CITATION: Martin v. 11037315 Canada Inc., 2024 ONSC 1877
COURT FILE NO.: CV-20-0650-0000
DATE: 2024 03 28

SUPERIOR COURT OF JUSTICE – ONTARIO
491 Steeles Avenue East, Milton ON L9T 1Y7

RE: Kelly Martin, Applicant

AND:

11037315 Canada Inc., Respondent

BEFORE: Justice E. Chozik

COUNSEL: Dennis Van Sickle, for the applicant
Roy D'Mello, appearing for 11037315 Canada Inc., self-represented

HEARD: August 24, 2023

RULING ON MOTION

AND

REPORT ON REFERENCE

INTRODUCTION:

[1] In *Martin v. 11037315 Canada Inc.*, 2022 ONCA 322 [*Martin*] the Court of Appeal ordered a trial of an issue of the potentially *bona fide* sale of Kelly Martin's ("Martin") property by 11037315 Canada Inc. ("110") to 2670082 Ontario Corp. ("267"). The Court of Appeal also ordered a reference of the accounting between Martin and 110 pursuant to r.55.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] The principal of 110 is Roy D'Mello ("D'Mello"). He is also a lawyer. As the principal of 110, he was summoned by Martin as a witness at the trial of the issue.

That trial commenced before me on April 17, 2023 and, at the time of this hearing, was on-going.

[3] Although the trial of the issue and the reference are two separate hearings, they are under the same court file number. It is the same court file number that was originally assigned to Martin's application to set aside the default judgment heard by Gibson J. on December 10, 2020.

[4] On May 30, 2023, I set the reference to be heard on August 24, 2023. This date was set in consultation with the trial coordinator and with the consent of Martin and D'Mello.

[5] At the reference, D'Mello brought a motion on behalf of 110 as its self-represented principal and in his personal capacity, as a non-party. The relief sought on the motion was that, (a) I recuse myself for bias or because my conduct during the trial of the issue gave rise to a reasonable apprehension of bias, or, (b) that the reference be adjourned due to procedural irregularities.

[6] I dismissed the motion with reasons to follow. The reference proceeded. At the conclusion of the reference, I found that D'Mello owed Martin $354,197.58 plus pre- and post-judgment interest pursuant to s.130 of the *Courts of Justice Act*, R.S.O. 1990, c.43. I signed an Order prepared by Martin to this effect, and a copy of that signed Order was provided to both parties.

[7] These are my reasons for dismissing D'Mello's motion and the report on the reference.

BACKGROUND:

Foreclosure and Sale of Martin's Property:

[8] The factual background to this matter is set out in greater detail in the decision of the Court of Appeal in *Martin*, at paragraphs 7 to 35, as well the decisions of Gibson J. (*Martin v. 11037315 Canada Inc.,* 2020 ONSC 8087 ["*11037315 Canada Inc.*"]) and Kurz J. (*1614358 Ontario Ltd. v. 2670082 Ontario Corp.,* 2023 ONSC 1774 ["*1614358 Ontario Ltd.*"]).

[9] Briefly, in the fall of 2019, 110 obtained a default judgment for foreclosure against Martin. Her cheque of $650, meant for her mortgage payment, had been returned by the bank earlier that summer when her bank account was frozen because of a fraud investigation. Within 38 days of the default judgment (November 20, 2019), 110 sold Martin's property to 267.

[10] Martin did not know that 110 held her mortgage. She had a first mortgage with TD bank and obtained the second mortgage from a different numbered corporation, who then assigned it to 110 without notice to Martin. When her cheque bounced, no one made any demand for payment. She had provided post-dated cheques for a year's worth of payments, which no one ever cashed.

[11] Though she was served with 110's Statement of Claim, Martin did not know that 110 had obtained default judgment against her or that the judgment entitled 110 to foreclosure. Foreclosure, of course, is not the same as a power of sale. Foreclosure transfers title to the property. Martin thought the action was for a power of sale, to which she was agreeable. She tried to contact D'Mello, who was identified as 110's lawyer in the Statement of Claim, to discuss the power of sale but he never returned her calls.

[12] Martin did not know that within days of obtaining the default judgment, 110 sold her property. This property was her home. She had owned it and lived there since 2010. 110 sold the property to 267 for $425,000. This was $150,000 less than its market value, which was $575,000. There was about $160,000 owing on the first mortgage to TD Bank and about $65,000 owing on the second mortgage to 110, leaving approximately $350,000 in equity.

[13] As a result of the foreclosure and the sale of the property by 110 to 267, Martin's equity and life savings were gone. She learned of all this when Paul Smith, a representative of Apex Property Management ("Apex"), knocked on her door on January 31, 2020 to evict her from the home. She refused to leave.

[14] In the meantime, 267 encumbered the property. Its purchase of the property closed on January 8, 2020, at which time 267 registered a new first charge in favour of Autodome Ltd. ("Autodome") in the amount of $460,000. This was $45,000 more than the purchase price. That mortgage was subsequently replaced by two other mortgages: (i) a one-year charge registered on October 14, 2020 in the amount of $480,000 in favour of 1614358 Ontario Ltd. replaced the Autodome first charge of $460,000, and (ii) a one-year second mortgage registered on December 14, 2020 in the amount of $100,000 in favour of Ranjit Singh Pandher: see *Martin*, at paras. 29-30; *1614358 Ontario Ltd.,* at para. 3*.*

[15] 267 then defaulted on those mortgages, resulting in judgments being obtained against it. The property was sold as a result of 267's default and Martin was evicted from her home in March 2023, just before the start of the trial of the issue before me: *1614358 Ontario,* at paras. 1 and 12.

Decisions Setting Aside the Default Judgment:

[16] When she learned of the foreclosure and sale of her property in January 2020, Martin immediately hired a lawyer and brought an application to set aside the default judgment obtained by 110 and the sale to 267. The motion was heard on December 10, 2020 by Gibson J. The only parties present were Martin and 267. 110 did not deliver a notice of appearance or participate in the proceeding. Autodome delivered a notice of appearance but did not attend.

[17] Gibson J. set aside the default judgment: *11037315 Canada Inc.,* at para. 7.

[18] The decision of Gibson J. was upheld by the Court of Appeal in respect of 110. The Court of Appeal found at paras. 45-48 and 53, that:

- Through exercising its equitable jurisdiction, the court was able to reopen a foreclosure order based on the particular circumstances of a case;
- Gibson J. fully considered the relevant factors set out in *Winter v. Hunking*, 2017 ONCA 909 including:
    - Whether the set aside motion was made with reasonable promptness,
    - Whether there is a reasonable prospect of payment of the mortgage at once or within a short time,
    - Whether the applicant for the set aside order has been active in endeavouring to raise the money necessary,
    - Whether the applicant has a substantial interest in the property, or the property has some special intrinsic value to them,
    - Where the property has been sold after foreclosure, whether the rights of the purchaser will be unduly prejudiced;
- Gibson J. answered the overarching question, whether the equities in favour of setting aside the default judgment outweighed the equities against doing so, in the affirmative;

- Gibson J. was also correct in his alternative conclusion that the default judgment for foreclosure and possession should be set aside because it was irregularly obtained.

[19] The Court of Appeal ordered, at point 2 of paragraph 88, a reference of the accounting in respect of the proceeds of the sale of the property by 110, having deemed that Martin filed a notice desiring a sale to 267. The Court of Appeal ordered that "any references directed under this order be conducted by way of motions returnable in Milton or before a judge designated by the Regional Senior Judge for Central West Region" ["RSJ"]: *Martin*, at para. 88.

[20] The Court of Appeal also ordered a trial of the issue in respect of whether 267 was a *bona fide* purchaser for value without notice that Martin was occupying the property and may have had a claim to set aside the default judgment for foreclosure: *Martin*, at para. 88.

