SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Rogier, 2013 NSSC 440

Date: 20131002
Docket: Hfx 405502
Registry: Halifax

Between:

Francesca Rogier

Appellant

v.

Her Majesty the Queen

Respondent

DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: October 1 and 2, 2013, in Halifax, Nova Scotia

Oral Decision: October 2, 2013

Written Decision: February 27, 2014

Counsel: Francesca Rogier, on her own behalf
Katherine Salsman and Jim Janson, on behalf of the Respondent

By the Court (Rosinski, J.):

[1] This is a motion pursuant to *Civil Procedure Rule* 63.09 for an order to dismiss an appeal for non-compliance with filing deadlines.

PROCEDURAL HISTORY

[2] In relation to the procedural background here, I will just briefly outline the history. It appears that there were some complaints in relation to a dog owned by Ms. Rogier known as Brindi; perhaps three or four in the period August, 2007 to July 20, 2008. Three charges were laid pursuant to the *Halifax Regional Municipality By-Law* respecting dogs under section 8(2)(d).

[3] On February 23, 2010, Ms. Rogier was found guilty and Judge Alanna Murphy of the Provincial Court, in relation to the incident specifically of July 24, 2008, imposed a sentence. Part of the sentence was that the dog Brindi was to be trained and then later released back at the appropriate time to Ms. Rogier, which the dog was, as I understand it, on or about July 9, 2010.

[4] Next, in relation to a September 14, 2010 alleged attack by the dog (Brindi), charges were laid in October, 2010. On October 21, 2010, the matter was docketed in Provincial Court and was adjourned to December 16, 2010. On December 16, 2010, there was a plea of "not guilty". Trial dates were set for November 8 and 9, 2011. On November 8, 2011 the defendant, Ms. Rogier, requested an adjournment. The matter was set over to March 2, 2012 and then March 16, 2012. At that time, Ms. Rogier failed to appear for the start of the trial at 9:30 a.m. although she did apparently call the Courthouse at some point thereafter advising that she had been involved in a motor vehicle accident. She did appear at about 1:30 p.m. The trial had already proceeded; some witnesses were recalled, and the trial continued as I understand it.

[5] On May 10, 2012 Judge Flora Buchan of the Provincial Court rendered a decision finding Ms. Rogier guilty. On June 26, 2012 she imposed sentence. It is from that conviction and sentence that Ms. Rogier filed a Notice of Summary Conviction Appeal. Firstly on August 1, 2012 and then an Amended Notice of Summary Conviction Appeal on August 29, 2012.

[6] Appeal hearing dates were set initially for November 30, 2012. On November 1, 2012 Ms. Rogier requested a change and the appeal was then instead set down for January 23, 2013. On November 29, 2012 Ms. Rogier requested a further adjournment and the appeal was set for April 2 and 3, 2013.

[7] On February 21, 2013, Ms. Rogier again requested an adjournment and the appeal was further moved to April 25 and 26, 2013. On March 31, Ms. Rogier once again made a request for an adjournment and the matter was set over to Crownside on May 9, 2013 and considered by Justice LeBlanc. He set the new hearing dates for August 29 and 30, 2013 with filing dates of July 19, 2013 for the appellant's factum, August 2, 2013 for the respondent's factum and August 9, 2013 for any reply factum by Ms. Rogier.

[8] Notably, this earlier period, up to about sometime in March 2013 had been consumed by problems that Ms. Rogier had in obtaining a transcript. However, as of early March or mid-March, it would appear those problems had been resolved.

[9] After the appearance in Crownside on May 9, 2013 the matter was ultimately docketed to my attention and, in response, I advised counsel that the dates that had been set did not accommodate my schedule; therefore, by letter I directed new dates. Those being: June 28, 2013 for the appellant's factum, July 19, 2013 for the respondent's factum, and July 26, 2013 for any reply factum.

