NOVA SCOTIA COURT OF APPEAL
Citation: ***Leigh v. Belfast Mini-Mills Ltd.***, 2013 NSCA 86

Date: 20130710
Docket: CA 416091
Registry: Halifax

Between:

Gillian Leigh, Wanda Cummings and Toltec Holdings Incorporated, carrying on business as Mabou Ridge Centre for Holistic Living

Appellants

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Respondents

Judge:	The Honourable Justice David P.S. Farrar
Motions Heard:	June 19, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Appellants' motion for filing Notice of Motion and extending time to file supporting materials allowed; appellants' motion to quash respondents' motion for security for costs dismissed; appellants' motion for a stay dismissed; and, respondents' motion for security of costs allowed
Counsel:	Appellants Gillian Leigh and Wanda Cummings in person Robert K. Dickson, Q.C. and Ian Brown, for the respondents

Decision:

[1] Belfast Mini-Mills Ltd. and International Spinners Ltd. bring a motion pursuant to *Civil Procedure Rule* 90.42 for an order requiring the appellants, Gillian Leigh and Wanda Cummings, et al. to post for security for costs. In response to the respondents' motion, the appellants made a motion to stay the decision under appeal, sought an order abridging the time for filing of the notice of cross-motion and extension of time for filing of supporting materials. Finally, they sought dismissal of the respondents' motion for security for costs as an abuse of process.

[2] For the reasons that follow, I would abridge the time for filing of the appellants' notices of motions for a stay and to quash the respondents' motion for security for costs as an abuse of process and extend the time for filing of supporting materials. I would dismiss the appellants' motions. The respondents' motion for security for costs is granted and I would order that the appellants post security for costs in the amount of $4,000 on or before July 31st, 2013, failing which the appeal shall be dismissed.

Background

[3] The appellants commenced an action in the Supreme Court of Nova Scotia on October 13, 2006, alleging that various pieces of fibre process equipment the defendants manufactured and sold to the husband of Gillian Leigh in 1998 and additional equipment sold to the appellants in 2004 had design flaws which allegedly caused their business to lose revenues. The appellants were initially represented by counsel. However, since early 2008 they have been self-represented.

[4] A list of documents was exchanged and discoveries of a number of representatives of the respondent companies were held on October 1, 2 and 3, 2007.

[5] Discovery of Gillian Leigh commenced on January 28, 2008, and was then adjourned when she refused to respond to specific questions and refused to produce relevant documentation.

[6] Since that time, and despite clear court orders, the appellants have refused to attend for discovery examination, answer questions and have refused to produce relevant documentation. Instead, the appellants have brought a multitude of various motions, applications and appeals.

[7] The appellants have several outstanding costs awards against them from various motions and a separate application to this matter which they had initiated. These include:

a. December 29, 2010 decision of Justice Coughlan dismissing the Application 2010 Hfx. No. 333144 with costs of $1,000 payable by the Appellants. An appeal of that matter was dismissed by decision of this Court dated May 24, 1011 – see *Cummings v. Belfast Mini-Mills Ltd.* [2010] N.S.J. No. 668, 2010 NSSC 459 (NSSC)

b. The Appellants brought a multiple number of motions (converting action to application; compliance with undertakings; summary judgment; injunction; striking the defence; prohibit further Plaintiff discoveries; bar further motions by Defendants etc.). The Respondents brought a motion filed on May 6, 2010 seeking compliance with undertakings and requiring that Gillian Leigh attend for further discovery and answer specific questions.

c. In a July 18, 2010 pre-hearing conference before Justice Arthur J. LeBlanc, the Appellants requested an adjournment of the various motions 3 days prior to the scheduled July 20, 2010 hearing date. Justice LeBlanc adjourned all motions to November 22 and 23, 2010. By decision dated January 25, 2011, Justice LeBlanc ordered costs payable by the Plaintiffs to the Defendants in the amount of $1,000 in any event of the cause payable at the end of the proceeding – see *Leigh v. Belfast Mini-Mills Ltd.* [2011] N.S.J. No. 118, 2011 NSSC 23 (NSSC)

d. Ultimately, all these motions were consolidated and argued before Justice Patrick Duncan. In a detailed decision dated July 20, 2011, on the merits, and August 17, 2011, on costs, resulted in an order dated September 26, 2011, ordering that the Plaintiffs multiple motions were dismissed, that both Plaintiffs attend or re-attend for discovery, answer specific questions and for the Plaintiffs to produce relevant documentation – see *Leigh v. Belfast Mini-Mills Ltd.* [2011] N.S.J. No. 409, 2011 NSSC 300 (NSSC). The Appellants then brought an unsuccessful motion for a ban on publication of Justice Duncan's decision – see *Leigh v. Belfast Mini-Mills*

