

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Hoffman v. Lamb, 2003 NSCA 144

**Date:** 20031217

**Docket:** CA 203383

**Registry:** Halifax

**Between:**

Benjamin Ralph Hoffman

Appellant

v.

Carolyn Jane Lamb

Respondent

**Judges:** Bateman, Freeman and Cromwell, JJ.A.

**Application Heard:** December 11, 2003, in Halifax, Nova Scotia

**Held:** Application dismissed per reasons of Bateman, J.A.;  
Freeman and Cromwell, JJ.A. concurring.

**Counsel:** appellant in person by telephone conference  
Joel Sellers, for the respondent

Reasons for decision:

[1] This is an application by the respondent, Carolyn Lamb, to dismiss an application by Benjamin Hoffman for want of perfection. The application in question is set to be heard by a panel of this Court on January 16, 2004. On that application Dr. Hoffman is asking that we permit a re-hearing of his appeal from a corollary relief judgment. The appeal was originally dismissed on a Registrar's motion in April, 2001.

[2] The divorce hearing in this matter was held on February 28, 29 and March 1, 2000 in the Supreme Court of Nova Scotia. The petitioner was Carolyn Hoffman Lamb, who is the respondent on this application. Dr. Hoffman had not filed an answer to the divorce petition (as is required pursuant to **Civil Procedure Rule 57.12** for any respondent to a divorce petition who wishes to be heard on the petition) and did not appear at the hearing although he had counsel in attendance on his behalf. Additionally, Dr. Hoffman had not complied with the financial disclosure requirements of the **Rules**. In view of the failure to file an answer and Dr. Hoffman's non-appearance, his then counsel was not permitted to participate in the hearing.

[3] According to the record, the parties separated in April of 1998, having married in 1982. The divorce petition was filed August 24, 1998 and served personally upon Dr. Hoffman on October 14, 1998 in New Glasgow, Nova Scotia where Dr. Hoffman continued to work at that time.

[4] At some stage after the commencement of the proceeding, Dr. Hoffman chose to leave this jurisdiction and refused to participate in the divorce proceeding. Scanlan, J. wrote in the decision following the divorce hearing (reported as **Lamb v. Hoffman**, [2000] N.S.J. No. 156 (Q.L.)(N.S.S.C.)):

¶ 1 I start out by noting that this is a very unique case in many ways. The acrimony between the parties, and Mr. Hoffman's approach to this litigation has meant the proceedings have not unfolded in the normal course. Mr. Hoffman has had a limited participation in the proceedings. He has failed, or refused to disclose assets. He has not disclosed to the Court the manner in which he has dealt with assets throughout the entire proceedings. As a result of Mr. Hoffman's behavior much of what the Court has before it is pieced together with bits of evidence. . . .

. . .

¶ 3 Mr. Hoffman was a successful radiologist working in Pictou county earning almost \$400,000.00 per year when the divorce proceedings began. He has chosen to remove himself from the jurisdiction and live on the run, living in any one city no more than seven consecutive days in the last year. As I will discuss later, in that year, he has not directly paid child or spousal maintenance even though the evidence clearly shows that he had several million dollars at his disposal. In addition to not paying the maintenance, he has consented to foreclosure on the matrimonial home in what is clearly an effort to force his wife and daughter into a position of absolute poverty. He has taken the family vehicle which Ms. Lamb used, stranding her and the child of the marriage in a remote rural location.

[5] Justice Scanlan rendered an oral decision on March 2, 2000, subject to providing written reasons. On April 6, 2000 the written judgment was filed wherein the trial judge left open to Dr. Hoffman the option of being heard by that court on several issues within 90 days of the decision and before the final order (the corollary relief judgment) issued.

[6] Dr. Hoffman did not avail himself of the opportunity to be heard by the court and on October 10, 2000, the Supreme Court issued the corollary relief judgment incidental to the divorce action.