[10] By August 1, 2013, there had been no appellant's factum filed. The matter was returned on that date to Crownside to address new filing dates. At that time, I was coincidentally in Crownside as the judge, and Ms. Rogier was present as was Ms. Salsman for Halifax Regional Municipality ("HRM"). Being aware of the previous scheduling difficulties on several occasions, I asked Ms. Rogier if she was confident that she would be able to file her Factum by August 9, 2013. Some of her commentary included: **"I was hoping actually to have it filed by today, and I would like to have it filed in a week from now"**; and she went on to say: "I have about 100 pages of draft at this moment." I asked her again: "So when is your date, that you are confident, you will be able to definitively and completely have concluded your factum?" She answered: **"I would very much like to be able to submit this by next Thursday or Friday."** [My emphasis.]

[11] And so I asked her again: "So you think by the 9th of August, which is not the end of this week, but the end of next week." Ms. Rogier: "Filed, yes." Court: "It will for sure be finished." Ms. Rogier: "Yeah, I would just like to add, so the Crown is aware, there isn't going to be...I am reducing the grounds of appeal from the original notice." And then I asked again. Ms. Rogier says: "Ah, but yes I can make the August 9th." And I asked: "And that's for certain? There's nothing else that is going to interfere?" Ms. Rogier nodded in agreement.

[12] Therefore, the revised date of filing for the appellant's factum was set (with input of Ms. Rogier) for August 9, 2013. The respondent's factum was to be filed September 6, 2013. Any reply factum by Ms. Rogier was to be filed by September 24, 2013 and the hearing itself set for October 1 and 2, 2013.

[13] Since that point in time, Ms. Rogier filed further correspondence with the Court. She sent a letter dated August 9, 2013. In that letter she suggested that because of the way the conversation on August 1, 2013 went between myself and Ms. Salsman, that it appeared to Ms. Rogier that Ms. Salsman needed only a three-week period to respond and, therefore, effectively Ms. Rogier should be able to file her Factum as late as August 16, 2013. I responded that same day and advised that the date of August 9, 2013 was still her filing date.

[14] On September 11, 2013 Ms. Rogier sent another letter. It reads: "It is my understanding that Ms. Salsman wishes to have this appeal dismissed based on a series of delays and suggests as grounds for dismissal that I have 'no regard for deadlines'. I wholeheartedly assure the court, and will gladly furnish proof that that opinion is baseless. The delays are not due to any lack of regard for court deadlines on my part, nor is the appeal lacking merit."

[15] In that letter the following sentence appears: "However, the factum is nearly complete." And further on she asks that the appeal be permitted to go forward on the assigned dates of October 1 and 2, 2013.

[16] Lastly, on September 30, 2013 Ms. Rogier sent another letter in which she says: "Since my last communication, I regret to inform you that I've been unwell and though I continued to work my condition and medications have prevented daily work at the number of hours and level of concentration needed to complete the documents.

As a result, unfortunately the factum is still in need of revision (and especially cutting, as it remains too long)."

[17] On October 1, 2013 we appeared in Court here. I indicated that the Crown brief, filed on September 6, 2013, was an acceptable format for putting the Motion to Dismiss the appeal pursuant to *Rule* 63.09 before the Court in my view.

[18] The Crown's position is that the appeal should be dismissed. This is pursuant to, they say, *Rule* 63.09. That *Rule* reads:

> A judge may dismiss the appeal of an Appellant who fails to file within a directed time, or to immediately deliver to the Respondent an appeal book, brief, or other directed document.

[19] They point out that the incident in question here occurred on September 14, 2010. The conviction and sentence were in May and June of 2012. The Notice of Appeal was filed in August 2012 and the transcript has been filed since March 4, 2013. They reiterate the point that on August 1, 2013, Ms. Rogier herself was certain that she could have her factum filed by August 9, 2013.

[20] In her letters Ms. Rogier does allude to the effects of exhaustion and also her medical conditions and medications.

