NOVA SCOTIA COURT OF APPEAL
Citation: ***Cragg v. Eisener***, 2012 NSCA 38

Date: 20120412
Docket: CA 377951
Registry: Halifax

Between:

Edward Gillmor Cragg

Appellant

v.

Randy Eisener

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Motion Heard:	April 5, 2012, in Halifax, Nova Scotia, in Chambers
Held:	Motion to set aside appeal dismissed.
Counsel:	Catherine Colville, Agent for the appellant Michael F. Feindel, for the respondent

Decision:

[1] On January 25, 2012 Summary Judgment was granted in favour of the respondent, Randy Eisener, against the appellant, Edward Gillmor Cragg, in a mortgage foreclosure action.

[2] On February 8, 2012 Mr. Cragg appealed that decision alleging:

1. The Learned Chambers Judge erred in law and principle in granting summary judgement against the appellant without affording the Appellant [the opportunity] to put his full case before the court inclusive of proposed affidavit evidence of the appellant and without the opportunity for cross-examination of the Plaintiff

2. The Learned Chambers Judge erred in law and principle otherwise as may appear from review of the transcript.

[3] On March 15th, Mr. Cragg brought a motion for date and directions but the appeal was not set down because no certificate of readiness had been filed. Today Mr. Eisener moved before the Court in Chambers seeking:

1. An order setting aside the Notice of Appeal under Rule 90.40(1) as it fails to disclose any grounds for appeal;

2. Alternatively, an order dismissing the appeal under Rule 90.40(2) because the appellant had failed to conduct the appeal in compliance with Rule 90; and

3. In the further alternative, security for costs under Rule 90.42(1).

[4] In correspondence dated yesterday, Mr. Eisener sought, in the further alternative, that the court set dates for this appeal as quickly as possible.

[5] Mr. Cragg did not appear on the motions. He was represented by his wife, Catherine Colville. Ms. Colville requested an adjournment of today's motions as her husband is seeking legal counsel. She explained what steps were being taken to that end. She also explained that her previous counsel withdrew just prior to the March 15th motion for directions.

[6] I did not grant Ms. Colville's request for an adjournment but I did dismiss the motions brought by Mr. Eisener. I advised the parties that I would provide brief written reasons for doing so.

[7] During oral submissions, Mr. Feindel withdrew the motion for security for costs. He did make submissions with respect to his motion to set aside the notice of appeal. Rule 90.40(1) says:

> **90.40 (1)** A judge of the Court of Appeal may set aside a notice of appeal if it fails to disclose any ground for an appeal.

[8] A single judge lacks jurisdiction under Rule 90.40 to set aside an appeal on the basis that it lacks merit. Such a motion could only be made to a panel of the Court of Appeal under Rule 90.44. Rule 90.40(1) would only permit a Chambers judge to dismiss an appeal if, on its face, there was no possibility in law that the grounds could constitute any basis to sustain the appeal. In *Fares v. CIBC Bank*, 2009 NSCA 124, Justice Roscoe set aside a notice of appeal because the grounds were illegible and, in her words, "hardly comprehensible". She went on to say:

> [6] ...While one might decipher the first ground as a claim that there was an error of law and jurisdiction, ***a ground of appeal must include some particularization or suggestion of what the alleged error of law or jurisdiction is***. In the context of this case, where Justice Wright dismissed an application for a date assignment conference because, among other things, the pleadings had not closed, ***a bare allegation of an error of law or jurisdiction is insufficient*** to disclose a valid ground of appeal. [Emphasis added]

[9] Conceivably, Mr. Cragg's second generic ground of appeal would offend the Rule. But in this case, Mr. Cragg also complains that he was denied an opportunity to lead evidence and was denied the opportunity to cross-examine Mr. Eisener. In *Guptill v. Guptill* (1987), 82 N.S.R. (2d) 390, the Appeal Division set aside an interlocutory decision of a Chambers judge in part because the appellant had no opportunity to cross-examine the respondent on her affidavit. The appellant did not have his "day in court". I do not suggest that the appellant here did not receive procedural fairness before Justice Hood. That assessment is not mine to make. Rule 90.40(1) does not permit me to assess the merits of the grounds of appeal. Typically, a judge in Chambers does not consider the merits of an appeal except in connection with other types of motions – and then only tentatively, (for example a motion for a stay or a motion for leave to extend time to file a notice of appeal).

For the purposes of Mr. Eisener's motion only, I must assume that the grounds of appeal are factually accurate. On that assumption, the grounds in item # 1 constitute sufficiently particular grounds of appeal to satisfy the Rule.

[10] In his oral submissions, Mr. Feindel did not pursue a motion under 90.40(2) that the appeal be dismissed for failing to comply with Rule 90 – specifically, that no certificate of readiness had been filed. An appellant in an interlocutory appeal would normally have to file a certificate of readiness in conjunction with a motion to set the appeal down within 15 days of filing the notice in accordance with Rule 90.25(2). But Justice Hood's Summary Judgment decision is a "final disposition" with respect to liability and therefore the rules applicable to a general appeal govern, rather than those applying to an interlocutory appeal, (*Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303 (S.C.A.D.); *Van de Wiel v. Blaikie*, 2005 NSCA 14). Rule 90.25(2) allows Mr. Cragg 80 days to move to set down the appeal for hearing. A certificate of readiness is only required in support of that motion and so is not yet due. Accordingly, Mr. Cragg is not in breach of the Rule.

[11] Ms. Colville indicated that she now has a recording of the hearing before Justice Hood. It only remains to assemble the appeal book. She has not yet filed a certificate of readiness. Ms. Coville explained that she would like the benefit of counsel to advance her husband's appeal. Both parties expressed a desire to have the appeal heard as soon as reasonably possible. Accordingly, I directed the parties to re-attend in Chambers on Thursday, April 26th, at which time I will set dates for filing the appeal book, factums, and a date for the hearing of the appeal.

[12] In the circumstances, costs of today's motions will be determined by the panel hearing the appeal.

Bryson, J.A.