[21] All the affected parties, Martin, 267 and 110, were parties to that appeal.

The Trial of the Issue - A Brief History of D'Mello's Attendances Before Me:

[22] The trial of the issue commenced before me on April 17, 2023. It was scheduled for three days. D'Mello, in his capacity as the principal or director for 110, was a witness in that trial.

[23] A pre-trial conference was held on March 22, 2023 before Associate Justice Jolley. Since the Court of Appeal gave no direction how the trial of the issue was to proceed, it was determined that it would proceed as a quasi-application, based on affidavit evidence, with a brief examination-in-chief followed by cross-examination.

[24] The endorsement of Jolley A.J. also reflects that Martin intended to summon Anoop Dhillon, the real estate solicitor who acted for 267 on the sale of Martin's

property by 110 to 267. Jolley A.J. stated in her endorsement that Martin also intended to summon "Roy D'Mello, the representative of 110037315, who obtained title to the property by way of foreclosure and then sold it to 267". Jolley A.J. directed Martin to summon these witnesses immediately. Jolley A.J. dismissed Martin's request to adjourn the trial for discoveries.

[25] Hence, when the matter came before me for trial on April 18, 2023, no discoveries had taken place.

[26] Prior to the trial, Martin summoned Dhillon. Dhillon attended on the first day of the trial. He brought his file containing relevant documents as required by the summons. 267 waived solicitor-client privilege in respect of that file and Dhillon turned his file over to Martin's lawyer, Van Sickle, for examination. Dhillon was asked to return on April 19, 2023 to testify. He complied. He gave evidence at the trial. His testimony completed on May 25, 2023.

[27] However, as of the first day of trial, Martin had been unable to serve D'Mello with the summons. Efforts to serve him made by a professional process server were of no avail. Martin believed that D'Mello was evading service and asked for an order for substituted service of the summons by email. I granted Martin's request. The summons was returnable the next day, April 18, 2023.

[28] On April 18, 2023 D'Mello appeared before the court pursuant to the summons. He brought a small file of documents. Van Sickle asked to review those documents, and court was briefly stood down for this purpose.

[29] After reviewing the documents, Van Sickle advised that the documents did not contain any emails whatsoever in respect of the transaction at issue. He asked that D'Mello be directed to produce the complete file and, in particular, that he be directed to produce all of the emails he has in relation to the sale of Martin's

property to 267. I agreed and directed D'Mello accordingly. I also directed him to produce both a physical and electronic file, to which D'Mello agreed.

[30] The next day, on April 19, 2023 D'Mello returned before the court, with a banker's box. He advised that he retrieved his physical file but was unable to scan the documents to produce them to the parties. He did not produce any portion of an electronic file. Van Sickle was given an opportunity to review the documents in the banker's box.

[31] In D'Mello's absence, counsel for the parties agreed that D'Mello met the definition of an adverse witness for the purposes of r.53.07. I was also advised that D'Mello was represented by 267's counsel, Samir Chhina ("Chhina") in another proceeding.

[32] On April 20, 2023, the last date set for the trial, the trial was not completed. D'Mello's evidence had not begun. Further dates had to be set. I adjourned the matter to May 15, 2023 to set dates for the continuation of the trial. I remanded D'Mello pursuant to the summons to May 15, 2023.

[33] Based on discussions with counsel, I was satisfied that a production order needed to be made in respect of other litigation 110 or D'Mello or any other corporations he was the principal of were involved in. I was also satisfied that the production order extend to any litigation Karanpaul Randhawa was involved in.

[34] Dhillon testified that Randhawa was his articling principle and that he continued to work closely with him. There was evidence before me that the day before 267 offered to buy Martin's property from 110, a statement of adjustments was prepared to reflect the sale of Martin's property for the exact same amount to another corporation. The two statements of adjustments were identical, except for the name of the purchaser. Both also *pre-dated* the Offer to Purchase made by

267. Randhawa was named as the lawyer for the other purchaser in that statement of adjustments.

[35] Evidence also showed that the corporation purporting to buy Martin's property had been incorporated only days earlier by Paul Smith - the same Paul Smith who worked for Apex and later came to evict Martin from her home.

[36] On April 20th, I explained the next steps in the trial and the production order to D'Mello as follows:

> The Court: All right. Thank you for returning today. I am adjourning this trial to May 15th at 2:15 p.m. Okay? It is to be spoken to at that time. You are under, appearing here, pursuant to a summons. So, I am remanding you to May 15th at 2:15 p.m. It's not expected that you will testify at that time, but we will set dates at that time for further appearances, and I am ordering you to attend for that. A consequence of not attending before the court when you are remanded pursuant to a summons is a possibility of a warrant being issued for your arrest. Okay. I'm telling you that because that is a consequence that can happen, and so it's important you attend. Okay? In addition, I am making a further order. **You are to provide particulars of any litigation where you are named as a defendant, personally, or a corporation of which you are a principal is named as a defendant, or you are named as counsel for one of the parties, or in which Mr. Randhawa is named as a defendant, either personally or a corporation of which he is a principal is named as a party, or he's named as counsel.** Okay? **The particulars you are to provide include copies of any court orders that have been made, endorsements or decisions of the court that have been made, and the evidence filed with the court in respect of those proceedings if the evidence is within your possession and control.** You are to provide this information to both Mr. Chhina and Mr. Van Sickle by 4:30 p.m. on Wednesday April 26th. Since you don't have a pen and paper to write down what I've said, Mr. Chhina will email you what it is you need to produce. Okay?
>
> [Emphasis added]

[37] In the following exchange, I also explained to D'Mello that an order excluding witnesses had been made as follows:

> THE COURT: […] And I am making one further, well I've already made an order excluding witnesses. As part of the order excluding witnesses, you are not to discuss evidence that has been given in this proceeding with anyone. So that means you can't, you know, you're not to get the information about what has been said in his proceeding, and you are not to talk about the evidence in this proceeding with anyone. Do you understand?

MR. D'MELLO: Yes.

THE COURT: Okay. Do you have any questions?

MR. D'MELLO: No. I do not.

THE COURT: So thank you for attending today. I apologize for the inconvenience again, because I know you are taking time out of your busy schedule, but you need to return at 2:15 on May 15th. I expect that would be, you won't be testifying at that time, and it won't be very long that you're here. Hopefully we can resolve the dates of the next steps relatively quickly, so we won't keep you very long.

MR. D'MELLO: Okay.

THE COURT: Okay and thank you.

MR. CHHINA: Sorry, Your Honour, one more thing, his file, I understand has been, my friend's done with it. It's here. I don't need it. He can take it back as far as it's up to me.

THE COURT: I think it's a good idea that you take your file so that way you have it in case you need it to prepare for the trial.

[38] I ordered the transcripts of the directions and order I made, appended those transcripts to the endorsement and ensured that it was emailed by the registrar to the parties and to D'Mello.

[39] On May 15, 2023, D'Mello attended before the court. At that time, I set dates for the continuation of the trial for May 25, 30 and June 1, 2023. All dates were set in court, in consultation with the trial coordinator in chambers. This is a usual practice in Milton. D'Mello was present when these dates were set.

[40] On that day, Van Sickle advised that he had only received partial productions from D'Mello. I reiterated to D'Mello that the production of the documents regarding the other litigation involving him, 110, Dhillon *or* Randhawa was important. D'Mello expressed concerns that providing "an affidavit of documents" in respect of other proceedings would violate the deemed undertakings rule in r. 30.1.01(3). I explained to him that he need not produce the "affidavit of documents" from those other proceedings, but produce only that which

is already public record such as pleadings or endorsements. I also told him to advise counsel if he had any concern about disclosing a particular document in his possession. I reiterated that the deadline for the productions was 4:30 pm on April 26, 2023. It had already passed.

