

NOVA SCOTIA COURT OF APPEAL

Citation: *Daye v. Savoie*, 2022 NSCA 27

Date: 20220329

Docket: CA 513059

Registry: Halifax

Between:

Stephanie Daye

Appellant

v.

Alain Savoie

Respondent

Judge: Derrick, J.A.

Motion Heard: March 24, 2022 in Halifax, Nova Scotia in Chambers

Held: Motions dismissed

Counsel: Stephanie Daye, in person
Hannah Rubenstein, for the respondent

Decision:

Introduction

[1] Ms. Daye and Mr. Savoie have been embroiled in divorce proceedings since 2019 in the Nova Scotia Supreme Court, Family Division. Agreements reached at settlement conferences before Justice LouAnn Chiasson are reflected in a Partial Consent Corollary Relief Order dated January 19th, 2021. A conference before Justice Samuel Moreau on December 7th, 2020 led to a Consent Order dated January 22nd, 2021. Ms. Daye wants to appeal the January 22nd Consent Order. She is very significantly past the deadline for doing so and is seeking an extension of time to file her Notice of Appeal.

[2] As Chambers judge, pursuant to *Civil Procedure Rule* 90.37(12)(h), I can “at any time” extend the applicable time limit to permit the filing of a late Notice of Appeal. As I will explain, I am not persuaded to do so in this case.

[3] There is an additional issue: s. 39 of the *Judicature Act*, R.S.N.S. 1989, c. 240 appears to indicate a Consent Order cannot be appealed without leave of the court. While this Court has not conclusively determined the issue of whether seeking to set aside a Consent Order is properly a matter for appellate consideration and if it is, whether leave is required¹, I am satisfied there would be no basis for granting it in this case as Ms. Daye’s proposed appeal has no merit.

Background

[4] My description of the background is restricted to the facts relevant to the matters before me.

[5] The January 22nd, 2021 Consent Order dealt with one specific matter: timelines for steps Ms. Daye was required to take in order to obtain title to a rental property at 17 and 17A Albro Lake Road, Dartmouth. A number of other issues had already been addressed and resolved by consent at the settlement conferences Ms. Daye attended.

[6] The settlement conferences before Justice Chiasson took place on March 4th and November 12th, 2020. Ms. Daye represented herself. Mr. Savoie was

¹ See *Kedmi v. Korem*, 2012 NSCA 124 at paras. 5-7 (as per Bryson, J.A. in Chambers); *Pritchard v. Pritchard*, 2009 NSCA 88 at para. 28 (as per Beveridge, J.A. in Chambers).

represented by Ms. Rubenstein. The Partial Consent Corollary Relief Order dealt with a number of issues on which agreement had been reached, including the 17 & 17A Albro Lake Road property. The property was owned by a numbered company, 8629714 Canada Inc., and was to be transferred to Ms. Daye subject to her satisfying certain conditions. In the Partial Consent Corollary Relief Order Ms. Daye waived “all claims to any ownership or assets” of the numbered company.

[7] The Partial Consent Corollary Relief Order provided that once Ms. Daye confirmed she was able to secure financing for the Albro Lake Road property, an agreement of Purchase and Sale would be signed setting out the following terms: (i) Ms. Daye was to receive copies of any current leases; (ii) Ms. Daye was to be given confirmation of any security deposits from the tenants in the possession of the numbered company; and (iii) the numbered company was to execute a Quit Claim Deed releasing its interest in the property and transferring ownership to Ms. Daye.

[8] As Ms. Daye was not a director or an officer of the numbered company, a Purchase and Sale Agreement and Quit Claim Deed were required to transfer title in the property to her.

[9] There was no mention in the Partial Consent Corollary Relief Order of timelines for Ms. Daye to arrange financing.

[10] Several matters that remained to be dealt with following the November 12th, 2020 settlement conference were adjourned to a further conference on December 7th, 2020 before Justice Samuel Moreau.

