NOVA SCOTIA COURT OF APPEAL

Citation: *Morrissey v. Morrissey Estate*, 2018 NSCA 19

Date: 20180223
Docket: CA 472795
Registry: Halifax

Between:

Glenda Morrissey

Applicant

v.

Tanya Elliott, in her capacity as the Personal Representative of the Estate of Joseph F. Morrissey and Tanya Elliott in her personal capacity

Respondent

Judge:	MacDonald, C.J.N.S.
Motion Heard:	February 15, 2018, in Halifax, Nova Scotia in Chambers
Held:	Motion granted
Counsel:	Peter C. Rumscheidt, for the applicant Ronald R. Chisholm, for the respondent

Decision:

[1] The applicant seeks to extend the time to file an appeal. For the following reasons, I grant her motion.

BACKGROUND

The Family Dispute

[2] This matter involves a family dispute flowing from the death of Joseph Morrissey. The applicant, Glenda Morrissey, is Joseph's sister, while the respondent, Tanya Elliot, is Joseph's wife. In Probate Court, Ms. Morrissey along with her mother, Geraldine Morrissey, filed a claim against Joseph's estate seeking the return of certain personal items. In a second claim, Geraldine alone claimed a debt of $54,000 against the estate. In a third claim, Geraldine filed a debt claim of $7,000 on behalf of her late husband Glen Morrissey (Joseph's father). All three claims asked the court to direct Ms. Elliot to comply, as the estate's personal representative.

[3] Justice Jeffrey R. Hunt of the Supreme Court heard all three claims together in the Fall of 2017 and rendered an oral decision granting the personal property claim but dismissing the two debt claims.

[4] The parties agreed that Ms. Elliot should have her costs from Geraldine Morrissey in the amount of $10,850. However, Glenda Morrissey argued that she should not bear any responsibility for costs, since she was involved in only one claim, which was successful. She explained it this way in her written submission to Justice Hunt:

> There were three separate Notices of Claim filed with the Probate Court which, by agreement, were dealt with at the same time by Your Lordship. The three claims were:
>
> 1. Claim of Geraldine Morrissey and Glenda Morrissey for the return of personal property;
>
> 2. Claim of Geraldine Morrissey for the sum of $54,000.00;
>
> 3. Claim of Geraldine Morrissey in her capacity as the Personal Representative of the Estate of Glen Morrissey for the sum of $7,000.00.
>
> Your Lordship ruled in favour of Geraldine Morrissey and Glenda Morrissey with respect to the claim regarding the return of personal property. Your Lordship

> ruled in favour of Ms. Elliott and dismissed the claims of Geraldine Morrissey for $54,000 and the claim of the Estate of Glen Morrissey for the sum of $7,000.00.
>
> Glenda Morrissey was completely successful in her Notice. She was not a party to the other two Notices of Claim.
>
> The Order proposed by Mr. Chisholm on behalf of his client would require Glenda Morrissey to pay costs to Tanya Elliott with respect to proceedings in which Glenda Morrissey was not a party.

[5] On the other hand, Ms. Elliot insisted that this was a mother-daughter joint venture and that she would likely never recover if only her mother-in-law were responsible:

> The Applicants argue that Glenda Morrissey should not be subject to the Order for costs as she was successful with her application. This is not accurate. In December 2016, almost 1 year ago, the Defendants made an offer to settle by providing the items requested in return for a release. In August 2017 this offer was made in a formal offer to settle. If these offers to settle had been accepted there would have been no hearing and no Order for costs. The *decision of the Court was a result no better than that party would have received by accepting the offer*. (Rule 10.09(c)) The offer was not accepted.
>
> …
>
> We submit the Applicants Geraldine and Glenda Morrissey acted in concert throughout. The claims were not conducted differently, but their evidence supported each other's position. They adopted a single common argument, with the same legal counsel. As noted in the cases cited by Wadden, *"the presumptive rule favours joint liability"*.
>
> …
>
> In our matter before this Court, Geraldine's evidence was that she did not use bank accounts and kept everything in cash. She does not own real property. She is 83 years of age and effectively immune to any Order from this Court related to costs.
>
> …
>
> In the present matter, having the Order for Costs apply only to the one Applicant who is judgement proof would frustrate the goals of rule 63 and 41 related to the purpose for costs, to *"do justice between the parties"* and would serve to assist the Plaintiffs limit the effectiveness of this Court Order related to costs.

[6] The judge agreed with Ms. Elliot, reasoning:

> It may be helpful to remember how the matter originally commenced. It was an Application for Proof in Solemn Form jointly by Geraldine Morrissey and Glenda

> Morrissey. Subsequently, it was agreed to transition the Proof in Solemn Form matter to an adjudication of the debt and property claims. While there were three Notices of Claim, the matter did proceed as on Application.
>
> I have considered the authorities which I conclude create a prima facie expectation of joint and several cost exposure as between co-applicants. The presumptive rule favours joint liability for joint actors in litigation. There must be a reason for departing from the presumptive stance. For instance, this can be overcome where the parties conducted their cases differently, through different counsel or with different theories. That is not the case here. Both parties were represented by the same counsel throughout and were essentially acting in one interest.
>
> …
>
> After considering the matter it is my view that the Order must properly include both Geraldine and Glenda Morrissey. They were joint Applicants. The matter was conducted jointly. There is no compelling reasons to depart from the presumptive rule in these circumstances.

