CITATION: D'Mello v. Sapusak et al., 2023 ONSC 970
COURT FILE NO.: CV-22-2425, CV-22-2405
DATE: 2023 02 08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Roy D'Mello, Applicant

AND:

Chris Jamie Sapusak, The Honourable Justice Leonard Ricchetti, Respondents

AND:

RE: Roy D'Mello, Applicant

AND:

Chris Jamie Sapusak, Attorney General of Ontario, Attorney General of Canada, Respondents

BEFORE: Justice P. A. Daley

COUNSEL: R. D'Mello – Self-Represented (Not in Attendance)

J. Naumis – For the Respondent, Chris Jamie Sapusak

M. Chung – For the Respondent, The Honourable Justice Leonard Ricchetti and The Attorney General for Ontario

A. Karakolis – For the Respondent, The Attorney General of Canada

HEARD: January 26, 2023

JUDGMENT

Introduction:

[1] This decision relates to two pending applications before this court and motions by the respondents to have those applications dismissed or struck out.

[2] These applications have both been instituted by Roy D'Mello, who is a defendant in a civil action brought against him and certain corporations with which he is connected by the plaintiff Chris Jamie Sapusak under action number CV – 18 – 1310.

[3] The application instituted under action number CV – 22 – 2405 has been instituted against Sapusak, the Attorney General of Ontario (the "AG Ontario") and the Attorney General of Canada (the "AG Canada"). The application as against the AG Canada will be dismissed on consent of all parties in accordance with the terms of the consent and draft order submitted to the court on the return of the respondents' motions.

[4] The application instituted under action number CV – 22 – 2425 has been instituted against Sapusak and The Honourable Justice Leonard Ricchetti, Regional Senior Justice of the Ontario Superior Court of Justice (the "RSJ").

[5] The respondents in each of the applications have brought motions to dismiss or strike out in their entirety the applications. The motion brought by the AG Canada, as noted, will be resolved by a consent dismissal order.

[6] The motions brought by Sapusak, who is a respondent in both applications, will be adjourned, on consent, sine die to a date to be scheduled following the determination of the motions brought by counsel on behalf of the AG Ontario and the RSJ.

[7] As will be considered below, the application in proceeding number CV – 22 – 2405 was instituted August 23, 2022, and in summary D'Mello seeks various relief specifically regarding decisions made by Petersen J., in respect of the underlying civil action, including an order that she recuse herself, and that she is functus officio. He also seeks a declaration that he was denied a fair hearing, in

violation of the *Canadian Charter of Rights and Freedoms*, and that Petersen J.'s orders in the underlying action dated March 28, May 25 and July 22, 2022, should be set aside on that basis.

[8] As to the application under number CV – 22 – 2425, which was instituted on August 24, 2022, D'Mello seeks an order that the RSJ recuse himself from the proceedings in the underlying action. He further seeks production of the complete record surrounding correspondence between the RSJ, Shaw J. and the Law Society of Ontario ("LSO") relating to his former solicitor Paul Robson and a complaint made to the LSO.

[9] Upon the return of the respondents' motions before the court on January 26, 2023, counsel for the AG Ontario and the RSJ advised that he had received email correspondence from D'Mello on January 25, 2023, advising that he would not be in attendance upon the return of the motions and that he wished to request an adjournment.

[10] For the reasons set out below the adjournment request conveyed by counsel for the moving respondents, was denied and the motions were heard.

[11] For the reasons set out below, the motions on behalf of the AG Ontario and the RSJ were granted dismissing both applications in their entirety, without leave being granted to amend either application.

Adjournment Request:

[12] Upon the return of the respondents' motions, counsel for the AG Ontario and the RSJ advised that D'Mello had emailed him the day before on January 25 indicating that he would not be in attendance on the return of the motion "due to illness". He enclosed with an email a medical note. The email exchange between

counsel and D'Mello was produced to the court along with a copy of a document purporting to be a medical note.

[13] Counsel advised D'Mello, upon receipt of his emails, that he would seek instructions with respect to his adjournment request but advised that he did not anticipate receiving instructions prior to the return of the motions the following morning. On the morning of the hearing of these motions counsel advised D'Mello by email that he had received instructions to oppose any adjournment request.

[14] The email exchange between D'Mello and counsel along with the medical note were collectively marked as lettered Exhibit "A" for the purpose of identification on these motions.