[41] On May 25, 2023, Van Sickle advised that he had still not received full production pursuant to the order I made. D'Mello was not present before the court that day. Van Sickle also advised that he had contacted the RSJ to request the appointment of a judge to hear the reference as ordered by the Court of Appeal, and that the RSJ had directed him to raise the issue before me in order for me to decide how to proceed. The email from the RSJ to Van Sickle was read and marked as lettered Exhibit E on the trial of the issue.

[42] Following a break, I advised the parties that I had spoken with the acting RSJ Tzimas and that she appointed me to hear the reference. I then directed Van Sickle to contact the trial coordinator to set a date for the hearing of the reference. The trial of the issue was adjourned to May 30, 2023

[43] On May 25, 2023 I made the following endorsement, and ordered that a copy of it be provided to D'Mello:

> Trial continued. Adjourned to May 30, 2023 at 10:00 am for continuation.
>
> The Applicant shall, by May 30, 2023 serve and file affidavit evidence in respect of the particulars produced by Mr. Demelo [*sic*] pursuant to the order I made on April 20, 2023. The affidavit shall be served on Mr. Chhina, counsel for "267" and on Mr. Demelo [*sic*] by email.
>
> Pursuant to prior directions given, Mr. Demelo [*sic*] is to attend before the court on May 30, 2023 at 10:00 a.m. At that time, he may be required to address whether he has complied with my order of April 20, 2023 and whether he is in contempt in the face of the court.
>
> The Applicant may file evidence at this trial of the various proceedings involving Mr. Demelo [*sic*], his corporations, Mr. Mangal, his corporations, Mr. Dhillon and Mr. Karanpaul Singh Randhawa by way of affidavit. I set no timeline and gave no direction in this regard today as the inherent requirements of the affidavit depend,

> in part, on Mr. Demelo's [*sic*] compliance with this court's order for productions of particulars made on April 20, 2023.
>
> The Applicant may also seek consolidation of the various proceedings by way of a motion with notice to all the parties, if she chooses. Mr. VanSickle indicated that this is not likely.
>
> Pursuant to the direction of the Acting Regional Senior Justice R. Tzimas, I am appointed to hear the reference directed by the Ontario Court of Appeal in this matter. The reference shall be scheduled through the trial coordinator at the next appearance.
>
> A copy of this endorsement shall be provided to the parties, including Mr. Demelo [*sic*].

[44] On May 30, 2023, I received the affidavit of Ula Swiezawska dated May 29, 2023. This affidavit set out what Martin said D'Mello produced and did not produce in response to my order of April 20, 2023. Martin took the position that D'Mello had not fully complied with my order.

[45] Van Sickle advised that he had discovered a total of eight other on-going mortgage actions in which D'Mello and/or 110 and/or another corporation of which D'Mello was the principal were named as defendants. These actions were proceeding in Brampton, Toronto and Hamilton. According to Van Sickle, as of the deadline I had set for productions, April 26, 2023, D'Mello had only disclosed two of those actions. As of May 15, 2023, and only in response to Van Sickle's inquiries, D'Mello produced documents for three more actions. One of these undisclosed actions also appeared to involved Apex Financial Corp. and Anthony Forgione (whose name had come up in the trial of the issue) and Shan Mangal, the principle of 267.

[46] Van Sickle made these submissions in D'Mello's absence. When D'Mello then came before me, I told him that I had reason to believe that he had not complied with my order of April 20, 2023 to produce certain documents by the April 26, 2023 deadline. I explained to him that the affidavit of Ula Swiezawska set out Martin's version of what he had and had not produced. A copy of that affidavit was

provided to D'Mello. I advised D'Mello that I intended to exercise the court's inherent jurisdiction to inquire into whether he had complied with my order of April 20, 2023 and, if he had not, whether he should be found in contempt of the court. D'Mello asked for an opportunity to consult with counsel, which I granted. The matter was adjourned to June 1, 2023.

[47] In my endorsement, dated May 30, 2023, I reiterated:

> Mr. D'Mello attended before the court today pursuant to a summons. He is a witness in the trial of an issue I am conducting as directed by the Court of Appeal for Ontario. As I explained to Mr. D'Mello, I am exercising the inherent jurisdiction of this court to embark on an inquiry into whether Mr. D'Mello is in contempt in the face of court for failing to comply with my order for production, made on April 20, 2023.
>
> The court received today the affidavit of Ula Swiezawska, dated May 29, 2023. It was served yesterday on both Mr. D'Mello and the Respondent, "267". It forms the evidentiary foundation for the inquiry into whether Mr. D'Mello is in contempt of court. To be clear, I make no findings as to contempt at this time.
>
> Mr. D'Mello shall have an opportunity to respond. He may consult with counsel in order to do so. Since a finding of contempt carries the possibility of imprisonment and is quasi-criminal in nature, Mr. D'Mello is entitled to constitutional and procedural safe-guards, including the right to silence. He may, but is not required to, file evidence to respond or choose to give evidence under oath or call other *vica voce* evidence. Today, he was advised that the court is embarking on this inquiry and the matter was adjourned to June 1, 2023 at 10:00 am in person for continuation to give him an opportunity to speak to a lawyer.
>
> Attached to this Endorsement is a portion of the transcript of April 20, 2023 containing the order and directions that I made in respect of the productions Mr. D'Mello was to make.

[48] Also on May 30, 2023, while D'Mello was before the court, Van Sickle indicated that he had not heard back from the trial coordinator about scheduling the reference for a hearing. The trial coordinator then joined the courtroom by Zoom and the date of August 24, 2023 for the reference was selected. Both Van Sickle and D'Mello agreed to that date.

[49] At that time, with D'Mello before the court, there was a discussion about the rules and procedures applicable to the reference. Van Sickle was of the view that the reference was proceeding under r.64.06 dealing with mortgage references generally and r.55 which sets out procedures on references. D'Mello heard Van Sickle's submissions. He took no issue with the rules or procedures discussed. He made no submissions and did not ask any questions, though I invited him to.

[50] I then set the timetable for the reference. I proposed that D'Mello file 110's accounts by June 30, 2023, Martin file any objections by July 21, 2023, and D'Mello file any answers by August 4, 2023. D'Mello agreed to this timetable. I invited both Van Sickle and D'Mello to re-attend before me should they require further direction in respect of the reference.

[51] In the endorsement of May 30, 2023, in respect of the reference, I stated:

> The Court of Appeal also directed a reference pursuant to rule 64.02 of the *Rules of Civil Procedure*. I have been assigned to conduct that reference by the Acting Regional Senior Justice R. Tzimas. The reference, though distinct from the trial of the issue, is under the same court file number.
>
> The date of the hearing of that reference is set for August 24, 2023 at 10:00 am in person (2 hours set aside).
>
> Mr. D'Mello shall serve and file his accounts by 4:30 pm on June 30, 2023. Ms. Martin, the Applicant, may serve and file any objections by 4:30 pm on July 21, 2023. Mr. D'Mello shall serve and file any response to the objection by 4:30 pm on August 4, 2023. If, once all of the materials have been served and filed, the parties require direction from the court, they may request a virtual appearance before me by contacting the trial coordinator.

D'Mello's First Motion for Recusal – At The Trial of The Issue:

[52] On June 1, 2023, Mr. D'Mello attended and was represented by Paul Robson. Robson had represented 267 at the pre-trial conference before Jolley A.J. Robson (and Samir Chhina, counsel for 267 at the trial of the issue). Both acted for 110 and 267 in this matter when it was before the Court of Appeal.

