

2038724 Ontario Ltd. v. “Quizno’s Canada Restaurant Corporation, 2009 ONCA 656
DATE: 20090916
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COURT OF APPEAL FOR ONTARIO

Sharpe, Gillese and LaForme JJ.A.

BETWEEN

2038724 Ontario Ltd. and 2036250 Ontario Inc.

Plaintiffs (Respondents)

and

Quizno’s Canada Restaurant Corporation,
Quiz-can LLC, The Quizno’s Master LLC,
Gordon Food Service, Inc. and GFS Canada Company Inc.

Defendants (Moving Parties)

Geoffrey B. Shaw, for the defendants (moving parties)

Allan D.J. Dick, for the plaintiffs (respondents)

Heard: September 14, 2009

ENDORSEMENT

[1] The moving parties (“Quizno’s”) ask us to set aside the order of Goudge J.A., dated June 26, 2009, dismissing their motion for an extension of time to file their notice of appeal. The underlying facts and the protracted procedural history of this intended class proceeding are fully set out in the reasons of Goudge J.A.

[2] For the following reasons we dismiss the motion and refuse to extend the time for filing the notice of appeal.

[3] As Quizno's failed to file the notice of appeal from the decision of Perell J. dismissing their stay motion within ten days after service, the appeal was deemed to be abandoned under rule 61.14(2). Goudge J.A. correctly stated the legal test to be applied on a motion to set aside the deemed abandonment of the appeal and to extend the time for filing the notice of appeal:

- a) whether the appellant (Quizno's) formed a firm intention to appeal within the relevant time period and has maintained it;
- b) the length of the delay and whether the appellant has offered a reasonable explanation for it;
- c) any prejudice to the respondents;
- d) the merits of the appeal;
- e) the overarching principle is simply whether the justice of the case requires that an extension be given. See *Bratti v. Wabco Standard Trane Inc.* (1994), 25 C.B.R. (3d) 1 (Ont. C.A.).

[4] The application of that test to the facts on this case involved a discretionary decision and we see no error that would permit us to intervene.

[5] In particular, we agree that Quizno's failed to demonstrate an intention to appeal within the applicable time period and to maintain that intention thereafter and that

Quizno's failed to provide an adequate explanation for the delay in filing the notice of appeal.

[6] Had Quizno's filed the notice of appeal, as the respondents urged it to do, the appeals would have been joined and heard together by this court pursuant to the *Courts of Justice Act*, s. 6(3). It is clear on this record that Quizno's made a conscious decision not to file the notice of appeal in order to avoid that consequence. We agree with and adopt what Goudge J.A. stated at para. 13 of his reasons:

In an era where it is the responsibility of all participants in the justice system to avoid, if possible, a multiplicity of steps in litigation, in the interest of getting at the merits of disputes, it is not reasonable to delay the stay appeal for 15 months because it might become moot, when the alternative would have been to proceed directly with both appeals and have them heard together on the merits in this court.

[7] Accordingly, the motion to set aside the order refusing to extend the time for filing the notice of appeal is dismissed with costs to the respondents fixed, in accordance with the agreement of counsel, at \$6,000 inclusive of disbursements and GST.

“Robert J. Sharpe J.A.”

“E.E. Gillese J.A.”

“H.S. LaForme J.A.”