

NOVA SCOTIA COURT OF APPEAL

Citation: *Gillard v. Nova Scotia (Registrar General)*, 2022 NSCA 74

Date: 20221201

Docket: CA 513766

Registry: Halifax

Between:

Marilyn Gillard and Stephen Gillard

Appellants

v.

Registrar General

Respondent

Judge: Beveridge J.A.

Motion Heard: October 20, 2022, in Halifax, Nova Scotia in Chambers

Held: Appeal dismissed

Counsel: Marilyn Gillard and Stephen Gillard, appellants
Jack Townsend, for the respondent

Decision:

[1] The Registrar moves to dismiss the appellants' appeal for failure to perfect the appeal as required by the *Civil Procedure Rules*. The respondent supports the motion.

[2] The appellants are self-represented. I adjourned the original September 29, 2022, hearing date to October 20, 2022, despite the service of the Registrar's materials in a timely fashion. I adjourned the hearing for two reasons.

[3] First, it appeared that the respondent's materials which supported the Registrar's motion had not yet been served on the appellants. Second, Hurricane Fiona may have hampered or even prevented the appellants' ability to be present to oppose the motion.

[4] The appellants filed a six-page letter on October 12, 2022, with a number of attachments. On October 20, 2022, the appellants, at their request, appeared by phone. Jack Townsend appeared for the Registrar General. I reserved to consider the submissions.

[5] The appellants concede they have not complied with the *Civil Procedure Rules* to perfect their appeal. As I will explain, the burden then fell to them to satisfy me on a balance of probabilities that it would not be in the interests of justice to dismiss their appeal for noncompliance with the *Rules*. They have not done so. I grant the Registrar's motion to dismiss for the following reasons.

THE LEGAL FRAMEWORK

[6] To perfect an appeal, an appellant must comply with the *Rules* with respect to a number of matters. *Rule 90.43(1)* sets out the steps an appellant must meet to perfect their appeal:

- (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.

[7] A judge has a broad discretion to excuse compliance (see, for example, *Rule* 90.37(12)).

[8] For a general appeal, *Rule* 90.25 requires an appellant to file their motion for date and directions along with their Certificate of Readiness no later than 80 clear days (this excludes holidays and weekends) from the filing of the Notice of Appeal.

[9] If they fail to do so, the *Rules* require the Registrar to bring a motion, on five days notice, to dismiss the appeal. On that motion, a judge may direct perfection of the appeal and set it down for hearing or dismiss the appeal. The relevant provisions are as follows:

90.43 (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.

[10] The *Rules* do not provide specific guidance about how a judge should exercise their discretion. Certain principles have been recognized. Appeals, like all court proceedings, should be conducted expeditiously. There can be little doubt that the parties, and this certainly includes respondents who have been successful in the first instance, deserve to have their appeals resolved in a timely and efficient manner. On the other hand, a judge should be hesitant to deny an appellant their statutory right to have this Court hear their appeal on the merits.

[11] The approach routinely cited and applied to balance these opposing principles was articulated 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.

BACKGROUND

[12] To understand the outcome, it is useful to set out some basic background facts and the relevant aspects of these proceedings.

[13] The Gillards own property in Glace Bay. Neighbouring property owners negotiated with DARR (Cape Breton) Ltd. to obtain a Quit Claim Deed for a small parcel of land (PID 15393622). In September 2010, Frank Gillis migrated and registered the PID under the *Land Registry Act*. Immediately thereafter, DARR conveyed any interest it had in the PID to those neighbours, Messrs. Simms, MacLellan and Turner.

[14] Prior to this transaction, Mr. Gillis and the Simms told Mr. Gillard he also appeared to be encroaching on the PID and invited him to join the transaction with

DARR to remedy any issue. He declined because he claimed his 1975 Warranty Deed makes it clear he is the rightful owner of all of the land he was occupying.

[15] On September 16, 2010, Mr. Gillis filed a Form 9 in the land register and duly served it on Mr. Gillard. A Form 9 gives notice of a PID registration that may impact a person's property interests. The Form 9 gave the following particulars about how Mr. Gillard's interests may be affected by the PID registration: "A portion of PID # 15393622 appears to be occupied by yourself without consent".