[53] Robson argued that I should recuse myself for bias. He argued that by inquiring into whether D'Mello had complied with the production order, my conduct evinced bias or gave rise to a reasonable apprehension of bias. He argued that there should not be any contempt proceeding, and, in the alternative, any contempt proceeding should be dismissed.

[54] While I did not accept Robson's arguments, I did not embark on any further inquiry or contempt hearing. Rather, I permitted D'Mello a further opportunity to comply with the April 20, 2023 order and produce the required evidence so that the trial of the issue could continue.

[55] In my endorsement dated June 1, 2023, I clarified that D'Mello was to produce the following:

1. The particulars of any of the litigation in which he is named a defendant or respondent either personally or in which a corporation of which he is the principal is named as a defendant or respondent in litigation. By "particulars" I mean the name of the case of the style of cause, the court file number if he has it and the jurisdiction where it is proceeding or has proceeded.

2. Any publicly available documents in the litigation described in paragraph 1 above, such as pleadings, court orders or endorsements or evidence if those documents are in his possession or control. He need not produce any evidence that has not been made part of the public record in the proceeding.

3. The particulars of any litigation he is aware of in which Mr. Randhawa is named as a defendant or respondent either personally or in which a corporation in which he is the principal is

named as a defendant or respondent in litigation. By “particulars” I mean the name of the case or the style of cause, the court file number if he has it and the jurisdiction where it is proceeding or has proceeded.

I clarified that:

4. D’Mello need NOT produce particulars of litigation in which he or Randhawa are counsel at this time, but may be asked to do so as the trial unfolds if it becomes relevant.

5. D’Mello is not required to produce particulars of any action that is not related to mortgage or financing proceedings (such as motor vehicle or family proceedings for example), or where he is the initiating party as the plaintiff or applicant.

[56] I adjourned the matter to July 4, 2023 to be spoken to for the purpose of ensuring that D’Mello had complied with the order so that the trial of the issue could continue. I invited the parties and D’Mello to request a virtual attendance before me at any time to address any issues with the production or other procedural matters. The trial was adjourned to August 4, 2023 for continuation.

[57] On July 4, 2023 counsel for Martin and 110 confirmed that they were ready to continue the trial on August 4, 2023. D’Mello was to testify that day.

[58] On August 4, 2023 the trial could not continue. D’Mello did not attend. He sent a note from a doctor stating that he was ill “from July 31 to August 7, 2023”. The trial was adjourned for continuation on October 12, 2023.

[59] On August 4, 2023 I made the following endorsement in respect of the reference:

> Under this same court file number is the Reference ordered by the Court of Appeal. That hearing was previously set to proceed on August 24, 2023. Mr. D'Mello was ordered to serve and file his accounts by June 30, 2023. None were served or filed. No extension of the deadline was sought by Mr. D'Mello, though the parties were invited to seek direction if they needed it. It is assumed, therefore, that he intends to file no material or accounts.
>
> On the Reference, Mr. Van Sickle and Mr. D'Mello shall attend before me on August 10, 2023 by zoom to be spoken to at 10:00 am.

[60] On August 10, 2023, Van Sickle and D'Mello attended before me to speak to the reference. 267 did not attend. D'Mello had served and filed this motion (for my recusal and adjournment of the reference), but had not served or filed any accounts or records related to the reference.

[61] I explained to D'Mello that I would hear his motion on August 24, 2023. I granted him a further extension to serve and file his accounts or any other materials he intended to rely on for the reference. I explained that if his motion is dismissed, the reference would proceed.

[62] I endorsed that:

> The timetable set for filing of materials on the Reference set out the deadlines. No materials on behalf of 11037315 have been served or filed on the Reference. No extension has been sought. **Mr. D'Mello submits that he needs one week to serve and file those materials. He shall have until Friday, August 18, 2023 by 4:30 pm to serve and file the accounts and any other materials he intends to rely on in respect of the Reference on behalf of 11037315.** No further extension shall be granted. This Order applies to 11037315, who is the named party in this proceeding. [Emphasis added]

[63] On August 24, 2023, I heard and dismissed this motion. The reference proceeded. D'Mello had not filed any accounts or made any claims. I made findings on the reference, as I set out orally and now in the report below. I signed an Order prepared by Martin setting out the particulars of my findings on the reference.

[64] On October 12, 2023, the trial of the issue continued. D'Mello testified. His testimony continued on October 23, 2023. The evidentiary portion of the trial

concluded that day. Closing submissions were heard on November 28, 2023. I reserved the decision on the trial of the issue.

POSITIONS OF THE PARTIES:

[65] On this motion, D'Mello took the position that he is a non-party entitled to relief. He argued that he is not a defendant and seeks a declaration to this effect. D'Mello argued that I must recuse myself from presiding over the reference because of bias, or because my conduct during the trial of the issue gave rise to a reasonable apprehension of bias. In the alternative, he seeks an adjournment of the reference for procedural irregularities.

[66] In particular, D'Mello argued that I should recuse myself from hearing this reference because:

a. As a witness in the trial of the issue, he and 110 have been excluded and therefore could not order transcripts of the proceedings in support of this motion;

b. I exercised my inherent jurisdiction to inquire whether D'Mello was in contempt of court;

c. I embarked on an inquiry into whether D'Mello breached a *Mareva* injunction made by Dennison J. on July 24, 2019;

d. I stated that D'Mello was a "defendant" in the reference;

e. I stated that a warrant would be issued for D'Mello's arrest if he did not attend the hearing on October 12, 2023.

[67] In the alternative, D'Mello argued that the reference be adjourned due to certain procedural irregularities, including lack of notice and non-compliance with the *Rules of Civil Procedure*.

[68] Martin opposed my recusal and an adjournment of the reference. She took the position that my conduct did not give rise to bias or give rise to a reasonable apprehension of bias. Rather, she argued, this motion is a tactic by D'Mello to attempt to delay what is otherwise a straightforward accounting for the proceeds of the sale of Martin's property required by 110.

[69] Martin did not disagree that D'Mello is a non-party – the reference is between Martin and 110. The trial of the issue is between Martin and 267. Any orders, including the order for production, were made against 110, not D'Mello personally.

[70] Martin submitted that any procedural irregularities did not require an adjournment of the reference.

ANALYSIS:

Legal Principles - Bias:

[71] The legal test for determining whether a trial judge's conduct evinced bias or a reasonable apprehension of bias was articulated by de Grandpré J. (dissenting) in *Committee for Justice and Liberty v. National Energy Board* (1976), [1978] 1 S.C.R. 369, at p. 394 as follows:

> What would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[72] This test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484

at para. 111. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including,

> the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold…. [T]he reasonable person should also be taken to be aware of the social reality that forms the background to a particular case,[…]
>
> [Citations omitted; Emphasis in original.]

[73] The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts: *R. v. MacMillan*, 2024 ONCA 115, at para. 77. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence: *R. v. Gager*, 2020 ONCA 274, at para. 153, leave to appeal refused, [2020] S.C.C.A. No. 444.

[74] As Benotto J.A. wrote in *MacMillan*, at para. 78, the application of this test is framed by: (i) a strong presumption of judicial impartiality, which accords judicial decision makers considerable deference on appeal; (ii) a high burden on the part of the party alleging bias; (iii) a contextual assessment of the alleged bias, i.e., the instances of alleged bias (e.g., inappropriate, unjustified, or improper comments) are not to be considered in isolation, rather, the question should be whether the alleged bias influenced the decision-making process; (iv) the broad discretion afforded to trial judges in exercising trial management powers to ensure a trial remains "effective, efficient and fair to all parties" (this includes the power to intervene to focus the evidence on material issues, clarify evidence, avoid irrelevant or repetitive evidence, dispense with proof of obvious or uncontested matters, ensure that the way a witness answers questions does not unduly hamper the progress of the trial, or prevent a trial from being unnecessarily protracted); and (v) the presence of a jury during the impugned conduct: see e.g., *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*,

2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 25-26; *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397, at para. 47-51; *Gager*, at paras. 144, 152-53.