> *Ltd.* [2011] N.S.J. No. 410, 2011 NSSC 303 (NSSC). The Appellants were ordered to pay costs of $972.52 forthwith and costs of $3,000 on or before January 31, 2012 – see *Leigh v. Belfast Mini-Mills Ltd.* [2011] N.S.J. No. 451, 2011 NSSC 320 (NSSC). The Appeal of that order was dismissed by this Court on May 31, 2012 for failure to perfect the appeal.

e. An Order dated May 30, 2012, Justice Kevin Coady dismissed a motion brought by the Plaintiffs again seeking compliance with undertakings. His order required payment of $300 in costs by the Plaintiffs to the Defendants "forthwith";

f. The Order of Justice J. Edward Scanlan dated May 16, 2013, being the subject of the current appeal, dismissed the appellants' action and ordered costs payable in the amount of $1,200, in addition to the previous unpaid costs awards plus estimated interest in the total amount of $6,700.

[8] Currently there is $7,900 in unpaid costs orders. After many requests for payment of the costs orders, the appellants have consistently refused to pay the amounts ordered. As well, the appellants have refused to obey court orders requiring them to attend for further discovery examination. They have also refused to obey a discovery subpoena in aid of execution.

[9] The issue for determination on this motion is whether the appellants should be required to post security for costs in relation to the upcoming appeal.

[10] *Civil Procedure Rule* 90.42 reads:

> 90.42 (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.
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> (2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[11] *Civil Procedure Rule* 90.42 is identical in all substantive respects to its predecessor found in the *1972 Civil Procedure Rules*, Rule 62.13. The same interpretative principles apply to Rule 90.42 as to the former Rule. (See for

example, *Sable Mary Siesmic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40 at ¶2 and *Walsh v. Unum Provident*, 2013 NSCA 82 at ¶10.)

[12] Security for costs on appeal will only be ordered where the applicant can show special circumstances.

[13] In *Geophysical*, Beveridge, J.A. discussed what constitutes special circumstances:

> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
>
> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at para. 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at para. 4-5; *Leddicote*, [2001] N.S.J. No. 394, at para. 15-16; *White*, [2000] N.C.J. No. 162, at para. 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at para. 7; *Smith v. Heron*, at para. 15-17; *Jessome v. Walsh*, [2002] N.S.J. No. 458, at para. 16-19.
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> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.

[14] In support of the motion for security for costs, Mr. Brown, co-counsel for the respondents filed an affidavit sworn June 11, 2013. The affidavit and supporting materials filed by counsel for the respondents confirms the various motions, applications and the attempts that have been made to secure the payment of the costs awards in these proceedings. I accept the affidavit and brief on behalf

of the respondents as constituting an accurate, fair and complete statement about the facts and the law of this matter. I am satisfied that "special circumstances" exist that give the respondents an objective basis to be concerned about their recovery of prospective appeal costs. However, that is not the end of the matter. Special circumstances do not automatically result in an order for security for costs. I must be cautious before granting such an order that may deny the appellants of their right of appeal (*Geophysical*, ¶7).

[15] In response to the respondents' motion, the appellants have filed the affidavits of Wanda Cummings and Gillian Leigh. The affidavit of Gillian Leigh essentially supports the respondents' recitation of the types of applications and motions made by the appellants. Despite the fact that the appeals from the various motions have been dismissed by this Court, in her affidavit Ms. Leigh continues to assert the appropriateness of the appellants' positions. The affidavit also sets out why Ms. Leigh considers herself to be impecunious.

[16] The affidavit of Wanda Cummings is similar to that of Ms. Leigh setting out in some detail the proceedings which they have taken to date and trying to justify the manner in which this action has been conducted to date. She also, inappropriately, in my view, criticizes Mr. Dickson, counsel for the respondents suggesting that the appellants' lack of success to date was a result of misrepresentations or inappropriate, unwarranted allegations against them by Mr. Dickson. Again like Ms. Leigh, she tries to justify the manner in which this litigation has proceeded and espouses the merits of the appellants' positions.

[17] She also sets out why she is not in a position to pay a costs order in this matter.

