NOVA SCOTIA COURT OF APPEAL
Citation: ***Dixon v. Cole***, 2014 NSCA 100

Date: 20141104
Docket: CA 430784
Registry: Halifax

Between:

William John Dixon

Appellant

v.

Kimberlie Heather Cole

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	October 30, 2014, in Halifax, Nova Scotia, in Chambers
Written Decision:	November 4, 2014
Held:	Motion dismissed
Counsel:	Terrance G. Sheppard, for the Appellant Kimberlie Heather Cole, Respondent in Person

Decision:

[1] In Chambers on October 30th, I heard a motion brought by the applicant William John Dixon for an order extending the time to file a notice of appeal. In support of the motion was an affidavit sworn by Terrance G. Sheppard, who, if the motion was successful, would be Mr. Dixon's legal counsel for the appeal. Mr. Dixon also filed an affidavit in support of the motion.

[2] The respondent, Ms. Kimberlie Cole appeared on her own behalf, and opposes the motion. She also filed an affidavit.

[3] At the conclusion of submissions, I advised the parties that the motion was dismissed, with reasons to follow. These are my reasons.

Background

[4] On October 11, and November 25, 2013, the parties appeared before Justice Douglas Campbell of the Supreme Court Family Division in relation to a variation proceeding under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). An oral decision was rendered on November 25, 2013, however an order was not issued until July 7, 2014. It is not clear based upon the evidence before me why a delay in excess of six months existed between the oral decision and the issued order.

[5] Justice Campbell directed that commencing on December 1, 2013, Mr. Dixon was to pay to Ms. Cole child support in the amount of $897 per month, being an aggregate of base child support based upon the *Federal Child Support Guidelines*, plus a component towards arrears accumulated since January 1, 2013.

[6] It would appear that on Friday, August 15, 2014, Mr. Sheppard attempted to file a Notice of Appeal, but he was advised on Monday, August 18, 2014, that the notice was rejected as the deadline for appeal had expired. There does not appear to be a dispute that Mr. Sheppard inadvertently miscalculated the appeal period, the attempted filing being seven days past the proper deadline.

[7] On August 27, 2014, Mr. Sheppard filed a Notice of Motion seeking an order extending the time to file a notice of appeal. At that time, the only evidence in support of the motion was the affidavit of counsel. The matter was initially scheduled for Chambers on September 11, 2014, at which time an adjournment

was granted to permit Ms. Cole the opportunity to file responding materials, as well as to have additional evidence filed by Mr. Dixon.

[8] Ms. Cole's unrefuted evidence is that she first became aware of Mr. Dixon's intent to appeal Justice Campbell's decision on September 4th, when she was served with the Notice of Motion which had been filed on August 27, 2014. This was the first time she had received a copy of the proposed Notice of Appeal.

[9] At this juncture it is useful to consider what is sought in the proposed Notice of Appeal. The grounds of appeal are stated as follows:

> 1. The Learned Trail (sic) Judge erred in fact and in law in finding that section 9 of the Federal *Child Support Guidelines* did not apply.
> 2. Such other grounds which arise out of the Trial transcript

[10] The relief sought is as follows:

> The appellant says that the court should allow the appeal and that paragraphs 39 through 44 of the Variation Order, issued on July 7, 2014, appealed from, be reversed and that the Appellant not be required to pay child support, as per the Corollary Relief Order of Justice O'Neil issued on February 13, 2012, and that any funds paid pursuant to said Variation Order be returned to the Appellant with costs.

Analysis

[11] *Civil Procedure Rule* 90.37(12)(h) describes a judge's authority to extend time to appeal. It provides:

> **90.37**(12) A judge of the Court of Appeal hearing a motion . . . may order any of the following:
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[12] In **Bellefontaine v. Schneiderman**, 2006 NSCA 96, Justice Bateman succinctly set out the analytical framework for motions to extend the time to appeal as follows:

> [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):

> (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
>
> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.
>
> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (**Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

Bona fide intention to appeal when the right to appeal existed

[13] The evidence before the Court in relation to whether Mr. Dixon had a *bona fide* intention to appeal is found in Mr. Sheppard's affidavit sworn August 25, 2014, and Mr. Dixon's affidavit sworn October 9, 2014. Mr. Sheppard asserts:

> 10. The Applicant instructed me to file an appeal within the proper appeal period.
>
> 11. The Applicant had a bona fide intention to appeal.

[14] Mr. Dixon says nothing beyond that offered by his counsel, his only evidence on this issue being:

> 10. I instructed my counsel to file an appeal within the proper appeal period.
>
> 11. I had a bona fide intention to appeal.

[15] To say the above evidence is "thin" with respect to Mr. Dixon's *bona fide* intention to appeal is an understatement. Mr. Sheppard attempts to expand upon Mr. Dixon's intentions in his written submissions. It must be remembered however, that submissions are not evidence. Facts to be used in support of a motion cannot be proven through the written or oral submissions of counsel. Facts must be proven by way of admissible evidence – in the context of motions, most typically affidavit evidence.

