

COURT OF APPEAL FOR ONTARIO

CITATION: Rubner v. Bistricher, 2020 ONCA 226

DATE: 20200317

DOCKET: C65323

Feldman, Pepall and Miller JJ.A.

In the Matter of the Appointment of a Litigation Guardian for Eda Rubner and *The Substitute Decisions Act, 1992*

BETWEEN

Joseph Rubner (also known as Yossi Rubner) and Marvin Rubner, in their capacity as Joint Attorneys for property acting under a Continuing Power of Attorney for Property granted by Eda Rubner dated January 12, 2003

Applicants/Respondents

and

Alexander Bistricher, Brenda Bistricher, Eda Rubner, in her personal capacity, in her capacity as a Trustee of the Bistricher/Rubner Family Trust, and in her capacity as Bare Trustee through Eda Rubner Realty a sole proprietorship in the Lower Fourth Joint Venture, Michelle Levinson and 975273 Ontario Limited

Respondents/Appellants

Anne Posno and Amy Sherrard, for the appellants, Alexander Bistricher and Brenda Bistricher

David Steinberg, for the respondent Brahm Rosen in his capacity as Litigation Guardian for Eda Rubner

Arieh Bloom, for the respondents Marvin Rubner and Joseph Rubner in their capacity as Joint Attorneys for Property of Eda Rubner

John Adair, for the respondent Joseph Rubner

Ian C. Matthews, for the intervenors on the appeal Mattamy (Sixth Line) Limited, Mattamy (Oak) Limited, Mattamy (Penlow) Limited, 1214850 Ontario Inc., Mattamy Realty Limited, Ruland Realty Limited, and Bratty BuildinG

Heard: November 28, 2018

On appeal from the judgment of Justice Frederick L. Myers of the Superior Court of Justice, dated March 22, 2018, with reasons reported at 2018 ONSC 1934, and from the costs order, dated May 14, 2018, with reasons reported at 2018 ONSC 3038.

COSTS ENDORSEMENT

[1] The parties have now provided written submissions following release of the court's decision on the appeal.

[2] The appellants and respondents have agreed that as success was divided, there should be no costs of the appeal.

[3] With respect to the costs of the summary judgment motion, the respondents submit that they are entitled to their costs, but on the partial indemnity scale (\$152,890.55) rather than the substantial indemnity ordered by the motion judge. The appellants submit that they are entitled to costs on the partial indemnity scale (\$100,000) of the application brought by the respondents as it was dismissed by the decision of this court.

[4] Dealing first with the appellant, Alex Bistricher, although he was fully successful on the appeal and all claims against him were dismissed, because the successful argument of bare trust was not argued on the motion but only on the appeal, we are satisfied that there should be no order as to costs of the summary judgment motion.

[5] For the appellant, Brenda Bistricher, the application against her was dismissed, but a number of findings made by the motion judge were not set aside, which had the effect of split success from a financial point of view. While she was found to be entitled to the funds in the disputed bank accounts held in trust, she is not entitled to any future distributions that were not held in trust. As success was divided, there will be no costs of the summary judgment motion as between the appellant Brenda Bistricher and the respondents.

[6] The litigation guardian seeks his costs of the appeal and the costs awarded to him by the motion judge from the appellants. The litigation guardian was aligned with the respondents and supported their position on the summary judgment motion and on the appeal. The only separate claim made against him was for an accounting of any funds received from the disputed bank accounts. That claim was dismissed by the motion judge and not pursued on the appeal. The litigation guardian is not entitled to any costs of the appeal. He is entitled to partial recovery of costs on the summary judgment motion fixed in the amount of \$40,000 inclusive of disbursements and HST.

“K. Feldman J.A.”

“S.E. Pepall J.A.”

“B.W. Miller J.A.”