NOVA SCOTIA COURT OF APPEAL
Citation: *Klefenz v. Klefenz*, 2018 NSCA 56

Date: 20180626
Docket: CA 473097
Registry: Halifax

Between:

Dawn Marie Klefenz

Appellant

v.

Byron Kees Klefenz

Respondent

Judge: Beveridge, J.A.

Motion Heard: June 21, 2018, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: Kenzie MacKinnon, Q.C., for the appellant
Janice Beaton, Q.C., for the respondent

INTRODUCTION

[1] Mr. Byron Klefenz asks that I order the appellant, Ms. Dawn Klefenz, to give security for costs—that is, pay $2,000.00 into Court that would be available to be released to Mr. Klefenz should he be successful in defending the appeal and costs are awarded in his favour.

[2] If ordered, and Ms. Klefenz did not post the ordered amount by the date set, Mr. Klefenz would be at liberty to move to have her appeal dismissed.

[3] I am far from satisfied that I should exercise my discretion to order security for costs. The motion is dismissed. My explanation why follows.

[4] I will set out enough facts to provide necessary context, then the principles that govern security for costs and then turn to how they apply here.

BASIC FACTS

[5] The parties were married for fifteen years. They had one child, who was still a dependent when the divorce was granted on December 16, 2015 (2015 NSSC 196).

[6] The Corollary Relief Order directed division of matrimonial assets and required the respondent to pay child and spousal support. Ms. Klefenz was ordered to pay Mr. Klefenz $20,000.00 in costs. Neither party appealed.

[7] Their son turned 19 and, at least for the time being, eschewed post-secondary education. Mr. Klefenz took the position that the legal requirement for child support should end as of May 1, 2016. Mrs. Klefenz agreed that their son was no longer a “child of the marriage” under the *Divorce Act*, but she wanted the quantum of spousal support increased in light of the pending cessation of child support.

[8] The Honourable Justice Cindy Cormier heard the variation application over two days in the fall of 2017. In an oral decision delivered on November 28, 2017, she made a number of findings. These included: imputation of income to Ms. Klefenz in the amount of $20,000.00; a decrease of Mr. Klefenz’s annual income to $86,000.00; and, their son ceased to be a child of the marriage effective May 1, 2016.

[9] As a consequence, Cormier J. ordered: child support terminated as of May 1, 2016; repayment by Ms. Klefenz of $24,498.00 in child support by deducting $510.38 per month from spousal support otherwise due; and, a reduction of spousal support from $2,600.00 a month to $2,083.33.

[10] The parties made written submissions on costs. Mr. Klefenz sought $7,000.00 plus disbursements and HST. Ms. Klefenz's counsel wrote that she had no ability to pay any order for costs, but, as an alternative, if costs were to be ordered, they should not be more than $5,000.00.

[11] Cormier J. ordered Ms. Klefenz to pay $5,000.00 costs by February 1, 2021.

PRINCIPLES

[12] The power to order security for costs is found in *Civil Procedure Rule* 90.42:

> 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.
>
> (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.

[13] In order to exercise this discretionary power, a judge must be satisfied that "special circumstances" exist, and, even if made out, a judge may decline to order security for costs if to do so would deprive a good faith appellant from being able to prosecute an arguable appeal.

[14] There are a variety of narratives that might make out "special circumstances", but the common thread is that it is unlikely the respondent will be able to collect an award of costs. As explained by Fichaud J.A. in *Williams Lake Conservation Company v. Chebucto Community Council of Halifax Regional Municipality*, 2005 NSCA 44, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances":

> [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 ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.

[15] Where the claim for special circumstances is the feared inability to pay appeal costs, the appellant's financial health is naturally the focus. Where the respondent presents evidence of acts of insolvency by the appellant, particularly with regard to previous costs orders, special circumstances will not be hard to find (see for example: *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2011 NSCA 40; *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131; *2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28; *Blois v. Blois*, 2013 NSCA 39; *Korem v. Kedmi*, 2014 NSCA 42; *Doncaster v. Field*, 2015 NSCA 83; *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 15).

