NOVA SCOTIA COURT OF APPEAL
Citation: *Marshall v. Robbins*, 2016 NSCA 51

Date: 20160607
Docket: CA 451593
Registry: Halifax

Between:

Gregory Marshall

Appellant

v.

Julie Robbins

Respondent

Judge:	Farrar, J.A.
Motion Heard:	June 2, 2016, in Halifax, Nova Scotia in Chambers
Held:	Motion for an Extension of Time to File the Notice of Appeal dismissed.
Counsel:	Appellant in person Daniel Boyle, for the respondent

Decision:

Overview

[1] Mr. Marshall is self-represented in this proceeding. He is a member of the Law Society of Upper Canada, however, he says he has not practiced law for a number of years. Mr. Marshall moves to extend the time to file a Notice of Appeal, seeking to appeal five Orders for Production issued by Judge David R. Hubley, a judge of the Family Court, on April 27, 2016.

[2] In support of his motion, Mr. Marshall filed his own affidavit. In opposition to the motion, the respondent has filed the affidavit of M. Ann Levangie, Ms. Robbins' counsel.

[3] For the reasons that follow, I dismiss the motion with costs to the respondent in the amount of $500.00 payable forthwith, in any event of the cause.

[4] In order to address Mr. Marshall's motion I will provide some more background.

Background

[5] Mr. Marshall and Ms. Robbins were in a common law relationship from September, 1995 until February, 2014. They have two children together, ages 18 and 13.

[6] In 2014 Ms. Robbins made an application to the Family Court seeking an order for custody, access and child support. An interim order was granted by Judge Jean Dewolfe and issued September 3, 2014.

[7] There was an unsuccessful settlement conference held on November 28, 2014. Following the settlement conference, the interim order remained in place. No further activity occurred until December 1, 2015, when Mr. Marshall filed a Response to Application in the Family Court together with a Statement of Undue Hardship Circumstances and supporting documentation.

[8] In his response, Mr. Marshall claims for spousal support. He also claims for a finding of undue hardship on the basis that he suffers from serious health complaints.

[9] In his Statement of Undue Hardship Circumstances, Mr. Marshall says, in part:

> I am disabled, unable to work, and the Applicant inflicts constant stress which makes things worse. My doctor and I have discussed the possible necessity of abandoning my children in order to protect my own health and survival, because there is a real and pronounced medical risk of stroke, debilitating paralysis, amputations, and/or fatal heart attack. …Due to her intentional conduct, and other negligent acts or omissions, as well as the undue and unrelenting stress caused by her behaviour, the Applicant has adversely affected my health and medical conditions to the extent that I have required hospitalization on numerous occasions – one was nearly fatal. Four of my doctors have confirmed that these were all stress-related incidents. Stress must be avoided with my conditions. Otherwise, my children will lose the natural love and affection – and the care, companionship and guidance – of their father.

[10] In his Statement of Undue Hardship Circumstances, when addressing his ability to pay child support, Mr. Marshall says:

> … (2) The stress is having serious effects on my medical condition, and I am at moderate-to-high risk of catastrophic – perhaps even fatal – results on my health.

[11] The parties appeared before Judge Hubley in the Truro Family Court on January 7, 2016. At the commencement of the proceeding a lawyer from the Truro Legal Aid office appeared to inform the court that Mr. Marshall had been granted a legal aid certificate. After imparting that information she left. For the remainder of the appearance, Mr. Marshall was self-represented. It was on this date that the Orders for Production were first raised by Ms. Levangie. She said they would be necessary to address the allegations in the Response and Statement of Undue Hardship Circumstances. At that hearing, Mr. Marshall acknowledged he knew that it was going to be necessary for him to provide further medical information to support his assertions. However, he objected to orders being issued, calling it a "fishing expedition" by Ms. Robbins.

[12] The matter was adjourned to allow Mr. Marshall an opportunity to seek counsel and to revise his affidavit – filed in support of his response – which Judge Hubley found to be somewhat problematic.

[13] Another appearance occurred before Judge Hubley on February 25, 2016. At that hearing, Mr. Marshall was represented by Ms. Marie-Andrée J. Mallet, a New Brunswick lawyer, who attended by telephone. The Production Orders were again discussed and Judge Hubley orally granted the requested orders for

production. He specifically found that the records were relevant and material to the issues raised by Mr. Marshall. Judge Hubley urged Mr. Marshall to voluntarily provide the information. Despite subsequent attempts by Ms. Levangie to obtain these records voluntarily, through correspondence with Mr. Marshall's counsel, the information was not forthcoming.