Application: The Recusal Motion:

[75] With these principles in mind, I conclude that, whether viewed individually or cumulatively, the concerns raised by D'Mello on this motion do not establish bias or give rise to a reasonable apprehension of bias.

[76] I address each issue in turn.

(a) Is D'Mello a Non-Party or Entitled to Relief?

[77] D'Mello argues that I have named him personally and made orders against him personally, which reveals bias or gives rise to a reasonable apprehension of bias. I disagree. Any reasonable informed observer would understand that D'Mello's involvement in this matter is in his capacity as the principal for 110, which is self-represented.

[78] Rule 15.01(2) requires a corporation to be represented by a lawyer, except with leave of the court. Rule 15.03(2) requires a corporation to file a notice of appointment of a lawyer by filing Form 15B. 110 has not sought leave under r.15.01(2) or filed a form 15B. 110 never sought an opportunity to retain a lawyer either. Instead, with Martin's consent, I exercised my discretion to allow D'Mello to represent 110 as a self-represented person.

[79] D'Mello wears many hats. As I have set out, he is the principal of 110, the corporation which is a party to these proceedings. That corporation is a "witness" at the trial of the issue in the sense that it has custody of evidence relevant to the issues before the court. Since a corporation cannot testify or produce documents,

D’Mello, who controls the documents, is named as the witness and subject to the summons, but only in his capacity as principal of that corporation.

[80] D’Mello is also a lawyer. But he has been clear that he is not the lawyer representing 110. He has not appeared gowned at any time before me and has never signed in as its counsel. However, he has represented 110 as its lawyer at other times. For example, when he filed the Statement of Claim against Martin in this court and obtained the default judgment against her, his name was on the court documents as 110’s lawyer. He acts as counsel in a number of other matters before the courts.

[81] Despite his many hats, D’Mello is not personally a party to these proceeding. The trial of the issue is between Martin and 267. D’Mello appeared in that proceeding as a witness. The reference directed by the Court of Appeal is for an accounting by 110 to Martin. The party to the reference is therefore 110. D’Mello is involved in the reference as the principal for 110. Any remarks I made to or about D’Mello in these proceedings were not intended at D’Mello personally and could not reasonably have been mistaken as such. The directions and orders made in these proceedings were directed at D’Mello as the principal of 110.

[82] When the date for the hearing of the reference was set on May 30, 2023, I told D’Mello that he could appear on behalf of 110 as self-represented or he could retain counsel on behalf of 110. For 110, he chose to remain self-represented.

[83] D’Mello complains that in my endorsement of May 30, 2023 under the column titled “counsel” I named him as the “Defendant” in the reference. This was an obvious error. The registrar usually prepares that portion of endorsements. No reasonable person informed of all the circumstances would conclude that this slip somehow converted D’Mello into a defendant personally on the reference. Nor does this error establish bias or give rise to a reasonable apprehension of bias.

[84] To the extent that D'Mello brought this motion for my recusal on his own behalf as a non-party, it must be dismissed. All his submissions are therefore taken to be made by 110. He has not established that he ought to be given standing. As a non-party, Mr. D'Mello is not entitled to relief from this court. He has no standing to bring this motion in his personal capacity or to take any position on this reference in his personal capacity.

[85] He asks for a declaration that "Roy D'Mello" is not a defendant in any reference. There is no issue in this regard. I agree, and Martin agrees, Roy D'Mello is not a party to these proceedings. He is not the defendant in this reference. The reference is for an accounting of the proceeds of the sale of Martin's property by 110 to 267.

[86] This does not absolve D'Mello of his obligation to account as a principal of 110, nor does it intend to limit his personal liability in this application in any way. His personal liability at large is not for me to determine at this time. But naming him as the "defendant" or addressing him as "D'Mello" is not bias and does not give rise to a reasonable apprehension of bias.

(b) D'Mello's Purported Inability to Access Transcripts of the Proceedings:

[87] D'Mello argued that since he and 110 could not obtain transcripts of the trial of the issue because of the order excluding witnesses at the trial of an issue, I must recuse myself. He submitted that there may be further evidence of bias or evidence giving rise to a reasonable apprehension of bias, which he could not access. I do not accept this argument.

[88] D'Mello and 110 could have obtained transcripts of the proceedings in support of this motion. A witness exclusion order applies to evidence, not

discussions about the process or procedures for the reference or the trial of the issue.

[89] D’Mello has not adduced any evidence that he has been denied the ability to order transcripts of the trial of the issue. He has not sought any direction from me regarding ordering the transcripts. Had he asked, I would have allowed it. All the transcripts of each appearance were produced at my request and, had he asked, I could have easily reviewed those transcripts and, in consultation with the parties, had the relevant portions that did not include evidence produced to him.

[90] I find that D'Mello has not been denied the ability to access relevant documents in support of his motion.

[91] I have, out of an abundance of caution, reviewed all of the transcripts and find that there is no further evidence that could establish bias or give rise to a reasonable apprehension of bias of which D’Mello was not aware.

(c) The Contempt Inquiry at the Trial of the Issue:

[92] D’Mello argued that I exhibited bias when I embarked on an inquiry into whether he had complied with the production order I made on April 20, 2023 and whether he should be held in contempt. I do not agree. In my view, the inquiry into whether D’Mello had complied with my order was fully justified based on the information and evidence before me. No contempt proceeding was held. Moreover, the production order was necessary in order to compel the production of relevant evidence at the trial of the issue. This was especially so since no discoveries had taken place in advance of the trial.

[93] The ability of the court to control its own process and ensure that its orders are complied with is within the inherent jurisdiction of the court: *Canaccede Credit LP v. Schulz-Hallihan*, 2021 ONSC 4851, at para. 10. Contempt in the face of the

court may be broadly described as any word spoken or act done in, or in the precincts of, the court which obstructs or interferes with the due administration of justice or is calculated so to do. Conduct which amounts to contempt outside the court may be described in general terms as words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice: *Cowan, Re,* 2010 ONSC 3138, 68 C.B.R. (5th) 248, at para. 16.

[94] In *B.C.G.E.U., Re,* [1998] 2 S.C.R. 214, the Supreme Court of Canada held that in certain circumstances, a breach of a court order undermined a court's authority, and that even though the immediate parties chose not to proceed, the court could act on its own. There are many other instances where this authority has been upheld and acted upon: *Foothills Provincial General Hospital Board v. Broad et al.* (1975), 57 D.L.R. (3d) 758 (Alta. T.D.); *Churchman v. Joint Shop Stewards' Committee of Workers of the Port of London*, [1972] 1 W.L.R. 1094 (C.A.); *Con-Mech (Engineers) Ltd. v. Amalgamated Union of Engineering Workers*, [1973] I.C.R. 620; *R. v. United Fishermen and Allied Workers' Union* (1967), 63 D.L.R. (2d) 356 (B.C.C.A.).

[95] While the jurisdiction of the court is not unlimited, the court may exercise its inherent jurisdiction to control its process in a way that secures convenience, expediency, and efficiency in the administration of justice and do what is necessary to do justice between the parties: *Canaccede Credit LP*, para. 50. To this end, courts can, and do, prosecute contempt on their own motion, but generally only in the case of *in facie* contempt: *Cowan*, paras. 22 and 27.

