NOVA SCOTIA COURT OF APPEAL

Citation: *Marshall v. Robbins*, 2020 NSCA 7

Date: 20200123
Docket: CA 490392
Registry: Halifax

Between:

Gregory Marshall

Appellant

v.

Julie Robbins

Respondent

Judge:	Bryson, J.A.
Motion Heard:	January 23, 2020, in Halifax, Nova Scotia in Chambers
Written Reasons:	January 24, 2020
Held:	Motion for date and directions dismissed; motion to quash the appeal dismissed; motion for security for costs granted;
Counsel:	Gregory Marshall, appellant, not present Michelle Axworthy, for Gregory Marshall (watching brief only) Karen Killawee and Kristy Hall, for the respondent

Decision:

*Introduction***:**

[1] Yesterday, I heard three motions in this appeal: Mr. Marshall's motion for date and directions and Ms. Robbins' motion to quash the appeal and alternatively, security for costs. I dismissed the first two motions and granted security for costs with reasons to follow. These are they.

*Background***:**

[2] Mr. Marshall has appealed the June 4, 2019 decision of the Honourable Justice Jamie Campbell which made various property awards in favour of Ms. Robbins (2019 NSSC 168). Mr. Marshall appealed on July 11, 2019. Just in time.

[3] Mr. Marshall did nothing to advance the appeal until he filed a motion for date and directions on October 31, 2019. He also sought a stay. Ms. Robbins moved to quash the appeal and alternatively to have security for costs. On November 7, 2019, the Honourable Justice Carole A. Beaton heard the stay motion and scheduled the date and directions motion and Ms. Robbins' motions for December 12, 2019.

[4] On November 26, 2019, Justice Beaton dismissed Mr. Marshall's motion for a stay (2019 NSCA 91).

[5] At the last minute on December 12, 2019, Mr. Marshall protested that he could not proceed and wanted the motions adjourned without day. He said his health was poor, prevented him from representing himself, that he wanted a lawyer but had so far been unable to retain one. He told Justice Beaton that he could not afford the $5,000 retainer required by the one lawyer to whom he actually spoke. He filed a letter from his physician, Dr. Trevor Locke, describing his health challenges. Mr. Marshall wrote the letter for Dr. Locke to sign.

[6] Reluctantly, Justice Beaton adjourned the motions to January 23, 2020. She set strict timelines for the filing of additional material. She required Mr. Marshall to pay a small outstanding costs award—there were many other larger costs awards which he has not paid. She issued an order dated December 16, 2019 setting down the December 12, 2019 motions for January 23, 2020 on conditions.

Another motion to adjourn:

[7] At approximately 4:15 p.m. on January 22, 2020, the Court received a faxed letter and affidavit from Mr. Marshall making a motion in writing to adjourn the January 23, 2020 motions. On the morning of January 23, 2020, he sent along an affidavit from Dr. Locke to support his submissions that he was unwell and could not represent himself and could not attend court.

[8] The motion was opposed, as was the admissibility of Dr. Locke's affidavit, on which Ms. Robbins alternatively sought cross-examination.

[9] In seeking another adjournment, Mr. Marshall did not explain what he had done about advancing the appeal or when the the appeal could proceed. He had not retained counsel, although he had made appointments with which the weather had apparently interfered.

[10] I dismissed the motion in writing for an adjournment in the morning and the motions proceeded in the afternoon. Mr. Marshall was advised by the Registrar that he could participate in the hearing by telephone should he so wish.

[11] Mr. Marshall did not attend the hearing but he did send a solicitor, Michelle Axworthy, as an observer whose role was limited to reporting to Mr. Marshall. She had no instructions on submissions to make and did not make any.

The motion to quash:

[12] I dismissed Ms. Robbins' motion to quash because the *Rule* does not permit a single judge in Chambers to grant relief under that *Rule* which reads:

> **Quashing or dismissing appeal**
>
> 90.44 (1) A party to an appeal may make a motion ***to the Court of Appeal*** at any time before or at the hearing of the appeal for an order setting aside the notice of appeal or dismissing the appeal on either of the two following grounds:
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> (a) the appeal is frivolous, vexatious, or without merit;
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> (b) the appellant has unduly delayed perfection of the appeal.
>
> (2) A party who makes a motion for an order setting aside the notice of appeal or dismissing the appeal must, no later than fifteen days after the day the notice of motion is filed, make a motion to a judge in chambers for directions on the motion for an order to set aside or dismiss, including

> setting a date to hear the motion and as to the record and written submissions to be filed by the parties.
>
> [Emphasis added]

[13] Although Ms. Killawee responded that the original motion also mentioned *Rule* 90.43, that *Rule* disappeared in Ms. Robbins' December 5, 2019 written submissions, and in oral submissions before me. Nor was it mentioned in Justice Beaton's December 16, 2019 Order. Accordingly, Mr. Marshall may not have understood that he also faced the jeopardy of a *Rule* 94.03 motion.