[16] The Form 9 also sets out the mandated advice:

If you believe that you may have an interest in the above lands, through occupation or usage, then you may have to take action to preserve your rights, within the ten year time limit set out in subsection 74(2) of the *Land Registration Act*.

[Bold in the original Form]

[17] The appellants have commenced no less than four actions about PID 15393622. In chronological order they are as follows.

[18] In 2014, they sued DARR. That action was dismissed at Mr. Gillard's request on the day the matter had been set for trial (January 30, 2017).

[19] In 2017, Mr. Gillard sued Frank Gillis, Q.C. Gabriel J. granted the defendant's summary judgment motion and dismissed the claim (2018 NSSC 44).

[20] On August 20, 2018, Mr. Gillard sued John and Helen Simms (Syd No. 479345) seeking to "have their property returned to its rightful owners with costs". The respondent, the Registrar General, has intervenor status in that action. It is still outstanding.

[21] Finally, on January 18, 2019, the appellants sued the Registrar General to have the court order the PID registration null and void (or for a correction of the registration) and for compensation (SN. 484317).

[22] On February 22, 2022, Justice Mona Lynch granted a summary judgment on the evidence in favour of the Registrar General. It is this decision and the subsequent order that are the subject matter of this appeal.

[23] Lynch J. delivered oral reasons. They are not reported. In a nutshell, she concluded there were no genuine issues of material fact requiring a trial. She

found the appellants had not satisfied her they had a real chance of success because their claims were outside the applicable limitation period and the Simms were not parties. Summary judgment and a modest costs order followed.

[24] The appellants filed their Notice of Appeal on March 29, 2022. It contains the following four grounds of appeal:

- (1) Justice Lynch ruled our Notice of Action was filed too late (six years) when in fact the form 9 we were served after P.I.D. 15393622 was Migrated, back in September of 2010, states very clearly that the Appellant [*sic*] have ten years to start an Action to preserve your right, within the ten year time limit set out in subsection 74920 (*sic*) of the Land Registration Act. The Schedule "A" attached to the Form 9 mentions Book 1918 at page 64. Our notice of action, in 2019, was well within this time frame. Justice Lynch erred in law on this point.
- (2) When Solicitor Frank Gillis, Q.C. Migrated P.I.D. 15393622, he used Book 1918-Page 64 in Schedule "A" as the basis for said Migration. The Book and Page # did not exist then, or now, which was a fraudulent act. Justice Lynch ignored this fact, which was an error of law.
- (3) In Justice Lynch's opening remarks, page 11. item 11, of our Ladies [*sic*] ruling, berated the Appellant for having allegations in his affidavit, that another Justice, Justice Gabriel, had ordered struck from a previous affidavit. The changes that Justice Gabriel had ordered struck, or changed, were made and not included in the Appellant's affidavit, that was before this court. This was an error in Judgement on Justice Lynch [*sic*] part.
- (4) Justice Lynch stated in our Ladies's [*sic*] decision that their [*sic*] is no mention in the Land Registration Act that would grant the Courts the authority to declare a Migration Null and Void. Section 92 (1) of the (LRA) reads as follows. Subject to this Act, in any proceeding with respect to a parcel registered pursuant to this Act, the court may order a registrar to (a)record an interest;(b)cancel a recording;(c)revise the priority of recordings;(d)revise a registration;(e)take any other action that the court thinks just. Justice Lynch erred [*sic*] in Law on this matter.

[25] The Registrar calculated the appellants had until July 25, 2022, to file their motion for date and directions and Certificate of Readiness. She sent her customary letter to the appellants on April 1, 2022. Her letter identified the July 25, 2022, deadline and the steps the appellants must take in order to make their motion for date and directions on or before that date.

[26] The Registrar moved on September 2, 2022, to dismiss the appeal pursuant to *Rule* 90.43(3) and (4). The Notice of Motion, her Memorandum to the Chambers Judge and September 2, 2022, cover letter were sent to the appellants

and the respondent. The September 2 letter advised the appellants that their presence was required in Court on September 29, 2022. If they did not attend, the judge could make an order against them, and their appeal may be dismissed. If they wished to file an affidavit or brief, it had to be done no later than the Monday prior to September 29, 2022.

