NOVA SCOTIA COURT OF APPEAL
Citation: ***Forrest v. Forrest***, 2013 NSCA 15

Date: 20130131
Docket: CA 410108
Registry: Halifax

Between:

Douglas Wayne Forrest

Appellant

v.

Juanita Louise Forrest

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Motion Heard:	January 9, 2013, in Halifax, Nova Scotia, in Telephone Chambers
Held:	Mr. Forrest's Motion to extend time to appeal is dismissed without costs.
Counsel:	Appellant, in person Respondent, in person

Decision:

[1] Douglas Wayne Forrest wishes to appeal the Corollary Relief Order of the Honourable Justice Margaret Stewart dated October 17, 2012. He was late in his efforts to file a Notice of Appeal and accordingly a motion was bought in Chambers to extend time to do so. Since Mr. Forrest's former wife, Juanita Louise Forrest, was not properly served, the motion was adjourned. As both parties reside in Cape Breton, I agreed to hear the motion by way of telephone Chambers on January 9, 2013.

[2] On the motion, both parties were unrepresented. But before Justice Stewart, both parties were represented by counsel. The Corollary Relief Order resulted from an appearance before Justice Stewart on July 3, 2012. Neither Mr. Forrest nor Ms. Forrest were very clear about what transpired before Justice Stewart. Apparently, Mr. Forrest left at some point during that hearing.

[3] At my request, Mr. Forrest forwarded to me a copy of the Corollary Relief Order. Amongst other things, it recites:

> And upon the Petitioner and Respondent agreeing on July 3, 2012 to enter into a binding Settlement Conference.

[4] In light of the foregoing recital, I wrote to trial counsel for both parties asking them to advise me what procedurally transpired on July 3rd. This letter was copied to both parties as was the reply of their respective trial counsel. I invited Mr. and Ms. Forrest to provide me with any additional submissions in light of counsels' letters by January 25th, following which I would make my decision. I have not received any supplementary submissions. This is my decision.

July 3, 2012:

[5] The information from counsel confirms that July 3, 2012 was scheduled as a contested divorce hearing. At the opening of the hearing, Justice Stewart encouraged counsel to discuss settlement with their clients.

[6] Both counsel confirm that Mr. and Mrs. Forrest agreed to enter into a "binding settlement conference", although in the case of Mr. Forrest, reluctantly. Some issues were agreed between the parties. The parties also agreed that Justice

Stewart could resolve any issues on which they did not reach agreement. Apparently she did so. At the conclusion of the settlement conference, the agreement (including issues resolved by Justice Stewart) was read into the record. However, his counsel advises that Mr. Forrest was experiencing some kind of panic attack and left the courthouse before the agreement was read into the record.

[7] Subsequently, Mr. Forrest refused to permit his counsel to sign the Corollary Relief Order which had been drafted in accordance with the settlement conference outcome. As a result, Ms. Forrest's counsel submitted the order to Justice Stewart who signed it. It was issued on October 17, 2012.

[8] The order provides that Ms. Forrest would have custody of the sole child of the marriage with access to be mutually agreed. There were to be no retroactive child support payments nor ongoing monthly support payments because Mr. Forrest's total annual income fell below the threshold amount provided for in the child support guidelines.

[9] Neither party was to pay the other spousal support, regardless of any change of their circumstances. With respect to the *Matrimonial Property Act*, the order says:

> All matrimonial property and matrimonial debts have been divided to the mutual satisfaction of the parties.

Mr. Forrest's motion for extension:

[10] Section 21(6) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd supp.) provides that appeals should be heard in accordance with the procedure of the relevant appeal court. *Civil Procedure Rules* 90.37(12) and 94.03 authorize a judge of the Court of Appeal to extend time to file an appeal. Section 50 of the *Judicature Act*, R.S.N.S. 1989, c. 20, expressly authorizes the making of such rules.

[11] A judge may grant an extension if it is just "in all the circumstances". Usually, the court will consider whether the intended appellant had a good faith intention to appeal within the appeal period, the explanation for missing the appeal period, and whether there are "compelling or exceptional circumstances" to warrant granting an extension, including whether there is a strong case for error in the court below (*Farrell v. Casavant*, 2010 NSCA 71; *Cummings v. Nova Scotia*

(Community Services), 2011 NSCA 2; and *Brooks v. Soto*, 2013 NSCA 7, at ¶ 4 & 5).

[12] In support of his motion, Mr. Forrest filed an affidavit in which he deposed that he was mistaken about the appeal period under the *Divorce Act*. He sought a brief extension so that he might file his notice of appeal. He says nothing about his intention to appeal during the appeal period, although his explanation for the error allows the Court to infer that he did have an intention to appeal within 30 days of the issuance of the Order. Accordingly, I am satisfied that Mr. Forrest had a good faith intention to appeal and that he has a reasonable explanation for not doing so in a timely way.

