

Ontario Court of Appeal upholds setting aside of a notice of discontinuance

Litigation | Litigation & Dispute Resolution | Real Estate | Rules of Civil Procedure

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On 3 August 2020, lawyers at Gardiner Roberts LLP were successful in getting a notice of discontinuance set aside for their real estate brokerage client. In that judgment, Justice Koehnen set aside the notice of discontinuance on the grounds that pleadings against the brokerage were closed and, in the alternative, that the notice of discontinuance was an abuse of process. When pleadings are closed, a plaintiff cannot deliver a notice of discontinuance without obtaining leave of the court. The plaintiffs had not obtained leave of the court in the circumstances.

In *Kawaguchi v. Kawa Investments Inc.*, 2021 ONCA 770, the plaintiffs appealed this judgment.

The factual background

The plaintiffs' case involved a corporate dispute between family members. The defendant, LK, essentially wanted to liquidate her shareholdings in a company that owned a commercial property. As President of that company, she engaged the brokerage to sell the Property. Another family-run business operated out of the Property owned by this company.

Under a signed Listing Agreement, the brokerage marketed the Property for sale and eventually a buyer made an offer. The offer to purchase, however, did not close because the plaintiffs commenced an action challenging the validity of LK to have entered into the Listing Agreement.

The brokerage and its agent were named as two of many defendants in this action. While they filed a statement of defence to the action, other defendants did not. The plaintiffs did not take any steps to note any of the defendants who did not file a statement of defence in default. In general, a defendant is required under r. 18.01 of the *Rules of Civil Procedure* (the "**Rules**") to deliver a statement of defence within 20 days after being served with a statement of claim.

Where a defendant does not serve and file a statement of defence within the prescribed time period, the defendant can be noted in default under r. 19.01(1) of the *Rules*. The plaintiffs took no steps to note in default those defendants who had not delivered a statement of defence, and therefore pleadings against them were not closed.

At the outset of the litigation, the plaintiffs sought an injunction against the defendants, including the brokerage and its [agent?], to prevent the listing and sale of the Property. The injunction motion was dismissed against the brokerage and its agent.

Following this dismissal, lawyers for the brokerage and its agent wrote to the lawyers for the plaintiffs to advise that they would be seeking summary judgment to have the claim against their clients dismissed. In response, the plaintiffs delivered their notice of discontinuance.

The Court of Appeal's decision

The motion judge held that even though pleadings were not closed against some of the defendants, they were closed against the brokerage and its agent.

The Court of Appeal rejected this finding. In the Court of Appeal's view, under rr. 23.01(1) and 25.05 of the *Rules* pleadings in an action remain open as long as they are not complete in respect of any one of multiple defendants.

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Contrary to the motion judge's conclusion, the appellate court held that the phrase "a reply" as found in *r. 25.05(a)* does not infer that pleadings close against each defendant separately.

However, the Court of Appeal accepted, in the circumstances, that the plaintiffs' notice of discontinuance was an abuse of process.

At paragraph 25, the appellate court noted that there was long-standing case law in Ontario and elsewhere that affirmed that a court has the authority, in the appropriate circumstances, to set aside a notice of discontinuance as an abuse of process even if the notice of discontinuance is properly delivered.

For example, in *Angelopoulos v. Angelopoulos*, 1986 CanLII 2716 (ON SC), the court relied on *r. 1.04* of the *Rules* to set aside a notice of discontinuance.

The Court of Appeal recognized that the ability of a court to prevent a plaintiff from discontinuing an action once it reached a certain point was a principle that existed for over 100 years. In the English case of *Fox v. Star Newspaper Co.* [1898] 1 Q.B. 636 (C.A.), aff'd [1900] A.C. 19 (H.L.), Lord Chitty found as follows:

The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms...The substance of the provision is that after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

The plaintiffs had confirmed to the motion judge that despite serving the notice of discontinuance, they wanted to retain the right to recommence the action against the brokerage and its agent in the future. This would have permitted them to essentially avoid the dismissal of the injunction against the brokerage and its agent. In the circumstances, the Court of Appeal agreed that the motion judge had the authority under *r. 1.04* of the *Rules* to set aside the notice of discontinuance.

As well, the Court of Appeal agreed that the motion judge had properly granted summary judgment to the brokerage and its agent. Among the facts fatal to the plaintiffs' case was that one of the individual plaintiffs had been complicit in the marketing of the real estate. This individual had facilitated some of the showings and had not objected to the listing.

Lastly, the Court of Appeal upheld the motion judge's order of substantial indemnity costs. As determined by the Supreme Court of Canada in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, a deferential standard applies to appellate review of a discretionary costs award, unless it is based on an error in principle or is clearly wrong. In the circumstances, there was no basis to interfere with the costs award. A PDF version is available to download [here](#).

Representation by Gardiner Roberts LLP

The brokerage and its agent were represented on the appeal by partners Gavin J. Tighe and Anna Husa. Mr. Tighe is certified by the Law Society of Ontario as a specialist in civil litigation.

Mr. Tighe and Ms. Husa were assisted in the preparation of the written legal argument filed with the Ontario Court of Appeal by partner Stephen Thiele. Mr. Thiele is the firm's Director of Legal Research.

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you.

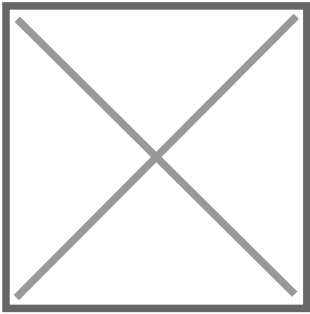
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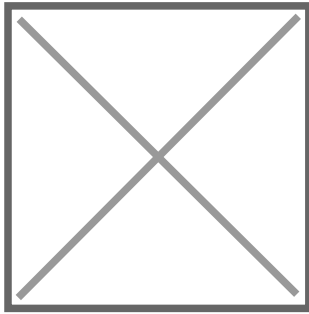
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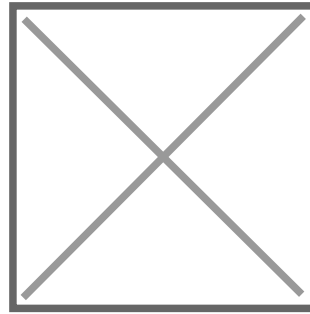
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