

**ONTARIO**

**SUPERIOR COURT OF JUSTICE SMALL CLAIMS COURT**

**BETWEEN:**

**JOSEPH ALLEN JOLICOUER and JOAN MARIE JOLICOUER**

Plaintiffs / Moving Parties / Responding Parties

- and -

**BETTY SCHEIBLER, also known as BETTY WESTOVER**

Defendant / Responding Party / Moving Party

**REASONS ON MOTIONS**

This is an action for:

- (i) payment of occupation rent. The Plaintiffs are part owners of land which was occupied by the Defendant from 2018 until 2023 without the permission of the Plaintiffs. The other owner of the occupied land is the Estate of Milton Westover (the "Estate"). The Defendant is the Estate Trustee of the Estate. The claim for occupation rent is based on use of the property and the home located on the property (together the "Home") by the Defendant in her personal capacity;
- (ii) damages for removal of the furnace from the Home at the time the Defendant vacated the Home; and
- (iii) aggravated, punitive and exemplary damages.

The Plaintiffs bring a motion to strike the Defence under R. 12.02 of the Rules of the Small Claims Court, based mainly on R. 12.02(1)(c) allegations of abuse of process. The primary allegation is that the Defence pleads facts contrary to findings already made in other proceedings in the Superior Court of Ontario and the Ontario Court of Appeal.

The Defendant brings a motion for dismissal of the Claim on the grounds that the Plaintiffs have not paid a \$750 costs order granted against the Plaintiffs on a motion to set aside default judgment in this action.

Plaintiffs' Motion

It is necessary to review the history of the litigation among members of the family of Milton Westover, the father of the Plaintiff Joan Joliceur and the Defendant. The history of the litigation and relevant extracts from the Reasons issued on various hearings are set out in detail in paragraphs 1-21 and 23-28 of the Plaintiffs' Factum on this motion.

In summary, in 2017, Milton Westover commenced an action in the Superior Court against the Plaintiffs to set aside a transfer of land he had made to the Plaintiffs in 1997. During the course of the action, Milton Westover died and the action was continued by the Defendant in her capacity as Estate Trustee of the Estate. The action was unsuccessful. In his decision dismissing the action issued on August 4, 2022 (2022 ONSC 4550) (the "Trial Decision"), Fitzpatrick J. made certain findings relied on by the Plaintiffs on this motion in support of their argument that the Defence is an abuse of process. Findings are summarized at paragraph 21 of the Plaintiffs' Factum, which I accept, as follows:

21. *In the Trial Decision and the Costs Decision, Fitzpatrick J concluded:*
- a. That the Defendant's evidence was "self-serving and not persuasive";
  - b. That the evidence regarding Milton's wills indicated that the Defendant was exercising undue influence on Milton from the time she moved into the Residence in 2013;
  - c. That the Defendant had been living in the Residence rent-free since Milton's death;
  - d. That the Defendant was "enjoying most of the rights Milton did have to the Home Property";
  - e. That the Defendant was "unduly influencing Milton to make the claims he did in [the 2017 Action]";
  - f. That Milton's estate's case was "not about asserting rights that would benefit Milton" but about asserting rights that would benefit the Defendant, as the chief beneficiary;
  - g. That the litigation was not in the interests of Milton's estate.

There was an appeal of the judgment dismissing the action. The appeal was dismissed by the Court of Appeal. Once again, the Plaintiffs rely on certain findings by the Court of Appeal in a decision issued on February 25, 2024 (2024 ONCA 81), (the "Appeal Decision") summarized at s. 28 of the Plaintiffs' Factum, which I accept, as follows:

28. *In affirming Fitzpatrick J in the Appeal Decision, Roberts, Sossin, and Dawe JJA wrote:*
- a. That the Defendant unduly influenced Milton to make the claims he made in the 2017 Action;
  - b. That the Defendant's continuation of the 2017 Action after Milton's death was "not reasonable";
  - c. That the Defendant had done little to administer the estate and had "enjoyed living rent-free in [Milton's] home for several years";
  - d. That the Defendant had "pursued litigation that chiefly benefitted her because of her free living arrangements and the possibility of enhancing her portion of the estate"; and

e. *That the appeal "was meritless and of no benefit to the estate", having been "founded on the same baseless allegations that were rejected at trial".*