[15] The note purportedly from D'Mello's physician is described as a "sickness certificate" and included the applicant's name and stated the "period of illness" to be from 25/01/2023 to 15/02/2023.

[16] The certificate contains three statements in respect of which the physician can provide a "yes" or "no" answer.

[17] The first statement reads as follows:

> This patient has presented to me seeking medical advice relative to ill health. On the basis of the history provided, the patient reported that they would have been required to have been off work during the time indicated above.
>
> – Answer: "Yes".

[18] The second statement on the certificate reads as follows:

> I can confirm the patient's illness based on the direct examination or management of the patient during the period indicated above.
>
> – Answer: "Yes".

[19] The third statement on the certificate reads as follows:

> Based on the information provided to me, the patient is capable to return to the work place or school.
>
> – Answer: “Yes”.
>
> The review of information may have included:
>
> Workplace Issues\Exposures
>
> Patient’s Medical History
>
> Current Health Concerns
>
> Objective Evidence (Signs/Investigational Data).”

[20] Although counsel for the moving respondents, as an officer of the court, provided the documents marked as Exhibit “A”, no admissible cogent evidence whatsoever was submitted to the court in support of D’Mello’s request for an adjournment of the pending motions.

[21] Furthermore, it is notable that the physician who completed the sickness certificate, namely Dr. Oluwole Adebajo, family physician, answered “yes” to the third referenced question as to whether D’Mello was “capable to return to the workplace or school.”

[22] Thus, even the material submitted in support of the request for the adjournment provided no evidentiary basis whatsoever for D’Mello’s request.

[23] The scheduling of the return date for the respondents’ motions on January 25, 2023, had been arranged several months prior to that hearing date.

[24] As the applicant D’Mello is self-represented, every effort was made to ensure that he was provided with ample time to prepare for the hearing of these motions and to file materials in response.

[25] At the request of counsel for the AG Ontario and the RSJ these matters came before the court on September 15, 2022, to be spoken to for the purpose of

the scheduling of the motions and time for filing of materials. It is notable that D'Mello did not attend before me on this date.

[26] At paragraph 6 of my endorsement released on September 20, 2022, I provided in respect of D'Mello that: "given that he is a self-represented party, I have concluded that it would be reasonable to allow more time than prescribed for the filing of a responding motion record." As such D'Mello was directed to serve and file his responding motion record by October 14, 2022, followed by his factum on October 21, 2022.

[27] D'Mello did not comply with the directions contained in that endorsement and chose to file no material in response to the respondents' motions.

[28] The scheduling of the return date of January 26, 2023, was coordinated with my administrative assistant, after the parties were provided with a selection of return dates available in my schedule. The hearing date chosen was agreed to by D'Mello and all other parties.

[29] Notably, I was advised by counsel for the moving respondents at the opening of the hearing of the motions that D'Mello had in fact filed fulsome application records in both applications on January 25, 2023. The application records filed in respect of the applications CV – 22 – 2405 and CV – 22 – 2425 are 488 pages and 178 pages, respectively.

[30] D'Mello had uploaded those application records to CaseLines the day prior to the return of the respondents' motions, without any notice to this court. In fact, D'Mello sought to have one of the applications returnable on the hearing date scheduled for the respondents' motions, however no such scheduling had been approved by the court.

[31] Furthermore, the application records submitted by D'Mello were not presented to the court as part of the evidentiary record to be considered on the return of the respondents' motions as is required by rule 37.10(1) of the *Rules of Civil Procedure*. Thus, there was no requirement to address or consider any of the material contained in the D'Mello application records as they did not form part of the motion record placed before the court on the motions to be heard.

[32] However, on examining the application records which were filed the day before the return of these motions, I found no evidence that indicated that D'Mello was of ill health or seeking an adjournment with respect to these pending motions.

[33] As to the considerations that should be examined when an adjournment request is made, in his decision in *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CanLII 13360, Perell J. addressed these at para 34.

[34] Several of the factors considered in that decision are relevant to the present circumstances including:

(A) the overall objective of the determination of the matter on its substantial merits;

(B) the circumstances of the request for an adjournment and the reasons and justification for the request;

(C) the practical effect or consequences of an adjournment on both substantive and procedural justice;

(D) the competing interests of the parties in advancing or delaying the progress of the litigation;

(E) the need of the administration of justice to orderly process civil proceedings; and

(F) the need of the administration of justice to effectively enforce court orders.

[35] Related to these considerations is delay in the underlying litigation caused by D'Mello and his co-defendants.

