

NOVA SCOTIA COURT OF APPEAL

Citation: *Suh v. O'Brien*, 2020 NSCA 61

Date: 20200929

Docket: CA 490271

Registry: Halifax

Between:

Yong-Joon Suh

Appellant

v.

Robert O'Brien and Jennifer O'Brien (also known as Jennifer McIntosh)

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: September 21, 2020, in Halifax, Nova Scotia

Subject: Dismissal of action

Summary: In June 2013, Yong-Joon Suh filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia. He alleged the defendants, Robert and Jennifer O'Brien, his then neighbours, had wrongfully caused trees to be removed from his property.

Mr. Suh did not move his claim forward. In May 2019, the Prothonotary made a motion to have the action dismissed. The motion was heard on June 21, 2019. Mr. Suh did not appear at the scheduled time. The court heard representations from the Prothonotary and counsel for the O'Briens. Mr. Suh's action was dismissed.

Mr. Suh filed an appeal.

Issues: (1) In dismissing the action, did the application judge make an error of law?
(2) Did the Dismissal Order result in a patent injustice?

Result: The application judge was well within her right to dismiss Mr. Suh's action based on the information before her.

Mr. Suh failed to demonstrate that the dismissal of his long outstanding decision gave rise to a patent injustice.

Appeal dismissed with costs.

<p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 6 pages.</i></p>

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Robert O'Brien and Jennifer O'Brien (also known as Jennifer McIntosh)

Respondents

Judges: Bourgeois, Van den Eynden and Beaton JJ.A.

Appeal Heard: September 21, 2020, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Van den Eynden and Beaton JJ.A. concurring

Counsel: Yong-Joon Suh, on his own behalf
Gavin Giles, Q.C. and Michael Ng, for the respondents

Reasons for judgment:

[1] In June 2013, Yong-Joon Suh filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia. He alleged the defendants, Robert and Jennifer O'Brien, his then neighbours, had wrongfully caused trees to be removed from his property.

[2] Mr. Suh did not move his claim forward. In May 2019, the Prothonotary made a motion to have the action dismissed. The motion was heard on June 21, 2019 by Justice Darlene Jamieson. Mr. Suh did not appear. The court heard representations from the Prothonotary and counsel for the O'Briens. Mr. Suh's action was dismissed.

[3] Mr. Suh filed an appeal, and the matter was heard on September 21, 2020. For the reasons that follow, I would dismiss the appeal.

Background

[4] Mr. Suh filed a Notice of Action and Statement of Claim on June 19, 2013. He filed amended documents the following day. From the record it would appear that:

- After commencement of the action, the O'Briens served a Demand for Particulars on Mr. Suh in July 2013;
- Mr. Suh did not respond to the Demand for Particulars;
- Given the outstanding Demand, the O'Briens have not filed a defence;
- No further action was taken by Mr. Suh in relation to the matter;
- By letter dated April 23, 2019 and mailed to Mr. Suh's designated address, Prothonotary Morse advised him as follows:

The above noted proceeding was commenced, by you, on June 19, 2013. *Civil Procedure Rule 4.22* requires that the Prothonotary bring a motion if:

- 1) five (5) years have passed since the day of filing the action; and
- 2) no trial date has been set and no request for trial dates has been received.

No Notice of Trial or Request for Date Assignment Conference has been filed with the court.

A motion is being considered, to be brought forward at Appearance Day, for the dismissal of the action. In my experience, the presiding judge appreciates a formal response, from Plaintiffs/Claimants, confirming their position on the Prothonotary's motion, which may be done via fax.

In the alternative, if the matter is not proceeding, a Notice of Discontinuance could be prepared and filed.

Please advise of the status of this file. If no response is received, I will bring a motion to dismiss this proceeding.

- An Appearance Day Notice was filed by the Prothonotary on May 21, 2019 setting a motion for dismissal on June 21, 2019. The Notice was sent via regular mail to Mr. Suh's designated address and to counsel for the O'Briens.

