

2015 ONSC 289
Ontario Superior Court of Justice

Ilmer v. Ilmer

2015 CarswellOnt 347, 2015 ONSC 289, 248 A.C.W.S. (3d) 292

**Irina Ilmer, Applicant and Yafim Ilmer, Respondent Ekaterina Ilmer,
Respondent**

C. Horkins J.

Heard: January 13, 2015
Judgment: January 14, 2015
Docket: Toronto 03-FP-287229FIS

Counsel: **Andrea DiBattista**, for Applicant
No one for Respondents

Subject: Civil Practice and Procedure; Family

Related Abridgment Classifications

Civil practice and procedure

X Pleadings

X.9 Application to strike

X.9.g Miscellaneous

Civil practice and procedure

XXIV Costs

XXIV.7 Particular orders as to costs

XXIV.7.b Lump sum award

Headnote

Civil practice and procedure --- Pleadings — Application to strike — Miscellaneous

Parties were involved in family dispute — Plaintiff commenced motion to strike defendant's answer and counterpetition (pleadings) — Plaintiff's motion was subsequently adjourned twice to allow defendant time to file affidavits and to explain his request for adjournment of motion — Defendant failed to attend hearing on return of motion to strike, failed to attend settlement conference, and failed to provide responding materials to plaintiff's motion to strike — Plaintiff brought motion to strike defendant's pleadings — Motion granted — Defendant's pleadings were struck and defendant was not entitled to any further notice of steps — Striking defendant's pleadings was appropriate and proportionate remedy to defendant's conduct — Defendant demonstrated pattern of ignoring court orders — Defendant failed to respond to motion to strike pleadings and offered no evidence to explain his non-compliance conduct, in spite of reasonable opportunity to do so.

Civil practice and procedure --- Costs — Particular orders as to costs — Lump sum award

Table of Authorities

Cases considered by C. Horkins J.:

Chiaramonte v. Chiaramonte (2013), 2013 ONCA 641, 36 R.F.L. (7th) 11, 2013 CarswellOnt 14325, 311 O.A.C. 113, 370 D.L.R. (4th) 328 (Ont. C.A.) — referred to

Kovachis v. Kovachis (2013), 36 R.F.L. (7th) 1, 2013 ONCA 663, 2013 CarswellOnt 15040, 311 O.A.C. 228, 367 D.L.R. (4th) 189 (Ont. C.A.) — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99

Generally — referred to

R. 1(8.4) [en. O. Reg. 322/13] — referred to

R. 2(2) — considered

R. 25(13) — referred to

Forms considered:

Family Law Rules, O. Reg. 114/99

Form 14C — referred to

MOTION by plaintiff to strike defendant's pleadings.

C. Horkins J.:

1 The applicant brings a motion to strike the Answer and Counterpetition (the respondent's pleadings) of the respondent Yafim Ilmer dated March 2, 2004. After the hearing of the motion on January 13, 2015, I granted the relief requested and struck the respondent's pleadings with costs and reasons to follow. These are my reasons.

2 There are two respondents in this application: Yafim Ilmer and Ekaterina Ilmer. Ekaterina Ilmer and her counsel did not participate in the motion to strike the pleadings of Yafim Ilmer. Reference in these reasons to the respondent means Yafim Ilmer. Where it is necessary to reference Ekaterina Ilmer I will do so by name.

Events Before the Hearing of the Motion

3 The applicant's motion was first returnable before the court on June 19, 2014. At that time the applicant was also seeking an order to amend her pleading. This was allowed and the motion to strike the respondent's pleadings was adjourned to a date in the fall to be set. Counsel for the applicant was unable to secure a date from the respondent for the return of her motion to strike the respondent's pleadings. As a result she chose November 14, 2014 and notified the respondents.

4 On November 14, 2014, the applicant's motion came before Justice Goodman. In a detailed endorsement, Justice Goodman described the respondent's lack of participation in this application and the applicant's unsuccessful efforts to try and secure a date for her motion from the respondent.

5 Four weeks after the respondent was served with the notice of the return of the motion to strike, the respondent contacted applicant's counsel and asked her to "cancel" the motion and obtain a new date. At this point the respondent had not filed any materials responding to the motion to strike his pleadings. The applicant refused to agree to an adjournment.

6 The respondent did not appear in court on November 14 and he did not retain a lawyer to speak on his behalf. The

applicant's counsel advised Justice Goodman that the respondent had asked the applicant to "cancel" the motion and that this request was refused. Justice Goodman adjourned the motion to November 20, 2014 to allow the respondent time to file material to support his request for an adjournment. She also ordered the respondent to pay the applicant \$2500 in costs. He has never paid this cost order.

7 The respondent filed an affidavit sworn November 19, 2014 to support his request for an adjournment of the motion. In this affidavit he states that he is working in Kyrgyzstan on a contract until the end of December 2014. For this reason he says that he cannot return to Toronto for the applicant's motion before January 2015. At that point the trial of the application was set for January 26, 2015. The respondent stated that he intended to return to Toronto for the trial.