POSITION OF THE PARTIES

[21] Today Ms. Salsman confirmed the position of HRM that the defendant, Ms. Rogier, has had ample time in all of the circumstances here to have had a factum filed; and, that whereas it is still 175 pages long it would appear that it is not much closer to being filed in the near future. Ms. Salsman also has real concerns about whether Ms. Rogier's circumstances would significantly change in the near future insofar as any obstacles to filing her factum are concerned. She questioned whether Ms. Rogier really would be in a position to file the factum any time soon.

[22] Ms. Rogier, in response, today basically urged the Court not to dismiss the appeal. She suggested that she had good reasons why her Factum had not been filed on time and that the matter in question is sufficiently serious insofar as it involves her family pet, her dog Brindi, the future for the dog and possibly the dog's return to her custody.

THE LAW

[23] Insofar as the law and the application of the law to the facts here is concerned, I did find the Crown brief helpful. The Crown brief points out that, essentially, there are three options before the Court: firstly, one could proceed to a hearing without the benefit of Ms. Rogier's brief. That, the Crown acknowledges, is not really feasible particularly since the Crown itself, of course, has not filed a brief in response because there was not a brief from Ms. Rogier. The Crown also notes that Ms. Rogier was going to abandon some of the grounds of her appeal and she, in that respect, would have the opportunity to perfect her appeal and then the Crown would have the opportunity to fully respond. A second option would be to adjourn to allow Ms. Rogier sufficient time to file her brief; and the third option would be to dismiss the appeal today.

[24] I'll deal with the most controversial aspect; that is, the dismissal of appeal, or not, today.

[25] In my view, the test for dismissal, which is not set out in *Civil Procedure Rule* 63.09, can be derived from three Court of Appeal cases: *R. v. Libertore*, 2010 NSCA 26 per MacDonald, CJNS, and *R. v. Libertore*, 2010 NSCA 33 per Saunders, JA and, more recently, *Deveau v. Fawson Estate*, 2013 NSCA 54 per Justice Bryson as the chambers judge.

[26] In the *Libertore* cases, Mr. Libertore's counsel failed to file his factum and Mr. Libertore's appeal was dismissed. The matter went to the Chief Justice for consideration under *Rule* 90.38(6)(c) as to whether leave should be granted for a panel to hear the application of Mr. Libertore to have his appeal reinstated. The Chief Justice determined that it was appropriate to do so. In relation to this, Justice Saunders at the hearing of the appeal, agreed leave to reinstate the appeal should be granted. Justice Saunders stated that, "In the absence of any wording in the *Rul*e which might guide our present view, that being under *Rule* 90.38 6(c), the question to ask in such circumstances is should this Court's previous order be set aside so as to prevent an injustice?" The court examined the question by taking account of the various interests involved: that being of the Appellant, the Crown, and the public interest regarding the administration of justice as a whole, and asking what decision would best maintain respect for the administration of justice.

[27] More recently in *Deveau v. Fawson Estate*, Justice Bryson was faced in chambers with a motion by Ms. Deveau for an extension of time within which to perfect her appeal; contrasted with a motion by two brothers of the deceased seeking dismissal of Ms. Deveau's appeal for reasons of non-compliance with the *Civil Procedure Rules*. Ms. Deveau did have counsel.

[28] The appeal books in that case were seriously deficient and her counsel failed to file a factum. Moreover, her counsel was found not to have been responsive to opposing counsel throughout the process. In the result, Justice Bryson dismissed Ms. Deveau's motion yet permitted the motion by the brothers Fawson. He concluded that pursuant to *Rule* 90.43(2) the appeal should be dismissed.

[29] I just want to briefly refer to Justice Bryson's comments at paras. 14-16 in *Deveau*: "The test for extending time to file an appeal applies to Ms. Deveau's motion here and has been expressed by the Court on numerous occasions. In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, Bateman, J.A., put it this way:

> 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)).

