). Of note the report, although dated February 9, 2017, was only produced May 5, 2017. In any event, the appellant advised the court that he was not relying on that report.

[11] He sought and was granted an adjournment of the motion on very specific terms. He was to provide a letter stating that he was not relying on the February 9, 2017 income report if that remained his position and why – that letter was provided but after the May 30, 2017 deadline Justice Horkins had imposed. He was required by June 30, 2017 to produce an income report on which he intended to rely – no further extensions were to be granted. No such report was provided prior to the October 17 motion before Paisley J. On July 20, 2017 the respondent renewed her motion to strike – Horkins J. by endorsement dated July 27, 2017 ordered that the appellant's pleadings were to be struck unless he complied with certain terms by September 1, 2017:

- pay all support arrears
- serve an expert income report that he relies on
- pay outstanding costs award of \$7,500 for May 16, 2017

[12] On the appellant's failure to comply, the respondent could proceed to an uncontested trial. He was ordered to pay the appellant's costs in the sum of \$5,000. This order was neither appealed nor did the appellant seek an extension of time to comply with its terms. He did not comply with its terms. It was in these circumstances that the appellant, in September, brought a 14B procedural motion in writing that resulted in the procedural order of October 13, 2017. Although not strictly required to do so, as a courtesy the respondent served the appellant with notice of the motion.

[13] Only in response to that motion, did the appellant finally take some steps. He filed an affidavit of Karen Pritchard sworn September 8, 2017 in which the appellant attempts, through his administrative assistant, to demonstrate there are no arrears of support owing. He alleges a number of payments made by his company should be credited to support payments he has been ordered to make.

[14] Through what he alleges is some "mix up" in the Superior Court, this affidavit he claims did not find its way to Paisley J. and accordingly – Paisley J.'s order is in error for, in effect, having been made without consideration of this evidence. The continuing record, which was before Paisley J. for this motion in writing, records

the fact that the affidavit was filed with the court and was therefore very likely before the judge when he made his order. While the preamble in the order doesn't refer to the affidavit, the draft order was prepared by the moving party's lawyer before she was aware that any responding materials would be filed. The appellant by the terms of the July 27, 2017 Horkins J. Order had no right to notice of the procedural motion in any event and was served merely as a courtesy. The moving party would have no reason to expect he would be filing materials – particularly in view of his history of non-compliance.

[15] The content of the Pritchard affidavit is highly contentious – much of the content on its face could not be considered support related. There was no opportunity given to cross-examine on its contents and perhaps most importantly, this is nothing more than an attempted collateral attack on previous support orders. It is also to be noted that the appellant unilaterally reduced his monthly support payments to \$1400 per month after Justice Horkins' July 27th order.

[16] In these circumstances we see no error in Paisley J. proceeding as he did. The appellant was given numerous chances to comply with and meet his obligations – he simply refused. Not until the very last minute did he take any steps to attempt to show he was not in arrears in respect of the support orders. He still had not complied with the obligations requiring financial production and unilaterally reduced his support payments. He remains in serious violation of a number of court orders.

[17] Even if Paisley J. proceeded in the absence of the Pritchard affidavit, it would have made no difference. All that affidavit does is record certain payments made by Venture the company – on behalf of the respondent and the children. There is no mention of any payments by the appellant personally of the amounts he was required to pay by court order.

[18] In this court he seeks to file as part of his appeal record, his affidavit sworn January 1, 2018. That affidavit was not before Paisley J. and should not have been contained in the appeal record.

[19] Long after this appeal was listed for hearing and one week before the appeal was to be argued, the appellant filed a fresh evidence motion.

[20] In the fresh evidence motion he files his own affidavit sworn March 13, 2018 – interestingly sworn a day after his motion to set aside the Paisley J. order, the same order which is the subject of this appeal, was dismissed by Kiteley J.

[21] In this affidavit he persists with his position that there are no support arrears owing because of amounts paid by the company to the respondent on behalf of the children.

[22] In this court, as he did on March 1 before Kiteley J., the appellant says “these materials were intended to prove that I had in fact, directly/ or indirectly, paid Angela considerably more than the ordered support ... and that there were therefore no arrears of support.”

