NOVA SCOTIA COURT OF APPEAL
Citation: *Stubbert v. MacLellan*, 2022 NSCA 19

Date: 20220228
Docket: CA 507725
Registry: Halifax

Between:

Edwinna Stubbert

Appellant

v.

Scott MacLellan

Respondent

Judge:	Beaton, J.A.
Motion Heard:	February 23, 2022, in Halifax, Nova Scotia in Chambers
Held:	Motion granted; appeal dismissed
Counsel:	Andrew Christofi, for the appellant Stephen Jamael, for the respondent Caroline McInnes, Registrar of the Court

Decision:

[1] On February 3, 2022, the Registrar of the Court brought a motion pursuant to *Nova Scotia Civil Procedure Rule* 90.43 to dismiss an appeal brought by Ms. Stubbert against Mr. MacLellan. The motion was heard in telechambers on February 23, 2022. The appellant opposed the motion; the respondent supported the motion and asked that the appeal be dismissed.

[2] At the conclusion of the motion hearing, I advised I would reserve my decision. The Registrar's motion is granted and the appeal is dismissed for the reasons that follow.

Background

[3] The parties are involved in a property dispute which resulted in an Interlocutory Order made by the Honourable Justice Patrick Murray of the Nova Scotia Supreme Court, issued May 6, 2021 and subsequently continued by further Order of June 7, 2021. On July 16, 2021, the appellant filed a Notice of Appeal (Interlocutory) in this Court, seeking leave to appeal the Order and setting out nine grounds of appeal.

[4] On August 4, 2021, the Court heard a Motion for Date and Directions. The appeal was set for hearing on March 14, 2022 at 2:00 p.m. Filing directions were that the appeal book was to be filed on November 25, 2021, followed by the appellant's factum and book of authorities due on December 13, 2021 and the respondent's factum and book of authorities due on January 11, 2022.

[5] A Registrar's letter to the parties of August 4, 2021 repeated those deadlines. It read in part:

> **Filing deadlines:**
>
> | | |
> |---|---|
> | Appeal Book to be filed by: | Nov. 25, 2021 |
> | Electronic Copy of Appeal Book *OR* Transcript (see options below) to be filed: | Nov. 25, 2021 |
> | Appellant's Factum and Book of Authorities to be filed by: | Dec. 13, 2021 |
> | Electronic Copy of Appellant's Factum to be filed by: | Dec. 13, 2021 |
> | Respondent's Factum and Book of Authorities to be filed by: | Jan. 11, 2022 |

Electronic Copy of Respondent's Factum to be filed by: Jan. 11, 2022

> **To extend a filing date:** the permission of the Registrar must be obtained and all parties must consent to the extension.
>
> **To request a new hearing date:** a motion must be made to the Chambers Judge.
>
> **FAILURE TO MEET ABOVE-NOTED FILING DATES MAY RESULT IN THIS APPEAL BEING DISMISSED BY THE PRESIDING JUDGE.**

[6] No filings were ever received by the Court. To the date of hearing of the Registrar's motion, neither party had met any of their respective filing deadlines, despite the date looming for hearing of this appeal.

[7] The Registrar of the Court communicated with the appellant by letter emailed on December 10, 2021 inquiring about the lack of an appeal book. No response was received. By January 18, 2022, with the situation becoming more critical, the Deputy Registrar wrote another email letter to the appellant, stating in part:

> The Registrar of the Court of Appeal, Ms. Caroline McInnes, sent an email to you on December 10, 2021 regarding the missed filing date of the appeal book. At that time, she further instructed that you would require an extension to file the appeal book and that consent for a new proposed appeal book filing date would be required from respondent counsel. The Court of Appeal has not received any correspondence from you nor the filing of the appeal book.
>
> The **appeal hearing date is now in jeopardy. You would need to file a motion for new dates as soon as possible. Should a motion not be filed for the above appeal, the Registrar may file a motion to dismiss the appeal.** [Emphasis added]

[8] The appellant certainly should have understood from that letter the problem presented by the lack of filings, and the need for a response. However, no reply was forthcoming.

[9] The Court heard nothing until February 17, 2022. Responding to the motion, the appellant filed an affidavit and a brief (which, in part, mirrored the contents of the affidavit) and relied on *Tawil v. Lawen*, 2020 NSSC 343 as authority for a request to adjourn the Registrar's motion, in anticipation of an imminent decision in the Supreme Court of Nova Scotia.