[96] I find that a reasonable informed person would not conclude that I was biased in making an inquiry into whether D'Mello has complied with the order for

productions. Concerns about non-compliance or delayed compliance and resulting delays of the trial of the issue arose from the outset of the trial. For example:

a. D'Mello could not be summoned – an order for substituted service was obtained at the commencement of the trial;

b. When D'Mello attended in response to the summons, he did not bring any of the required documents;

c. When D'Mello initially produced his file to Van Sickle for examination, he produced only a partial file. He did not include any emails whatsoever in respect of the transaction in issue;

d. D'Mello told Van Sickle that he initially interpreted my order for production as requiring him to produce only those matter in which he, Dhillon and Randhawa were conjunctive defendants when this was obviously not the case;

e. The deadline for the productions was April 26, 2023. As of May 15, 2023 only partial productions had been made. As of May 25, 2023 only partial productions had been made. As of May 30, 2023 no further productions had been made.

[97] On June 1, 2023, D'Mello attended before the court. He was represented by Paul Robson on that day, who sought my recusal at that time. Rather than embark on a contempt hearing, I gave D'Mello a further opportunity to produce the required documents. The order I made on April 20, 2023 set a deadline of April 26, 2023. It was not satisfied until July 4, 2023.

[98] In the circumstances, I am of the view that a reasonable person fully apprised of the circumstances would not view the exercise of the inherent

jurisdiction of the court to inquire into whether its order was complied with as biased or as giving rise to a reasonable apprehension of bias.

[99] I am also of the view that the production order itself was reasonable and necessary in the circumstances. The critical issue at the trial of the issue was whether 267, or its principal Mangal, had actual knowledge of Martin's claims against 110. Mangal testified that he had done business with D'Mello before but denied having any knowledge of Martin's claims. He acknowledged that he purchased the property knowing that someone was living in it and that it was most likely the owner. He did not inspect the property before he bought it.

[100] Evidence of multiple proceedings involving D'Mello and his corporations, the connections between D'Mello, his corporations, Mangal, Mangal's corporations and their lawyers including Dhillon and Randhawa was potentially relevant to 267's state of knowledge. The fact that both Mangal and D'Mello used Apex Property Management and associated with Apex Financial Corporation was potentially relevant. Whether 267 was an arm's length purchaser was a live issue. Mangal's credibility, as well as Dhillon's, were at issue at the trial.

[101] At the trial of the issue, evidence was adduced that Martin's motion against 110 to set aside a default judgment improperly obtained was not the only case in which it was alleged that 110 abused the court's rules to improperly obtain default judgments to enforce its mortgages. Rather, the affidavit of Ula Swiezawska set out that there were at least eight such on-going actions against D'Mello, 110 and 9706161 Canada Ltd., one of D'Mello's other corporations. These actions involved many of the same peripheral players, and also included Mangal and his corporations.

[102] These on-going actions and applications included:

Title of Proceedings:	Court File No.	Jurisdiction	Notes:
Sapusak v. 9706161 Canada Ltd., Roy D'Mello, 11037315 Canada Inc., 1152729 B.C. Ltd., and Bangia Property Services Ltd.,	CV-18-131	Brampton	
Sapusak v. 1103 Canada Inc., Annageldi Dirdyev, Eric Saldana, First National Holding Corp., Parduman Kassiedass, Amritpal Singh, Alice D'Mello, Davinder Single	CV-19-118	Brampton	Karanpaul Randhawa counsel of record for 11039342 Canada Inc. Both Sapusak matters are case managed together. Both matters include *Mareva* injunctions dating back to summer of 2019.
Liscio et al. v. Solutions Real Estate and Financial Corporation, Roy D'Mello, Anthony Forgione, Apex Financial Corp., Douglas Rollo, 2859775 Ontario Inc., Shan	CV-21-671965	Toronto	2859775 Ontario Inc. is Mangal's corporation. Apex Property Management and Anthony Forgione are the property managers used by Mangal to evict Martin. Anthony Forgione is a former director of Apex

Mangal, and Grupal Singh			and is still involved with the company. Paul Smith, an employee of Apex, created a corporation in December of 2019 who appears to have tried to buy Martin's property from 110. His lawyer for that (aborted) purchase was Randhawa.
Jagdeo et al. v. 9706151 Canada Ltd., 2670082 Ontario Corp., and Roy Francis D'Mello	CV-18-00611696000	Toronto	970 is D'Mello's corporation. 267 is Mangal's corporation.
Di Tripani v. 9706151 Canada Ltd., Roy Francis D'Mello, 269133 Ontario Inc., and Anthony Forgione	CV-19-69777	Hamilton	269 is Forgione's corporation.
Shillingford v. 9706151 Canada Ltd., Roy D'Mello, 1107315 Canada Inc., 2224504 Alberta Corp., Haracharan Kaur, Apex Financial Corp.	CV-20-4357	Brampton	970 and 110 are D'Mello's corporations

Mebrahtu et al. v. 9706151 Canada Ltd., Jorawar Sandhar, 1102015 Canada Inc., Alice D'Mello, Roy Francis D'Mello, Haracharan Kaur	CV-18-607539	Hamilton	
Diarra et al. v. 115634599 Canada Corp. and John Doe	CV-22-374	Milton	D'Mello appears to be the lawyer of record for 115 Corp.

[103] Many of the same lawyers were involved in these various actions and applications. For example, Paul Robson and Samir Chhina acted for 110 and 267 on the appeal in *Martin*. Robson then appeared before me as D'Mello's lawyer on the recusal motion. Chhina acts for 267 on the trial of the issue. Randhawa acted for the non-party lender on the appeal in the Court of Appeal, as well as for Paul Smith's corporation on the aborted purchase of Martin's property. Dhillon acted for 267 on the sale of Martin's property by 110 to 267. He testified that he articled with Randhawa and continues to work closely with him.

[104] Further, based on the evidence at the trial of an issue and available caselaw, it is apparent that Robson was counsel for D'Mello in *Sapusak v. 9706151 Canada Ltd.*, 2023 ONSC 5122. Chhina was counsel for D'Mello in *Sapusak v. 9706151 Canada Ltd.*, 2023 ONSC 197 (Div. Ct.), *Sapusak v. 9706151 Canada Ltd.*, 2023

ONSC 196 (Div. Ct.). Randhawa represented a non-party, Ranjit Singh Pandher, in *Martin*.

[105] Randhawa and Dhillon were respondents in *Sheth v. Randhawa*, 2022 ONCA 89. In this same case, Robson represented other respondents. In *Sheth v. Randhawa*, 2022 ONCA 707, Randhawa and Dhillon were respondents and Chhina represented other respondents. Chhina and Randhawa represented different defendants in *Tang v. Xpert Credit Solutions Inc.*, 2023 ONSC 4580. Chhina and Randhawa were deposed during this matter, and it appears that Randhawa was represented at the deposition by Robson.

[106] In *Fatahi-Ghandehari v. Wilson*, 2022 ONSC 4799, Chhina took over in representing Wilson when Robson was suspended by the Law Society of Ontario. Affidavits proffered on Robson's motion for a stay in *Law Society of Ontario v. Robson*, 2022 ONLSTA 12, were made by Chhina and Randhawa.

[107] Robson and Chhina were both counsel for the plaintiffs in *Ntakos Estate v. Ntakos*, 2021 ONSC 2492. Chhina is counsel for the respondents, including Shan Mangal (the principal of 267 and a witness at the trial of the issue before me) in *Chan v. Mangal*, 2022 ONSC 2068. In the body of the judgment, Randhawa is also identified as a lawyer of Mangal's.

[108] Given this web, the production order I made was more than justified.

[109] In any event, no inquiry into contempt of court took place. D’Mello was given a further opportunity to comply with the order without the need for such an inquiry.