[18] Mr. Dickson, in his submissions before me, suggests that the affidavits filed by Ms. Leigh and Ms. Cummings do not establish that they are impecunious. He points to the fact that they have been able to fund this litigation and the various motions and appeals over the past seven years. Though this argument resonates somewhat with me, I am not prepared to allow this motion solely on the basis that Ms. Cummings and Ms. Leigh are not impecunious. In my view, this is one of those rare cases where despite the impecuniosity of the appellants or the fact that compelling them to post security would likely terminate the appeal, I would order

security for costs in favour of the respondents in the face of the appellants' persistently inappropriate conduct in this litigation.

[19] This case is not unlike *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSCA 122, a decision of Bateman, J.A. where she held:

> [35] I am confident that, as they have in the past, the appellants will find the resources to advance the appeal in the face of a security for costs order, if they continue to believe in the merits of their cause. I add, however, that, in these circumstances, a consideration of the interests of not only the appellants but also the respondent leads me to conclude that an order for security is appropriate even should the result be termination of the litigation. In other words, even had I been satisfied that the appellants are impecunious I would have ordered security.
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> [36] Had I accepted that the appellants were impecunious, the manner in which this litigation has been conducted would be relevant to the balancing of interests between the appellants and the respondent. On several occasions judges hearing interlocutory matters have commented unfavourably upon Mr. Lienaux's conduct of the proceeding on behalf of Ms. Turner-Lienaux and Smiths Field. This occurred in both security for costs applications; on an application for summary judgment before Saunders, J., as he then was, (*Campbell v. Lienaux* (1997), 165 N.S.R. (2d) 356; [1997] N.S.J. No. 314 (Quicklaw) (N.S.S.C.)); on an interlocutory application before Hood, J. in 1996 (*Campbell v. Lienaux* (1996), 153 N.S.R. (2d) 241; [1996] N.S.J. No. 312 (Quicklaw) (N.S.S.C.)); and most recently in the trial judgment, cited above. I conclude from reading these decisions that Mr. Lienaux's conduct of the proceedings and approach to the issues has significantly complicated the matter and driven up expenses for both parties, but in particular, for Mr. Campbell.
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> 37 He has pursued many futile applications and appeals therefrom which have substantially impacted upon the expense of this matter. He has not conducted the litigation in a way which indicates concern for efficient use of the appellants' financial resources, which he maintains are limited. There has been a failed application to disqualify Mr. Campbell's solicitors from continuing to act for him (*Campbell v. Lienaux* (1996), 153 N.S.R. (2d) 241; [1996] N.S.J. No. 312 (Quicklaw) (N.S.S.C.)); an unsuccessful appeal from that order (*Campbell v. Lienaux* (1996), 154 N.S.R. (2d) 159; [1996] N.S.J. No. 401 (Quicklaw) (N.S.C.A.)); unsuccessful opposition to an application by Mr. Campbell to discontinue the original action (unreported); his appeal of that order was dismissed (*Campbell v. Lienaux* (1996), 154 N.S.R. (2d) 241; [1996] N.S.J. No. 408 (Quicklaw) (N.S.S.C.)); the above mentioned unsuccessful application for

> summary judgment before Saunders, J.; and most recently, the unsuccessful application to this court to stay the execution of the order for costs in the summary judgment matter (*Campbell v. Lienaux (*1997), 161 N.S.R. (2d) 236; [1997] N.S.J. No. 441 (Quicklaw) (N.S.C.A.)); an unsuccessful appeal of the dismissal of the stay application (Campbell v. Lienaux (1998), 167 N.S.R. (2d) 196; [1998] N.S.J. No. 142 (Quicklaw) (N.S.C.A.)); an unsuccessful application before this court to rehear that appeal (Campbell v. Lienaux (2000), 188 N.S.R. (2d) 171; [2000] N.S.J. No. 259 (Quicklaw) (N.S.C.A.)); an unsuccessful application to stay execution of the trial judgment (Campbell v. Lienaux, [2001] N.S.J. No. 273 (Quicklaw)). (My emphasis)

[20] Similar principles apply in this case. The appellants have pursued frivolous and futile motions, applications, and appeals, none of which have been successful. They refuse to accept court rulings on various issues and simply appeal each and every decision. Communication has been conducted by them in such a way as to complicate and prolong litigation. Justice Duncan commented unfavourably on the appellants' conduct in this action and their attitude toward the respondents in *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 320:

> [24] Substantial parts of their submission are assaults on the integrity of counsel for the defendants. The plaintiffs raise the same allegations that they advanced in support of the failed motion for an abuse of process. They continue to insist that the defendants accessed "sealed" and "confidential" documents; that counsel breached the implied undertaking rule; that defendants' counsel have not been "forthright", having committed "perjury" and actively misrepresented information to the court. They suggest the motive is to cause "harm and delay" and to "crush" the plaintiffs into submission. The ongoing personalized attacks on counsel for the defendants are unwarranted and reprehensible.