[10] During argument, the appellant reported to the Court, and the respondent did not dispute, that the appellant had filed a contested summary judgment motion in the Supreme Court, *after* the motion for date and directions in this Court had assigned the series of dates referred to earlier herein. That summary judgment hearing commenced in October 2021 and was completed on January 31, 2022. The decision of the presiding justice of the Supreme Court is now under reserve, which creates potential for the appeal scheduled before this Court to be rendered moot, if the appellant's summary judgment motion is granted.

[11] The brief of the appellant states in part:

> 13. It is respectfully submitted that the if Justice Bodurtha decides to allow the appellant's summary judgment motion, then the Order under appeal must and shall be vacated. If the Order under appeal is vacated, this appeal shall become moot. Therefore the disposition of the motions below by Justice Bodurtha will strongly influence the appellant's desire and ability to litigate the present appeal.
>
> 14. The appellant does not wish to be put to any unnecessary legal expense in the litigation of this appeal or in the proceedings below.
>
> 15. At no time has the respondent moved for this Court to dismiss this appeal.
> […]

[12] The appellant says it would be appropriate for the Court to adjourn the motion brought by the Registrar until such time as there is a decision from the Supreme Court on the summary judgement matter. I have inferred from the submissions it is unknown when that decision will be provided.

Analysis

[13] The Registrar's motion is brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43, which states:

> (1) In this Rule 90.43 a 'perfected appeal' means one in which the appellant has complied with the Rules as to each of the following:
>
> (a) the form and service of the notice of appeal;
>
> (b) applying for a date and directions in conformity with Rule 90.25;
>
> (c) filing the certificate of readiness in conformity with Rule 90.26;
>
> (d) the ordering of copies of the transcript of evidence, in compliance with Rule 90.29;

> (e) filing and delivery of the appeal book and of the appellant's factum.
>
> (2) A respondent in an appeal not perfected by an appellant may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the respondent, to dismiss the appeal.
>
> (3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.
>
> (4) A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[14] Filing of the Registrar's motion is mandatory on the part of the Registrar (*Islam v. Sevgur*, 2011 NSCA 114 at para. 38). Granting of the motion is in the discretion of the Court. The chambers judge's options are to provide further directions to move the appeal toward conclusion or to grant the Registrar's motion (*Green v. Green*, 2021 NSCA 90 at para. 9). Granting the motion results in dismissal of the appeal.

[15] While there should be restraint exercised in denying the opportunity to appeal, it is the appellant's burden to show why the Registrar's motion should be dismissed (*Williams v. Nova Scotia Health Authority*, 2021 NSCA 27 at para. 13; *Downey v. Burroughs*, 2021 NSCA 87 at para. 34).

[16] In considering the matter I am guided by the often cited test set out in *Islam, supra* where Saunders J.A. summarized the analysis to be undertaken in considering a Registrar's motion to dismiss an appeal:

> [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.

[17] I turn to the application of several of the above factors to this motion.

[18] The entirety of the reasons set out by the appellant as to the absence of any adherence to filing deadlines is, with respect, problematic. The appellant has apparently chosen to avoid the effort and expense associated with preparation for the imminent appeal hearing during the period of time in which summary judgment has been pursued in the Supreme Court. I am left to question how it is this Court was to be kept apprised of events in the litigation occurring in another court if not by the appellant, and furthermore, for how long the Registrar could have been expected to ignore the complete absence of filings for an appeal scheduled to be heard less than a month after the date of the hearing of her motion? With respect, both conundrums were within the control of the appellant to avoid.

[19] The appellant relies on *Tawil*, *supra* in support of the contention that adjourning the motion would effectively support "the just, speedy and efficient resolution" of the appeal, because if the appellant is successful on the summary judgment motion, that will "strongly influence" any desire to pursue the appeal. In the appellant's brief on the motion, it is submitted:

> 12. In ***Tawil v. Lawen*, 2020 NSSC 343**, the Honourable Justice D. Timothy Gabriel heard the intervenor's summary judgment motion seeking to dismiss the plaintiff's action under the *Testators' Family Maintenance Act*. The intervenor

> had successfully commenced a separate proceeding in the Supreme Court challenging the constitutionality of certain sections of that legislation. The decision declaring those sections unconstitutional was appealed to this Court, and the appeal hearing was scheduled to be heard 3.5 months later. Justice Gabriel **(para 17)** found it was 'surely just' to adjourn the summary judgment motion 'in anticipation of the relatively imminent hearing by our Court of Appeal…'.

