

NOVA SCOTIA COURT OF APPEAL

Citation: *Hughes v. Cumberland (Municipality)*, 2019 NSCA 96

Date: 20191209

Docket: CA 489068

Registry: Halifax

Between:

Trevor Idwal Hughes

Appellant

v.

The Municipality of Cumberland

Respondent

Judge: Beaton, J.A.

Motion Heard: November 22, 2019, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Trevor Idwal Hughes, appellant in person
Dennis James, Q.C. and Grace MacCormick, for the
respondent

Decision:

[1] The Registrar filed a properly constituted motion pursuant to *Civil Procedure Rule 90.43(4)* seeking dismissal of the appeal. For the reasons that follow, the motion is granted and the appeal is dismissed.

Background

[2] The Notice of Appeal was filed on June 11, 2019, appealing a decision of the Supreme Court of Nova Scotia made pursuant to the provisions of the *Building Code Act*, R.S. 1989, c. 46. That order directed the respondent to destroy and remove a building located on lands belonging to the appellant on or before July 10, 2019.

[3] Pursuant to *Civil Procedure Rule 90.25(2)*, the appellant was required to make a motion for date and directions no later than October 7, 2019. The Registrar sent an information letter to the appellant on June 17, 2019 outlining his obligations concerning, among other things, the filing of that motion. The relevant portion of that letter is reproduced below:

Once you have completed the steps outlined above, you are ready to apply to get a date for your appeal hearing. This is called making a motion for date and directions and is heard by a judge of the Court of Appeal in chambers, either in person in a courtroom on a Thursday at 10:00 a.m. or by telephone at a pre-arranged time on a Wednesday.

If you are choosing to appear in chambers in person on a Thursday, you may select the date on which you would like to appear. If you are choosing to appear by telephone on a Wednesday, the telephone conference must be arranged in advance through the Deputy Registrar, who can be reached at **(902) 424-6937**. Please note, you are required to take reasonable steps to consult with the other party regarding their availability to attend chambers.

To make this motion for date and directions, you must file a Notice of Motion for date and directions and a Certificate of Readiness. These forms, along with an instruction sheet explaining this process, may be found on the Courts' website:

http://www.courts.ns.ca/Appeal_Court/NSCA_forms.htm

These forms have to be filed with the Court and provided to the respondent(s) at least four (4) clear, business days before the motion hearing date. Four clear days means that, assuming there are no holidays in that week, your documents will have to be filed and served the Thursday before the Thursday you want to appear in Court.

It is important that you work quickly to take the necessary steps to move your appeal along. Your motion for date and directions (to get a hearing date for your appeal) must be heard no later than eighty (80) days from the date your Notice of Appeal was filed. **In this case, the time period started to run on June 11, 2019. That means that you must have your motion filed and heard no later than October 7, 2019.** If the motion is not done within this time, I am required as Registrar to make a motion pursuant to **Civil Procedure Rule 90.43(4)**, on five (5) days' notice, to have the appeal dismissed for non-compliance with the Rules.

[4] The Registrar did not receive a motion for date and directions, nor any other materials or communication from the appellant; on October 11, 2019 the Registrar filed the motion to dismiss, scheduled for chambers hearing on October 31, 2019. On October 25, 2019, the Court received a handwritten two-page memorandum from the appellant indicating, among other matters, that he had requested but not yet received a transcript of the trial and would re-request it in person at the local courthouse on October 26, 2019. (It is unclear why the local court would be involved with the appellant's obligation to produce a trial transcript for appeal purposes.) On October 28, 2019, counsel for the respondent filed an Affidavit and Brief in support of the Registrar's motion.

[5] At the commencement of the hearing of the motion on October 31, 2019, it became apparent to the Court that, despite the best efforts of the respondent's counsel, there was some question as to whether the appellant had been effectively served with copies of the filings of the respondent and the matter was adjourned to November 7, 2019. On that date, the question of service on the appellant remained unresolved and the matter was further adjourned to November 22, 2019.

[6] On November 21, 2019, the appellant filed a four-page handwritten memorandum with four single-page attachments. It did not address the merits of the motion before the Court. The only relevant portion of the document concerned the matter of the appellant securing a transcript of the trial, as was set out in the following passage:

10. The transcrip (sic) were ordered from court office and they now tell me they can't find the request a paper wich (sic) instructions was left at the court office desk in July and my request for them in October again saying they can't find request.

[7] If the appellant was having some difficulty securing a transcript, which is the very most that could be inferred from his representations set out in paragraph 6 above, it was incumbent on him to provide details such as:

- i) his plan with respect to pursuing the securing of the transcript;
- ii) the date when the transcript would be expected to be received by him;
- iii) the name, address and contact information of the certified transcriber and/or transcription service;
- iv) a copy of communication from the transcriber and/or transcription service identifying the date the transcription could be expected to be completed.