8 On November 20, 2014 the matter came back before Justice Goodman. While the respondent had filed an affidavit he did not appear in court. On the basis of his affidavit Justice Goodman adjourned the applicant's motion to strike the respondent's pleadings to January 13 2015, peremptory to the respondent. Once again she issued a detailed endorsement and made various orders. As noted the new date for the applicant's motion was peremptory to the respondent. In particular, Justice Goodman ordered as follows:

[The motion] will proceed on [January 13 2105] whether or not he (or counsel for him) attends. If neither he nor anyone else on his behalf attends, then it will be treated as if he does not oppose the relief sought by the [applicant].

9 Justice Goodman directed that the respondent could participate by telephone on January 13, 2015. If he chose to do so, Justice Goodman ordered that it was his "sole responsibility for arranging with the court to participate by telephone conference call". The order set out the telephone number to call to arrange telephone participation. Justice Goodman set a deadline for the respondent to serve and file his responding materials to the applicant's motion to strike his pleadings.

10 On November 24, 2014, Justice Kiteley held a combined settlement conference and trial management conference. The respondent participated by telephone. Justice Goodman had ordered the respondent to serve and file a settlement conference and trial management conference brief by November 23, 2104. The respondent did not comply with this order and this is recorded in Justice Kiteley's endorsement dated December 1, 2014.

11 Justice Kiteley made several orders at this combined conference. She adjourned the trial set for January 26 to March 9, 2015. The respondent was ordered to attend questioning in Toronto on January 14, 2015. The time and place of this questioning was subsequently confirmed by the applicant's counsel. A further settlement conference and trial management conference was set for January 16, 2105. The endorsement states that because of the applicant's motion to strike set for January 13, 2015, the respondent planned "to arrive in Toronto the week before the motion scheduled for January 13."

The Hearing of the Motion

12 The respondent did not appear in court on January 13, 2015. Instead his form 14C confirmation notice stated that he would participate by telephone. At the start of the motion, the respondent called the telephone number for the motion court room. Several calls were received in the courtroom. The telephone was answered and the caller was connected to the courtroom. The voice of the caller was heard but the call was then disconnected for reasons unknown to the court. The court did not have a number to try and reach the respondent and did not know where the respondent was when he called the court.

13 As Justice Goodman ordered, it was the respondent's responsibility to make arrangements to attend the motion by telephone conference or to be present. The date was peremptory to him and the court proceeded in his absence.

14 The respondent did not have counsel attend on his behalf in the courtroom. However a person who identified himself as Nathan Copeland attended. Mr. Copeland identified himself as an acquaintance of the respondent. He is not a lawyer. Mr. Copeland had received some documents from the respondent by email. He explained that the respondent asked him to go to court and give the documents to the judge. Mr. Copeland was not asked to do anything further. He had no knowledge of the respondent's whereabouts.

15 Three documents were presented. Counsel for the applicant objected to these documents being presented to the court. The documents are not reliable and their relevance is unclear. They were not attached to a sworn affidavit. The applicant had no notice from the respondent that he intended to try and file additional documents. From the various orders that have been filed in this application the respondent knows that he cannot simply deliver documents to this court. If the respondent wished to rely on evidence he had to file a sworn affidavit and this was made clear to him by Justice Goodman.

16 I refused to allow the documents to be filed as evidence on the motion. For the purpose of identification only I have marked the documents together and labeled them as “A”. They are attached to the endorsement that I made in court on January 13. The documents are not evidence on this motion. I am describing the three documents solely to assist in understanding why I refused to allow them to be filed as evidence.

17 The first document appears to be a copy of an airline ticket issued by Turkish Airlines to the respondent on January 4, 2015. It describes a series of flights as follows. A flight leaves Bishkek Kyrgystan on January 13, 2015 at 7:55 am and arrives in Istanbul at 9:45. A second flight leaves Istanbul on January 13 at 13:40 and arrives in Toronto at on January 13 at 17:40. A third flight leaves Toronto on February 14, 2015 for Istanbul and arrives in Bishkek Kyrgystan on February 16, 2015.

18 The content of the second document cannot be described. It is a two page form with handwriting in a language that is not English (the respondent was ordered by Justice Goodman to file evidence in English).

19 The third document purports to be a translation of a document from Russian to English. It is titled “Ambulance Call Report” and is dated January 11, 2015. The document was apparently translated on January 13, 2015 (the day of the motion). The reliability of this translation is not possible to assess. A person named as Ilmer Efmin is named as the subject of the ambulance call. The person was not hospitalized.

The Respondent’s Conduct

20 The respondent has demonstrated a pattern of ignoring court orders.

21 The respondent failed to attend a case conference before Justice Perkins on January 22 2014. The court’s endorsement states that the respondent is “[n]ot participating in the case anymore” and has “apparently been in Kyrgystan for several years”.

22 The most egregious conduct is the respondent’s failure to pay child support pursuant to the April 23, 2003 order of Justice Weekes. The respondent and applicant have one child Michal Ilmer born August 17, 1990. For a period of time he paid child support as directed by this order. In March 2005, the respondent left Canada and he has not paid any child support since that date. A letter dated August 2, 2013 from the Family Responsibility Office confirms that as of that date he owed \$70,701.24 in child support arrears. The respondent has not paid any of the child support arrears.