Finally, a beneficiary of the Estate, Debra Westover, commenced an application to have the Defendant evicted from the Home. That application was heard by Pierce J. In a decision dated June 14, 2023 (2023 ONSC 3561) (the "Eviction Decision"), Pierce J. made certain findings relied on by the Plaintiffs on this motion in support of their argument that the Defence is an abuse of process. These findings are summarized at paragraph 25 of the Plaintiffs' Factum, which I accept, as follows:

*25. In the Motion Decision, Pierce J stated:*

*a. That the Defendant had refused requests that she pay occupation rent to the estate and the Plaintiffs, which she had not paid for nearly 5 years at that point;*

*b. That the Defendant had not disclosed whether she had been paying any expenses for the Home Property;*

*c. That it was in evidence that the Residence had fallen into a state of disrepair since Milton died;*

*d. That the Defendant had refused access to the Residence to the Plaintiffs, despite their legal interest in the Home Property;*

*e. That the Defendant had refused proposals to purchase the estate's interest in the property or to rent the Residence to a tenant; and*

*f. That there was no provision in Milton's will for the Defendant to reside at the Residence as long as she liked.*

Turning to the Defence filed in this action, the Plaintiffs say the pleadings are directly contradictory of findings made in the Trial Decision, the Appeal Decision and the Eviction Decision.

The Plaintiffs say that these pleadings are an abuse of process and argue for the striking of the Defence and for judgment in favour of the Plaintiffs. The basis of the argument is that the pleadings are an abuse of process as these allegations contradict findings made in the Trial Decision, the Appeal Decision and the Eviction Decision and are an attempt to relitigate findings already made.

The Supreme Court of Canada has stated that an abuse of process occurs where a party takes steps which violate the fundamental principles of justice. While abuse of process arises in numerous contexts, the court considered the concept of abuse of process in the context argued by the Plaintiffs in *Toronto (City) v. CUPE 2003 SCC 63*. In that decision, the court stated:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

The principle was further enunciated in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, where the Supreme Court held that once a material fact is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be litigated in subsequent proceedings. The Supreme Court has acknowledged that the issues or cause of action need not be the same, as different causes of action may have one or more material facts in common.

In response, the Defendant argues that the Plaintiffs' motion is itself an abuse of process, on the grounds that the Plaintiffs are attempting to relitigate issues determined by Deputy Judge B. Richardt in his decision dated January 15, 2025 setting aside the default judgment in this action. The Defendant says, in essence, that the Plaintiffs argued in opposition to the set aside motion that the Defendant had no defence to this action on the basis that other courts had already made findings adverse to the Defendant and so there was no meritorious defence possible to the Plaintiffs' claim for occupation rent.

The Defendant arranged for a transcript of the hearing on January 15, 2025 of the Defendant's motion to set aside the default judgment. It is apparent that most if not all of the same findings in the prior decisions referred to above as the basis for the motion before me were referenced in the Plaintiffs' argument before Deputy Judge Richardt opposing the Defendant's set aside motion. The Defendant argues that, since Deputy Judge Richardt did not hold that the prior findings in the Trial Decision, the Appeal Decision and the Eviction Decision did not support a finding that the Defendant had no meritorious defence and because Deputy Judge Richardt did find that the Defendant had a meritorious defence to the Plaintiffs' Claim, that the Plaintiffs are now bound to accept that the Defendant can litigate on the basis of their Defence as filed, without regard to the findings made in the Trial Decision, the Appeal Decision and the Eviction Decision.

I disagree. Firstly, the Defendant's argument is tantamount to suggesting that when a default judgment is set aside on the basis that a defendant has a meritorious defence, the plaintiff's claim must therefore be dismissed on the basis that the defence has merit. The implication of this argument is that the setting aside of a default judgment becomes an order for summary judgment dismissing a plaintiff's claim. This is not a correct interpretation of an order setting aside a default judgment.

