

NOVA SCOTIA COURT OF APPEAL
Citation: *Allen v. Hatfield*, 2013 NSCA 138

Date: 20131129
Docket: CA 407990
Registry: Halifax

Between:

Errol Wayne Allen

Appellant

v.

Nancy Lorraine Hatfield and
Doris Mae Allen

Respondents

Judge: The Honourable Justice Duncan R. Beveridge
Motion Heard: November 28, 2013, in Halifax, Nova Scotia, in Chambers
Held: Registrar's motion to dismiss appeal is granted.
Counsel: Appellant in person
Respondent Nancy Hatfield, not appearing
Ronald Chisholm, for the respondent Doris Mae Allen, not appearing

Decision:

[1] The Registrar moved to dismiss this appeal due to a failure by the appellant to comply with filing deadlines. In other words, that he has failed to perfect his appeal as defined in *Nova Scotia Civil Procedure Rule 90.43*.

[2] There is no need to list all of the procedural history on this appeal. The following is sufficient. The Notice of Appeal was filed October 12, 2012. The appellant's certificate of readiness was dated February 20, 2013 announcing his anticipated ability to file the Appeal Book by April 15, 2013. The appeal was set down for hearing for October 3, 2013. The appeal book was not filed.

[3] On May 22, 2013 new dates were set for the filing of the Appeal Book and facta. A new hearing date was set for November 12, 2013. The appellant failed to file the Appeal Book (due June 20, 2013) or his factum. At first he made an effort to try to get new filing dates. He did not follow through.

[4] Eventually, the Deputy Registrar wrote to the appellant on September 25, 2013, pointing out his failures, and requesting his participation in a telephone conference with the Chambers Judge. The appellant declined. The Chambers Judge ordered the hearing date be released and that it not be re-scheduled until the appellant filed both the Appeal Book and his factum.

[5] On November 1, 2013, the Registrar, acting pursuant to *Rule 90.43(3)* and (4) filed a motion to dismiss this appeal, to be heard November 28, 2013.

[6] I am satisfied that the appellant and the respondents were duly served. *Rule 90.43(4)* requires five days notice. Notice was, in the case of the appellant,

effected on November 8, 2013, considerably more than the minimum of five days. The respondents shortly thereafter.

[7] There was no response by any of the parties. On November 28, 2013, Mr. Allen appeared. He filed no affidavit or submissions. He spoke against the motion. He wanted some further unspecified time to “perfect” the appeal by filing the Appeal Book and his factum.

[8] In support of his request, he produced a photocopy of a handwritten note from his family physician dated July 5, 2013 that contained the simple phrase that Mr. Allen was currently being treated for severe stress and depression. He did not offer any reason for why he had not filed the Appeal Book on the original date of April 15, 2013, nor on the extended date of June 20, 2013. Perhaps he wanted me to infer that it was for medical reasons. He did not say so.

[9] I asked him directly, at least three times, why he had not met the dates. His response was never direct. He said he had expected to have assistance, but it had not materialized. He then said he tried to get counsel, but could not get any lawyers interested in his case. His last explanation was that he had arranged for an investigation to be done by an unnamed person who lives in New Brunswick. The investigation was described as being related to disbursements of money from the property.

[10] I asked him if he had the transcript of the proceedings and the pleadings. He said he did. In short, he appears to have had in his possession the basic things that belong in an Appeal Book.

[11] *Rule 90.43(4)* provides that on hearing the Registrar's motion, a judge may either direct perfection of the appeal, set the appeal down for a hearing or dismiss the appeal. No further guidance is provided by the Rule on how a judge should exercise his or her discretion in selecting the appropriate outcome.

[12] I think it is safe to say that, as a general rule, a judge should be hesitant to deny an appellant his or her statutory right to appeal to this Court. My colleague, Justice Saunders in *Islam v. Sevgur*, 2011 NSCA 114 set out a useful approach where an appellant seeks to avoid a dismissal of his or her appeal due to a failure to “perfect”:

[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.

[13] The appellant has failed to perfect. The burden was on him to satisfy me that the Registrar's motion should be dismissed. He failed to do so. He filed no admissible evidence. Even if I were to accept his oral submissions as a substitute, he completely failed to explain why he has done nothing to file the Appeal Book over the last five months. The appeal has been outstanding for over a year. The grounds of appeal do not appear to have any real substance. In the meantime, this is his third appearance in Chambers. Two separate hearing dates for the appeal were assigned, and then released.

[14] In light of what has transpired, all without legitimate excuse, I see no point in setting new dates. I am not convinced the appellant would comply. The only appropriate outcome is that his appeal stands dismissed. The respondents have not requested costs. I order none.

Beveridge, J.A.