

NOVA SCOTIA COURT OF APPEAL

Citation: MacDonald. v. Jollymore, 2007 NSCA 46

Date: 20070423

Docket: CA 272069

Registry: Halifax

Between:

Roddy Robert MacDonald

Appellant

v.

Ruth Catherine Jollymore

Respondent

Judge:

The Honourable Justice Thomas Cromwell

Application Heard:

April 18, 2007, in Halifax, Nova Scotia in Chambers

Held:

Appeal dismissed with costs for failure to post security for costs as ordered.

Counsel:

Terrance Sheppard, for the appellant
R. Lester Jesudason and Angela Swantee, for the respondent

Decision:

[1] The respondent, Ms. Jollymore, applied in Chambers for an order dismissing the appeal because the appellant, Mr. MacDonald, has failed to comply with the order of Saunders, J.A. that he post security for costs of the appeal on or before April 3, 2007. I announced in chambers that the application was granted and the appeal was dismissed with costs and that I would give written reasons. These are my reasons.

[2] I acknowledge that this is an extraordinary order. In my view, however, it is amply justified by the persistent failure of the appellant to recognize his obligations to the Court. He has failed to pay the judgment under appeal, neglected his appeal until prodded by a Registrar's motion to dismiss it and failed to provide the security ordered by Saunders, J.A. on March 1st, 2007. There has been offered by Mr. MacDonald no evidence by way of justification, excuse or even apology for this course of conduct. His failure to pay the security for costs, viewed in the full context of his conduct on the appeal, in my view, constitutes an abuse of process of the Court which ought to disentitle him from continuing with the merits of his appeal.

[3] Mr. MacDonald sued Ms. Jollymore in the Family Division claiming, among other things, an equal division of their residence under the **Partition Act**, R.S.N.S. 1989, c. 333 and an equal share of Ms. Jollymore's business assets through either a constructive trust, a claim for unjust enrichment or a resulting trust. After a trial, Legere-Sers, J., in a reserved judgment, awarded Mr. MacDonald just over \$8,000.00 for his share of the net equity in the family residence, found that Ms. Jollymore remained the sole beneficial owner of the business assets and ordered him to pay Ms. Jollymore \$11,000.00 (inclusive of disbursements) for the costs of the action. The amounts due and owing from the parties were set off with the result that Mr. MacDonald owed Ms. Jollymore \$2,623.69 which he was ordered to pay on or before July 14th, 2006.

[4] In her 23-page written decision, the trial judge concluded as following concerning the business assets:

[137] The license, the boat, and the wharf are business assets. The evidence does not support a claim that there was a common intent to make these assets a shared business asset. As for the unjust enrichment claim, the Applicant has not made

out the necessary elements of enrichment, a corresponding deprivation and the absence of a juristic reason for the enrichment. He has been properly paid for his work with the Respondent. Thus the valuation of the license *is not a relevant* consideration for the purposes of this proceeding.

[5] Although the trial judge in her written reasons dated May 19, 2006, directed that Mr. MacDonald pay the amount owing to Ms. Jollymore on or before July 14, 2006, and a formal order was issued by the Court on August 30, 2006, that sum remains unpaid. No application for a stay of the execution of the judgment has been made and no evidence from Mr. MacDonald has been offered to justify or attempt to excuse his default.

[6] Counsel for Ms. Jollymore wrote to Mr. Sheppard, who represented Mr. MacDonald at the trial and now represents him on appeal, requesting payment of the \$2,623.69. Mr. Sheppard advised, in a letter dated August 30, 2000, that he was “not retained by Mr. MacDonald to deal with that issue” and told counsel for Ms. Jollymore that he could deal directly with Mr. MacDonald. Communications directly to Mr. MacDonald by counsel for Ms. Jollymore went unacknowledged and unanswered.

[7] Mr. MacDonald, on his own behalf, filed a notice of appeal dated September 29, 2006. Mr. Sheppard provided a certified copy of this notice of appeal to counsel for Ms. Jollymore noting, however, that the notice of appeal had been filed by Mr. MacDonald. Counsel for Ms. Jollymore took out a certificate of judgment on October 10, 2006, and recorded it at the Registry of Deeds in Halifax shortly thereafter. The judgment remains unpaid.