[11] On December 4th, 2020, Ms. Rubenstein wrote Justice Moreau about two additional matters Mr. Savoie wanted addressed at the December 7th conference. The only matter relevant to Ms. Daye’s motions before me was Mr. Savoie’s concern that the November 12th, 2020 settlement conference had not addressed a timeline for Ms. Daye’s financing for the Albro Lake Road property. On Mr. Savoie’s behalf, Ms. Rubenstein proposed the following deadlines: the signing by Ms. Daye within seven days of the issuance of the Partial Consent Corollary Relief Order of a Purchase and Sale Agreement, confirming her purchase of Albro Lake Road from the numbered company; ten days following that seven day period for Ms. Daye to provide confirmation of financing from the bank or financial institution; and in the event of Ms. Daye either failing to execute the Purchase and Sale Agreement or provide confirmation of financing within the time periods, the

payment to Ms. Daye of \$67,177.75 by Mr. Savoie and the retention by Mr. Savoie of the property.

[12] At the December 7th conference, Justice Moreau confirmed his receipt of Ms. Rubenstein's December 4th letter which he noted addressed the issue of financing for 17 and 17A Albro Lake Road. After Justice Moreau had heard from Ms. Rubenstein and Ms. Daye on other matters, Ms. Rubenstein asked him to inquire of Ms. Daye about the timelines proposed in the December 4th letter. The following exchange occurred:

The Court: Okay. Ms. Daye, with respect to the rental property, have you secured financing?

Ms. Daye: Actually I will be talking to a mortgage broker after this hearing and go over the finances. I will be putting a ... (inaudible – audio skips – distorted) (refinancing?)² I will have numbers and figures probably within the next three or four days.

The Court: Okay. So then the timeline as suggested by Mr. Savoie and Ms. Rubenstein's correspondence then shouldn't be an issue?

Ms. Daye: No it shouldn't be an issue.

The Court: Okay. So that is agreed upon?

Ms. Daye: Yes.

The Court: All right.

[13] Ms. Rubenstein then asked Justice Moreau if she could draft an Order and provide it to him for signature. Justice Moreau agreed. The discussion proceeded on to other unrelated matters.

[14] Ms. Rubenstein forwarded a draft Consent Order to Justice Moreau on December 8th requesting its issuance. She copied her correspondence to Ms. Daye.

[15] In Ms. Daye's email response to Ms. Rubenstein, she indicated that "financing for Albro will be dealt with by December 16th..." Subsequently, Ms. Daye wrote to Justice Moreau stating that:

Purchase and sale agreement does not apply in this matter as it is part of the division of Matrimonial property, it is a Refinancing Agreement and not

² Ms. Daye attached a certified transcript for the December 7th, 2020 conference with Justice Moreau to her Supplementary Affidavit filed in support of her Motion for an extension of time to file a Notice of Appeal. The (inaudible – audio skips - distorted) (refinancing?) is reproduced here as shown in the transcript.

considered a new sale and must include a spousal consent form and details of the refinancing structure for the spouse involved in the purchase...

[16] The remainder of Ms. Daye's letter suggests that she was encountering difficulties in relation to financing the acquisition of the Albro Lake Road property. Her email exchanges with Ms. Rubenstein indicated she was not prepared to consent to the Order. She said her consent was required as the Order to be issued by Justice Moreau was part of the Partial Consent Corollary Relief Order. As Ms. Daye indicated at the hearing of this Chambers motion, she regarded the timelines for the Albro Lake Road property to be a variation of the Partial Corollary Relief Order.

[17] Ms. Rubenstein wrote Justice Moreau on January 14th, 2021 asking for the Order to be issued. She said: "It is respectfully submitted that this draft Order accurately reflects the agreement reached by the parties on the record at the conference held on December 7th, 2020".

[18] Ms. Rubenstein also addressed emails Ms. Daye had sent to the Court on January 13th, 2021:

In the first email sent by Ms. Daye, she states that Mr. Savoie requires her consent to this Order, as it is part of the initial Order issued by Justice Chiasson. This is incorrect. The issue of the timeline with respect to the financing of 17 & 17A Albro Lake Road was not discussed with Justice Chiasson; instead, this issue was raised in my letter to Your Lordship, dated December 4, 2020, and again at the parties' Conference on December 7, 2020. It is respectfully submitted that Ms. Daye's further consent to this Order is not required, as both parties confirmed their consent to the terms of this Order on the Court record at the December 7th Conference.

With respect to the transfer of the Albro Lake Road property, this is the sale of an asset owned by a corporation, specifically 8629714 Canada Inc., to an individual, who is neither a director, nor an officer, of the corporation. Accordingly, contrary to Ms. Daye's comments in her letter, dated January 13, 2021, this is not a simple transfer of title – instead, the sale of this property requires a Purchase and Sale Agreement...