[110] Ultimately, whether or not D’Mello complied with the production order or his conduct at the trial of an issue has nothing to do with this reference. I am prepared to and have disabused myself entirely of the evidence and the events at the trial

of the issue. That evidence and events are unrelated to the issues on the reference, which is a straightforward accounting.

[111] Nothing I have heard or decided at the trial of the issue is of any relevance or assistance in respect of the reference. The ultimate issues are not the same and do not overlap whatsoever. The issue at the trial is whether 267 was a *bona fide* purchaser of Martin's property from 110. The reference is an accounting for the proceeds of the sale of the property, and nothing else.

(d) Inquiry into Whether D'Mello Breached a Mareva Injunction:

[112] D'Mello argues that I evinced bias or gave rise to a reasonable apprehension of bias by embarking onto an inquiry into whether he breached a *Mareva* injunction. As of the date of the hearing of this motion, the court has not embarked on any such inquiry. Evidence was adduced at the trial of the issue that at the time of the sale of Martin's home to 267, D'Mello and 110 were subject to a *Mareva* injunction made by Dennison J. on July 23, 2019. This prohibited D'Mello and 110 from dealing with any assets when he sold Martin's property to 267. No further evidence was heard in this regard and no inquiry was made. Unless Mangal knew about the *Mareva* injunction, it is not relevant to the issues at trial.

(e) My Endorsement that D'Mello Is a Defendant in the Reference:

[113] As I set out in para. 83 above, identifying D'Mello as a defendant in the reference in a brief endorsement is of no consequence. No reasonable informed person would conclude that I was biased as a result, nor would this typographical error give rise to a reasonable apprehension of bias.

(f) The Caution that a Warrant for Arrest Could Issue for a Witness who Does Not Attend Court Pursuant to a Summons:

[114] D'Mello argued that I evinced bias or gave rise to a reasonable apprehension of bias because I noted, in an endorsement dated August 4, 2023, that a warrant could issue for his arrest if he did not attend at the trial on October 12, 2023. I observe that I also said that a warrant could issue for the arrest for a witness who does not attend for trial on the very first day D'Mello appeared before me as a witness.

[115] A warrant can issue for the arrest of any witness who does not appear when summoned or fails to produce documents in response to a summons or subpoena: r.53.04(7). As a trial judge, it is my obligation to explain relevant procedures to self-represented litigants. This is especially true where the failure to comply could result in serious consequences, such as a warrant being issued.

[116] In my view, there was good reason to caution D'Mello as to the consequences of not complying with court rules. It was not the first time D'Mello was cautioned by this court. In *D'Mello v. Sapusak et al.*, 2023 ONSC 970, Daley J. commented on D'Mello's claimed illness and whether he was too sick to attend court or was simply attempting to prolong proceedings. Daley J. made the following findings in respect of D'Mello's conduct:

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

[117] In another case, *D'Mello v. Sapusak*, 2023 ONSC 3088, Daley J. said the following:

> [15] As set out in my earlier decision, both applications constituted proceedings in the nature of appeals and were collateral attacks on the orders made in the underlying action and therefore I concluded they were an abuse of the courts process.
>
> [16] That conclusion applies equally to the respondent's present motions in both applications.
>
> [22] The applicant is a lawyer licensed to practice law in Ontario and from the history of these proceedings and the underlying litigation, it is evident that he is entirely familiar with the intricacies of the Rules of Civil Procedure.
>
> [23] Apart from my conclusions that the applications constitute an abuse of the court process and further that they had no hope of success, these ill-conceived applications are not proceedings that are otherwise authorized to be instituted as applications under Rule 14.05 and on that basis as well the applications must be dismissed.

[118] In the case before me, D'Mello could not be served with the summons. An order for substituted service by email had to be obtained. He did not really comply with any order I made or the timelines I set. He did not attend on the day he was supposed to testify. The trial was adjourned repeatedly, in part because of his actions. 267 often expressed concerns with the pace of the trial.

[119] Concerns about D'Mello's non-attendance were not unreasonable in the circumstances. Concerns about further delays of the trial because of his non-attendance and non-compliance were not unreasonable in the circumstances. It was important that D'Mello understood the potential consequences for non-compliance and non-attendance.

[120] In my view, setting out the potential consequences for non-compliance with court directions or non-attendance when summoned as a witness does not reveal bias or give rise to a reasonable apprehension of bias in the mind of a reasonable informed observer of the circumstances.

[121] For all of these reasons, I declined to recuse myself.

Procedural Irregularities:

[122] Mr. D'Mello argued that the reference should not proceed because:

a. 110 was not properly served with a Notice of Motion in accordance with the *Rules of Civil Procedure*;

b. The scheduling of the reference was not done through the trial coordinator;

c. The rules and/or statutory provisions upon which Martin relies were not stated;

d. D'Mello did not have a copy of the direction or endorsement of Tzimas J. who assigned me to hear the reference in her capacity as the Acting Regional Senior Justice for Central West Region;

e. As a self-represented litigant, he needed more time to consider his position and retain counsel.

[123] I did not accept these arguments.

[124] In my view, 110 was put on notice of the reference by the decision of the Court of Appeal in *Martin*. The reference was directed by the Court of Appeal. All of the affected parties, including 110, were parties to that appeal. Neither 110 nor D'Mello could have been under any misapprehension what the reference was for or what rule it was proceeding under.

[125] The Court of Appeal's direction in respect of the reference was clear: it could proceed ***either*** by motion ***or*** by appointment of a judge to hear the reference by

the RSJ at the request of either party. There is nothing in the *Martin* decision of the Ontario Court of Appeal directing the reference requiring a notice of motion be served if a judge was appointed by the RSJ to act as the referee.

[126] D'Mello could not have been under any misconception as to the rules in respect of the reference. The Court of Appeal stated that the reference was pursuant to r.55.04. D'Mello was also present before me on May 30, 2023 when the rules were discussed. The correct rule for the reference is r. 54.02. My endorsement states r. 64.02. This is an obvious typo. D'Mello could not have been misled by it because the rules and the process were discussed in his presence. He took no issue with the applicable rules during that discussion and did not ask any questions though he given an opportunity to do so.

[127] As I have already set out, D'Mello is a lawyer. He advised me that he is a lawyer in good standing with the Law Society of Ontario. I find that he is familiar with the *Rules of Civil Procedure*. His name appears as the lawyer for 110 on the Statement of Claim against Martin and he moved for default judgment against Martin on behalf of 110. He also acts as a lawyer in at least come of the other court proceedings of which I am aware. I am confident that he understands civil litigation and how to use the rules.

[128] Ordinarily, when a reference is ordered, the party having carriage of the reference seeks an appointment before the referee for a hearing for directions: r. 55.02(1). Once that appointment is obtained, a notice of hearing for directions is served on all parties to the proceeding at least five days before the hearing "unless the referee directs or these rules provide otherwise": r. 55.02(2).

[129] The formality of r.55.02(1) and (2) was unnecessary in the circumstances. The Court of Appeal ordered the reference and put 110 on notice of this by virtue of its decision. Acting RSJ Tzimas appointed me as the referee and I advised the

affected parties (Martin and 110) of this when they were both before me in court. A date for the reference was canvassed with both Martin and 110. D'Mello agreed to the date in his capacity as the principal of 110.

[130] As a lawyer, D'Mello was reasonably aware that he was entitled to request an opportunity to obtain independent legal advice for the corporation. He did not raise any concern about scheduling the reference without having consulted or retained a lawyer. He subsequently consulted and retained a lawyer, Robson, who attended before me on the first motion for recusal. Neither Robson nor D'Mello raised any concerns about the reference at that time. D'Mello had almost three months from the time the reference was set for hearing until the hearing to consult with a lawyer or retain one. He chose not to.

