2014 CarswellOnt 5584, 2014 ONSC 2362

Kalman v. Pick

Susan Kalman, Applicant and Andrew Pick and Anita Katz, Respondents

Ontario Superior Court of Justice

T. McEwen J.

Heard: April 3, 2014
Judgment: April 28, 2014
Docket: 05-84/12

Counsel: Kimberly Whaley, Heather Hogan, for Applicant

David Boghosian, for Respondents

Subject: Civil Practice and Procedure

Civil practice and procedure

***T. McEwen J.*:**

1 I am taking the liberty of releasing my reasons by way of a short endorsement given the fact that this matter is scheduled to proceed to trial on November 10, 2014 and a number of steps have to be taken in the interim over the next seven months.

2 Furthermore, by way of explanation, it must be noted that this is one of those few cases that has reached a level of acrimony so that several immediate orders are necessary to regularize the application. To date, there have been multiple motions before the court. The litigation has become oppressively expensive with the Respondents incurring over $50,000 in legal fees in 2013 and the Applicant spending approximately $75,000 over the same time period. In addition, the parties have been unable to agree on the most rudimentary and obvious points, including straight forward production requests, or even exactly what productions have been exchanged.

3 This level of animosity has increased to the level that in the motion before me the Applicant seeks approximately 30 orders while the Respondents seek approximately five orders. Both parties request contempt orders against each other over lack of productions as ordered by Moore J. on June 5, 2013. Collectively they seek over $100,000 in costs for this three-hour motion.

4 Given the above, I have advised the parties that I will take over case management of this matter.

5 In the interim, having heard the submissions of counsel and having reviewed the motion materials I am prepared to make the following orders:

(i) The Applicant seeks an order requiring the Respondents to Pass Accounts. The Respondents agree to do so but do not want to complete the task until 60 days before the trial date so that they would not have to do it on more than one occasion. The Applicant wants the Passing of Accounts to take place within 20 days. In my view, neither submission is realistic. The Respondents shall Pass their Accounts in proper form by May 31, 2014.

(ii) The Bank of Nova Scotia Trust Company shall be appointed to acts as Estate Trustee During Litigation ("ETDL"). It has filed a consent. The ETDL shall be appointed without the necessity of posting security. In this regard, the Respondents shall arrange for an orderly transfer of all Estate assets including s. 72 assets contemplated in the Order of Moore J. dated June 5, 2013.

I am aware that a court should not lightly interfere with the Testator's choice of Estate Trustee or Trustees but the simple fact of this case is that, as noted, a level of dysfunction has arisen that requires the appointment of the ETDL. To date, it appears that the Respondents bear most of the responsibility. At the end of the day, the trial judge will have to make significant findings of credibility. The current state of affairs at this time, however, is that the Respondents have not passed accounts as required, have not provided meaningful documentation on a number of occasions, and have provided conflicting evidence with respect to the disposition of the deceased's condominium, amongst other things, all of which endanger the administration of the Estate and is of concern to the Applicant who is the beneficiary.

The Respondents raised the issue of the unnecessary expense involved with having an ETDL. I disagree that this will result in unnecessary expense. In my view, given the excessive legal fees that are being generated, the appointment of an ETDL will likely result in savings to the parties in that the administration of the Estate can be done in an orderly fashion, without acrimony and suspicion. The estimate of the proposed cost provided by the ETDL is in the $25,000 to $30,000 range. This pales in comparison to the ongoing legal expense being incurred by the parties.

(iii) Since the capacity of the late George Pick is in dispute, it is reasonable to allow the Applicant, through her solicitor and/or the ETDL, production of the deceased's medical records from January 1, 2010 to the date of death, including OHIP records and the medical records of Dr. Mark Sager, Harry Rakovsky and the Toronto General Hospital. The cost is to be paid out of the Estate. If a review of these records leads to other relevant documentation, a further motion can be brought to the Court.

(iv) The Applicant is entitled to compel production of the solicitor records, notes and files related to the file from Kenneth Picov, Grant Gold, Harry Greenberg and Richard Pine. In my view, the records are, again, relevant and producible given the issues in dispute. The cost is to be paid out of the Estate. The Applicant also sought an order to examine the aforementioned lawyers. The lawyers were served with the materials and did not respond. In my view, however, it would be premature to order that they be examined until which time their files are reviewed and it is determined whether this is necessary. Once again, this is being done to reduce the ongoing legal expenses being incurred by the parties and bring some reasonableness to the proceedings.

(v) The Applicant shall be allowed to amend the Application so that one of the issues to be tried shall be: "What is the Last Will and Testament of the Deceased?"

No prejudice shall occur to the Respondents as a result of any such amendment, and given the lack of production to date, it is not entirely clear as to whether the July, 2011 Will is the only existing, valid Will.

(vi) With respect to the issue of productions, as noted, each side accuses the other of failing to make proper production as ordered by Moore J. It was impossible, in the time allotted at the motion, to parse through what was outstanding and what had been produced. As I indicated to the parties, they are to each, within seven days of receipt of this endorsement, to write to the other side advising what documents they require. The other side is to respond within 7 days indicating whether the documents had been produced in the past and if so, to identify when and how, and also to provide production of outstanding documentation within the same time frame. As I indicated to counsel, the straight forward exchange of productions should not degenerate into an exercise of putting the Court in a position where it has to determine what documents were in fact sent. Reasonable counsel should be able to ensure that such production requests are made and met within a reasonable fashion. Once this exercise is completed it can be determined if further production orders are warranted and whether the Applicant need deliver a sworn financial statement.

(vii) The Applicant seeks further interim support in a lump sum. The initial amount requested was $100,000 but this was later reduced during argument to somewhere in the neighbourhood of $42,000. Justice C. Brown J. made a previous funding Order by way of her endorsement dated January 14, 2013, the amount of $50,000 for legal fees and $10,000 for disbursements. In my view, one further modest funding order is reasonable for the same reasons set out by C. Brown J. No doubt, the actions of the Respondents have caused the Applicant to be put to additional legal expense. This coupled with the level of her income and her other living expenses has put her in some difficult circumstances. In all of the circumstances, I am ordering a further interim support payment in the amount of $25,000, on a without prejudice basis, pending the court disposing of the within Application. There is little, if any, risk to the Respondents as beneficiaries given the size of the Estate, the likelihood of the amount of award that the Applicant will receive, and the fact that she has assets capable of reimbursing the Respondents for any shortfall that may result from my Order and the Order of C. Brown J. The amount is to be paid within 30 days. I should add, however, that in my view, it is unlikely that any further funding orders will be necessary given the timing of the trial date and the fact that this matter is being placed into case management.

(viii) The contempt motions are dismissed. In my view neither side has proven contempt beyond a reasonable doubt on the record before me.

6 With respect to my orders above, I should note that I am fully cognizant of the dispute between the parties as to whether some of these matters were previously dealt with by Moore J. and as such are *res judicata*. Unfortunately, the parties did not produce to me whatever oral reasons Moore J. may have provided. Rather only his brief handwritten endorsement which indicates reasons were given, as well as a copy of his typewritten Order. Having reviewed these, it is my view that the aforementioned Orders do not constitute issues that were fully argued by Moore J. and rejected by him. Since the Applicant enjoyed greater success at the motion, she is entitled to her costs of the motion which I fix at $25,000 inclusive.

7 In future, neither party is to bring a motion without first arranging for and attending at a 9:30 a.m. meeting before me so that the subject matter of the motion can be discussed and proper scheduling provided.

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