**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Hartery v. Rasmussen*, 2015 NSCA 96

**Date:** 20151021
**Docket:** CA 439832
**Registry:** Halifax

**Between:**

Shelly Hartery

Applicant

v.

Todd Rasmussen

Respondent

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| **Judge:** | The Honourable Justice Cindy A. Bourgeois |
| **Motion Heard:** | October 15, 2015, in Halifax, Nova Scotia in Chambers |
| **Held:** | Motion dismissed |
| **Counsel:** | Shelly Hartery, on her own behalf<br>William L. Ryan, Q.C., for the respondent |

**Decision:**

[1] The parties are the joint owners of a residential property in Dartmouth. Prior to their relationship terminating, they resided there together. They were not married.

[2] In April 2015, a hearing was held before Associate Chief Justice O'Neil. Mr. Rasmussen was represented by counsel; Ms. Hartery was not.

[3] In an order issued May 19, 2015, A.C.J. O'Neil determined the fair market value of the property; determined the value of Ms. Hartery's equity and directed that she, upon payment to her reflective of her equity, sign a Quit Claim Deed releasing her interest in the property to Mr. Rasmussen.

[4] Ms. Hartery has appealed the order, and has filed a motion seeking a stay. That motion was heard October 15, 2015. The motion was opposed by Mr. Rasmussen.

**Law**

[5] Unlike in some jurisdictions, the filing of a notice of appeal does not automatically stay the order of the court below. A motion must be made by a party seeking that reprieve. Civil Procedure Rule 90.41 provides:

> **90.41**(1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
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> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[6] The test this Court employs when considering a motion for stay is well established. In *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), the court set out that an applicant must show:

1. There is an arguable appeal, denial of the stay would cause irreparable harm and the balance of convenience favours the applicant; OR
2. There are exceptional circumstances which justify the granting of a stay.

**Analysis**

[7] The material before the Court is limited. I have reviewed the Notice of Appeal and order being challenged. There is, as of yet, no transcript of the hearing or A.C.J O'Neil's oral decision. The affidavit Ms. Hartery filed in support of the motion is very brief.

[8] I turn to the above test. Is the appeal arguable? In answering that question I am mindful of Justice Saunders' observations in *Federated Life Insurance Company v. Fleet*, 2008 NSCA 90:

> [19] At this stage the Chambers judge does not delve into the merits of the appeal. Rather, the inquiry focusses on whether the notice of appeal contains realistic grounds which, if established, could be of sufficient substance to persuade a panel of this court to allow the appeal. **Lienaux et al v. Toronto-Dominion Bank**, 137 N.S.R. (2d) 150 (C.A.); **Westminer**, supra; and **Whitewood v. Austin**, 109 N.S.R. (2d) 290 (C.A.).

[9] In the Notice of Appeal, Ms. Hartery alleges the trial judge refused to accept into evidence documents she tendered, and failed to account for certain liabilities in the calculation of the equity in the property. I am not to delve into the merits of the appeal. Given the paucity of information before me, it would be difficult to do so. I am satisfied however, that Ms. Hartery has raised an arguable issue.

[10] I turn now to consider whether Ms. Hartery has demonstrated irreparable harm. She does not seek to return to reside in the property, rather her concerns appear to be financial. In her affidavit Ms. Hartery states that she is fearful that if she signs the deed as ordered, she will be at the mercy of Mr. Rasmussen to pay the mortgage and another joint loan. Ms. Hartery seems to base this fear in the fact that Mr. Rasmussen has declared bankruptcy in the past.

[11] In *National Bank Financial Ltd. v. Barthe Estate*, 2013 NSCA 127, Justice Fichaud had this to say about irreparable harm:

> [16] In *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 341, Justices Sopinka and Cory for the Court said that irreparable harm "is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other".
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> [17] *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6, says:

> [12] Generally, if the judgement is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. [citations omitted]

[12] The evidence presented by Ms. Hartery falls far short of establishing that there is a real risk that Mr. Rasmussen will not abide by the financial consequences of the court order. Although Ms. Hartery references a past bankruptcy, there is no timeframe associated with that event, nor does she provide any evidence that Mr. Rasmussen is presently unable or unwilling to meet his financial obligations. In her oral submissions, Ms. Hartery referenced that Mr. Rasmussen currently enjoys excellent relationships with banking institutions. This does not support her proposition that she is at risk due to Mr. Rasmussen being in a perilous financial situation.

[13] With respect to the balance of convenience, Ms. Hartery's submissions did not address this element of the test directly. She says in her affidavit that being compelled to sign a deed as ordered would result in a loss of her "balance of power", and that a stay is necessary "to maintain some leverage". Although from her oral submissions it is obvious she is concerned with her financial well-being, I am not satisfied that the balance of convenience lies in Ms. Hartery's favour.

[14] Finally, there is nothing before me which establishes this matter would constitute an "exceptional circumstance" justifying the stay sought.

**Conclusion**

[15] Ms. Hartery has the burden to meet the test for a stay. She has not, and accordingly her motion is dismissed.

[16] In the event the motion was dismissed, Mr. Rasmussen sought costs in the amount of $550.00, payable forthwith. Although counsel attended to oppose the motion in chambers, no written submissions or responding affidavit were filed on Mr. Rasmussen's behalf. In the circumstances, I order Ms. Hartery to pay costs on the motion to Mr. Rasmussen in the amount of $300.00, payable forthwith.

Bourgeois, J.A.