NOVA SCOTIA COURT OF APPEAL
Citation: *Doucette v. Smith*, 2003 NSCA 130

Date: 20031203
Docket: CA 200125
Registry: Halifax

Between:

Ryan Doucette

Appellant

v.

Candace Smith

Respondent

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	November 14, 2003, in Halifax, Nova Scotia
Held:	**Application for leave to appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Oland, JJ.A. concurring.**
Counsel:	Larry Binns, appearing as agent, for the appellant W. Michael Cooke, Q.C., for the respondent

Reasons for judgment:

[1] The appellant, Ryan Doucette, is the defendant in a civil suit brought by Candace Smith, the respondent. She sued the appellant in May of 1999 for assault and battery which allegedly occurred in May of 1998. Her suit has not progressed very quickly to say the least. She applied for summary judgment in late 2002, but her application was dismissed. She did not set the action down for trial.

[2] Under the Civil Procedure Rules, the Prothonotary of the Supreme Court is required to take action when proceedings are not being advanced. Acting under Rule 28.11, the Prothonotary served a notice in February of 2003 that the respondent's action would be dismissed unless the case was moved forward. The respondent did not serve a notice of trial within the 21 days set out in the Prothonotary's notice and the Prothonotary dismissed the action by order dated March 17th, 2003.

[3] The respondent applied almost immediately to set aside this order and Hood J. granted the application. The appellant applies for leave to appeal her order.

[4] As mentioned, the respondent applied very promptly to set aside the dismissal order. Her counsel filed an affidavit indicating that, after receipt of the notice of order dismissing the action issued by the Prothonotary, he had prepared a draft notice of trial without jury, certificate of readiness and record for the trial judge and contacted the respondent to supply funds for proceeding to trial. These funds were provided to counsel on March 12th, but counsel did not file the required documents within the time frame mentioned in the Prothonotary's notice and the Prothonotary issued the dismissal order on March 17th.

[5] The respondent's application to set that order aside was heard by Hood, J. on April 3rd, 2003. Apparently no affidavit material was filed on behalf of the appellant. However, at the hearing, Mr. Binns, who appeared as agent for the appellant, advised the Court that certain documentary evidence, including police statements and medical reports, had been discarded by Mr. Doucette's mother following receipt of the Prothonotary's order dismissing the action. Although strictly speaking there was no evidence of any of this before the learned Chambers judge, she pursued the matter during the hearing and satisfied herself that the lost evidence could be obtained once again either through the discovery process or by other means. The judge concluded:

> ... I appreciate the inconvenience that this [i.e., loss of evidence] has caused and, as I've indicated, if you're successful at the trial this is one of the things that a court would look at in terms of assessing the costs in your favour against Mr. Cook and his client, if you're successful at trial, the fact that you did have to duplicate this effort and that it was more difficult for you to prepare for the trial but, under the circumstances, I am going to grant the Order allowing the matter to proceed to trial. ...

[6] The appellant seeks leave to appeal Hood, J.'s order and asks that the order of the Prothonotary dismissing the action be restored.

[7] The order under appeal was within the discretion of the Chambers judge. This Court will not interfere with her exercise of that discretion unless it is shown that she erred in legal principle or that her order gives rise to a patent injustice: see **Day v. Guarantee Co. of North America** (2003), 212 N.S.R. (2d) 177 (C.A.).

[8] The appellant advances three main arguments, none of which has any merit. First, the appellant says that Hood, J. "failed to extract [from respondent's counsel] ... solid reasons" for failing to file a notice of trial on time. However, the judge had no such obligation, particularly where an apparently reasonable explanation was put forward by the respondent, the delay in filing was extremely short, the application to set aside the order was made very promptly and no affidavit evidence from the appellant was filed to show why the order should not be set aside. Next, the appellant submits that the judge erred by failing to give the loss of evidence sufficient weight. Once again, no sworn evidence about this loss of evidence was placed before the Chambers judge but she nonetheless carefully considered the matter and satisfied herself that no critical evidence was irretrievably lost so as to affect the fairness of a future trial. There was no error in this conclusion on the material in the record. Finally, the appellant submits that the judge failed to take into account the injustice that would result to him if the matter were to proceed to trial. However, the Chambers judge clearly took into account what justice to both parties required and determined that setting aside the Prothonotary's dismissal order was appropriate. She did not err in doing so.

[9] I would dismiss the application for leave to appeal with costs fixed at $500.00 inclusive of disbursements payable by the appellant to the respondent forthwith.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.