ENDORSEMENT

Short Style Of Cause: 2676914 Ontario Inc. v. Aviva File No. DC-24-00000044

Date	Counsel	
November 19, 2024	M. D'Mello, for 2676914 Ontario Inc. o/a Prozone Auto Collision, **Appellant** **Email:** mdmello@kaniallawyers.com L. Clarence for Aviva Insurance c/o Arlin Peixoto, **Respondent** **Email:** **clui@ztgh.com**	Background The Appellant operates as an automobile storage and repair garage. The principal behind the enterprise is Mark Terenzi. The Respondent, Peixoto, is the owner of a vehicle that was towed to the Appellant's garage and stored there. On March 11, 2021, the Respondent began a s. 24 application pursuant to the *Repair and Storage Liens Act* (*"RSLA"*) against the Appellant, seeking to recover his vehicle. The Appellant subsequently commenced a s. 23 application under the *RSLA* for a determination of his rights regarding the seizure of the vehicle and associated costs. On June 14, 2022, the Respondent brought a motion on notice to dismiss the Appellant's s. 23 application on the basis that, pursuant to s. 23(2) of the *RSLA*, a s. 23 application concerning an amount of the lien cannot be brought after a s. 24 application. The Appellant did not attend the June 14, 2022, motion, nor did he file any materials. Deputy Judge Oliver ordered that the Appellant's action should be dismissed in favour of the prior action brought under s. 24 of the *RSLA*. On May 21, 2024, the Appellant brought a motion to set aside D.J. Oliver's order from June 14, 2022, stating he was not advised of the return date. By coincidence, the motion was heard by D.J. Oliver herself, by Zoom. She determined that the Appellant had actual notice of the return date by June 2, 2022, at the very latest. She also observed that the Appellant failed completely to address the merits of the issue before the court on June 14, 2022. She dismissed the motion. The Appellant now seeks to set aside the Order of May 21, 2024, of D.J. Oliver.

Issues on this Appeal

This Appeal raises essentially three issues:

1. Did the motion judge correctly determine that the Appellant had notice of the June 14, 2022, motion?
2. Does the Appellant have a meritorious defence?
3. Can the Appellant appeal on the ground of reasonable apprehension of bias?

Issue #1: Did the motion judge correctly determine that the Appellant had notice of the June 14, 2022 motion?

As the *Rules of the Small Claims Court* do not directly address situations where a party fails to attend a motion on the basis that the party did not receive notice, pursuant to R. 1.03(2) the motion judge properly referenced R. 37.14 of the *Rules of Civil Procedure* and found as a fact that the Appellant had notice of the June motion.

This conclusion was justified, as the motion judge relied on the evidence of both email correspondence between the Appellant and the Respondent's counsel concerning the June motion and screenshots of the Appellant's email inbox showing the Appellant's receipt of emails from the Small Claims Court on other matters. Those communications made it clear that the motion was scheduled for 11:00 a.m. on June 14, 2022.

Issue #2: Does the Appellant have a meritorious defence?

There is no merit to the Appellant's defence. In clear contravention of s. 23(2) of the *RSLA*, the Appellant commenced his s. 23 application under the *RSLA* after the Respondent filed a s. 24 application.

Further, the Appellant failed to bring the motion as soon as reasonably possible. He initiated the motion to set aside only after being advised of the Respondent's intention to enforce the

Court's order – approximately eleven months after the June 2022 motion.

Issue #3: Can the appellant appeal on the ground of reasonable apprehension of bias?

The May 2024 motion was conducted by Zoom. Importantly, Mark Terenzi, who operates the Appellant's business, personally participated in the Zoom session. However, he failed to raise the issue of bias before the motion judge.

A party seeking to challenge the presumption of impartiality has "the obligation to raise [the issue] with the judge below at the time." *Palkowski v. Ivancic*, 2009 ONCA 705 at para. 74. Once raised, the issue of a reasonable apprehension of bias is on the record, which can then be assessed by the reviewing court: *Palkowski*, at para. 74.

Where the issue of bias cannot be raised before the presiding judge, such allegations must be brought "as soon as is reasonably possible." A party cannot "stay still in the weeds" and then "pounce" once the matter is in appellate court: *Hennessey v. Canada (Attorney General),* 2016 FCA 180 at paras. 20- 21. Where a party delay raising the issue of bias, the genuineness of the apprehension becomes suspect. *Health Genetic Centre Corp v. New Scientist Magazine*, 2019 ONCA 977 at para. 11.

Here, aside from not offering any evidence to support the allegation of bias, the appellant failed to raise any objection at the motion. The issue therefore does not deserve review at the appellate stage.

Date	Counsel	

Conclusion

The motion is dismissed.

This appeal was utterly without merit and has consumed valuable court resources as well as putting the Respondent to considerable expense. In accordance with costs submissions received at the hearing, the Appellant shall pay the Respondent costs of $10,051.68 (inclusive of HST and disbursements) within 15 days.

Baltman J.

Released: November 19, 2024