

COURT OF APPEAL FOR ONTARIO

CITATION: Hategan v. Frederiksen, 2023 ONCA 57

DATE: 20230124

DOCKET: M53423 (C69160)

van Rensburg, Miller and Nordheimer JJ.A.

BETWEEN

Elisa Romero Hategan

Plaintiff (Appellant/Moving Party)

and

Elizabeth Moore Frederiksen and Bernie Farber

Defendants (Respondents/Responding Parties)

Joseph Kary, for the moving party

Alexi N. Wood and Lillianne Cadieux-Shaw, for the responding party Elizabeth Moore Frederiksen

Mark Freiman, for the responding party Bernie Farber

Heard: January 20, 2023

REASONS FOR DECISION

[1] The moving party commenced an action against the responding parties. On a summary judgment motion the action was dismissed and judgment on the counterclaim was granted in favour of the responding parties. The summary judgment decision was released on February 3, 2021. The moving party filed a

notice of appeal one month later. The appeal was dismissed by the Registrar in July 2021 because the appeal had not been perfected in time. The moving party eventually brought a motion to set aside the Registrar's order and to extend the time to perfect her appeal. Pardu J.A. dismissed the motion: 2022 ONCA 217.

[2] This is a motion under s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for a panel review of Pardu J.A.'s order. On a motion to review an order denying an extension of time to appeal, the moving party must satisfy the court that the motion judge (i) failed to identify the applicable principles; (ii) erred in principle; or (iii) reached an unreasonable result: *Oliveira v. Oliveira*, 2022 ONCA 218, at para. 5.

[3] The moving party acknowledges that the motion judge identified the relevant factors to guide her discretion: whether the appellant formed an intention to appeal within the relevant period; the length of and explanation for the delay; prejudice to the respondent; the merits of the appeal; and whether the "justice of the case" required the extension of time and order setting aside the dismissal: *Issai v. Rosenzweig*, 2011 ONCA 112, 277 O.A.C. 391, at para. 4. However, the moving party contends that the motion judge's decision was unreasonable because she erred in her assessment of the delay (including by attributing the delay entirely to her, rather than to the responding parties), and in her assessment of the merits of the appeal.

[4] We disagree.

[5] First, the motion judge carefully reviewed the evidence that was relevant to the moving party's delay at paras. 19 to 31 of her reasons. Although the notice of appeal was served and filed in March 2021 and the Registrar, after providing notice and an initial extension of time, dismissed the appeal for delay because it had not been perfected in July 2021, the motion materials were served in October 2021, and the motion was scheduled much later, and eventually argued in February 2022.

[6] Contrary to the moving party's arguments on the review motion, the communications between counsel do not show that any material delay was attributable to the responding parties, while the moving party was taking reasonable steps to avoid further delay and to bring on her motion. During the relevant time – that is after the notice of appeal had been delivered, and until and after the Registrar's dismissal, the responding parties urged the moving party to perfect her appeal and then to bring a motion (which they made clear they would oppose). It was up to the moving party to deal with the court to ensure that appropriate steps were taken, if she intended to proceed with her appeal. And, as the motion judge noted, even by the time the motion was argued before her, no appeal book had been prepared, there was no draft factum, and there was no indication as to when the moving party would be in a position to perfect her appeal.

[7] As such, there is no basis to interfere with the motion judge's reasonable conclusion that the moving party had not pursued the appeal with reasonable diligence, and her observation that the moving party's approach to the appeal was desultory.

[8] Nor is there any basis to interfere with the motion judge's conclusion that the appeal had little or no merit. She carefully reviewed the overall context of the action, the parties' positions before the summary judgment motion judge, the decision in the court below, and the grounds of appeal. She addressed the arguments of counsel for the moving party and assessed the merits of the appeal at paras. 45 to 60 of her reasons. Contrary to the moving party's submissions, there was no error in the motion judge's approach to the question of the merits of the appeal, and her conclusions are unassailable.

[9] In summary, after identifying the correct test for setting aside a Registrar's dismissal and extending time, Pardu J.A. exercised her discretion on the proper principles, she thoroughly canvassed and considered the evidence put before her, and she arrived at a decision that was entirely reasonable. Her reasons explain her conclusions that the moving party failed to pursue the appeal with reasonable timeliness, there was little merit to the appeal, the responding parties would be prejudiced if the appeal were allowed to proceed, and that the moving party was proceeding with evident malice. There is no error in her determination that the

overall justice of the case did not warrant an order permitting the appeal to proceed.

[10] For these reasons, the review motion is dismissed. Costs, inclusive of disbursements and applicable taxes, are payable by the moving party to the responding party Frederiksen fixed at \$7,500, and to the responding party Farber fixed at \$5,000.

“K. van Rensburg J.A.”

“B.W. Miller J.A.”

“I.V.B. Nordheimer J.A.”