[7] The judge's subsequent order rendered all three claimants (Glenda Morrissey, Geraldine Morrissey, and Glen Morrissey's estate) jointly and severally liable.

[8] It is this order that Glenda Morrissey now seeks to appeal.

[9] At the outset of the hearing before me, I expressed my concern over Geraldine Morrissey's potential interest in this appeal. Specifically, if successful, only she would be responsible to pay the costs. Glenda Morrissey's counsel, Mr. Peter Rumscheidt, (who also represented both mother and daughter at the first hearing) assured me that Geraldine Morrissey was aware of the appeal and supported it. He undertook to file an affidavit to that effect.

The Late Filing

[10] Justice Hunt's order was issued on December 18th, 2017 and received by Mr. Rumscheidt the next day. The parties agree that (with the holidays) the last day to file the appeal was Thursday, January 4th, 2018. Two working days later, on Monday January 8th, Mr. Rumscheidt forwarded a draft Notice of Appeal to Ms. Elliot's counsel, Mr. Ronald R. Chisholm, with a cover letter explaining the delay and requesting Ms. Elliot's forbearance:

> Dear Ron:
>
> **RE: Estate of Joseph Morrissey**
>
> I have received instructions from Glenda Morrissey to file a Notice of Appeal with respect to Justice Hunt's ruling on costs and, in particular, his decision that Glenda be jointly and severally liable for costs together with Geraldine.
>
> Attached is the draft Notice of Appeal which I have prepared.
>
> Justice Hunt's decision was issued on December 18th. You sent me a copy on December 19th. As the appeal is with respect to costs only, under Rule 90.13(3), the Notice of Appeal was to have been filed within ten (10) days of the Order. By my count, ten (10) clear days from December 19th is January 4, 2018. I was out of the office from December 22 to January 3, inclusive. Our office closed early on January 4th due to the weather.
>
> Please advise whether your client will object to the Notice on the basis it was filed out of time. If so, a motion will be brought seeking an extension of the time line in which to file the Notice. In the circumstances and given the applicable test, I am very confident an extension will be granted, particularly as we are only looking at a matter of several days after the passing of the deadline.
>
> I look forward to hearing from you.

[11] On January 15th, Mr. Chisholm wrote to Mr. Rumscheidt explaining that his client would not agree to the extension:

> Hi Peter,
>
> My client was not available until the end of last week. She does not agree to an extension of time for filing an appeal on the issue of costs.
>
> Yours truly,
>
> Ron Chisholm

[12] This prompted Mr. Rumscheidt to file the present motion.

ANALYSIS

[13] The *Nova Scotia Civil Procedure Rules* authorize me to grant the requested extension [*Rule* 90.37(12)]. Not surprisingly, my overarching consideration is whether it is in the interests of justice to do so, considering at least five factors, namely:

- the length of the delay
- the reason for the delay
- the presence or absence of prejudice
- the apparent strength or merit of the proposed appeal, and
- the good faith intention of the appellant to appeal within the prescribed period.

(*Farrell v. Casavant,* 2010 NSCA 71, ¶ 17)

[14] I will now address each of these factors in the context of this motion.

The Length of Delay

[15] Mr. Rumscheidt forwarded his documentation to Mr. Chisholm on January 8th. With January 4th being the last filing day (and a storm day at that), only one working day – January 5th – was missed. Unless, Mr. Rumscheidt had filed on January 5th, there could not be a shorter delay. Mr. Chisholm urged me to have the clock run against Ms. Morrissey until later in January, when Mr. Rumscheidt's documents were filed in this Court. I reject this submission because from January 8th to the 15th, the ball was in Ms. Elliot's court to determine if she would consent to the extension. It was entirely reasonable for Mr. Rumscheidt to pursue that option instead of filing his motion on the 8th.

The Reason for the Delay

[16] The reason for the delay is evident. It included Mr. Rumscheidt being out of the office during the holiday season and a snow day on January 4th.

The Presence or Absence of Prejudice

[17] There is absolutely no prejudice to Ms. Elliot with such an insignificant delay.

The Apparent Strength or Merit of the Proposed Appeal

[18] I realize that Ms. Morrissey is challenging a discretionary costs order. This commands deference. That said, it would not be a frivolous appeal. Furthermore, considering how close Ms. Morrissey was to meeting the filing deadline, I would not deny her appeal on this basis.

The Appellant's Good Faith Intention to Appeal Within the Prescribed Period

[19] Although not in his affidavit, Mr. Rumscheidt offered this in written submissions to me (which I accept considering he is an officer of the Court):

> *Bona Fide* Intention to Appeal
>
> 13 My office provided Ms. Morrissey with a copy of the Order on December 19, 2017. We discussed her position over the phone on the following day.
>
> 14 Ms. Morrissey formed a good faith intention to appeal the Order upon receiving it and following up with counsel; however, my office did not have firm instructions to file the required documents before my absence began on December 22, 2017.

[20] Ms. Morrissey therefore considered an appeal well within the timeline and appeared to give definite instructions to do so at the earliest reasonable opportunity. That satisfies me.

[21] In summary, the interests of justice cry out for the requested extension. It is granted.

DISPOSITION

[22] The motion to extend the time for filing the proposed notice of appeal is granted. Ms. Morrissey shall until March 16, 2018 to do so. Costs of this motion will be in the cause.

Michael MacDonald, C.J.N.S.