[27] The appellants made no contact with the Registrar's office. They filed no materials. In the meantime, on Monday, September 26, 2022, the respondent filed an affidavit with numerous exhibits and a detailed brief in support of the Registrar's motion to dismiss. As I noted at the outset of these reasons, I adjourned the September 29, 2022, hearing because the respondent had been unable to serve the appellants with its materials, and the impact of Hurricane Fiona may have precluded the appellants from being able to attend.

[28] I heard the Registrar's motion on October 20, 2022. The appellants filed a detailed brief and numerous documents on October 12, 2022. With this background information in hand, I turn to my analysis.

ANALYSIS

[29] The appellants were aware of the basic legal principles that guide a judge hearing a Registrar's 90.43(3) motion. The respondent's September 26 brief accurately and completely sets out those principles.

[30] The respondent urged dismissal because: there is no good reason for the appellant's non-compliance; any prejudice to the appellants would be tempered by the fact they still have an outstanding action in the Supreme Court disputing the registration of the PID; and the four grounds of appeal do not raise legitimate arguable issues.

[31] The appellants' lengthy response of October 12, 2022, does not adequately address why I should excuse their non-compliance, nor why it is not in the interests of justice to dismiss their appeal. Much of their filed material simply repeats the history of the property dispute and their complaints of wrongdoing by various actors.

[32] The lone comment offered by the appellant to excuse non-compliance was:

We admit we did not file a Certificate of Readiness or brought a motion for date and directions, or filed our appeal book, or factum. The simple truth is, we don't

know how. There is not a Lawyer in this province, and we have asked many, that will help us with our land dispute, but we are still looking.

[33] I am unconvinced by the protestation Mr. Gillard did not know how to comply with the *Rules*. The Registrar's Memorandum to the Chambers Judge recites:

On May 12, 2022, the appellant Mr. Gillard spoke to the Registrar by phone, asking questions about transcripts, the appeal book and the appeal process. According to the court record, the appellants have not made contact with the Court since that date.

[34] Mr. Gillard acknowledged the accuracy of this recital. The Registrar had explained the process. If he had further questions, he knew who to contact. In addition, Mr. Gillard advised that he has a lawyer on retainer. Although not interested in doing the appeal or litigating the land dispute, this lawyer was someone the appellant acknowledged he could have reached out to obtain guidance.

[35] Furthermore, Mr. Gillard has launched various lawsuits and participated in various motions; he was able to obtain the recordings of the proceedings before Justice Lynch and have them transcribed. Mr. Gillard filed the transcript in his action against Mr. and Mrs. Simms on August 12, 2022. If he were genuinely interested in pursuing this appeal that transcript was obviously an important component to being able to file a certificate of readiness and consequent motion for date and directions. I am not convinced he has a genuine interest.

[36] Other than his phone discussion with the Registrar on May 12, 2022, he has not sought advice nor done anything. The relief he seeks before me belies such an interest.

[37] He writes in his brief:

The Respondents are requesting that the Appeal Hearing, re this matter be adjourned, until the matter with the Simms family is heard and decided on. The Registrar General has Intervener status in that matter, and as you will see from the attachments, that matter is far from over.

[38] Lastly, there is the matter of the merits of the grounds of appeal. They need not be compelling. However, the stronger the grounds of appeal, the more likely it will not be in the interests of justice to dismiss an appeal for non-compliance.

[39] At a minimum, the grounds must raise legitimate, arguable issues. With respect, the grounds of appeal cited in the Notice of Appeal do not.

[40] Lynch J. granted summary judgment on evidence because there were no genuine material issues of fact requiring trial and the appellants had not demonstrated they had a real chance of success. This was because the relevant limitation period precluded a viable cause of action, and the Simms were not parties to the action before her.

[41] The appellants continue to misplace reliance on the language of the Form 9 that they had ten years to start their action against the Registrar General. The appellants sued the Registrar General for compensation pursuant to s. 88 of the *Land Registration Act*. That section provides:

Action for compensation

88 (1) A person who claims to be entitled to compensation may commence an action against the Registrar General.

(2) The court may

(a) declare that the person is entitled to compensation;

(b) determine the amount of or a method of determining the compensation, interest and costs to which the person is entitled;

[42] Section 85(4) sets out the relevant limitation period. It is six years from the date the person learns a loss may have been sustained:

(4) Notwithstanding the *Limitations of Actions [Real Property Limitations] Act*, a person loses the right to compensation if, within six years after the person learns that a loss may have been sustained, or within such additional time as the Registrar General may agree, that person does not either enter into an agreement with the Registrar General providing for compensation or commence an action for compensation.