[36] In her decision of May 25, 2022, Petersen J. made important observations with respect to the extraordinary delay in the underlying action.

[37] The underlying action came before Petersen J. to determine whether a *Mareva* injunction was improperly obtained, whether that injunction should continue, whether the plaintiff should be required to post security for costs and who should be responsible for the costs of the motions before her.

[38] In the action, the plaintiff Sapusak asserts that D'Mello and the corporate defendants related to him are engaged in a fraudulent conspiracy, or alternatively, that D'Mello carried out an improvident sale of the properties in question in the underlying action.

[39] In considering the balance of convenience factor relating to the *Mareva* injunction Petersen J. specifically addressed the defendants', including D'Mello's, delay. She noted in part at para. 102:

> The defendants are responsible for the overwhelming bulk of the inordinate delay in this proceeding. As set out in my prior endorsement, after Dennison J. issued the temporary interlocutory *Mareva* injunction, the defendants were responsible for successive adjournments of the continuation dates of August 13, 2019, October 8, 2019, and May 13, 2020. After the *Mareva* continuation motion was argued before Shaw J. in July 2020, the defendants were responsible for further delays caused by their late disclosure of the Esposito property appraisal reports, their requests for postponements of the continuation of the hearing to the end of January 2021 and by their initiation of a motion to have Shaw J recuse herself – a motion with that was subsequently abandoned.

[40] Following her decision of May 25, 2022, Peterson J. awarded costs against the defendants on a substantial indemnity basis in the amount of approximately $124,000 payable to the plaintiff Sapusuk, which costs remain unpaid.

[41] It is evident to this court that D'Mello has no regard whatsoever for court orders, as is demonstrated by his egregious breach of the scheduling orders relating to these motions, including the requirements that he file any responding material within the generous deadlines that were provided to him. It is further evident that he is a rogue litigant who cannot be managed or sanctioned even by a very substantial costs award.

[42] D'Mello has shown absolute disregard for the court's orders.

[43] As was noted by the Court of Appeal in its decision in *R. v. S.M.C.*, 2023 ONCA 47, at para. 14:

> Our system of justice cannot operate effectively if directions and orders designed to advance a party's appeal are flouted and ignored. The conduct of this appeal was unfair to all justice system participants be they opposing counsel, members of the judiciary or court administration, complainants or other litigants wanting their cases heard.

See also *R. v. Villanti*, 2020 ONCA 436.

[44] As will be considered in detail below, I have concluded that there is no merit whatsoever to the applications which have been brought by D'Mello. There is no reasonable prospect at all that they could succeed in any degree, if allowed to proceed.

[45] The intended purpose of the applications is patently obvious and transparent; namely, to circumvent this court's rules of procedure and process and to continue the campaign of stonewalling and delay of the underlying civil action.

[46] While procedural fairness must be given a high priority, particularly where self-represented parties are involved, in the circumstances of these two applications, considerations as to procedural fairness should not take priority over the court's proper adjudication of these applications which have absolutely no merit whatsoever.

[47] As will be discussed below, facially the applications are both an abuse of process and have no basis whatsoever in law or procedure.

[48] In the application naming the RSJ as a respondent, no civil claim can be maintained against him, as alleged given his absolute immunity from personal liability in the exercise of his judicial functions*: Ahmed v. Ontario (Attorney General),* 2021 ONCA 427, at para. 6. See also *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, at paras. 50–57.

[49] Turning to the considerations from *Ariston Realty Corp. v. Elcarim Inc.*, the overall objective of determining these matters on their substantive merits favours denial of the adjournment request.

[50] Similarly, the circumstances of the request and the complete absence of any cogent and credible evidence as to D'Mello's health also favours denial of the adjournment request.

[51] Further, the practical effect of an adjournment would simply be to allow D'Mello to continue his campaign of stonewalling and delay in the underlying litigation with these meritless claims. Again, this conclusion favours the denial of the adjournment request.

[52] Finally, it is evident that D'Mello has no regard whatsoever for the orders and directions provided by this court and as such the needs of the administration

of justice in carrying out the orderly management of civil proceedings also favours the denial of the adjournment request.

[53] For these reasons, the adjournment request was denied, and the respondents' motions were heard in D'Mello's absence.

The Applications:

[54] The respondents' motions are brought pursuant to rule 21.01(1)(b) whereby they seek to strike out the applications on the ground that they disclose no reasonable cause of action. The respondents further rely upon the provisions of rule 21.01(3)(d) in seeking dismissal of the applications on the basis that they constitute an abuse of the court process.