In granting a motion to set aside a default judgment, the granting court is not making a finding that the defence has merit in the sense it will be a successful defence, it is making a finding that there is a basis on which the defendant could succeed in defending the plaintiff's claim. This is reflected in the reasons of Deputy Judge Richardt when he says:

In this case, even assuming there is liability on the part of the defendant, damages will need to be assessed. The defendant should be able to participate in that process. I find that the defendant has intended to defend this action since she was served. A motion was brought in a timely fashion. The defendant has an arguable defence on the merits. There is an explanation for the delay. There is minimal prejudice to the plaintiffs in reopening pleadings and substantial prejudice to the defendant if the pleadings are not

reopened. Accordingly, the noting of default is set aside. The defendant has 10 days to file a defence.

There is no reference in the Rulings section of the decision of Deputy Judge Richardt to any finding related to issues of res judicata, issue estoppel, collateral attack, or abuse of process.

Deputy Judge Richardt did not have a specific pleading before him as I do today. The Defendant argues that Deputy Judge Richardt must have known or anticipated the gist of what the defence was going to say and was, by silence or omission, condoning the relitigating of findings made in other proceedings. This interpretation is not borne out in the decision. Deputy Judge Richardt stated that “the Defendant should be allowed to participate in the process” of defending the claim and set aside the noting in default.

Finally, it was not open to Deputy Judge Richardt to set aside the default judgment as it related to damages but refuse to set aside the default judgment on liability. Set aside motions are “all or nothing” – the default judgment stands or it is set aside in its entirety. It is apparent that Deputy Judge Richardt was somewhat skeptical of the defence on liability while holding that it met the necessary test for a set aside motion, but took the view that the Defendant should be entitled to challenge the quantum of damages.

It was not open to Deputy Judge Richardt to control the content of the Defendant’s pleadings. He could not have made a ruling that the Defendant could or could not plead certain facts. Once the default judgment is set aside, the Rules of the Small Claims Court apply to the pleadings in the same way that the Rules would apply had there never been a default judgment and set aside motion.

As noted by Deputy Judge Richardt, the setting aside of the default judgment would allow the Defendant to “participate in the process”. The motions before me today are part of that process, and I am not prepared to find that Deputy Judge Richardt made findings, either directly or by implication, that the now impugned pleadings in the Defence, which was not before him, did not constitute an abuse of process.

Based on the findings noted in the Trial Decision, the Appeal Decision and the Eviction Decision and the principles enunciated in cases cited above, the pleadings in Paragraphs 4, 10, 11, 12 and 29 of the Defence are an abuse of process and are struck out.

These pleadings are as follows:

Paragraph 4

*Ms. Scheibler began to reside with Milton Westover (hereinafter ‘Milton’) in or about late November 2013 as Milton was nearing the end of his life and was struggling to live by himself. Ms. Scheibler cared for Milton until the time of his death.*

This allegation is contrary to findings in Trial Decision, the Appeal Decision and the Eviction Decision concerning the reasons and motivations for the Defendant’s occupation of Milton Westover’s home.

Paragraph 10

*During this time, Ms. Scheibler owned her own property, subject to a divorce proceeding, and would have preferred to reside there. As the estate trustee, she resided in Milton's Home to ensure that the property was adequately taken care of, especially during the winter months.*

This allegation is contrary to findings in Trial Decision, the Appeal Decision and the Eviction Decision concerning the reasons and motivations for the Defendant's occupation of Milton Westover's home.

Paragraph 11

*As Milton's Home lacked insulation, someone needed to fill the wood stoves twice a day to prevent damage to the pipes from freezing.*

This allegation is contrary to findings in Trial Decision, the Appeal Decision and the Eviction Decision concerning the reasons and motivations for the Defendant's occupation of Milton Westover's home.

