NOVA SCOTIA COURT OF APPEAL
Citation: *Raymond v. Brauer*, 2015 NSCA 106

Date: 20151119
Docket: CA 442739
Registry: Halifax

Between:

Paulette Raymond

Appellant

v.

Connie Brauer and Victor Harris

Respondents

Judge:	Justice Cindy A. Bourgeois
Motion Heard:	November 5, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion granted, appeal dismissed
Counsel:	Paulette Raymond, appellant, in person Connie Brauer and Victor Harris, respondents, in person

Decision:

[1] The parties have been involved in contentious litigation for a number of years. They are self-represented litigants and are scheduled to appear before a civil jury in March 2016. Although their matter has yet to go to trial, this is by my count, at least the sixth time these parties have found themselves before this Court.

[2] It would appear that in August 2015, Ms. Raymond made a motion for summary judgment against Ms. Brauer and Mr. Harris pursuant to *Civil Procedure Rule* 13.04 – Summary judgment on evidence. That motion was dismissed by Justice Gregory M. Warner, by order issued August 12, 2015.

[3] Ms. Raymond filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) – Amended, on September 21, 2015, purporting to appeal the above order. Ms. Brauer and Mr. Harris have brought a motion seeking to have the appeal summarily dismissed. I heard that motion in Chambers on November 5, 2015.

Background

[4] I have not been provided with a transcript of the summary judgment motion before Justice Warner, or any materials filed in relation thereto. What I know of that matter is contained in the order attached to Ms. Raymond's Amended Notice. It provided:

> WHEREAS Paulette Raymond filed a motion on August 4, 2015, for an order for summary judgment;
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> AND WHEREAS Paulette Raymond appeared on her own behalf;
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> AND WHEREAS Connie Brauer appeared on behalf of the respondents Connie Brauer and Victor Harris;
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> AND WHEREAS the court confirmed that there was no sworn affidavit provided with this motion;
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> AND WHEREAS the court reviewed paragraph 87 of *Coady v Burton*, 2013 NSCA 95, which sets out the two-part test for a summary judgment on evidence;
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> IT IS HEREBY ORDERED that in the absence of any evidence that would meet the first part of the test, the motion is dismissed.

[5] There is no dispute, as referenced in the recital above, that Ms. Raymond did not file an affidavit in support of her motion.

[6] In her Amended Notice, Ms. Raymond seeks to appeal the above order in part. The part she seeks to challenge is noted as:

> AND WHEREAS the court reviewed paragraph 87 of *Coady v Burton*, 2013 NSCA 95, which sets out the two-part test for a summary judgment on evidence;

[7] Ms. Raymond puts forward nine grounds of appeal. For the analysis to follow, it is prudent to set them out in their entirety:

1. This leave to appeal application is the result of an order by the Honourable Justice Gregory M. Warner who dismissed my motion, in part, for summary judgment on evidence based on his review of paragraph 87 of ***Burton v Coady***, ***2013 NSCA 95***. The citation referred to in the order dated August 12, 2015 in actuality is ***Burton v Coady*** 2013 NSCA 95. This is an obvious error that from my perspective is a typographical error, which can be overlooked.
2. The Honourable Justice Jamie W. S. Justice Saunders writing for the Court of Appeal in paragraph 87 of ***Burton v Coady*** 2013 NSCA 95 reviewed the analytical framework by providing a summary of the law as it presently stands in Nova Scotia and the well-established legal principles involving a two-stage analysis for summary judgment.
3. With respect, Justice Saunders' summary of the two-stage analysis on summary judgement in 2013 NSCA 95 is in conflict with Nova Scotia Civil Procedure Rule 12 (2008) on ***Questions of Law*** because this new rule (as opposed to the 1972 Rule 25) is ***broader***.
4. Nova Scotia Civil Procedure Rule 12 *no longer requires an agreed statement of facts, or no material facts in dispute*. The new rule only deals with questions of law, and not preliminary questions of fact/evidence as in the old Rule 25. This contradiction between Rule 12 and 13.04 is a bona fide ground for appeal on a question of law.
5. With respect, Justice Saunders' summary of the two-stage analysis on summary judgment in 2013 NSCA 95 paragraph 87 is in conflict with Nova Scotia Civil Procedure Rule 2.03(3)(b). Rule 2 is in sync with Rule 13.02 (1972) civil procedure rule on summary judgment. This contradiction between Rule 2 and 13.04 (2008) is a bona fide ground for appeal on a question of law.
6. The inconsistencies in the application of the law with regard to ***Coady v Burton*** – 2012 NSSC 257; ***Burton v Coady*** – 2013 NSCA 95 and more recently and in light of ***Hryniak v Mauldlin*** – 2014 SCC 7 and bona fide grounds for appeal on questions of law. The latter dismissed the notion and the