[23] Similarly, as he did before Kiteley J. – he annexes his “new income report”, which he argues now make him fully compliant with the Horkins J. order.

[24] In paragraphs 30-34 of her reasons, Kiteley J. considers the Pritchard affidavit in some detail. Her observations are apt and we reproduce them here:

Based on the affidavit of Pritchard I make these observations. First, the affidavit was not from the Respondent. In a motion of such importance, it was critical that the Respondent provide first hand evidence, not rely on others.

Second, the affidavit did not provide any evidence that, before September 1, 2017, the Respondent had complied with the July 27 order or evidence that he had made any efforts to comply. Specifically, it did not provide proof of payment of arrears owed as of August 1, 2017 which, as indicated by Horkins J. at paragraph 62 were at least \$68,149.30. It did not indicate that he had retained an expert and the stage the expert was at nor did it include an explanation for failing to meet the deadline of September 1, 2017. It did not reference two costs orders in the amount of \$7500 and \$5000. In submissions, counsel for the Respondent conceded that the Pritchard affidavit did not respond to the specifics of the order made by Horkins J. Counsel conceded that the reader would “have to read between the lines that the evidence had any bearing on paragraphs 1(a), 1(c) and paragraph 4 of that order.”

Third, it demonstrates that the Respondent has no regard for the orders that had been made requiring *him* to pay support. Based on the contents of paragraph 3, this affidavit refers only to payments made by the corporation.

Fourth, it was prepared by an administrative assistant who had worked for the Respondent for approximately 6 months yet she had accumulated “intimate familiarity with the accounts, ledgers, receipts, payments and other

paperwork of Venture". As paragraph 4 of her affidavit indicates, some of the documents and information go back to 2011 and have no bearing on arrears that began to accumulate following the first order for support dated January 15, 2016. Some of the historic information may have been relevant to the motion heard by Horkins J. I observe as well that in paragraph 33, Pritchard purported to express an opinion about the capital needs of the corporation without any qualifications that would permit her to express such an opinion.

For those reasons, if the affidavit of Pritchard had been before Paisley J. when he considered the 14B motion, it would have had no impact. I am confident that he would have made the order striking the Respondent's pleadings and directing an uncontested trial. Accordingly, I decline to exercise my discretion pursuant to rule 25(19) to set aside the order dated October 13, 2017.

[25] We agree with those observations and would adopt them.

[26] Justice Kiteley then goes on to consider the recent expert's report the appellant also seeks to rely on to demonstrate that he is now fully in compliance with the Horkins J. order.

[27] Paragraphs 8, 9, 10 and 11 of his affidavit before this court are identical to paras. 38, 39 and 40 of his February 13, 2018 affidavit filed on the motion before Kiteley J.

[28] The fact remains that even in this court, the appellant remains non-compliant with the Horkins J. order. He has obtained an expert's report now – on his own time and terms – and long after the deadlines imposed. Even now in its letter dated February 27, 2018 RSM, the proposed expert for the appellant states:

...certain components of our analysis are preliminary pending receipt of further information. As additional information becomes available, we may update our analysis and the conclusions may be impacted substantially. (Emphasis added)

[29] Paragraph 11 of the letter is to the same effect.

[30] With this caveat, the report is in essence no report at all. His counsel advised the court that she has a letter from RSM in which their report is “finalized.” This only on the return of the appeal at the opening of argument.

[31] The only reasonable conclusion on all the evidence before this court is that the appellant simply does not accept that he is in arrears of support. In his view, payments made by his company, some going back a number of years before the support order was made, constitute compliance with those orders. He is mistaken. He remains in non-compliance to this date. He has had many, many chances to rectify his situation but refused to do so. If court orders are to have any meaning they must be respected.

[32] There is no merit to his appeal. The order of Paisley J. was reasonable and correct. We would not interfere with it. The appeal is dismissed. Costs of the appeal to the respondent fixed in the sum of \$14,000 inclusive of disbursements and HST.

“J. MacFarland J.A.”

“Grant Huscroft J.A.”

“I.V.B. Nordheimer J.A.”