

COURT OF APPEAL FOR ONTARIO

CITATION: Kanata Utilities Ltd. v. 1414610 Ontario Inc. (MAG Eastwood Construction), 2024 ONCA 367
DATE: 20240506
DOCKET: COA-23-CV-0963

Roberts, Trotter and George JJ.A.

BETWEEN

Kanata Utilities Ltd.

Plaintiff (Respondent)

and

1414610 Ontario Inc. o/a MAG Eastwood Construction, 2573262 Ontario Inc. o/a Eastwood Construction*, Mario Grandinetti, John Grandinetti*, Carlo Grandinetti*, Lewis Grandinetti*, Matthew Grandinetti* and Dylan Grandinetti*

Defendants (Appellants*)

Martin Diegel, for the appellants

Matthew Benson, for the respondent

Heard and released orally: May 3, 2024

On appeal from the order of Justice Robyn M. Ryan Bell of the Superior Court of Justice, dated July 27, 2023.

REASONS FOR DECISION

[1] The appellants appeal from an order striking their Statement of Defence for failing to comply with interlocutory orders and failing to comply with their documentary disclosure and production obligations. The appellants also seek to appeal the costs order.

[2] The respondent previously brought a motion compelling the appellants to produce an affidavit of documents and Schedule A documents, and for an order that they attend examinations for discovery. On September 3, 2020, and on the consent of the parties, Master Kaufman (as he then was) granted the relief requested and fixed costs in the sum of \$1,000.

[3] The appellants did not comply with any aspect of the order of Master Kaufman. Counsel for the respondent wrote to counsel for the appellants on January 5, 2021 and in June 2021, seeking compliance with the order. There was no reply. In April 2023, a full 2.5 years after the order of Master Kaufman, the respondent initiated the motion to strike the appellants' Statement of Defence.

[4] The motion judge considered and rejected the explanations for the delay advanced by the appellants. She applied r. 30.08(2) of the *Rules of Civil Procedure*, R.R.O. 1998, Reg. 194 (dealing with failure to comply with documentary disclosure) and r. 60.12 (dealing with failure to comply with a court order) and struck the Statement of Defence. She awarded costs of the motion to the respondent in the amount of \$3,000, and \$5,000 for the action.

[5] The appellants submit that the motion judge erred in striking their Statement of Defence because: (a) she failed to consider relevant evidence; (b) she failed to take a common sense approach to the situation that had unfolded; and (c) the order that she made was disproportionate.

[6] We do not accept these submissions. The motion judge followed the approach required by this court in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310. She considered the evidence placed before her and the submissions of counsel and concluded:

This action was commenced approximately 4.5 years ago. Master Kaufman’s order was made, on consent of the parties, almost three years ago. Because [the appellants] have deliberately ignored their production obligations and a court order, the [respondent] has been unable to move this matter forward. In all the circumstances, I am ordering that the statement of defence be struck.

[7] These findings were open to the motion judge on the record. Her conclusions were legally sound. In light of the lengthy delay, and in view of the finding that the delay was deliberate, the order was both appropriate and proportionate in the circumstances. The motion judge did not err in declining to make a “last chance” order, giving the appellants another opportunity to comply, as the appellants submit she should have done. The appellants had multiple opportunities to comply with the order of Master Kaufman, a number of them offered by counsel for the respondent. Indeed, respondent’s counsel provided a draft notice of motion to appellants’ counsel in April 2023, attempting to trigger a response. However, he received no response.

[8] The main appeal is dismissed.

[9] We grant leave to appeal costs as a result of a calculation error made by the motion judge, an error that respondent's counsel fairly concedes. Costs of the action should be reduced from \$5,000 to \$3,000. All other aspects of the order remain in place.

[10] The appeal is dismissed. The costs appeal is allowed, as indicated. Costs of the appeal are awarded to the respondent in the amount of \$5,500, all-inclusive.

“L.B. Roberts J.A.”

“Gary Trotter J.A.”

“J. George J.A.”