IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Capital Auto Sales and Repair v. Taylor, 2004 NSSC 218

Date: 20041102
Docket: SH 232110
Registry: Halifax

Between:

2304606 Nova Scotia Limited
(c.o.b. as Capital Auto Sales and Repair)

Applicant

v.

Carolyn Taylor

Respondent

Revised decision: The text of the original decision has been corrected according to the erratum released November 15, 2004.

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: October 5, 2004, in Halifax, Nova Scotia

Counsel: Kelvin Gilpin, for the applicant
Nicole Godbout, for the Respondent

By the Court:

[1] The applicant seeks an extension of time to file a notice of appeal from a decision of the Small Claims Court.

Background

[2] The applicant was the defendant in a matter heard in Small Claims Court on April 8, 2004. The claimant (and respondent on this application) claimed that a car the defendant sold her was unsafe, unfit for purpose and unmerchantable, and that the defendant had misrepresented the condition of the vehicle, inducing her to buy it. The adjudicator found that, although the defendant was "frank and forthright" with the claimant regarding damage the vehicle had suffered in Hurricane Juan, and the subsequent repairs, "unbeknownst to the Defendant and the Claimant, the vehicle was not fit. It was not of merchantable quality, nor was it durable for a reasonable period of time." As a result, the adjudicator ordered rescission of the contract.

[3] The adjudicator's decision was filed on August 23, 2004. According to the affidavit of the defendant's solicitor, Mr. Gilpin, he received the decision on August 26 and forwarded it to the client on August 31. The respondent's solicitor, Ms. Godbout, states in her affidavit that she wrote to Mr. Gilpin on August 26 and September 14, 2004, seeking to arrange payment by his client to her client. She states that Mr. Gilpin phoned her on September 14, acknowledging her fax of that

day, and told her that his client had been “considering” an appeal and that he would get back to her when he had spoken to the client again.

[4] In his affidavit Mr. Gilpin says he received instructions to appeal on September 17, but became ill on September 19. He was off work for a week, returning on September 27, and missed the deadline to file an appeal. Ms. Gilpin says that after the deadline to file an appeal expired on September 22, she faxed Mr. Gilpin again (on September 27) seeking to make arrangements to comply with the adjudicator’s order. She says she received no specific reply to this correspondence, but received notice of this application for an extension of time to file an appeal on September 28. She also says she “received no telephone calls nor correspondence from Mr. Gilpin or anyone of his office advising me that he was off work for a week during which the period to appeal passed.”

The Law on Extension of Time

[5] In *Spence v. Nantucket Investor Group* (1998), 169 N.S.R. (2d) 176 (C.A.), where Chipman J.A. said:

> **[14]** In *Nova Scotia (Attorney General) v. Mossman et. al.* (1994), 133 N.S.R.(2d) 229; 380 A.P.R. 229 (C.A.), Roscoe, J.A., referred at p. 231 to the well-established three part test which states:

> "The time period for filing a notice of appeal should only be extended where:
>
> > (1) The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
> >
> > (2) There was a bona fide intention to appeal while the right to appeal existed;
> >
> > (3) A reasonable excuse for the delay in launching the appeal is advanced."
>
> **[15]** In addition, as Hallett, J.A., pointed out in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173; 307 A.P.R. 173 (C.A.), the three part test is not the only test for determining whether the time for appeal should be extended. An overriding question in all cases is whether the court is satisfied that justice requires that an application for extension of time be granted. There is no precise rule; the circumstances in each case must be considered so that justice can be done.

[6] See also *Briand v. Coachman Insurance,* [2003] N.S.J. No. 116 (C.A.) at para. 10 (QL).

[7] The respondent argues that Mr. Gilpin's affidavit does not demonstrate that the appeal has "sufficient merit" as required by the first branch of the *Mossman* test. This alone, the respondent submits, demands that the application be denied. Additionally, the respondent's counsel claims that the applicant has not provided a reasonable excuse for the delay as required by the third branch of the test. On the latter point, Ms. Godbout points to the statements in her affidavit to the effect that

she had written and spoken to Mr. Gilpin, who told her that his client was "considering" an appeal, but then heard nothing further until this application was served.

Analysis

[8] The three-prong analysis set out in *Spence and Briand* is a "useful guideline", but "ultimately, it comes down to a question of whether or not justice requires that discretion be exercised in favour of granting the application": *Hanna v. Maritime Life Assurance Co. et al.* (1995), 150 N.S.R. (2d) 34 (C.A.) at para. 17.

[9] I am satisfied that the applicant had a *bona fide* intention to appeal the adjudicator's decision and that the illness of the applicant's solicitor – who is a sole practitioner – is a sufficient excuse for the delay. Ideally Mr. Gilpin would have sought consent from the respondent to file late, but I am not prepared to hold that his failure to do so should negate his illness. At the very least, the respondent was on notice that an appeal was under consideration.

[10] The respondent's primary argument is that the appeal has no merit. An arguable ground of appeal has been defined as "a realistic ground, which if

established, appears to of sufficient substance to be capable of convincing a panel of the court to allow the appeal": *Nova Scotia (Minister of Community Services) v. L.L.P.* (2002), 207 N.S.R. (2d) 324 (C.A.) at para. 23, citing *Coughlan v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.) at pp. 174-175. For the purposes of a Small Claims Court appeal, I read "panel of the court" to mean a judge of the Supreme Court hearing the appeal.

[11] Mr. Gilpin's affidavit discloses no basis upon which to conclude that there is an arguable issue. His brief adds only that "the adjudicator made an error of law with respect to the interpretation of the Sale of Goods Act insofar as quality or fitness for particular purpose with respect to damaged and repaired vehicles." Apparently he is asserting that section 17 of the *Sale of Goods Act* should be interpreted differently, or should not apply, with respect to damaged and repaired vehicles. At this stage, it is not for me to prejudge the strength of this submission.

[12] The ultimate question is whether justice demands that I allow the extension. The respondent argues that she would be unfairly prejudiced if the applicant is allowed to file a notice of appeal at this time, as she has been attempting since late August to see the terms of the Order met. But given the relatively short delay, and

the fact that Mr. Gilpin made this application promptly upon returning to the office, I am not persuaded that the applicant should lose the opportunity to appeal.

[13] Accordingly, I grant the application and extend time to file the Notice of Appeal to Monday, November 22, 2004.

J.