[30] Justice Bryson states in *Deveau, supra,* at para. 15 and 16:

> 15 The ultimate question is whether justice requires that an extension be granted. The three-part test is a useful, but not exhaustive guide for the exercise of the court's

discretion, *Farrell v. Casavant*, 2010 NSCA 71, at para. 17 and *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2, at para. 19.

16 As a corollary, similar considerations apply to a motion to dismiss an appeal, which is effectively the result of refusing to extend time. Both parties refer to the decision of *Islam v. Sevgur*, 2011 NSCA 114, for the criteria that should govern the court's discretion with respect to both motions. In Islam, Justice Saunders helpfully summarized the principles:

> [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.
>
> [38] Civil Procedure Rule 90.43(a) is mandatory. It obliges the Registrar to enforce the Rules and chase delinquent appellants.

[31] In my view the same test should be applied to *Civil Procedure Rule* 63.09. Therefore, has the appellant satisfied me on the balance of probabilities that the appeal ought not to be summarily dismissed for non-compliance with the *Rules*?

[32] I should consider whether there is good reason for the default sufficient to excuse the failure? Secondly, does the appeal raise material and arguable issues? Justice Bryson discussed this standard at para. 61 in *Deveau*. Thirdly, is the appeal taken in good faith? I note here that this is usually most relevant to interlocutory appeals and, in fact, those are the majority of which the Court of Appeal cases that I cited have dealt with. Does the appellant have willingness and ability to comply with future deadlines under the *Rules*? Fifth, what is the prejudice to the appellant if the appeal is dismissed? Sixth, what is the prejudice to the respondent if the appeal is not dismissed? Seventh, what is the effect on the Court's resources and time, and what, if any, impact of delay will there be on the public purse as it is intended that appeals be perfected and heard expeditiously? Eighth, are there procedural or substantive impediments that affect the viability of the appeal? And, I would add a ninth, which was implicit in Justice Saunders decision: are there any other relevant factors?

Applying the Test Under *Rule* 63.09 to the Circumstances of the Case at Bar

[33] In this case I heard from Ms. Rogier about the circumstances of her failure to file her factum on August 9th. Ms. Rogier testified in an effort to establish evidence that: there were sufficient good reasons for her failure to file her factum on August 9th as directed by the Court on August 1; as well as to present evidence about her

willingness and ability to comply with her similar directions in the future; and, to present any other relevant information that could affect the Court's decision.

[34] Ms. Rogier has been pre-occupied with legal matters involving her dog, Brindi, since 2008.

[35] She referred to fibromylagia, chronic fatigue, anxiety and depression, as well as insomnia, as being some of the spectrum of ailments interfering with her ability to prepare, formalize and file her factum in this appeal.

[36] She has also endured financial stressors, she says, indicating that her significant source of income at present is as a person listed on a web clearing house for translators from German to English, where she gets unpredictable levels of workloads which is understood (by translators and clients alike) must be done immediately as is the reality of rushed deadlines arising from a globalized workforce. These jobs pay reasonably. She indicated that she presently reached the maximum debt limits of her credit cards. She faces a potential tax-sale of her home and applied for Social Assistance in June, 2013. She had so little income in August, 2013, she says, that she declined to purchase some of her necessary prescription medication which was not covered by insurance in order to devote that money to other matters.

[37] In cross-examination she effectively admitted that she did not make filing her factum, directed to be more no more than 60 pages in length by me on Crownside August 1, 2013, as much her priority as she did paying bills. She stated for example: "I spent as much time as I could on it"; she testified that whenever work or other matters would take her away from the preparation of the factum, it was hard to pick up where she had left off, as she was trying to do a conscientious job though this is difficult in her capacity as a self-represented litigant. She also referred to other upsetting personal matters such as revisiting the anniversaries of days when her dog, Brindi, was seized and such.

