

NOVA SCOTIA COURT OF APPEAL
Citation: *Walker v. Walker*, 2021 NSCA 19

Date: 20210219
Docket: CA 497465
Registry: Halifax

Between:

Donald Laughlin Peter Walker

Appellant

v.

Kathryn Mary Walker

Respondent

Judge: Beaton, J.A.

Motion Heard: February 10, 2021, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Donald Walker, appellant in person
Roseanne Skoke and Allison Avery, for the respondent
Caroline McInnes, Registrar

Decision:

[1] On January 19, 2021, the Registrar of the Court of Appeal filed a properly constituted motion, with supporting material, pursuant to *Civil Procedure Rule* 90.43(3) seeking to dismiss the appeal. The motion was heard February 10, 2021 in telechambers. At the conclusion of the hearing, in which the Appellant (“Mr. Walker”) opposed the motion and the Respondent supported it, I reserved my decision. For the reasons that follow, the motion is granted and the appeal is dismissed.

Background

[2] Mr. Walker filed a Notice of Appeal with the Court on March 16, 2020. He appealed from a Consent Corollary Relief Order (“CRO”) granted by the Honourable Justice N. Scaravelli in the Supreme Court of Nova Scotia issued February 19, 2020. The grounds of appeal contained in the Notice are reproduced here:

- I did not get to testify and my evidence was based on my testimony.
- I was not informed of a conference call and it took place without me and I was never told what happened at the conference call.
- I was told I would go on the stand but did not.

[3] The relief sought in the Notice is identified as:

The appellant says that the Court should allow the appeal and that the judgment appealed from rescinded [*sic*] and I get a divorce trial.

[4] In response to his filing of the Notice, the Registrar sent Mr. Walker and the Respondent’s counsel an information letter on April 3, 2020. That four-page letter outlined in detail Mr. Walker’s obligations and the steps needed to move the appeal forward. A portion of that letter read:

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 March 16, 2020. That means that you must have your motion filed and heard no later than October 14, 2020 [Note that this date takes into account the suspension of filing deadlines from March 26 to June 26, 2020, as set out in the attached**

COVID-19 Notice from the Court of Appeal. You may keep up to date on updates from the Court regarding measures being taken in relation [sic] COVID-19 at www.courts.ns.ca. 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.

[5] Among other matters, the letter instructed Mr. Walker his next due material—a Motion for Date and Directions—was to be filed and heard no later than October 14, 2020. Nothing was filed. Furthermore, as seen above, the instructions specifically mentioned the “suspension of filing deadlines from March 26 to June 26, 2020” due to COVID-19, and how to stay current on updates from the Court concerning COVID-19 measures.

[6] Before me, the Registrar confirmed that to date the only communication received from Mr. Walker was after this Motion, to dismiss the appeal, was filed and copied to him. Mr. Walker then contacted the Court asking how to respond to the Motion, and on January 29, 2021 he faxed a handwritten submission to the Court, the body of which stated:

I didn't send paper to the Court because The [sic] T.V. NEWS said that they only were dealing with murder and so!

[7] During the hearing Mr. Walker confirmed both his contact information as shown on the file, and that he had received the Registrar's letter of April 3, 2020 and the more recent Motion to Dismiss materials at that same address. He reported he “thought I would be contacted when Court opened” to move his matter forward. I am left without an understanding of why Mr. Walker did not respond to the instructions provided to him in the Registrar's April 3 letter, nor what, if any, effort he intended to make, and when, to perfect his appeal.

[8] The filing of a motion pursuant to Rule 90.43(3) is mandatory on the part of the Registrar. Whether to grant the motion is within the discretion of the Court. The Court has long applied the analytical framework described by Saunders J.A. in *Islam v. Sevgur*, 2011 NSCA 114:

[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.

[38] **Civil Procedure Rule** 90.43(a) is mandatory. It obliges the Registrar to enforce the **Rules** and chase delinquent appellants.

