

NOVA SCOTIA COURT OF APPEAL

Citation: Ofume v. CIBC Mortgage Corporation, 2003 NSCA 114

Date: 20031023

Docket: 206463

Registry: Halifax

Between:

Dr. Phillip Ofume and Maureen Ofume

Appellants

v.

CIBC Mortgage Corporation, a body corporate

Respondent

Judge: Bateman, J.A. (in Chambers)

Application Heard: September 18, 2003, in Halifax, Nova Scotia

Held: Application for extension of time to file notice of appeal dismissed, as is the appeal.

Counsel: appellant Dr. Phillip Ofume, in person for the appellants
Wayne Francis, for the respondent

Reasons for judgment:

[1] On August 29, 2003, Dr. Philip Ofume filed a notice of appeal from an interlocutory order of Justice Walter R.E. Goodfellow of the Supreme Court of Nova Scotia. The Canadian Imperial Bank of Commerce had applied to the Supreme Court for leave to amend its statement of claim in a foreclosure action in which Dr. Ofume and Maureen Ofume are the defendants. On August 12, 2003, Justice Goodfellow granted leave to the CIBC to amend. This is the Order that the Ofumes seek to appeal. A notice of appeal from an interlocutory order must be filed within 10 days (**Civil Procedure Rule 62.02(1)(a)**). Dr. Ofume says that he represents his wife, Maureen Ofume as well as himself in this matter.

[2] Dr. Ofume appeared in Chambers on September 4, 2003, before Justice M. Jill Hamilton of this Court. It was unclear from the lengthy material filed by him at that time what relief he was seeking. He requested “directions” and asked that the Supreme Court order be set aside.

[3] At that hearing Dr. Ofume was advised by Justice Hamilton that, if he wished to appeal Justice Goodfellow’s Order, he must first apply for an extension of time to file the notice of appeal, which had been filed out of time. The hearing of that application was set, in consultation with Dr. Ofume, for Chambers on September 18, 2003. Justice Hamilton directed that Dr. Ofume file all documents in support of the application by 4:30 p.m. on September 15, 2003.

[4] Dr. Ofume did not file the documents as directed, but appeared in Chambers on September 18, 2003. He maintained that computer problems prevented him from filing on September 15, 2003. He advised that he could file the documents in support of his application to extend time by the end of business on September 18, 2003. He sought an adjournment of the application which request I denied. I heard submissions on the application to extend time from Dr. Ofume and counsel for the CIBC and reserved decision pending receipt of Dr. Ofume’s documents later that day.

[5] In oral submissions on September 18, 2003, I understood Dr. Ofume to say that he had not filed the notice of appeal on time because he was out of town during the period for filing the appeal. Although he had notice of the date when the application to amend the statement of claim would be heard in the Supreme Court he did not attend that hearing. According to the notice of appeal filed by Dr.

Ofume, the amendment application first came on for hearing in Chambers on July 22, 2003. Dr. Ofume did appear on that date. The amendment application was to be adjourned to a future date, with the judge proposing August 12, 2003. Dr. Ofume did not agree with that date and advised the court that he and his family would be travelling out of the country at that time and he would not be available for the hearing until mid-September, 2003. The judge determined that the application would proceed on August 12, 2003. Dr. Ofume did not appear on the adjourned date.

[6] Dr. Ofume's affidavit, filed in support of the application to extend the time states that "... the Appellants traveled out of Nova Scotia when the Interlocutory Order dated August 12, 2003 was heard and issued". He deposes that the appellants and their entire family, on that day, were in St. Stephen, New Brunswick at the St. Stephen Inn, "resting for further voyage". In support of that assertion Dr. Ofume attached as an exhibit an undated business card from the St. Stephen Motor Inn. He also attached to the affidavit, as Exhibits "C" and "D" "further travel information". Those exhibits are five bus receipts for fare from Saint John, New Brunswick to Bangor, Maine. There is no date on the receipts although each receipt has a date of August 8, 2003, below it. It is unclear to what the date relates.

[7] At the proceeding on September 18th, 2003 Dr. Ofume gave the following explanation for his failure to file within the requisite time period:

DR. OFUME: Yes. So during the, - we were not in the court that day and they heard that on the 20th, the 20th of August. That's when we received the Order and then the 20th, according to the interlocutory order, 20th or 29th, I think it's within the statutory period, My Lady. So that's what our petition for a extension of time is speaking about because I filed affidavits ... our travel documents and all that is is a ticket of our family up to , you know, the places we went in those periods. So we are not in Nova Scotia, My Lady.

