

*Case Name:*

**Tupper v. Van Rooy**

**RE: Diane Tupper, and  
Helen Jacqueline Van Rooy et al.**

[2007] O.J. No. 315

154 A.C.W.S. (3d) 957

Court File No. 02-CV-236494 CM1

Ontario Superior Court of Justice

**F.J.C. Newbould J.**

Heard: January 25, 2007.

Judgment: January 25, 2007.

(14 paras.)

*Civil procedure -- Judgments and orders -- Setting aside judgments or orders -- Obtained by fraud -  
- The plaintiff's motion seeking to set aside an order in which the judge had dismissed her motion to  
strike the statement of defence, and varied a prior costs award of \$140,000 against the defendant  
was dismissed -- The plaintiff had failed to establish that the defendant's affidavit was fraudulent or  
deceitful entitling her to set aside the order.*

*The plaintiff moved to set aside an order in which the judge had dismissed her motion to strike the  
statement of defence, had varied a prior costs order, and had ordered the defendant to provide a  
statement of assets and liabilities and income tax returns for 2004 and 2005 -- The plaintiff alleged  
the defendant had filed a false or misleading affidavit on the prior motion -- HELD: The motion was  
dismissed -- The plaintiff had failed to establish that the affidavit was fraudulent or deceitful enti-  
tling her to set aside the order -- The defendant's statement that she was unable to satisfy the  
\$140,000 costs order was not untrue -- It had not been established that the defendant intended to  
deceive the plaintiff or the court -- Furthermore, the plaintiff could have cross-examined the defen-  
dant before the motion to obtain production of her financial disclosure in her matrimonial litigation  
but chose not to do so.*

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 59.06(2)

**Counsel:**

Richard M. Bogoroch for the plaintiff.

Martin P. Forget for the defendant.

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**ENDORSEMENT**

**1 F.J.C. NEWBOULD J.:**-- This is a motion by the plaintiff to set aside the order of Pitt J. of November 6, 2006 in which he dismissed the plaintiff's motion to strike to the statement of defence, varied an order of McWatt J. dated October 5, 2005 dealing with costs, and ordered the defendant to provide a statement of assets and liabilities and income tax returns for the years 2004 in 2005.

While the plaintiff also asked in her motion for an order striking the statement of defence of the defendant Van Rooy, this relief was not pursued in oral argument. In any event I would not have been inclined to strike the statement of defence as the material ordered by Pitt J. to be delivered was delivered, albeit not entirely in time.

**2** What gave rise to this motion has its genesis in a trial that took place in 2005 before McWatt J. Sometime into the trial, the plaintiff brought a successful motion for a mis-trial because of the pre-trial failure of Van Rooy to disclose certain facts. McWatt J. made a cost order against Van Rooy in the approximate amount of \$140,000 for costs of the plaintiff thrown away, to be paid forthwith. It was this order that Pitt J. varied.

**3** The allegation of the plaintiff is that Van Rooy filed an affidavit on the motion before Pitt J. that was false or misleading. The plaintiff relies upon rule 59.06(2) which enables a party to have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made. The onus is on the plaintiff to prove the fraud, which requires a higher degree of probability than would be required normally in a civil case: see *Continental Insurance Co. Ltd. v. Dalton Cartridge Co. Ltd.* (1982), 131 D.L.R. (3d) 559. In order to establish fraud, it must be established that there was a false statement made knowingly, without an honest belief in its truth or with a reckless indifference to its truth or falsity. Fraud will not be established where the party making the statement honestly believed in its veracity: see *UEM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* [2002] O.J. No. 2412. It must be proven that the defendant made the statement with the intention to deceive the plaintiff: see *Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler*, [2004] O.J. No. 3147. A judgment may be set aside as obtained by fraud if it is shown that the fraud may have affected result; it is not necessary to show it did affect the result: see *100 Main St. East Ltd. v. Sakas* (1976), 8 O.R. (2d) 385 (C.A).

**4** There were two motions before Pitt J. heard on September 1, 2006. The first was by the plaintiff to strike the statement of defence by reason of the failure of Van Rooy to pay the cost order of McWatt J. The other was by the defendant Van Rooy to vary the cost order of McWatt J. from costs payable forthwith to costs payable in any event of the cause, which would have meant that the costs would be payable at the conclusion of the case. At that time the trial was scheduled to recommence on January 8, 2007.

**5** The affidavit of Van Rooy which is now said to have been fraudulent was sworn on August 9, 2006. The paragraphs in the affidavit which Mr. Bogoroch points to are the following:

11. I am unable to satisfy the cost order. I am a single mother of a 15-year-old daughter and am currently in a dispute with my estranged husband regarding child and spousal support. I am self-employed and have limited income.
15. I have not flouted my obligations or taken a cavalier attitude towards the Court or its cost order, and my inability to pay the order has not undermined the plaintiff's substantive right to a fair trial.
16. I truly believe that in these circumstances it would be unfair and punitive in nature to strike my statement of defence and deny me the opportunity to defend this claim on its merits based solely on my inability to satisfy a substantial cost award.

