

NOVA SCOTIA COURT OF APPEAL

Citation: *Trachevska v. Hayne*, 2019 NSCA 79

Date: 20191004

Docket: CA 487375

Registry: Halifax

Between:

Mariia Trachevska

Appellant

v.

Jamas Daniel Hayne

Respondent

Judge: Beaton, J.A.

Motion Heard: September 12, 2019, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Mariia Trachevska, appellant in person
Celine Morrow, for the respondent

Decision:

[1] The Registrar filed a properly constituted motion pursuant to *Civil Procedure Rule* 90.43(4) seeking dismissal of the appeal. For the reasons that follow, the motion is granted and the appeal is dismissed.

Background

[2] The appellant filed a Notice of Appeal on April 17, 2019 appealing a decision of the Family Court of Nova Scotia dated March 13, 2019. Pursuant to *Civil Procedure Rule* 90.25(2) the appellant was required to make a motion for date and directions no later than August 15, 2019. The Registrar sent an information letter to the appellant on April 24, 2019, the relevant portion of which is reproduced below:

Once you have completed the steps outlined above, you are ready to apply to get a date for your appeal hearing. This is called making a motion for date and directions and is heard by a judge of the Court of Appeal in chambers, either in person in a courtroom on a Thursday at 10:00 a.m. or by telephone at a pre-arranged time on a Wednesday.

If you are choosing to appear in chambers in person on a Thursday, you may select the date on which you would like to appear. If you are choosing to appear by telephone on a Wednesday, the telephone conference must be arranged in advance through the Deputy Registrar, who can be reached at **(902) 424-6937**. Please note, you are required to take reasonable steps to consult with the other party regarding their availability to attend chambers.

To make this motion for date and directions, you must file a Notice of Motion for date and directions and a Certificate of Readiness. These forms, along with an instruction sheet explaining this process, may be found on the Courts' website:

http://courts.ns.ca/Appeal_Court/NSCA_forms.htm

These forms have to be filed with the Court and provided to the respondent(s) at least four (4) clear, business days before the motion hearing date. Four clear days means that, assuming there are no holidays in that week, your documents will have to be filed and served the Thursday before the Thursday you want to appear in Court.

It is important that you work quickly to take the necessary steps to move your appeal along. Your motion for date and directions (to get a hearing date for your appeal) must be heard no later than eighty (80) days from the date your Notice of Appeal was filed. **In this case, the time period started to run on April 17, 2019. That means that you must have your motion filed and heard no later**

than August 15, 2019. If the motion is not done within this time, I am required as Registrar to make a motion pursuant to **Civil Procedure Rule 90.43(4)** on five (5) days' notice, to have the appeal dismissed for non-compliance with the Rules.

[3] The letter reveals the appellant was clearly and fully informed by the Registrar about her obligations to the Court and the process, the specific deadline for filing a motion for date and directions (set out in bold typeface) and the Registrar's obligation to make a motion for dismissal if the deadline was not met (also set out in bold typeface).

[4] The appellant did not meet the deadline of August 15 for filing of the motion for date and directions, as a result of which the Registrar filed a motion to dismiss the appeal on August 27, 2019. The appellant filed an affidavit in response to the Registrar's motion on September 6, 2019 and a Certificate of Readiness – out of time – on September 11, 2019. The respondent filed an affidavit in response to the Registrar's motion on September 10, 2019.

[5] At the chambers hearing, the respondent was cross-examined on his affidavit; the appellant was not cross-examined on her affidavit. Each party made oral submissions. At the conclusion of the hearing, I reserved my decision. On September 17, the appellant submitted further written arguments, which I advised the Registrar I would consider provided a copy was forwarded immediately to counsel for the respondent, advising that the respondent could have a further week to reply; none was received.

Analysis

[6] The appellant's evidence was that "unfortunate financial circumstances" and having been denied representation by Nova Scotia Legal Aid had occasioned her delay and that a transcript of the trial proceeding would now be ready by September 30, 2019. Further, she maintained the subject matter of the appeal (custody of her child), the lack of any prejudice to the respondent by the delay, and her "limited knowledge of legal proceedings" and "limited access to the case law" as a self-represented litigant all justified dismissing the Registrar's motion. In oral submissions, the appellant argued that while she had intended to comply with the filing requirements, the delay occasioned by her failure did not justify dismissal of an important case.

