

NOVA SCOTIA COURT OF APPEAL
Citation: *McCarthy v. Pruneau*, 2023 NSCA 89

Date: 20231207
Docket: CA 524733
Registry: Halifax

Between:

Elizabeth McCarthy

Appellant

v.

Joseph Pruneau

Respondent

Judge: Bourgeois, J.A.

Motion Heard: December 7, 2023, in Halifax, Nova Scotia in Chambers

Written Decision: December 14, 2023

Held: Registrar's motion to dismiss granted

Counsel: Elizabeth McCarthy, appellant, not appearing
Joseph Pruneau, respondent, on his own behalf
Caroline McInnes, Registrar

Decision:

[1] On December 7, 2023, I heard a motion brought by Caroline McInnes, Registrar of the Court, for the dismissal of an appeal brought by Elizabeth McCarthy. In addition to hearing from the Registrar, I heard from the respondent, Joseph Pruneau.

[2] Ms. McCarthy did not file anything in response to the motion. On the morning of the hearing she left a voicemail for the Registrar, indicating she would not be attending. More will be said about the voicemail later in these reasons.

[3] At the conclusion of submissions, I advised Mr. Pruneau and the Registrar that I was satisfied the motion should be granted and the appeal dismissed. I promised written reasons to follow. These are my reasons.

Background

[4] On June 15, 2023, Ms. McCarthy filed a Notice of Appeal in which she sought to challenge an order of Justice Cindy G. Cormier issued May 9, 2023.

[5] On June 26, 2023, the Registrar sent Ms. McCarthy her customary letter in which she set out the required steps to be undertaken to advance the appeal. The letter included the following direction:

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 June 16, 2023. That means that you must have your motion filed and heard no later than October 13, 2023.** 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*.

(Emphasis in original)

[6] Ms. McCarthy did not make a motion for date and directions as required by the *Civil Procedure Rules* and as directed by the Registrar.

[7] The Registrar filed a motion to dismiss the appeal on November 16, 2023. It provided:

TAKE NOTICE that the REGISTRAR of the Nova Scotia Court of Appeal will make a motion to dismiss this appeal pursuant to Civil Procedure Rules 90.43(3) and (4) in Court of Appeal Chambers on **Thursday, December 7, 2023, at 10:00 a.m.**

You have the right to be present or represented by counsel. If you are not present or represented, the judge may proceed without you.

[8] Along with the above notice, the Registrar wrote to Ms. McCarthy advising as follows:

I enclose a notice of motion made by the Registrar to dismiss this appeal, pursuant to ***Civil Procedure Rule 90.43(3)***.

Your presence is required in Court of Appeal Chambers at the time and date provided in the notice of motion. If you do not attend the hearing, the judge may make an order against you, and your appeal will likely be dismissed.

You may file a brief or affidavit in response to the motion no later than two days before the date of the hearing, as set out in ***Civil Procedure Rule 90.37(4)***. These days are calculated as clear, business days. This means that if your hearing is set for a Thursday, your documents must be filed, and delivered to any other parties, no later than the Monday.

If you have any questions about this process, please do not hesitate to contact me.

[9] On November 16, 2023, the Registrar emailed the above documents as well as a copy of the memorandum she would be providing to the chambers judge to Ms. McCarthy at the email address she had provided for service. The documents were also sent to Ms. McCarthy by regular mail at the address she had provided to the Court. The documents were also sent to Mr. Pruneau by regular mail.

[10] Ms. McCarthy did not file a brief or affidavit in response to the Registrar's motion to dismiss.

[11] On the morning of the scheduled motion, Ms. McCarthy left a voice message for the Registrar at 9:15 a.m. in which she stated there was a court hearing that morning but she did not know what it was for, or whether she was required to attend. She advised that she was ill and was not intending to appear. She did not ask for an adjournment, nor did she request to participate by telephone.

[12] Mr. Pruneau attended at the hearing. He advised that he had received the notice of motion, the Registrar's letter and the memorandum by regular mail. He further confirmed that the email used by the Registrar to send the documents to Ms. McCarthy is still being used by her.

The Law

[13] As noted above, the Registrar's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). Rule 90.43 provides:

90.43 Appellant failing to perfect 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.
- (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] Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. When a motion to

dismiss is brought, Rule 90.43(4) provides a chambers judge with the discretion to provide further directions to move a stalled appeal toward conclusion, or grant dismissal.

[15] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge's discretion to dismiss for failure to perfect the appeal. He wrote:

[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.

(Emphasis added)

[16] As noted by Justice Saunders, the above factors do not constitute a finite list. Further, the unique circumstances of each appeal will make certain factors more or less relevant to the exercise of a chambers judge's discretion.

[17] Ultimately, a chambers judge must consider whether it is in the interests of justice for an appeal to proceed to hearing. A defaulting appellant who does not provide evidence justifying the continuation of their appeal will face a strong likelihood of it being dismissed.

Analysis

[18] I am satisfied that Ms. McCarthy received by email, the notice of motion, the Registrar's letter and the memorandum. Despite being aware of the motion to dismiss since November 16, 2023, Ms. McCarthy made no attempt to respond until her late-placed call on the morning of December 7th. It is inconceivable, given the clarity of the documentation sent to her, that Ms. McCarthy did not understand the nature of the hearing, or what may occur should she not meaningfully respond.

[19] Ms. McCarthy has not provided a response to explain her failure to advance the appeal as required by the *Rules*. It was her obligation to do so. Further, given the content of her voicemail, I doubt whether she has the willingness or ability to comply with further directions of the Court should her tardiness be excused.

[20] Of greatest significance in the present instance, however, is the dubious nature of the grounds of appeal. In her Notice of Appeal, Ms. McCarthy sets forth the grounds of appeal as follows:

1. Justice C. Cormier has erred (*sic*) in law
2. Justice C. Cormier has erred (*sic*) in finding of fact
3. Justice C. Cormier has erred (*sic*) in application of law to the facts
4. Procedural error

[21] In my view, the above do not give rise to arguable grounds of appeal. An arguable ground is one that is reasonably specific as to the errors being alleged to have been made by the lower court judge and could result in a panel of the Court granting relief (*Amirault v. Westminster Canada Ltd.* (1993), 125 N.S.R. (2d) 171 at para. 11). In my view, Ms. McCarthy has not set out arguable grounds of appeal.

[22] I have further reviewed the provisions of the order being challenged on appeal and cannot see any obvious concerns which would help explain Ms. McCarthy's vague allegations of error.

[23] There is no prejudice to Ms. McCarthy in being prevented from advancing an appeal with no demonstrable error. However, there is clear prejudice to Mr. Pruneau in being required to respond to one.

Conclusion

[24] For the reasons above, I would grant the Registrar's motion, and dismiss the appeal.

Bourgeois, J.A.