> traditional summary judgment interpretation of it by saying "*a trial is not the default procedure*". Karakatsanis J.
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> 7. In my view, Justice Warner's long reflective analysis leading to his comprehensive discretionary decision challenges the status quo. Rethinking, reviewing and rewriting Rule 13.04 and its application of the law are appropriate questions of law for a panel proper in my view.
> 8. This notice of appeal referred to a panel for an opinion could expand Rule 13.04 qualitatively in a fair, fruitful and flexible manner that advances the law and creates a transparent, caring and effective means to access justice – in essence, a voice for the ordinary citizen.
> 9. Current research aligns itself with 21st century art and science decision-making practices, which is in keeping with access to justice. The Nova Scotia Court of Appeal has the opportunity to interpret and justify the law so that it is fair, proportional and open for everyone who requires access to it.

[8] The order requested on this appeal is described in the Amended Notice as follows:

> The Appellant requests an order that remits the questions to a panel for review in light of the inconsistencies and interpretation between the 1972 Rules and the 2008 new Rules regarding summary judgment, residual inherent jurisdiction and questions of law.

[9] In their motion seeking dismissal of Mr. Raymond's Interlocutory Appeal, Ms. Brauer and Mr. Harris allege the appeal is an abuse of process, that Ms. Raymond is a vexatious litigant, and that the appeal raises no legitimate ground of appeal. In resolving this motion, I will only address the third concern – the nature of the grounds of appeal.

Law

[10] *Civil Procedure Rule* 90.40 permits a single judge to summarily dismiss an appeal in narrow circumstances. It provides:

> 90.40(1) A judge of the Court of Appeal may set aside a notice of appeal if it fails to disclose any ground for an appeal.

[11] That rule can be contrasted with Rule 90.44 which clearly requires a panel of the Court to hear a motion that an appeal is "frivolous, vexatious or without merit".

[12] In *MacDonald v. Nova Scotia (Attorney General)*, 2012 NSCA 64, Beveridge, J.A. considered a motion for dismissal brought under Rule 90.40. There, a self-represented litigant raised two grounds on appeal, firstly, that he had been self-represented in the court below, and secondly, that "nothing had been done". His Lordship's approach to the motion is instructive. He wrote:

> [13] I am mindful of the distinction between determining if a notice of appeal sets out at least a ground that could ultimately lead to this court possibly granting relief to an appellant, and the role of a panel of this court considering a motion to quash or dismiss an appeal under Rule 90.44 of the basis the appeal is frivolous, vexatious or without merit (see *Cragg v. Eisener*, 2012 NSCA 38).
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> [14] In *Fares v. CIBC Bank*, 2009 NSCA 124, Roscoe J.A. dealt with a motion to set aside a notice of appeal under Rule 90.40. She wrote:
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> > [6] I agree with the respondents' submissions. The grounds of appeal are hardly comprehensible. **While one might decipher the first ground as a claim that there was an error of law and jurisdiction, a ground of appeal must include some particularization or suggestion of what the alleged error of law or jurisdiction is**. In the context of this case, where Justice Wright dismissed an application for a date assignment conference because, among other things, the pleadings had not closed, a bare allegation of an error of law or jurisdiction is insufficient to disclose a valid ground of appeal.
> >
> > [7] The second ground of appeal might be decoded to imply an allegation that the appellant was denied access to service based on racial profiling. In the absence of some further particular and reference to a specific ruling, finding, or statement of the Chambers judge, I am unable to understand how this ground discloses an error of law or fact.
> >
> > [8] The third ground of appeal is completely inexplicable.
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> [15] Turning to the grounds of appeal advanced by Mr. MacDonald. His first, is that he did not properly represent himself. I fail to see how this constitutes a proper ground of appeal. A person who represents himself at a hearing or a trial cannot later complain that his representation was deficient and seek to obtain a legal remedy on appeal on that basis (see for example, *R. v. Gordon*, [2003] O.J. No. 2145 (C.A.), *Allen v. Canada Post Corp.*, 2011 NSCA 72).
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> [16] The remaining ground of appeal "Nothing has been done**", makes no suggestion that the learned Chambers judge committed any error of law. In fact, it doesn't allege the Chambers judge made an error at all.**
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> [Emphasis added]
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> [17] There may very well be instances where a self represented appellant has been unable to properly articulate his or her complaint of error. An appeal should not be set aside due to clumsy or inarticulate grounds if an amendment can cure