[21] The appellants make similar assertions before me calling into question the integrity of respondents' counsel and the propriety of the decisions which have been decided against them.

[22] Ms. Leigh and Ms. Cummings are not unlike Mr. Doncaster who was recently commented upon by Saunders, J.A. in *Doncaster v. Chignecto Central Regional School Board*, 2013 NSCA 59:

> [44] In light of Justice Coady's findings in the court below and from what I have seen on this and other matters on our Court's docket, it seems to me that litigants

> such as Mr. Doncaster appear to fall into a camp of persons who claim an unconditional, and unassailable "right to appeal" every step, in every case. Persons who hold such a view are seriously misguided or ill-informed. No right is absolute. In our free and democratic society every right, privilege or interest is balanced and held in check by other rights, privileges and interests. The opportunity to appeal is regulated by long held practices and rules, by which deadlines, substance, style and content are strictly enforced. Those unwilling or unprepared to follow those strictures do so at their peril.
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> [45] Litigants, self-represented or not, with legitimate interests at stake will be treated with respect and will quickly come to realize that judges, lawyers and court staff are prepared to bend over backwards to accommodate their needs, to explain procedures that may seem foreign, and to ensure that the merits of their disputes will be heard. They and their cases will be seen as the raison d'être for access to justice.
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> [46] Litigants, self-represented or not, with a different agenda designed to wreak havoc on the system by a succession of endless, mindless or mind-numbing paper or electronic filings, or meant to drive a spouse or opposite party to distraction or despair or financial ruin will quickly come to realize that the Court's patience, tolerance and largesse have worn thin. They and their cases will be seen as an affront to justice and summarily shown the door. (My emphasis)

[23] I would place the appellants in this case in that category of litigant. Being self-represented does not inoculate the appellants from the courts' processes. The appellants have no respect for court orders, have thumbed their noses at the request by the respondents to pay costs, failed to attend at a discovery and, in general, have conducted this litigation in a frivolous and vexatious manner. I pause here to comment that on my review of the record and the submissions of the parties there is absolutely no merit to the allegations of improper conduct on the part of Mr. Dickson in any of the proceedings. The appellants continued assertions that Mr. Dickson is acting inappropriately further highlights their lack of respect and understanding of the court's processes.

[24] In my view this case cries out for an order for security for costs as a result of the appellants' persistently, inappropriate conduct of this litigation.

Quantum of Security for Costs

[25] In fixing the security it is necessary to estimate the costs which might be ordered on appeal. This Court often applies a 40% guideline to those ordered at trial. In this case, the costs of the dismissal of the action have not yet been determined. I can only do a rough estimate as to what I think the costs to be awarded by the trial judge may be. In this estimate I am in no way limiting the assessment of costs by a judge. The judge will have much more information on the nature and extent of the proceedings to date than I have before me. For the purposes of this exercise I estimate the costs below to be $10,000. I will use 40% of that amount, $4,000, as being the amount ordered for security for costs.

[26] The appellants are to pay this amount into court on or before July 31, 2013, failing which their appeal will stand dismissed.

Application and Motion to Quash for Abuse of Process

[27] As noted earlier in this decision, I abridged the time for filing of the Notice of Motion for a stay of the order below and to quash the respondents' motion for security for costs as an abuse of process. I also extended the time for filing of the supporting materials.

[28] I will deal with both of these applications summarily. The affidavit evidence filed by Ms. Leigh and Ms. Cummings does not even come close to establishing they would suffer irreparable harm if a stay were not granted. In light of this, it is not necessary for me to review the arguable issue and balance of convenience test on the stay motion. The motion to stay the order of Justice Scanlan is dismissed.

[29] With respect to the motion to quash the respondents' motion for security for costs as abuse of process, it should be apparent from my conclusions on the respondents' motion that it is an entirely appropriate motion and does not constitute an abuse of process. I would dismiss the appellants' motion to quash.

Conclusion

[30] The respondents' motion for security for costs is allowed, the appellants' motion for late filing of the Notice of Motion and extending the time for supporting materials is allowed. The appellants' motion for a stay of the Order below is dismissed. The appellants' motion to quash the motion for security for costs as an abuse of process is dismissed.

Costs of this Proceeding

[31] The respondents shall have their costs of this proceeding which I fix at $1,500 inclusive of disbursements payable forthwith.

Farrar, J.A.