

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Dataville Farms Ltd. v. Colchester County (Municipality)*,  
2014 NSCA 95

**Date:** 20141017

**Docket:** CA 423138

**Registry:** Halifax

**Between:**

Dataville Farms Ltd.

Appellant

v.

Municipality of the County of Colchester and  
Jonathan Baha'i (aka Jonathan Tranter dba Server Balance Data Solutions)

Respondents

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Motion Heard:** October 9, 2014, in Halifax, Nova Scotia, in Chambers

**Written Decision:** October 17, 2014

**Held:** Motions for dismissal granted

**Counsel:** Anton E. Self, agent for the appellant

Jeffrey R. Hunt, for the respondent Municipality of the  
County of Colchester

Charles A. Thompson, for the respondent Jonathan Baha'i

## **Decision:**

### **Introduction**

[1] On October 9, 2014, I heard two motions brought by the respondents, each seeking dismissal of the appeal due to the appellant's failure to post security for costs as earlier ordered by this Court. After hearing evidence and considering the submissions of the parties, I advised that the motions were granted with reasons to follow. These are my reasons.

[2] Given the above outcome, it was not necessary to address an outstanding Registrar's motion to dismiss the appeal for failure to perfect, nor a motion brought by the appellant seeking case management and other remedies.

### **Background**

[3] It is helpful in order to place the analysis to follow in context, to briefly review the decision under appeal. The factual background was reviewed by the trial judge in his decision (2013 NSSC 355):

[1] In 2009, the Colchester Regional Development Agency sold two properties in Debert to Dataville Farms Ltd. ("Dataville"). The president of Dataville is Mr. Anton Self. The properties which were purchased by Dataville included underground structures built by the Department of National Defence, which have been known colloquially as the "Diefenbunker".

[2] By 2012, Dataville had fallen behind in payment of the municipal taxes owing on the properties to the Municipality of the County of Colchester ("Colchester"). As a result of the tax arrears, Colchester initiated the process to sell the properties by public auction in accordance with the tax provisions of the *Municipal Government Act*. The tax sale was held on November 21, 2012.

[3] The purchaser of the properties at the tax sale was Mr. Jonathan Baha'i. His bid was \$35,450.00. Following the sale, Mr. Baha'i took possession of the properties and incurred various expenses in relation to operation and maintenance of the bunker. During the time of his possession, he allowed the properties to be used for purposes of a movie and a paint ball event, both of which generated some revenue.

[4] In early May, 2013, counsel for Dataville notified counsel for Colchester that the company wished to redeem the properties. Counsel for Colchester advised that the six month redemption period expired on May 21, 2013.

[5] Between May 3 and 21, 2013, the lawyers for Dataville and Colchester exchanged e-mails and had discussions on a number of topics, including the amount required to be paid for redemption, the form of payment, as well as the place and deadline for payment.

[6] The Municipal Tax Office for Colchester closed at 4:30 p.m. on May 21. Mr. Self arrived in Truro early that evening with a bank draft payable to Colchester in the amount of \$40,058.45, which was the agreed redemption amount. He spent that evening attempting to find the home address for the Deputy Treasurer of Colchester in order to deliver the bank draft to her. He was not successful.

[7] On May 22, 2013, Mr. Self went to Colchester's offices during business hours and attempted to hand the bank draft to the Municipal Treasurer, who refused to accept it.

[4] Two separate proceedings were commenced and eventually heard simultaneously by the Supreme Court. The appellant brought a Notice of Application seeking an order setting the appropriate redemption value and seeking a certificate of discharge from the respondent Colchester upon payment of those funds. The respondent Baha'i filed a Notice for Judicial Review seeking an order compelling the respondent Colchester to deliver a tax deed in accordance with s. 155 of the *Municipal Government Act*, S.N.S. 1998, c. 18, as amended.

[5] In his written decision, Justice Michael Wood undertook a review of the relevant provisions of the *Municipal Government Act*, and found based on the evidence before him, that the appellant failed to redeem the subject property within the meaning of the legislation. As such, the respondent Baha'i as purchaser at the tax sale, was entitled to receive a deed to the property.

### **Procedural History**

[6] A review of the procedural history of this matter is also of assistance. On January 8, 2014 the appellant, through its legal counsel filed a Notice of Appeal, which set out ten detailed grounds of appeal. On January 9, 2014, the Registrar wrote to the appellant's counsel confirming receipt of the Notice of Appeal and advising of the deadline to bring a Notice of Motion for hearing and directions – May 5, 2014.