[8] Mr. MacDonald did nothing to move his appeal forward. Consistent with the Court’s normal practice, Mr. MacDonald received a letter from the Registrar shortly after his notice of appeal was filed indicating to him that if, within four months of the date of the decision under appeal, he did not arrange a date for the hearing of his appeal the Registrar would make an application to have the appeal dismissed for non-compliance with the **Rules**. Mr. MacDonald took no action to move his appeal forward until counsel for Ms. Jollymore wrote in early January urging the Registrar to proceed with the motion to dismiss.

[9] Mr. Sheppard advised by letter dated January 12th (two days after Ms. Jollymore’s counsel urged the Registrar to proceed with her motion) that he had

“been recently retained” by Mr. MacDonald in relation to his appeal, indicated that he had obtained the tapes of the trial, intended to file his certificate respecting preparation of the appeal book the next week and requested the Registrar not to bring a motion to dismiss the appeal.

[10] However, the Registrar, as required, had already acted. By notice dated January 10, 2007, the Registrar applied for an order dismissing the appeal under **Rule 62.17(2)** returnable in chambers on January 25, 2007.

[11] The Registrar’s motion to dismiss had to be adjourned and ultimately came before Saunders, J.A. on March 1st, 2007. Ms. Jollymore’s counsel brought an application for security for costs before the chambers judge on that same date. Saunders, J.A. dismissed the Registrar’s motion, set dates for hearing of the appeal and the filing of the books and, as noted, directed that Mr. MacDonald provide \$3,000.00 security for costs of the appeal on or before April 3rd, the date set for filing his factum.

[12] The three volume appeal book, running to about 1500 pages, and the appellant’s factum were filed as directed by Saunders, J.A. The outstanding amount of the judgment remained unpaid and the required security was not provided.

[13] On January 23, 2007, counsel for Ms. Jollymore received an envelope addressed to him with Mr. MacDonald’s return address enclosing 23 cheques payable to her on the account of a third person. The cheques were dated for various dates spanning almost 2 years from February 15, 2007, to December 15, 2008. The total amount of all cheques was \$2,623.69. There were three cheques, for \$50.00 each, dated the 15th of February, March and April and a cheque for \$400.00 dated May 15th. The appeal was set to be heard June 4. Thus, nearly a year after the date by which Mr. MacDonald was to have paid \$2,623.69, he had provided post-dated cheques which would provide \$550.00 prior to the hearing of the appeal.

[14] On the Registrar’s application to dismiss the appeal and Ms. Jollymore’s application for security for costs, no evidence was filed by Mr. MacDonald. There was no evidence as to his inability to pay either the amount due under the outstanding judgment or an amount for security for costs of the appeal.

[15] As noted, the security ordered by Saunders, J.A. was not paid and counsel for Ms. Jollymore applied in chambers for an order dismissing the appeal.

[16] Mr. Sheppard appeared in chambers on behalf of Mr. MacDonald and indicated that he had the funds to satisfy the order for security for costs. However, the money had not been paid in as ordered by Saunders, J.A. This, of course, ensured that these funds would not be at risk unless the appeal was permitted to proceed. No affidavit material was filed on behalf of Mr. MacDonald by way of justification or excuse for his failure either to pay the outstanding judgment or to post the security as ordered by Saunders, J.A.

[17] In summary, the appellant, in this matter, has failed to pay the judgment outstanding against him from the trial in this matter, a judgment which is essentially an order for costs, he retained counsel and moved this appeal forward only once under the threat of imminent dismissal, failed to pay the security for costs ordered by Saunders, J.A. and only put his solicitor in funds to do so in response to the respondent's application to dismiss the appeal. From the beginning of the appeal until the end, the appellant has not provided evidence of any inability on his part to fulfill his obligations, pursuant to Court order or which offered any excuse for his failure to do so. In my view, having counsel show up in chambers with a cheque at this late stage is not a sufficient response.

[18] As indicated in chambers, the appeal is dismissed. I fix the costs of the appeal payable by the appellant to the respondent at \$1,000.00 inclusive of disbursements. I also award the respondent the costs of its application to dismiss the appeal fixed in the amount of \$750.00 inclusive of disbursements.

Cromwell, J.A.