NOVA SCOTIA COURT OF APPEAL
Citation: *Lewis v. Tsavos*, 2013 NSCA 115

Date: 20131015
Docket: CA 413257
Registry: Halifax

Between:

Graham Lewis and Josephine Lewis

Appellants

v.

Louis Tsavos

Respondent

Revised Decision: This decision has been corrected according to the attached erratum of October 16, 2013 and replaces the previously released decision.

Judge:	The Honourable Justice Joel Fichaud
Motion Heard:	October 10, 2013, in Halifax, Nova Scotia, in Chambers
Written Release	October 15, 2013
Held:	Dates for filings extended, and motion to authorize a subpoena dismissed
Counsel:	Appellant, Josephine Lewis, in person
	Jonathan Hooper for the respondent

Reasons:

[1] The Appellants move for an extension to file the Appeal Book and their factum, and for permission to subpoena a witness at the appeal hearing.

[2] Mr. and Mrs. Lewis had a property dispute with Mr. Tsavos and Mr. George Vassilakis, now deceased. The dispute involved a right of way over the Lewis' property at 144-145 Melrose Avenue in Halifax. Mr. Tsavos and Mr. Vassilikis claimed the right of way for the benefit of their neighbouring property, an apartment building at 148 Melrose Avenue. There were physical altercations, threats and a lawsuit.

[3] A settlement conference occurred on June 4, 2012, involving Justice Robertson of the Supreme Court of Nova Scotia, counsel for Mr. Tsavos, and counsel for Mr. and Mrs. Lewis. The conference generated a draft settlement agreement. Mr. and Mrs. Lewis refused to sign it. There was another meeting involving both counsel, Justice Robertson and Mr. and Mrs. Lewis. Mr. and Mrs. Lewis then dismissed their counsel and, since, have been unrepresented.

[4] Next, Mr. Tsavos applied to Justice Robertson for an order to confirm the terms of the settlement agreement of June 4, 2012. On February 1, 2013, the judge issued a decision that confirmed the settlement agreement. Justice Robertson's decision said that the draft agreement accurately reflected the terms of consensus at the conference.

[5] Mr. and Mrs. Lewis appealed to this Court from Justice Robertson's decision. On July 4, 2013, Chief Justice MacDonald in chambers scheduled September 30, 2013 for the filing of the Appeal Book, October 31 for the Appellant's factum, November 29 for the respondent's factum and January 22, 2014 for the hearing.

[6] On October 2, 2013, the Appellants moved for an extension of time for filing the appeal book and their factum and for permission to subpoena a witness to the hearing in the Court of Appeal. The Appellants have tendered two affidavits as fresh evidence. I heard the motion in chambers on October 10. Ms. Lewis spoke for the Appellants. At the hearing, it was apparent that Ms. Lewis needed some direction on the process for submitting fresh evidence to the Court of Appeal.

[7] First, the extension. The Respondent opposed it.

[8] Ms. Lewis said that the transcript is done, and that she only needs a short time to complete the Appeal Book. The Respondent has cited no prejudice from a short extension. The scheduled date for the Appeal Book was September 30, 2013. An extension to October 31 would allow the Respondent to have the same interval for his factum, without affecting the scheduled hearing date of January 22, 2014. I grant the extension. The new filing dates will be October 31, 2013 for the Appeal Book, November 7, 2013 for the Appellants' factum and December 6, 2013 for the Respondent's factum. The hearing date will remain January 22, 2014 at 10 AM.

[9] Next, the fresh evidence motion. The Appellants wish to adduce fresh evidence before the Court of Appeal. They have sought to file two affidavits, sworn on October 7, 2013 and October 8, 2013. These affidavits attach documents and attempt to recite facts that, according to Ms. Lewis, relate to the appeal.

[10] The Appellants may file these two affidavits in support of their fresh evidence motion. These should be filed by October 31, 2013 with the Appeal Book, but in a separate volume entitled "Fresh Evidence".