[7] On May 16, 2014, the Registrar filed a Notice of Motion seeking dismissal of the appeal given the appellant's failure to file the motion for hearing and directions within the required timeframe. Originally scheduled for June 5, 2014, the Registrar's motion was adjourned at the request of appellant's counsel to June 26, 2014.

[8] On June 19, 2014, Anton E. Self as the "Agent for Appellant" filed a Certificate of Readiness in which he states a transcript of the proceedings under appeal would be available by August 1, 2014 and that he anticipated filing an appeal book no later than October 17, 2014.

[9] On June 26, 2014, the parties appeared in chambers in relation to the Registrar's motion to dismiss. At that time, Mr. Self appeared as agent for the appellant. The Chambers judge adjourned the motion to dismiss to August 21, 2014 and further directed that the appellant have its appeal book filed by August 15, 2014.

[10] On July 28, 2014, the respondent Baha'i filed a Notice of Motion seeking an order that the appellant give security for costs of the appeal. On July 29, 2014, the respondent Colchester filed a similar motion. Both motions set a return date in Chambers of August 21, 2014.

[11] On August 21, 2014, the three outstanding motions – the Registrar's motion to dismiss and the two motions for security for costs returned to Chambers. Based on both the reported decision (2014 NSCA 81) as well as the material filed on behalf of the appellant, it is clear that the motion for security for costs was strenuously opposed by the appellant. After hearing from the parties, Scanlan, J.A. ordered that the appellant give security for costs on or before September 4, 2014 failing which the respondents could bring a motion for dismissal of the appeal. Security of \$4,000 was ordered in relation to the respondent Baha'i, and \$3,200 in relation to the respondent Colchester. In addition to the above, and in light of the failure of the appellant to have filed its appeal book by the previously set deadline, the Court directed the appeal book be filed on or before October 2, 2014.

[12] On September 12, 2014, the respondent Baha'i filed a Notice of Motion seeking dismissal of the appeal due to the appellant's failure to give security for costs as ordered by Scanlan, J.A. On September 15, 2014 the respondent Colchester filed a similar motion, both of which had a return date of September 18, 2014.

[13] On September 15, 2014, the appellant filed a Notice of Motion pursuant to Civil Procedure Rule 90.38 to the Chief Justice of Nova Scotia seeking leave to review the order of Scanlan, J.A. compelling security for costs. By order issued September 16, 2014, the appellant's motion for leave was dismissed.

[14] On September 18, 2014, the motions for dismissal were adjourned at the request of the appellant to October 9, 2014.

[15] On September 24, 2014, the appellant filed a Notice of Motion seeking various forms of relief, including a dismissal of the respondent's motions, case management, an extension of time to file the appeal book and other remedies, returnable on October 9, 2014.

### **Analysis**

[16] The respondents have brought their respective motions for dismissal pursuant to Rule 90.42. It provides:

#### **Security for costs**

**90.42** (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

(2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[17] The respondents assert that the appellant has failed to comply with this Court's order to give security for costs and as such, the appeal should be dismissed. They acknowledge that dismissal is not automatic in the face of such a failure, but submit that a heavy onus should lie upon a defaulting appellant to convince the Court that the appeal should be permitted to continue. They submit that the Court should not gut the purpose and effectiveness of an order for security for costs, by too readily permitting an appellant to avoid giving the ordered security.

[18] The appellant through its agent submits it is impecunious and unable to pay the security ordered. Mr. Self argues the dire financial circumstances in which both he and the appellant now experience, is due to the wrongful conduct of the respondent Baha'i, and to a lesser extent the respondent Colchester. Mr. Self submits that the respondent Baha'i in particular is disentitled to security, given the

low value for which he purchased the property at tax sale and by virtue of his wrongful conversion of assets belonging to him and/or the appellant. Mr. Self submits that other than posting security for costs, the appellant is willing and able to comply with the requirements for advancing the appeal, and wants to have the matter dealt with on the merits.

[19] At this juncture it may be of assistance to make some general observations. Firstly, the remedy sought by the respondents - dismissal of the appeal due to failure to provide security for costs, is, in accordance with Rule 90.42(2), discretionary. It should not be presumed that an order for dismissal will automatically flow from an appellant's failure to abide by an order to give security.