[7] In his evidence, the respondent observed the appellant never communicated with the Court about any difficulties she might be encountering prior to her

August 15 deadline. The respondent also challenged the absence of any evidence from the respondent about her actual financial circumstances, the merits of the appeal and the prejudice to both the parties' child, who was entitled to the finality of an order, and to the respondent if the appeal were permitted to proceed. In oral submissions the respondent again emphasized the appellant had been given the time to file the motion for date and directions but had done nothing following the filing of the Notice of Appeal.

[8] Filing of the Registrar's motion pursuant to *Rule* 90.43(3) is mandatory on the part of the Registrar; the granting of the motion is within the discretion of the Court. The frequently cited decision of Saunders, J.A. in *Islam v. Sevgur*, 2011 NSCA 114 discusses factors to be considered in assessing the Registrar's motion and the burden on a party opposed to it:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the Rules.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any

other circumstances the judge may consider relevant in the exercise of his or her discretion.

[9] Several of those factors are applicable in this case along with additional points.

Reasons for appellant's delay

[10] The Court knows nothing about the nature or details of the appellant's financial situation that could support a conclusion she has been hampered in her ability to proceed with the appeal. The appellant argued her financial circumstances factored greatly in why she did not file anything with the Court prior to the August 15, 2019 deadline. It was incumbent on her to provide specifics, however there were no details about any financial impediments to efforts to secure a transcript or any other of the necessary Appeal Book materials. I am left with an absence of understanding about the appellant's finances and how that would relate to her ability to meet the deadline of August 15.

[11] Taken as a whole, the appellant's evidence would seem to suggest no positive steps were taken by her toward securing the necessary materials *until* the Registrar filed the motion to dismiss. If the appellant was experiencing difficulty in meeting her obligations by August 15, the Court and the Registrar should not have had to wait until the Registrar's motion prompted the appellant to communicate. It was the appellant's obligation to file a motion for date and directions by August 15; regardless of any difficulties in generating materials, that motion was never filed and the deadline came and went. I am not able to conclude there were "good reasons" afoot that would now excuse the failure to file.

Whether the grounds of appeal raise arguable issues

[12] The Notice of Appeal identifies the grounds of appeal as the failure of the trial judge to properly consider the best interests of the child in rejecting the appellant's parenting plan and in denying the appellant increased weekend and summer access time. While it is not my task on this motion to delve into the merits of the appeal, on their face these grounds do not articulate errors of law or fact; rather they purport to seek a re-hearing to achieve a preferred outcome, which is not the purpose of an appeal nor the function of this Court.

Prejudice to either party

[13] There is an obvious or fundamental prejudice to any appellant who seeks to advance their position on an appeal when that appeal is dismissed as a result of the Registrar's successful motion made pursuant to *Rule* 90.43. As noted by Beveridge, J.A. in *Leigh v. Belfast Mini-Mills*, 2012 NSCA 67 at para. 22:

[22] I think it fair to say that as a general rule a judge should be hesitant to deny an appellant his or her opportunity for this Court's review of a decision that can be appealed to this Court. ...

(See also *An Jager v. Jager*, 2019 NSCA 9 at para. 31).

[14] While such restraint is appropriate, it does not displace the appellant's burden on the motion. I am satisfied in this case that the respondent would be equally prejudiced by permitting the appeal to continue when the appellant has not provided any "good reason" to excuse her default.

The subject matter of the appeal

[15] I am of the view the subject matter of the appeal is also a factor to be considered on this motion. Given the case at trial concerned parenting time with a young child, it would be reasonable to expect that to underscore the need for responsiveness on the appellant's part, given the potential for an appeal to inject further waiting and uncertainty for each parent and the child. Therefore, it was not reasonable for the appellant to remain silent and ignore starting the process of securing a date for the appeal by the August 15 deadline.

The appellant's status as a self-represented litigant

[16] The appellant's evidence was that she had applied for assistance from Nova Scotia Legal Aid and in June 2019 unsuccessfully appealed the rejection of her application. She reported that as a self-represented litigant she has "limited access to the caselaw" and a "limited knowledge of legal proceedings". That contention stands in contradiction to the various references to caselaw found in the appellant's affidavit and submissions. While I agree the Court should demonstrate flexibility with self-represented parties to the extent they are not legally trained, absent any "good reason" for the delay the fact the appellant is self-represented cannot in itself constitute that reason. Despite being self-represented, the appellant had a clearly

communicated deadline by which to file a motion for date and directions and she did not meet that deadline.

Conclusion

[17] For the reasons set out above, I am satisfied the appellant has not met the burden to demonstrate on a balance of probabilities that the Registrar's motion should not be granted. The Registrar shall prepare the Order granting the motion and dismissing the appeal.

Beaton, J.A.