[16] In his written submissions, Mr. Sheppard, who was not counsel for the proceeding before Justice Campbell, writes:

> Mr. Dixon consulted with me regarding the appealing the decision of Justice Campbell in late November and early December 2013.

[17] Although the above assertion should have been presented in an affidavit, it did prompt an inquiry from this Court, as to why, if an appeal was being considered at that early stage, Ms. Cole had not been advised of that potential. The court rendered its oral decision in November 2013, and Mr. Dixon immediately commenced payment of the ordered child support, and continued to do so in compliance with that decision until recently. At no time, despite Mr. Dixon apparently contemplating almost immediately seeking a return of child support paid, a sum now in excess of $9,000.00, was Ms. Cole advised this was a possibility. In response to that inquiry, Mr. Sheppard advised that the decision to appeal was "up in the air" in light of Ms. Cole's decision to file a mobility application in May of 2014.

[18] The Court has not been provided with evidence when exactly Mr. Dixon provided his counsel with firm instructions to appeal. We have only the assertion that instructions were provided within the proper appeal period. As noted above, this is very thin evidence, but I accept Mr. Sheppard's evidence that the intention and instruction was made known to him within the appeal period. With reluctance, I accept there was a *bona fide* intention to appeal.

Reasonable Excuse for Delay

[19] In his affidavit Mr. Sheppard deposes that he miscalculated the appeal deadline believing the 30 day appeal period as specified in the *Divorce Act* was "clear days". I accept this as being a reasonable excuse for not filing within the appeal period.

[20] What I do not accept as being reasonable however, is the subsequent nine day delay from Mr. Dixon's counsel being advised that the appeal was rejected on August 18th, to filing the motion seeking an extension on August 27th. Contrary to Mr. Sheppard's assertion that upon becoming aware of the rejection he took "immediate steps to properly file a Notice of Motion for an extension of time to file the appeal", he did not.

Exceptional circumstances/Grounds of appeal

[21] The grounds of appeal are outlined above. The only evidence offered by Mr. Dixon going to "a strong case for error at trial and real grounds justifying appellate interference" consists of the following:

> "I believe the Applicant has a valid and arguable grounds for appeal" – affidavit of Mr. Sheppard;
>
> "I believe I have valid and arguable grounds for appeal" – affidavit of Mr. Dixon.

[22] In his written submissions, Mr. Sheppard makes a number of factual assertions in support of the existence of arguable grounds of appeal. He writes:

> When the parties were first divorced, the Corollary Relief Order issued by Justice O'Neil established a shared parenting arrangement. Justice Campbell engaged in a tight accounting of parenting time resulting in a finding that the parties' parenting arrangement was not shared. In fact, he found that the children's parenting time with Mr. Dixon in one year was 39+% and 41% in alternate years. The issue of shared parenting was not before the Court, and was not in dispute. The application, filed on behalf of the Respondent, was for a variation of child support, and not for a variation of the parenting arrangement as set out in the Corollary Relief Order issued by Justice O'Neil. Parties had the exact same parenting schedule after the decision then prior to the decision.

[23] He further submits:

> Mr. Dixon has legitimate grounds of appeal. There is conflicting jurisprudence at the provincial courts of appeal on whether the 40% threshold for a shared parenting is an absolute cutoff. This Court has never addressed the issue. In this case, there is the added complexity that Associate Chief Justice O'Neil already determined that their particular parenting schedule constituted shared parenting. Finally, there is the issue that, even on Justice Campbell's own findings, Mr. Dixon had shared parenting in alternating years.

[24] Mr. Sheppard was not counsel in the matter before Justice Campbell. Mr. Dixon has filed no evidence which supports the factual assertions which support Mr. Sheppard's views as to the issues giving rise to arguable grounds of appeal. This is problematic. What is more problematic in my view, is that Ms. Cole has filed an affidavit in which she provides evidence which **refutes** the factual underpinnings relied upon in Mr. Sheppard's submissions. That evidence was not challenged.

[25] In her affidavit, Ms. Cole swears:

> 22. The Order from July 7, 2014 which is being appealed resulted from a Variation Application filed by the Respondent on December 4, 2012 for child support, and a separate Variation Application filed by the Appellant on January 10, 2014 to address parenting issues.

. . .

25. Rachael and Rebecca's primary residence was with me as per the parenting schedule in the February 13, 2012 Corollary Relief Order, and remained with me in the parenting schedule in the July 7, 2014 Variation Order in question.

26. It was established by Justice Campbell in his decision of November 25, 2013 that Mr. Dixon's parenting time does not constitute 40% or more of the parenting schedule.

. . .

32. It is clear that Justice Campbell was being generous in allocating time to Mr. Dixon, and still he could not find that Mr. Dixon had reached 40% of the parenting time.