[20] While there is undoubtedly merit in avoiding duplicitous proceedings, it is not appropriate to ignore direct inquiries from the Court and then suggest the Registrar should not proceed with her motion. The proper way to approach the matter would have been for the appellant to seek an adjournment of the appeal at a much earlier point in the history of this matter. The appellant would have known at least since the date the summary judgment motion was set down in Supreme Court that it could have an impact on the appeal in the fashion the appellant now asserts. This begs the rhetorical question as to what would have happened to the appeal, currently on the Court's docket for hearing on March 14, had the Registrar's motion not prompted the appellant to provide the information now shared?

[21] I do not see any connection between events unfolding in another court and the absence of effort to meet deadlines set by this Court such that the former justifies the latter. There is nothing in these circumstances to persuade me the first criterion discussed in *Islam, supra*—whether there is a good reason for the appellant's default, sufficient to excuse the failure—has been satisfied.

[22] As to whether there are any procedural or substantive impediments to the appellant meeting the deadlines imposed, I see none. In addition, there is no suggestion put forward that the appellant was somehow unable to reply to the inquiries of the Registrar and/or the Deputy Registrar referred earlier herein; there was simply no response. The appellant may well be motivated to avoid the expense associated with multiple proceedings, but again, it was for the appellant to alert this Court to the events unfolding in the Supreme Court and, if desired, request an adjournment of the appeal in the proper manner.

[23] Not only is it inappropriate to leave the Court effectively "dangling" while conducting another proceeding in a different court, I am puzzled as to how it could be said to be more efficient and less costly for the appellant to have now contested the Registrar's motion, rather than simply moving for an adjournment of the appeal at an earlier date. Furthermore, a stalled appeal unnecessarily taxes the resources of the court, which is inconsistent with the public's interest in the efficient administration of justice.

[24] It is recognized there is inherent prejudice to any party who seeks to advance an appeal that is dismissed (*Leigh v. Belfast Mini-Mills*, 2012 NSCA 67; *An Jager v. Jager*, 2019 NSCA 9). However, permitting the appellant to continue would be inconsistent with the body of jurisprudence from this Court since *Islam*, *supra*, which emphasizes the need for parties engaged in appeals to adhere to the *Civil Procedure Rules* and the directions of the Court when conducting them. While perhaps trite to observe, appellate practice and appeals are very different from trial practice and trials. Among those differences, given the nature of the work, is that the mechanics and procedures of appeals are heavily focussed on and driven by the *Rules*. While I am not suggesting there could never be a reason or set of circumstances that would call upon the Court to exercise a certain flexibility, I see no reason to do so under the circumstances of this motion.

[25] The appellant submitted several times during oral argument there was no understanding of the process the appellant should have undertaken to seek an adjournment of the appeal or to avoid the Registrar having made her motion. This is reminiscent of the argument advanced but rejected in *Walker v. Walker*, 2021 NSCA 19:

> [13] … 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.

[26] A similar approach was also rejected in *MacLean v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2021 NSCA 24:

> [14] I consider as well the seventh factor identified in *Islam*, *supra*, being the matter of the impact of delay on the Court, and by extension, on the public. Mr. MacLean knew over six and a half months ago what he needed to do, as set out in the Registrar's July 2020 letter. Regretfully, he chose to do nothing. Regardless of what other processes or procedure he may have had underway in the same period the Court needed to be able to operate efficiently, by moving this appeal forward

> in a timely fashion. As in *Walker*, *supra*, had Mr. MacLean reached out to the Court to inquire whether his other matters had any impact or relevance to taking the necessary steps in this appeal, it may have been easier for the Court to now justify more flexibility.

[27] I also consider the prejudice to be suffered by the respondent if the appeal were permitted to continue. The respondent is entitled to finality (*Siscoe v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2020 NSCA 81 at para. 21) and in my view would be equally prejudiced by allowing the appeal to continue under all of the circumstances.

[28] In conclusion, the appellant has not met the burden to persuade the Court it would be contrary to the interests of justice to grant the Registrar's motion.

[29] The motion is granted and accordingly the appeal scheduled for March 14, 2022 is dismissed.

Beaton J.A.