[19] Ms. Rubenstein wrote Justice Moreau again on January 20th, 2021:

I am following up on my letter, dated January 14, 2021. To provide an update to Your Lordship, the parties' Partial Corollary Relief Order was issued by the Honourable Justice Chiasson on January 19, 2021, a copy of which is enclosed.

It is respectfully submitted that the commencement of the timeline for the financing of 17 & 17A Albro Lake Road should have been triggered by the issuance of the Corollary Relief Order (as agreed to by the parties on Court record); however Mr. Savoie is not comfortable with commencing the timeline until the Consent Order (Financing of 17 & 17A Albro Lake Road) is issued by Your Lordship.

Mr. Savoie is respectfully seeking that the Consent Order be issued by Your Lordship with the parties' signatures, as both parties agreed to the terms of the Order on Court record. Mr. Savoie is trying to avoid further delay in this proceeding and is seeking to ensure the parties are moving forward on finalizing agreements reached at the Settlement Conferences held in March and November of 2020. The only way to ensure Ms. Daye will follow through with agreements reached on Court record is to have timelines detailed in a written Court Order.

[20] Ms. Daye did not sign the Consent Order. It was issued on January 22nd, 2021 by Associate Chief Justice Lawrence O'Neil of the Family Division. Ms. Rubenstein emailed Ms. Daye a copy of the issued Order that same day. She indicated Ms. Daye would have to: sign a Purchase and Sale Agreement within seven days of January 25th, 2021 and then confirm financing within ten days following the first seven day period. She noted: "Paragraph 3 of the Consent Order outlines what will occur if you fail to complete either of these tasks in their respective timelines". As noted earlier, paragraph 3 of the January 22nd, 2021 Consent Order provided that in the event Ms. Daye failed to satisfy either of the requirements for acquiring the property, Mr. Savoie would retain it and pay her \$67,177.75.

[21] Ms. Daye did not sign a Purchase and Sale Agreement for Albro Lake Road nor did she secure financing. Mr. Savoie, through the holding company, sold the property on April 18th, 2021 to unrelated third parties. In the affidavit he filed in response to Ms. Daye's motion Mr. Savoie indicated the property has since changed hands again.

[22] In November 2021, Mr. Savoie paid \$67,177.75 to Ms. Daye in satisfaction of paragraph 3 of the January 22nd, 2021 Consent Order. At the hearing before me, Ms. Daye confirmed she had received those funds.

The Hearing on Ms. Daye's Motions

[23] In support of her Motion for an extension of time to file her Notice of Appeal, Ms. Daye filed an affidavit sworn on March 3rd, 2022 and a supplementary affidavit sworn on March 17th. Ms. Daye's proposed Notice of Appeal and a copy

of the January 22nd, 2021 Consent Order relating to the Albro Lake Road property are exhibited to her March 3rd affidavit. Her March 17th affidavit includes as exhibits copies of the certified transcript of the December 7th, 2020 conference before Justice Moreau and the partial Consent Corollary Relief Order of January 19th, 2021.

[24] Exhibited to Mr. Savoie's affidavit are copies of the email and formal correspondence to which I referred earlier. He also filed a brief.

[25] Missing from Ms. Daye's filings is a Motion for leave to appeal a Consent Order notwithstanding s. 39 of the *Judicature Act*, R.S.N.S. 1989, c. 240, which states:

39 **No order of the Supreme Court made with the consent of the parties is subject to appeal**, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, **except by leave of the Court of Appeal.** (emphasis added)

[26] Ms. Daye's failure to file a motion for leave was dealt with as a preliminary issue. Ms. Rubenstein indicated Mr. Savoie did not object to the requirement for a formal motion being waived so the Chambers hearing could proceed. Ms. Daye was accordingly asked to address the tests for an extension of time to file a late appeal and for obtaining leave to appeal an Order that had been consented to by the parties in the Supreme Court.

[27] Ms. Daye confirmed certain issues at the start of the hearing: (1) that she was seeking to appeal the January 22nd, 2021 Consent Order relating to the Albro Lake Road property; and (2) that the thrust of her proposed appeal was that the Consent Order was an illegitimate variation of the Partial Consent Corollary Relief Order issued on January 19th, 2021. Ms. Daye indicated this represented the scope and focus of her intended appeal.

