

FILE/DIRECTION/ORDER

BEFORE JUDGE MONAHAN

ACTION # CV-16-564154

B. Sach in her capacity as P.O.A. for
Albertina Alexandre Plaintiff(s) (Appellant)

Damaris Viola Defendant(s) (Respondent)

CASE MANAGEMENT: YES [] NO []

COUNSEL: Tanya Walker for B. Sach PHONE NO. _____
Julian Heller for D. Viola PHONE NO. _____
PHONE NO. _____

[] ORDER [] DIRECTION FOR REGISTRAR

[] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT _____
[] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT _____

This is an appeal to set aside the Order of
Master Short dated October 5, 2017 whereby the
Master ordered that certain affidavits that had
been filed by B. Sach could not be used by
either counsel until after a CPL motion had
been argued. An interim CPL had been placed on a
property jointly owned by Ms. Alexandre (the mother

February 13, 2018
DATE

Patrick Monahan
JUDGE'S SIGNATURE

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of B. Sach and D. Viola) and by Mr. Sach, as joint tenants. The title to the property had previously been held by A. Alexandre solely, but on November 4, 2015, Alexandre added Sach as a joint tenant for no consideration. The effect of Master Short's October 5, 2017 order was to prevent any use being made of certain affidavits filed by ~~the~~ Sach, ^{both} during cross-examinations of Viola and Alexandre on affidavits that they had filed, as well ^{as} during the motion that was to be argued on whether the CPL should be removed from the property.

It should be noted that the dispute over the CPL, and whether certain affidavits can be used in that matter, are part of broader litigation between the parties relating to certain funds that are said to have been removed from a GIC investment account by Viola. However, the narrow issue before me relates to the October 5, 2017 Order of Master Short regarding the use of affidavits, and thus

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I will make reference to that broader litigation only to the extent necessary to resolve the narrow issue before me.

The motion brought by Viola to register a CPL on the property was based on a number of grounds, including: that Alexandre had been unduly influenced and coerced by Sachs to transfer his interest in the land to Sachs; alternatively, that Alexandre was not competent to transfer his interest in the land; that Alexandre was under the direct control and influence of Sachs at all material times; and that Sachs had frustrated the terms of ~~the~~ Alexandre's Will in which Sachs and Viola were to be equal beneficiaries.

Following the interim CPL ordered by Master Pope on February 24, 2017, the parties had ~~also~~ filed affidavits from Viola and Alexandre. A number of delays had occurred, with the result that

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cross-examinations on those affidavits ~~was~~ were scheduled for September 26 and 27, 2017. The day before those examinations were to take place, namely, September 25, 2017, counsel for Sach sought an adjournment due to counsel's illness. This request was granted and the examinations were rescheduled for October 5th and 6th, 2017. The argument on the CPL motion was then scheduled for October 31, 2017.

On October 3, 2017, counsel for Sach delivered two new affidavits, the first from a Mr. Jones, who was the real estate lawyer representing Alexandre ~~that~~ on the transaction that caused the transfer of the property to joint tenancy, and the second from a Mr. Paiva, who is the wills and estates lawyer who acted on the amendment of Alexandre's Will. The affidavit of Jones responded to the claim that ~~the~~ Alexandre had transferred joint tenancy of her property because Sach had influenced her to do so, while the

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affidavit of Paiva responded to the claim that Alexandre changed her Will based on undue influence from Sacha.

On October 4, 2017, counsel for Sacha delivered a further affidavit from Alexandre, responding to allegations that had been made in an earlier affidavit filed by Viola, relating to the alleged misappropriation of funds by Sacha.

I will refer to the affidavits by Jones, Paiva and the October 4, 2017 affidavit by Alexandre as the "Contested Affidavits".

Counsel for Viola took exception to the late delivery of the Contested Affidavits on a number of grounds, ~~of which~~ including that they had been delivered after the original date the cross-examinations had been scheduled to take place and only a day before the cross-examination

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of Alexandre. ^{Counsel} ~~He~~ argued that the late delivery of the Contested Affidavits was improper and an abuse of process, and that they would cause the loss of the October 31, 2017 motion date. ~~Alta~~

The parties attended before Master Short on October 5, 2017 to determine how to proceed. After reviewing the Contested Affidavits and hearing from counsel, Master Short ruled that under Rule 1004, he is to construe the Rules liberally to secure the most just and "MOST expeditious" determination on the merits. He indicated that the matter had come before him in June 2017 and that the record seemed "locked and loaded" at that time. He held that it was simply too late in the "unique circumstances of this case to seek to alter the issues." He further noted that the Contested Affidavits were not necessarily relevant to the "preservation of the property by way of a CPL, as opposed to the ultimate determination of the issues in the main action." He therefore

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ordered that no use could be made of these affidavits ~~and~~ during the cross-examinations of Viola and Alexandro, and at the argument of the CPL on October 31, 2017.