> the deficiency. This is not one of those cases. Mr. MacDonald's explanation for the ground "Nothing has been done", is that it is a reference to the inaction by government officials to admit their wrongdoing and apologize. This is not a proper ground of appeal.

[13] From the above, I distill the following principles:

- If there is a sustainable ground of appeal, the appeal should not be dismissed by a single judge in Chambers, even in the face of questionable merit;
- A ground of appeal is unsustainable if there is no possibility in law that it could be found to be meritorious on appeal;
- A sustainable ground of appeal must not be a bare assertion of an error of law or jurisdiction, but rather, requires particulars of the error alleged; and
- An appeal should not be dismissed if an amendment could cure deficiencies in the drafting of the grounds.

Analysis

[14] At the hearing of the motion, I took great care to ensure I understood the purpose of Ms. Raymond's interlocutory appeal. I asked her to explain why she felt Justice Warner erred when he dismissed her motion for summary judgment. Ms. Raymond made herself very clear. She does not assert that Justice Warner erred in any way. Rather, she asserts he is in complete agreement with the views she expresses on this appeal with respect to the current law of summary judgment on evidence.

[15] Ms. Raymond acknowledged that Justice Warner, in dismissing her motion, followed the current and binding law in this province, as set out by this Court in *Burton v. Coady*, 2013 NSCA 95 and *Civil Procedure Rule* 13.04. Her goal is to have that binding law changed.

[16] Ms. Raymond stated, repeatedly, that what she is seeking is to refer a discrete question of law, unrelated to her particular case, to this Court for an opinion. In effect, she is not appealing Justice Warner's recent decision, but rather, that of Justice Saunders in *Burton*.

[17] I could extensively address the merits of this appeal but, as noted above, that is not my function. Rather, I must confine myself to determining whether Ms. Raymond has raised a sustainable ground of appeal.

[18] In my view, none of Ms. Raymond's stated grounds raise any ground of appeal recognized in law. Focusing solely on the grounds as drafted, most contain argument, as opposed to allegations of error. Where error is alleged, it is by way of bare assertion, without particulars. What is critical, however, is that Ms. Raymond raises no error at all, in relation to the decision purportedly under appeal – that of Justice Warner. Her only reference to Justice Warner is found in ground 7 in which she notes his "long reflective analysis". At the hearing she confirmed that this ground was not referencing His Lordship's response to the summary judgment motion now under appeal, but rather his written decision in *Burton*.

[19] There is further difficulty. Ms. Raymond's goal is to have this Court reconsider the law on summary judgment, particularly as expressed in *Burton*. After reviewing the materials and hearing from Ms. Raymond, I am satisfied that what she wants is to have this Court express an independent opinion on a question of law. She said as much repeatedly. However, the ability to make such a referral is limited. Rule 90.24(1) provides:

> 90.24(1) A court, tribunal, commission, **or other party allowed by legislation** wishing to refer a question of law to the Court of Appeal for an opinion, must state a case in writing setting forth the question or questions of law to be answered and file it with the Court of Appeal.
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> [Emphasis added]

[20] I am unaware of any legislation which would permit Ms. Raymond to refer a question of law to this Court. As such, she does not fall within the above rule. In my view, if a party is unable to bring a question to the Court for consideration, such cannot constitute a sustainable ground of appeal at law.

[21] After having heard Ms. Raymond, I am satisfied that this is not a case where the unsophisticated drafting of a self-represented litigant has obscured an appropriate ground of appeal. To the contrary, Ms. Raymond is clear with respect to her intent and objective. However, notwithstanding this clarity, she has not raised any ground of appeal which this Court can properly consider.

Conclusion

[22] I grant the motion, and dismiss the Interlocutory Appeal. At the hearing, both parties requested costs in the event they were successful on the motion. Ms. Brauer and Mr. Harris are entitled to costs on the motion in the amount of $500, payable by Ms. Raymond, forthwith.

Bourgeois, J.A.