The motion to set down:

[14] I dismissed Mr. Marshall's motion to set the appeal down under *Rule* 92.25 because no Certificate of Readiness has been filed in compliance with the *Rules*. No transcript has been obtained. No transcription service has been retained. There is no credible timeline for completion of a transcript or filing of an appeal book. Although Mr. Marshall's October 31, 2019 Certificate says that he expected a transcript to be ready by the end of March, there is no evidentiary foundation for this assertion, and his inaction to date makes this highly unlikely.

[15] The dismissal of Mr. Marshall's motion for date and directions does not dispose of the appeal but exposes him to a motion to dismiss for failure to perfect it.

The motion for security for costs:

[16] In his written materials, Mr. Marshall makes two submissions which would effectively shut down his appeal without explaining when it can be resumed, leaving the Court and Ms. Robbins in limbo.

[17] First, he claims that owing to ill health and "doctor's orders" he is not able to represent himself. Second, he wishes to retain a lawyer but has been unsuccessful in doing so.

[18] Mr. Marshall is a non-practicing lawyer whose letterhead tells us that he has an LLB, and MBA and an M.Ed. Mr. Marshall was treated in December prior to the hearing before Justice Beaton for a serious leg infection. But he appeared before Justice Beaton and made submissions at that hearing that lasted about 90 minutes. He did say he couldn't read the materials filed by Ms. Robbins for health reasons. Dealing with the appeal is stressful for him and he has some trouble

concentrating. But he was able to file at least four affidavits in October and November when he wanted a stay from this Court. As earlier described, he wrote a letter for his doctor recounting his health challenges, submitting it at the last minute at the December 12, 2019 hearing before Justice Beaton.

[19] For yesterday's motion to adjourn, Mr. Marshall filed a 30-paragraph affidavit describing his medical condition and its alleged effects on his cognition. He repeats a desire to hire a lawyer without saying how or when that might happen. Mr. Marshall added a 22-paragraph affidavit from his physician, Dr. Locke, confirming a recurrence of a serious leg infection or infections experienced in December, and explaining in some detail why he cannot and should not represent himself. The affidavit appends 29 pages of exhibits. The format and fount of these affidavits follow previous evidentiary filings and were apparently prepared by Mr. Marshall.

[20] The litigious history of Mr. Marshall, his Notice of Appeal, his numerous filings and motions in this Court all belie a want of intellectual capacity and energy about which Dr. Locke freely opines in the materials that Mr. Marshall prepared for his signature.

[21] Although Mr. Marshall's leg infections are recent, his "impairment and confusion" arise from conditions from which Dr. Locke says Mr. Marshall has suffered "for about 20 years".

[22] Ms. Robbins' motions to dismiss the appeal and alternatively for security for costs were filed with the Court on November 7, 2019 and served on Mr. Marshall in Truro on November 21, 2019. There has been ample time to respond or retain counsel.

[23] *Rule* 90.42(1) authorizes an order for security for costs. A party seeking security must show that there are "special circumstances" warranting such relief. There are many examples, but as Justice Beveridge has said:

> [6] [. . .] 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.
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> (*Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40)

[24] In *Bardsley v. Stewart*, 2014 NSCA 32, the Court put it this way:

> [25] "Special circumstances" are not confined to the failure to pay judgments either in a case under appeal or unrelated matters. Rather, that is evidence of an

> inability or unwillingness to pay. Depending on the circumstances, a failure to pay judgments may constitute an "objective basis" for concern that a respondent may not recover costs from an appellant. Behaving in an insolvent manner towards a respondent can give rise to such a concern, even if an appellant may be able to pay costs. It is not a question of the appellant's *ability* to pay but rather the *objectively founded concern that a respondent may not recover* because of insolvent behaviour towards that respondent: Frost at ¶10, cited in *Monette v. Jordan*, 163 N.S.R. (2d) 75 at 6; and see cases in ¶12 above.
>
> [Emphasis in original]

[25] Insolvent behaviour is one way of objectively justifying a respondent's concern. Other special circumstances may include evidence of actual insolvency; a demonstrated unwillingness or inability to meet obligations such as paying judgments or costs; not pursuing an appeal in good faith or otherwise abusing the court's process to name a few of those circumstances (see for example: *Williams Lake Conservation Company v. Chebucto Community Council of Halifax Regional Municipality*, 2005 NSCA 44, para. 11; *Frost v. Herman* (1976), 18 N.S.R. (2d) 167; *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131; *Rogers v. Nova Scotia Power Inc.*, 2006 NSCA 33; *Leigh v. Belfast Mini-Mills Ltd.*, 2013 NSCA 86; *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 72 O.A.C. 303).

[26] Even if special circumstances have been demonstrated, a discretion remains in the court to refuse security, particularly if the court is satisfied that an appellant is proceeding in good faith, but simply lacks the resources to pursue an arguable appeal (*Sable Mary*, para. 7).

[27] Mr. Marshall acknowledges in his affidavit that he visited Ontario over the Christmas break for two weeks. Apparently, he had both sufficient means and health to do so.

