

2009 CarswellOnt 5487  
Ontario Superior Court of Justice

McNicol v. McNicol

2009 CarswellOnt 5487, [2010] W.D.F.L. 352, 180 A.C.W.S. (3d) 509

**Margo Suzanne McNicol v. David Ian McNicol**

Pazaratz J.

Judgment: September 14, 2009

Docket: Hamilton D1618/06

Counsel: Shawn M. Philbert for Applicant  
John W. Spears for Respondent

Subject: Family; Property

APPLICATION by wife to have corollary relief judgment set aside.

***Pazaratz J.:***

1 Having read the voluminous motion documents, each party's factum, and their supporting documents, at the outset of this motion I was able to narrow the issues as follows:

2 The Applicant sought an order against Mr. Orme - her former solicitor of record — in relation to disclosure relating to certain insurance monies. Since Mr. Orme was not present, I stood the matter down and asked counsel to try to contact him. When we reconvened Mr. Spears advised that he had reached Mr. Orme who is out of town. Mr. Orme apparently takes the position that he has already advised Mr. Philbert that he never received the insurance cheques which are the subject of the inquiry. Mr. Philbert advised the court that this appeared to conflict with information contained in a transcript of a January 22, 2009 court attendance at which time Mr. Orme acknowledged having had certain monies in trust on behalf of the Applicant.

3 Mr. Spears took no position in relation to the Applicant's request for information from her former lawyer.

4 *Mr. Orme shall, within 21 days of receiving a copy of this order, provide to the Applicant a copy of his trust ledger statement regarding any monies received from State Farm insurance relating to a house insurance claim regarding 6 Walnut Street, Grimsby. He shall provide full particulars as to whether he received any funds from State Farm, including amounts, dates, and the ultimate disposition of funds.*

5 That left the issue of the Applicant's request to set aside the corollary relief order of Justice McLaren dated January 27, 2009. The Respondent opposed this request.

6 The facts are actually quite straightforward. This was a long, bitterly contested case, complicated by the fact that the Applicant has gone through a series of lawyers. On April 22, 2008 Justice Mazza made a consent order in relation to certain separation agreements, and at the time he ordered that the remaining issues would be dealt with by way of a trial to take place during the sittings commencing January 5, 2009.

7 There is overwhelming evidence that the Applicant always knew (or should have known) that her trial was scheduled for the sittings of January 5, 2009.

8 In September 2008 Mr. Orme was retained by the Applicant and went on record. By December 2008 he was trying to get off the record. He told the Applicant he was no longer going to represent her. He served her with a motion to be removed from the record. She did not respond to that motion. She accepted Mr. Orme's representation to her that he was no longer going to be her lawyer and he would be removing himself from the record.

9 As it happens, Mr. Orme was not successful with his motion to be removed from the record, partly because when the motion came up I was not satisfied that the Applicant had been properly served.

10 Accordingly, as of December 2008 the Applicant presumed Mr. Orme was off the record, but Mr. Orme apparently never conveyed to the Applicant that - as far Respondent's counsel and the court were concerned - he was still her solicitor of record.

11 The trial was called to commence January 22, 2009. The trial co-ordinator notified both counsel of record - including Mr. Orme - of the trial date. The expectation would be that counsel would arrange for their clients to attend court to participate in the trial.

12 On January 22 2009 Mr. Spears attended with the Respondent. Mr. Orme attended without the Applicant. He advised the court he had not had any meaningful communication with the Applicant since October 2008. He gave the presiding judge the impression the Applicant had lost interest in the case.

13 The Applicant's materials indicate however that at all material times Mr. Orme had her address and telephone number - even a fax number - and he simply failed to advise her of the January 22, 2009 court date.

14 As it happens the matter was only partially dealt with on January 22, 2009. The uncontested trial resumed January 27, 2009. No one took any steps to notify the Applicant of what was happening.

15 The only evidence before me is the evidence of the Applicant - and the transcript evidence of Mr. Orme on January 22, 2009 - which satisfy me that while the Applicant may well have known the trial was set for the January 5, 2009 sittings, she had no notice of either the January 22 or January 27 dates.

16 In my view Mr. Orme had the ability and responsibility to make better efforts to advise his client of the court dates - particularly since he had that extra time between January 22 and January 27.

17 I find that the Applicant did not have notice of the trial date. I am satisfied that had she received notice should would have attended.

18 Mr. Spears argues that even if the Applicant didn't have notice, she has no claim or position which would properly have been considered on the merits. However, it is clear to me that there were many issues in dispute which the Applicant should have been in a position to deal with at trial, including a four-year gap in the valuation date, the value of a house, credit with respect to mortgage payments, whether \$50,000 of tools were properly valued, and whether a \$150,000 injury/disability settlement should have been factored into the equalization equation.

19 Justice McLaren's order requires the Applicant to pay to the Respondent \$117,500.00 as an equalization payment. The Applicant suggests the figure should be zero. That's a very large gap, and I am satisfied that the list of arguable issues presented by the Applicant could well have significantly affected the ultimate determination of equalization.

20 For these reasons, *the corollary relief order of Justice McLaren dated January 27, 2009 is set aside, and the matter is restored to the trial list.*

21 There is a significant costs issue remaining. The Respondent has done nothing wrong in relation to relying on Mr. Orme's representations as solicitor of record, and I would anticipate Mr. Spears will be seeking significant reimbursement for costs. The Applicant will inevitably be taking the position that the problems were created by Mr. Orme.

22 *The costs issue is adjourned to October 19, 2009 at 9 am before me. Mr. Orme is to be served with a copy of this endorsement by Mr. Philbert.*

23 *Pending further order, each party shall be restrained from allowing any waste, depletion or dissipation of property.*

24 The underlined portions of this endorsement should be included in the order.

25 *4 day trial set for sittings of March 29, 2010, Purge Court March 22, 2010 9 am.*

*Application granted.*

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