[20] The above being said, it is also important to note that for an order for security to have issued, the Court was satisfied based on evidence before it, that there were "special circumstances" justifying same (**Lienaux v. Campbell**, 2011 NSCA 94; **Sable Mary Seismic Inc. v. Geophysical Services Inc.**, 2011 NSCA 40). In the present case, Justice Scanlan based on affidavit evidence before him, found there were special circumstances justifying an order compelling the appellant to provide security for costs, and exercised his discretion accordingly. It is not the function of the Court faced with a subsequent motion to dismiss, to review and re-consider the original decision for security. That decision has been made, I cannot "unmake" it.

[21] So what does the Court consider when faced with a motion for dismissal pursuant to Rule 90.42(2)? Although there are a number of authorities which consider security for costs, there is little authority which address what considerations the Court should employ when a motion for dismissal arises following such a direction.

[22] The respondents rely upon **MacDonald v. Jollymore**, 2007 NSCA 46, where Justice Cromwell (as he then was) dismissed an appeal due to an appellant's failure to post security for costs. The rationale for doing so is explained as follows:

[2] I acknowledge that this is an extraordinary order. In my view, however, it is amply justified by the persistent failure of the appellant to recognize his obligations to the Court. He has failed to pay the judgment under appeal, neglected his appeal until prodded by a Registrar's motion to dismiss it and failed to provide the security ordered by Saunders, J.A. on March 1st, 2007. There has been offered by Mr. MacDonald no evidence by way of justification, excuse or even apology for this course of conduct. His failure to pay the security for costs,

viewed in the full context of his conduct on the appeal, in my view, constitutes an abuse of process of the Court which ought to disentitle him from continuing with the merits of his appeal

[23] The appellant relies upon four decisions in support of his contention that dismissal of the appeal would be inappropriate. With respect, none are of assistance. Three clearly relate to the appropriateness of security for costs in the first instance (**Blois v. Blois**, 2013 NSCA 39; **S.U. v. Family and Children's Services of Yarmouth County**, 2005 NSCA 76; and **Disabled Consumer Society of Colchester v. Burris**, 2009 NSCA 21), and the fourth appears to be a divorce proceeding, with no applicability at all to the matter before the Court. Mr. Self argues that to terminate an appeal is, as stated by Justice Cromwell, "extraordinary" and should be a measure of last resort.

[24] I agree that dismissing an appeal is "extraordinary" given the finality of that decision. I do not, however, interpret **MacDonald, supra**, as standing for the proposition that the Court should shy away from dismissing an appeal for failure to post security for costs in appropriate cases.

[25] Once it is established by evidence that an appellant has failed to abide by an order requiring the posting of security for costs, in my view, the onus then shifts to the appellant to provide compelling reasons why dismissal is not in the interests of justice. Support for this proposition is found in the Court's well established approach to motions to dismiss arising from an appellant's failure to perfect. I have found instructive the comments of Saunders, J.A. in **Islam v. Sevgur**, 2011 NSCA 114, where he observes:

[35] The **Rule** is silent as to the factors which may guide a judge in the judicial exercise of his or her discretion when deciding whether to grant or deny the Registrar's motion. See generally **CIBC Mortgage Corp. v. Ofume**, 2004 NSCA 134 (in Chambers); **Mason v. Mason**, 2007 NSCA 43 (in Chambers); **MacDonald v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2010 NSCA 23 (in Chambers); and **S.S. v. D.S.**, 2011 NSCA 14 (in Chambers).

[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.

[26] In the present case, Rule 90.42(2) is also silent with respect to the factors which should guide the exercise of the Court's discretion. The factors as outlined in **Islam, supra** are also applicable to a motion under this Rule, although I would suggest one modification as it relates to a consideration of the grounds of appeal.

[27] There is in my view, an important distinction between a motion to dismiss for failure to perfect, and the present matter. In the former instance, an appellant has failed to follow procedural time lines as set out in the *Civil Procedure Rules*. However, when an appellant faces the prospect of dismissal due to a failure to post security for costs, the peril arises due to the failure to follow an order of the Court – an order obtained after the consideration of evidence, and a finding of special circumstances justifying that directive. Although the importance of abiding by procedural timelines should not be minimized, the failure to follow an order of the Court should be considered in a more serious light. An appellant should have not merely arguable grounds of appeal, but in my view a strong case for appellate intervention.