23 The applicant’s motion to strike the respondent’s pleadings was adjourned to give the respondent an opportunity to file an affidavit and in particular explain why he has not complied with the child support order and why this court should not strike his pleadings.

24 The affidavit that the respondent filed does not address the child support order in any way. The content of his affidavit simply copies paragraphs verbatim from his Answer and Counterpetition.

25 The seriousness of the applicant’s motion was readily apparent to the respondent. He was given a fair opportunity to respond. The applicant’s April 24, 2014 affidavit sets out her understanding of the respondent’s significant assets when they came to Canada.

26 The respondent’s financial disclosure is incomplete. Justice Goodman ordered him to serve and file a financial statement by December 15, 2014. The financial statement had to include his 2014 income and expenses, the property and debts he had on the date of marriage as well as on the competing valuation dates (she ordered two versions of the financial statement). He was also ordered to produce a copy of his employment contract.

27 The financial statements that the respondent produced are incomplete and do not follow the order of Justice Goodman. Date of marriage values are not provided. The applicant provided evidence that the respondent's financial statement fails to disclose all of his assets.

28 The financial statement states that the respondent is employed by "Kant Sut". Reliable proof of his 2014 income and expenses has not been provided (Justice Goodman ordered him to provide this evidence). Attached to the respondent's financial statement is a translation of what appears to be his contract with Kant Sut. It says that he is paid \$500 at the start of each month and \$700 at the end of each month. There is no proof of what was actually paid or any of his expenses in 2014.

29 The respondent attached to his financial statement, incomplete copies of Canadian income tax returns for 2000, 2011, 2012 and 2013. It is unknown why he would file an income tax return in Canada since he does not live or work in Canada. The source of the income reported in these income tax returns is not revealed. It is not connected to Kant Sut because his contract with that company apparently started in January 2014.

The Respondent's Pleadings are Struck

30 The law is clear that pleadings in a family case should only be struck in exceptional circumstances, and where no other remedy would suffice (see *Chiaramonte v. Chiaramonte*, 2013 ONCA 641 (Ont. C.A.) at para. 31-33; *Kovachis v. Kovachis*, 2013 ONCA 663 (Ont. C.A.) at paras. 24-25).

31 The respondent's non-compliance with court orders and the Family Law Rules is serious as detailed above. He has not paid court ordered child support since 2005 and owes \$70,701.24 in child support arrears as of August 2, 2013. He has not paid the costs that Justice Goodman ordered. His financial statement and financial disclosure are incomplete. The respondent had a reasonable opportunity to respond to the motion to strike his pleadings and he offered no evidence to explain his conduct.

32 Striking the respondent's pleadings is an appropriate remedy that is proportionate to the respondent's conduct. There is no alternative remedy that would suffice in the circumstances of this case.

33 The decision to strike the respondent's pleadings fulfills the primary objective of the Family Law Rules as set out in rule 2(2) to "deal with cases justly". It would not be just to allow the respondent to continue to participate in this application given his conduct.

34 The issues for trial are complex as noted by Justice Kiteley in her settlement conference and trial management conference endorsement dated December 1, 2014. This conference will continue before Justice Kiteley on January 16, 2015 at 10 am. In the December 1 endorsement Justice Kiteley noted that if the respondent's pleadings were struck an issue to be dealt with at the next trial management conference is whether the respondent is "a compellable witness at the request of counsel for [the respondent] Ekaterina Ilmer." Now that I have struck the respondent's pleadings, the applicant and the respondent Ekaterina Ilmer must be prepared to make submissions on this issue before Justice Kiteley, so that the issue can be determined before the trial.

Costs

35 The applicant seeks costs of her motion on a full indemnity basis. The costs requested are \$10,452.34. I have reviewed the Bill of Costs and find that the time incurred and the hourly rate are reasonable. The issue was important to the applicant and of moderate complexity. The applicant had to incur the expense of the requested adjournment and yet the respondent failed to comply with all of the terms of the adjournment and never offered evidence to explain his behaviour. The applicant acted in reasonable manner throughout and the respondent did not.

36 The applicant is entitled to fair and reasonable costs that I fix at \$8000 all inclusive.

Conclusion

37 I make the following orders:

- (1) The Answer and Counterpetition of the respondent Yafim Ilmer are immediately struck.
- (2) Pursuant to Family Law Rule 1(8.4) the following consequences apply:
 - (i) Yafim Ilmer is not entitled to any further notice of steps in the case, except as provided by subrule 25 (13) (service of order, in this case by email).
 - (ii) Yafim Ilmer is not entitled to participate in the case as a party in any way. His role as a witness, if any, shall be decided by Justice Kiteley.
 - (iii) The court may deal with the case in the absence of Yafim Ilmer.
- (3) The respondent Yafim Ilmer shall pay the applicant costs fixed at \$8000 all-inclusive payable in 10 days.

Motion granted.