[28] In this case, Mr. Marshall has flouted a court order by refusing to pay for occupation of Ms. Robbins' home. He is withholding payment because he does not want to pay under threat of sale of the house and eventual eviction. This is hardly a good argument. Mr. Marshall is obliged to pay. He would have to pay rent wherever he lived in any event. He has also failed to pay every single costs award made against him but one. That one he was obliged to pay at the instance of Justice Beaton who required it as a condition for the adjournment she granted him on December 12, 2019. Six other costs awards made against Mr. Marshall, totalling approximately $36,000, remain unpaid.

[29] It is clear that there is a substantial risk to Ms. Robbins that she will be unable to collect any costs awarded as a result of successfully defending the appeal brought by Mr. Marshall.

[30] Mr. Marshall would no doubt respond that he lacks the ability to post security for costs or at least to post a substantial security for costs. He would add that his appeal has merit, and he wants to pursue it.

[31] Mr. Marshall has had a number of court proceedings with Ms. Robbins in which he has been unsuccessful. Accordingly, the following from *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 15 is apposite:

> [15] The appellant has not been denied his "day in court". He has had five of them, without success, at great expense to the Attorney General. As Justice Oland observed in *Munroe v. Morgan Industrial Contracting*, 2004 NSCA 49*:*
>
> > [8] Even if I were to assume that he is self-represented and has not paid any portion of the trial costs because he is impecunious, that financial situation of itself does not preclude an order for security for costs. In regard to the previous Rule on such security, MacKeigan, C.J.N.S. stated in *L.E. Powell & Co. Ltd. v. Canadian National Railway Co. et al. (No. 2)* (1975), 11 N.S.R. (2d) 532 (N.S.C.A.), as follows:
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> > By Rule 62.30, *supra*, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p. 38:
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> > > ***The general rule is that poverty is no bar to a litigant***, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. ***There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.*** There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.
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> The following comments by Bateman, J. in Smith's Field Development Ltd. v. Campbell, supra, are also worth noting:
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> > [40] The appellants are able to pursue this appeal, as they have the litigation before the trial court, principally without concern for legal fees.

> Should the appeal fail, the only risk to the appellants, apart from their own disbursements, is an order for costs, which will inevitably go unanswered. As Pugsley J.A. said in *Arnoldin Construction, supra*:
>
> [9] ...
>
> > (1) ... [the respondent] is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the company to have a "free ride" without posting security, renders an[d] injustice to Alta. Alta's rights must also be considered ...
> >
> > [Emphasis added in original]

[32] In this case, Mr. Marshall lists 18 grounds of appeal. He threatens more with an Amended Notice of Appeal and fresh evidence. The grounds of appeal mostly attack mixed findings of fact and law of Justice Campbell. Without in any way expressing an opinion on the merits of the appeal, it is plain that Mr. Marshall will have to overcome the demanding standard of review of "palpable and overriding error" to succeed.

[33] Finally, there is Mr. Marshall's record of non-compliance with the *Rules of Court* on such things as disclosure, proper service and filing deadlines. He has demonstrated as much in this Court, failing to perfect his appeal, failing to file evidence in a timely way, failing to copy Ms. Robbins with at least one court filing, and seeking adjournments at the very last minute with little or no notice.

[34] On December 5, 2019, Ms. Robbins filed her brief seeking dismissal of the appeal in accordance with Rule 90.44 or alternatively security for costs pursuant to Rule 90.42. Despite ample opportunity, Mr. Marshall has never replied to the merits in writing. Instead, he has devoted himself to justifying why he cannot advance the appeal he started. No doubt the rent-free *status quo* suits him.

[35] In light of Mr. Marshall's conduct, Justice Farrar's observations in *Doncaster v. Field*, 2015 NSCA 83 resonate here:

> [31] Even if I was satisfied that Mr. Doncaster was impecunious; having regard to Mr. Doncaster's litigious history, his failure to honour costs awards in the past, and the number of costs awards against him, leads me to the conclusion that an order for security for costs is appropriate in these circumstances. As in *Norbridge, supra*, I am not prepared to allow Mr. Doncaster to proceed with another appeal without posting security.

[36] The amount of security for costs is an exercise in judicial discretion taking into account the likely award of costs on appeal if the appellants are unsuccessful

(*Sable Mary*, para. 38*)*. In this case, an appeal is unlikely to be brief because there are 18 grounds of appeal. Forty percent of trial costs would require posting security for costs of $8,000. In all the circumstances, this is an appropriate amount.

[37] Accordingly, Mr. Marshall will be ordered to post security for costs of $8,000 by 4:00 p.m., Thursday, February 20, 2020, failing which the appeal will stand dismissed.

[38] The order will provide for an automatic dismissal if security is not posted, because Ms. Robbins should not be put to the further time and expense of yet another motion which Mr. Marshall's conduct to date suggests may well be necessary.

[39] An order will issue accordingly.

Bryson, J.A.