

COURT OF APPEAL FOR ONTARIO

CITATION: Martin v. 11037315 Canada Inc., 2025 ONCA 44

DATE: 20250121

DOCKET: M55466 and M55636 (COA-23-CV-1089)

Paciocco, Monahan and Wilson JJ.A.

BETWEEN

Kelly Martin

Applicant/Respondent

and

11037315 Canada Inc.*, 2670082 Ontario Corp. and Autodome Ltd.

Respondents/Appellant*

Roy D'Mello, for the appellant

Dennis Van Sickle, for the respondent

Heard: January 17, 2025

On appeal from the endorsement and the order of Justice Erika Chozik of the Superior Court of Justice, dated August 24, 2023, with reasons and report on reference reported at 2024 ONSC 1877.

REASONS FOR DECISION

[1] The appellant filed a notice of appeal seeking to set aside orders resulting from a reference under rr. 54 and 64.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The respondent seeks to quash the appeal on the basis that an appeal does not lie directly to this court from such orders. The appellant opposes the motion to quash and brings a cross-motion to extend time to perfect the appeal.

[2] At the conclusion of the hearing, we advised that the motion to quash was granted, with reasons to follow. These are our reasons.

Background

[3] The factual background to this matter is complicated and has already resulted in an earlier appeal to this court: see *Martin v. 11037315 Canada Inc.*, 2022 ONCA 322, 161 O.R. (3d) 401 (“*Martin v 110, 2022 ONCA*”). By way of overview, in 2019 the respondent obtained a second mortgage on the subject property, which was her personal residence, for about \$65,000. She provided post-dated cheques for the monthly \$650 payments due under the second mortgage.

[4] In June 2019 the respondent’s bank account was defrauded and subsequently frozen for a short period of time. As a result, the bank did not honour the respondent’s cheque for the June 15, 2019 mortgage payment. On July 22, 2019, without notice to the respondent, the holder of the second mortgage assigned the mortgage to the appellant. On November 20, 2019, the appellant obtained a default judgment and, on December 5, 2019, sold the property to a third party (the “Third Party”) for \$425,000. The Third Party then further encumbered the property. The respondent only learned that her property had been sold when a representative of the Third Party attended at her home on January 31, 2020.

[5] The default judgment was subsequently set aside by Gibson J.,¹ and that part of his order was upheld by this court in *Martin v 110*, 2022 ONCA. This court also ordered a reference under rr. 54 and 64.06 (the “Reference”) to, among other things, settle the amount the appellant should pay to the respondent out of the \$425,000 proceeds from the December 5, 2019 sale to the Third Party.

[6] The appellant brought a motion before the judge hearing the Reference to recuse herself on grounds of reasonable apprehension of bias and procedural unfairness (the “Recusal Motion”). In a short endorsement, the Reference judge dismissed the Recusal Motion in August 2023 and proceeded to hear the Reference. In her March 28, 2024 report, the Reference judge provided reasons for dismissing the Recusal Motion, and ordered the appellant to pay the respondent \$354,197.58 plus interest out of the proceeds of sale to the Third Party (the “Reference Order”).

[7] The appellant has filed a notice of appeal of both the endorsement dismissing the Recusal Motion as well as the Reference Order, and seeks an extension of time to perfect the appeal.

¹ See *Martin v. 11037315 Canada Inc.*, 2020 ONSC 8087.

[8] The respondent has brought a motion to quash the appeal on the basis that there is no direct right of appeal to this court from either the order dismissing the Recusal Motion or the Reference Order.

ANALYSIS

[9] The respondent argues that r. 54 sets out the proper procedure governing appeals from rulings or orders resulting from references conducted under that rule. In particular, r. 54.05(3) provides that where a referee has made an order on a motion in a reference, a person who is affected by the order may make a motion to a Superior Court judge to set aside or vary the order within seven days after the order is made.

[10] Similarly, rr. 54.09(2) and (3) provide that a person who opposes confirmation of a report on a reference must file a motion with a Superior Court judge within 15 days of the filing of the report with the Superior Court.

[11] The appellant has not moved under either r. 54.05(3) or r. 54.09(3) and, instead, has appealed directly to this court. The respondent argues that no such appeal lies to this court until the appellant has exhausted the remedies provided under those subrules.

[12] We agree.

[13] As Pardu J.A. determined in *Fernandez v. Unique Auto Collision Network Solutions Corp.*, 2014 ONCA 458, at paras. 14 and 16, there is no direct right of

appeal to this court from an order resulting from a report from a reference conducted under r. 54. The proper procedure is to oppose confirmation of the report under r. 54.09, which results in a hearing in the nature of an appeal. Following the hearing contemplated by r. 54.09(3), there is a further right of appeal without leave to this court for a second review of the merits of the report, and any subsequent decision on the motion opposing confirmation. If the report has already been confirmed (as is the case here), then the dissatisfied party must seek special leave from the Superior Court to extend the time to file a motion in opposition.

[14] The same considerations apply in relation to motions to vary or set aside orders made on motions heard by a reference judge, brought pursuant to r. 54.05(3). If no motion to vary or set aside has been made within the time allotted, a motion to extend time must be made to the Superior Court, failing which no appeal lies directly to this court.

[15] The appellant argues that the Reference Order, unlike in references decided by associate judges, is by a judge of the Superior Court, and thus this court has jurisdiction pursuant to s. 6(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. We disagree. The process for opposing confirmation expressly applies to references before a judge as well as an associate judge: see rr. 54.05(1) and 54.09(2). Therefore, regardless of whether the reference is undertaken by a judge or associate judge, a dissatisfied party must first exhaust the remedies provided for under r. 54 before appealing to this court.

[16] The appellant also argues that the respondent did not file her quash motion until the materials perfecting the appeal had been filed with this court. But this court's jurisdiction does not turn on the timing of a motion to quash. Thus, the fact that the appellant filed his appeal materials prior to the respondent bringing the motion to quash cannot clothe this court with jurisdiction over a matter when no such jurisdiction existed previously.

[17] Finally, the appellant objects to certain procedural errors he claims were made by the Reference judge. These are matters that must first be pursued in accordance with the procedures set out in r. 54, rather than through a direct appeal to this court.

[18] We therefore grant the respondent's motion to quash the appeal, and award the respondent her costs on a partial indemnity basis in the all-inclusive amount of \$6,295.

"David M. Paciocco J.A."

"P.J. Monahan J.A."

"D.A. Wilson J.A."