[43] The appellants do not dispute that they knew of their potential loss no later than 2010. There were neither any actions commenced nor any agreements with the Registrar General.

[44] The appellants continue to believe they had ten years to start a lawsuit and they have done so with this 2019 action. They cite the language of the Form 9 served on them in 2010. The ten-year period referred to Form 9 comes from the

limitation period in the *Land Registration Act* to assert a claim for adverse possession found in s. 74(2) of the *Act*. It provides:

Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless

- (a) an order of the court confirming the interest;
- (b) a certificate of *lis pendens* certifying that an action has been commenced to confirm the interest;
- (c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the *Crown Lands Act*; or
- (d) the agreement of the registered owner confirming the interest, has been registered or recorded before that time.

[45] There are two fundamental problems. First, the appellants' action does not assert a claim of adverse possession. Second, even if it did, they cannot seek compensation from the Registrar General for such a claim.

[46] The suggestion of legal error because of a purportedly fraudulent act by Frank Gillis, K.C. and Justice Lynch's criticism of the appellant's allegations of corrupt or dishonest behaviour by others are not legitimate grounds of appeal.

[47] The suggestion of fraud against Frank Gillis, K.C. would have only been relevant in his previous action against Mr. Gillis or perhaps arguably in his current action against the Simms. The motion judge found it disturbing that Mr. Gillard would put in his affidavit allegations similar to ones that Justice Gabriel had already told him were inappropriate. Justice Lynch's criticism could not possibly amount to reversible error. It had nothing to do with the outcome.

[48] Finally, the appellants assert Justice Lynch was wrong when she said the *Act* did not provide authority to declare a migration null and void. Lynch J., in the course of her oral decision, did say, "There is no provision under the *Land Registration Act* that I can see that provides for the property, the PID number ending in 622, to be declared null and void". If that were the basis for granting the summary judgment motion, the appellants might have an arguable ground of appeal.

[49] However, it is abundantly clear Justice Lynch did not grant the summary judgment motion on that basis. She granted it because the relevant limitation

period barred the claim, and the requested relief could not be granted because the Simms were not parties to the action.

[50] Justice Lynch did not limit the appellant's remedy to just a declaration that the registration is null and void. That was the specific remedy the appellants' identified in their Statement of Claim. However, the Claim also cited other provisions of the *Act* (s. 35) with respect to rectification of a registration. Early in her reasons, the motion judge commented on the relief being requested:

The claims made under the Statement of Claim filed by the Gillards are not easy to determine. Justice Coady, when considering the Gillards Motion to amend the Notice of Action and Statement of Claim, interpreted the claims to be an order making the PID 15393622 null and void, and an order for compensation. **I would, in a wider interpretation, also interpret the null and void claim to include a correction of the registration.**

[Emphasis added]

[51] The motion judge made it abundantly clear the reason she granted the summary judgment motion was not due to any lack of power to rectify the registration—it was because the people affected by the requested relief were not parties to the action. She said this:

The claim for declaring the property null and void or a correction of the registration are in the *Land Registration Act* under s. 35 and we looked at s. 35. It says, "A person who objects to and is aggrieved by a registration and a land parcel register may commence a proceeding before the court requesting a declaration as to the rights of the parties, an order for correction of the registration and a determination of entitlement to compensation, if any"

...

So s. 35(2) makes it clear that in any proceeding requesting a declaration as to the rights of the parties in order for correction of the registration and a determination of entitled [sic] to compensation, the Simms must be parties to the proceeding and notice must be provided to the Registrar General. The Simms here are not parties to this proceeding and anything decided could affect their title which they currently hold to the property identification number 15393622.

Therefore, I have to find that there is no real chance of success on that claim because the proper parties are not before the Court. And so I am going to dismiss the claim as well for a declaration that the property registration is null and void or correction.

[Emphasis added]

[52] For all of these reasons, the appellants have not satisfied me it is in the interests of justice to deny the Registrar's motion. The appeal is dismissed for failure to comply with the applicable *Civil Procedure Rules*. The respondent has not asked for costs. I award none.

Beveridge J.A.