**6** Counsel for the plaintiff chose not to cross-examine Van Rooy that on this affidavit or to request disclosure of any documents from the matrimonial dispute that was referred to in her affidavit. On September 1, 2006, Pitt J. ordered that the costs that had been ordered by McWatt J. to be paid forthwith be payable 30 days after the new trial. This was subsequently amended on November 6, 2006 by Pitt J., the date of the formal order, to provide for the costs to be paid no later than 30 days following the completion of the trial or the resolution of the within action. Pitt J. ordered Van Rooy to provide a statement of assets and liabilities and her income tax returns for the years 2004 in 2005 by no later than September 30, 2006.

**7** On September 29, 2006 a financial summary for Van Rooy was delivered to the solicitors for the plaintiff. It disclosed monthly income of \$2200 and monthly expenses of \$3800. It disclosed a few minor assets. It also disclosed a 50% interest in the matrimonial home, with her 50% interest estimated at \$150,000. It also disclosed an RSP of \$80,000. It disclosed debts and other liabilities of approximately \$38,000.

**8** In January 2, 2007 the motion before me was served. The financial summary was the sole basis at that stage to support the argument that the statements in the Van Rooy affidavit were not true. The responding material subsequently delivered by Van Rooy included her financial statement filed in the matrimonial litigation that was sworn on July 25, 2006, shortly before her affidavit that was before Pitt J. This July 25, 2006 statement disclosed monthly income of \$2144 against monthly expenses of \$4106. It disclosed debts to various financial institutions of approximately \$31,000 and outstanding legal fees at \$15,000. It disclosed her 50% joint tenant ownership of the matrimonial home valued at \$150,000 and her interest in an RRIF (probably a RSP mis-described) valued at approximately \$80,000. Mr. Bogoroch submits that this financial statement ought to have been disclosed in the affidavit that was before Pitt J. and that as it was sworn shortly before, it is evidence that Van Rooy knowingly misled the court in her affidavit of August 9, 2006.

**9** There is disclosed in the responding material of Van Rooy before me that since September 2005, Rooy has been employed as a farm worker earning \$50 per day or approximately \$13,000 per year and that she has needed to cash in portions of her RSP to support herself and her daughter. As at December 19, 2006 her RSP was depleted to a value of approximate \$51,500 and her debts to various financial institutions had increased slightly to approximately \$33,000.

**10** It would seem to me that Van Rooy's interest in the matrimonial home at the time she swore her affidavit on August 9, 2006 was an illiquid asset. It is tied up in the matrimonial litigation under the Family Law Act. No lender would lend to Van Rooy without at least her husband's signature, and even then would be unlikely because of her financial circumstances. It could not have been used at the time of her affidavit to pay the outstanding cost order.

**11** It would have been possible for Van Rooy to cash in her RSP. There would have been some taxes payable on the proceeds but undoubtedly there would have been a substantial amount received by her. Had she done so and applied all the proceeds to the cost order, ignoring her living requirements and her other debts, there would not have been a sufficient amount to satisfy the cost order.

**12** Has the plaintiff established that the affidavit of August 9, 2006 was fraudulent or deceitful entitling the plaintiff to set aside the order of Pitt J. In my view it has not. I say that for the following reasons:

- (a) At the time she swore her affidavit, Van Rooy did not have the financial means to satisfy the cost order of approximately \$140,000. Her statement "I am unable to satisfy the cost order" was not an untrue statement. It was made in the context of a paragraph that described her situation as a single mother with a teenage daughter who was involved in a matrimonial dispute with her estranged husband. It was also made in the context of a motion brought by the plaintiff to have her statement of defence struck out for not paying the entire cost order. For her to say that she could not satisfy the cost order was understandable and not fraudulent.
- (b) Mr. Bogoroch contends that Van Rooy was required to make full disclosure of her financial affairs on the motion before Pitt J. However, that is not the real issue before me. Mr. Bogoroch could have cross-examined Van Rooy before the motion to obtain production of her financial disclosure in the matrimonial litigation but chose not to do so. If the Van Rooy affidavit was not fraudulent or deceitful, the fact that she could have added more information to her affidavit is not relevant.
- (c) The tactical decision by Mr. Bogoroch not to seek further information by way of cross-examination is of more relevance because the financial statement sworn July 25, 2006 was something that Mr. Bogoroch could have obtained by the exercise of reasonable diligence.
- (d) It has not been established that Van Rooy intended to deceive the plaintiff or the court. The plaintiff must establish that Van Rooy did not honestly believe her affidavit to be true. There is no evidence that she did not believe her affidavit to be true, and therefore it would only be possible to conclude that she intended to deceive the plaintiff and the court if her affidavit was so obviously untruthful as to admit of no other conclusion. That is not the case.

**13** While it is not necessary for me to decide this, I have serious doubts that Pitt J. would have made any different order had a fuller picture of Van Rooy's financial affairs been before him. It is difficult to accept that he would have required Van Rooy to cash in her RSP and pay the net proceeds towards the outstanding cost order of \$140,000 and ignore her daily financial needs to survive. There can be no doubt but that Van Rooy needed the RSP to meet her daily living require-

ments and, as the matrimonial litigation had just commenced shortly before, there was no certainty that any meaningful award would be made in her favour in that litigation before the conclusion of the trial that was scheduled to start in January 2007.

**14** The motion is dismissed. Van Rooy is entitled to her costs of the motion. Cost submissions may be made by her counsel to me in writing within seven days and reply submissions may be made within a further five days. The submissions of each party should be no longer than three pages double-spaced.

F.J.C. NEWBOULD J.

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