[28] The applicable law for both motions, which I will describe in more detail, was explained to Ms. Daye. She indicated she understood what was required for her motions to succeed. She had to show: she had a genuine intention to appeal during the period when the right to appeal existed; that she had a reasonable excuse for not doing so; and that she has an arguable ground of appeal. Ms. Daye was told

that establishing an arguable ground of appeal was required both to obtain an extension of time to file her appeal and, in this case, for leave to appeal.

[29] Ms. Daye's March 3rd affidavit sets out her evidence on the issues of *bona fide* intention to appeal and her reasonable excuse for not doing so in time. She stated:

- She had “a genuine intention to appeal and that I first formed such an intention on the 1st of July, 2021”. (para. 7)
- She was unable to file her Notice of Appeal within the timelines under the *Civil Procedure Rules* because an earlier lawyer failed to “file a variance”. She was then stymied by the pandemic and could not find a new lawyer which meant “...it was left up to me and my responsibility to acquire the research in order to file the appeal”. (para. 9)

[30] As for the merits of her proposed appeal, in her affidavit Ms. Daye claims to have been broadsided at the December 7th, 2020 conference with Justice Moreau:

- “At the very outset, I was led to believe that this was not another hearing to discuss a Consent Order nor did the judge outline that the hearing contents would now be changed to address concerns of the CRO [Corollary Relief Order] from opposing counsel”. (para. 10)
- There was “no mention of an order” at the conference. (para. 11)
- Justice Moreau simply “outlined or stated if the terms of the letter were agreeable to me but did not list them or repeat them” for the record. (para. 13)

[31] Ms. Daye indicates in her affidavit she did not understand the letter being referred to at the conference was the letter that discussed timelines for her obtaining title to the Albro Lake Road property. She says when she agreed with Justice Moreau, she “erroneously” thought he was referring to an earlier letter he had received from Ms. Rubenstein.

[32] There was only one letter to Justice Moreau that referred to timelines for the Albro Lake Road property. It was Ms. Rubenstein's December 4th, 2020 letter. An earlier letter from Ms. Rubenstein to Justice Moreau, dated December 1st, 2020,

made no mention of the Albro Lake Road property and dealt exclusively with the outstanding issues from the November 12th, 2020 settlement conference with Justice Chiasson. It is exhibited to Mr. Savoie's affidavit. Both letters were copied to Ms. Daye.

[33] As I have noted, Ms. Daye sees the January 22nd, 2021 Consent Order as an improper variation of the Partial Consent Corollary Relief Order. She says it has "muddied the waters". She says: Mr. Savoie's sale of the Albro Lake Road property should not have proceeded; once it did she should have received the full sale proceeds, and now she is experiencing prejudicial taxation consequences flowing from the division of the matrimonial assets. She did not explain what these consequences are beyond stating there is a "tax assessment" against her and she is still being "bombarded" by the Canada Revenue Agency.

[34] In her response, Ms. Rubenstein noted the ownership of the Albro Lake Road property by a holding company, the numbered company. The company dealt with the taxes associated with the sale of the property. She went on to take issue with a number of Ms. Daye's statements in her March 3rd affidavit and at the hearing. In Ms. Rubenstein's submission, Ms. Daye has no arguable ground of appeal. She sought \$1000 in costs in the event Ms. Daye's motions are dismissed. Ms. Rubenstein said the divorce proceedings have been protracted and costly for Mr. Savoie. As Chambers judge I have the authority to award costs pursuant to *Civil Procedure Rule* 90.37(14).

Applicable Law

[35] The factors to be considered in the exercise of discretion to grant an extension of time to file a Notice of Appeal are well-established: the applicant must have had a *bona fide*, that is, genuine, intention to appeal within the period when the right to appeal existed; they must provide a reasonable excuse for why no appeal was filed; the question of prejudice to the opposing party must be addressed; and the merits of the proposed appeal assessed. Even if these criteria are not met, "compelling or exceptional circumstances", such as "a strong case for error in the court below" can warrant an extension of time being granted.³ "Ultimately, the discretion must be exercised according to what the interests of justice require".⁴

³ *Forrest v. Forrest*, 2013 NSCA 15 at para. 11.

⁴ *R. v. R.E.M.*, 2011 NSCA 8 at para. 39; *Pritchard*, *supra* at para. 19, per Beveridge, J.A. citing *Bellefontaine v. Schneiderman*, 2006 NSCA 96 at paras. 3-4.

