

NOVA SCOTIA COURT OF APPEAL

Citation: *MacDonald v. Jollymore*, 2007 NSCA 29

Date: 20070301

Docket: CA 272069

Registry: Halifax

Between:

Roddy Robert MacDonald

Appellant

v.

Ruth Catherine Jollymore

Respondent

Judge: The Honourable Justice Jamie W. S. Saunders

Application Heard: March 1, 2007, in Halifax, Nova Scotia, in Chambers

Held: Registrar's application to strike dismissed. Respondent's application for security for costs allowed.

Counsel: Terrance G. Sheppard, for the appellant
Angela Swantee, for the respondent

Decision:

[1] After hearing counsels' submissions I announced the outcome with reasons to follow. Here are the reasons.

[2] In this proceeding there were two applications before me this morning. First, a registrar's motion to dismiss (which had been scheduled for an earlier appearance day but was adjourned by agreement), and second, the respondent's motion for security for costs in the event that this case goes ahead.

[3] The registrar's motion is denied. I am satisfied that the appellant now represented by counsel seems intent on proceeding with the appeal. I see, for example, that the appeal book was filed February 16, 2007.

[4] As far as the respondent's application is concerned I need only briefly refer to the facts which are thoroughly canvassed in the respondent's supporting affidavit sworn February 15, 2007. A précis of the material facts for the purposes of this morning's appearance establishes that:

- by the order of Leger-Sers, J., the appellant was to pay the respondent \$2,623.69 on or before July 14, 2006;
- that sum has not been paid and is now seven months past due;
- in the intervening period several requests were made through the appellant's counsel, or to him directly when he was not represented by counsel, to pay the obligation or face judgment;
- a refusal to pay eventually led the respondent to obtain judgment against the appellant for the sum of \$2,623.69 which has been recorded at the Registry of Deeds Office in Halifax;
- on January 10, 2007 the Registrar moved to dismiss the appeal for non-compliance with the **Rules**, the application to be heard on January 25, 2007;
- that court appearance was rescheduled by agreement of the parties;

- on January 23, 2007 the respondent's counsel received an envelope bearing the appellant's address, enclosing twenty-three cheques payable to the respondent and drawn on the account of Joyce Pye said to be the appellant's common law spouse. These cheques are dated at intervals spanning almost two years, from February 15, 2007 to December 15, 2008. The cheques are primarily in the amount of \$50.00, with four written in the amount of \$400.00 each, and a final cheque for \$123.69. These cheques total \$2,623.69.

[5] Ms. Swantee, of counsel for the respondent emphasises the unfairness in being expected to wait 2 ½ years for money plainly owed to her client as of July 14, 2006, by order of the trial judge. It should be emphasized that this due date was agreed to by the parties as reflected in their consent order. Obviously the respondent has been forced to incur additional legal costs in an attempt to collect these monies from the appellant. She fears that she will never receive this money from the appellant, and that should the present appeal result in his having to pay her additional money, she will never see those funds either. Finally, she is concerned that the cheques were drawn on the account of Joyce Pye who hasn't any obligation to the respondent under the order of Leger-Sers, J.

[6] The respondent's application is contested but I have not heard any compelling reason offered by the appellant why I should refuse the sought-after relief.

[7] The prevailing authorities with respect to granting or refusing security for costs are well known. See, for example, **L. E. Powell & Co. v. Canadian National Railway No. 2 et al** (1975), 11 N.S.R. (2d) 532 (NSCA); **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (NSCA); **Arnoldin Construction and Forms Ltd. v. Alta Surety Co.** (1994), 134 N.S.R. (2d) 318 (NSCA); **Turner-Lienaux v. Campbell**, (2001) NSCA 122; **Silver v. Cooperators General Insurance Co.**, 2002 NSCA 6; **Williams Lake Conservation Co. v. Chebucto Community Council of Halifax**, 2005 NSCA 44; and **J & P Reid Developments Ltd. v. Branch Tree Nursery & Landscaping Ltd.**, 2006 NSCA 131.

[8] In simple terms, the principle or test comes down to this: are there special circumstances to warrant an order for security for costs? Here I am satisfied there

are. The appellant has acted in an “insolvent manner” towards the respondent by first, failing to comply with the order of Leger-Sers, J. when the date for re-payment had been consented to, thus obliging the respondent to incur unnecessary legal costs in pursuit and in entering judgment; and then, by unilaterally establishing a re-payment scheme which effectively obliges the respondent to wait a further 2 ½ years to recover the money she is owed, with that outcome anything but certain.

[9] Setting an amount, and terms, are of course within my direction. Security for costs on appeal after trial are generally fixed at an amount estimated to be somewhat less than the costs award anticipated on the appeal (**Frost v. Herman**, supra). Costs on appeal after a trial are typically fixed at 40% of the costs awarded at trial, provided the panel hearing the case is satisfied that such a calculation would be just. Justice Leger-Sers fixed the costs at trial at \$11,000.00 inclusive of disbursements based on counsels’ agreement. Forty percent of that sum is \$4,400.00.

[10] Taking into account Mr. Sheppard’s submissions and the cost that the appellant has already incurred in preparing and filing the lengthy appeal books, I order the appellant to pay the sum of \$3,000.00 into court on or before Tuesday, April 3, 2007, which is the date his factum is due to be filed.

[11] Failure to do so may well invite an application by the respondent in Chambers to strike the appeal for non-compliance.

[12] To recap the dates I fixed:

Appeal Book:	Filed February 16, 2007
Appellant’s Factum:	Due April 3, 2007
Respondent’s Factum:	Due May 1, 2007
Hearing Date:	Monday, June 4, 2007 at 10 a.m. (½ day)

Saunders, J. A.