[39] In my opinion, the Rules and the Registrar's explicit directions concerning the perfecting of an appeal and the consequences of non-compliance ought to be strictly interpreted and applied so as to give effect to the object of the Rules which is to achieve the just, speedy, and inexpensive determination of every proceeding.

[9] Mr. Walker's reason for not moving the appeal forward is, quite simply, that he was waiting for the Court to contact him, as according to "the T.V. news", COVID-19 imposed restrictions meant only murder cases were being heard. With the greatest of respect, this defies logic, in the face of the letter Mr. Walker received in early April 2020 that discussed COVID limitations and also told him about the need to meet certain filing milestones. It was incumbent on Mr. Walker to oversee his matter and, if he thought COVID restrictions had further implications for his case, at any point in time, to clarify that with the Registrar, or at the very least, with Court staff. Unfortunately, he did not do so, even though I am satisfied he knew how to make contact with the Court. Furthermore, Mr.

Walker's lack of initiative to date leaves me unpersuaded he would follow through and take a more proactive approach in future, in terms of meeting deadlines, were I to dismiss the motion.

[10] In his comments to the Court during the motion, Mr. Walker maintained that he filed his appeal because he is "looking for the one hour [that he] missed out on" when he "was promised to get on the stand" and he "didn't get that". When I consider those submissions in light of the grounds of appeal listed by Mr. Walker in his Notice of Appeal, I am concerned about whether the appeal raises arguable issues. An appeal is not a re-trial. It is also notable that the Order appealed from is a Consent Order. While only conjecture, perhaps there was some misunderstanding on Mr. Walker's part about the process or procedure employed at the time the divorce proceeding was completed. None of that would mean there were errors of law or fact from which this Court, sitting on appeal, could act.

[11] I am keenly aware of the prejudice to Mr. Walker if the appeal is dismissed (*Leigh v. Belfast Mini-Mills*, 2012 NSCA 67, at para. 22; *An Jager v. Jager*, 2019 NSCA 9, at para. 31). While restraint is to be exercised in denying Mr. Walker an opportunity to appeal, nonetheless it is his burden to show why the motion should be dismissed.

[12] I must also consider any prejudice to be suffered by the Respondent if the appeal is permitted to continue. Mr. Walker did not challenge the representations of the Respondent as to her continued compliance with those terms of the CRO that require her to meet ongoing financial obligations to Mr. Walker. In reply, Mr. Walker maintained only that he didn't have an opportunity to "take the stand". The Respondent is entitled to finality (*Siscoe v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2020 NSCA 81, at para. 21), and I am satisfied she would be equally prejudiced by allowing the appeal to continue.

[13] I take into account as well the public interest in the efficient operation of the Court and the need to avoid undermining the *Civil Procedure Rules* (*American Holdings 2000 Inc. v. Royal Bank of Canada*, 2019 NSCA 78, at para. 18). I am satisfied Mr. Walker was well-aware of the deadlines given to him early on by the Registrar. Unfortunately, he was careless in relying on a generic television broadcast(s) rather than the detailed instructions of the Registrar. He never reached out to the Court to inquire about the status of his case or whether what he had heard on television applied to his case. Had he done so, it might have been easier for the Court to now justify a less rigid adherence to the *Rules*.

[14] The Court should not have had to wait months, until the Registrar's motion prompted him, for Mr. Walker to communicate. I am not persuaded he had a valid reason for failing to file his Motion for Date and Directions. As an appellant, the burden on Mr. Walker was not diminished by COVID-19 restrictions to the point where complete silence on his part was reasonable under all of the circumstances.

[15] Mr. Walker has not persuaded the Court that it is not in the interests of justice to grant the Registrar's motion and dismiss the appeal.

[16] The Registrar's motion is granted; the appeal is dismissed. Both parties were responding to the Registrar's motion and on that basis there will not be any costs award imposed.

Beaton, J.A.