[36] The interests of justice are not served by a proposed appeal that lacks merit being afforded an extension of time. As Justice Beveridge held in *R.E.M.*:

[45] ...the ultimate question is whether or not the interests of justice require the extension of time to be granted. It cannot be in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit...

[37] Satisfying the meritorious appeal criterion, or in other words, showing there is an arguable issue for appeal, requires Ms. Daye to advance "realistic grounds, which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal".⁵

Analysis

[38] The clear evidence in this case satisfies me that Ms. Daye's motions cannot succeed. Her March 3rd, 2022 affidavit establishes her genuine intention to appeal was formed on July 1st, 2021. The deadline for filing an appeal to the January 22nd, 2021 Consent Order had long passed by then.⁶ Her explanation for why she did not file an appeal during the time when the right to appeal existed is unsupported: beyond a vague claim that she was unable to find a lawyer, she has not shown what efforts she made to retain one. As noted by Justice Bryson in *Dorey v. Nelson*,⁷ there are easily accessible resources on the webpage for the Nova Scotia Court of Appeal to assist self-represented litigants advance their appeals. Ms. Daye had options that would have enabled her to comply with the time requirements under the *Civil Procedure Rules*. She did not utilize them.

[39] Even if Ms. Daye had been able to demonstrate she genuinely intended to appeal and, for good reason, had been unable to do so in time, the most pronounced problem with her motions is the lack of merit in her proposed appeal. There is nothing to support a case for an error by Justice Moreau, nor any grounds that warrant appellate intervention. The target of Ms. Daye's motions is a Consent Order: that alone "precludes any serious consideration that justice would require an extension of time".⁸

⁵ *R.E.M.*, *supra* at para. 50, per Beveridge, J.A. citing *MacCulloch v. McInnes, Cooper & Robertson*, 2000 NSCA 92 at para. 4.

⁶ An appeal from the January 22nd, 2021 Consent Order, an order pursuant to proceedings under the *Divorce Act*, had to be started no more than 30 days after the date of the Order (*Civil Procedure Rule*, 90.13(3)).

⁷ 2020 NSCA 34.

⁸ *Pritchard*, *supra* at para. 29.

[40] Contrary to Ms. Daye's submissions, the January 22nd, 2021 Consent Order is not a variation of the Partial Corollary Relief Order. It is a second Order. It deals with an issue that was not addressed in the Partial Corollary Relief Order, timelines for the acquisition and financing by Ms. Daye of the Albro Lake Road property.

[41] The January 22nd, 2021 Consent Order resulted from Ms. Daye consenting to the timelines Ms. Rubenstein had proposed in her December 4th, 2020 letter to Justice Moreau. As the transcript from the December 7th conference with Justice Moreau confirms, Ms. Daye was specifically asked about the financing of the Albro Lake Road property which was the subject of the December 4th letter and had not been addressed in Ms. Rubenstein's earlier letter of December 1st. Ms. Daye's responses to Justice Moreau make it absolutely clear that she did not misunderstand what was being put to her. She told Justice Moreau the proposed timelines - suggested, as he pointed out - "by Mr. Savoie and Ms. Rubenstein's correspondence", would not be an issue.

[42] Ms. Daye has produced no evidence the consent she gave to the Albro Lake Road property acquisition timelines was the result of mistake, misrepresentation or fraud. There is nothing to support Ms. Daye's claim she misapprehended what was being discussed. The evidence in relation to Ms. Daye's consent is unequivocal. It establishes Ms. Daye knew precisely what she was consenting to and was a fully informed party to the agreement. There are no compelling or exceptional circumstances in this case that would justify appellate intervention.

[43] It was no doubt a disappointment for Ms. Daye that her hoped-for acquisition of the Albro Lake Road property did not materialize. In accordance with the agreement reached before Justice Moreau, Mr. Savoie's numbered company retained the property and Ms. Daye received \$67,177.75. There is no basis for appellate interference in the finality achieved by the terms of the parties' agreement.

Conclusion

[44] Ms. Daye's proposed appeal of the January 22nd, 2021 Consent Order is without merit. There is incontrovertible evidence she agreed to the timelines reflected in the Order. She did not meet those timelines and was paid the \$67,177.75 that she and Mr. Savoie had agreed she would be entitled to. There is no arguable issue that would justify either an extension of time to file a Notice of

Appeal or granting leave to appeal. Ms. Daye's motions are dismissed with costs in the amount of \$500 payable forthwith to Mr. Savoie.

Derrick, J.A.