[55] I am mindful of the principles set out by the Court of Appeal in *National Steel Car Limited v. Independent Electricity System Operator*, 2019 ONCA 929, at paras. 22 to 24, where it was noted that the threshold is high on a motion to strike out a notice of application under rule 21.01(1)(b), and it must be plain and obvious and beyond doubt that the applications cannot succeed. It was further noted that caution must be exercised on attacks of notices of application and that supporting affidavits are to be regarded as pleaded material facts for the purpose of such motions. I have applied this direction when considering the respondents' motions and when examining the application records which do not properly form part of the motion records.

[56] As already noted, no affidavit material was filed by D'Mello in response to these motions although more than ample time was provided for him to do so. For whatever strategic reason, he opted to file his substantive full application records in both proceedings rather than submit any affidavit evidence in response to the present motions.

[57] Even though the requirements of rule 37.10(1) were not complied with so that the two full application records would form part of the motion records before this court, given that the applicant is self-represented, and although not required to do so, I did review the affidavit evidence submitted in the applications proper.

[58] From my review of both application records, I have concluded that there is no evidence whatsoever that would properly bear upon the determination of whether the applications are an abuse of process or whether it is plain and obvious and beyond doubt that the applications cannot succeed as they disclose no viable claim or cause of action. The evidence adduced in those affidavits adds nothing to any position that could have been advanced by D'Mello in responding to these motions.

[59] Although the inherent and fatal flaws in each application overlap in terms of the applicable law, the moving respondents stand in distinct positions and have unique rights vis-à-vis D'Mello.

[60] I will briefly outline the essence of each application to put in context the conclusions I reach below.

CV – 22 – 2405: D'Mello v. Sapusak, AG Ontario, AG Canada

[61] In this proceeding the applicant is essentially appealing several decisions made by Petersen J. in the underlying civil action. All the allegations made relate to the procedural and substantive rulings Petersen J. made on motions on March 28, May 25, and July 18, 2022.

[62] All allegations and claims for relief are in respect of alleged errors, bias, or reasonable apprehension of bias on the part of Peterson J. No relief whatsoever is sought from either the AG Ontario or the AG Canada.

[63] Although the application as against the AG Canada will be dismissed on consent, it is notable that the applicant asserts that that respondent and the AG Ontario are responsible for the appointment of judges to the Superior Court of Justice and although no relief is sought from these respondents, it is the assertion that these government agencies are in some way responsible for the conduct of judges of the Ontario Superior Court of Justice.

[64] The application in this proceeding simply constitutes argument in the nature of an appeal from the various orders made by Petersen J. and as such the proceeding as framed cannot continue. The applicant is attempting to appeal the orders in question outside the proper and prescribed process as provided for in the *Rules of Civil Procedure*.

CV – 22 – 2425: D'Mello v. Sapusak and RSJ Ricchetti

[65] In this proceeding the applicant seeks two principal forms of relief: (1) an order that the RSJ recuse himself from proceedings in the underlying civil action CV – 18 – 1310; and (2) an order for production of the complete record of correspondence between the RSJ, Shaw J. and the LSO relating to a complaint to the LSO regarding Paul Robson, the applicant's former solicitor.

[66] The applicant is alleging that the RSJ acted with bias or a reasonable apprehension of bias in the way he case managed the underlying civil action.

[67] The applicant further pleads that he has filed a complaint with respect to the RSJ's judicial conduct with both the Ontario Judicial Council and the Canadian Judicial Council.

[68] Further it is stated by the applicant in the notice of application that a separate judicial review application has been instituted by him before the Divisional Court against the RSJ. That judicial review application pending in the Divisional Court

was not before this Court upon the return of the respondents' motions. However, even without reviewing the judicial review application, I can infer that it is another attempt by the applicant to circumvent the requirements of the *Rules of Civil Procedure* to further delay the underlying civil action. The inference I have drawn has no bearing on the determination of these pending motions.

Analysis:

ISSUE #1 – Should both applications be dismissed as collateral attacks in the underlying action and therefore as abuse of process?

[69] It is facially obvious that both applications constitute an abuse of process in that they are impermissible collateral attacks on decisions made by the RSJ and Petersen J.