[14] A Date Assignment Conference was held before Judge Hubley on March 11, 2016. At that time the court and Ms. Levangie were informed that Robert Moores of Nova Scotia Legal Aid would be representing Mr. Marshall going forward. Ms. Mallet appeared by telephone and was granted a motion to be removed as Mr. Marshall's counsel.

[15] A further pre-trial conference was held on April 19, 2016, to allow Mr. Moores an opportunity to review the file. At that teleconference, Ms. Levangie again raised the need to issue the orders for production and her intention to obtain the requested information. In her affidavit filed in opposition to Mr. Marshall's motion, Ms. Levangie said that Mr. Moores would have been aware of the Orders as a result of attendances at the pre-trial teleconferences. Ms. Levangie was not in attendance at the hearing of this motion. I asked her co-counsel, Mr. Boyle, to have Ms. Levangie file a supplemental affidavit to clarify how Mr. Moores would have been aware of the Orders. She did so on June 3, 2016 saying as follows:

> 5. With regard to paragraph 16 of my affidavit sworn May 30, 2016, on file with this Honourable Court, I wish to clarify that Mr. Moores was in attendance at teleconferences held on April 19 and May 5, 2016 in this matter. These are the two teleconferences that took place prior to May 11, 2016, the date on which the Appellant indicated he was first made aware that written Orders for Production were issued on April 27, 2016. In the course of these teleconferences, Mr. Moores was made aware of the Orders for Production which were granted February 25, 2016.
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> 6. I have referred to my personal notes taken during the April 19, 2016 teleconference and have specific recollection of portions of the conversation that took place on that day.
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> 7. During the course of the April 19, 2016 teleconference, I raised the issue of Orders for Production and our intention to obtain the requested information.
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> 8. During the course of the April 19, 2016 teleconference, the Honourable Judge Hubley indicated to Mr. Moores that His Honour hoped disclosure of the materials subject to the Order for Production would be made voluntarily. Mr. Moores did at that time indicate that his client had concerns about and objections to the requested disclosure. In response,

> both myself and Judge Hubley stated that the Orders for Production were already in place. These Orders had been granted February 25, 2016. It was again affirmed by me at that time that the materials sought by the Respondent are relevant to considerations of parenting, spousal support, and undue hardship.
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> 9. During the course of the April 19 teleconference, Mr. Moores requested details of what information the Respondent was seeking. I clarified that we were seeking medical records and financial disclosure.
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> 10. Further teleconferences were held in his matter on May 5, 2016, and May 19, 2016. The Appellant continued to be represented on both occasions by Mr. Moores.
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> 11. I was aware throughout this process that the Appellant contested the content and substance of the Orders for Production. The Appellant's concerns were argued before Judge Hubley in advance of His Honour granting the Orders on February 25, 2016. The Appellant's concerns were again raised by Mr. Moores on the April 19, 2016 teleconference, as discussed above.
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> [Emphasis added]

[16] On April 27, 2016, the orders were issued, although it is not clear from the information when the orders were delivered to Mr. Moores.

[17] Mr. Marshall, in his affidavit, says that he learned of the orders when he met with Mr. Moores on May 11, 2016, but, inexplicably, did not request or receive a copy of the orders from Mr. Moores at that time despite being in the Legal Aid office where, presumably, the orders would have been readily available. In his affidavit, Mr. Marshall says the following:

> At that time, the managing lawyer at the Truro Legal Aid office, Robert Moores, advised me, and I believe, that he had just received copies of the Orders.

[18] At the hearing of this motion, Mr. Marshall attempted to resile from what he said in his affidavit suggesting that he did not know whether Mr. Moores had the Orders at that time. Frankly, I think Mr. Marshall, during questioning by myself, became aware of the import of Mr. Moores being in possession of the Orders on May 11 and Mr. Marshall doing nothing to attempt to get copies of the Orders or to instruct Mr. Moores to appeal the Orders. In any event, he did not receive copies of the Orders until May 18, 2016, when they were sent to him from the Legal Aid office.

