NOVA SCOTIA COURT OF APPEAL
Citation: ***Smith v. Heron***, 2003 NSCA 88

Date: 20030909
Docket: CA 189018
Registry: Halifax

Between:

Donald MacGillivary and Brian Heron

Appellants/Respondents

v.

Charles A. Smith

Respondent/Applicant

Judge:	Hamilton, J.A.
Application Heard:	June 30th, 2003, at Halifax, Nova Scotia, in Chambers
Held:	**Application of the respondent/applicant for security for costs of appeal granted.**
Counsel:	Brian Heron, for the appellants/respondents John E. MacDonell & Gavin Giles, for the respondent/applicant

Decision:

[1] The respondent, Charles A. Smith, applied on March 21, 2003, for an order that security for the costs of this appeal be given by the appellants. The application was heard on June 30, 2003. Brian Heron, one of the appellants, representing himself and the other appellant, Donald MacGillivary, filed their final post-hearing submissions on August 19, 2003. Mr. MacGillivary filed a notice of discontinuance on August 21, 2003. This is my decision on Mr. Smith's application for security for costs.

[2] For the most part the delay in completing this application resulted from Mr. Heron's living in California and from his having other priorities, including studying for and writing, or intending to write, the California Bar exams on two occasions between March, 2003 and the present time and fulfilling his culturally-oriented endeavours. The fact that Mr. Heron's address for service in California is not his home, and that his fax machine at his home must be manually turned on in order to receive a fax, resulted in delay because of numerous conflicts between the parties concerning delivery of materials. It took several teleconferences and significant documentation and correspondence to resolve these conflicts. Also Mr. Heron wished to cross-examine on the affidavits filed in support of Mr. Smith's application. With cross-examination, I required a personal appearance in court in Nova Scotia. This caused delay because it took time for Mr. Heron to arrange to come to Nova Scotia.

[3] Mr. Heron and Mr. Smith have been involved in almost continuous litigation since 1988, arising from a single rental agreement with an option to purchase that they entered into in 1987 with respect to a house in Venice, California. There have been at least 14 concluded court proceedings in California arising from this one agreement, all but one of which favored Mr. Smith. In addition to the American court proceedings there have been at least four completed court proceedings in Canada, three in Nova Scotia courts and one in the Supreme Court of Canada, involving at least 26 court appearances. As a result of this enormous amount of litigation, many issues have already been decided and courts have ordered that costs be paid, for the most part by Mr. Heron to Mr. Smith.

[4] By orders dated August 16, 2000, Justice Walter R. E. Goodfellow of the Supreme Court of Nova Scotia granted Mr. Smith summary judgments in his

action on judgments for court costs obtained against Mr. Heron in California. Mr. Heron's appeal to this court was dismissed June 20, 2001 **(Smith v. Heron**, [2001] N.S.J. No. 233). His application to the Supreme Court of Canada for leave to appeal was denied (**Smith v. Heron,** [2001] S.C.C.A. No. 510). The issues adjudicated in those court proceedings are finished and are not relevant to the application before me.

[5] The application before me arises from the appellant's present appeal of the order of Justice Gerald R. P. Moir of the Supreme Court of Nova Scotia, dated September 18, 2002 and his supplementary decision dated September 25, 2002. Justice Moir ordered that the amended defence of Mr. Heron and Mr. MacGillivary be struck and that judgment be entered in favour of Mr. Smith against them jointly and severally. He declared that the August 8, 2000 deed whereby Mr. Heron conveyed certain Cape Breton real property to Mr. MacGillivary was void and ordered that the conveyance be set aside.

[6] As noted by Mr. Heron in his post-hearing brief, Mr. Smith submitted a very substantial amount of evidence in support of his application. The affidavits are five inches thick. While they are substantial, they set out facts and are logically constructed. Much of the information contained in the affidavits, though not all, was relevant to the security for costs issue before me.

[7] I accept the documentary evidence set out in the affidavits filed on behalf of Mr. Smith. This evidence indicates, among other things, that the costs that prior courts have ordered Mr. Heron to pay to Mr. Smith have never been paid voluntarily. For instance, the costs and disbursements Mr. Heron was ordered to pay as a result of his earlier appeal to this court, totaling $3,182.80, have not been paid, despite the fact they were ordered to be paid almost two years ago. Also, the court proceedings in Nova Scotia originated from unpaid costs that California courts ordered Mr. Heron to pay to Mr. Smith. Those costs exceed $100,000 CDN without interest. In addition, Mr. Heron, together with Mr. MacGillivary in some cases, have been ordered by the Nova Scotia Supreme Court to pay costs in excess of $12,000 CDN, which have not been paid.

[8] Mr. Heron provided a number of affidavits also. I found them to be rambling and unfocused for the most part. They did not deal with facts alone, containing expressions of Mr. Heron's personal opinions of the law, particularly of

California law. They dealt with matters Mr. Heron would like me to consider, that are irrelevant to the application before me.

[9] Mr. Smith argued that the appellants evidence was not credible or specific. He argued that many of the matters raised by the appellants were irrelevant to this application and that Mr. Heron was attempting to re-litigate matters that had already been argued and determined in previous court proceedings. He argued that raising them again was an abuse of process. He argued that one reason to grant security for costs is the fact that Mr. Heron does not reside in this jurisdiction. However, the focus of his argument was on the substantial court related costs Mr. Heron, and to a lesser extent Mr. MacGillivary, have been ordered to pay and have not paid. Mr. Smith's counsel pointed out that the whole basis of the numerous court proceedings in Canada arose from unpaid costs California courts ordered be paid to Mr. Smith by Mr. Heron, that have not been paid. Mr. Smith's counsel also pointed out the other outstanding court costs documented in the affidavits that have not been paid. He also pointed out that in order to be paid the $1,500 CDN costs awarded to Mr. Smith by Justice Hood in July, 2002, Mr. Smith had to execute on the bank account of Mr. MacGillivary.