[7] On November 7, 2000, Dr. Hoffman, through new counsel, filed a notice of appeal of that judgment. No steps were taken by Dr. Hoffman to advance the appeal. On April 11, 2001, Dr. Hoffman was advised by letter from the Registrar of this Court that on April 27, 2001, she would apply to dismiss the appeal for failure to perfect in accordance with the **Rules** of Court. Dr. Hoffman did not respond.

[8] The Registrar's motion came on for hearing, as scheduled, before the Chief Justice. Dr. Hoffman's counsel appeared on the motion asking permission of the Court to withdraw as counsel because he was unable to get instructions from his client on the appeal. Counsel was released as requested and the appeal was dismissed for want of perfection pursuant to **Civil Procedure Rule 62.17**.

[9] In the period between the granting of the corollary relief judgment and the current application, Dr. Hoffman initiated several appeals in this Court from enforcement orders granted by the Supreme Court (see, for example, **Lamb v.**

**Hoffman**, [2001] N.S.J. No. 393 (Q.L.)(N.S.C.A.); **Lamb v. Hoffman**, [2001] N.S.J. No. 395 (Q.L.)(N.S.C.A.); **Lamb v. Hoffman**, [2001] N.S.J. No. 39 (Q.L.)(N.S.C.A.)). On each such occasion Dr. Hoffman was represented by counsel. The record on those appeals reveals that Dr. Hoffman has, through his various counsel, applied not only in this Court, but also to the Supreme Court for relief. We said, for example, in our judgment on February 2, 2001 ([2001] N.S.J. No. 39, *supra*):

¶ 4 It is our unanimous view that for the following reasons these appeals cannot proceed today.

¶ 5 The Supreme Court Order dealing with the corporate shares was allegedly made *ex parte*. **Civil Procedure Rule** 37.13 provides that "the court may set aside or vary an order made *ex parte* on such terms as it thinks just." As is appropriate, the appellant has applied in the Supreme Court to vary that Order. That application is scheduled to be heard on March 21, 2001. Until such time as a decision on that application is rendered, it is our view that the appeal of the March 10th Order is premature. It may ultimately be moot. Accordingly, the appeal in C.A. No. 162593 is stayed pending the determination of the application to vary or set aside the Order. In the event that either party appeals from the Order flowing from that proceeding, and the appellant wishes to continue with this appeal, the two appeals shall be heard at the same time, subject to any further direction from the panel seized with that appeal. In such event the respondent's motion to quash, should she wish to pursue it, shall be heard at the same time. The appellant's application to adduce fresh evidence will be heard at that time if pursued.

¶ 6 The appellant applied in the Supreme Court, pursuant to **Civil Procedure Rules** 37.13 and 55.08, to vary or set aside the contempt Order. The judge declined to grant that relief and by decision dated December 6, 2000, confirmed the contempt Order of March 10th, 2000. On December 15, 2000 the appellant filed a notice of appeal from that further disposition. He has not yet applied to set a hearing date for the appeal. In that notice of appeal (C.A. No. 167969) are included the same grounds of appeal in relation to the March 10th, 2000 Contempt Order as are raised on this appeal. Accordingly, it is appropriate that the within appeal of the March 10th Order, being C.A. No. 162592, be heard contemporaneously with the appeal of the confirming Order. This appeal is, therefore, stayed until the hearing of the appeal from the Order confirming the contempt and subject to any further direction by the panel seized with that appeal. The respondent's motion to quash, should she wish to pursue it, shall be heard at the same time.

(Emphasis added)

[10] Dr. Hoffman has not, however, applied to vary the spousal or child support provisions of the corollary relief judgment, although he is entitled to do so pursuant to **Civil Procedure Rule 57.30**.

[11] This current matter commenced when, on March 12, 2003, Dr. Hoffman, apparently acting on his own behalf, filed what purported to be another notice of appeal of the corollary relief judgment. It was filed with the Prothonotary in Pictou and forwarded to this Court. In that "Notice of Appeal" Dr. Hoffman stated that "he takes full responsibility for the withdrawal of the" first appeal.