[8] At the outset of the hearing on November 22, 2019, I advised the appellant that both of his filed documents would be received as written submissions; they were not put before the Court as properly sworn affidavit evidence. The appellant cross-examined the respondent's witness Mr. James; virtually every question put to the witness related to matters other than the merits of the motion.

Analysis

[9] All of the evidence in relation to the motion leaves the Court without any understanding whatsoever as to why the appellant did not respond to the instructions provided to him in the Registrar's June 17 letter, nor what if any effort he was making or intending to make to perfect his appeal. In short, the appellant's reply to the motion to dismiss was non-responsive.

[10] While filing of a motion pursuant to *Rule* 90.43(3) is mandatory on the part of the Registrar, the granting of the motion is within the discretion of the Court. The frequently cited decision of Saunders, J.A. in *Islam v. Sevгур*, 2011 NSCA 114 discusses factors to be considered in assessing the motion, and the burden on a party opposed to it:

[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.

[Emphasis added]

[11] I have considered each of those factors in this case.

[12] It was not possible to discern or understand why the appellant did not progress in the process of pursuing the appeal, beyond the filing of the Notice of Appeal. He did not communicate with the Registrar, nor provide any indication about moving the appeal forward at any time between the sending of the letter to him on June 17 and the hearing of the motion. During the motion hearing there was no further or additional information provided in that vein.

[13] The appellant's grounds of appeal as set out in the Notice of Appeal are:

1. Unfair and excessive cruelty;
2. Vindictive. Judge would not listen to evidence;
3. Not fair to remove winter shelter for our animals to be out in winter weather. Cruelty as this is our livelihood;
4. We can't afford \$750 fine with no income;
5. Protection of Wildlife Order on building for brown bats habitat.

[14] The Court's understanding of the order under appeal is gleaned from the copy of the order attached to Mr. James' affidavit. I read that order as having directed the appellant to pay \$750 in costs; there is no mention of any fine having been imposed on the appellant.

[15] While it is not my task to delve in to the merits of the appeal, on their face the enumerated grounds do not articulate errors of law or fact. I note there has never been any motion filed for a stay of the trial order. It would seem the appellant is seeking a re-hearing of the case to achieve a preferred outcome. With respect, a re-hearing is neither the purpose of an appeal nor the function of this Court.

[16] As to the issue of the prejudice to either party that might result from the granting of the dismissal of the motion, I recognize there is inherent prejudice to any party who seeks to advance an appeal which has been dismissed under *Rule* 90.43 (*Leigh v. Belfast Mini-Mills*, 2012 NSCA 67; *An Jager v. Jager*, 2019 NSCA 9). However, I am also equally cognizant that allowing the appellant to continue in the face of the deficiencies discussed above would in this case seem to equally prejudice the respondent (*Trachevska v. Hayne*, 2019 NSCA 79).

[17] I have considered whether the appeal has been filed in good faith as opposed to being an effort to delay or deny the respondent's success at trial. A number of the oral representations made by the appellant over the course of the three appearances needed to complete the hearing of the motion left the distinct impression the appellant is merely trying to stall the effect of the trial judge's order.

[18] The appellant has not persuaded this Court he intends to comply with future deadlines or requirements imposed by the Court or under the *Rules*. He did not lead any evidence to that effect and has not demonstrated that intention. To the contrary, the appellant's stated intentions before the Court regarding the circumstances of the order and alternate avenues he intends to pursue, his demeanour toward opposing counsel and the Court, and the difficulties the respondent experienced in having him served with a copy of the respondent's brief and affidavit (which necessitated two adjournments) all lead me to the opposite conclusion. I am doubtful the appellant would have any intention to comply with future directions from the Court or the Registrar concerning the appeal.

[19] I heard nothing in the argument on the motion that could allow me to conclude there exist any procedural or substantive impediments that prevent the

appellant from moving the matter forward. He referenced being in “poor health” and “not getting out much” but provided no evidence to support those representations.

[20] The Court should demonstrate flexibility with self-represented litigants such as Mr. Hughes, to the extent that he is not legally trained. However, absent any good reason for the delay, the mere fact the appellant is self-represented cannot constitute that reason (*Trachevska, supra*). The appellant had a clearly communicated deadline by which to file a motion for date and directions. He did not meet it, he did not provide any reason for that failure, and he did not identify any plan with respect to moving the matter forward, much less doing so expeditiously.

[21] Finally, I note that stalled appeals tax the court system. It would be inconsistent with the public’s interest in the efficient administration of justice to permit this stalled appeal to proceed. The appellant has not offered any evidence or made any submissions, much less persuasive ones, that could demonstrate on a balance of probabilities that the Registrar’s motion should not be granted.

[22] The respondent sought costs in relation to the motion. As referenced earlier, the motion was required to be made by the Registrar, thereby enabling both appellant and respondent to respond to the motion. The appellant opposed the motion and the respondent supported it. Under the circumstances of this case, I decline to exercise my discretion to award costs.

[23] An order shall issue granting the Registrar’s motion.

Beaton, J.A.