[28] To fend off dismissal, an appellant who has failed to post security for costs, must come prepared to satisfy the Court with properly filed and admissible evidence, that it would not be in the interests of justice to grant the motion. An appellant who simply re-argues that security is unwarranted, will likely be unsuccessful.

[29] On behalf of the appellant, Mr. Self filed several affidavits with the Court, the latest being affirmed September 24, 2014. He states that the appellant is impecunious and describes the attempts he has made to canvas with various “capital partners” their willingness to post security for costs. He states he is personally impecunious. Mr. Self argues that he and the appellant find themselves in dire financial straits due to the conduct of the respondent Baha’i, and that the Court should decline to dismiss the appeal on this basis. Considerable effort was put towards adducing evidence that the respondent Baha’i has wrongfully withheld assets, and undertaken other wrongful acts to the detriment of Mr. Self and the appellant.

[30] Although the appellant’s impecuniosity and the reasons for it may very well be considered by a court in deciding whether to exercise its discretion, in the present instance I am not satisfied based upon the evidence before me that the actions of either respondent caused the appellant’s impecuniosity. The record establishes that the appellant was experiencing serious financial difficulties, unrelated to the respondent Baha’i’s occupation of the property. Further, I am not satisfied that the appellant’s impecuniosity constitutes a sufficient reason to excuse compliance with the decision of Justice Scanlan.

[31] Two aspects of Mr. Self’s evidence are particularly relevant to his ability to fund the costs of litigation, including posting security for costs. Firstly, Mr. Self advises that he has been able to secure the assistance of a third party who is prepared to fund the cost of obtaining the trial transcript. Secondly, and of greater importance in my view, is that Mr. Self has made it abundantly clear that he and the appellant will be pursuing other legal claims against the respondent Baha’i and others, with the assistance of legal counsel.

[32] The nature of this impending litigation is described in “With Prejudice” correspondence dated July 18, 2014, from the appellant’s legal counsel to the respondent Baha’i’s legal counsel as follows:

Mr. Self forwarded me your letter of last week for my reply. While I am no longer counsel of record for the redemption appeal matter, please send all further correspondence regarding other matters to my attention.

...

In addition to the redemption matter appeal, my clients are currently preparing two related but separate claims against Mr. Baha'i personally and against his businesses – and other involved parties – for 1). defamation and breach of contract; and 2), for conversion, breach of contract, intentional interference with economic relations, and conspiracy. The extensive damages claimed will be the full replacement value of all the chattels as new, and other substantial damages.

...

My clients are determined to see these three matters – the appeal, the conversion and conspiracy, etc. action, and the defamation action – through to their respective conclusions.

Irrespective of the outcomes of these actions, your client's unreasonable will find him – and in conversion, conspiracy and tortious interference, etc. his cohorts – in costly litigation for the foreseeable future.

[33] It was Mr. Self who introduced the above correspondence into evidence, seemingly in an attempt to show the wrongful conduct of the respondent Baha'i. The letter contains merely allegations of wrongdoing – it is not proof that the allegations are true. It is clear that the allegations are and will be contested by the respondent Baha'i. What is established by the introduction of the correspondence however, is that the appellant not only has the intent to engage the respondent Baha'i in further “costly litigation for the foreseeable future” on matters unrelated to this appeal, but it has the resources to obtain the assistance of legal counsel in advancing these pursuits. In my view, to excuse the appellant from complying with Scanlan J.A.'s order in light of the clearly planned campaign of additional litigation would make a mockery of that order and the purpose of posting security for costs.

[34] On the above basis alone, I would grant the motions to dismiss, however, I am further satisfied that the appellant has failed to establish that the appeal has merit. Notwithstanding the grounds of appeal being well articulated in the Notice of Appeal, the appellant in its submissions before the Court did not address the merits in any material fashion. Merely referring to the grounds as stated in the Notice of Appeal cannot serve to make those grounds either arguable, or establish a strong case for appellate intervention. More is required. Nothing was submitted to this Court to justify or explain why or how the trial judge erred.

## **Conclusion**

[35] There may be instances where an appellant fails to comply with an order to post security for costs, yet is able to satisfy the Court that the interests of justice require the appeal to continue. This is not such a case. The appeal is dismissed. As such, the Registrar's motion to dismiss is rendered moot, as is the appellant's motion for various other relief.

Bourgeois, J.A.