[12] On June 30, 2003, Dr. Hoffman filed a notice of application for an order extending the time for filing the notice of appeal, stating that the application would be brought before the Court on July 3, 2003. Neither Dr. Hoffman nor counsel on his behalf pursued the extension application on that date.

[13] Yet another counsel on behalf of Dr. Hoffman brought the application to extend the time for filing a notice of appeal, before me, in Chambers, on September 18, 2003. At that time counsel requested that the application to extend time be set before a panel of the Court, rather than heard by a single judge sitting in Chambers.

[14] On September 26, 2003, I ordered that the application be heard by a panel of the Court (decision reported as **Lamb v. Hoffman**, [2003] N.S.J. No. 345 (Q.L.)) and be entertained as an application for a re-hearing of the appeal, in view of the prior dismissal of the appeal for non-perfection. At issue before the panel would be (i) whether a re-hearing could be granted in the circumstances (a prior appeal having been dismissed on the Registrar's motion); and, if so, (ii) whether the case should be reheard.

[15] I held a subsequent telephone conference with counsel to provide directions as to the materials to be filed on the application. Counsel for Dr. Hoffman advised at that time that it was crucial to the application that he file supporting affidavit evidence from Dr. Hoffman. The application for a re-hearing was scheduled to be heard on January 16, 2004 and a panel was assigned.

[16] On October 14, 2003 the panel, by letter from the Registrar of the Court, provided detailed directions as to what material was to be filed, permitting the

requested receipt of affidavit evidence and designating the dates for those filings as follows:

The panel assigned to this application has asked that I write with directions as to the filing requirements for the hearing scheduled for January 16, 2004.

The applicant, Dr. Hoffman's, material shall be filed not later than November 14, 2003. If it is the applicant's intention to file affidavit material in support of the application, the affiant(s) must be available, in Nova Scotia, for cross-examination by way of Discovery the week of November 24, 2003, should the respondent wish to conduct cross-examination.

The applicant's brief on the application shall address, in addition to the jurisdictional issues and aspects of the law deemed by counsel to be relevant to this application to re-open this matter for appeal, the question of whether an appeal lies to this court from a decision of the trial judge in these circumstances - relevant circumstances include that this was an undefended divorce proceeding, with no Answer filed (**Civil Procedure Rule 57.12(1)**); the trial judge left open to Dr. Hoffman the opportunity to be heard by that court on several issues within 90 days of the decision and before the order issued; and taking into account that a procedure for variation of the support provisions is available in the Supreme Court.

The respondent shall file a brief and any affidavit material on or before December 14, 2003. In the event affidavit material is filed, the affiant(s) shall be available, in Nova Scotia, for cross-examination by way of Discovery the week of January 5, 2003, if cross-examination is requested by the applicant.

In addition, the applicant shall file, by November 14, 2003, the intended Notice of Appeal and a brief of the argument on the appeal. It is not necessary for the respondent to file a response to the brief of the argument on appeal until directed by the Court to do so.

[17] On October 23, 2003, counsel for Dr. Hoffman requested another telephone conference. On November 3, 2003, the two members of the panel who were then available participated in a further telephone conference and granted Dr. Hoffman's counsel's request to extend the time for filing the required materials. The new filing date for Dr. Hoffman's material was set as November 21, 2003, all other dates to remain the same.

[18] On November 12, 2003 this Court received a communication from counsel for Dr. Hoffman advising that “[u]nhappy differences have arisen between myself and Dr. Hoffman. After carefully reviewing my obligations to the court and to my client, I have concluded that I must withdraw as his counsel on his application to the court for a re-hearing of his appeal”.

[19] By letter dated November 19, 2003 the Registrar advised that Nova Scotia counsel for Dr. Hoffman would remain solicitor of record for the purpose of serving documents until there had been compliance with **Civil Procedure Rule** 44.06 and confirming that the application and filing dates remained as scheduled.