[11] I will not comment on whether the contents of the tendered affidavits are appropriate for admission as fresh evidence. That is an issue for the panel at the appeal hearing.

[12] From her comments at the chambers hearing on October 10, it appears that Ms. Lewis is of the understanding that the appeal hearing on January 22, 2014 is the Appellants' opportunity to call the evidence that, with hindsight, they now wish had been called in the first place before Justice Robertson.

[13] I say to Ms. Lewis - It isn't that simple.

[14] The Court of Appeal decides whether the lower court judge committed an appealable error. Appealable error means an error of law or a "palpable and overriding error of fact". Generally, such an appealable error must appear from the record that was before that judge. Mr. and Mrs. Lewis should be prepared to address those standards in their factum and at the appeal hearing.

[15] On what *Civil Procedure Rule* 90.47(1) terms "special grounds", the panel of the Court of Appeal may allow fresh evidence to supplement the record. Those special grounds require that the proponent of the fresh evidence satisfy the Court that the fresh evidence meets certain conditions. Those conditions are whether, on balance: (1) Mr. and Mrs. Lewis, with the exercise of due diligence, could have adduced this evidence before Justice Robertson, (2) the fresh evidence is relevant, (3) the fresh evidence is credible, (4) the fresh evidence could reasonably have affected the result, and (5) the fresh evidence is in admissible form. Mr. and Mrs. Lewis should be prepared to address those conditions in their submission, at the appeal hearing, that the fresh evidence be admitted.

[16] Ms. Lewis asks that I authorize the issue of a subpoena to require the attendance of Ms. Helen Demestha to give testimony at the appeal hearing on January 22, 2014. Ms. Lewis says that Ms. Demestha can corroborate the Lewis' evidence, but Ms. Demestha is unwilling to testify and a subpoena is required. At the chambers hearing, I asked Ms. Lewis whether Ms. Demestha testified before Justice Robertson. She did not. I asked – Why not? The answer, basically, was that it did not occur to them to call Ms. Demestha as a witness.

[17] Rule 90.02(1) states that the *Civil Procedure Rules* that are not inconsistent with Rule 90 apply, with necessary modifications, to a proceeding in the Court of Appeal. Rule 50.02(2) says that the Prothonotary may issue a subpoena for the attendance of a witness at a motion "only … if a judge permits". I will apply Rule 50.02(2) consistently with Rule 90. Ms. Lewis seeks such a subpoena for her fresh evidence motion to the panel.

[18] The party moving for a subpoena at a motion has a burden to show a material connection between the proposed evidence and the issues to be determined at the motion: *Bowater Mersey Paper Co. Ltd. v. Nova Scotia (Minister of Finance)*, [1991] N.S.J. No. 114, per Tidman, J.; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 20, per Smith, A.C.J.. For a fresh evidence motion in the Court of Appeal, this means that the proponent of the subpoena must show arguable, or *prima facie* grounds that the proposed testimony would satisfy the conditions for the admission of fresh evidence in the appeal court.

[19] No such arguable or *prima facie* grounds exist here. Ms. Demestha could have been subpoenaed to testify before Justice Robertson with no less facility than

she can be subpoenaed in the Court of Appeal. The outcome in the Supreme Court, from the evidence presented to Justice Robertson, wasn't what the Appellants wished. Now the Appellants hope to recast their evidence in the Court of Appeal, and request a different finding. The first pre-condition for admission of fresh evidence in the Court of Appeal - that the evidence could not have been adduced below, even with "due diligence" - is meant to preclude exactly what the Appellants propose. The Court of Appeal does not re-try the facts with new evidence that a diligent party could have, but did not, adduce in the lower court.

[20] Mr. and Mrs. Lewis have not provided even a superficially arguable basis to satisfy the test for the admission of Ms. Demstha's testimony as fresh evidence. I dismiss their motion for a subpoena.

[21] The costs of this motion are in the cause.

Fichaud, J.A.

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Revised Decision: Replace the name "Lewis Tsavos" with "Louis Tsavos" in style of cause

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