[38] Ms. Rogier suggested, with confidence, at the hearing before me that she could have her brief (estimated at 175 typed pages) reduced to 120 to 150 pages within a month and filed. Later during submissions when asked pointedly if she could have a 60 page factum completed within that same 30 day timeframe, especially if she knew that failing to file her factum might cause the appeal to be automatically dismissed,

she responded that she would "do whatever she had to" in order to maintain the appeal and her chance to perhaps have her dog returned to her custody.

[39] In summary, I would characterize her testimony as somewhat unfocused and driven by her determination to establish that her dog is not a social menace. Unfortunately, this meant that some of her testimony tended to drift away from the focus of the hearing before me, which was to determine whether the appeal should be dismissed or not for lack of not filing her factum on time.

[40] Though not essential to the outcome herein, I found her evidence to be generally credible with added-on commentary which bore the hallmarks of an advocate's position rather than that of an independent witness. Nevertheless, in conclusion, I accept that she has a number of significant stressors in her life which will probably not abate in the near future. These stressors though, do, in some respects, go a long way to help one understand why Ms. Rogier believes she was unable to file her factum on time. While a reasonable observer might second-guess her decisions in that respect, on balance, I am prepared to accept that her decisions were made in good faith and not with the deliberate view to delay proceedings.

[41] As to material and arguable issues, I have referred to Justice Bryson's decision in *Deveau* at para. 61 and also note that this is a fairly low threshold test: whether the issues are of sufficient substance that they could persuade a Court in an appeal situation. I also refer to *Attorney General of Nova Scotia v. Spence*, 2004 NSCA 45 at para. 10.

[42] As to the issue of good faith, I have addressed that in my assessment of Ms. Rogier's testimony.

[43] As to Ms. Rogier's willingness and ability to comply with future directions. Perhaps one must take her at her word that she will do, this time, whatever it takes to maintain the appeal.

[44] As to the prejudice to the appellant, Ms. Rogier, if the matter is dismissed today. Well, of course she will not have had her chance to plead her case on appeal, and perhaps most significantly to her, will have the loss of potentially having her dog returned to her custody.

[45] As to the prejudice to the respondent, HRM. Certainly there will be more costs involved in care for the dog in the meantime; and more counsel time, as the dates of October 1 and 2, 2013 have been taken up with this particular matter.

[46] As to the public interest in the administration of justice. Certainly this matter has absorbed much more time than one would reasonably have expected. Given, however, my finding regarding the reasons for the non-filing on August 9, 2013 by Ms. Rogier of her factum, I do not think a reasonable observer would at this stage conclude that the administration of justice will be brought into disrepute if Ms. Rogier is given one last chance. Certainly a reasonable observer would be troubled by the delays and, rightly so, in my view. However, I bear in mind that Ms. Rogier is a self-represented litigant and is trying to be conscientious in her presentation of her case. There is a significant outcome at stake, insofar as her dog is concerned and the potential that if she is correct, theoretically the dog could be returned to her custody.

[47] In conclusion then, I recognize that HRM has reason for real concern that Ms. Rogier will not make filing her factum a priority. It is apparent, at least from August 1, 2013 onward, that Ms. Rogier committed to, and was confident she said, that she could file a factum by August 9, 2013 when in fact it was not even filed by September 30, 2013. So HRM and the Court both are rightly concerned about Ms. Rogier's suggestion now that within a 30 day period, roughly, she can have filed a 60 page factum summarizing her appeal position. On the other hand, certainly this appeal should be heard on its merits in my view

CONCLUSION

[48] In order to reconcile these competing concerns, I find it appropriate here to conditionally dismiss this appeal. By that I mean, the appellant, Ms. Rogier will be given a reprieve to file her factum. The order will be that Ms. Rogier must file her factum by November 8, 2013, and that it be no longer than 60 pages; and, thereafter appear at Crownside on November 14, 2013 at 9 a.m. to set new hearing dates and new dates for a Respondent's factum and any reply factum by her. Failing the filing of her factum on November 8, 2013, or her appearing at Crownside on November 14 at 9 a.m., the appeal will be dismissed with costs.

Rosinski, J