[131] D'Mello agreed to the timetable I set for the service and filing of his accounts. As a lawyer, he ought to have been aware of the consequences of agreeing to a timetable on behalf of 110. He did not request to have a timetable put over to a further hearing for 110 to retain a lawyer to be present.

[132] 110 did not comply with the agreed upon timetable. There was no request to extend the deadlines I ordered. On August 10, 2023, I asked D'Mello if he needed more time for 110 to file its accounts. D'Mello said that he needed a week. I granted him that extension, to August 18, 2023, but D'Mello still did not serve or file any accounts or other materials on the reference. I find that that D'Mello's failure to file any accounts was an attempt to delay the reference and obstruct it from proceeding.

[133] Having been appointed as the referee, I fixed a date for the hearing of the reference. Both Martin and 110 agreed to the date. I proposed a timetable for service and filing of materials. Martin and 110 agreed to the timetable. 110 did not comply with the timetable. I granted it an extension. It still did not comply with that

deadline. The reference proceeded without any accounts from 110. There is nothing unfair about this process.

[134] In all of the circumstances, I am not satisfied that there were any procedural irregularities in how the reference was set down for hearing or how it proceeded. In the alternative, any procedural irregularities did not warrant an adjournment of the hearing.

CONCLUSION ON THE MOTION:

[135] For these reasons, the motion to recuse myself and, in the alternative, adjourn the reference, was dismissed.

REPORT ON THE REFERENCE:

[136] On August 24, 2023, at the conclusion of the hearing of the reference, I provided my report orally, with a written report to follow. The following is the written report.

[137] Pursuant to r. 64.06(16), the referee must set out in his or her report the following:

a. the names of,

   (i) all persons who were parties on the reference,

   (ii) all subsequent encumbrancers who were served with notice of the reference, and

   (iii) all subsequent encumbrancers who failed to attend on the reference and prove their claims;

b. the amount and priority of the claims of the parties who attended and proved their claims on the reference, and the report shall show those parties as the only encumbrancers of the property; and

c. the date on which the report was settled.

[138] The parties to the reference were Martin and 110. Notice of the reference, as I set out above, was given to Martin and 110. Both Martin and 110 attended at the reference. No one else attended at the reference. There was no evidence of any claims on the reference. Martin acknowledged, however, that she owed $71,055.78 to 110 at the time of the sale of her property.

[139] 110 sold the property to 267 for $425,000. There is no claim by 110 for any costs or expenses associated with that sale. There is no evidence of any loans, mortgages or encumbrances 110 paid to sell the property. There is no evidence of any fees, legal expenses or other costs. Therefore, I find that 110 has not proven any claims or additional amounts owing to it on the reference.

[140] Prior to the reference, D'Mello, on behalf of 110, emailed a document with some figures to Van Sickle but it was marked without prejudice. No supporting documentation in respect of those figures was provided. I give no effect to the document. It was not properly adduced in evidence or put forward by 110 on the reference.

[141] Based on the unchallenged evidence before me, I found that 110 was owed $71,055.78 by Martin. When I deduct that amount from the sale proceeds as adjusted of $425,253.36 obtained by 110, the balance owing is $354,197.58. I therefore found that 110 must pay to Ms. Martin $354,197.58 plus pre and post judgment interest.

[142] Ordinarily on a reference, Martin (who has carriage of the reference) would prepare the draft report: r. 55.02(20) and serve it on 110, and file a copy with proof of service: r.55.02(21). The parties would then fix a date to settle the report on notice: r. 55(19)-(21) before the referee. The referee would then confirm the report by signing it. Once the report is signed, since the Court of Appeal did not require

any report back, it would be confirmed within 15 days of service by operation of r. 54.09(1). It would then be entered and issued: r.59.05(1). See also *Exteriors By Design v. Traversy*, 2012 ONSC 6369, at paras. 53-57. The report would then take effect as a judgment.

[143] In my view, it is not strictly necessary to follow these procedures in this case. The Order I signed at the conclusion of the hearing conforms in substance to this report. I have already settled it, signed it and a copy was already provided to D'Mello. Within 15 days from the release of this decision, it may be entered and issued. This is the most expeditious and least expensive process to achieve a just result between the parties, which is what the *Rules of Civil Procedure* intend: r.1.04(1).

[144] In conclusion, I found on the reference that 110 owed Ms. Martin $354,197.58 plus pre- and post-judgment interest pursuant to s. 130 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. The Order I signed shall within 15 days be entered and issued and take force as a judgment.

COSTS:

[145] At the conclusion of the hearing on August 24, 2023, I invited Martin and 110 to settle the issue of costs of the motion and reference. Failing that, I invited the parties to make written submissions with respect to the costs. The deadline for completing the costs submissions was September 8, 2023. 110's submissions on costs were to have been served and filed by 4:30 pm on September 6, 2023.

[146] To date, no submissions in respect of costs were received from 110.

[147] Martin, as the successful party on the motion, is entitled to her costs of the motion. She seeks costs in the amount of $9,023.33 on a substantial indemnity

basis. She is also entitled to her costs of the reference, which are included in this quantum.

[148] Rule 57.01 of the *Rules of Civil Procedure* lists the various factors to be considered in fixing and awarding costs. The court is directed to consider, amongst other things:

- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed,
- the amount claimed and the amount recovered in the proceeding,
- the complexity of the proceeding,
- the importance of the issues,
- the conduct of the parties, and
- whether any step in the proceeding was improper, vexatious, or unnecessary, or taken through negligence, mistake, or excessive caution.

[149] The court has a broad discretion in fixing costs under s. 131 of the *Courts of Justice Act*. In *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 24-26 and 38, the Court of Appeal held that costs must be fair and reasonable and within the expectation of the parties. Proportionality is a governing principle and must be considered by the judge fixing costs.

[150] In fixing costs, my objective is to consider the factors set out in r. 57.01 and identify an amount that is fair and reasonable. Specifically, I must identify an amount that is fair and reasonable for an unsuccessful party to pay in these

particular circumstances, rather than an amount fixed by the actual costs incurred by Martin.

[151] Martin argues that the court should express its disapproval of 110's failure to abide by a litigation timetable on the reference to which it had consented. While I agree in principle, the reality is that 110's failure to file any accounts benefitted Martin. As a result, I decline to impose costs on a substantial indemnity scale.

[152] With respect to quantum, 110 did not take issue with the costs sought. 110 did not file a costs outline, so there is nothing to compare or to suggest that Martin's costs are either unreasonable or disproportionate.

[153] The issues on this reference were straightforward, but extremely important to Martin. As a result of the default judgment improperly obtained by 110, she lost her home and all of the equity in it. She lost her life's savings. The accounting for the sale proceeds was critical to her. As I have said, I disabused my mind of the evidence of D'Mello's conduct in all of the other proceedings.

[154] On the unchallenged or undisputed materials before me, I am satisfied that the quantum of costs sought by Martin is reasonable in the circumstances.

[155] Costs are awarded on a partial indemnity scale in the amount of $6,015.56 for this motion and reference.

[156] 110 shall pay costs of the motion and the reference to Martin of $6,015.56 inclusive of disbursements and HST forthwith.

Chozik J.

Released: March 28, 2024

CITATION: Martin v. 11037315 Canada Inc., 2024 ONSC 1877
COURT FILE NO.: CV-20-0650-0000
DATE: 2024 03 28

ONTARIO

SUPERIOR COURT OF JUSTICE

Kelly Martin, Applicant

– and –

11037315 Canada Inc., Respondent

RULING ON MOTION

AND

REPORT ON REFERENCE

Chozik J.

Released: March 28, 2024