[10] Mr. Heron's submissions, as was his evidence, were also rambling and unfocussed. His argument included assertions of fact which were not supported by evidence. He either is not able to or does not wish to deal solely with the issues relevant to this application. He wants me to consider and determine what he characterizes as the "jurisdiction issue." His position is that all prior Canadian decisions between himself and Mr. Smith are null and void, and should be declared so by me. This would include the decision of Justice Goodfellow which this Court previously confirmed on appeal, and on which the Supreme Court of Canada refused to grant Mr. Heron leave to appeal. It would also include the present appeal. His basis for this position seems to be the same as it was when he argued it before Justice Goodfellow, that the orders for costs in California were not final and are subject to change. As I indicated to Mr. Heron long before the hearing of this application, that issue is not before me on this application.

[11] On the security for costs issue, Mr. Heron argues he is owed more in costs by Mr. Smith than Mr. Heron owes Mr. Smith. He has not satisfied me that this is the case. Broad general statements are not sufficient. Mr. Heron has not presented any documentary evidence quantifying any costs awarded to him or satisfied me that any orders for costs in his favour are effective today, considering the whole of

the concluded litigation. On the evidence before me I am not able to judge what if any amount is owed to Mr. Heron by Mr. Smith for costs.

[12] Mr. Heron argued that the parties in this appeal are different from the parties in most of the other court proceedings where costs have not been paid so that security for costs should not be awarded. I am not persuaded by that argument. All of the court proceedings arise from the same agreement respecting the house in California mentioned previously regardless of any difference in the parties. Also, now that Mr. MacGillivary has discontinued his appeal, the parties are the same.

[13] Mr. Heron also argued that the real property Mr. Smith is trying to execute on is security in a sense for any costs of this appeal. Again I am not persuaded by this argument. This real property has an assessed value of $40,300 CDN. Over $110,000 CDN is presently owed to Mr. Smith for costs, so there is a good chance this real property will not be sufficient to cover all debts already owed. In addition, the successful party to an appeal should not be forced to execute in order to collect costs and disbursements awarded to him.

[14] Civil Procedure Rule 62.13 governs security for costs and provides as follows:

> (1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.
>
> (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

[15] This Rule was considered in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (NSCA) at ¶ 3:

> ...In my view, however, the discretion given a judge under the present Rule 62.13 to order security “as he deems just” should not be exercised in favor of an applicant unless special circumstances exist for so doing.

[16] In that case the court did order security for costs where it found the appellant had acted in an insolvent manner by not paying prior court awarded costs, after an execution order had been taken out.

[17] I am satisfied on the evidence before me that there are special circumstances here that require me to order that security for costs be posted before this appeal can continue. Mr. Heron certainly, and even Mr. MacGillivary, have acted in an "insolvent manner" toward paying costs that courts have ordered them to pay to Mr. Smith. I am satisfied they have never paid court awarded costs voluntarily with respect to this matter and there have been a significant number of such awards against Mr. Heron especially. This, along with the manner in which the appeal has proceeded to date, satisfies me it is appropriate that security for costs be ordered.

[18] As stated at ¶ 15 of **Crouse v. Crouse**, 2002 NSCA 15:

> Security for costs in this Court are generally ordered in an amount estimated to be somewhat less than the costs award anticipated on the appeal. Costs on appeal from a disposition at trial are often fixed at 40% of the trial costs awarded if this Court is satisfied that such an award would not be inappropriate.

[19] Here the costs awarded by Justice Moir were $7,435.00, plus disbursements. 40% of this amount would be approximately $3,000. Mr. Heron's continuing failure to focus on the relevant issues and continuing attempts to re-litigate matters already adjudicated, if it continues, has the potential to cause costs awarded to be significantly higher than normal. Given this and the long history of unpaid costs, I am satisfied $3,000 would be too small an amount to order as security for costs. I am satisfied the security for costs should be double that amount, $6,000, rather than the $20,000 requested by Mr. Smith. Accordingly I order that the cash amount of $6,000 be posted as security for costs. The security shall be posted not later than 4:00 p.m. on September 30, 2003.

[20] Given that Mr. MacGillivary filed a notice of discontinuance of this appeal with respect to himself, it will fall to the remaining appellant, Mr. Heron, to pay this amount in order to continue with the appeal.

[21] In the event Mr. Heron does not post security as ordered, Mr. Smith may apply to a judge of this court, without notice, to dismiss the appeal without costs. If Mr. Smith wishes to claim costs on an application to dismiss, he shall give notice

of the application to Mr. MacGillivary as required by the Civil Procedure Rules. Notice to Mr. Heron will not be required.

[22] Mr. Smith seeks costs and disbursements in connection with this application.

[23] An affidavit has been filed indicating Mr. Smith has incurred substantial disbursements because of his need to hire another lawyer, Gavin Giles, to represent him while his usual lawyer was cross-examined on the affidavits he filed in connection with this application. Mr. Smith argues, and I agree, that the cross-examination on the affidavits filed in support of Mr. Smith's application was unnecessary and irrelevant to the application and that consequently he should be reimbursed by Mr. Heron for this cost. He argues that the amount of costs set should reflect the wasted time spent on cross-examination. The application took one full day. Mr. Smith also points out that I warned Mr. Heron months in advance of the hearing that there would be costs to him for unnecessary cross-examination.

[24] Accordingly, I order the appellants jointly and severally to pay to Mr. Smith forthwith and in any event of the appeal, costs in connection with this application, in the amount of $3,000, plus disbursements which will include the fees and disbursements charged by Mr. Giles.

Hamilton, J.A.