33. Mr. Bernard Thibault, who was representing Mr. Dixon at the time, submitted that the children were only in Mr. Dixon's care for 39.85% of the time.

[26] It seems that the grounds of appeal rest upon the assertion that Justice Campbell erred in disrupting the previously ordered shared parenting arrangement, when the only matter before him was a variation for child support. It is further asserted that Justice Campbell erred in failing to take into consideration that the children were in the care of Mr. Dixon at least 40% of the time, and improperly calculated child support on that basis. Although such could constitute grounds for appellate intervention in appropriate circumstances, the evidence before the Court does not support the factual basis of those assertions.

[27] There is no evidence before the Court that there was, prior to Justice Campbell's decision, a shared parenting arrangement, or that the children were in the care of Mr. Dixon 40% of the time or more. There is further, no suggestion in the material before me, that Justice Campbell made a finding that the children were in the care of their father 40% of the time, and thus triggering the alleged improper application of s. 9 of the *Guidelines*. Ms. Cole's evidence, being the only evidence before the Court, suggests otherwise. Further, although Mr. Sheppard suggests there was no application before Justice Campbell which would entitle him to consider a variation of the parenting arrangement, Ms. Cole's evidence (paragraph 22 of her affidavit) identifies that there were in fact, two applications before the court, including one seeking to vary parenting. The existence of two applications, and thus the ability of the court to address support and parenting issues, is also referenced in the July 7, 2014 order, which states:

> This proceeding was before the court for determination on October 11, 2013 and November 25, 2013. **Each party has filed respective applications.** (Emphasis added)

[28] Further, the Corollary Relief Order, exhibited to Ms. Cole's affidavit indicates it was made based on a settlement reached by the parties, and that the children's primary residence was with Ms. Cole. There is no reference contained therein, that Justice O'Neil had ordered or found a shared parenting arrangement. There is no reference to the children being with their father 40% of the time.

[29] Mr. Dixon had failed to establish "a strong case for error at trial and real grounds justifying appellate interference". The only evidence properly before the Court going to the merits of the appeal was that offered by Ms. Cole, which served to factually undermine the scant submissions provided by Mr. Sheppard.

Does justice require the extension be granted?

[30] Mr. Dixon submits justice requires the extension be granted, given that the deadline was missed by only seven days, and that Ms. Cole would not be prejudiced by that delay.

[31] Ms. Cole submits she was in fact prejudiced, in that during the same time frame – that between the attempted filing of the Notice of Appeal on August 15th and being served with the Notice seeking an extension on September 4th, the parties had been once again, before the Supreme Court. She submits that Mr. Dixon and his counsel, present with her on three occasions in court during that time frame, purposely kept the pending appeal "under wraps" for tactical advantage.

[32] As previously referenced, I find it curious that Mr. Dixon never indicated to Ms. Cole either directly or through his counsel, from November 25, 2013 to August 15, 2014 that there was an intent to appeal Justice Campbell's decision regarding child support. I also find it curious and somewhat disconcerting that Ms. Cole was not made aware of the planned appeal until September 4, 2014. In her affidavit she deposes:

> 16. Mr. Sheppard did not provide me with the Notice of Motion until 4:30 p.m. on September 4, 2014.
>
> 17. That is 8 days after he filed the Notice of Motion.

> 18. Mr. Sheppard was physically present in court with me on August 18, 20, and September 4, 2014 and gave no indication of the intent to appeal until the case was closed on September 4, 2014.

[33] From Ms. Cole's evidence, I am aware that the order for child support which would be subject to the proposed appeal, will be re-considered given a recent decision of Associate Chief Justice O'Neil. Therefore, the order under appeal is not a continuing one, but by virtue of subsequent proceedings in the Supreme Court, will be subject to variation.

[34] I am also mindful that the remedy sought by Mr. Dixon on the proposed appeal, if successful, would be a return of child support in excess of $9,000.00. I find it very disconcerting that notwithstanding Mr. Dixon and his counsel discussing as early as November of 2013 potentially appealing, no one advised Ms. Cole that the funds she was receiving for the needs of the children may be sought back from her. Some ten months later, she is advised that there has been a longstanding intent to appeal, and is facing a return of a substantial sum of funds presumably already expended for the benefit of the children. Although I recognize the appeal period did not commence running until the order was taken out on July 7, 2014, in my view, and in the particular circumstances of this case, Mr. Dixon did not act in good faith by maintaining his silence.

Conclusion

[35] Although I accept that Mr. Dixon had a *bona fide* intention to appeal and a reasonable excuse for failing to meet the deadline for doing so, he has not established arguable grounds for appeal, let alone a "strong case for error at trial".

[36] In considering whether justice requires the extension, in the particular circumstances of this case, in my view justice favours the extension not being granted.

[37] The motion for extension of time to file a Notice of Appeal is dismissed, without costs.

Bourgeois, J.A.