Paragraph 12

*At no time did Ms. Scheibler even intend to derive any personal benefit from the occupation of Milton's Home. Her priority was to ensure that his possessions were secured as required pursuant to her role as estate trustee.*

This allegation is contrary to findings in Trial Decision, the Appeal Decision and the Eviction Decision concerning the reasons and motivations for the Defendant's occupation of Milton Westover's home.

Paragraph 29

*The Plaintiffs were aware of the occupancy of the property during the initial litigation started by Milton and continued by Ms. Schiebler in her capacity as litigation trustee as per Milton's instructions.*

This allegation is contrary to findings in Trial Decision, the Appeal Decision and the Eviction Decision concerning the reasons and motivations for the Defendant's occupation of Milton Westover's home.

As to the remainder of the Defence, with respect to carrying costs and expenses concerning the Home, Justice Pierce in the Eviction Decision stated that the Defendant had not disclosed whether she had been paying any expenses for the Home. There was no specific finding on whether any particular expenses were paid for by the Defendant or by Estate or by either of

them. The Defendant should be entitled to lead evidence as to costs, if any, she paid personally with respect the Home.

With respect to the condition of the Home, in the Eviction Decision Justice Pierce stated, “there is evidence that the home had fallen into a state of disrepair since Milton died.” The Defendant alleges in her Defense that the Home was in poor condition at the time of Milton’s death. The finding by Justice Fitzpatrick that the condition of the Home deteriorated after Milton’s death does not preclude the leading of evidence as to the state of the Home at the time of Milton’s death as a baseline from which its condition deteriorated during the Defendant’s occupation. The Defendant should be entitled to lead evidence as to the condition of the Home from time to time, and the Defendant’s responsibility, if any, for that condition may be a relevant factor in determining the quantum of occupation rent.

None of the prior decisions concerning the Home and the Defendant’s occupation reference the Limitations Act as it relates to the Plaintiffs’ claim for occupation rent and the Defendant should be entitled to lead evidence as to limitations.

There is little evidence concerning the appropriate quantum of occupation rent in the Plaintiffs’ materials, insufficient to warrant a finding as to quantum. The Plaintiffs’ theory appears to be that the amount of occupation rent will be so far in excess of the Small Claims Court’s jurisdiction that the standard of proof is somehow relaxed. Quantum must still be proven to the same standard as in any other case and if the proven claim is in excess of the jurisdictional limit, it will be reduced accordingly.

For those reasons, part of the Plaintiffs’ motion striking the Defence is granted and the matter is to proceed to trial on November 3, 2025.

At the trial, the parties will remain entitled to raise objections to any otherwise admissible evidence presented which is consistent the Claim and Defence on the grounds that the presentation of the evidence is, in the objecting party’s view, an attempt to relitigate matters on which findings were made in prior decisions, and those objections will be addressed on their merits. This decision relates only to the contents of the Defence.

#### Defendant’s Motion to Dismiss

The Defendant’s motion is founded entirely on the non-payment of \$750 in costs ordered by Deputy Judge Richardt on the motion to set aside the default judgment. The Plaintiffs acknowledge that the costs are not paid. They take the view that there has been no demand for payment and that they have a costs order against the Defendant for some \$30,000 from other proceedings which is also unpaid.

An order for costs in an action in favour of a party cannot be set off against costs ordered against that party in another action.

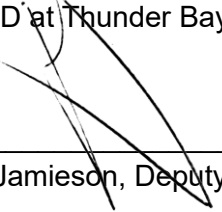
I note that Deputy Judge Richardt did not leave the costs of the set aside motion in the cause, to be determined after trial by the trial judge. He ordered the costs to be paid unconditionally. No demand is necessary. I am not prepared to leave the liability to pay the costs in abeyance and,

in effect, overrule the order of Deputy Judge Richardt. If the costs of \$750 are not paid by October 31, 2025, the Plaintiffs' Claim is dismissed.

Costs

Costs of both motions are reserved to the Deputy Judge conducting the trial.

DATED at Thunder Bay, ON this 9<sup>th</sup> day of October, 2025

  
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Jack Jamieson, Deputy Judge