[19] At the hearing of this motion Mr. Marshall also said that he has had medical information in his possession since January but had no explanation for why he did not provide, at the very least, the information he considered relevant.

[20] With this backdrop I will now turn to the issue of whether I should grant the extension of time to file the appeal from the five orders.

Analysis

[21] Mr. Marshall did not file a brief nor did he reference the Rule he relies upon in seeking the extension of time. However, it is Rule 90.37(12) which provides:

> (12) A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
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> …
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> (h) that any time prescribed by this Rule 90 may be extended or abridged before or after the expiration thereof.

[22] Much has been written about the appropriate test for granting an extension of time to file an appeal culminating in the decision in *Farrell v. Casavant*, 2010 NSCA 71, where Beveridge, J.A. explained the test as, ultimately, a determination of whether it is in the interest of justice to grant the extension:

> [17] Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines

[23] I am not satisfied that justice requires an extension of time in these circumstances. I say this for the following reasons:

1. In Mr. Marshall's Statement of Undue Hardship Circumstances, he clearly puts his medical condition and inability to earn income in issue;

2. As early as January 7, 2016, Mr. Marshall was aware that Ms. Levangie would be seeking an Order for Production. In fact, he acknowledged that he had an obligation to provide information that would support the assertions he was making.

3. On February 25, 2016, when Mr. Marshall was represented by counsel, the issue of the production orders again was discussed with Judge Hubley. At that time, Judge Hubley specifically made the finding that the records were relevant and material to the matters in issue and orally granted the Orders for Production. He urged Mr. Marshall to provide the information voluntarily. No appeal was taken from the granting of the Orders on that date, even though he could have done so under Rule 90.13(4).

4. On March 11, 2016, Ms. Mallet ceased to be counsel for Mr. Marshall. From that point forward he was represented by Mr. Moores. The Orders were the subject of discussions in pre-trial teleconferences on April 19 and May 5, 2016. On April 19, 2016, Judge Hubley again urged that the information be provided voluntarily. These teleconferences took place prior to May 11 when Mr. Marshall says he became aware of the issuance of the Orders.

5. Despite requests for production of the information to Mr. Marshall's counsel, no information was forthcoming.

6. Mr. Marshall had information in his possession which he did not disclose.

7. Mr. Marshall could have avoided the orders being issued by simply providing the information voluntarily. He chose not to do so.

8. On May 11, when hearing of the orders, he did not request copies of the orders from Legal Aid. He did not make that request until May 18, 2016.

9. He has been less than forthright in his affidavit filed in support of his motion, in particular, he failed to detail the process by which the orders were granted; failed to disclose that the orders were orally granted on February 25, 2016; failed to disclose that he knew Ms.

> Levangie was seeking these orders as early as January 7, 2016; and failed to disclose that he was seeking a finding from the Court that he suffered from undue hardship.

[24] All of these factors lead me to the conclusion that Mr. Marshall did not have a *bona fide* intention to appeal the orders. He was aware of the potential of these orders being issued and took no steps to prevent that from occurring such as providing the information voluntarily. This, despite being aware he had to provide evidence to support the assertions he was making in his Response and Statement of Undue Hardship Circumstances.

[25] In my view, his attempts to seek to extend the time for appeal and to appeal the motions is nothing more than a stalling tactic and is not a *bona fide* intention to appeal.

[26] The Rules, and the procedures provided thereunder, are intended to be for the just, speedy and inexpensive determination of a proceeding (Rule 1). As in this case, all too often parties seek to use the Court and its processes as a battlefield in an ill-advised and ill-defined war which has little to do with the dispute between the parties, with no other purpose other than to create hardship and undue expense on the other side. A litigant, whether self-represented or not, seeking to have this Court exercise its discretion in granting a remedy, has to satisfy this Court that there is a legitimate reason for doing so. I am not satisfied that Mr. Marshall has even come remotely close to doing so.

[27] In considering whether to exercise my discretion to extend the time for filing an appeal, the object is to do justice between the parties. In these circumstances, justice does not require that I grant this motion. Quite the contrary, extending the time to appeal would be inappropriate.

[28] For these reasons I dismiss the motion with costs to Ms. Robbins in the amount of $500.00 payable forthwith and in any event of the cause.

Farrar, J.A.