The CPL motion did not proceed on October 31, 2017, in light of this appeal. It has now been scheduled for May 29, 2018.

The parties are agreed that a Master's Order will be interfered with only if the Master made an error of law, or exercised his or her discretion on wrong principles or misapprehended the evidence such that there was a palpable and overriding error.

The initial question is whether there was legal authority for the Master to make the October 5, 2017 Order. I note that the Order did not strike out the affidavits, or find that ~~that~~ they were otherwise legally inadmissible. Although

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admissible, the Order directed that they could not be used by either counsel until after the CPL motion had been argued. Counsel for Viola argued that the Master had authority to make this Order under Rule 1.04(1).

That said, Rule 1.04 cannot be used to override the clear intent of another Rule. (Baker v. Chrysler Canada Ltd. [1998] O.J. No. 531). Here, the ~~affidavits~~ Controverted Affidavits had certainly been filed late, but they were filed prior to the commencement of cross-examinations, in accordance with Rule 39.02(2). They were clearly relevant to the CPL motion, since they responded directly to the claims made by Viola in her notice of motion for the CPL. There was no other basis for their exclusion from the proceedings. Nor, indeed, did Master Short strike them out or rule them inadmissible; instead, he simply ordered that, although otherwise admissible, they could

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not be used by counsel until some later time.

This appears to be inconsistent with Rule 39.02(2) in two ways. Rule 39.02 states that a party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing without leave. This Court has held that affidavits delivered as late as the day of cross-examinations do not require leave under 39.02, as the word "subsequently" should be given its ordinary meaning, which is after cross-examinations have commenced. (Arfanis v. Univ. of Ottawa). Further, Rule 39.02(2) goes on to provide that even after cross-examinations have commenced, leave to admit an affidavit "shall" be granted ^{by the Court} on terms that are just, "where it is satisfied that the party ought to be permitted to respond to any matter raised on cross-examination." If, ^{after} ~~if~~ ~~subsequent~~ cross-

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examination, any one of the Contested Affidavits responded to a matter then raised, 39.02 directed the Court to consider and, if satisfied, order the admission of ~~the~~ ^{such} affidavit. Master Short's order prevented that consideration from taking place, by prohibiting counsel from using the Contested Affidavits, even if it turned out after cross-examination that ~~the~~ one or the other of them reasonably responded to a matter raised on cross-examination. It is true that Master Short did not actually rule the Contested Affidavits to be legally inadmissible, merely that they not be "used," but in my ~~view~~ ~~his~~ ~~Order~~ respectful view, his Order was inconsistent with Rule 39.02 and amounted to an error in law.

It is, of course, true that litigation should be conducted in an expeditious manner. Counsel for Such failed to provide an explanation for her late filing of the Contested Affidavits, and, as Master Short observed, this is not how litigation

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is to be conducted. There are a variety of ways to deal with this concern. The problem, however, is that preventing the affidavits from being used, when they are plainly directly relevant to the issues raised by Viola on the CPL Motion, could cause prejudice to Sack and Alexandro, and cause the Court to adjudicate the merits on an incomplete and, therefore, potentially inadequate record. Rule 104 requires the most expeditious determination of proceedings, but it also requires that ~~they~~ this be done justly and on the merits.

I do not believe that Rule 104 provides a legal basis for the October 5, 2017 Order, in the face of the clear words of Rule 39.02(2).

I would further observe that the CPL Motion is now scheduled for May 29, 2018. The urgency regarding the October 31, 2017 date has now been removed, and there is no reason why ~~the~~ Viola ~~parties~~ cannot now prepare any further materials,

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and/or cross-examine the affiants on the Contested Affidavits. This is a further consideration in favour of permitting the parties to use the Contested Affidavits from this point onwards. To ^{now} rule otherwise would, in my view, be inconsistent with Rule 1.04. I therefore set aside the October 5, 2017 Order and direct that the Contested Affidavits may be filed and relied upon in these proceedings. Sack is entitled to her costs of this motion, which I fix at \$8,220.30 on a partial indemnity basis, inclusive of HST and disbursements.