[13] Mr. Forrest lists these grounds of appeal in his proposed notice of appeal:

> (1) Matrimonial Act **[sic]** not followed;
>
> (2) Judge was changed when original judge was at court;
>
> (3) Denied Defense counsel chance to speak and evidence was ignored;
>
> (4) Proceedings proceeded without Mr. Forrest being present in court room;
>
> (5) The Judge was pre-disposed to settling in favour of the Petitioner-Respondent.

[14] Mr. Forrest seeks an order revoking the Corollary Relief Order and returning the matter to Supreme Court for "trial continuation".

[15] In our telephone conference call, Mr. Forrest expanded somewhat on his grounds of appeal. During pre-trial motions, Mr. Forrest was under the impression that Justice Kenneth Haley would hear his case. Justice Haley was otherwise occupied in another court on July 3, 2012. To be clear, no trial commenced before Justice Haley and he was not seized with the matter. Nothing required him to hear the case.

[16] Mr. Forrest says that he feels that Justice Stewart had "already made up her mind". Counsel's response to the court's inquiry established that Justice Stewart invited the parties to try and settle and gave them time to do so. No settlement

resulted. The parties reconvened in court when Mr. Forrest alleges Justice Stewart said "she would do it".

[17] Mr. Forrest's substantive concern was that there is a matrimonial home – in fact a converted garage – in which he thought he should have an interest as a result of a division of matrimonial assets.

[18] Following the hearing before Justice Stewart and while attempts were being made to settle the order, Mr. Forrest's counsel wrote to Justice Stewart indicating:

> Mr. Forrest has advised that I did not have his consent to agree to a binding settlement conference. Mr. Forrest has asked me to express to Your Ladyship that he felt the matter had been predetermined by the Court and that his position was not listened to and given consideration. Mr. Forrest advised that the reason he left was because he was having a panic attack because of the pressure of the situation and therefore was unable to provide his consent to me. It is Mr. Forrest's wish that the matter be scheduled for a full hearing.

[19] From the materials placed before me, Mr. Forrest agreed to a binding settlement conference before Justice Stewart. Moreover, although Mr. Forrest raises a concern about ownership of the matrimonial home, the order itself records that "all matrimonial property and matrimonial debts have been divided to the mutual satisfaction of the parties".

[20] In *Pritchard v. Pritchard*, 2009 NSCA 88, at ¶ 26, Justice Beveridge commented on the merits of an appeal where the parties had agreed on the judgment:

> [26] Furthermore, the aspect of the test that speaks of compelling and exceptional circumstances is qualified by the reference to the import of considering the case for error at trial and the existence of real grounds justifying appellate interference. With all due respect to Mr. Pritchard's beliefs, there is in fact no error at trial alleged, nor any grounds set forth justifying appellate interference. This was a judgment that was arrived at by consent.

[21] Mr. Forrest can argue that this case is different from *Pritchard* because he did not consent to all the terms of the Corollary Relief Order. It appears that he very much regrets entering into a settlement conference. It also appears that Justice Stewart decided some issues on which the parties could not agree – but it is

clear that they agreed to that process. Although Mr. Forrest left during the day, his agreement to the process and his settlement meeting with Justice Stewart preceded his departure. The matter was concluded before both counsel by reading the terms of the resolution into the record, in open court.

[22] Courts recognize the importance of encouraging settlement and settlement-oriented dispute resolution processes. Litigation is expensive and uncertain. It exhausts the resources of the parties and taxes those of the public who provide judges, courts and support staff. Less formal alternatives to trials should not be lightly cast aside. In this case, there were not extensive resources to fight about or with. Settlement was a sensible option. Mr. and Ms. Forrest were not required to agree to an alternative process, but on the facts before me, they were wise to do so. It is unfortunate that Mr. Forrest wishes he had not done so – but he had the benefit of the advice of counsel and an experienced trial judge. Moreover, on the face of the order, the parties agreed on Mr. Forrest's principal concern – division of matrimonial property.

[23] Accordingly, I am not able to conclude that Mr. Forrest has any reasonable prospect of succeeding in his appeal. He agreed to "a binding settlement conference". The settlement conference resolved all outstanding issues. There is no decision of the trial judge to appeal. The process that resulted in the order was agreed by Mr. Forrest and concluded with the assistance of counsel. In the circumstances obtaining here, opposite parties and the court were entitled to rely upon counsel having the authority of the client: *Kedmi v. Korem*, 2012 NSCA 124.

[24] Mr. Forrest's motion to extend time to appeal is dismissed without costs.

Bryson, J.A.