

Case Name:
Ottenbrite v. State Farm Fire and Casualty Co.

Between
Joseph Ottenbrite, Appellant, and
State Farm Fire and Casualty Company, Respondent

[2008] O.J. No. 886

Court File No. 91063/98

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty J.A.

February 28, 2008.

(4 paras.)

Civil litigation -- Civil procedure -- Appeals -- Quashing or dismissal of -- Abandonment or dismissal for delay -- Reinstatement -- Motion by Ottenbrite for reinstatement of his appeal after it had been dismissed for delay -- Motion dismissed -- Under the circumstances, which included a five-year delay, it would not be in the interests of justice to set aside the dismissal.

Motion by Ottenbrite for reinstatement of his appeal after it had been dismissed for delay.

HELD: Motion dismissed. In light of the absence of any adequate explanation for the long delay by Ottenbrite in bringing the motion and the lack of merit in the proposed appeal, it would not be in the interests of justice to set aside the dismissal. In particular, the Court found that there was obvious prejudice to State Fire in hearing a case that was dismissed five years previously.

Counsel:

Alfred Kwinter and Gurlal Kler, for the Appellant.

David Zarek and Robert **Betts**, for the Respondent.

ENDORSEMENT

D.H. DOHERTY J.A.:--

A. EXPLANATION FOR DELAY

1 The appellant received timely notice of the dismissal for delay in November 2002. He had legal advice in 2003 that he had to move to set aside the dismissal and he had to move quickly. He eventually brought this motion in May 2007. The appellant offers some explanation. None are sufficient to explain the delay. Funds were no doubt a problem but there was enough to retain various counsel for various reasons. There is obvious prejudice to the defendants in hearing a case that was dismissed over five years ago.

B. THE MERITS OF THE APPEAL

2 The issue named by the appellant as grounds of appeal are not meritorious. There was good reason to refuse the Appellant's request for another adjournment of the trial. The striking of the jury was not only unopposed by the appellant who was self represented but was also very much in his interest given the evidence of the conviction for arson. The trial judge specifically indicated at paragraph 10 that he will by way of alternative, consider the case without regard to the appellant's conviction as it was under appeal (the appeal was later allowed). He did so. I see no reason to think he couldn't do so. The evidence was overwhelming.

3 In light of the absence of any adequate explanation for the long delay in bringing this motion, and the lack of merit in the proposed appeal it could not be in the interest of justice to set aside the dismissal. The motion is dismissed.

4 Costs to the respondent in the amount of \$5000.00 all inclusive.

D.H. DOHERTY J.A.

qp/t/qlaxs/qlpxm