[70] In accordance with the inherent jurisdiction of the Court and rule 21.01(3)(d) I have concluded that both applications constitute an abuse of process as collateral attacks on decisions made by both judges: *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, at para. 35.

[71] The rule against collateral attacks prevents parties from challenging the correctness or fairness of a previously issued court order in a separate proceeding. In other words, "a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed.": *Toronto (City)*, at para. 33.

[72] Furthermore, a motion for recusal shall be made to a judge being asked to recuse themselves. A party alleging bias or a reasonable apprehension of bias should bring a motion seeking a judicial officer's recusal at the earliest opportunity: *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 11.

[73] In each application D'Mello has attempted to circumvent the proper procedure seeking the recusal of a judicial officer by way of a standalone proceeding brought before another judge.

[74] Thus, I have concluded that both of the pending applications constitute an abuse of the court process and on that basis alone they should be dismissed.

ISSUE #2 – Should the application CV – 22 – 2405 be dismissed as against the Attorney General of Ontario?

[75] It is plain and obvious that, being concerned with prior judicial decisions, this application cannot succeed against the AG Ontario. As such those parts of the application should be struck out and the application dismissed as against the Crown as represented by the Attorney General of Ontario, pursuant to rule 21.01(1)(b): *National Steel Car Limited v. Independent Electricity System Operator*, 2019 ONCA 929, at para 24 (leave to appeal dismissed, 2020 CanLII 32277 (SCC)).

[76] The Executive branch of government cannot direct or otherwise influence how judges decide matters before them: *Bérubé v. Lajoie*, 2010 ONSC 1677.

[77] Furthermore, Superior Court judges are not servants or agents of the Crown as represented by the Attorney General of the Province of Ontario: *Bérubé* at para. 36.

[78] In the result the application involving the Crown as represented by the Attorney General of Ontario is struck pursuant to rule 21.01(1)(b) as it does not disclose a reasonable cause of action against the Attorney General.

Issue #3 – Should the application CV – 22 – 2425 be dismissed as against the RSJ?

[79] I have concluded that the application as against the RSJ lacks any chance of success whatsoever, as it is plain, obvious and beyond doubt that the application discloses no reasonable cause of action, as per rule 21.01(1)(b).

[80] As a Superior Court judge the RSJ has absolute immunity from suit in the exercise of his judicial functions: *Ahmed v. Ontario (Attorney General)*, 2021 ONCA 427, at para. 6.

[81] Judicial immunity is not limited to adjudicative acts; it extends to complaints made about lawyers' conduct to the LSO: *Hamalengwa v. Duncan*, 2005 CanLII 33575, at para. 11 (ON CA).

[82] The allegations of bias or a real apprehension of bias, even if taken as true, failed to demonstrate any real apprehension of bias that would warrant recusal. Furthermore, as noted already, any motion for recusal must be made in the underlying proceeding before the RSJ and not by way of an application.

[83] There is a high level of presumption of judicial impartiality that is not easily displaced: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at para. 25.

[84] The fact a complaint has been made to the Canadian Judicial Council about a judge's judicial conduct does not establish bias or a reasonable apprehension of bias, nor do adverse rulings made against a party do so: *Simon v. Feeney*, 2020 ABQB 641, at paras. 12–21.

[85] For these reasons, the application as against the RSJ must be dismissed.

Conclusion:

[86] In addition to dismissing both applications as they fail to disclose a reasonable cause of action and as both constitute an abuse of the court process, I have considered whether leave should be granted to the applicant to amend these applications.

[87] As I have concluded that neither application has any merit whatsoever and would never be successful if they were allowed to continue, I see no basis upon which leave to amend the applications could possibly be granted as no amendment could cure the fundamental defects in these applications.

[88] Thus, both applications are hereby dismissed without leave to amend them.

[89] The applications as they relate to the respondent Sapusak are adjourned sine die on consent to a date to be scheduled with me.

[90] Application CV – 22 – 2405 in respect of the AG Canada is hereby dismissed, without costs in accordance with the consent filed and in accordance with the form of the draft order submitted which shall be signed, issued and entered.

[91] With regard to the costs of the motions brought on behalf of the AG Ontario and the RSJ, counsel for those parties shall serve and file cost submissions of no longer than three pages, double spaced, along with a bill of costs within 15 days from the date of release of these reasons. Similar submissions shall be served and filed by D'Mello within 15 days thereafter.

Daley J.

Date: February 8, 2023

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JUDGMENT

Daley J.

Date: February 8, 2023