APPLICATION

[16] Mr. Klefenz's brief suggests that the appellant's history with prior costs orders, her email communications and her counsel's prior submissions establishes an objective basis for his concern about recovery of prospective appeal costs. Hence, 'special circumstances' exist.

[17] Counsel's oral submissions list six factors to demonstrate that special circumstances are made out. In sum, she says the appellant has behaved in an insolvent manner toward the respondent, and there is an objective basis for his concern over recovery.

[18] The six factors overlap. They can be condensed as follows: the $20,000.00 costs order from the divorce trial remained unpaid for two years; the appellant had started a $40.00 a month payment schedule, but had stopped payments with $19,560.00 outstanding; the appellant had threatened bankruptcy; there is a $5,000.00 unpaid costs order from the variation proceedings; and appellant's counsel had made submissions that she had "no ability to pay any costs award".

[19] I do not doubt that the respondent subjectively believes there is an unacceptable risk to recovery of costs. There is also some objective basis for his fear. But as pointed out by Fichaud J.A. in *Williams Lake, supra*, a risk is not enough. When the focus is on lack of financial health, there must be evidence that

the appellant is insolvent or has acted in an insolvent manner toward the respondent.

[20] The respondent produced no evidence that the appellant is insolvent. Her current cash flow situation may not be attractive, but I have no evidence about her assets and liabilities.

[21] Nor does the evidence satisfy me that she has acted in an insolvent manner towards the respondent. The balance of the $20,000.00 costs order from the divorce trial was paid in December 2017. The appellant borrowed the funds from her mother to release the judgment the respondent had registered a few weeks earlier.

[22] Prior to that time, it is accurate that the appellant had made what would be considered token payments to the respondent. But the context is this—in March 2016, the appellant and respondent exchanged email messages about payment of the $20,000.00. The appellant wanted to discuss arrangements, but noted that she still owed her own lawyers more than that amount.

[23] The respondent replied that she should pay her lawyers' bill and they would discuss terms after that event. When the appellant pointed out it would take a few years for that to happen, the respondent replied: "Pay your lawyer bills and we can discuss this in a couple of years".

[24] Viewed in context, the delay in paying the $20,000.00 costs award is not evidence of behaving in an insolvent manner towards the respondent.

[25] The appellant did not threaten to declare bankruptcy. She did refer to bankruptcy when she implored the respondent to release the costs judgment.

[26] What happened is this. The respondent learned that the appellant had her rental property for sale in October 2017. He registered the costs judgment. The rental property closed. The lawyers missed the judgment. It was not paid out.

[27] The appellant discovered the judgment when the bank declined her application to re-mortgage the matrimonial home. In December 2017, the appellant wrote a lengthy email to the respondent. The appellant feared she would lose the matrimonial home. She wrote: "I can not do anything with our family home other than sell it or I guess declare bankruptcy"; and, along with her view

that she could not imagine his intent was to force the sale of their family home, also said “I don’t see any other way around this without going bankrupt”.

[28] Again, viewed in context, I do not accept that the appellant expressed a threat to declare bankruptcy in order to avoid her obligation to pay the divorce trial costs order. Furthermore, bankruptcy is not a get-out-of-debt card available to anyone who wants it. Requirements must be met. And, in any event, the appellant paid the costs order.

[29] The respondent says there is an outstanding $5,000.00 costs order from the variation proceedings. However, the order says that appellant does not have to pay until February 2021.

[30] Lastly, the respondent points to counsel’s written costs submissions to Cormier J. that the appellant had “no ability to pay any costs award”. While positions taken by counsel, including admissions, may in some circumstances carry weight, this advocacy by Mr. MacKinnon to the application judge not to order costs does not persuade me that the appellant is insolvent. As an alternative position, counsel had suggested a costs award of $5,000.00.

[31] I accept that the evidence from the record shows the income she earns or receives would make it difficult, if not impossible, to pay a costs order out of current cash flow. But I have no evidence that she does not own exigible assets to satisfy a potential costs award on appeal.

[32] I dismiss the respondent’s motion to require the appellant to post security for costs and order costs in the cause of the appeal in the amount of $1,000.00, including disbursements.

Beveridge, J.A.