[20] No documents in compliance with the Court’s direction have been filed, nor has Dr. Hoffman appeared in the jurisdiction for discovery.

[21] On December 2, 2003, this Court, on its own motion, pursuant to **Civil Procedure Rules** 62.33, 62.30 and 37.12, provided notice to the parties that we would convene on Thursday, December 11, 2003 at 11:00 a.m. at which time Dr. Hoffman could show cause why his application to the panel should not be dismissed for want of perfection. On that same date Ms. Lamb, through her counsel, also gave notice of an application for dismissal, which application was set to be heard at the same time as the Court’s motion to dismiss.

[22] The only document which has been filed by Dr. Hoffman in this application is a letter faxed to the Court on December 10, 2003, purporting to be from Dr. Hoffman’s “American counsel”, Leonard G. Korenberg. In that letter the writer asks that we relieve Dr. Hoffman from the requirement that he attend in Nova Scotia for discovery on any affidavit which he may file. The letter is dated November 25, 2003 but unsigned, not on letterhead and does not contain the sender’s return address. The letter does not speak to Dr. Hoffman’s failure to file any of the documentation directed by this Court on October 14, 2003.

[23] At Dr. Hoffman’s request, advanced to the Court just this week, the panel permitted him to participate in this application by telephone from an undisclosed location. His Florida counsel, Nanci Landy, spoke, also by telephone, on his behalf.

[24] A theme which pervades Dr. Hoffman's previous written submissions to the Court, as well as the oral submission of his solicitor, Ms. Landy, on this

application, is the alleged lack of due process he has received in Nova Scotia. That allegation is completely without merit. The divorce proceeding was commenced in Nova Scotia where the parties had made their home for many years and where they resided at the time of separation. This was the appropriate jurisdiction for the action. A review of the chronology above reveals that Dr. Hoffman has been repeatedly accommodated by the courts of this Province. He has been represented by counsel but has chosen not to take advantage of opportunities to rectify what he says is a flawed judgment. He complains of *ex parte* proceedings, however, neglects to acknowledge that such were made necessary by his absence from the jurisdiction and refusal to return. The record reveals that on many occasions his whereabouts were unknown to Ms. Lamb and to the court.

[25] The burden is upon Dr. Hoffman to persuade the Court that his application for a re-hearing should not be summarily dismissed. Left unaddressed by him is any explanation as to why he has not filed the documentation directed by the Court in our October 14, 2003 letter. He has been extended the unprecedented opportunity of demonstrating to this Court why the prior dismissal of his appeal should not stand. He has failed to file the necessary, or any, material in support of that application. In short, we have nothing of assistance before us.

[26] From the outset of the divorce proceeding Dr. Hoffman has repeatedly been afforded opportunities to be heard in the courts of Nova Scotia which he has willfully ignored. He declined to file an answer to the petition for divorce; failed to provide the required financial disclosure; elected not to appear at the divorce hearing; chose not to use the opportunity offered by the trial judge to be heard within 90 days of the written judgment; although given notice that his appeal would be dismissed for want of perfection, failed to appear or instruct counsel thus permitting dismissal of the appeal; over three years later, purported to file another appeal, notwithstanding the dismissal of the first appeal; and although granted the unique opportunity to be heard on the issue of re-opening the appeal, chose to ignore the filing directions of this Court.

[27] I conclude that Dr. Hoffman has abused the process of the Court. He has not demonstrated cause why his application should not be dismissed for want of perfection. His protestation that he fears civil or contempt proceedings should he return to the jurisdiction does not provide an explanation as to why the material directed has not been filed. We are left only to conclude that his intended application is without foundation.



[28] Accordingly, I would dismiss the application for re-hearing with costs payable to the respondent in the amount of \$5000 inclusive of disbursements. For further clarify, the appeal from the corollary relief judgment of October 10, 2000, remains dismissed as ordered by this Court on April 27, 2001.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.