[5] On June 21, 2019, Mr. Suh did not appear at the hearing of the motion. The Prothonotary confirmed to the appearance day judge that the Notice had been sent to Mr. Suh's designated address and he had heard nothing from Mr. Suh. Mr. Giles, counsel for the O'Briens, advised his last contact with Mr. Suh was on August 13, 2013 in relation to the outstanding Demand for Particulars. The appearance day judge dismissed the action and a Dismissal Order was issued and mailed to Mr. Suh at his designated address.

Issues and Standard of Review

[6] In his Notice of Appeal filed July 19, 2019, Mr. Suh challenges the Dismissal Order and sets out the following grounds of appeal:

- 1) I was not given prior notice of the Appearance Day Motion. I received it after the Appearance Day Motion, via regular mail.
- 2) I intended to pursue the claim against the Defendants.
- 3) I have now sought legal advice and will take active steps to move the matter forward.

[7] Mr. Suh is self-represented and English is not his first language. His written submissions to this Court did not address the above grounds, nor how the appearance day judge erred by dismissing the action. It is clear from the material filed, Mr. Suh wanted this Court to award him damages for the trees removed from his property. That, however, was not the issue before us, and we are unable to provide the remedy he seeks.

[8] The standard of review this Court applies is well-established. In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders wrote:

[14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge’s factual findings will only be disturbed if they evince palpable and overriding error. “Palpable” means obvious. “Overriding” means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge’s exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 ff.; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[9] In the present instance, the appearance day judge’s decision was one that called upon her to exercise her discretion. Therefore, in order for this Court to interfere with her decision, Mr. Suh must establish she erred in law, or the dismissal was patently unjust.

Analysis

In granting the Dismissal Order, did the appearance day judge err in law? Did the Dismissal Order result in a patent injustice?

[10] In his Notice of Appeal Mr. Suh asserts he did not receive notice of the motion brought by the Prothonotary. With respect, this is incorrect.

[11] *Nova Scotia Civil Procedure Rule 31* addresses the requirements of notice. *Rule 31.16* applies to these circumstances and provides in part:

31.16 Delivery to designated address

(1) A party entitled to further notice must do everything that is reasonable to allow for quick and economical delivery of documents to the party, including:

(a) designate an address for delivery of documents at which the party is assured of receiving a document when it is delivered;

(b) designate a new address for delivery of documents by filing a notice of change of designated address, if the party ceases to be assured of receiving a document when it is delivered to the former designated address;

(c) maintain the place at the address in such a way that there is no danger of a document being taken away by others or lost.

...

(3) A document delivered by mail to a designated address is taken to be received by the party three days after the date of mailing.

(Emphasis added)

[12] The record shows Mr. Suh designated his address for service in the Notice of Action. He never filed a notice of change of designated address after that time. I note he has designated the same address for the purposes of this Appeal.

[13] The Prothonotary filed the Appearance Day Motion a full month in advance of the hearing and sent it to Mr. Suh, as the *Rules* permit, by regular mail. It was open to the appearance day judge, based on the *Rules* and the record before her, to find Mr. Suh had notice of the hearing.

[14] Further, at the hearing the appearance day judge was advised by Mr. Giles that he had not heard from Mr. Suh since July 2013. *Rule* 24.06 permitted the appearance day judge to act on the representations of Mr. Giles. The record was clear Mr. Suh had done nothing to move the action forward in over six years. In light of the record, I see no error in the appearance day judge's exercise of discretion in dismissing the action.

[15] I am also unconvinced the dismissal resulted in a patently unjust outcome. Mr. Suh has provided no explanation why he allowed the action to stall for six years. Although he was, and remains, self-represented, the obligation to advance a claim in a timely fashion applies to all litigants.

[16] A claimant's obligation to advance their claim with diligence is an important one—it ensures fairness to the opposing party and respect for the court's limited resources. A claimant who does not meet this obligation must do more than make a bald assertion the dismissal resulted in an unjust result. They must compellingly demonstrate this. With respect, Mr. Suh has not done so.

Disposition

[17] For the reasons set out above, the appeal is dismissed. I further order Mr. Suh pay costs of the appeal to the O'Briens in the amount of \$500.00, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Van den Eynden J.A.

Beaton J.A.