(Emphasis added)

[8] The CIBC has filed an affidavit of service confirming that both Dr. Ofume and Maureen Ofume were served with the amended statement of claim and order of Justice Goodfellow, at their home at 8 Edwin Court, Bedford, Nova Scotia on August 13, 2003, at 6:15 in the afternoon. It would seem, then, that the Ofumes, if they were in New Brunswick on August 12, 2003, had returned to Nova Scotia by the next day. When this was brought to Dr. Ofume's attention at the hearing on September 18, 2003, we had the following exchange:

DR. OFUME: Yeah. The issue, you know, receiving the order.

JUSTICE BATEMAN: Pardon?

DR. OFUME: The order came to my house. I mean, because I came to the court to take a copy, a photocopy of it. I did not look at the amended statement of claim because I did not look at it, you know, when -

JUSTICE BATEMAN: You got it, but you didn't read it.

DR. OFUME: I did not read it because I -

JUSTICE BATEMAN: But you acknowledge you got it on August 13th

DR. OFUME: August 13th?

JUSTICE BATEMAN: Yeah, that's what the affidavit says.

DR. OFUME: No, it should be August 15, not, not - is that ... signature there?

JUSTICE BATEMAN: We have a sworn affidavit from a process server saying he served you on August 13th.

DR. OFUME: No, it's August 15th. It's not 13th.

JUSTICE BATEMAN: Okay. You admit you got it by August 15th, if not the 13th.

DR. OFUME: No, you know, what I am saying there is that when I received it on August 15th all work, you know, I did not look at it. I never .. the order, you know, the order, those amended statement of claim and once was my .. that, you know, if something would have to appear so I was looking for, I never thought such a, such a, you know, I thought you went to court on that after the Registrar and they told me that it had been decided and eventually I got a photocopy of the order. But what I'm saying there in essence is that from the period of July 22nd up to July, I mean, August 15th, the issue is that I was not, I was not, you know, I was present in Nova Scotia starting from ... So within that period I was not, I hadn't, it wasn't, I hadn't any equipment or any document to work on, anything like this which I made a note to the judge presiding on that day. And I wrote, I mean we wrote to the judge before the time, before the 22nd of July and eventually, I told the judge that we are not going to be in the province .. mid-September has to be

considered, I say, ... So when he refused I was not really surprised because .. in this court where they force us to do, you know, certain things which is contrary to the fundamental right of our affairs. So I was not bothered. I felt that anything you give, you know, let me go like that because the usual court .. which we, you know, ... started up hearings in the court here since 1999 so that is the thing. The issue is whether I was in the Province, that is why the document I am going to file today will be able to determine all this type of thing because there are a lot of ..., the hotel, we give the court ... to call the hotel in St. Stephen, you know, in Moncton, you know, we requested them to call, free to call the hotel to see when I was lodged there. So that is the issue, My Lady.

[9] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate:

- (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
- (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
- (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[10] Saunders, J.A. noted in **Jollymore v. Jollymore Estate** (2001), 196 N.S.R. (2d) 177; N.S.J. No. 296 (C.A.) (Q.L.) that the test must not be applied rigidly and the objective must always be to do justice between the parties.

[11] Dr. Ofume has not satisfied me that he had a *bona fide* intention to appeal the order within the time for filing the appeal, nor that he has a reasonable excuse for not doing so. In light of the affidavit of service filed by the CIBC, I do not accept Dr. Ofume's evidence that he could not commence the appeal because he was travelling. Even if I accepted Dr. Ofume's version of events given once confronted with the proof of service, which version I do not accept, he was in possession of the order and amended statement of claim, at the latest, by August 15, 2003. This was well within the period for filing a notice of appeal.

[12] I have taken into account the fact that Dr. Ofume is a lay litigant, however, he appears frequently in this Court and is not unfamiliar with the time periods

within which he must file a notice of appeal from a Supreme Court order. (See **Ofume v. Vukelich** (2002), 205 N.S.R. (2d) 62; N.S.J. No. 217 (Q.L.)(C.A. Chambers))

[13] There are no compelling or exceptional circumstances which would weigh in favour of extending the time. Dr. Ofume has not made out a case suggesting error on the part of the Chambers judge in permitting the amendment nor does the proposed notice of appeal raise other grounds which would attract appellate interference. I am not persuaded that an extension of time for filing this notice of appeal is necessary to do justice between the parties. The statement of claim on this mortgage foreclosure action was issued on February 19, 2003. A lengthy defence was filed on March 19, 2003. The only further step in the proceeding, prior to the application to amend, was a successful application by Dr. Ofume wherein a Chambers judge ordered that he be permitted to continue to make payments on the mortgage during the course of the proceeding, by paying the monies through the Supreme Court. In these circumstances, the order permitting amendment of the statement of claim seems to occasion no hardship to the appellants.

[14] Accordingly, the application to extend the time for filing the notice of appeal is dismissed, as is this appeal, in this instance, without costs.

J.A.

Bateman,